

FAMILY, LAW AND GENDER:

A STUDY OF MASCULINITY AND LAW

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RICHARD STANLEY COLLIER

This thesis is an attempt to explore the construction of masculinity in a variety of areas of law pertaining to the family. It attempts to integrate recent theoretical developments within the legal sub-discipline family law, in particular in relation to feminist theory and critiques of doctrinalism, with a social theory of gender and scholarship which foregrounds the social construction of masculinity.

Chapters 1 - 5 are concerned to analyse and overview approaches to theorising law, gender and the family, and to present a theoretical base from which to begin to examine the relationships between legal discourse, power and sexuality in Chapter 6 - 9. They seek to define and analyse concepts and themes within the sociologies of law, gender and the family, concluding with an assessment of the implications of a theory of law as a social discourse and of 'familialist' approaches to law and the family for the study of masculinity and power. Chapters 4 and 5 are explicitly concerned with theorising masculinity, drawing out the themes, issues and implications for legal scholarship of developing a perspective from which analysis of the construction of masculinity in legal discourse may take place.

Informed by the theoretical developments in Chapters 1 - 5, Chapter 6 - 9 examine the legal construction of sex and gender in relation to the formation and annulment of marriage, focusing on transsexualism and the non-consummation of marriage. Conclusions relate (a) to the construction of marriage and sexuality in legal discourse, and (b) generally, to the theorising and study of masculinity, law and the family. The thesis brings together a number of themes within the study of law and the family to present, I hope, an original and challenging analysis of a neglected and important dimension to the study of law and gender.

FOR MY FATHER

STANLEY GEORGE COLLIER

(1926 - 1988)

AND MY MOTHER

NANCY COLLIER

WITH LOVE AND THANKS

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CHAPTER 1

INTRODUCTION

This thesis is an attempt to explore the construction of masculinity in areas of law pertaining to the family. While the principle focus is matrimonial law - specifically the formation and annulment of marriage - the conclusions have implications for the study of law outside these specific areas and this research is part of a wider study of masculinity and law which is concerned to examine the constitution of male sexuality, paternity and fatherhood in legal discourse [1]. Rather than present a doctrinal analysis of a designated area of the legal sub-discipline 'family law', it is my intention in this thesis to integrate current developments in legal theory within a historical and sociological analysis of the family, by way of establishing a theoretical base from which to begin an analysis of the social construction of gender in law.

To this end I shall, in Chapters 2 and 3, present an overview and analysis of approaches to theorising law, gender and the family. I shall conclude by presenting a theoretical base from which to begin to examine the relationships between legal discourse and sexuality, and through a critique of the methodology of doctrinal exegesis, illustrate alternative perspectives within the sociologies of law, gender and the family which are of considerably more purchase to an analysis of the social construction of masculinity in law than traditional 'black letter' law.

In Chapters 4 and 5 I shall draw out the themes, issues and implications for legal scholarship of an emerging sociology of masculinity within the social sciences. There remain few texts which address masculinity and the law as the specific object of research [2], even though masculinity and male sexuality have been identified by feminists as fundamental to power relations between men, women and children. I shall address in

particular the relationship between these studies of masculinity and feminist scholarship. While feminist jurisprudence explicitly and implicitly questions masculinity, feminism(s), as theor(ies) and practice(s) by and for women, privilege women's experiences and interests. It is feminism which has highlighted the problematic nature of the academic study of men and masculinity, noting that throughout institutions of higher education feminism has not gone unnoticed by men. Indeed,

"Anglo-American academic male critics do seem to be very into feminism these days..." (Jardine, 1987: 55)

In Chapter 4 I shall assess what these debates might mean for the study of law and the family. I shall proceed in Chapter 5, through investigating the social and legal construction of homosexuality and heterosexuality, to present the outlines of a social theory of male heterosexuality which is compatible with the legal theory developed in Chapters 2 and 3.

In Chapter 6, having established a theoretical position from which to begin a deconstruction of masculinity in law, I shall undertake an analysis of the legal construction of sex and gender in relation to the formation of marriage, via a study of transsexualism in law. In Chapters 7 and 8 this focus on male heterosexuality in family law will shift to an analysis of sexuality in marriage, by means of a detailed study of the legal treatment of non-consummation of marriage.

While the central focus in the latter part of this thesis is the formation and annulment of marriage, this research is, I hope, a contribution to wider debates around the family, law and gender. It constitutes the beginnings of an unpacking of 'the family man' in law and the legal construction of heterosexual relationships. It is an interdisciplinary and contextual study of law and gender, about the concepts and politics of 'family law' itself and keeping in mind Freeman's pertinent warning that

"...lawyers who remain technicians cannot contribute to the current debate currently raging about the family."
(Freeman, 1985: 154)

This thesis is concerned with the silences, prohibitions and exclusions of the law - with what is not said as much as what is said - about being a man and, specifically, about sexual relations between men and women in law [3]. Focussing on the implications of feminist legal scholarship for the study of 'men in law', I am concerned to shift the gaze from femininity and female sexuality to masculinity and male sexuality, and to address the methodological and epistemological implications of researching men and masculinity.

In one sense, this thesis is no doubt marginal to mainstream legal scholarship. While the search for a 'feminist jurisprudence' is now the object of a considerable literature [4], as Smart (1989: 25) comments it seems that there are at present no UK law schools which would introduce Women's Law as part of a compulsory syllabus. Written by a man in an institution suffused by an ideology of masculinism [5], this thesis is perhaps both with and against the grain of legal scholarship in UK law schools [6]. Nonetheless, it is my conviction that there are important questions which remain to be asked about law and masculinity, about the masculinism which informs the social sciences as a collection of disciplines and the relation between masculinity and the continued exclusion of feminist knowledges. As Hearn (1987: 22) questions, what might the study of masculinity tell us about law and legal institutions, of those

"...structures of power, the enormities of which are so obvious and taken for granted within the social sciences. How can there be so many books, articles and treatises written on parliament, industry, the City, the professions, and so on, that do not even mention the power of men?" (1987: 22)

It is not that men have not been concerned to write at length on sexual politics, but rather that this tradition has taken the form of **men writing about women**, of men writing on 'Woman'- as Enigma, as Other, as the object of male inquiry, fantasy and desire. Men, it seems, are obsessed with women, or rather obsessed with finding the answer to the impenetrable and often repeated conundrum 'What do women want?'. As Simone de Beauvoir has argued, women have been and are objectified from the male vantage point, the Subject to Man's Object [7].

"...just as for the ancients there was an absolute vertical with reference to which the oblique was defined, so there is an absolute human type, the masculine...Thus humanity is male and man defines woman not in herself but as relative to him; she is not regarded as an autonomous being... she is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute - she is the Other."
(de Beauvoir 1949: xviii - xix)

Man as Object fades from view within the hierarchic structure of this discourse. Within the realm of the 'absolute vertical' Man is cast as Subject. In the asymmetrical sexual economy, it is Woman who is marked as 'Other', as the embodiment of 'sex' and 'sexuality', as Object. Crucially, Man is absent, but we do not see his absence. In history, politics, philosophy, economics and law we hear only the silence of the absence of men. In the disciplinary tradition of the law I shall argue that masculinity is most marked by its absence, it's invisibility. Of what we cannot see, we cannot know [8]. It is time this absence was corrected.

Defining the 'Family'

In the remainder of this introductory Chapter I shall address the problematic nature of defining 'the family' both in legal

and in sociological texts. If one is to address 'the family' then it is necessary to explain what the concept means. I shall present a historical overview of changing household structures, and place this thesis within the wider context of debates about the politics of the family. Referring at each stage to themes and issues within family law, I shall relate arguments raised to the following Chapters in which they will be addressed at more length. I shall also address issues and questions which, though relevant to the study of gender, law and the family, will not provide the primary focus in this thesis. The concept 'family' covers many questions relating to kinship, household organisation and sexuality, and the sociology of the family constitutes a voluminous literature. While it is not my intention to overview this in detail, it is possible to draw out a number of themes which have particular bearing on the following analysis.

Methodologically, a range of research techniques have been used to study the family, and much research uses more than one method of data collection [9]. Research into families involves complex moral and ethical questions. Recent feminist scholarship has sought to address the gendered dynamics of research methodologies, both generally within the social sciences [10], and with specific regard to the sociology of the family [11]. Research on the family varies from large scale survey techniques [12] used to identify developments in family structure, to smaller qualitative, ethnographic and interactionist studies [13]. In particular, researchers have utilised demographic tools [14], and have turned to historical social science as a means of constructing specific family histories as well as identifying general developments in population trends, mortality rates and fertility. Together, family historians have pieced together demographic patterns which have formed the core of the developing historical sociology of the family [15]. Gomm (1981) argues that such demographic information continues to provide a knowledge base for state policy, and also represents in a statistical form aspects of an individuals relationship with the state. Thus,

demographic categories, when attached to individual or family, become official status markers which then determine legal rights and obligations.

Theoretically, there are as many approaches to the study of the family as there are methodological perspectives. I shall in this thesis focus on two, the 'public/private dichotomy' and the 'familialisation' approaches to the study of law and the family. A third category however, functionalism, has produced much literature and is arguably the most influential theoretical perspective within the sociology of the family. Functionalism came to dominate sociology particular in the 1940's and 1950's, in relation to the family perhaps most notably through the work of the American sociologist Talcott Parsons [16]. Functionalist sociology proceeded to develop an analysis of social systems and their interrelationships in which the family was considered to be fundamental, linking the individual and the wider social group.

Functionalism presents the family as playing a fundamental role in the processes of socialisation whereby an individual learns her or his 'role' in society (Parsons and Bales, 1956). It is the family which socialises the child into the values required for adult life, and the family which provides an orderly means of reproduction, a means of controlling, though marriage, the potentially destructive forces of sexuality. In this perspective, both physical and emotional support are provided for the child, while adults are constructed as receiving economic and emotional support through means of the family; indeed, economic rewards are distributed and consumed through the family (Fletcher, 1966). Together, these are said to constitute some of the 'core functions' of the family.

The concepts of 'function', 'need' and 'stability' remain problematic and have deeply conservative implications [17], while the concept of the family itself within functionalist theory is historically questionable [18]. Nonetheless, located within a historical context [19] and seeing functionalism as a

sociological defence of the post-war family the appeal of the more overt progressive and evolutionary overtones is perhaps understandable. However structural functionalism is theoretically flawed in several respects. Implicitly, family life is conceived as a social good, the key to the fit between system and structure and depicting different roles for male and female which rest on naturalist presuppositions [20]. Functionalism's ethnocentrism [21], an overemphasis on urban communities in a number of functionalist studies [22] and underlying tautology [23] have not however prevented the adoption of a functionalist approach in studies of law and the family.

Functionalism does offer a certain appeal within family law. Family law appears to be defined by its functions, thus presenting a framework for exposition of a subject whose academic and legal origins are dubious (Bromley and Lowe, 1987: 2-3). Eekelaar (1978, 1984) argues that family law might best be understood as performing three important 'functions'. These are, first, a protective function, whereby law is seen to protect family members from detriment (be it physical, emotional or economic). Secondly, law is understood to have an 'adjustive' function, by which law assists individuals in cases where the original family unit has fell apart; the family members 'adjust' to their new circumstances. Thirdly, it is Eekelaar's contention that law has a 'supportive' function, whereby law and social administration generally attempt to promote the success of the 'family' unit (Eekelaar, 1978: 44-6; 1984: 24-6). With the three 'functions' in mind, it thus becomes possible to measure whether or not these functions are being achieved.

Eekelaar's analysis shares the general theoretical problems. Ultimately, functionalism is static: it presents a model in which each element of society is necessary to overall stability, yet it is difficult to see where change, where the dynamic for transition, emerges from. Underlying the functionalist enterprise is a concentration on structure at the

expense of relations of power, and this renders its conclusions suspect. What is meant by Eekelaar's 'protection' and 'adjusting' functions? There is a wealth of evidence that the law does not protect women and children from male violence, as I shall argue in this thesis. What does the 'adjustment' of family relationships on divorce mean for women, men and children? While it might be argued that the law does have goals and that the minimal ends of law might be identified, social objectives which are not obvious from a functionalist study may also be advanced by law, as I shall argue in Chapter 3. In the end, the functionalist argument falls apart perhaps most of all because there is no one type of family which can perform these 'functions'. However, if there is no one family, this is not to say that there is not to be found in law a systematic privileging of one family form, and it is in this respect that the concept of 'familial ideology' has proved useful in unpacking the political effects of functionalism.

Fletcher (1966: 3rd Edition 1977, 26-7) describes the family as

...a small, relatively permanent group of people, related to each other in the most intimate way, bound together by the most personal aspects of life, whose experience amongst themselves the whole range of human emotions...who experience continual responsibilities and obligations towards each other; who experience the sense of 'belonging' to each other in the most intimately felt sense of that word." (My emphasis)

Fletcher's definition of the family is just one among many in which the 'most intimate' and 'most personal' (sexual?) dynamics of family life are presented as the core of familial relationships. Leach (1955) argues that no definition of marriage can be found that applies to all institutions which ethnographers and anthropologists refer to as 'marriage'. All that may be presented is a definition based on a 'bundle of rights' at least one of which must be present before the term 'marriage' can be used [24]. Mair (1971:19), in contrast,

referring to family forms within subsistence economies, argues that marriage is important as a knot in a kinship network which binds society together. Marriage is thus a formally recognised means of recruiting new members to a line of descent, of creating alliance between such lines. Gough (1959) meanwhile argues that the status of children born to various types of unions is the critical fact in deciding which of these unions is deemed to constitute a marriage [25], while Harris (1979) argues that while there may be 'an idea' (1979: 49) of marriage common to many cultures, what constitutes such a marriage differs. In short, there are many sociological approaches to the family and there is no consensus as to what constitutes a 'family'.

Rather than endeavour to establish how dissimilar ideas have to be to stop the definition 'marriage' applying to a certain type of relationship, it might be argued that the search for an essential definition of marriage is ultimately a false quest. A definition may be 'tasks based' [26], may succeed in avoiding essentialist presuppositions through integrating the contingencies of age [27] and ethnicity [28], referring perhaps to cross-cultural and anthropological studies [29]. However, it would remain the **search for an essential definition of the family per se** which is itself, I shall argue in Chapter 4, problematic.

This does not mean, however, that it does not make sense to speak of a 'familial ideology'. Barrett and McIntosh (1982: 7) argue that the 'family' may be understood in two senses. First, as a social and economic institution, in which, by and large, households are assumed to be organised on a sexual division of labour between primary breadwinner/male and childrearer/female. Barrett and McIntosh make the crucial point that though these are **assumptions** which are not based on reality, they must be considered **part** of the family since they form elements of the conditions in which men and women are employed, and are reflected in levels of wages, taxes and benefits and so forth. This point I shall consider below.

With this may be contrasted a second way of understanding the family - familial ideology, or the family as ideology. While institution and ideology are reciprocally related, the ideology of the family, Barrett and McIntosh suggest (1982: 8) is stronger than is commonly allowed.

"It should be remembered that the currently dominant model of the family is not timeless and culture free...This hegemonic form is a powerful ideological force that mirrors in an idealised way the characteristics of contemporary family life. It has only a tenuous relation to co-residence and the organisation of households as economic units." (Barrett and McIntosh, 1982: 33-4)

Thus, because the family is understood to be a collection of ideological and cultural factors which are imbued within power relations between family members, the family is constantly idealised as the goal to which all should aspire. It is at this level - of the experiential commitments to family life of both women and men - that I wish to engage the analysis in Chapter 3 of this thesis, focussing in particular on sexuality and subjectivity in family law.

There is no 'one' , single, British family form but rather a plurality of 'families'. 'Family' and 'household' have different meanings in different contexts [30]. It is now clear that there has occurred in the past twenty years major changes in the number of families that conform to the nuclear family ideal (see below) and if the statistics reveal a discernible trend, it is perhaps a marked increase in the number of single person households [31], in levels of cohabitation [32] and in the percentage of births outside marriage [33]. The analysis of the family which follows should be placed in this historical context.

This research is concerned with the construction of heterosexuality in marriage and the family, and on one level

will, perhaps inevitably, reproduce hegemonic heterosexism [34] by reason of its subject matter. As Barrett and McIntosh state,

"...the present ideology of the family is so steeped in heterosexism that any realistic engagement with familialism must locate the discussion within that framework." (Barrett and McIntosh, 1982: 9)

If there is no one definition of the family to be found in sociological literature, what then of the law? What does family mean in legal discourse?

The 'Family' in Law

The meaning which one gives to the 'family' in law may have far-reaching implications, and it is important to begin to question what the 'family' in legal discourse signifies. An unproblematic resorting to the 'family' might serve to obscure the real reasons individuals may have for differing about the desirability or effects of a piece of legislation. For example, assessment of the effects of the Divorce Reform Act 1969 may turn on the definition of family; if family is taken to constitute a life long union, then the 1969 Act may be argued to have weakened the family, diminishing respect for the family and bringing about a rising divorce rate. However, if family is to be understood as a temporary arrangement, then it is arguable that the family is as respected as ever, at least in terms of the numbers of people marrying.

However, lawyers often adopt simplistic approaches to the word 'family', implying that the concept means the same thing in all situations. While there are many conflicting definitions of the family within legal discourse, I shall argue in this thesis that a 'familial ideology' systematically informs judicial treatment of household arrangements in which it is not simply assumed that sexuality is heterosexual, but also that heterosexual relations are themselves structured around a

normative 'marriage like' relationship which involves a certain kind of sexual relation. While at the technical level it is rare for the concept of the 'family' to receive statutory definition, it does occur in a number of different statutes and definitions of family arise in a number of areas of law. As a brief examination of the law relating to the Rent Acts reveals, there is no essential family form in law.

According to the Increase of Rent and Mortgage Interest (Restriction) Act 1920, "...a person who was a member of the original tenants family..." residing with the tenant at the time of the original tenants death shall become a statutory tenant of the deceased tenants property so long as they continue in residence of that property. Schedule 1, paragraph 3, of the Rent Act 1977 permits a statutory tenancy, in the absence of a surviving spouse, to devolve to any person who was "a member of the original tenants family" and who was residing with the deceased at the time of, and for six months preceding, his death. What therefore does a 'member of the tenant's family' actually mean?

The courts have stated that the word 'family' should be given its "proper meaning" (Brock v Wollams [1949] 1 All E.R. 715). In Gammans v Ekins [1950] 2 All. E.R. 140, Asquith LJ considered the relationships of the parties:

"...if their relations were platonic, I can see no principle on which it could be said that these two were members of the same family, which would not require the court to predict the same of two old cronies of the same sex innocently sharing a flat. If, on the other hand, the relationship involves sexual relations, it seems to me anomalous that a person can acquire a 'status of irremovability' by living or having lived in sin...To say of two people masquerading, as these two were, as husband and wife, (there being no children to complicate the picture), that they were members of the same family, seems to be an abuse of the English language..." [35]

We return, it seems, to the special 'intimacy' referred to by Fletcher: that is, sex. In the later case of Dyson Holdings v Fox [1976] Q.B. 503 [36] however, the Court of Appeal were clear that a relationship between an unmarried man and an unmarried woman living together over a very long period might constitute a family relationship necessary to satisfy the relevant section. Bridge, LJ considered that

"The ordinary man in 1975 would, in my opinion, certainly say that the parties to such a union, provided it had appropriate degree of apparent permanence and stability, were members of a single family whether they had children or not."

However, in Helby v Rafferty [1979] 3 All E.R. 1016 a 'mistress' was not considered to be a member of a man's family [37].

"...there was no charade...Nor was there any attempt made, as I understand it, to throw dust in the eyes of friends as to the true nature of the relationship..the parties...were less intimate than was in fact the case."

What a family in law certainly is not, I shall argue in Chapter 6, is homosexual: Harrogate Borough Council v Simpson (1985) 17 HLR 205; (1986) 2 FLR 91: R v Immigration Appeal Tribunal, ex parte Windestedt (1984) The Times 12 December [38]. Whether or not a particular institution/household grouping is to be regarded as a 'family' therefore is a matter of ascribing definition, and in this process what the judicial gaze perceives as familial is fundamental. In a sense, as we shall see, this gaze brings the 'family in law' into being. While avoiding definitions of the family which are transhistorical and transcultural however, this does not mean that there is no utility in adopting the concept of the 'family' by way of a generalisation to begin to engage in an analysis of a range of social interactions. As a historical approach to the family shows, changing household structures

relate to wider social, economic, demographic, and legal shifts.

The Changing Family: Historical Perspectives

Forms of household structures vary historically and this thesis may be placed in a wider context which integrates questions of history and theory. Sociology has utilised a number of models of family structure to analyse kinship [39] and two models in particular have been singled out for extensive analysis, those of the 'extended family' [40] and the 'nuclear' family [41] form. Understood as analytical tools, these ideal types have been used in the study of kinship relations and represent a useful way of giving form to comparative studies [42]. Generally, historical social science has revealed much about how the family has changed over time, through the use of indicators such as age of marriage [43], life expectancy and fertility rates [44]. In particular, historians have analysed the nature of the changes in family structure resulting from industrialization and the agricultural and industrial revolutions of the eighteenth and nineteenth centuries [45], tracing relations between the enclosure movement, changes in farming practice and the emergence of the working class in a process whereby surplus labour shifted from the factory to the towns, with the growth of the factory system itself creating new job opportunities in industrial areas.

In analysing the effects of this flow of migrants from rural communities to the expanding towns of industrial England, historical scholarship has questioned whether the pre-Industrial family form was of an 'extended' type [46] (Perhaps most notably in the work of Laslett (1965) [47] and Anderson [48] (1971, 1980). There is evidence that the nuclear family itself was the prominent form of family organisation in pre-Industrial England, and while the debates between opposing views continues, what is clear is that since Victorian times major socio-demographic and socio-economic changes have

affected patterns of sexual behaviour, marriage and women's employment as well as mortality and birth rates. Crucially, such developments in health care, contraception, housing and public hygiene were all experienced in class and gender-specific ways which were to have major implications for the historical constitution of masculinities [49]. In a passage which might well originate in the masculinity studies I shall discuss in Chapter 4, Gill (1977: 191) argues that emerging middle-class lifestyles provided

"...ample opportunity for the menfolk to demonstrate their masculinity. The middle-class husband and father has adequate opportunity to exercise realistic control over objects, situations and often other people. Even routine non-manual workers who are often placed in a subordinate position can identify vicariously with middle class standards of manipulation and control, their masculinity is therefore never threatened, but the working class male is in a much less satisfactory position. At work he is often controlled rather than being the controller...Wage differentials between men and women in the unskilled and less attractive occupations, although present, can be quite small, and, if his wife goes out to work, the threat to his status as the wage earner and chief support of his family is undermined."

In the aftermath of the Second World War, ideological support for the traditional sexual division of labour the war had so disrupted reformed the family and in the context of conservative consensus, the family appeared almost as a self evident good [50]. The 1940's and 1950's however witnessed high levels of marital breakdown, a concern reflected in the Denning Report (1956) [51], and an advocacy of financial assistance and guidance in appropriate cases to maintain marital unity. Concepts which emerged in specific historical circumstances, such as 'maternal deprivation' [52], 'moral panics' [53] and the notion of 'permissive' legislation [54], continue to inform debates around the politics of the family,

and these general shifts in social and moral values, as well as major changes in geographical and social mobility constitute the context in which contemporary debates about the family take place. The family remains in the political limelight and increasing trends towards cohabitation [55], the shifts in the number of remarriages that follow divorce or bereavement [56] and perhaps most of all the increasing number of children born outside of marriage [57] and in the number of one-parent families with dependent children [58], all recur in debates around the family. Just as it is necessary to place this study in a historical context, it is also necessary to recognise the political context in which contemporary debates around the family are framed.

The Politics of the Family

Barrett and McIntosh (1982) address the appeal of the family, arguing that the idealised family offers (if it does not always deliver) such virtues as security, protectiveness, dependence, intimacy, support and companionship. Nonetheless, and despite the undoubted continued appeal of marriage, the social changes cited above have been identified as indicating a disintegration of family stability in Britain within the pro-family arguments of the New Right [59]. In these debates the family has assumed an ideological significance, serving as a metaphor for structural changes in society (Barrett and McIntosh, 1982: 12).

In some respects the politics of the family cut across traditional left-right political spectrum. What conservative theorists tend to share however is a support for a 'rolling back' of the state from the family within a broad policy of minimum state intervention. Implicit in such arguments tends to be an assumption not only that the family is self-enclosed but also that the 'private' familial space (the site of sexual intimacy) is a pre-given of human existence [60]. Lasch (1977) argues that the family constitutes a 'buffer' between the

individual and society, which is weakened by state intervention [61], while Mount (1983) characterises the 'subversive' family as vulnerable to domination yet resistant to state intervention. For Mount, it is the family which is the enemy of the state and hierarchy. By 'family' however, Mount is being quite specific; he is referring to the nuclear family, the heterosexual household of parents and children,

"...a biologically derived way of living which comes naturally to us and which generates force of enduring and unquenchable power." (1983, 64) [62].

The 'subversive family' to which Mount refers is in fact an ideology of individualistic familialism, and in opposition to such pro-family arguments, there exists also a rich tradition of radical critiques of the family. In the (much quoted) words of Sir Edmund Leach (1967)

"Today the domestic household is isolated. The family looks inward upon itself, there is an intensification of emotional stress between husband and wife, parents and children. The strain is greater than most of us can bear. Far from being the basis of the good society, the family with all its tawdry secrets and narrow privacy is the source of all our discontents." [63]

In a similar fashion, Barrett and McIntosh (1982) depict the family as 'anti-social' in fostering private, exclusive relationships, at the expense of more flexible, sharing and non-sexist social relationships.

"As a bastion against a bleak society [the family] has made that society bleak. It is indeed a major agency for caring, but in monopolising care it has made it harder to undertake other forms of care. It is indeed a unit of sharing, but in demanding sharing within it it has made other relations tend to become more mercenary. It is indeed a place of intimacy, but in privileging the

intimacy of close kin it has made the outside world cold and friendless, and made it harder to sustain relations of security and trust except with kin. Caring, sharing and loving would be more widespread if the family did not claim them for its own." (Barrett and McIntosh, 1982: 80)

Integrating aspects of feminist and marxist analysis, Barrett and McIntosh locate the family as the vehicle for the transmission of private wealth and the perpetuation of divisions of class in which women and children are identified as subservient to the power of men.

"Women's main concern must always be not that they want themselves but with how to strike just the right balance in attracting men." (Barrett and McIntosh, 1982: 74)

Such feminist critiques of the family are wide ranging and far reaching, and it would be a mistake to characterise just one feminist position on the family. As Bottomley et al (1987) write,

"In so far as feminism is held together by an acceptance that women are subordinated and their position must be changed this, of itself, says little. It is like saying that we all like democracy. Feminists divide over many major issues. To conflate is not simply to confuse but to patronise and to attempt to control through simplification and caricature.." (Bottomley et al, 1987: 49)

This point is particularly compelling when considering the diversity within the feminist perspectives on the family which I shall consider in this thesis.

The family has been constructed as fundamental to relations of oppression both within classical [64] and more contemporary marxism [65], and the negative aspects of family life have been forcefully stressed in the 'radical psychiatry' of Laing [66] and Cooper [67]. Aside from those critiques of the family which

emerged from the Freudian and 'New Left' perspectives [68], it is important to recognise a tradition of writing in British socialist thought which argues that sex, gender and the politics of the family can be seen as acting in class and gender interests [69]. However, it is without doubt feminism which, be it in the form of marxist-socialist feminism [70] or an essentialist 'radical' feminism [71], has confronted the politics of family life head on. The inter-relation of the concepts of class and patriarchy [72] remain problematic and I shall in Chapter 4 assess both marxist and 'radical feminist' conceptions of gender. Though there are difficulties with the concept of patriarchy (Smart, 1984: 13) I shall continue to refer to patriarchy, or patriarchal relations in this thesis though, I hope, sensitive to these debates.

To summarise, critiques of the family take a number of forms, have a long history, and come from perspectives which are not necessarily compatible. It is in this wider context of the politics of the family that I wish to locate the arguments of this thesis. Most of all, it is in the context of the feminist revolution in the social sciences that this analysis of family, law and masculinity will take place. Central to this is the problematic of male sexuality and masculinity. As Lucy Bland (1985: 21) has argued,

"Many feminists are unlikely to feel inclined to ally with the male left until the men have begun to put their own house in order - that is, have started to discuss their own sexuality, sexual behaviour and its effects, rather than leaving the field of sexual morality to feminists or the moral Right."

In Chapter 4 I shall address the range of perspectives within male writing on masculinity 'in response' to feminism. While I shall remain critical of aspects of this literature, it is within the context of what I take to be an emerging 'sociology of masculinity' that the following analysis of 'men in law' is to take place. However, the project of constructing an analysis

of 'men in law' is, I shall argue, fraught with difficulties, and a range of contradictions/tensions within such an analysis are brought out when considering the relations between men and employment in law. Though the focus in this thesis is on male sexuality and law, I shall here consider briefly the notion of 'breadwinner masculinity' in law: first, because it is an important aspect of masculinity in its own right, and secondly, because it is possible at this point to bring together questions of history and politics considered above within a critical approach to family law which might begin to unpack implicit assumptions as to sex and gender.

'Breadwinner' Masculinity

The interrelation of childcare, employment and domestic labour is fundamental to an analysis of family, law and masculinity. For example, the relation between structures of employment and childcare in the judicial determination of custody disputes constitutes an important and productive site for constructions of masculinity and male authority in law and the linking of masculinity and paid employment is to be found in many areas of law^[73] In the context of assessing family assets on divorce in Watchtel v Watchtel [1973] 1 All ER 829 Denning comments

"When a marriage breaks up, there will thenceforward be two households instead of one. The husband will have to go out to work all day 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...Or she may remarry, in which case her husband will provide for her."

A 'breadwinner' masculinity is here constructed by Denning in a way in which the relation between the division of labour in the home and the division of labour in paid work is such as to

absolve men from responsibility for household chores, and to grant to men a continued servicing from women (whether or not their wives). However, this breadwinner masculinity is, at least for proponents of the 'men's liberation' I shall discuss in Chapter 4, a double-edged benefit producing stress and employment related anxieties. A result of this, of course, is that men will be able to work longer hours, to travel further to obtain better employment and to undertake training and forge their careers. This 'double bind' for men cuts to the heart of debates around men and domestic labour. This fundamental assumption that it is the husband's duty to both to work and to support wives and children is legally structured.

While the ideological assumptions as to gender and class in comments such as Denning's are blatant, they are not as archaic as might at first appear, and there remains an element of truth in the picture of marriage breakdown Denning presents. It is clear that divorce is economically disadvantageous to women, and all the more so when children are involved [74]. Many would share Denning's assertion that the husband 'will have to go out to work all day', even if one may disagree with the domestic arrangements he leaves behind. There now exists a considerable body of scholarship which examines the internal dynamics of the economic behaviour of members of the family [75] and the sexual division of labour within and outside family relationships is a recurring theme within feminist literature which has addressed women's place in familial relations. During the 1970's, these issues took the form of a 'domestic labour' debate [76] concerned to address the relation between domestic and waged labour, in which the family itself emerged as both a prop of capitalism and a continued source of women's oppression (Secombe, 1974: Delphy, 1976: Molyneaux, 1979: Malos, 1980).

The debates surrounding domestic labour have highlighted tensions between marxism and feminism and questioned the role of men in the family. Identifying housework [77] as degrading, repetitive and lacking social participation, the

domestic labour debates constitute more than just a critique of the familial sphere: domestic labour is itself seen as a form of production [78]. It is not just that the privatised household makes demands for consumer goods, though this is undoubtedly a related factor, but that the economic dependence of wives on husbands is identified as itself enabling capitalism to treat married women as a reserve army of labour, to be mobilised according to the 'needs' of capitalist production [79]. The debate therefore rested on an underlying acceptance, new to marxism, that not only did housework constitute an important part of the reproduction of capitalist relations but that this process was itself gendered. The debate therefore implicates the power of masculinity in the family. As Connell (1987: 106) has argued in a different context,

"A number of important practices have to do with the definition of masculinity and its mobilization as an **economic resource**" (My emphasis).

Implicit in debates around domestic labour and childcare rested the contention that forms of masculinity and femininity are instrumental in the perpetuation of such structures of labour. Economic dependence has both psychological and economic consequences, resulting in a lack of autonomy and insecurity in personal relations (Grieve et al, 1974). Male defence of economic superiority is particularly evident in attempts by certain groups of male workers to secure higher wages based on the assumption that a man would need sufficient wages to support wife and children (Milkman, 1976: Humphries, 1976: Beechy, 1977: Bruegel, 1979: Barrett and McIntosh, 1980: Land, 1980) [80]. The domestic labour debates have certainly been subjected to criticism [81]. However, they at least questioned the politics of housework and childcare, and were to add to feminist analysis of men's power within the home. Generally, the sociology of the sexual division of labour has been referred to and integrated within analyses of legal regulation of families (eg, O'Donovan, 1985: Atkins and Hoggett, 1985) and it is with a discussion of this wider legal structuring of

familial relationships that I shall conclude this introductory Chapter.

The Legal Context: Power, Gender and 'Family Law'

From what has been termed a 'women and law' perspective and expressed in terms of equal rights, a liberal feminist case for female emancipation has been built up throughout the nineteenth and twentieth centuries [82] which, it might be argued, has largely succeeded in its aims. Whatever the strategic and theoretical strengths and weaknesses [83] of a liberal feminist framework, it is in liberal terms that the long history of feminist reform campaigns around the family have been couched. While it is not my intention to present an overview of the origins and history of liberal feminist thought [84], I shall in this thesis question the notion that the state may be conceived, in principle, as the neutral arbiter of the claims of interest groups. In the context of legal reforms in relation to the family, it might appear that there is now (more or less) equality between men and women. For example, men and women are formally equal in law (eg, see Sex Discrimination Act 1975, Equal Pay Act 1970) and a range of efforts have sought to improve women's position. However, whether this formal equality reflects the realities of women's and men's lives and substantive changes in power relations however is a different question, as a brief historical overview of the wider legal context of developments around family law makes clear.

In part, the problems of a liberal feminist perspective follow from the theorising of law implicit within liberalism, a conception of law as responsive to social demands in which it is the pursuit of formal legal equality which constitutes the goal of reform strategies. For example, statements that the law has now reached a position of equality between men and women are by no means new.

"[T]he status of women has very much changed in the last twenty-five years...[she] has almost the same status as a man. She has not altogether the same status because it is necessary to preserve the family as a unit and if you have a unit you must have a head." (Parliamentary Debates, 1924, Vol. 57, Col. 191: Quoted in Brophy and Smart, 1985: 8)

There is, however, no direct relation between quantifiable legislation and the perpetuation of relations of oppression. Legal reforms may in practice have no or minimal effects on the lives of the women and men, or may not have the effects intended, and it is one of the problems of remaining within a liberal framework that politics becomes a matter of institutional forms of change rather than questioning the epistemological status of the law itself and concepts as 'equality' and 'difference' [85]. As Smart (1989: 82) has argued, feminism has faced the problem that legislation based on 'equality' or 'rights' might equally be used by men to claim new or to extend existing rights and privileges. This is perhaps most evidently the case at present with regard to custody claims and promoting the rights of unmarried fathers [86]. However, questions of equality might also be extended to abortion, harassment, pornography and access to public services; within liberal terms there is no reason why men should not claim equality in ways which have anti-feminist implications [87]. The concept of rights [88] within liberal legal discourse is therefore deeply questionable from a feminist perspective.

For example, in relation to finance and property on divorce men have proceeded to argue that they too get a 'raw deal' from existing arrangements [89], and in the 1970's and 80's their arguments have clearly been heard by legislators as the Matrimonial and Family Proceedings Act 1984 testifies [90]. As Alcock has commented,

"No doubt there are some men paying relatively large sums out of their relatively large incomes to ex-wives without paid jobs, perhaps some of them occupying the influential roles in government circles that produced this Act. For them the Act signifies the recognition that the private law of maintenance must move on into the new climate of equality and independence for women. But all the evidence suggests that these men, and women, are a minority of divorcees; and that for the majority of divorced women the private law of maintenance is already an inadequate sop to paternal responsibility, the new climate of equality and independence a figment of middle-class imagination, and the public provisions for wage protection, benefit policy and child care support a more pressing but largely unacknowledged area of legal reform." (Alcock, 1984: 360-1)

Vilification of one-parent families, the perpetuation of the myth of the 'alimony drone', the depiction of hard-pressed husbands and the continuing invisibility of the hand of the state in debates around private maintenance [91] perhaps indicate that such financial support for parenting as envisaged in the form of the the Guaranteed Maintenance Allowance (Finer, 1974) will be a long time coming. Such developments in family law involve questions of power between men and women and what adopting a historical perspective on legal reforms reveals is not so much that formal equality in law has been achieved but that it has taken so much struggle, has taken so long for reforms to occur and that in this process there has taken place systematic and considerable resistance on the part of men to a diminution of their formal legal power in the family (Sachs and Wilson, 1978). This point is brought out clearly by a brief overview of some of the legal consequences of marriage. In terms of heuristic/jurisprudential, rather than analytic, divisions, this involves assessment of contract, tort and property as well as the law governing marriage and divorce.

Smart (1984) has argued that the process whereby the law reproduces the material and ideological conditions under which patriarchal relations are produced and reproduced is particularly visible in the operation and effects of laws relating to divorce. In particular, it is Smart's contention that it is on divorce that the vulnerability and economic dependence of women during marriage is evident. As Brophy and Smart (1985: 15) have argued,

"...the alliance of family and welfare law has not been a process of enhancing individual women's rights but a process of regulating the family structure and reducing the costs of the single family unit to the state. Husbands are increasingly obliged to maintain their wives, not because wives are the 'spoilt darlings' of the law, but because the law attempts to contain dependency within individual, economically viable family units."

Feminists have argued that marriage constructs woman as a 'male appendage' [92]. Singled out for particular critique has been the common law doctrine of unity [93], a legal fiction whereby the husband and wife were deemed in law to be one person - the husband. Historically, in contract [94], tort [95] and property [96] law it has been argued that this doctrine continues to have ramifications within the legal structuring of marriage and that the rights, duties and obligations of those that choose to get married continue to reinforce male power and to reproduce patriarchal relations. For example, the right to consortium [97] and the ideology of woman as man's property [98] have been singled out as informing the inadequacy of legal responses to domestic violence [99].

It is important to recognise that historically women's economic dependence on men has stemmed from the possession of **property**. The law of property applies to both married couples and unmarried couples and there is no one body of property law which applies specifically to those who marry. Nonetheless, on divorce, the question whether the parties are married or

unmarried is important in ascertaining whether or not the divorce courts will have the power to allocate the property between the spouses under the terms of the Matrimonial Causes Act 1973. The historical development of women's property rights [100], from the common law position whereby the married woman would be denied access to any legal action, the courts, and to property has, since the Married Woman's Property Act 1882, seen a formal improvement in the position of women. However, gendered assumptions continue to inform judicial treatment of property entitlements and legal constructions of familial relationships continue to be based on a presumed division of labour, as is evident in a number of judicial statements.

In attempting to establish whether or not a cohabitee in Cooke v Head [1972] 2 All. E.R. 38 made any indirect but 'real and substantial' contributions so as to justify drawing an inference that the sharing of a beneficial interest was the common intention of the parties, Lord Denning MR considered that

"She used a sledge hammer to demolish some old buildings. She filled the wheelbarrow with rubble and hard core and wheeled it up the bank. She worked the cement mixer, which was out of order and difficult to work. She did painting and so forth. The plaintiff did much more than most women would do."

Accordingly, her share of the proceeds of sale should be one-third. In the later case of Eves v Eves [1975] 3 All. E.R. 768, Lord Denning MR continued in a similar vein on the woman's contributions to the relationship:

"...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...She did much work in the house and garden. She looked after him and cared for the children. It is clear that her contribution was such that if she had been a wife she would have had a good claim to have a share in it on a divorce."

That is, she did these things which women would presumably not normally do. On the facts of Burns v Burns [1984] 1 All ER 244, it would appear that keeping house, giving birth to helping look after and helping to bring up children is not a sufficient basis for a claim in this context. It is not simply that there are many such assumptions as to masculinity and femininity to be found in family law, nor indeed that finance and property, on divorce or between the unmarried, constitutes a fruitful though much neglected source of representations of gender in law. The legal construction of 'housekeeping' in these cases takes place from a male vantage point, in which particular gendered roles for male and female are assumed, and it is on the termination of relationships that the law is given the opportunity to assess behaviours in these gendered terms. Ideologies of gender inform both the substantive law and its application, and it is the place of law and the interconnections of familial ideology, masculinity and state policies within this network of regulation that I wish to address in this thesis.

To conclude this introduction and overview, it is my belief that both women and men are constructed in the family sphere. I shall argue in this thesis that potent images of masculinity are constructed in law which are crucial to the constitution of subjective commitments to family life. Though I am focussing on sexual pleasure, specifically the construction of male heterosexuality in law, important representations of masculinity are involved also in the construction of parenthood, fatherhood and the relation of men to children in law. However, it has been sexuality which feminists have brought to the foreground of family politics, focussing on the

experiential dimensions to family life [101] and socialisation practices [102] as fundamental to the reproduction of patriarchal ideology. Sexuality and the emotional structuring of cathexis also has a distinct lineage in historical sociology and in what has been termed a 'sentiments' approach to the family analysis of changing conceptions of childhood [103] has involved an investigation of emotional relationships within the family, utilising qualitative data, rather than quantitative, to piece together family histories and changes in family forms. In this literature the emotional/sexual dynamics of family life have been presented as fundamental to the making of the 'modern' family [104], with the valorizing of individual freedom and romantic love seen as instrumental in the dismantling of sex role divisions in domestic labour. While marriages may end, it has been argued that romantic love as the idealisation of affective sexuality brought humility and equality to family relations, with the historical changes outlined in this Chapter resulting in a transition from distance, deference and patriarchy in the family to the affective individualism of transcendent love (Stone, 1977:282) [105].

The reconstruction of sexual desire in the 'companionate marriage' has been presented as involving nothing less than the emergence of a new family type [106], the class-specific construction of domesticity and of the family as a private sphere, a child centred family life based on affection and not authority [107]. In Chapter 4 I shall attempt to integrate transitions within the emotional dynamics of the family within broader social, economic and legal shifts in society. While such a 'sentiments' approach to family history is flawed in several respects, not least in a blindness to power relations [108], this is not to deny the crucial importance of a historically specific theorising of sexuality and of those discourses which address sexuality and family relations. This thesis therefore is, in part, an attempt to

"...examine the new ways of thinking and acting which these languages of the family have introduced into our reality...they actually constituted new sectors of reality, new problems and possibilities for personal investment as well as for public regulation." (Rose, 1987: 68)

In addressing the construction of masculinity in law - to hopefully open up the possibilities of 'new ways of thinking and acting' - it is, I hope, a worthwhile contribution to debates about the politics of the family and gender, as well as a rethinking of the personal investment of both women and men to marriage and the family .

CHAPTER 2

LAW, DISCOURSE AND GENDER

Introduction

Historically, the faith of the legal community in the doctrinal ideal of the foundational rationality of law has been subject to a succession of periodic crises [1]. While the challenges of legal realism [2] to doctrinal orthodoxy may have questioned the 'gap' between law in books and law in practice, the doctrinal tradition has nonetheless continued to dominate the intellectual and cultural climate with regard to legal education and scholarship. However, it is my belief that the time is most propitious for a critical analysis of the relation between family, law and masculinity to take place. I shall, in this Chapter, elaborate on what such an approach might entail and attempt to establish a theoretical base from which to begin the study of masculinity and law.

Of particular significance to this study of family, law and gender are analyses of the gendered nature of 'traditional' jurisprudential debate which have questioned the humanistic presuppositions which underlie legal theory. Feminist scholarship has endeavoured to question the gendered dimensions of legal method [3], legal practice [4] and the legal text itself [5]. The intellectual ramifications of feminist legal theory are, I believe, far reaching.

Law as Doctrine, positivist jurisprudence [6], remains in the stranglehold of an Austinian theory [7] in which a debate between Hart [8], as the persuasive orthodoxy, and Dworkin [9] is presented as central to the jurisprudential enterprise. It is this jurisprudential model which has been subjected to wide ranging and systematic critique, most recently in feminist and critical legal scholarship [10]. In the positivist tradition, law is said to be bracketed off as a field of study, separated

from the political system in which it has its effects. In the terms of positivist jurisprudential debate, natural law is characterised as a challenge to positivistic conceptions of law [11], while the doctrinal formulation of law understood as 'the enterprise of subjecting human conduct to the governance of rules' [12] constitutes the foundational rationality of the intellectual enterprise of legal studies. However, this is not to say that doctrinal law has not addressed questions of sex and gender. The problem is the way in which it has done so.

Doctrinal Conceptions of Sex and Gender

Writing in 1929 on 'Marriage and Morals', Bertrand Russell considered that

"The Law is concerned with sex in two different ways: on the one hand to enforce whatever sexual ethic is adopted by the community in question, and on the other hand to protect the ordinary rights of individuals in the sphere of sex. The latter have two main departments: on the one hand the protection of females and non-adults from assault and harmful exploitation, on the other hand the prevention of venereal disease." (Russell, 1929: 14)

According to Russell, the law is concerned with enforcing communitarian values and, it seems, the 'ordinary rights of individuals'. That is, 'females and non-adults' are to be protected from the deleterious effects of masculinity. As we shall see again and again, male sexuality and masculinity are presented as a social problem which the law, through establishing normative criteria, is to control and to protect from. What, therefore, might a doctrinal analysis of law tell us of this masculinity?

It is not difficult to locate law as a productive, though limited, source of representations of sexuality and gender, and remain at the same time within the doctrinal exegetical

tradition. For example, the "protection...from assault" to which Russell refers, might involve masculinity as an issue for social workers [13], doctors [14], lawyers, and for those engaged with the criminal justice system. Indeed, feminist scholarship has highlighted the masculinist assumptions which pervade the criminological enterprise [15]. This much locates masculinity as a subject with a broad ambit, and it might be expected that there should exist a considerable literature addressing masculinity. Yet this is certainly not the case, and masculinity remains largely invisible in doctrinal considerations of these issues.

One reason for this is that a positivist conception of law, characterises the role of law and questions which may be asked by the 'lawyer' in a circumscribed way. It is one thing to proclaim that masculinity is relevant to a wide range of areas. It is another to argue, as I shall, that the power of masculinity is bound up with the the power of law. For Honore,

"...it is the lawyer's job to cultivate justice, to disseminate a knowledge of what is good and equal, to distinguish the lawful from the unlawful and to profess true philosophy..." (Honore, 1978:5. My Emphasis)

Texts such as Honore's 'Sex Law' specifically addressing the law 'relating to sex' are rare compared with treatises on more 'traditional' legal subjects such as contract, tort and property [16]. The notion of the "lawyer's job" in the doctrinal tradition from which Honore is writing involves a process of classification and selection into those questions and concerns which are, and are not, of concern to law and the lawyer. In this process, alternative knowledges, different conceptions of law, are disqualified as the 'science of law' [17] proceeds to determine what is and what is not relevant. The doctrinal conception of legal regulation as a scientific and rational enterprise in the exegesis of legal texts fails to address whether or not the 'true philosophy' advocated by Honore may itself constitute a claim to power.

To say that the law is concerned with sexuality is, perhaps, to state the obvious therefore. Through multiple forms of prohibition law constitutes the category 'unlawful sex' in all its forms. However, within the positivist paradigm, law is conceived in black-letter legal scholarship to be a catalogue of rules, concerned with negation, denial of the sexual; crucially, 'law' 'sexuality', 'natural/unnatural' 'male/female' and the normative standards and tropes of legal discourse remain pre-theoretical and unproblematic (eg, in Honore, 1978: Huntington Cairns 1929: Ploscow 1951: Calverton, 1929: Slovenko, 1965). What is sexual, and how it relates to law, is given and the meaning of 'male' and 'female' within legal discourse are determined. This is the most common approach to law and sex within legal scholarship. Legal academics may debate 'sex and law', but gender remains pre-theoretical. Positivist conceptions of the relationship between law and gender afford no conceptual hold on a critical analysis of the relationship between sexuality, law and the cultural nexus within which specific forms of regulation attain validity.

One effect of this conception of law is to exclude the questions which may be asked by and of other disciplines. Different subjects from different disciplines have, on this understanding, a different methodology which is incompatible with the law as science model. Within an underlying positivist epistemology, law and legal studies would have little to say about sexuality, masculinity, femininity and law, outside of the 'law book' descriptions of the text on 'law relating to sex' (see Abel, 1973). It is necessary to adopt an interdisciplinary approach and transcend these limitations. Black letter law disarms the analysis before it begins, rendering illegitimate by its own terms of method attempts to theorise the connection between masculinity and law.

Critiques of Doctrinal Orthodoxy

The critique of law as doctrine does not stop here. Expository legal education has been criticized for failing to meet both academic and vocational aspirations [18], the abstract and ahistorical methodology encouraging a narrow cognitive sense of the law which is premised on a closed model of rationality precluding by definition reference to critiques or methodologies other than its own. The critique of doctrinalism has constituted an intellectual project in itself within legal studies, and is a central tenet of a critical legal studies that it is necessary to 'take doctrine seriously' [19]. In unpacking the ideological nature of the intellectual rationale for doctrinal academic legal education, both the purported coherence and underlying principles of the law have been subject to systematic critique. While proponents of doctrinalism might maintain that skills in handling legal materials and aptitude in 'legal reasoning' constitute one of the highest levels of intellectual pursuits (that is, 'thinking like a lawyer') doctrinalism itself remains no more than an ideology characteristic of the legal consciousness of judges and textbook writers.

"The habits of mind appropriate, within narrow limits, to the procedure of law courts in the most stable legal systems have been expanded to provide legal theory and ideology with an entire system of thought and values. This procedure has served its own ends very well: it aims at preserving law from irrelevant thinking and from all contact with the rest of historical thought and experience." (Stanley, 1987: 85)

A number of critiques of doctrinal orthodoxy might be termed 'partial', in so much as they all remain within the parameters of the doctrinal tradition; that is, methodologically, they constitute approaches to legal study in which the base of the expository tradition is overlaid by a range of pluralistic expressions of course structure. For example, the foundational studies of legal method [20], curriculum expansion [21] and socio-legal studies [22] all, in different respects, replicate

the concerns of the doctrinal tradition. Socio-legal studies in particular, premised on the criticism of the expository tradition that it ignored the formative influences on the form, content and impact of law, replicates the concerns of legal realism. While socio-legal studies might be characterised as foregrounding the development of critical legal studies, they have been criticised as atheoretical and, at worst, in political effects amounting to no more than 'social engineering'. Nonetheless, this is not to argue that socio-legal studies have not made an important contribution to understanding of family law [23].

Despite these criticisms, law as doctrine continues to dominate the legal educational curriculum and constrain the possibility of taking gender seriously, despite the considerable degree of methodological and epistemological pluralism which exists in the legal academy. There are several aspects to the legal educational curriculum which are resistant to a theory which might question gender blindness. Instrumental in the development of Law as Science has been the the institutionalised link between the academic and vocational in legal education, reflected in the development of the curriculum itself [24]. The dominance of rule base procedural subjects in doctrinal legal education has been criticised from both marxist [25] and feminist [26] perspectives, it being pointed out that the positivistic focus on law as a vocabulary of rules, themselves subject to increasingly rapid obsolescence, fails to place intellectual issues in a context and to meet the demands of the profession [27]. The existence of the core syllabus and ethos of legal professionalism also define criteria of relevance which have a subjective effect on law students in terms of professional socialisation [28], and on legal scholarship in determining the criteria of relevance regarding legal publications (themselves instrumental in the progression of the academic legal career) [29]. The ideology of legal professionalism and legal socialization forms the subject of a considerable literature assessing the power relations in the

pre-vocational education, placing the role and status of the law teacher in a confused position [30].

It is important to recognise therefore that the limitations to and intellectual weaknesses of the black-letter law approach have wider implications than for just for the study of law and gender per se. Doctrinalism constrains and limits the legal educational curriculum generally.

"The expository tradition may be safe, comforting and inducive of security, but it can be argued that it kills thought, stops it dead in its tracks: there is merely allegiance to tradition without understanding and, more importantly, without anything more than merely superficial questioning." (Stanley, 1987: 84)

Rethinking the gender dimensions to legal theory cannot simply be limited to those subjects such as family law in which gender is, to a degree, foregrounded. Liberal-legal conceptions of readings of sexuality in law, premised on a positivist juridical conception of power, primarily locate 'sex' as an entity manifest in forms of prohibition and see the exercise of power as the expression of and ability to negate and deny human behaviour [31]. Feminist legal scholars have sought to analyse the construction of women in many areas of law [32]. Implicit in such studies are conceptions of relationships between masculinity, male power and law, and within different feminist perspectives and approaches to law these representations themselves vary. The 'women and law' framework discussed in Chapter 1 (p 23) [33] does entail constituent questions and dominant models (Brown, 1986: 433-9) but does not begin to question the coherence of 'women' as an organising concept in these different areas of law [34].

In contrast to this it is a common theme of more recent feminist legal scholarship that there exists the need for a new direction which might transcend the limitations of the 'women and...' approach to the study of law. Smart (1989: 67) notes the

frustration which has occurred within women's movements where struggles which have been hard fought to achieve particular legal reforms have in fact been translated into legal measures which only slightly improve, if they do at all, the position of women. This critique of the failures of a liberal engagements with law is evident in the work, for example, of McCann (1985), Smart (1986) O'Donovan (1985) and Mackinnon (1987) and has been discussed in Chapter 1 (p 23-27). Feminist legal practitioners, Smart (1989: 67) argues, are in the "unenviable position" of dealing with such issues as rape, divorce and domestic violence in a profession and through a legal analysis which leaves little scope for feminist praxis. While some feminist practitioners have organised outside their legal practices (eg Rights Of Women, 1985), it is argued that this in itself does little to challenge the "apparently impervious system of law/knowledge" (Smart, 1989: 67).

The call for a 'new approach' is, therefore, understandable and one direction both feminism and critical legal studies have subsequently taken is to question the centrality of law to an analysis of power relations. In the remainder of this and the following Chapter I shall refer to differing theoretical conceptions of power and attempt to draw out the implications of a de-centring of juridical forms of power for this study of masculinity and law. First, I shall look further at how legal method excludes considerations of gender.

Legal Method

Feminist legal scholars and lawyers have argued that they face a dilemma in teaching students and working within a method and logic of law which is 'male'; that is, a logic which presents itself as neutral and objective but which in fact disqualifies alternative knowledges (such as feminist) and denies that relations between women and men are relations of power (eg, see Smart, 1989: 20-25). As such, the possibilities for feminist praxis are if not excluded, then denied purchase and validity.

This concern with legal method marks a transition in legal scholarship, and Bottomley (1987: 12) argues that an interdisciplinary feminism has shifted the debates from the concerns of a liberal feminist engagement with the power of law. That is, feminism is not just asking how, and in what ways, law silences women's aspirations and needs, but also whether the very construction of legal discourse and the legal academy are themselves the product of patriarchal relations. This is to shift the focus from the substantive content of the law to the problem of legal method itself and central to this project are the ways in which the law is separated from other knowledges. This involves questioning the neutrality of the very tools of legal method.

These shifts may be related to general developments within a feminist theoretical challenge to social science research, and one form of this debate in the academy has been over the politics of 'women's studies' [35]. In law, the legal scholar who does not think and write according to the dictates of 'traditional' legal method approaches the 'basics' of the legal academic trade in a different manner. From defining which issues are important, through the analysis of 'relevant' precedents and to the conclusions which follow, s/he challenges the enterprise of doctrinal exegesis but at the cost of having their legitimacy as a 'legal' scholar in the academy rendered suspect [36]. Mossman (1986: 46) argues that the feminist scholar who conceptualises the 'legal' problem in different ways, risks both a reputation for incompetence in legal method as well as a lack of recognition for intellectual achievement. In law,

"Not only does the dissenter challenge academic standards, but also the standards of law as a profession." (Smart, 1989; 21)

Mossman (1986) is concerned to examine those mechanics of legal method which militate against recognition of anti-patriarchal discourses. Legal method is, Mossman argues, impervious to

feminism. In this exclusionary practice three main elements are identified to traditional legal method: boundary definition, defining 'relevance' and case analysis. The first, boundary definition, is concerned with the process whereby certain matters are identified by legal method as outside the realm of the law. For example, the 'moral' question is separated from the 'legal' matter [37]. Boundary definition, Mossman argues, is particularly significant because of the seeming **neutrality** it confers on the law. Thus, while lawyers may maintain that the legally trained mind interprets the law, and does not pass judgement on it, the lawyers and judges themselves **gain credibility** from this supposed objective neutrality. The question is framed within the language of the legal community, to be understood by the 'correct' application of legal method; morals, politics, questions of power and inequality are denied legally defined purchase. Denied also are questions of sexuality, gender and power. Stanley (1988: 85) argues that, far from such doctrinal skills of legal reasoning constituting a worthy intellectual pursuit,

"...the black-letter lawyer is already a dodo. Law as Science is isolationary, denied the existence of its social context. It is thus an academically prohibited frame of reference, severed from other academic disciplines. Teaching 'techniques' tend toward the acquisition of knowledge in a short period, the benefits of which are questionable: the technique of the application of knowledge is a useful skill, the mere acquisition and retention of knowledge is not."

By 'defining relevance', Mossman identifies the effects of the process whereby the law student learns that certain facts are, or are not, relevant to the hypothetical case, and it is at this point that a crucial exclusion of the politics of masculinity may be seen to take place. One effect may be, for example in the areas of rape [38], domestic violence [39], child sexual abuse [40], that the problem of masculine sexuality and male power is disqualified from the 'legal'

analysis, though an interdisciplinary study would locate masculinity and male power as fundamental to these social problems. The process whereby the legally trained mind separates out 'good' from 'bad' law is thus deeply contingent. The legal decision, put simply, is not given. It is political and it is constructed. It is not that there is an easy way round these processes of disqualification for law, Mossman argues, may in all the above areas evade the feminist challenge [41].

To summarise the argument thus far, the politics of masculinity, and the politics of gender generally, remain marginal and peripheral to mainstream legal scholarship in the intellectual context of a discipline premised on a positivist epistemology and doctrine. Indeed, analysis of masculinities and their relation to the patriarchal structuring of legal theory is most marked in the teaching and study of law by its absence in the law school. As Connell argues,

"We cannot understand the place of gender in social process by drawing a line around a set of 'gender institutions'. Gender relations are present in all types of institutions. They may not be the most important structure in a particular case, but they are certainly a major structure of most." (Connell, 1987: 120)

Attempts to critique masculinity which might "originate not only in conceptual constructs but in experience - in being [dominant], not just in thinking about domination" are rare (Menkel-Meadow, 1988: 91). While it is hoped that the analysis of masculinity which follows is more than a turn to 'generic feminism' for assistance out of an 'intellectual malaise' (Bottomley et al, 1987: 48), it is certainly necessary to break free of the confines of a doctrinal analysis of law in order to begin to question the relations between masculinity, law and power.

Alternative Approaches?

It is necessary to embrace an interdisciplinary approach to law [42], to undertake an analysis of masculinity which is neither reductionist (biologically or culturally) [43] and which does not seek to extend the power of men further in both the form and content of the analysis [44]. This is possible, in part, because of the emergence within the legal academy of a feminist scholarship which has placed questions of masculinity and male sexuality on the agenda. For clarity of argument, I am here characterising within a broad heading a disparate range of works with their own internal tensions, contradictions and perspectives. Recognition of this point is most important. While this necessarily involves a (considerable) degree of simplification, it is, for analytical purposes, of some utility. Both feminism and critical legal studies have potential, and also remain problematic, for a critical engagement with masculinity and law.

The confused and contentious nature of the relation between critical legal studies [45] and feminism is now well documented. Within this 'critical' approach to law men and feminism continue to be uneasy colleagues and, amidst pleas for a supposedly 'critical' legal studies to 'take feminism seriously' it is obvious that feminism and CLS are not the same political project [46].

"The main difference between the two ways of looking at the world [Feminism and CLS] is that feminist critique starts from the experiential point of view of the oppressed, dominated, and devalued, while the critical legal studies critique begins - and some would say remains - in a male constructed, privileged place in which domination and oppression can be described and imagined but not fully experienced..." (Menkel-Meadow, 1988: 61: See also Bottomley et al, 1987: 49)

Within 'critical' legal scholarship there is little methodological orthodoxy. Indeed, the concept and politics of 'critical legal studies' is open to question and it is most important to recognise the diversity of scholarship within the 'critical' legal community [47]. Different conceptual apparatuses may not necessarily be compatible, and within the post-structuralist and postmodernist influenced strand of critical legal studies the very possibility of making any claims to knowledge about the law is itself rendered problematic [48]. As Goodrich (1987: 211-2) argues,

"...the study of law as social discourse conceives law to be pre-eminently a practical category, a mode of social being and belonging which largely lacks justification. To view law as primarily an ontological, practical, category, is to refer philosophy of law to the study of law in terms of social ontology, that is to its existence as social practice - to the influence it actually exerts, to the functions it performs and to the meaning and effects it realises.....the need [is] to read law dialectically, in terms of the functions it performs within a complex political and social totality."

Goodrich thus argues in favour of privileging ontology over epistemology, and the study of law as social discourse will be discussed below. While in following chapter I will examine post-structuralist conceptions of power in relation to theorising law and the family, it is important at this point to recognise also the force and limitations of the study of law in terms of its political functions and ideological effects. I will therefore first consider the study of law as ideology, in critical legal studies, realist, marxist and feminist accounts of law. To focus on the ideological effects of law has, I believe, considerable purchase for the study of law and gender in the following chapters.

(i) Law as Ideology

Ideological accounts of law conceptualise law as a framework within which we live our lives. In marxist [49] and neo-marxist [50] accounts of law, concepts such as hegemony and reification [51] have been employed to signify the dynamics of class domination in which both the dominant and dominated classes, it is argued, believe that the existing order, perhaps with some marginal changes, is politically satisfactory. Law is conceived of as part of a belief system or superstructure, a cluster of beliefs which convince people that the hierarchical relationships in which we live and work are normal and satisfactory. Such a superstructure rests on a 'base' of 'real relations', be they of class or sex oppression, which varies in different accounts in the degree of determination of the superstructure. In marxist accounts of ideology [52] this belief structure is understood to abstract and generalise the ownership claim. However, a conception of law as ideology is also to be found in feminist scholarship concerned with theorising the relationship between law, gender and power [53]. On this view, legal systems regulate social interactions - legal, economic, political - in such a way as to reinforce existing hierarchies of wealth and privilege, including the power relations of gender. From a feminist perspective, the social world comes to be seen as natural and inevitable, externalised in liberal legal ideology and the discourse of 'rights' and 'equality' referred to in Chapter 1.

The ideological effects and content of family law thus obfuscate the belief structure of liberal legalism which abstracts particular relationships between real people into relations of abstract categories of individuals playing abstract social roles of, for example, 'owner' 'employee' 'husband' and 'wife'. Examples of this process have been shown in Chapter 1. A theorising of law as ideology also underlies, for example, accounts of the law relating to domestic violence [54] and the legal consequences of marriage [55].

The concept of legal ideology has, I believe, considerable purchase in approaching the study of law and gender. Through

identifying the process whereby structures are socially constructed and which in turn mediate relations so as to 'reify' real relations of power and oppression, human agency is negated as the material and ideological power of law deflects attention from its social construction and place within history, human nature and economic laws. Social relations are constituted through economic, political, legal, sex and gendered relationships, though legal ideology obfuscates this process. This in turn has implications for the questions which are asked of the law. For example, to investigate the legal regulation of marriage, or domestic violence or fatherhood entails analysis of the inter-relations between legal, economic, gender, sexual relations. Thus, all legal relations may be understood as involving the presence of other forms of primary or abstract social relations, be they economic or politico-legal.

Ideological accounts of law are clearly very different from doctrinal studies. While law remains the object of inquiry, this research takes place by means of exploring the interaction between legal relations and other forms of social relations, such as sexual. Legal study premised on the political project of critique [56] thus utilises intellectual tools of inquiry to expose these belief structures as historically contingent, seeking to reveal how arbitrary our categories for dividing up experience are and how non-exhaustive of human potentiality existing gender roles are (O'Donovan, 1979). In scholarship espousing a critical legal studies or feminist perspectives such ideological studies are linked to an explicit political project.

The conception of law as ideology does have a number of problems however. First, it could be argued that it fails to engage with the power of legal discourse and the legal text. This I shall explore further below. Secondly, the critique of ideology developed in post-structuralist accounts of law [57] questions the existence of an underlying 'reality' or base of 'real relations' which exist to be exposed by the 'critical'

legal academic. Perhaps the most forceful criticism however is against the notion that law 'functions' to serve the interests of a particular group or class. In a crude economic determinist marxist account, all law might be held to be 'bourgeois law', and therefore to represent the interests of a particular class. In relation to sex and masculinity, the attendant problems associated with developing a 'grand theory' of law resulting from such 'real' relations of oppression, at least in the work of Catherine Mackinnon (1982, 1983, 1987), leads to the development of "a feminist theory of the state and male power". Such an approach certainly 'takes gender seriously' but is of questionable utility in analysing the relationship between masculinity and law is. This point requires some clarification.

(ii) Grand Theories of Law

For Mackinnon (1982, 1983, 1987) law is taken to be, or to present itself as, an objective and universal system of adjudication. Law's objectification of women is the focus of Mackinnon's critique, in which it is argued that the supposed neutrality of the law is in fact the representation of the interests of the sex-group men. Mackinnon's conception of law has considerable overlap with marxist conceptions of the ideological power of law, a relation between marxist and feminist theory which Mackinnon herself recognises [58].

"I propose that the state is male in the feminist sense. The law sees and treats women the way men see and treat women." (1983: 644)

On Mackinnon's analysis, the power of law and the power of men are inseparable. They become one and the same. The state itself is understood as male. Feminist praxis is possible through the 'true feminist' methodology of consciousness raising [59], premised on an implicit conception of a feminist false consciousness [60]. It is the supposed neutrality of the state that Mackinnon is concerned to unpack.

"When [the state] is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied...Once masculinity appears as a specific position, not just the way things are, its judgments will be revealed in process and procedure, as well as adjudication and legislation...However autonomous of class the liberal state may appear, it is not autonomous of sex." (1983: 658)

Mackinnon is correct in stating that social relationships are gendered and that law is part of such a gendering process. However, a tremendous power is here given to masculinity. As Smart (1989: 81) argues, within Mackinnon's schema women appear to be powerless before the unrelenting power of male objectification through law. Mackinnon would appear to see law, state and society as all representing and being constituted by male interests in the same manner. That there might be power differentials between men, or that all men do not benefit at least in the same way under patriarchy, does not figure. On Mackinnon's analysis, law appears as the cornerstone of sexual politics, as the indicator of power relations in society (Smart, 1989: 81). For Mackinnon, masculinity and law are inseparable. Mackinnon thus accords a tremendous significance to law and masculinity, but, like crude doctrinalism, in an analysis which leads to a paralysing politics for men and, in the end, for women too [61].

It is not that Mackinnon's criticisms of liberalism are not valid, or that the law does not indeed objectify women. The problem is really one of the search for a grand theory per se, of the search for meta-narratives [62] which explain all relations of power from one over-arching perspective. It might be argued that what strands of marxism and feminism share, for example in the depiction of law as ideology outlined above, is a notion of objective jurisprudence as a reflection of power relations. However, the notion that there do exist real relations of oppression easily leads to a position in which law

is conceived as the embodiment of the totalising domination of one sex group/class over another. These difficulties pervade both feminist and marxist engagements with law.

To return to legal method, Thornton (1986: 12) alerts feminists to what is termed the 'androcentric standard' of law, arguing that feminists may also, in fact, be involved in a method which is predetermined by masculine requirements and the positivistic tradition. A feminist vision of law, Thornton argues, may be so constrained that feminist jurisprudence becomes no more than an idealized abstraction which fails to address the subjective experiences of women. The construction of a universal 'woman' in feminist discourse side-steps the complexities and contradictions of women's experiences, evading questions of class and ethnic differences in the name of 'women's oppression'. In short, it is not clear who the 'woman' in law actually is.

In establishing strategies for the present political situation therefore, grand theories such as Mackinnon's are of limited assistance, presenting masculinity and male power as omnipresent and omnipotent. Interestingly, it is this conception of the power which is ascribed to masculinity which becomes central to whether or not the theory leads to a politically viable praxis. It is significant that the power of masculinity, of sex, is to Mackinnon's feminism what class is to a marxist analysis. Masculinity is both omnipresent and omnipotent. It is this essentialism, this unitary conception of power relations, which has blighted an analysis of law and gender which might begin with the subjective experiences of women and men. Masculinity is fundamental: what men can, and cannot, do because they are men determines the praxis which follows.

Alternative feminist analyses have questioned this academic practice of constructing universal, abstract theories and have focussed instead on challenging naturalized and abstract constructions of the social world. In such a perspective,

analysis turns to the 'micro-politics' and it is within this network of power relations that I will, in the following chapter, connect the politics of masculinity and a genealogical study of the family in a theoretical position which starts with, rather than ultimately negates, the experiences of women and men. As Smart (1980: 69) has noted,

"...the last thing we need is a feminist jurisprudence on a grand scale which will set up general principles based on abstractions as opposed to the realities of women's (and Men's) lives."

If grand theorising, therefore, is in the end no more than setting up a 'scientific' 'correct' feminism (as opposed to other unscientific, incorrect feminisms) then, like positivism, feminism too assumes ultimate objectivity and absolute truth. In the end, attempts to construct a feminist jurisprudence as a 'grand theory' entails a continuing fetishizing of law. That is, as with a position which views multifarious ideological consequences resulting from law, such grand theory construction continues to place law at the centre of thought and to confirm again law's place in a hierarchy of knowledge. There are, therefore, at least two issues raised by this consideration of alternative approaches to doctrinal law. First, an argument against the construction of grand theories which are then taken to explain all aspects of legal power [63] and, secondly, that in both ideological and grand theory accounts too much power is here being ascribed to law at the same time, ironically, that the power of law as doctrine - as written texts - is not being taken seriously enough.

I have argued that not only is it necessary to question such grand theories which purport to explain the power of law, it is also necessary to question the centrality of law itself. Legal discourse does not necessarily reflect the social inequalities and power relations which constitute the gender regime at any given moment. Contrary to scientific and positivistic feminist jurisprudence which proclaim their own

truth through reference to hierarchic structures of knowledge, feminist and anti-patriarchal discourses are in fact themselves sources of power and resistance to law, offering a discursive space where dominant subject positions may be resisted. Recent legal scholarship has sought to avoid turning to a general theory of law and, through speaking of women's experiences, develop a theoretical approach to law which might break out of the problems of liberal legalism and seek to provide an understanding of law which might integrate both the procedural issues raised within liberal feminism (for example, how to use law to improve women's position) with inescapable philosophical questions, such as whether or not such an enterprise is viable at all from a feminist perspective.

Feminist Poststructuralism:

The Deconstruction of Legal Discourse

Feminist poststructuralism, far from constructing grand theories of the nature of women's oppression, has questioned the notion of 'truth' and the hierarchies of discourse in which truth-claims are formulated (Weedon, 1987). In relation to law, it has been argued that it is necessary to break out of the positivist power of law in which "...feminists can only challenge [law] and maintain credibility within law by positing an equally positivist alternative." (Smart, 1989: 71). The conception of law as social discourse has, if not fundamentally threatened the tradition of doctrinal exegesis in the legal community, come to the fore in critical legal scholarship in recent years. Legal education has, not for the first time, been characterised as in a state of transformation, if not crisis. The resistance to theory, the effects of which for a gender-sensitive study of law I have discussed above, has been debated with varying cynicism and nihilistic optimism [64] and the challenge of critical legal studies to the intellectual strait-jacket of doctrinal exegesis has manifested

itself in both academic journals and departmental politics [65].

Within contemporary legal theory, an analysis of legal discourse [66] derived from a methodology of deconstruction [67] and the development of legal semiotics [68] has considerable purchase and, it might be argued, has assumed a fashionable status among the critical legal studies community [69]. I wish at this point to elaborate on what these developments might mean for the study of law and gender. Developments around the concept of legal discourse must be placed in the wider context of modernity and postmodernity in the social sciences [70]. While I shall, in the following Chapter, investigate the implications of de-centring law for an analysis of the inter-relations between family, law and gender, I wish at this point to re-examine the status of the legal text itself and to build on the critique of doctrinalism outlined at the beginning of this chapter.

According to Goodrich,

"Legal studies have been infected by modernity and the legal educational institutions have unwillingly begun to come to terms with the need to debate, if not yet to teach, the rhetorical status of law, the political character of legal discourse and even the relation of nihilism (or the refusal to believe in absolute values) to the exegetical exposition of law as a system of rules."
(Goodrich, 1986: 211)

It has been argued by proponents of a methodology of deconstruction, that the correct meaning of a legal text has no existence prior to its formulation. That is, the formation of 'correct legal meaning' is a process involving choice, a process which can be deconstructed and analysed. The purportedly 'coherent' legal text may, in one variant, be 'trashed' [71] in order to reveal the contingencies of its meaning and construction. This is not to argue that previous

cases, that precedent, is unimportant, as I shall explain below. The essence of doctrinal legal reasoning as a **constructed argument** is that it is supported by appeals to authority. The essence of textual deconstruction is that there is no essence to the text [72]. Viewed as a methodology, deconstruction of the legal text is concerned with more than simply the dynamics of legal reasoning. As applied in the legal academy, it is, above all, about taking doctrine seriously. What, therefore, does this involve for researching family, law and gender?

First, it is necessary to recognise the process of the construction of the text in the doctrinal exegetical tradition. Reported cases are basically legal texts, compiled in a ritualised form for both the teaching of law and the 'carrying out' of law. Within the traditional view of doctrinal exegesis, reported texts are 'good rule' (as opposed to 'good policy') cases used as teaching texts for trainees to be initiated into the discourse of solicitors, barristers, judges and of the legal community generally. Central to the concept of legal discourse is the concept of the legal text and the fact that the law is written [73].

Secondly, in relation to the meanings to be given to law language is of central importance, and for this reason legal scholars have turned to the study of semiotics and rhetoric. Through the concept of legal discourse, law is understood as a process of definition, depending for its existence on the nature and structure of its operation, an operation in which judicial neutrality and academic objectivity have been exposed as false presumptions and social constructions [74]. Within discourse theory [75] generally, language is of crucial importance in structuring the reality of the text; that is, texts are understood to have a social, cultural and symbolic value. Discourse is here understood as more than simply the framework within which explanations are sought. Rather, working definitions of discourse refer to the linguistic unity of groups of statements which constitute a specific area of

concern, governed by rules of formation with their own discursive modes of establishing truth from falsity [76].

Crucially, the process of textual construction involves relations of power. The legal text is therefore **regulated**: that is, the resulting indeterminacy of the text is confined, and analysis of the text seeks to deconstruct the ways in which a range of possible meanings are organised historically into sets of permissible or impermissible readings [77]. In the terms used by Smart (1989: 11), this is a question of how law

"..exercises power not simply in its material effects (judgments) but also in it's ability to disqualify other knowledges and experiences. Non-legal knowledge is therefore suspect and/or secondary."

We are back to the problem of legal method discussed above in relation to feminist legal scholarship and central to this construction of the text is the exercise of power. Murphy and Rawlings (1982:61) conclude an analysis of judgements of the House of Lords,

"Ultimately, then, whether we explore the techniques of persuasion employed in these texts, analyse the conditions of existence and consequences of textual production, or examine the structure of the discourses contained in the text, we are led to questions of power and of how power circulates within a society."

It is the power of law with which such textual study is concerned, and central to these debates stands the rhetorical status of the law itself. In analysing these techniques of exclusion and inclusion it is important to recognise the rhetorical status of legal discourse and modes of establishing truth from falsity, the establishing of that which is or is not 'legitimate' legal knowledge. In the construction of judgments, the use of rhetorical devices are established as

central to the systems of discursive formation. Rhetoric, it has been argued,

"...combines an aesthetics of oratory with a systematic taxonomy of the techniques of persuasion... It provides a fairly rigorous scheme for analysing the periodic structure of a text and a useful catalogue of 'figures', for example metaphor, metonymy, syndetic and apostrophe, which can facilitate a more careful treatment of the functioning of the elements of a text. " (Murphy and Rawlings, 1982: 58)

The features of metaphor and metonymy have been treated as providing a basis of studying the fundamental structure and workings of language and the constitution of meaning in the deconstruction of legal discourse which draws on linguistics and semiotics. It is through analysis of the rhetorical status of legal discourse therefore that the methodology of deconstruction provides a way of exploring the relations of affinity between legal discourse and other forms of discourse - political, moral, scientific, sexual - which would itself assist investigation of what is meant by the separateness and autonomy of law and provide a way of beginning to unpack the relation between law and masculinity [78]. That is, this approach transcends the purported exclusion identified by Mossman at the level of textual legal analysis and opens up the legal text to alternative, resistant, readings which themselves constitute the claims to power of the oppositional discourse.

The legal judgment thus constitutes a temporary crystallisation of the multifarious meanings in legal circulation. In each judgment may be found a multiplicity of influences which affect the formation of the arguments themselves. In the case of legal discourse one influence [79], for example, in this formation is that legal judgments are commonly, if not habitually, formed with reference to and following a reading of prior texts, that is, according to a system of precedent. Legal discourse thus conceives legal texts

as the amalgam of a series of pre-existing texts. Through focussing on the intertextuality of the legal judgement, not only are prior texts located as contributions to a code which makes possible the various effects of signification, it also becomes possible to identify the discursive space within which texts are produced and which governs the construction of those texts. In identifying this discursive space, the educational practice of the legal system is itself rendered suspect:

"...the concept of legal discourse is a methodology for the reading of legal texts which places the communicative or rhetorical functions of law within their institutional and socio-linguistic contexts...In explicitly political terms the various doctrinal representations of the coded unity of jurisprudence and the univocality of legal language constitute an institutional programme or strategy of furtherance of legal professionalism and its inherent belief in the discrete, distinctive and expert character of legal practice as an elite occupation."
(Goodrich, 1987: 205-6)

Locating the legal judgement as an interdiscursive nexus, such an approach not only displaces the author, whose role as the originating point of the text is de-centred [80], but also constructs the text as a moment in a constitutive process. For the significance of the text

"to be properly understood, it becomes necessary to explore the pre-existing practices of reading and writing and the matrix of expectations which are presupposed by a particular text " (Murphy and Rawlings, 1982: 60).

In the case of legal discourse, this involves a reading of previous cases. This is not, of course, to confine the effects of a judgement simply to a textual analysis. One effect of the legal text is the social implications of a particular decision or judgment. An empirical sociological inquiry might seek to pursue such effects of the judgment as a decision. However,

this quest is problematic in several respects. It is by no means clear what the causal 'effects' of a decision are and what its sphere of application may be. A focus on the impact of a judgment assumes an object which possesses its own historical time. Yet the legal text does not work this way. The duration of a decision may be long or short, and is

"caught up with a complex of interdependent variables concerning its reach and reception - most obviously, the disposition of the legislature or the legal profession to accept, circumvent or reverse it." (Murphy and Rawlings, 1982: 60)

It is thus the 'second life' of the judgment - as a text - which is foregrounded. That is, the judgment as that which is presupposed in the future production of legal texts which are read (itself an activity central to the legal circulation). It is to historicise the text, to recognise

"...the peculiar and distinctive character of law as a specific, socio-linguistically defined, speech community and usage...[to] treat legal discourse or the legal genre as an accessible and answerable discourse, as a discourse that is inevitably responsible for its place and role within the ethical, political and sexual commitments of its times." (Goodrich, 1987: 2)

The function of precedent as a fundamental concept within the apparatus of doctrinal exegesis is thus rendered problematic. Various arguments have been advocated in favour of and against strict adherence to precedent [81], the narrowest conception of judicial creativity and statutory interpretation entailing a view that all judges do is apply the law made by parliament and not 'improve' it [82]. It is clear that judges disagree as to the limits of creativity, and competing conceptions of judicial assistance in the form of the literal [83], golden [84] and mischief [85] rules hardly clarify the process of statutory interpretation and judicial creativity. What is lacking is the

establishment of a clear and consistent relationship between the general pronouncements of the judges on the on the matter of creativity and the way they conduct themselves in court. Griffiths comments that

"..the public position adopted by judges in the controversy about creativity is not consistently reflected in their judgements and that more important are their reactions to the moral, political and social issues in the cases that come before them." (1985:186)

Griffiths concludes his study of the politics of the judiciary by stating that judges "... cannot be politically neutral because...their interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the position they hold in our society" (1985: 225-6). It is not that this mild formulation of judicial creativity, which does engage with the politics of the legal text may not be accurate. What it fails to question, however, is the foundational rationality of the law itself.

To summarise the above, the construction of the text, I have argued, is itself an exercise of power and it is necessary to recognise both the discursive context and the relations of power and knowledge in the discursive field within which textual readings are located. These presumptions threaten the autonomy of the text and point to the need to contextualise the text with reference to a historically specific set of institutional practices of reading and writing. This may be contrasted with a form of contextualisation which takes as its object historical contingencies which precede the production of a particular text (Murphy and Rawlings, 1982:60). The methodology of doctrinal exegesis is hereby disregarded in preference of an analysis which **culturally** orders the problem. Thus, the cultural nexus within which legal meanings are produced is itself constituted as the object of analysis. I have suggested, and will elaborate in the following chapter, that in one sense analysis of law may be the wrong place to

begin a study of gender and power. The focus when law is taken as a linguistic register or literary genre becomes the ordinary aspects of the text, rather than focussing on the legal details which would otherwise represent to object of analysis within a doctrinal study of law. Murphy and Rawlings (1982: 57) summarise this method of reading, highlighting both its strengths and weaknesses, in a passage which is worth quoting at length:

"Breaking a judgment down in order to isolate the units of which it consists involves a method of reading which permits a careful and detailed appraisal of the content, highlighting how it is glued together and analysing how a plausible reading is made possible. Thus it can provide answers to some of the more familiar concerns of academic lawyers: to what extent is judgment explicitly rooted in "policy"? How sophisticated is the discussion of "policy"? How well reasoned is the decision? Further, by directing us to the form and organisation of legal judgments, it can highlight regularities and modalities in a series of judgments which often elude the fragmented and dispersed "point of view" encapsulated in the case note. The "discursive techniques" which we have presented, such as repetition, assertion, the use of common sense, the invocation of the ordinary man, silence and suppressions, have been derived from the texts we have read and have been framed in a non-technical commonplace vocabulary....there are limits to the potential of our approach unless it is harnessed to a method which permits a systematic identification and ordering of these techniques and their internal relations one to another."

This discussion of the social construction of the legal text is not to negate the importance of the practices of the law. Rather, it is to engage with the doctrinal conceptions of law as a structurally determined and ordered activity, the "...internally defined 'system' of notional meanings...unproblematically univocal in its application"

(Goodrich, 1987: 1), an analysis of which I began this Chapter. It is to question those legal texts which address the ethical basis of the legal order, to begin to unpack the gendered dimension to those rationalities constructed and to deny the technical indeterminacy of the social order.

Conclusions

The theoretical basis of a study of family, law and gender which is to address questions of power, sexuality and subjectivity is not to be found in an essentialist, doctrinal or 'grand theory' approach to law. The connections lie elsewhere. Rather, and crucially,

"...both law and masculinity are constituted in discourse and there are significant overlaps in these..law is not rational because men are rational, but law is constituted as rational as are men, and men as the subject of the discourse of masculinity come to experience themselves as rational - hence suited to a career in law." (Smart, 1989: 86-7. My emphasis).

The centrality of masculinity to theorising the power of law relates to the law's own power to disqualify alternative discourses, alternative accounts and experiences, such as feminism. Smart (1989: 86) continues,

"...these visions implicate law with masculinity. This is not a simple reductive statement akin to 'all law is man-made', rather it is intended to draw upon an understanding of how the constitution of law and the constitution of masculinity may overlap and share mutual resonances."

I have sought in this Chapter to present the beginnings of a theoretical base from which to begin analysis of masculinity and law. Feminism has fundamentally challenged the gender blindness of legal theory. However, it is most important to

avoid a notion of law which conceptualises masculinity as essentially oppressive. The notion that men are themselves the subjects of a discourse of masculinity manages to do this. In particular, I have argued that it is the de-centring of liberal-humanism and the rejection of the notion of a coherent unified subjectivity within discourse which is of the essence to a deconstruction of masculinity. Moi (1985: 8) puts a tenet of postmodernism's anti-humanism with clarity:

"...traditional humanism...is in effect part of patriarchal ideology. At its centre is the seamlessly unified self - either individual or collective - which is commonly called 'Man'...this integrated self is in fact a phallic self, constructed on the model of the self-contained, powerful phallus. Gloriously autonomous, it banishes from itself all conflict, contradiction and ambiguity. In this humanist ideology the self is the sole author of history and of the literary text: the humanist creator is potent, phallic and male - God in relation to his world, the author in relation to his text. History or the text become the 'expression' of this unique individual: all art becomes autobiography, a mere window onto the self and the world, with no reality of its own. The text is reduced to a passive, 'feminine' reflection of an unproblematically 'given', 'masculine' world or self."

In the case of liberal legalism, the case for linking masculinity with law is perhaps all the more acute, for both liberal legalism and doctrinal exegetical method are underscored by positivist conceptions of law itself as a unified, coherent entity. A mutual resonance of law and, I shall argue in Chapter 5, the construction of hegemonic masculinity in discourse is the ability of each to exclude that which would challenge their hegemonic power, their univocality and claims to authority. As Weedon notes,

"The de-centring of liberal humanism, with its claim to full subjectivity and knowing rationality, in which man is

the author of his thoughts and speech, is perhaps even more important in the deconstruction of masculinity than it is for women, who have never been fully included in this discourse." (Weedon, 1987: 173)

The notion that men are rational, responsible human agents is deeply problematic. While legal scholarship of an explicitly postmodernist turn has attempted to place irrationality onto the legal agenda, it is important to recognise that the linking of the discursive field of law to masculinity has proved to be a contribution of explicitly feminist scholarship. While rejecting abstracted and ahistorical conceptions of law, post-structuralist feminism has questioned the univocality of the text. Law, understood as a phallogocentric discourse [86] is inseparable from masculinity. The deconstruction of each are related, in that the power of law to disqualify that which is not part of its method (subjectivity, alternative accounts of 'reality') is bound up with the power of men and hegemonic masculinity to exclude that which might challenge masculinity's own pervasive ideology; that is, male authority, the neutral competence and purportedly objective reason of masculinity [87].

This is not simply a matter of esoteric discursive analysis devoid of material effects. These exclusions cannot be separated from the material benefits which accrue to those who live their lives by the unrelenting rhythm of hegemonic masculinity - the material power of men is itself threatened by a feminism which attempts to speak of the social constitution, the contingent nature, of the power of masculinity and of law. The conception of the legal judgement I have presented in this Chapter has major implications for the study of family, law and gender. Legal discourse is but one specific site where the ideological construction of gender takes place. It is only one discourse, albeit, I shall argue, an important one. It is my contention that particular meanings, values, and forms of pleasure (I shall be focussing on sexuality) are central to the constructions of masculinity

and femininity offered by the legal text. It is here that the work of Foucault [88] (see below Chapters 4 and 5) links both the power/knowledge relations of the legal text and the constitution of subjectivity each as exercises in **technologies of power**. In Chapters 7-8 I shall argue that the male body is an object of legal discourse, of a regime of examination and surveillance through which normal/perverse, natural/deviant sexualities and gender are constructed. In the deconstruction of male heterosexuality in law, it is necessary to not simply challenge

"...legal discourse but, also naturalistic assumptions about masculinity. The struggle therefore goes far beyond law...tackling family law means tackling constructions of fatherhood, masculine authority, and economic power."
(Smart, 1989: 87)

In Chapter 4 I shall investigate such constructions within the sociology of masculinity. I shall in the following Chapters investigate the extent to which, if at all, there can be identified in law a 'reverse discourse' of male heterosexuality which demands that its legitimacy or 'naturalness' be acknowledged, a masculinity which is neither oppressive or patriarchal and which, like law, might take "responsibility for its place and role within the ethical, political and sexual commitments of its times." It is not difficult to see why law should be so hostile to forms of feminism which question its epistemological premise. Men, constituted in discourse as masculine subjects, have their interests represented by discourses such as law in which a particular construction of hegemonic masculinity is constructed as part of their world view. When the law is concerned to test equality, equal opportunity or difference, concepts which share law's constituent theoretical dualisms, the assumption is that individuals will be tested against the male norm; if found equal, the individual will be allowed 'equality' in whatever area. This has proved to be the case with regard to family law, as I have argued in Chapter 1. Focussing on difference might

be said to confirm the the 'difference' of masculinity itself. Equality of opportunity for women and men has, as feminists have argued, not proved to be a great threat to the balance of power in society when patriarchal relations have informed the production and regulation of the male and female subjects themselves. We are no longer simply looking at whether the law embodies a formal equality between men and women: we are now looking at the relation between law and how we actually experience ourselves as men and women, male and female.

In the process of deconstructing the gender blind discourse of law, I have argued that attention to the historical context, to the character of law as a socio-linguistically defined speech community, reveals both the contingencies and politics of the constitution of gender in legal texts. To valorize the social nexus within which the forms of regulation attain validity, law's unity is fractured: it is, like all human relations, part of structures of power informed by divisions and relations of gender, race and class. I have in this chapter, via a synthesis of contemporary methodological approaches to the legal text, sought to address the gender of law in a way which neither paralyzes anti-patriarchal praxis nor denies the gender of discourse in and of the text itself. It has been argued that in producing a reading of legal texts, in the processes of interpretation, the legal community is engaged in temporarily fixing meanings and privileging particular social interests in a process which is gendered and which involves relations of power. It is now necessary to relate these arguments to questions of power and the family. Thornton (1986) has argued that legal discourse is structured around 'sexualised, hierarchical' dualisms, whereby men are identified with one set of dualisms (throughout, rationality, reason, culture, power, objectivity, abstract and principled activity), and women with the other side. Law is associated with the male side of such dualisms: law is, like men, supposed to be rational, objective, abstract and principled. In the next Chapter I wish to analyse in more detail the construction of masculinity and femininity around a dualism which has been identified as fundamental to

liberal legal regulation and debates around law and the family:
the dichotomy between the public and the private spheres.

CHAPTER 3

THEORISING LAW AND THE FAMILY

Introduction

In this Chapter I shall argue that the gendered separation of work and home is legally constituted and reinforced [1] and that the idealisation of the private family and construction of the familial roles of the male/breadwinner and female/homemaker constitutes an organising moment in the construction of masculinity in legal discourse. It has become commonplace to assert that the 'public/private' dichotomy is at the heart of critical theory of law and the family and it is through an understanding of this distinction that several writers have, in recent years, contended that understanding of the relation between law, family and state intervention might best be achieved [2]. In contrast with the functionalist studies of the family discussed in Chapter 1 (p 6 - 8), the division between the public and the private constitutes an alternative approach to law and the family worthy of analysis [3]. In this Chapter I will assess the public/private distinction, and then move on to what I believe is the theoretically superior approach of what has been termed 'familialist' studies of the family and law.

The range of problems in family law which may be formulated in terms of the boundary between public powers and private freedoms is considerable. Questions such as how, and to what extent, the state should intervene in family life [4], what personal morality is the concern of the law [5] and the extent to which welfare professionals should intervene in family life, have all been couched in terms of the dichotomy between the 'public' and the 'private' spheres. The issues addressed in the language of public/private and state intervention range through divorce [6], child care [7], child abuse [8], marriage [9], sexuality [10], the provision of maintenance [11],

responses to domestic violence [12] and moves to conciliation in the decision making process [13]. Yet while the dichotomy is presented as central to theorising the law/family relation, the division, others have argued, simultaneously confines and limits understanding of reform strategies around law, failing to account for the power of law and liberal legal discourse. The public/private dichotomy, it seems, is to be accepted, rejected and 'transcended' all at the same time.

It is curious that the 'public/private' split should be held to have a conceptual utility precisely for the reason that the dichotomy does not hold up to analysis. For example, Freeman (1985) argues that the private sphere does not exist outside of the state and that the public and the private each contain the other at the level of social practices and strategies of power. The private is as constructed a space as the public. However, the domestic sphere is also presented as beyond the concern of the law: "In which the King's writ does not seek to run, and to which his officers do not seek to be admitted." (Balfour v Balfour [1919] 2 KB. 571, 579). Set up in this way, questions of morality, subjectivity, sexuality and gender all become, by a misleading sleight of hand, 'not the concern of law'. O'Donovan (1985) argues that the 'absence' of legal regulation, the 'unregulated private' (1985: 11), facilitates the exercise of the power of men over women and serves to mask the fact that the 'private' world of the family is formed by structures which are external to it - for example with reference to welfare policies and the legal structuring of employment. Thus, the state continues to define what is private while at the same time maintaining that the private is itself preconstituted naturally, and is therefore outside the area of legitimate state action. These complexities require clarification.

The Public and the Private

"Law is not only central to the concepts of private and public, and to the division between the two, but also plays an important part in the construction of that division." (O'Donovan, 1985: 3)

It is not surprising that feminists should have sought to analyse the public private dichotomy, both with a view to developing reform strategies around law and in understanding the legal decision making process, the politics and power of family law [14]. Feminists have argued that the public/private division legitimates the refusal of the state to intervene in specified areas, masking the fact that privacy might mean no more than the right of men to dominate women and children, and it is within feminist analyses of the dichotomy that an understanding of power relations emerges. This point has been well made in feminist debates, for example, of the law relating to marital rape [15] and domestic violence [16]. This question of power is fundamental to debates around the public/private. Theoretically, understood in terms of the public/private dichotomy, legal reform becomes a matter of 'increasing' or 'decreasing' legal intervention and family privacy. Understanding state policy to be expressed through law therefore, such a conception of state intervention involves an implicit juridical conception of power [17] in which the exercise of power is understood by way of a zero-sum equation in which an 'increase' in the power of the state means a 'decrease' in the power of the family, and vice versa.

'Power' is just one of a range of concepts within the social sciences have been employed in analyses of the public/private dichotomy and in seeking to establish what these terms signify. O'Donovan (1985) presents a historical analysis of the division in terms of the values of *Gemeinschaft* and *Gesellschaft* [18], while Freeman (1985: 168) contends that the history of liberal political thought itself can be seen as a retreat from a 'laissez faire' position and free market

economy to an acceptance of the legitimation of state intervention and regulation. Such differing explanations of the dichotomy highlight the important point that the division itself must not be seen as stating a literal truth either about the family or the form of legal regulation. Rather, the public/private dichotomy is constructed within liberal legal discourse as premised on two separate realms of existence.

The notion of 'sex roles' also frequently figures in the literature addressing the division and the two realms relate directly to the notion of 'breadwinner masculinity' introduced in Chapter 1 (p 20). In the gendering of the dichotomy in feminist scholarship, while the world of work, the market and individualism, of politics, competition and the state are associated with men and masculinity, the private sphere, in contrast, is associated with 'the world of women'. The domestic, familial and the personal, the sphere of sexuality, desire and emotion are fixed to the feminine, not masculine, polarity, to the 'Angel in the House' and not the 'breadwinner' male [19], be it in terms of socially proscribed sex roles or as resting on essentialist presuppositions [20]. There are however two concepts which are, I believe, central to an analysis of law and the family understood in terms of the public/private division, and it is these which I wish to explore in more detail at this point. First, an implicit unity is given to the concept of the 'state' and 'state intervention' in theorising law and the family in terms of public/private spheres and, secondly, this theorising involves a juridical concept of power which is conceived in the zero-sum terms referred to above. The theorising of both the 'state' and 'power' require clarification, for it is these concepts which are rendered problematic within the familialist approach.

The State, Gender and the Public/Private Dichotomy

The public/private dichotomy has a long history [21]: in considering the gendered dimension to the division Aristotle states "to be born female is the most common kind of deformity" [22]. The dichotomy is also to be found in the natural rights theories of Locke [23] and the philosophical foundations of contemporary liberal conceptions of the dichotomy are evident in the political philosophy of Mill [24], for whom the realm of morally legitimate state regulation is to be contrasted with a realm of privacy, personal choice and freedom from state intrusion. This liberal conception runs through the Wolfenden (1957) and Williams (1979) Reports and continues to inform contemporary legal theory.

Analysis of the division therefore is not new and it would be incorrect to set up doctrinal legal analysis as wholly insensitive to the delegation of 'public' powers through the mechanism of 'private' law [25]. The dichotomy is in fact but one of a range of divisions, of binary oppositions, which together constitute liberal political philosophy [26] and it has been argued that that the construction of such dichotomies per se is itself a reflection of a binary, patriarchal mode of thought [27]. In critical legal studies literature, the public/private division has been related to an analysis of law in which the oppositions of liberal legal discourse are fundamental to the shaping of consciousness and the fostering of an acceptance of existing social arrangements [28]. As with the law/ideology perspective discussed in Chapter 2 (p 44 - 6), law here masks the realities of oppression, it being understood to be a dynamic of oppression that people think and act in terms of the socially constructed, reified, dichotomies. As a device of liberal legal discourse the public private dichotomy has been subjected to the critique from both marxist and feminist perspectives that it functions to maintain the belief that certain areas of life are 'outside' the law. They are thus beyond the control of the state and political processes. A corollary of this is that the dichotomy

also serves to delegitimise alternative forms of group solidarity which do not fit within the public/private divide. Rose (1987) argues that the distinction itself is inimical to

"...the construction of democratic, self-governing group life which would transcend the distinction between state as locus of all political power and individual as isolated atom of freedom and rights." (Rose, 1987:63)

As an alternative form of group solidarity, this would exclude both feminist practices and anti-patriarchal praxis on the part of men [29]. Conceptions of the state and power are here most important and Rose makes the crucial point that rethinking the concept of the public/private dichotomy entails also a questioning of the state as 'locus of all political power and of the interests which the law - as expression of state policy - is deemed to serve (Rose, 1987:66).

There exists a voluminous literature addressing the state's regulation of sexuality [30]. From a historical perspective which endeavours to integrate theoretical developments around sexuality and power, Weekes (1981) presents a wide-ranging discussion in which it is coherently and forcefully argued that the state both overtly and covertly controls sexuality, for example by criminalising homosexuality [31], legislating on the age of consent [32] or attempting to regulate the circumstances in which prostitution takes place [33]. Connell (1987) argues that the state also intervenes in the sexual division of labour premised on the public/private division through a range of regulatory mechanisms; for example, through developing equal opportunity policies [34] or passing legislation on sex discrimination [35]. The work of Weekes and Connell is explicitly concerned with the state and sexual politics [36].

This is, however, not necessarily the same project as addressing the relation between the concept of the state itself and the construction of gender. Weekes (1981), despite

the theoretical introductory chapter, proceeds to present a broadly positivistic account of the regulation of sexuality which does not address the (purported) aim of assessing the place of legal regulation in the constitution of subjectivities [37]. Similarly, Connell (1987), while presenting a wide-ranging and detailed study of gender and power in which the politics of masculinity are admirably addressed, nonetheless continues to conceive of the state as a 'player' in the gender regime he describes. As we have seen in relation to doctrinal exegetical conceptions of law, it is not that gender sexual issues are not addressed within theories and accounts of the state and law. The state may be theorised in terms of gender, but it remains a coherent entity and the locus of power and decision-making.

Working within the liberal legal terms of the public/private dichotomy, it is clear that, like law, the state has a gendered dimension to it. The personnel of the state are divided by sex and, though there may be exceptions, the legal elites remain the preserve of men. As Connell (1987) argues, the diplomatic, colonial and military policies of major states are formed within the context of ideologies of masculinity which valorise attributes of force, aggression and 'toughness' [38]. Connell (1987: 109) analyses this 'core' of the power structure of gender in advanced capitalist countries, identifying four aspects to the structure. First, it is noted that the hierarchies and workforces of institutional violence, of the military and paramilitary forces, the police and prison systems, are predominantly male [39]. Secondly, it must be recognised that aggressive masculinity informs oppositional politics and does not necessarily result in destruction.

"The state both institutionalizes hegemonic masculinity and expends great energy in controlling it. The objects of repression, for example 'criminals', are generally younger men themselves involved in the practice of violence, with a social profile quite like that of the immediate agents

of repression, the police or the soldiers." (Connell, 1987: 128)

There is no unproblematic 'good' and 'bad' aggressive masculinity. For example, it might be an aggressive masculinity which leads to protection of the environment in the work of Greenpeace or Animal Rights protestors, or in civil disobedience.

Thirdly, Connell identifies the structures of gender evident in work place politics [40]. This does not just refer to the hierarchies within heavy industries, such as steel and oil companies, mining and engineering, but also to technological industries such as computing and aerospace, as well as the institutions of the law and education. Feminists have argued that the history of the labour movement might itself be read as one of macho solidarity involving the protection of specifically male interests in employment practices [41] (see the discussion of the 'family wage' and domestic labour Chapter 1, p 21 - 23). Fourthly, and at a different level, the planning and control machinery of the central state may be identified as predominantly masculine [42]. The mandarins of Whitehall, the upper echelons of local authorities and central government, remain in the hands of men. Connell (1987: 109) concludes by stating that these parts of the complex of the power structure are tied together by an ideology which links explicitly masculinity, authority and technological knowledge. This may be contrasted with the privatised world of femininity, identified in the terms of the dichotomy around a set of ideas of deference, domesticity, nurturing and self-regulation: the private sphere [43]. This is one possible way of constructing an inter-relation between the public/private division, the state and masculinity.

Understood thus, it might be argued that the state and the struggles for the form and direction of state policies are very much a stake in gender politics. This is not the same thing as arguing that the state is 'male' in the sense of

universally and omnipotently objectifying women and female sexuality (which is what Mackinnon (1982, 1983) would argue: see Chapter 2, p 46 - 8). It is to place the politics of the state firmly within the terrain of sexual politics, not to present the state as a meta-social guarantee of social order, but to argue that the state should be understood as constituted in liberal legal discourse as a concrete historical collectivity defined in both gender and class terms. It is the state which regulates both family and workplace and, through a range of regulatory measures, relates the relationship of the individual to itself [44].

To theorise the state in terms of gender and power is crucial to the study of masculinity and law. While 'the family' is commonly understood as bearing responsibility for the determination of male and female gender, as discussed in Chapter 1, the state commonly appears as a gender blind institution.

"...almost no one has seen it [the state] as an institutionalisation of gender. Even in feminist thought the state is only just coming into focus as a theoretical question." (Connell, 1987: 125-6)

To recognise that the state is gendered is an important progression in social theory. However, to recognise that the state is gendered does not necessarily involve transcending a liberal legal conception of the state and nor does it necessarily entail any rejection of juridical notions of power and law. While there is certainly a long tradition of theorising the state within the social sciences [45], the concept of the state is usually separated from the family, the domestic, and the 'personal' concerns of the private sphere. Locating the crucial role of the state in constructing the public/private dichotomy in the first place is an important corrective to this. Yet this leads to the perhaps ironic situation in which the public/private division informs even purportedly critical theories of the state and the

public/private division. For example, the marxist concept of 'alienation' [46] addresses both the 'personal' experiential and public, traditionally 'political', aspects of oppression, but it remains premised on the notion of a 'true', unalienated, self unconstituted by discourse: there remains an ultimately 'private' self to be contrasted with the 'public'. It is as if it is impossible to break free of the terms of the discourse which is the object of critique.

To summarise the argument thus far, in liberal legal discourse it is the state which, through law, determines what is private, and what is public. It is the state which is theorised as establishing the legal framework within which policy decisions are implemented. This conception is not confined to traditional positivist constitutional concepts of juridical state power, but is also evident in feminist analyses of the public/private. The state is presented as a 'player' in relations between men and women, to be contested for and 'won' by particular groups. It is the state which does, or does not, support the interests of a particular group, the state which is the neutral arbiter of competing interest claims. It is conceived as the source of rights and responsibilities, of moves to equality or of moves towards further discrimination. On this view, it is the state which both produces and reproduces 'patriarchal relations' [47].

Critical theory of the family has begun to question the adequacy of such conceptions of the state, albeit that they may address gender issues. Indeed, this shift in debates around the state can be traced in the development of the theoretical positions of individual feminists [48]. Rather than accepting the concept of the state unproblematically, the state itself has become the object of analysis and critique. Rose (1987) argues that the public/private dichotomy serves a number of functions, one being that it mystifies the fact that it is the state which itself has constructed the dichotomy, while Freeman (1985: 170) argues that

"The current controversy about the respective realms of the public and private, and about the limits of state intervention into the family...distort and perpetuate a mystifying discourse which sees 'the family' as separate from, and in opposition to, the state." (Freeman, 1985: 170)

What Freeman here recognises is that language of public and private is part of a 'mystifying discourse', the basic concepts of which it is necessary to question. The public/private dichotomy is therefore a paradox, and this has major implications for theorising the place of law in relation to power and the family. It both purports to explain, yet is itself explained by, the productive power of law to constitute the social realms. Yet this involves ascribing enormous power to the law. Law constitutes the public/private dichotomy in the first place, yet the dichotomy is then used to justify, or to critique, where the boundaries have been drawn. We are no longer simply concerned with shifting these boundaries - a little more privacy here, a little less there - but with rejecting the boundaries per se. The liberal conception of the 'private' entails conceptualising not only the state but also law in a particular way, for law is here understood as an expression of the limits of state intervention.

Far from being a pre-given entity, the public/private dichotomy has no determinate content in law and functions as an image/metaphor which is able to structure judicial arguments to existing values and beliefs (Rose, 1987). Understood in this sense, the concepts of the public and the private constitute not so much an analytic tool in deciding cases but rather a form of political rhetoric involved in the making of value choices. As such, and in the light of the discussion in the previous Chapter of the need to deconstruct the rhetorical status of legal discourse, the questions we are led to ask relate to such matters as who determines what is and is not public, why does this happen and what are the effects of this? These are, above all, political questions about the relation

between meanings of the state, law and power, and they come together when considering the 'familialisation' approach to law and the family.

Law, Regulation and the Family:

Transcending the Public and the Private?

I have referred thus far to the functionalist and the public/private approaches to the study of law and the family. A third position, a 'familialist' approach, is perhaps most evident in feminist thinking about the family and law, though this is not to argue that the writings I am terming familialist are necessarily pro-feminist. Indeed, the contrary might arguably be the case [49]. This transition in theorising law and the family is also, in part, a result of the developments within social theory and, in particular, of attempts to make social theories politically intelligible [50]. In the rejection of 'meta-narratives' and rethinking the juridical concept of power, social theory has turned to a focus on superstructure and the socially constructed nature of the present and of subjectivity [51]. It is history, rather than the search for abstracted grand theory, which is used to deconstruct the present. In the analytical approach developed by such writers as Foucault and Donzelot, genealogy [52] is understood not so much as a methodology but as a distancing process from conceptual tools which are taken to have hitherto constrained study of the family and law. I have here in mind the categoricalism [53] which underlies certain feminist literature [54], reductionist marxism [55] and functionalism.

It has been the primary contention of writers adopting a familialist approach that the dichotomy between the public and the private is to be 'transcended'. Freeman concludes his 'Towards A Critical Family Law' by stating that "Real reform can only come if the dichotomy [public/private] is transcended" (Freeman, 1985: 174) while Rose (1987) advocates the need to go

'Beyond the Public/Private Division'. Central to a transcending of the dichotomy is the rethinking of the centrality of law in a political analysis of the family powers I have introduced above.

(i) De-Centring Law

Law is just one regulatory system within the network of powers which regulate the family. To transcend the public/private dichotomy, it is first necessary to engage with the interconnections between law and these other systems, as well as with emerging forms of rationalisation concerned with the transformation of subjectivity. This implicates domestic, reproductive and conjugal politics. Law therefore is not the only, though it is an important, means by which the family may be regulated. Disrupting the unitary nature of the concepts of state and power, 'law' no longer can be said to operate on 'the family'. Rather, 'family law' becomes little more than the creation of textbook writers and legal ideology. As Rose has argued,

"If we are to understand the politics of familialisation, and the transformation of political concerns into personal and familial objectives which it entailed, we need to fragment, disturb and disrupt some of the central explanatory categories of critique." (Rose, 1987: 66)

I have already argued in Chapter 2 that there is no unity to the written codes, institutions, agents and techniques of the law. The law exercises power not just by its material effects, but also in its ability to disqualify knowledges and experiences. In relation to the family, it is clear that a considerable range of laws are of relevance to the family. A selection from a traditional text book on family law (eg Bromley and Lowe, 1987) might list laws relating to marriage [56], divorce [57], inheritance [58], the protection of children [59], domestic violence [60], and custody [61]. All have objects and powers which cannot simply be translated into

each other because they all constitute 'law' and one 'legal subject' in each and every instance. In different areas of law, 'husband' and 'wife', 'mother' and 'father' may each have different meanings, and as I have shown in Chapter 1 (p 11 - 14) there is no one 'family' in law.

If such a wide variety of laws relate to the family, then the range of **issues** to be considered when analysing the family and gender is equally wide. Again, and as we have seen throughout Chapters 1 and 2, relations between law and masculinity concern such diverse subjects as reproduction [62], birth control [63], education [64], public health [65] and domestic architecture [66]. We might also add housing [67], marriage guidance and conciliation [68] and the role of the medical profession [69] as well as the more traditional objects of legal analysis, the courts, lawyers and police. All come within the sphere of familial politics.

The family constitutes, therefore, the object of a range of regulatory programmes which go far beyond mere formal legal regulation. Understood in this way, the very **diversity** of legal regulation becomes fundamental to understanding the power of law.

"They [regulatory practices] do not operate according to a single division of 'public' and 'private' - spaces, activities and relations which are within the scope of regulation for one purpose are outside it for another. Unities and coherences must be analysed in terms of **outcomes** rather than origins or intentions. Rather than conferring a false unity upon the diversity of legal regulation, critical analysis should treat this diversity as both a clue to the intelligibility of the law and, perhaps, as the key to a political strategy in relation to law." (Rose, 1987: 67)

Re-locating law within this network of regulatory mechanisms however, one faces a paradox in that in many respects analysis

of law may be the wrong place to start if one wishes to understand regulatory strategies within the network of familial powers. Carrying on from the analysis of the legal text developed in Chapter 2 (p 50 -5), the focus shifts away from law conceived as a discrete body of rules. Recounting the 'rules of law' in a given area of the sub-discipline family law does not simply mislead as to the practice and politics of law, but also obfuscates the place of law within this complex of regulatory practices. To understand law's power therefore involves looking elsewhere.

It is recognising and integrating within an analysis of familial relations this wide range of factors which marks the familialisation approach evident in Donzelot's (1980) 'The Policing of Families', and the influence of this perspective is evident in Smart's argument that law should not be understood

"...as a homogenous entity but as a collection of practices and discourses which do not all operate together with one purpose...I do not perceive the law as a superstructural reflection of the economic base but recognise that it contains within its own constraints and motivation as well as being influenced..." (Smart, 1984: 22)

Rethinking the place of law in this way involves questioning the role of institutions central to regulation of the family. For example, though the powers of public authorities are derived from statute [70] such institutions may have their own internal dynamics, structures of power, gender and labour, and be bound up in complex and contradictory ways with voluntary initiatives and private actions which do not derive from a formally legal source. Historically, the emergence of the sovereign state may be understood as involving a centrifugal process of a concentration of a range of powers and authorities which had hitherto been dispersed, authorities which contain within themselves mechanisms for the monitoring and sanctioning

of aspects of conjugal, personal, sexual and domestic behaviour which are by no means necessarily mutually consistent [71].

Thus, there is no 'one' state policy which is implemented across all these concerns and which is invariant in the form of its regulation. The state is here conceived of as part of a dispersed apparatus of social control, a control which works through dominant discourses as much as through force. This is not to ignore what has been termed the 'old' contrivances of power [72], nor to contend that formal law cannot be said to be increasing its regulation over certain areas of life [73]. It is, in the terms of the textual analysis presented in the Chapter 2, to identify the family not as the object of a unitary state policy but as an interdiscursive nexus of legal, medical and religious discourses, the very diversity and contingencies of which testify to the existence of hybrid forms of intervention in family life. The challenge of this approach to understandings of law and the family in terms of the public/private division does not stop here however. This de-centring of law involves also rethinking the juridical conception of power.

(ii) Power

There is now a considerable literature in which power is held not simply to be negative, in the sense of repressive and inhibitory, but also positive, concerned with exhortation, incitement and production [74]. In the analysis developed by Foucault [75], power is not simply a negative, repressive entity. Foucault conceives power as creating resistances and struggles against its operation which themselves bring about new knowledges and transformations within the power-field [76]. It is a concept which covers both 'force' in domestic relations, as well as the dynamics of emotional relations, what Connell (1987) terms the 'structure of cathexis'. Within this conception power is as much about an ability to mobilise subjectivities, the constitution of aspirations and beliefs, as with prohibitions and negation of human behaviour, the

sanctions of formal positivist law with which I began Chapter 2. Power cannot be calibrated in zero-sum terms, and the effects of power relations cannot be confined to the effects of law. Power is no longer a single object or a repetitive form. Rather,

"The sources of power are multiple - from control over economic, political, cultural, or military resources to charisma, erotic attraction and desire." (Rose, 1987: 68-9)

It is not that Foucault is denying juridical power but that

"...power is tolerable only on condition that it mask a substantial part of itself. It's success is proportional to its ability to hide its own mechanisms...Not only because power imposes secrecy on those whom it dominates, but because it is perhaps just as indispensable to the latter; would they accept it if they did not see it as a mere limit placed on their desire, leaving a measure of freedom - however slight - intact? (Foucault, 1981: 86)

It is no longer only the immediate participants to a case who make demands of law, but also professional bodies, litigants and the entire range of non-legal systems and bodies of knowledge concerned with the regulation of the family and with processes of normalization. In Foucault's words (1981: 144),

"Another consequence of this development of bio-power was the growing importance assumed by the action of the norm, at the expense of the juridical system of law. While law refers to the sword, 'armed to the death', ...a power whose task is to take charge of life needs continuous regulatory and corrective mechanisms."

Foucault is concerned with these 'new' powers of normalization in a disciplinary society, arguing that such a non-economic concept of power is more in keeping with the mechanisms of

regulation in the late twentieth century and the diversity of regulatory practices outlined in this Chapter. This is not to deny that power and judicial rights are linked but that a transformation has taken place, away from the question of who 'has' power, to the mechanisms of power and disciplinary coercion (Foucault, 1975, 1979, 1971, 1981). The 'disciplinary society' which emerges from Foucault's work is part of the processes of familialisation addressed above: it is not that juridical forms of power are no longer relevant, but that

"...we should talk of two parallel mechanisms of power which operate symbiotically, but where the old mechanism will be eventually colonized by the new" (Smart, 1989: 8).

As Foucault argues,

"It is no longer a matter of bringing death into play in the field of sovereignty, but of distributing the living in the domain of value and utility...I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative and so on) whose functions are for the most part regulatory. A normalizing society is the historical outcome of a technology of power centred on life." (Foucault, 1981: 144).

The 'governmentalization of the state' (Foucault, 1979) involves a transformation of what could be governed, by whom and in what ways. Rather than understand reform strategies, legislative changes and social transformations as originating from 'the state', as if the state was anything other than an abstracted signifier within a particular political discourse, it becomes possible to locate heterogeneous sources of reform, bound up within different networks of power. According to Minson (1985 :182), it becomes

necessary to question the appropriateness of legality and legal action in relation to the formation of all government objectives with regard to the family. Sexuality, masculinity, femininity and desire - all are implicated in the play of power relations.

The de-centring of law entails a rejection of a simple juridical theory of power [77] and in this sense the two concepts are inseparable. Understanding law in terms of regulation rather than repression, legal concepts such as 'rights' and 'entitlements' in legal discourse are conceived not so much as absolute abstractions resting on humanist presuppositions but rather means to an end, to be understood within the particular discourse in which they are formulated [78]. Legal intervention is co-terminous with other systems of intervention. Notions of power as simple 'social control' are rejected as an explanatory device in familialist writings on the basis that they unify a range of mechanisms, techniques and objectives, which not only may be irreconcilable but also involve writing out of a political engagement with law concerns which are central to this thesis - desire, aspiration, sexuality and gender. (Rose, 1987). Such a negation of praxis, the politics of personal life, ethical commitments, sex and desire - the exclusions of doctrinal conceptions of law (Chapter 2) - must be resisted if analysis of law and the family is to take seriously the politics of masculinity.

To summarise, one effect of characterising law, state and power in this way is that law is no longer considered to be a homogenous coherent unit which can be reduced to the expression of class - or male - interests. This has important implications for understanding the construction of men and masculinity in legal discourse, for law and the state can no longer be understood as unproblematically serving the interests of all men. This involves rejecting essentialism, be it feminist or marxist, and is to question not only whether law constitutes an entity unto itself but also the existence of a readily identifiable set of male interests which may be said to be

served by law, unmediated by class or ethnic differences [79].
As Brown (1986: 434) writes,

"It is this model [of the law as male] which is (or should be) on the rubbish pile today, this model which is at issue in the attacks on the idea of a homogenous content of women at law and in the rejection of the 'equal rights' analysis of legal effects and legal reform."

This is not to argue that law does not serve interests. It is to reject the model of law in which legal regulation is presented as embodying a simplistic struggle between 'men versus women'. To reject the conception of law as the embodiment of male interests is ultimately to empower both women and men in taking control over their lives. It is to avoid the characterisation of all women as either passive victims or collaborators, it is to reject the notion of 'false consciousness' and 'true feminism' underlying Mackinnon's argument (Chapter 2, p 46 - 50) and it is to reject the notion that all men embody patriarchal power in the same respect. It opens up masculinities to analysis. Not all men seek the same (oppressive) relations with women, and it at least allows for the possibilities of an anti-patriarchal praxis on the part of men. It is, far from writing women out of history, to recognise that sexuality, aspirations, motivations and desire are all enmeshed within power relations and social objectives.

This is not to say that campaigns around legal reform cannot be interpreted to reveal underlying class, gender and ethnic interests, but is also to valorise the search for new ways to constitute oneself which is central to the politics of sexuality. As Rose (1987: 69) notes, amongst the modes of operation of power "...the shaping of wills, desires, aspirations and interests, the formation of subjectivities and collectivities is more typical than the brute domination of one will by another." 'Familialisation' signifies this historically specific range of programmes aimed at diverse aspects of

familial life, but which nonetheless shares in common a concern to reconstruct the citizen, her/his ambitions, desires and subjectivities. The familialisation of society is fundamental in the constitution of subjectivity and also constituted a historical redefinition of masculinity. It is necessary at this point to shift from the theoretical level to a consideration of the substance and history of these developments. What does this process and theory mean for understanding the history of the family and the changes in relations between men and women therein? In particular, how does this compare with accounts couched in terms of the public and the private to explain the power of men, as husbands, lovers and fathers, in familial relations?

The History of 'The Family'

Freeman has integrated the notion that power may be positive in his argument that not only does law serve to reproduce social order,

"...it actually in part constitutes and defines that order. Family law (and not only family law, for labour law, tax law, social welfare law, immigration law and other laws and regulations are similarly creative of such an ideology) produces and reproduces patriarchal relations. The legal form is one of the main modalities of social practice through which actual relationships embodying gender stratification have been expressed."
(Freeman, 1985: 158)

Freeman's argument is by no means new, but serves to highlight the fundamental insight that the family is a social construct and that law is "one of the main modalities" of this constitution. However, it is the work of Donzelot (1980) which is perhaps the most influential recent contribution to debates around the family and which has far-reaching implications for analysing the place of law in the history of the family. In

'The Policing of Families' (first published in Britain in 1980), Donzelot presents an analysis of the family which attempts to relate the 'Birth of the Family' to the emergence of a newly delineated domain of 'the political'. In contrasting the modern family with prior types of social organisation of an earlier epoch, Donzelot's analysis shares certain similarities with Foucault (see further on this point Minson, 1986 : 180-224) and I wish to take Donzelot's thesis as representing aspects of the familialist approach outlined above.

In defence of genealogy, the disadvantage, Donzelot argues, of the "meticulous restitution of the familial past" lies in "the excessive leeway it gives pre-existing theoretical machineries" to appropriate that kind of investigation for themselves or simply to ignore it. Clarifying the genealogical approach, Donzelot continues

"The method we have employed tries to avoid this danger by positing the family, not as a point of departure, as a manifest reality, but as a moving resultant, an uncertain form whose unintelligibility can only come from studying the system of relations it maintains with the socio-political level. This requires us to detect all the political mediations that exist between the two registers, to identify the lines of transformation that are situated in that space of intersections." (Donzelot, 1980: xxv)

Donzelot is concerned, in part, with addressing the problems of the liberal state via an analysis of the residue of pre-modern and early modern regulation of everyday life. In questioning the social welfare objectives which had previously been operated by moral policing, without over extending the domain of state law to the public domain, Donzelot identifies the problems confronting the liberal state and its pre-history so that they cannot be derived from the development of capitalism alone. Crucially, it is Donzelot's contention that society has become increasingly influenced by the idea of the family. It is the construction of this ideal in the processes

of power which is termed the 'familialisation' of society. Without denying economic imperatives, focus shifts to the ways in which the problems of the family are constructed in discourse [80]. By the mid-twentieth century,

"From being the plexus of a complex web of relations of dependence and allegiance, the family became the nexus of nerve-endings of machinery that was exterior to it."
(Donzelot, 1980: 91)

Noting the emergence of liberal demands on the state expressed through the legal discourse of rights, Donzelot constructs the problem faced by the liberal state as one of administering a national population and the provision of welfare. The conception of liberal government in Donzelot's thesis is thus one of a plurality of overlapping and contradictory notions of the public and private domains. It is not so much that the family was the cause of the problems faced by the liberal state. Rather, it is the modern family which became

"...a positive form of **solution** to the problems posed by a liberal definition of the state." (Donzelot, 1980: 53)

The status of the family as a 'private' area is thus a hybrid of various attempts to differentiate the private and public within liberal legal discourse. It is the family itself which appeared as a 'positive solution' to the problems of regulating morality and health. The problems of welfare arose from concerns which had themselves resulted from the liberal definition of what was, and was not, legitimate state action. Having defined an area outside the concern of the law as 'private', it is the family which, on Donzelot's analysis, becomes the object of projects of social intervention.

Rejecting the dichotomies of liberal legal discourse between political/governmental and social/economic, and the related public/private dichotomy, Donzelot's account of the construction of the family is concerned also with the

establishment of norms of sexual discipline and affectionate ties; that is, with the constitution of subjectivity and the social construction of masculinity and femininity. In this analysis the family is not understood as a unitary, private institution, but rather as a range of **discretionary private spaces** which are constructed differentially for the different members of the family. It is the **subjective commitment** to family life which Donzelot's thesis writes into the analysis which, I believe, renders it particularly relevant for a study of masculinity. It is not so much the substantive conclusions Donzelot draws as the theoretical development in relation to the family that the work represents which renders it worthy of further discussion.

What is crucial is that in the promotion of a range of biopolitical objectives, which may or may not be fulfilled, other regulatory strategies than simply formal law are at work as the constructed 'social' becomes suffused with regulation and power. It is not necessary for formal law to be extended to every area of life,

"For 'the social' is not society understood as a set of material and moral conditions that characterise a form of consolidation. It would appear to be rather the set of means which allow social life to escape material pressures and politico-moral uncertainties; the entire range of methods which make the members of a society relatively safe from the effects of economic fluctuations by providing a certain security - which give their existence possibilities of relations that are flexible enough, and internal stakes that are convincing enough, to avert the dislocation that divergences of interests and beliefs would entail." (Donzelot, 1980: xxvi)

Donzelot identifies such agents as doctors, social workers and public health visitors not simply as points of inspection and social evaluation, but also as originating the competences and forms of relationships for which different family members are

held to be responsible (for example, see the case of Gillick v West Norfolk and Wisbech Area Health Authority [1986] A.C. 112 [81]). Donzelot identifies the doctor/medical and the school/educational interdiscursive nexus as points of inspection and therefore possible intervention. Both of these provide normative criteria of competence in areas in which gender can be seen to be of a central significance (These are not, of course, the only locations).

The notion of the 'discretionary space' is central to the above conception of familial powers, indicating both freedom from supervision and also the fact the family privacy is provisional. This point is most important, for the condition of such privacy is evidence of individual family competence. Whether or not an individual is held to be competent might depend on factors such as sex and age (as in Gillick, op.cit., in which conceptions of competence were clearly held to be gendered). These new forms of discretionary space, as opposed to old forms based on rights, are identified as crucial to the change in the nature of intervention. The 'tacit agreement' underlying the provisional nature of intervention is captured by Dingwall, Eekelaar and Murray (1983), who argue that in the context of child protection agencies and state intervention that

"...at each and every stage, the structures of the organizations involved and the practical reasoning of their members have the effect of creating a preference for the least stigmatizing interpretation of available data...Compulsory measures are employed only in those cases where parental recalcitrance or mental incompetence leave no room for voluntary action." (1983: 207. My Emphasis)

The discretionary space of the social worker would, it might appear, to be considerable, even though her/his powers are formally legally circumscribed. However, elsewhere, the authors

take issue with Donzelot's thesis, arguing that it fails to recognise the

"...inherent weakness of such intervention, depending, as it does, on a tacit bargain between surveyors and surveyed...this is a bargain about framing assumptions within which moral character is assessed, that, in exchange for their consent to inspection, the surveyed require the surveyors to place the most favourable gloss on the evidence made available. As the surveyors lose confidence in their own legitimacy, the surveyed gain power to rewrite the bargain on different terms."
(Dingwall, Eekelaar and Murray, 1984: 229)

However, I am not sure whether there is such a discrepancy between these two views. Dingwall et al's argument captures the power/resistance dynamic, though it is not theorised in these terms (they "derive two roles for the state..A necessary part of this is the existence of compulsory powers which agencies may invoke with the sanction of the courts...as a residual resource in bargaining with parents" (1984, 229-30)). The authors do make a telling comment about the nature of liberal legal intervention in relation to the 'no win' position of social workers and the problem of the liberal state:

"It should be clear why agencies will always fail to recognize more than a selected proportion of child mistreatment. They cannot be given the legal power to underwrite an investigative form of surveillance without destroying the liberal family. At the same time the state cannot opt out...The only body with the legitimacy to survey the whole population is that which, in liberal principle, is accountable to the whole population - the state. Whatever machinery is devised, however, it will always remain vulnerable to criticism from Utopian libertarians whose ideals break on the brute reality of children's dependence on adults." (Dingwall, Eekelaar and Murray, 1983: 220) [82]

It is important to recognise the historical dimension to Donzelot's analysis. Tracing the reshaping of families since the industrial revolution through the development of the welfare state and non-state agencies and policies, Donzelot focusses on the family as a product of modern history. It is argued that the old, authoritarian and patriarchal family has been replaced by 'policed' families in a process which Donzelot refers to as a shift from family patriarchalism to the patriarchy of the state. Historically the family is presented as a constructed entity, a product of family reforms, administrative measures and moral invocation.

This reconstitution of familial powers is itself, as feminists have argued, a gendered process. O'Donovan (1985) foregrounds the gendered aspects of this historical shift in which legal regulation of the family undergoes a profound transition, arguing that many of the functions which had previously resided in the father as the head of the household, are usurped by the state [83]. As weakened family ties are substituted by stronger ties between the individual and the state, O'Donovan concludes by arguing that while public regulation provided a legal form for conjugal relations, the actual content of those relations continued to be ordered by patriarchy. This analysis has been criticised by Brown (1986: 436), who argues that what O'Donovan then proceeds to do in developing her thesis is to turn Donzelot's analysis "completely upside down." For my present purposes, it is interesting to note that central to both O'Donovan's and Donzelot's historical account is the role of the father and, implicitly, the power of masculinity. This point requires some clarification, for it brings out aspects of both the strengths, and weaknesses, of Donzelot's thesis .

It is O'donovan's argument that the modern family is patriarchal, noting that the Elizabethan Poor Law instituted a public responsibility for support for the poor while establishing the liability of the immediate family for the maintenance of relatives (O'Donovan, 1985: 14). It became "the

responsibility of the husband and the father to support his family" (1985: 13) and subsequently policies

"...in areas which impinge on the family and which are expressed in legislative, judicial and administrative provisions construct a particular family form. The nuclear family in which there is a division of labour between wife and husband is an expression of these policies." (O'Donovan, 1985: 14)

A sexual division of labour premised on the gendered public/private dichotomy, the male/husband breadwinner (Chapter 1, p 20 - 3) and female homemaker is central to the transition O'Donovan describes. While recognising that within the bureaucratic state the nuclear family of husband, wife and children are treated as a unit,

"The head and public representative of this unit is the husband, whose wife and children are legally constituted his dependants, not only economically but also because they are subject to his orders. Rather than intervene directly to regulate family relations publicly, the state delegates its powers and authority to the husband. His role is to control what goes on within the family in private." (O'Donovan, 1985: 57)

Thus, it is the husband to whom the state delegates power and authority. It is "his role" to control the family. The state is here conceived as the enunciator of regulation in the form of law. Implicitly, the transformations which have occurred in the family have originated in the state and it is O'Donovan's argument that the transition from feudal to market society marked also a transition from a private arrangement of such matters as marriage and divorce to the public constitution of a legal form.

"Public regulation controlled the formation and dissolution of conjugal relations but the content of that

relationship continued to be ordered by patriarchy. State intervention to impose work discipline, to place financial responsibility for his family on the husband and father, to discourage the birth of unsupported children resulted in a new form of family. Patriarchal powers may have been reduced but the husband continued to head the family." (O'Donovan, 1985: 57)

It is not so much the substantive analysis which is problematic in this passage (it is not difficult to find examples of the law placing such financial responsibilities on men [84]) as the underlying theory. Brown (1986) questions O'Donovan's use of 'patriarchy', arguing that patriarchy as a term of political discourse has a specific meaning. Within O'Donovan's analysis, just as the sovereign governs citizens, the father is constructed as 'governing' the household, thus linking the sovereign and household within a continuous political domain premised on the juridical conception of power I have questioned above. However, in Donzelot's analysis it is this patriarchy, this form of juridical power and authority, which has been overthrown in favour of the "responsibilisation" of the family and, specifically, of the mother and her accompanying discretionary openness to agencies of public intervention (Donzelot, 1980: 40).

Ultimately, it is the continuing centrality of law to the analysis of the family which Brown questions. It is perhaps ironic that O'Donovan's analysis, concerned to challenge the power of men and masculinity, also renders the power that men have a matter of what is, or is not, allotted to them by law. O'Donovan is arguing that power originates from the state, cyphered through the authoritarian patriarchal father/husband figure. Yet it is this juridical conception of power which itself serves to

"...obscure the new types of powers and relations between individuals, experts, professionals and authorities which have taken shape over the last century, and they ways in

which the subjectivities, responsibilities and aspirations of both women and men have been transformed." (Rose, 1987: 69)

It is, therefore, difficult to fit these new powers and relations into the thesis that law has 'placed' a responsibility on the husband. It is from the confusions around the centrality of law and the implicit notion of power that in the end the public/private discourse appears inescapable and incapable of being transcended. O'Donovan refers to the private as an 'unregulated' sphere, yet the historical transition presented might plausibly be interpreted as involving more, not less, regulation.

"The elaboration in legal discourse of a private domain of subjectivity, morality and the personal as 'not the law's business' has inevitably led to non-intervention in domestic life." (O'Donovan, 1985: 11: My Emphasis))

Of course, it is only non-intervention if one remains within the liberal terms of the public/private division. Brown (1986) argues that O'Donovan's analysis is ultimately structured around a fundamental contradiction, whereby "'The private' is presented both as a new space of social regulation and as eternity of patriarchy and non-regulation." On the one hand the construction of the public/private division in liberal legal philosophy is explicitly rejected as false:

"The idea that private and public can be distinguished is imbued in legal philosophy and informs legal policy...It...draws a line dividing the law's business from what is called private...The dichotomy between private and public as unregulated and regulated has its origins in liberal philosophy." (O'Donovan, 1985: 8)

Yet, Brown argues, it appears in the end that this argument accepts the liberal philosophy which it seeks to deconstruct, accepting, as it were, that liberal legal discourse is the only

available claim to truth about it's own form of legal and social intervention. Thus, the treatment of the family is itself trapped within the positivist epistemology which is ostensibly the object of it's critique.

On the question of the law granting responsibility to the husband, Rose has commented that

"To claim that the content of family relations is either unregulated or delegated to husbands is to fundamentally mistake the nature of the modern family and its political role, it is to fall victim to the public/private dichotomy, not to transcend it." (Rose, 1987: 71)

To remain within the liberal legal conception of state and law leads to a position whereby power is seen to flow from the state to the family. In contrast, Donzelot argues that just as families are influenced by economic and social forces, society is also affected by families. It is this, in part, which explains why the definition of the family is itself flexible (Chapter 1, p 4 - 11). For Donzelot, the family is to be understood

"...not as a point of departure, as a manifest reality, but as a moving resultant, an uncertain form whose intelligability can only come from studying the system of relations it maintains with the sociopolitical level." (Donzelot, 1980: xxv)

The above discussion illustrates both the pitfalls of failing to engage with the public/private dichotomy while also illustrating the strengths of a contextual analysis of law which foregrounds relations of gender and power in relation to the family. The picture which emerges in Donzelot's analysis is one in which the 'family domain' is not so much the site of a universally stable core of family members, such as mother and child, father and son and premised on such legally ascribed 'roles' as breadwinner and homemaker, but rather the

family as a working hypothesis. Donzelot is not arguing that the objects of state interventions have a single purpose or origin, though it has been argued that the usual occasions for such intervention relate to the care and control of children [85]. However, Donzelot does argue that there has occurred with the emergence of the 'patriarchy of the state' a rebalancing of men's and women's interests through the emergence of rights claims. While O'Donovan is clear about relations of power between men and women, it is at this point that Donzelot's analysis appears problematic in several respects.

The identification of this family domain is a significant step forward and the familialisation approach transcends the historical/sociological debates around 'extended' or 'nuclear' families introduced in Chapter 1 (p 14). However, it also faces it's own problems and unanswered questions, and it is when considering the notion of a rebalancing of the interests of women and men as resulting from a liberalisation of the family that Donzelot's argument is most contentious. First, it might be argued that the familialisation approach leads to an unclear politics. Donzelot's analysis is, above all, analytical rather than prescriptive. As with criticisms levelled at Foucauldian conceptions of power (eg, Fine, 1984), if power is 'everywhere', how does one account for the very real power differentials in society? Secondly, it has been argued that both Donzelot [86] and Foucault [87] fail to differentiate between the different effects of legislation and policies on men and women; that is, that this approach is itself as gender blind as the dichotomies it seeks to transcend and, far from the changes in the family resulting in an equality between men and women, the law continues, as O'Donovan surely correctly argues, to support patriarchal relations. Thus, while advocates of familialisation endeavour to deconstruct the idea of the family in important ways, the arguments remain premised on an assumed monolithic type family which varies only by social class and in which relation of gender, and ethnic background, are evaded.

The sexual politics of Donzelot's work, and in particular Hirst's interpretation of the study, have proved to be the cause of controversy and heated debate [88] (Bennett et al, 1981), a debate which has itself been taken as illustrative of the difficult relationship between men and feminism. Hirst, in 'The Genesis of the Social', writes (1981:80) that

"If feminists wish to improve women's lot in contemporary capitalism, rather than wait for some completely socialist system...then they must adjust their politics to the place of the family in capitalism that Donzelot outlines. By committing itself to a narrowly anti-familialist ideology modern feminism could all too easily alienate itself from the majority of women." (My emphasis)

That feminists must 'adjust their politics' is taken issue with by Barrett and McIntosh (1982), who argue that

"...defence of an idealized family invariably carries anti-feminist implications...Underlying the 'Policing of Families' is a very familiar theme. The authoritarian patriarchal family is mourned, and women are blamed for the passing of this organic basis of the social order. The text is incipiently anti-feminist, and even at times explicitly conjures up for the reader's sympathy the 'poor family' and the 'henpecked husband'." (Barrett and McIntosh, 1982: 103-4)

A further criticism relates to historical fact. It is arguable that there is an inherent assumption in the work of Donzelot (in this respect similar to both Lash and Mount: see Chapter 1, p 16 - 7) that at one time in the past there did in fact exist a 'real' family type which has been lost in modern industrialised society. It is questionable whether the 'familialisation' of society argument does in fact stand up against historical evidence and a set of functionalist assumptions underlies Donzelot's argument [89]. Barrett and McIntosh contend that

"Donzelot's is a functionalist text; but what is radical about his approach, and the reason why his work has been taken up from an anti-functionalist position, is that he rejects the integrated logic of a functionalist perspective. Specifically, he rejects the Marxist concepts of a capitalist state and of a bourgeois class as agents seeking to secure interests." (Barrett and McIntosh, 1982: 102)

'Familialist' approaches to the study of law are not without difficulties therefore, and I do not wish to proclaim a genealogical approach to the study of law and gender as the only viable methodology. The debates generated by Donzelot's study are far reaching, and go beyond my immediate concerns in this Chapter (See in particular 'Come Whoam to thi Childer an' me', a review of Mount's 'The Subversive Family' and Barrett and McIntosh's 'The Anti-Social Family' (Murphy, 1983: 363).

Conclusions

The concept of the state, far from embodying the essence of patriarchal power, is constructed in liberal legal discourse to be at the centre of power relations and political processes within which the 'gender regime' is at any given moment constructed and contested (Connell, 1987: 130). Conceptions of the family/state relation understood by way of allocation of power from the state to the husband are limited, failing to engage with the complexities of familial powers and failing to address the constitution of subjective commitments to family forms by both women and men which are central to an analysis of masculinity and law. The family is itself a site for the exercise of power. It is not that power relations operate on the family, so much as that power suffuses the family. The family cannot be separated from the environment in which it exists, which is within a network of relations of power. As such,

"...feminist critiques and proposals will be of limited value unless they can provide a positive analysis of the new types of power and authority which have come into existence over the last century and the ways in which they operate." (Rose, 1987: 74)

It is, however, at the same time most important to avoid the incipient anti-feminist position which Barrett and McIntosh (1982) identify in Donzelot's thesis, and to not lose the sensitivity to relations of power which O'Donovan (1985) shows. The programmes of social reform in the nineteenth and twentieth century have been understood in this Chapter not as constituting yet another area of state power, but rather as part of a process of familialisation. In this process subjectivity is itself ordered and socialised in ways to accord with the moral principles of liberal society. The family, therefore, is understood by way of a cypher for the realisation of various public objectives, though this clearly occurs in various contradictory and conflicting ways. These tensions are also evident in law. It is through thinking in terms of the family that these social projects, seeking to change conjugal, domestic and child rearing behaviour have been constituted. The construction of hegemonic masculinity in Chapters 4 and 5 is part of this process of familialisation. In terms of the structures of power, cathexis and labour developed by Connell (1987) [90],

"The gender regime of a particular family represents a continuing synthesis of relations governed by these three structures." (Connell, 1987: 125: My emphasis)

It is via an analysis of what have been termed the 'new technologies of power' that, I believe, the inter-relations between family, law and gender might best be approached. It is certainly the case, as Donzelot and others have argued, that the 'traditional' patriarchal family entails considerable power to men. However, the resulting division of labour also places limits on the ability of men to exercise power freely.

Certain skills and knowledges, for example in relation to childcare, may be monopolised by women. This is not to say that the juridical form of power does not continue to speak of sexuality, of masculinity, and is not of relevance. It is not to argue that 'patriarchal relations' has no analytic purchase or that reforms in relation to family have resulted in the realisation of a liberal conception of equality between men and women. Rather, as Rose has argued, it is necessary to

"...relocate legal regulation within the complex network of powers which link up domestic, sexual and parental relations with social, economic and political objectives. Laws and statutory duties, statuses and obligations are very important here, but are neither primary nor constitutive." (Rose, 1987: 74)

It has been the achievement of feminism to show that the gendered nature of the state and of law are central to the politics of masculinity. Historically, male sexuality has been and continues to be an issue around which the social forces outlined in this Chapter are mobilized. For example it has been around the social effects of male sexuality that heterogeneous groups have, in the past, promoted the kind of reforms to which I have referred as addressing the family. From campaigns around prostitution in the nineteenth and twentieth centuries [91], to arguments in favour of marriage [92] and surrounding child abuse [93], conceptions (usually naturalistic) of masculinity and male sexuality have figured in the constitution of reform strategies. This is not simply to infer that the regulatory agencies are concerned with the distribution of benefits, but rather that the discourses have a constructive role in the forming and reforming of social relations themselves. This is perhaps most clearly the case, I shall argue in Chapter 5, in relation to the construction of homosexuality [94].

Legal discourse has a constitutive role in constructing the very categories of husbands, wives, mothers, fathers, in constructing the commitments of both women and men to the

institution of marriage and, through representations of domesticity, child care, motherhood and fatherhood, presenting legitimate sites of female and male satisfaction. It is by way of the activation of subjective commitment, and not so much domination and subordination, that relates the familial to social, economic and political objectives of capitalist relations. It has been the construction of these subjective values which has constituted the aim of the process of familialisation. The governmentalization of familial conduct has constituted a process of formation of new social subjects, each committed to a subjective fulfilment in which marriage and the family is central. I have endeavoured to stress the effects rather than the intentions behind law, locating the diversity rather than the homogeneity of regulatory practices.

It is my intention in the remainder of this thesis to write a critical analysis of masculinity onto the legal agenda in the light of these theoretical developments. In the opening out of the complex of social powers to analysis, it becomes possible to ask a quite specific question of the law: what does it mean mean to be a man in legal discourse? What assumptions underlie both the power, the resistance, the strength and the vulnerability of men in familial relations? In the following Chapter I shall proceed to examine those works which have attempted to foreground masculinity and address the social construction of male gender, and to build on the preceding analysis of family, law and the state to question the cultural nexus within which forms of regulation attain validity. As I have stated, analysis of law may well be the wrong place to start to begin to deconstruct masculinity.

CHAPTER 4

THE SOCIOLOGY OF MASCULINITY

Introduction

It is necessary at this point to shift the focus from theorising law and the family to the theorising of masculinity itself. It is my intention in this Chapter to clarify and analyse just what is meant by 'masculinity' and to draw out the implications of an emerging sociology of masculinity for the study of law, gender and the family. Throughout the 1970's and 80's the 'subject of masculinity' has generated a literature of considerable quantity throughout the social sciences and across academic disciplines [1]. Much of this research has attempted to avoid the pitfalls of biological essentialism and sets out to analyse the involvement of men in social relations from a viewpoint which has been, if not sympathetic to, then at least informed by feminism and the 'second wave' of women's liberation [2]. Within the field of legal studies however, this research has had little impact. Why this might be the case I have discussed in Chapter 1 with regard to positivist conceptions of law.

Implicit in this literature, which I am here referring to as a sociology of masculinity [3], is an assumption that men, as individual, social and economic categories and as a historically constituted sex-group, have become increasingly problematic. Carrigan, Connell and Lee (1985) in their article 'Towards a New Sociology of Masculinity' present an overview of these attempts to analyse such historical changes and seek to assess the limitations as well as the explanatory potential of critiques and analyses of masculinity. In this Chapter I wish to provide an overview of this literature, which has emerged in a steady stream since the early 1970's specifically from the United States and other advanced capitalist countries [4]. Though Carrigan et al (1985) are concerned specifically

with the field of sociological study, I believe the sociology of masculinity has significant implications for the analysis of law and legal discourse presented in Chapters 1 - 3, in which law has been understood as a constituent element within the play of social forces which constitutes the gender order and within which masculinity has itself been constructed as instrumental in the reproduction of patriarchal relations. Though rather schematic, and allowing for a considerable overlap of themes and issues, the following analysis constitutes an attempt to engage with this literature on masculinity with a view to assessing its implications for legal studies.

The foregrounding of men and masculinity: men's studies
modified?

The empirical content of the bulk of this literature on masculinity is slight [5] and theoretically the study of masculinity stands in an uneasy relation to feminism. For some proponents of the study of masculinity it is clear that the work rests upon the essential feminist insight that the relationship between men and women is one involving domination and oppression. Analysis of masculinity, therefore, must be methodologically and epistemologically, related to currents within feminism [6]. If there is a 'cause' of the contemporary questioning of masculinity then it may be understood to be the impact of the women's liberation movement and feminism, within the social sciences and academic discourse and within society generally. The nature of men's response to feminism however tells us much both about the historical specificity of the accounts of masculinity in question and also of the types of men for whom masculinity has become, under the influence of feminism or not, a political issue.

Taking their cue from the Women's Movement and the responses of individual women to the socially destructive consequences of

(specifically, though not exclusively, heterosexual) masculinity, these men 'writing about masculinity and themselves' have drawn out the contours of intellectual and political project. For Connell (1987: xiii), it is this 'politics of masculinity' which should be the business of the heterosexual men who bear the brunt of the feminist critiques of masculinity. Connell states that,

"Heterosexual men are not excluded from the basic human capacity to share experiences, feelings and hopes." (1987: xiii)

This is the starting point of much of this writing: that men have a potential to be different, but that at present that potential is, in Connell's word, blunted. Implicit is the dynamic of change and a critique of contemporary masculinity. These contemporary writings on masculinity may be placed in a context not just with regard to feminism, but also with reference to earlier attempts to theorise masculinity within sociology. It would be inaccurate to present the literature of the 1970's and 80's as constituting the first attempts to present a sociological analysis of masculinity. However 'intellectually disorganized, erratic and incoherent' such research may have been, there existed an extensive discussion of masculinity before the main impact of the 'second wave' of feminism; that is, a 'prehistory' of research, indeed a distinct sociology, on men and masculinity before Women's Liberation and the profound questioning of masculinity by feminism. (See further Carrigan et al, 1985: 553-578).

The methodology of this 'old' sociology of masculinity is, however, problematic in a number of respects, and has rightly been criticised by feminists who have questioned the masculinism of traditional sociological research methodologies [7]. The form the research tended to take would usually be where a particular group of men, or boys, would be singled out for analysis because, for some reason, their behaviour was deemed by the academic researcher to constitute a social

problem. This literature can be seen therefore as very much part of the criminological mainstream [8]. There exists a substantial, in quantitative terms, literature addressing the problems of 'juvenile delinquency' [9], street-corner gangs [10] and the causes of educational underachievement and emergence of youth subcultures amongst groups of males [11]. That these constituted texts on masculinity however was usually unstated.

It is not just that masculinity was being studied, it was also being studied in a particular way and with certain underlying assumptions as to its nature. For example, the notion of conflict within masculinity is by no means new. In the 1950's and 1960's sociologists and psychologists had already noted the socially detrimental effects of a sexual division of labour, where the demands of employment were perceived to lead to the widespread problem of 'father absence' and its consequential destructive effects on the gender of the growing male child, for whom the father is never there to serve as 'appropriate' male role model [12]. Hartley (1959) argues that these anxieties produce in the male child an overemphasis on masculine behaviour, while Hacker (1957) is more concerned to stress tensions between the demands of strong masculine authority and increased opportunities (and demands) for emotional articulacy in relationships with women. In Komarovsky's 'Blue Collar Marriage' (1964) masculinity is presented as riddled with tensions around interpersonal communication (specifically with women), and the author characterises a general male powerlessness which produces anger and, in the context of scarce economic resources, a reassertion of traditional patriarchal authority in the home. This is echoed in the analysis of Willis (1977) of an educational system whereby 'working class kids get working class jobs' in so much as forms of sexism and assertions of masculine power are seen to become ways of coping with the exigencies of the moment.

Themes around male authority therefore were being developed in this earlier sociology and they recur in the contemporary literature on masculinity. However this earlier research systematically failed to account for the fact that the object of research is a historically and culturally specific form of masculinity and not groups of 'youths' or 'adolescents' in general [13]. In speaking of 'men', the research remained blind to the social production of men as men, to the communality and differentiation within male experiences. What theoretical coherence there was to this 'old' sociology of masculinity the concept of 'role' provided [14], and by avoiding wider questions of social structure wherein gender is constructed, particular manifestations of masculinity become both pathologized and individualized. When all sense of structure is lost, the problem of masculinity fades away before it is even recognised. It is the 'gender blindness' of so much sociological research which proponents of a theoretically coherent social analysis of masculinity have highlighted and attempted to remedy. In failing to address the central question of power relations between men and women, such literature seemed oblivious to what the chroniclers of this early sociology of masculinity term

"One of the central facts about masculinity is that men in general are advantaged through the subordination of women." (Carrigan et al, 1985: 590)

Carrigan et al conclude that what is striking about much contemporary research on masculinity is that it has not really improved on these earlier studies - "Indeed much of it has been a good deal more primitive." (Carrigan et al, 1985: 561) Nonetheless, more recent research has attempted to address these problems, and in particular the relationship between men and feminism, and here the notion of foregrounding masculinity has, I believe, considerable purchase in establishing a position from which to analyse relations between legal discourse and masculinity. One of the earlier attempts to address the masculinism of methodology in sociological

research was Morgan's (1983) 'Men, Masculinity and the Process of Sociological Enquiry', in which the author subjected his own previous sociological study to an analysis which endeavoured to highlight it's masculinist assumptions [15]. As Morgan (1983: 95) observes,

"...taking gender into account is 'taking men into account' and not treating them by ignoring questions of gender as the normal subject of research."

Thus, in contrast to the earlier sociology of masculinity, contemporary research attempts to explore the 'maleness' of men and to bring the 'he' hidden from (male) stream sociological enquiry into the light of day [16]. Put simply, the research on masculinity addresses and draws upon the fundamental feminist insight that masculinity was, in the sense of forming an object of research, before us all along. When we presumed we were looking at mankind, we were looking at historically and culturally specific masculinities [17]. The 'rendering visible' of masculinity constitutes an organizing perspective of these 'men's studies', subverting de Beauvoir's 'absolute vertical' discussed in Chapter 1 (p 4).

The form that such a foregrounding should take is, however, a different matter, and it is here that questions of strategy and politics are crucial and differences of approach emerge. For writers such as Brod (1987a), while the practical political implications of male engagement with feminism remain problematic, it is seen as necessary and desirable to develop the study of men and masculinity as a subject in its own right. This, it is argued, might best be achieved under the rubric of 'men's studies'. What marks such studies out from the earlier sociology of masculinity literature, Brod argues, is the recognition, and epistemological presupposition, that relations between men and women are relations of power and that these relations are both individual and structural. The recognition of power is undoubtedly a major step forward in theorising masculinity. Though the focus is men, this approach arises, at

least in theory, out of explicit support for feminism. Similarly, for Hearn (1987: 21), men concerned to oppose sexism and who want to study gender should focus primarily on the critique of men and masculinity, not the study of women, and men studying men and masculinity should do so with an explicit anti-sexist commitment. Hearn argues that through an 'anti-patriarchal praxis' men should not try to 'solve' women's problems for them but recognise men's responsibility to each other to change relationships, with both women and other men [18]. Yet it would be a mistake to assume that such men's studies are necessarily pro-feminist. On closer examination, the concept of 'men's studies' becomes fraught with possible dangers and is both methodologically and theoretically questionable.

For Brod (1987a) men's studies is concerned not just with the writing out of history of the conceptualization of women. It has also left out men. The 'task' therefore is to address the specifics of masculinities, to depower men by exposing the false universality of 'masculinity'. For example, in the study of male violence, a men's studies approach might focus on male socialisation towards violence [19]. The 'task' of such men's studies is to bring men back into history. This insight is not to be underestimated. It is, however, not more or less than what feminists have been asserting for decades - that men should look at, take responsibility and be held accountable for their own masculinity and sexuality.

'Change' is envisaged by proponents of men's studies not simply at the abstracted level of developing non-patriarchal forms of masculinity, but also within the processes of doing the research on masculinity itself [20]. In 'doing the research', men's studies advocates have developed concepts which are taken to be particularly relevant to the male experiences [21]. The research also encompasses policy implications in terms of institutional resources. For Brod (1987a), for example, violent men are 'victims' in the sense that they are the impersonal locus of forces that move them. In relation to

rape and violence against women, Brod therefore advocates treatment programmes, forms of 'masculinity therapy' which might, to put it crudely, tackle the socially destructive effects of masculinity at root [22]. For Brod, men's studies actually is a feminist project, feminist scholarship applied to the case of men. Resources should, therefore, be diverted to such masculinity therapy as, Brod argues, prevention is better than cure. However, in the context of limited funding, the institutional resource implications of this are far reaching. What might this mean for feminist/women's organisations?

To argue, as Brod does, that feminism is in men's interests involves no less than developing a new concept of interests. These interests should be, it is argued, developed in relation to, and not antithesis, to other men. It is this relationship to other men and to 'mainstream' patriarchal scholarship which has proved to be a fundamental problem for advocates of men's studies. Whereas analyses of women by feminists are in opposition to mainstream theory, this is simply not possible for men who themselves constitute the mainstream. To elaborate, women in law schools 'taking feminism seriously' in legal journals or in their research and teaching, do so in opposition to the dominant modes of the institution. Women's studies exists as a separate category with its own practices and policies; it would not be appropriate therefore to simply affix 'men' to women's studies, when there is a strong case to be made that the dominant scholarship is already a form of 'men's studies' inasmuch as it can be said to reproduce masculinist assumptions [23]. Just how different would the men's studies envisaged by Brod et al be? [24]

In so far as legal scholarship theoretically informed by feminism is going to be marginal to the dominant epistemological ethos of the institution, it is undoubtedly correct that the study of masculinity exists in contradiction to the dominant theorising (that of doctrinal exegesis, discussed in Chapter 2). Research on men and masculinity in law is developing 'in connection' with the mass of men, in that

the objects of study, men in family law, constitutes the interpersonal norm for the majority of heterosexual men. Yet it is also, I have argued above, oppositional to the dominant research in the legal academy. Such work cannot ignore the masculinism of legal method (Chapter 2, p 38 -43), yet it is clearly in both relation and contradiction to such dominant theorising.

To summarize these arguments, the institutional relationship with feminism is far from clear and it is not surprising that the thorniest issue around the institutional establishment of the study of masculinity has proved to be the politics of men's studies as an academic discipline in its own right (as distinct, that is, from feminism and women's studies). Brod's 'prevention rather than cure' approach has a certain purchase. Yet it is also double edged. While some men might proclaim themselves to be feminists, and focus (in academic research, or other political activity) on women and 'women's issues', others have argued that such a practice is at best misguided (Hearn, 1987). This, I believe, is correct. If feminism as theory and practice is by and for women, the participation of men speaking for feminism - crucially - **on behalf of women** would reduce women's autonomy. This is a consideration which any study of masculinity should remain sensitive to.

Defining Masculinity

To talk of 'foregrounding' masculinity assumes that the concept has a certain coherence, that there is something which is to be foregrounded [25]. Brod (1987a:61) states that the analysis of one's identity as a male is indispensable to understanding the modalities of oppression. It is, Brod argues, not to proclaim that masculinity is invariant to hold there is a sufficient unity to the object of study denoted by the concept of "masculinity" to justify its investigation under one rubric. Yet the meaning of 'masculinity' is by no means clear, and definitions and understandings of masculinity vary across

different disciplines, paradigms and perspectives. The 'object of study' of masculinity is constituted differently, for example, in sociological, psychological, psychoanalytical and medical texts. Within each discipline, different theoretical traditions conceptualise masculinity in different ways. For the postmodern sociologist of culture and for the Freudian psychoanalyst, masculinity may mean very different things. What many studies of masculinity tend to share however is that, like law, masculinity is seldom theorized in social and historical terms. It is, like 'sexuality' itself, so often taken as given, as natural. 'Masculinity' is thus seen as the social expression of the immutable essence of the human male, and it is this essentialism which is to be found across, and which unites, perspectives within the above disciplines.

Understood as a sociological concept, 'masculinity' is concerned with a range of issues - with the social behaviour, attitudes and beliefs of men [26], with the construction of the male gender [27], and with cultural representations of being a man [28] in historically specific societies. Focussing on the dynamics of change in masculinity, sociologists have turned, perhaps most notably, to the concept of 'sex role' [29] and to the concept of 'androgyny' in conceptualising masculinity [30]. Of the range of concepts to be found within the sociology of masculinity however, the notion of a 'male role' has achieved a prominence and, in the work of Joseph Pleck, is presented as fundamental to an account of masculinity which has leant a certain intellectual weight to the project of men's liberation (to be discussed further below).

Pleck's work might be divided into a number of categories, which themselves are determined by the audience he is addressing, and Pleck has attempted to bring a coherence to the sex role concept and has been concerned to develop a theoretical approach to sex roles. His work deserves some consideration, both as an example of a sociological and psychological approach to masculinity and as an example of the limitations of the sex role concept. His work also brings

together a number of recurring themes within the sociology of masculinity. In 'The Myth of Masculinity' (1981), Pleck argues that masculinity may be understood as a role which undergoes significant change during the lifetime of an individual. Pleck is concerned to reject essentialism in the study of masculinity, and he locates psychological identity as central to his concept of masculinity. In the role perspective, social expectations are emphasised, and Pleck notes that masculine conformity may often be socially dysfunctional.

The presentation of sex role theory by Pleck is quite sophisticated, but continues to rest on the implicit assumptions of role theory, such as concepts of sanction, norms and conformity, which themselves relate to the juridical concept of power I have questioned in Chapters 2 and 3. Law, as enforcing such norms, is implicated in Pleck's general thesis if one accepts the fundamental concepts which rest on this notion of power. It is not simply this notion of power however which is problematic, so much as the notion of sex role per se. Masculinity says nothing if it means no more than 'male gender' and 'how men are', floating free of power relations and the constitution of subjectivities, and it is this which has proved one of the major problems with the 'sex role paradigm' in relation to masculinity (Brannon, 1976: Pleck, 1976: cf. Carrigan et al 1985: interestingly, also Pleck, 1987).

The problem lies, at root, with the concept of 'role' itself. At one level, for example as presented in Nichols (1975), it is sex role stereotyping which is located as the problem for men, a problem which might be cured by free-will, by thinking oneself out of ways of being which are damaging for women and to the male self. The answer is an **individual** solution to the problems of 'being a man'. For Goldberg (1976) women's oppression is itself denied in a characterisation of all liberation movements as equal, a denial of any hierarchy of oppression. This notion of liberation, linked to the individual/social dynamic within the concept of sex role, is questionable.

"The liberation of women must mean a **loss of power for most men**; and given the structuring of personality by power, also a great deal of personal pain. The sex role literature fairly systematically evades the fact of men's **resistance** to change in the distribution of power, in the sexual division of labour and in masculinity itself. Role framework is not conceptually stable or practically or empirically adequate." (Carrigan et al, 1985: 580-1: My emphasis.)

A central problem is the notion of a 'true' inner self implicit in sex role theory, be it a masculine or feminine self, the assumption that there does indeed exist a 'inner self', in the classic humanist sense, which might be separated from other behaviour which may be taken as the expression of 'masculinity' [31]. Though it is perhaps to oversimplify, if change is something which happens to the 'sex role' (from society, from the 'real' self) irrespective of human agency, then praxis becomes no more than a response to external social forces. Where does change come from? Sex role theory remains oblivious to the dialectics inherent in gender relations, to the constitution of subjectivities and the activation of interests and desires and is, accordingly, incompatible with the approach to law and the family outlined in Chapters 2 and 3.

Furthermore, the theoretical **object** of role theory is is by no means clear. Accommodating psychological argument, accounts of interpersonal transactions and explanations of macro-sociological determinations, the men's sex role literature is, as Carrigan et al (1985) argue, incoherent. The point may be put more strongly. The abstracted male 'role' does not exist at all, in that there is no one 'role' which might be identified as capturing all the complexities and contradictions of male experiences. 'Sex Role' might have proved to be personally useful for some men, perhaps in progressing academic careers [32]. As a theoretical contribution to understanding the construction of masculinity, however, it is severely limited [33].

In contrast to the sociological concept of sex roles developed by writers such as Pleck, a biological definition or focus on masculinity is concerned with the male body, with the sexuality of men in terms of the body and with the biological determinations of male behaviour [34]. Biological reductionist and essentialist conceptions of masculinity pervade a voluminous literature and differing perspectives, from social Darwinism [35], social biologism [36] and eugenics [37] and inform a strand of feminist scholarship [38], often termed 'radical feminist' [39]. In contrast to both sociological and biological approaches, masculinity has also been identified as a psychological concept [40]. Here, questions are asked about the process in which masculinity accounts for or is itself accounted for by motivations and psycho-sexual frameworks for interpreting the world and understood as, in a sense, a continuation of the sexological tradition [41], it is perhaps the work of Freud [42] and the subsequent development of psychoanalysis [43] which has provided a most productive and interesting development in relation to the construction of masculinity and which affords a grip on the study of the relation between masculinity and law as social constructs. Psychoanalysis at least accommodates within its account of the construction of gender an approach which locates personality as both fractured and in conflict (and therefore within a network of power relations) with society.

While it is not my intention to provide a comprehensive discussion of Freud's work and of conceptions of masculinity within the psychoanalytical tradition, it is, I believe, worthwhile to at least draw out the implications of Freud's theory of psychoanalysis for the study of masculinity and law [44]. The following is, therefore, not a summary of Freud's ideas nor a history of the development of the psychoanalytic discipline, nor even an overview of a body of scholarship a brief analysis of which would be outside the area of this work: it is an attempt to introduce and discuss some of the issues psychoanalysis raises for the study of masculinity and law.

Freud's work is particularly valuable in fundamentally questioning the idea of male and female, of man and woman, as constituting two fixed and immutable categories. In a sense, Freud placed the relationship between the social and the psyche on the agenda [45]. Freud's analysis of the repression of sexuality in European culture (1908: 1930) entails a critique of marriage based on the suppression of female sexual pleasure in which neuroses are depicted as resulting from the denial of sexual satisfaction, and the concept of **repression** is fundamental to the psychoanalytic enterprise [46]. Even remaining within the juridical model outlined above, repression implicates the law in the network of power relations within which adult personalities are structured. The super-ego is understood thus as a social mechanism [47]. Indeed, Connell (1987: 198) argues that Freud replaced the hitherto social scientific history of nature/culture with one of a **historical** process, operating simultaneously at the macro-social and individual levels.

If correct, then psychoanalysis at least provides a way of linking the subjectivities of masculinity to legal regulation. Following Freud's basic premise, it is thus possible to sociologize psychoanalytic concepts, as for example in the work of Marcuse [48]. The Oedipus Complex [49] is no longer universal, but understood as a product of a historically specific family form. In the feminist appropriation of psychoanalysis, particularly the interpretations of Lacan developed by Mitchell and others [50], the symbolic entry into the gender order is theorised as itself a patriarchal process, a process fundamental to the power of men and of masculinity [51] in which masculinity and femininity are constituted in patriarchal, phallogentric ways. 'Repression' is no longer an abstracted consequence of human relations but something which must be located in particular historic, social and economic contexts, a perspective which integrates both legal regulation and familial relations.

Psychoanalysis, at least on one variant therefore [52], writes history into the construction of gender. In terms of the theoretical concepts of psychoanalysis, in particular the notion of 'bisexuality' [53] in human desire and the insistence on the centrality of conflict within emotional life, this involves at least questioning any idea of sexuality and gender as fixed and essential characteristics of human sociality.

This is not to say that basic psychoanalytic concepts (eg, repression and penis-envy) are not problematic in several respects. For example, in applying the concept of 'repression' to the libidinal force of erotic impulses, Freud builds his entire theory of personality on a dynamic within libidinal development (cf. Foucault's rejection of 'the repressive hypothesis' [54]). Repression in psychoanalysis may be understood as having both politically conservative and radical implications. The latter is clear in the analysis of the repression requirements of western capitalism explicit in the work of Marcuse [55] and Reiche [56]. The 'repression' of homosexual desire is theorised by Altman and Meili [57] as central to homophobia and the oppression of homosexuals. As Connell (1987) recognises, it is possible to utilise the concept of repression yet also transcend the individualizing of notions of 'psychic' liberation and recognise that 'liberation' (a concept which appears symbiotic to 'repression') might indeed have progressive resonances. For a politics of masculinity, this might involve a reworking of erotic attachments within a politics of gender, while recognising just how deep seated patterns of erotic attachment can be [58]. At the same time however, repression underscores hydraulic models of male sexuality and is premised on a juridical, zero-sum, calibration of power and resistance. Repression is compatible with regressive ideologies of essential male sexual needs (McIntosh, 1978).

In the development of the concept of the unconscious [59], what is perhaps most enlightening from a Freudian psychoanalytic

perspective, whether or not one accepts the purchase of concepts such as the Oedipus Complex, is the fundamental significance of cross-sex relationships in the formation of masculinity [60]. In the establishing of psychoanalysis Freud also provided a **methodology** which might be of use in developing information about emotional and sexual life. An account of masculinity and law which did not address psychoanalysis would be fundamentally flawed. The object of psychoanalysis is human subjectivity, a focussing on individual life-history. On one level the methodology of psychoanalysis is certainly inimical to the law and legal method for the legal and psychoanalytic subject are, epistemologically, world's apart. The object of psychoanalysis is the life history which legal discourse denies a voice, except in a limited, legally approved manner. In psychoanalysis, subjectivity is the object of analysis, in contrast to focussing on abstracted meta-theoretical 'species'. To argue that psychoanalysis asks important questions about masculinity is not to accept the basic tenets of psychoanalysis, to say that it answers them correctly, nor is it to fail to recognise the tradition of psychoanalytic jurisprudence [61] and the questions raised therein about law and psychoanalysis.

It is ironic and paradoxical that the authoritarian and hierarchical disciplinary tradition of psychoanalysis contains within it a methodology which has the potential to subvert disciplinary medical discourses in its giving voice to the subject. As a field of knowledge in its own right, psychoanalysis valorises the fragmented nature of human subjectivity within a methodology which accepts gender as a social construct and which might accord political significance to the ideological implications of human relationships. In producing accounts of masculinity and femininity as psychological forms, psychoanalysis contains a notion that gender is a social process, in a state of flux and change. The social nexus involves the law, and for all Freud's biological determinism and the problems of method, concepts and politics within psychoanalysis [62], psychoanalysis as a method

implicates analysis of the social. Whether the phallocentrism of the psychoanalytic enterprise ultimately renders these gains dubious is open to, and perhaps another, question [63].

There now exists a considerable literature in which it is argued that sexuality and gender are social constructs (eg, Stoller, 1968: Oakey, 1972: Weekes, 1981: Weekes, 1985: Illich, 1985: Hirst and Woolley, 1982: Nicholson, 1984: Maccoby and Jacklin, 1974: Davidson and Gordon, 1979: Archer and Lloyd, 1982: Weekes, 1982). Masculinity and femininity are not **settled** by biology but are **historically** produced, and it is this social construction of masculinity which I will take up in more detail in Chapter 5. At this point, and in the context of defining masculinity, I wish to note that, as is clear from the above discussion of sex roles and psychoanalytic approaches to gender, masculinity is not theoretically coherent as a concept. There is no 'essence' to masculinity. However, it is possible to analyse historically specific **shifts in the forms** of masculinities, to search for the origins and social and economic backgrounds of social and legal changes in the construction of masculinities. This I intend to do in the following Chapters. To say that masculinity is a social construct is not to ignore the bodily dimension but to locate the body as a presence within **social practice**, not as a 'base' but as an object of practice in itself. It is this constitution of desire and sexuality in legal discourse, through social injunction and prohibition, pain and pleasure, incitement and negation, that I shall examine in detail in Chapters 5 - 8. As Foucault (1981: 36-7) argues, such an

"...historical approach to sexuality would stress rather the impact of various social practices that construct sexual regulations, give meaning to bodily activities, shape definitions and limit and control human behaviour."

It would do so in an attempt to understand

"...the actual mechanisms of power at work in any particular period...It operates through complex and overlapping - and often contradictory - mechanisms which produce domination and oppositions, subordination and resistances." (Foucault, 1981: 36 - 37)

It is necessary at this point to recognise and identify these modalities of power as a prerequisite to understanding of the possibilities of transformation, and central to this dynamic of change is the relation between sex and gender. For Kimmell (1987: 19) 'masculinity' is tied intimately to sexuality, the author arguing that as sexuality is organised around a gender axis, so gender is a key organising principle of sexuality: as gender informs sexuality, sexuality confirms gender [64]. Critical analyses of masculinity, I would argue, are more usefully located within a more general political economy of sexuality, a questioning of the place of sex and sexuality within our lives [65]. In this project it is necessary to 'unfreeze' the dichotomies of male and female, to see what sex is and what it means to us now and what it has meant in the past. This approach is consistent with the perspective introduced in Chapter 3 in relation to 'familialist' approaches to the family and succeeds in escaping the confines of debates around the men's studies project by addressing sexual politics in the general sense. Rather than search for the essential masculinity, it becomes clear that what we are in fact dealing with not one but many masculinities.

'Masculinities': Some themes of the 'New Men's Studies'

The sociology of masculinity has sought to analyse the processes of construction of the plurality of masculinities, the differentiation and the communality of male experiences. Masculinity can and does vary [66]. Attention is paid within the sociology of masculinity literature to those contingencies which inform and in a stronger form construct masculinity, and it is the constitution of these contingencies that I am here

terming 'themes' of these studies. In the recognition that masculinity is a social construct and thus liable to change, analysis of specific sites of the production of representations of masculinity covers both experiential and cultural manifestations of male experiences. It is, therefore, not surprising that consideration of representations of masculinity should be quite developed within a broader sociology of culture and that the 'new men's studies' should be sensitive to the fact that masculinity varies through men's lives, concentrating, for example, on the relation between age and gender and referring to boyhood, adolescence and the experiences of the elderly [67].

The language of **masculinities** has gained a certain popularity within these men's studies [68] in accepting that masculinity has different meanings in different contexts and that there is no **one** masculinity (though this is not to argue that there is not a hegemonic form). As Connell points out (1985: 265), if

"... 'all men' are seriously to be taken as a political category, about the only thing they have in common is their penises. The biological fact of maleness thus gets attached to the social fact of power, not by historical analysis, but by definition. Conversely, the biological fact of femaleness becomes the central way of defining the experience of women."

Brittan (1989) explicitly adopts the notion of the pluralities of masculinities in his wide-ranging analysis of 'Masculinity and Power', while Brod (1987a: 40), very much a proponent of 'men's studies', states

"The most general definition of Men's Studies is that it is the study of **masculinities and male experiences as specific and varying social-historical or cultural formations**. Such studies situate masculinities as objects of study on a par with femininities, instead of elevating them to universal norms." (My emphasis.)

Adopting the plurality of masculinities has far reaching implications, integrating such differences as race, ethnicity, physical ability and sexual orientation. As an essential correction to the ethnocentrism of so much research on masculinity, it becomes possible to identify and explore the race specific aspects of male experiences (See, for example, Mercer and Julien, 1988: Sinha, 1987: Gary, 1987: Cazenave and Leon, 1987: Franklin II, 1984, Hoch, 1982, Franklin II, 1987: The racial element in masculinity identified by Hoch (1979) is notably reproduced in the development of discourses around AIDS). Accounts of race and law which ignore the specifics of gender will remain, at best, partial.

Multifarious images of masculinity pervade media representations of aspects of men's lives. Concluding his analysis of the sexuality of adolescent boys, Wood comments:

"Our patterns of consumption are built around the notion that women can be bought...part of the problem for boys is that they are encouraged to measure their masculinity via a woman-hating rapacious sexuality. This pressure to be a sort of Tarzan-cum-Ripper is sedimented into the history of how to be male. Men cannot imagine a desire that is not like theirs, that does not seek to devour its object."
(Wood, 1982: 42)

'Patterns of consumption' locates the centrality of cultural factors, the cultural nexus, in the production of representations and normative codes of masculinity and male behaviours. It is not surprising therefore that more recent works within the sociology of masculinity have focussed increasingly (indicative perhaps of the contemporary intellectual climate) on the many manifestations of masculinity which pervade contemporary culture [69]. However, there is one contemporary image of masculinity which has, perhaps, proved to be the most talked-about of all - that of the 'new man' (White, 1985: Vittachi, 1985: Chapman, 1988) [70].

The popular press has not failed to report the pressures on, the demise and then rebirth of the Seventies 'new man'. The 'new man' is, however, socio-economically and race specific. Where there is a product, there will be a market for the

"..professional single men between 25 and 35...having something of an identity crisis. Their difficulties are being exploited - for consumer purposes at least - by the women's media: enter Cosmo Man..." (White, 1985: 8)

The tone of writing on new man is often affectionate though mocking.

"It could only have happened in Islington - home of bean eating, knit your own yoghurt, and the CRE (Consciousness Raising Exercise)...The woman with the shampoo and set and fishnet tights turned out to be a builder from Clapham called Greg." (Lockyer, 1987: 11)

Alongside the cynicism however, an important point is made. Men it seems are different and liable to change. **Rarely however is the fragmentation of contemporary masculinities theorised** for, to begin to do so would entail taking masculinity seriously. It is important to ask just **who** is being addressed by the talk of 'new man', of the male need for 'true feeling'. If the new man discourse is addressing groups of men, it seems those men, judging from the magazines and journals in which the issue is raised, the attendance at workshops and conferences and the products attached to the image in representations in advertising, are most likely to be tertiary educated and middle class: it is **these** men who are 'cut off from their feelings'.

The notion of 'new man', it's treatment in both popular journalistic and academic discourse, serves as an example of a historically, culturally and class specific account of masculinities. Though debates about the existence of the 'new man' might not appear to be a 'serious' object of academic

study, the idea that there has occurred a shift in masculinity, particularly with regard to men and fatherhood, is not confined to media debates around new man and has been located as feeding in to debates around legal reforms (Smart, 1989a: Smart and Sevenhuijsen, 1989). There is to the 'new man' question both more and less than might at first seem (Chapman (1988) and what the 'new man' debates reveal is that real existing tensions within masculinity are being resolved in systematically anti-feminist ways [71].

If new man is one cultural form of masculinity, there are many others on offer. This is particularly evident when analysing the succession of shifts in masculinist images in advertising [72], film and television [73]. There is a rich tradition of images of masculinity, through literature, sculpture, dance and painting which by no means always conform to any hegemonic form [74] and there now exists an identifiable genre within cultural and communication studies which addresses masculinity as problematic and socially constructed within differing media in different forms and to different effects.

Analysis of the production of cultural meanings, and in particular a questioning of why certain phenomena are sexualised and others are not, points to analysis of the ways in which systems of signification and power/knowledge relations are historically organised so as to produce sexual meanings [75]. The constitution of masculinity in the media is of great importance and, I believe, should not be underestimated in terms of the power of such representations to inform the wider cultural nexus within which meanings are produced, both individually and collectively. The assertion of difference between men and women in law is culturally reinforced through modes of representation which are themselves subject to legal regulation as, for example in the case of pornography [76]. Pornography constructs signifiers of sexual difference, celebrating a culturally exalted model of masculinity which, though it may correspond only to the actual characters of small numbers of men, serves as to the benefit

of all men in reproducing at the ideological level the subordination of women and the institutionalisation of the dominant form of masculinity. What is, and is not, pornographic is subject to legal definition and regulation. This inter-relation between law and culture is vital to the study of masculinity yet is notably underdeveloped.

A Contemporary Crisis of Masculinity?

The studies discussed thus far have been presented as, first and foremost, about the possibilities of change in masculinity.

"The causes and the explanations of the problematisation of men and masculinity are many, and not mutually exclusive. In this process, men and masculinity become more liable to critique, more open to critique, and perhaps more able to respond to critique by changing."
(Hearn 1987: 30)

What has prompted this critique in the first place has been termed, by some writers, a 'crisis of masculinity'. It has been argued, in particular, that there is a contemporary 'crisis' of masculinity [77] (Brittan, 1989: 25-36, Hearn, 1987: 16-31, Connell, 1987: 183-6). According to Carrigan et al.

"...there have been recent changes in the constitution of masculinity in advanced capitalist countries, of at least two kinds: a deepening of tensions around relationships with women, and the crisis of a form of heterosexual masculinity that is increasingly felt to be obsolete."
(Carrigan et al, 1985: 598)

One aspect of this 'crisis' is identified as being the occurrence of a breakdown of traditional masculine authority and in one variant refers to tensions within the masculinities of a group of the younger professional intelligentsia of western cities; a stronger version would cite a crisis of

masculine authority in society as a whole, derived from the impact of feminism. The causes of such a crisis vary, though common references are made to significant social and economic shifts in the 'world order' and , particularly, military changes [78] and the development of nuclear weapons [79]. The general point is well captured by Carrigan et al (1985):

"Forms of masculinity well-adapted to face to face conflict and the management of personal capital are not so well suited to the politics of organizations, to professionalism, to the management of strategic compromises and consensus." (Carrigan et al, 1985: 599)

On one level this relates to a shift to the bureaucratic-administrative state (Kamenka and Tay, 1981) and the growth of large bureaucratised corporations within a general transition to technocratic modes of decision making and control. An analysis of the organisational sexual politics of such institutions would locate such historical changes as having ramifications for male and female behaviour in institutional settings (Hearn and Parkin, 1987). The result is seen as a transformation in 'traditional' forms of male power in the face of a fracturing of the social and economic infrastructure within which such power was held [80].

Yet it would, I believe, be easy to overstate the crisis thesis. In many respects 'traditional' expressions of masculine authority have been untouched by feminism. Resistances to monetarist and technological restructuring of employment practices may themselves again assert male power, though perhaps in differing forms (eg, Cockburn, 1983). A shift in the structure of employment does not a priori produce significantly different forms of masculinity, though the reorganisation of capital and technological restructuring have undoubtedly transformed many men's lives. The 'crisis thesis' should therefore be used cautiously. As Banner (1989:707) notes, for all the arguments of these authors that masculinity

has periodically fallen into 'crisis' (and is thus 'vulnerable and mutable' (Brod, 1987a: 57),

"...almost any historical period can be defined as "in crisis" if one is clever at historical analysis. In my mind, the bedrock of masculinity has remained essentially the same from Odysseus's slaying of the suitors in the ninth century B.C. in defence of home and family to the cowboy's and detective's and vigilante's slaying of villains in the twentieth century: heroic violence lies at the heart of the patriarchal masculine definition of self." (Banner, 1989: 707)

It is not necessary to accept the reductionism implicit in Banner's depiction of the 'bedrock of masculinity' to take the point. It is, I have argued, essential to place forms of masculinity in the wider historical, social and economic context whence they derive their meaning. It is also necessary to place such studies in the wider political context.

The Politics of Men's Studies

(i) Men Against Sexism

I shall now consider two approaches to masculinity which relate to the themes explored thus far. In assessing what I shall term the Men Against Sexism and Men's Liberation approaches, I wish to conclude this Chapter with a discussion of the politics of the sociology of masculinity and men's studies and, in particular, assess the relation of this sociology to feminism.

Politically, the 'anti-sexist men's movement', as Rowen (1987) terms it, fits uneasily with the centralised party hierarchies of the organised left, and has developed aside, if not in contradiction to, traditional political culture [81]. Taking up the challenges of feminism and gay liberation, it has been the concern of men engaged in this field of politics to

question the assumption that, as Rutherford (1987: 29) puts it, heterosexual men do not in fact have a sexuality, and that this sexuality bears no relation to such issues as sexism, violence, fatherhood and sex discrimination. A recurring theme within the writing of 'men against sexism' therefore is an assumption that men do not address questions of their sexuality, and that such a questioning must be part of sexual politics and responding to feminism.

Rowen's (1987) 'The Horned God: Feminism and Men as Wounding and Healing' is one of a number of works which are concerned to explore the possibilities of and limits to men expressing emotions with each other and with breaking down dependencies on women for validation [82]. The end result of this engagement with sexual morality, it is argued, may be to render men emotionally more free to negotiate a realignment of power in relations with women of the kind envisaged by feminism and supported by men against sexism. As Hearn (1987: 11) puts it,

"...the recognition of the facts of the existence of the 'personal' and the 'political' is a necessary part of theory. Academic theory that 'chooses' to ignore half the 'facts' of existence is simply poor theory".

On one level, subjecting male practice to a theory informed by feminism is seen as the primary task. It is this approach which is central to what I am terming a men against sexism perspective. On the broader level within this sexual political terrain the place of sexuality is located as central to wider structures of regulation and control, and it is in this respect that the law is more traditionally understood to have a place within sexual politics. That is, when men do 'overstep the mark' the law becomes involved, as within the positivist conception of law discussed in Chapter 2. The concerns of the men against sexism movement therefore have definite implications for theorising areas of legal regulation: in terms of strategy and praxis, men against sexism seek to address discriminatory practices, forms of violence against

women and sexism in general through the production of leaflets, workshops, publications and newsletters, as well as constituting a point of contact for discussion, advice and counselling.

The first anti-patriarchal men's groups meetings were in the United States in 1970 and the establishment of 'Brother' magazine in San Francisco in 1971. Certainly, by 1970 it appears that men's groups had been formed in the United States, drawn predominantly from university educated New Left activists (in this respect, similar to the US critical legal studies movement) (Carrigan et al, 1985: 574). The establishment of Men's Centres did not evolve by way of spontaneous upsurge but rather as organized units to parallel the (higher profile) Women's Centres in the United States. Indeed, it is interesting that by the mid-seventies Farrell (1974) would be talking of the 'masculine mystique' to parallel the feminine, and advocating a 'Men's Awareness Network' and national organisations, along the lines of the National Organization of Women (NOW). Though writing in response to feminism's critique of heterosexuality, this literature was premised on the responses of heterosexual men to feminism. Thus, Carrigan et al (1985) argue, the 'author's girlfriend' becomes a collective presence in a literature concerned to exorcise the tensions within masculinity. If male sexuality is a problem, it is a certain type of sexuality: heterosexual.

By 1972, the first groups were formed in Britain [83]. An example of literature from the genre of men against sexism is the magazine 'Achilles Heel' which, though only one of many such magazines (see Ford and Hearn 1988) has had, along with the 'Men's Anti-Sexist Newsletter' (MAN) probably the highest profile of such works in the UK [84]. 'Achilles Heel' described it's target readership (Issue 6/7, p 3) as

"...many active trade unionists who have become interested in feminism...single parent fathers; men whose male

identity is threatened by unemployment or divorce; men who read 'Spare Rib'..."

Common reference is made in the literature to those texts often classified as 'radical feminist' (for example, citing Solanas, 1971: Dworkin, 1981: Daly, 1975: 1985: Browmiller, 1975: Griffin, 1981). The personal/theoretical dimensions are clear in Hearn's recollection that,

"While holidaying in Tenby in South Wales I was surprised to find in a local bookshop a copy of the SCUM manifesto. This quiet Welsh coast had offered up nothing less than the document of the Society For Cutting Up Men...And yet hurtful as these words might appear, they slid off me because I knew them partly to be true..." (Hearn, 1987: 7)

Solanas's SCUM manifesto in fact reads as follows:

"Every man, deep down, knows he's a worthless piece of shit. Overwhelmed by a sense of animalism and deeply ashamed of it; wanting, not to express himself, but to hide from others his total physicality's total egocentricity, the hate and contempt he feels for other men, and to hide from himself the hate and contempt he suspects other men feel for him." (Solanas, 1973)

Certain feminist arguments, most notably around men's emotional inarticulacy, have assumed a common currency in the literature. For example, Seidler (1985) argues that while men might hear women's cries of anger and frustration and while men might understand these intellectually, men continuously find it difficult to accept that things could really be so bad. This curiously echoes Dworkin's assertion that,

"The poet, the mystic, the prophet, the so-called sensitive man of any stripe, will still hear the wind whisper and the trees cry. But to him, women will be mute. He will have learned to be deaf to the sounds, sighs,

whispers, screams of women in order to ally himself with other men in the hope that they will not treat him as a child, that is, as one who belongs with the women." (Dworkin, 1981:49)

Understandably in response to such views, Seidler comments "It is as if all long-term heterosexual relationships in our time are doomed." For Rowen (1987: 7)

"It is true that there are some groups of men who from time to time do get treated badly - gay men, disabled men, handicapped men, and so on - but even these get treated better by society than the equivalent groups of women."

It is men as a sex-class therefore which is problematic within the men against sexism literature, and there might be said to be a broad agreement with Dworkin's comment that

"...male sexual aggression is the unifying thematic and behavioural reality of male sexuality; it does not distinguish homosexual men from heterosexual men....An absence or repudiation of this aggression, which is exceptional and which does exist in an eccentric and minuscule minority composed of homosexual and heterosexual men, distinguishes some men from most men, or, to be more precise, the needle from the haystack." (1981: 57)

Within legal scholarship, this is similar to the approach of Mackinnon (Chapter 2, p 46 - 8) in the characterisation of men as a sex-class, and is now being echoed in some male attempts to engage with feminism and men's power in the law school. Fraser, for example, states

"Sex. I am a white, male, heterosexual law professor, and when I talk about sex, people listen...The feminist project hits us where we live. It threatens to, at the grossest level, cut off our cocks." (Fraser, 1988)

Leaving aside the implicit essentialism and the uneasy relationship with 'academic feminism' [85], it is these tensions which are brought out in the men against sexism literature. Ironically, for those men who engage in a dialogue with the women centred analyses of radical feminism, what in fact occurs is a shift in the male/female subject/object relationship. As Eisenstein (1983: 101) points out,

"In this perspective, culturally defined maleness was very far indeed from the normative role ascribed to it by Simone de Beauvoir. On the contrary, a women-centred analysis presented **maleness and masculinity as a deformation of the human**, and as a source of ultimate danger to the continuity of life." (My emphasis)

What has occurred is a discursive twist: man has become the object, but at the cost of framing the questioning of masculinity in such a way as to assume that there is a normative woman-centred position (non-patriarchal) which may be positioned in opposition. This position itself derives from an essential, natural, womanhood. Thus, the dualism repeats itself. Put simply, women have the answers and men must turn to women to find out what they are. Essential, benign, positive and life-affirming womanhood is set up in opposition to an essential destructive, negative and oppressive masculinity.

This perspective has a direct relation to the powerful sense of guilt which, perhaps unsurprisingly, pervades much of the men against sexism literature. This in turn at times tends to paralyse any praxis which might follow on from the theorising of power relations in this way. For example, Reynaud's (1983) polemical 'Holy Virility' is a forceful and powerful critique of masculinity and male sexuality [86]. However, along with work such as Snodgrass (1977), it is limited by a position which renders such guilt central to praxis. The work tends to present all men, including the authors, as the deliberate causes of women's oppression. Essentially, all men are

misogynists and the best that might be achieved, politically, is to recognise one's misogyny.

"...when a man is suffocated by the paltriness of his existence, and he tries to put an end to power once and for all, he need not go far to find the enemy: his struggle is first and foremost within himself. Getting rid of the 'man' buried inside him is the first step for a man aiming to rid himself of his power." (Reynaud, 1983: 114)

Whether this vague tautology is confronting patriarchal power structures is questionable. It is important to note that what also marks out the men against sexism literature is a more clearly articulated relation to class/materialist based politics that is to be found in other male writings on masculinity. The materialist politics of the US literature is fundamentally different to the UK, inasmuch as it has a cultural rather than dialectical materialist focus, and this certainly should be in mind when making comparisons between the US and the UK literature. For example, the pro-feminist collection of essays edited by Snodgrass (1977) attempts a broad structural approach to men's power while, in the UK, Tolson (1977) attempts an analysis of masculinity which fits in the context of left politics through focussing specifically on the relation between forms of masculinity and the relations of production. In the end however, the political effect of such engagement with masculinity seems to have been to make attempts to make socialist movements aware of masculinity as a political issue, to support feminists. By way of criticising the men against sexism literature therefore the organising perspective of a class-based politics remains with all its attendant limitations.

This literature contains strengths - not least an admirable commitment, thoughtfulness and focus on social practice - as well as the limitations I have outlined above. It is important to recognise the diversity within this literature, the centrality of the relationship to feminism and the relation to

more traditional class-based politics. However, for the range of reasons above, it faces severe limitations. A second perspective within men's studies - men's liberation - is very different, but is also seriously flawed. It is one thing to present a universal characterisation of all men as innately powerful, rapists or transhistorical embodiments of misogyny. It is quite another to then conclude, in rejecting this perspective, that men too are equally oppressed under patriarchy. 'Men against sexism' at least entails a realisation of power relations. 'Men's liberation', however, is a political project of a very different order and with a very different aim.

(ii) Men's Liberation

It is a central theoretical contention in much of the masculinity literature of the 1970's that men too are oppressed within patriarchy in a manner which might be compared to women's oppression. As a political movement, 'men's liberation' should not be overemphasised and the term 'movement' may itself be inappropriate.

"An intermittent, thinly spread collection of support groups, therapeutic activities, and ephemeral pressure-group campaigns might be nearer the real picture; and it is hard to think of any significant political effect it has had in any country over ten years. " (Carrigan et al, 1985: 575)

An appeal of what has been termed the men's liberation approach is that it gets round the guilt and frustration of some male responses to feminism. From this perspective men are seen as victims of their own advantages, their characters distorted by the pressure of 'being a man' in contemporary society. Among these 'costs' of masculinity, the writings tend to focus on male anxieties, neuroticism and low self-acceptance and, in particular, sexual difficulties [87]. The disadvantages of being a man are listed at length, the maladaptive effects of

male sex role socialisation lamented, and the call is made for more new, more humane alternative ways of 'being a man' [88]. In particular, the destructive effects of employment are identified as central to the impoverished nature of a 'breadwinner masculinity' (see Chapter 1, p 20 -3) which involves considerable emotional costs for men, not least in excluding men from childcare [89]. However, it is the area of sexuality and interpersonal relations which are singled out in this perspective. A recurring theme is the pressure of men having to 'take the sexual lead', linked to, at extremes, mental imbalance and the psychological fears of impotence (to be discussed further in Chapters 7 - 8). It is noted that when men talk about their problems, it is to women friends, 'safe' listeners because of their subordination (Fasteau, 1974), though Clarke (1974) suggests that such inexpressiveness might be due to fear of intimate exchange between men in bringing them close, indicating a taboo on homosexuality. Journard (1974) discusses such male self-disclosure, linking it to tensions around revealing and the problematic nature of male friendship [90].

The concept of men's liberation is deeply problematic. While it recognises the complexities of oppression, it constitutes, like men against sexism, a limited approach to masculinity. One problem is the tendency to **psychologize** feminist critiques of masculinity (Interrante, 1981). That is, the problems of masculinity become matters of individual psychology rather than structural relations of power. This is, in part, a problem of methodology.

"...the research base of the genre is so slight as to be embarrassing, given the repeated claims about establishing a 'new area of study'...[the rest] do not make a great contribution to the growth of knowledge." (Carrigan et al, 1985: 570)

The methodological weaknesses also have implications for the analysis of power which follows. For example, within the men's

liberation framework feminist critiques of the family as fundamental to women's oppression are ignored or passed over [91], while feminism itself is presented as a matter of women breaking out of inappropriate roles rather than fundamentally challenging men's power [92]. Elsewhere, a more blatant anti-feminism is evident in the advocacy of 'men's rights' which might, legally, best advance the collective interests of men [93] (See further the problems of rights based claims, Chapter 1, p 23 - 4). For example, it is clear that, for David and Brannon (1976) at least, the '49% Majority's interests might best be advanced through utilisation of rights based claims in the areas of custody and abortion [94].

If the work is theoretically problematic therefore, it is also politically suspect. To argue that men too need liberating entails, as Carrigan et al (1985: 568) have argued, a redefinition of liberation, from meaning a struggle against the powerful to a breaking free of conventions which are seen as inimical to men's well-being. Thus, feminism is seen as good for men too, and is approved of as a worthy means of self-help, part of a politics of personal liberation for men rather than an attack on the power and privilege of those who are already powerful. Feminism is thus transformed into a humanistic growth movement. Practically, it is seen as imperative that men become involved in self-help groups, therapy, consciousness raising, role sharing and changing occupations which were seen as the practice to back up the theory. The notion of men's liberation itself is, I would argue, both naive and dishonest, as evidenced by the appropriation of consciousness raising [95] and the turning to techniques which had emerged from the early years of women's liberation. This is not to argue that methodologies 'belong' to any one group, but to question the nature of the support for feminism which inspires much of the political commitment. It has been argued that what is in fact occurring is a process of modernizing masculinity.

"It is not, fundamentally, about uprooting sexism or transforming patriarchy, or even understanding masculinity

in its various forms...what it is about is the modernizing of hegemonic masculinity. It is concerned with finding ways in which the dominant group - the white, educated, heterosexual, affluent males...can adapt to new circumstances without breaking down the social-structural arrangements that actually give them their power." (Carrigan et al, 1985:577)

Men's Liberation de-politicises gender. The oppression of women becomes a problem of role identity, not individual and collective power and homosexuality is curiously ignored within the literature. If sexuality and the family are important "social-structural arrangements" in the maintenance of male power, then it is perhaps not surprising that familial and (homo) sexual politics should be ignored. As Connell notes,

"...it is clear what its point is: not contesting inequality, but modernizing heterosexual masculinity. The discontent many men feel as holders of power under challenge is to be relieved by a change of personal style - a change of tactics in dealing with women, perhaps a changed self-concept - without any challenge to the institutional arrangements that produce their power. Perhaps the most interesting thing about this business is that it often requires a therapists assistance." (Connell, 1987: 236)

The 'modernizing' of masculinity is an important part of the 'new man' debates discussed above, and of the development of images of fatherhood throughout the 1980's which might in theory at least offer emotional involvement to the emotionless male [96]. These developments must not be dismissed as simply cultural manifestations of shifts in gender and as therefore not of concern to the law and lawyers. They are structural, historical and feed into debates around legal reforms in which oppressive representations of masculinity need to be contested and resisted. However, adopting a 'men against sexism' or

'men's liberation' perspective is, I believe, not necessarily the most appropriate way of beginning to do so.

In this Chapter I have presented an overview and analysis of some of the issues and themes which have emerged within the sociology of masculinity, and have attempted to place this literature in a wider context, both with regard to theorising masculinity in sociology generally and in relation to feminism and feminist analyses of male power. I have discussed both the strengths and weaknesses of 'men's studies', introduced some of the difficulties and issues which arise in defining masculinity, and have presented the beginnings of an approach which is consistent with the theoretical positions developed in Chapters 2 and 3. I would stress 'beginnings' because the arguments developed thus far are to be continued in the following Chapter, specifically with regard to theorising the law and homosexuality. For this reason, general conclusions on Chapters 4 and 5 will be presented in the latter Chapter.

In Chapter 5 I shall seek to develop the theoretical approach introduced in Chapters 2 - 4; that is, to transcend the theorisation of masculinity in terms of a bifurcation between heterosexual and homosexual identity and, with regard to law, to locate the place of legal discourse in the constitution of normative and deviant forms of male sexual behaviour. As Connell (1987) notes, homosexuality is of crucial significance in the constitution of hegemonic masculinity in creating a negative symbol of masculinity in the form of stigmatized groups, identifying the creation of a hierarchy which has at least three important elements: hegemonic masculinity, conservative masculinities (complicit in the collective project but not its shock troops) and subordinated masculinities. It is the relation between these masculinities which I shall explore in the following Chapter.

CHAPTER 5

LAW, HOMOSEXUALITY AND HEGEMONIC MASCULINITY

Introduction

In the investigation of the themes and concepts of the sociology of masculinity I have presented in Chapter 4, and in the light of the discussions of law, gender and power in Chapters 2 and 3, one issue has been largely conspicuous by its absence: that is, the constitution, and relation to heterosexuality, of male homosexuality in law. It would be a major weakness of any work on law and heterosexual relations to fail to include analysis of (what are usually taken to be) minority forms of sexuality, and consideration of homosexuality has a crucial importance to the argument developed thus far in this thesis. There are, of course, other forms of sexuality than simply heterosexuality and homosexuality, and to fail to account at all for non-heterosexual or non-reproductive forms of sexual behaviour would fundamentally flaw a social analysis of masculinity and law. It is not simply that for centuries sex outside of marriage has been subject to moral and legal regulation (be that regulation canonical or secular) [1], and that such an omission would 'miss out' an important part of the legal regulation of sexuality. Rather, it is at the level of theorising masculinity per se that I believe it is necessary to engage in analysis of the relationship between heterosexuality and homosexuality. As Weekes (1981: 96) argues, the study of homosexuality is essential both in its own right and because of the light it sheds on the regulation of sexuality generally, on "the development of sexual categorisation, and the range of possible sexual identities." The history of homosexuality is one of a considerable hostility, which is reflected in legal sanctions [2]. This hostility must be accounted for.

Theorising Law and Homosexuality

An immediate distinction may be made between homosexual **identity** and homosexual **behaviour**. It is now clear that homosexual behaviour is both transhistorical and transcultural, in that it has existed in different cultures and throughout history [3]. What has varied, however, are legal and social responses to homosexuality. Theorists of gay liberation have argued that, given the historical variation in the subjective meanings of homosexuality, it can no longer be possible (if it ever was) to theorise homosexuality in **universal** terms (eg, see Weekes, 1977: Hocquenghem, 1978: Plummer, 1975: Bray, 1982: Altman, 1983. Also Mort, 1987). That is, analysis of law and homosexuality must take place in a historical context sensitive to the variation within legal responses and to the different constructions of homosexuality in different social and economic contexts.

A comprehensive study of the theorising of homosexuality is outside the scope of this Chapter, and it is necessary to be selective in outlining possible approaches to the subject in sociology. Adopting a 'deviancy' approach to homosexuality, analysis takes place at the level of the individual or, in Lemert's (1967) terms, as 'primary deviance'. That is, homosexuality is here seen as something which inheres, biologically, in the **individual**. I have argued throughout this thesis that gender identity is not the product of irresistible biological forces so much as a socially and historically constituted product of a combination of factors which themselves channel sexual possibilities. It is unnecessary to accept the conceptual baggage of Freudian psychoanalysis wholesale to argue that both heterosexuality and homosexuality are social constructions (Hocquenghem, 1978) and, in contrast to the idea of homosexuality as a 'primary deviance' which inheres in the individual, it is at the level of 'secondary' deviance, that is, deviance as a result of social definition,

that the focus shifts from the individual to the **social** responses to homosexuality.

It is through this notion of secondary deviance that the content and form of legal regulation are implicated in theorising homosexuality. On one level, the law may be understood to serve as a barometer of social reactions to homosexuality: repressive or liberal laws may be taken to be indicators of the degree to which homosexuality is tolerated in a certain society at a particular time. However, social definitions are important at another level too. That is, it is in the theorising of homosexuality per se that there has emerged a historical and social analysis which, far from positing homosexuality to be an essential expression of a particular human sexuality, has focussed instead on **social sources of stigmatisation** (of which law is one) and on collective and individual responses. This argument locates social factors - familial structures, parenting, social sanction etc - as constitutive of gender identity and implicates the law and legal sanction at the level of assigning deviant status.

Mary McIntosh (1968) argues that it is possible to theorise the legal constitution of homosexuality as a 'deviant' psychological state, as individual 'primary' deviance, through development of the concept of 'the homosexual role'. McIntosh argues that it is possible to historically locate the emergence of a particular male role (around the late seventeenth century) by reference to which the rest of a population may in turn define themselves oppositionally: as pure, 'normal', as not in need of treatment: as heterosexual. The homosexual role, McIntosh argues, thus functions both to segregate the deviant from the normal, limiting their behaviour or inscribing it within a limited social subculture, and also by setting up a dichotomy between that behaviour which society deems to be acceptable and that which is unacceptable. In the setting up of this division the law is instrumental. In the crudest terms, the law - through criminal and matrimonial law in particular -

denies the legitimacy of homosexuality as an alternative sexuality. The dichotomy between heterosexuality and homosexuality is institutionalised in the law relating to the family and is, I shall argue, central to the social construction of masculinity per se.

The notion of the 'homosexual role' remains problematic in a number of respects [4] and the construction of a crude dualism between heterosexuality and homosexuality fails to account for the psycho-sexual dynamics between the two. The social nature of the dichotomy itself is evaded. It is also clear that female and male homosexuality are in many respects very different in both social expression and the sanctions they receive so as to belie any notion that 'homosexuality' is itself a unitary concept. The need to be sensitive to this social, historical and sexual variation is brought out when considering the legal regulation of lesbianism [5]. The law treats male and female homosexuality in different ways, and while my focus here is male homosexuality, attitudes to women's and children's sexuality inform the law's treatment of male homosexual behaviour [6]. It is male homosexual relations which bear the brunt of the criminal law sanctioning, and homosexual acts between women have not been regarded as crimes at common law [7]. As to why this should be the case, it is certainly necessary to improve on the theorising of Honore (1978), who states that

"The sexes are very different in their attitudes to sex. Men are far more adventurous. There are more male than female homosexuals. The ways of women arouse less feelings than those of men. The objections to homosexuality apply more strongly to men than to women..." (Honore, 1978: 110)

What is perhaps more probable is that legislators have failed to consider that women might have and express a sexual desire which exists independently of men [8]. As a potential disturbance to a heterosexual phallogentric order (which male homosexuality constitutes), lesbianism may escape criminal

sanction, but when female sexuality is seen as threatening essential womanhood in law (motherhood), then the lesbian mother might well be deprived of her children. The criminal context might indicate lesbianism to exist with relative legal impunity [9], but this is certainly not the case with regard to other areas of law, as the legal treatment of lesbian custody cases makes clear [10].

In S v S (Custody of Children) (1978) 1 FLR 143, despite the advice of the court welfare officer and conflicting psychiatric evidence, as well as the wishes of the children themselves, the court awarded custody to the father not so much because of any express virtues he might have, but simply because the mother was a lesbian. In Re P (A Minor) (Custody) 4 ELR 401 a lesbian mother was awarded custody (with supervision) though because "...the choice before us lies between care and the mother's custody" (p 403). The court could only so decide when "driven to the conclusion" (p 405) that there was no other acceptable form of custody. Arnold J considered the lesbian mother in question,

"...struck me as being a sensitive, articulate, and understanding woman. She tells me she is not one of those homosexuals who, as many do nowadays, flaunt their homosexuality not only in the face of those who are interested to know but also of those to whom it is no concern whatsoever." (P403).

In S v S approving reference was made to the judgement in Re D (an infant) (Parent's consent) [1977] 1 All ER 145, a case in which the court dispensed with a father's consent to the adoption of his son on the grounds that, being homosexual, it was 'unreasonably' withheld. In discussing how a 'reasonable' father "...in the circumstances of the actual father...would approach a complex question" (p 150) Wilberforce considered,

"Whatever new attitudes Parliament, or public tolerance, may have chosen to take as regards the behaviour of

consenting adults over 21 inter se, these should not entitle the courts 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 unhappiness and possibly even to physical experiences which may scar them for life." (p 153)

It would be incorrect, therefore, to argue that just because male homosexuality bears the brunt of the criminal law that lesbianism can be said to legally and socially approved. We have, it seems, two central dichotomies, two axes of power relations to consider when addressing the law and homosexuality. First, that between male and female homosexuality and secondly, between heterosexuality and homosexuality itself. With regard to the latter, while the sexological tradition [11] focusses on the differences between heterosexuality and homosexuality, it is, I believe, instructive to turn instead to the considerable similarities between the two forms of sexual expression by way of a preliminary questioning of why it should be that the legal treatment of the two should be so different. The categories of homosexuality and heterosexuality are not pre-theoretical but are, like law, social constructs.

According to Kinsey (1948: 623), among a study of white US males, around 4 % of men appeared to have sex only with other men throughout their lives. Around 6 % were found to confine their sexual activity to other men for at least three years after adolescence. This figure is confirmed by Burnett (1973) and such statistics, Honore concludes, "... can be accepted as a rough guide to the number of homosexuals in Western Countries, including England." (Honore, 1978: 85) Kinsey in fact finds (1948: 65-6) that around 37% of men were found to have had sexual experiences with other men. The estimate that around one third of men, while not exclusively homosexual, have sex with other men has been much quoted, and there is evidence

that **homosexual behaviour** is not confined to homosexual-identified men (Ross, 1983). That is, in certain circumstances, sexual relations between men can and do take place. Honore postulates possible reasons why heterosexual men might have homosexual sex: variety, being cut off from their wives or other women, when drunk, high or uninhibited, to please a friend (Honore, 1978: 86). There are, of course, other possible 'explanations' [12].

I have argued that the division between heterosexual and homosexual should be treated with caution and the fragility of the heterosexual/homosexual dichotomy may also be seen in the fact that, as a 'variation' of sexual behaviour, homosexuality corresponds to the cultural norm of heterosexuality in several respects. It is possible to identify a number of similarities between heterosexual and homosexual gender identity in this context [13]. Conceptions of the repression [14] of homosexual desire within the constitution of heterosexual masculinity might be equated with a repression of heterosexual desire within the homosexual constitution. This is somewhat simplistic, but I hope it makes the point that there is nothing a priori unlikely or impossible about a resolution of sexual orientation in either a heterosexual or a homosexual direction, as I shall clarify below. Related to this point, the subjective experience of gender identity as 'fixed' is common to both heterosexual and homosexual identified individuals and relationships [15]. If one wished to account for why heterosexual and homosexual identified men resist homosexual identity formation, it might plausibly be understood to be a matter of rational self-interest at recognition of the consequences of being a homosexual male in a homophobic society, as perhaps testified to by the experiences of the 'homosexual panic', well documented by both heterosexual and gay men [16]. A further link between heterosexual and homosexual masculinity might be seen in the prominence of genital sexuality in the maintenance of masculine identity, be that masculinity heterosexual or homosexual. As well as differences therefore, they may be seen to be considerable

similarities and overlap between homosexual and heterosexual sexuality.

To summarize the above, the relationship between heterosexuality and homosexuality is more complex than might at first appear. The types of connections between heterosexuality and homosexuality outlined above have already emerged in Chapter 4 and it is with regard to the psycho-sexual constitution of relations between men (eg, Chapter 4, p 117) that I wish to pick up the argument at this point. Pleck (1980) has argued that the dichotomy between heterosexual and homosexual men acts as a central symbol for all rankings of men and masculinity, a hierarchy he argues which is maintained across a number of dimensions - wealth, age, strength, and, crucially, heterosexuality. Within Pleck's analysis (at least in this article) the heterosexual/homosexual ranking serves to locate all men in a relative position of power to other men, a hierarchy based on sexuality which is particularly evident in the use of homosexual derogations by heterosexual men [17].

This insight is fundamental. It is necessary to render problematic the male/male axis, for the relationship between heterosexuality and homosexuality is not only more complex than it might at first appear (it being necessary to question the supposed 'otherness' of homosexuality) but also to recognise that it is in relations **between men** that a power dynamic between men and women is to be located. That is, that the dynamic between male heterosexuality and homosexuality has implications also for understanding male/female power relations.

This point may be brought out perhaps clearest in a consideration of male homosociality [18], particularly as depicted in feminist scholarship. Accepting the diversity of potential erotic stimuli, some feminists have drawn attention to the notion of male homosociality as reflected in a range of culturally proscribed male behaviour; in particular, male homosocial behaviour is singled out as a way of understanding

men's playing out the dynamics of male heterosexuality and homophobia [19]. This requires some clarification.

By 'homosocial' is meant the seeking enjoyment, and/or preference for the company of the same sex. It is distinguished from 'homosexual' in that it does not necessarily involve, though in certain circumstances it may, erotic interaction between members of the same sex [20]. It has been argued that men are attracted to, stimulated by, and intensely interested in other men [21]. On one level, this might be taken to be an obvious point of little relevance: men have male friends and enjoy male company [22]. It might be argued that once involved in heterosexual relationships most men may be less likely to seek homosexual relationships [23], but this does not explain the complexities of the dynamics of interaction between men, and the (continuing) exclusion of women from a range of institutions which promote, privilege and provide the forum for male bonding [24]. Across social, economic and ethnic divides (though recognising the variation within each), feminists have attempted to draw out the relation between the exclusion of women from, for example, affluent men's clubs [25], pub culture [26], working men's clubs and institutionalised sport [27], the social practices of trade unions [28] and the legal profession [29], as well as with reference to the wider oppression of women and the construction of forms of masculinity which bond the sexual objectification of women to acute expressions of homophobia. The popularity and social acceptance of homosocial bonding would seem to testify to the call of a homosocial world which goes on long after the, statistically the majority, of men have become engaged in 'secure' heterosexual relationships. Crucially, this relates to men's interaction with women: it is not simply a matter of male-male relations, but also of power. On the exclusion of women Rosaldo and Lamphere have argued,

"Distance permits men to manipulate their social environment, to stand apart from intimate interaction, to control it as they wish...Because men can be separate they

can be sacred and by avoiding certain sorts of intimacy and unmediated involvement they can develop an image and mantle of integrity and worth. "(Rosaldo and Lamphere, 1974: 27)

The denial, and arguably the fear [30], of homosexuality is an integral part of the ideology of the essential natural sexual difference between male and female. Hoch (1979) takes up the argument, pointing to the fact that

"A whole male culture...has grown up, providing an ambiguous collective reinforcement against the tabooed feminine and homosexual orientation...the more one retreats to an all-male environment, presumably the greater the homosexual temptation, and hence the continued need to 'up the ante' in the way of violence to prove one's manhood." (Hoch, 1979: 85)

We come to a position where masculinity is defined in the negative sense - as that which is not feminine. The dichotomy of heterosexuality and homosexuality thus sets up a 'real' authentic masculinity (heterosexual) as opposed to a 'false', denied masculinity (homosexual) while at the same time denying the homosexual dimension to much 'heterosexual' male behaviours. As I have argued in Chapters 2 and 3, the process of making claims about law and masculinity, claims about the 'truth' of gender, involves relations of knowledge and power. Crucially, homosexuality is central to the social construction of heterosexual masculinity. The force of McIntosh's argument lies in the fundamental insight (itself a variation of de Beauvoir's 'absolute vertical' referred to in Chapter 1, p 4) that it is through defining what we are **not** that we become able to define what we **are**, or at least see ourselves to be.

This negation of homosexuality is evident in several sociological accounts of male heterosexuality. There are elements of this in the work of Willis (1977), who notes the frequency of anti-homosexual derogation in what he terms

'working class oppositional culture' and Hartley (1974) argues that masculinity would not appear attractive is it were not for the stereotypes of femininity which are counterposed to it [31]. Hoch's presentation of 'masculinity as the avoidance of homosexuality' argues a similar point, though from an explicitly psychoanalytic perspective. For Hoch (1979: 78 - 94), heterosexual masculinity functions in two quite specific ways; as a defence against impotence and as a defence against homosexuality. It is possible, therefore, to identify patriarchy as a dual system in which men oppress women, but in which there also exists a systematic structure of power relations between men based on sexuality and gender identity (Pleck, 1980). It is sexuality - sex, desire and the politics of the body - which is central to the dichotomy that one sex (women) exists as potential sexual object for the other sex (men), while the other sex (men) is negated as sexual object.

It is the role of law in this process of negation to which I wish to now turn. Gay sexuality disturbs this polarity of 'men' and 'women' as complementary parts of the natural (conjugal) whole. If all men are by definition heterosexual, then gay men simply do not exist as men. 'Harsh' punitive laws in relation to homosexuality might not **construct** a dichotomy (to argue as much would be to give too much power to law: I have argued against this in Chapters 2 - 3, eg. p 77 - 80) but they certainly buttress the dichotomy between heterosexuality and homosexuality in important ways, as a historical overview of the legal regulation of homosexuality reveals. Just as the public/private dualism discussed in Chapter 3 is central to liberal legal discourse, so the distinction between heterosexuality and homosexuality is, I believe, central to the power of heterosexual men.

Legal Regulation of Homosexual Behaviour

The Example of Honoré's 'Sex Law'

The criminal law is concerned with homosexual relations in a number of different ways. The object of legal intervention is not homosexual desire as such, but rather the carrying out of a specific range of 'homosexual acts'. However what such acts actually involve in law is by no means clear. If the law is not concerned to prosecute those who are simply attracted to their own sex, this is not to say that the law approves of homosexuality, or that the law can be read as condoning homosexual activity. The law is not concerned, at least formally, with individuals who believe themselves to be homosexual: however, it is certainly not concerned with the promotion of homosexuality and homosexual relations as viable alternatives to the heterosexual.

'Homosexuality', if taken as a discrete object of legal analysis in much the same way as one might undertake study of the law and 'the family', would be a subject which traverses many areas of traditional legal scholarship [32]. Family law, criminal law, the civil law generally (for example, redress for sexual discrimination, protection of 'fundamental rights' such as Articles 8 and 12 of the European Convention) all might be said to involve analysis of homosexuality. Even within the confines of a doctrinal exegetical study of law, homosexuality is a relevant (if much neglected) area of study. As analysis of these laws would constitute a thesis in its own right, I shall in this section focus specifically on aspects of criminal law and seek to address, in particular, the account of homosexuality presented by Tony Honore (1978) in 'Sex Law'. This work is worthy of discussion in some detail, first, because the (unquestionably prejudiced) assumptions about homosexuality contained therein say much about the implicit conception of heterosexuality, and secondly, because 'Sex Law' is one of the few works which specifically address the law

relating to sex in it's own right. As a purportedly 'contextual' study of law it's interdisciplinary analytic intentions are confined within a heuristic doctrinal study which serves as an example of how **not** to write a 'book about law' and sex (Able, 1973: Ch 2, 32 - 4). Though the focus is criminal law, this does not mean that analysis of other areas are not important to an overall understanding of homosexuality; it is simply outside my present concern (Generally, see Crane, 1985: In relation to matrimonial law, Chapter 6).

One of the most frequently espoused objections to homosexuality is that it is the antithesis of that which is 'natural': that is, natural heterosexual sex within the institution of marriage. Legal hostility to male homosexual activity has a long history, a hostility within the Judaeo-Christian tradition which derives from biblical sources in which the 'unnatural' nature of homosexuality is stressed [33]. Religious objections continue to inform debates of law reform in this area and the attitude of the churches to homosexuality remains controversial and, arguably, influential [34]. Biblical condemnation of homosexuality based on its 'unnaturalness' should be placed in the context of a general condemnation of sexual practices within the bible, a condemnation which clearly includes homosexuality along with bestiality, coitus interruptus and masturbation and, indeed, any form of sex, other than intercourse between a man and a woman, which might not lead to conception. 15: Deut 27.21 proclaims "A curse on him who lies with any animal". Such exhortations against homosexuality have been understood in terms of population policy [35] as well as in the light of political considerations [36]. If society does 'need' an expanding population for reasons of defence and economics, legal sanctions may be seen to be desirable.

The argument that homosexuality is 'unnatural' informs (it is not the basis of) the broadly doctrinal analysis of this area of law undertaken by Honore (1978). These arguments do not stand up to analysis and reveal systematic ideological heterosexist assumptions which deserve to be unpacked. Honore

addresses the argument that homosexuality is unnatural in a way which is most revealing as to his conception of natural heterosexual sex.

"But in another sense homosexual acts, and any form of sex other than normal intercourse between a man and a woman, are unnatural. They are unnatural in that there is no advantage from the point of view of the survival of the human species in these forms of sex, whereas in normal sex between men and women there is. It would be begging many questions to speak of a design set by God or nature, but clearly the normal act tends to the survival of human kind and the others do not." (Honore, 1978: 105)

The normal and natural are here reduced to the conjunction of penis and vagina, and the attendant possibilities of conception (presuming lack of reliable contraception). Honore continues, taking up the argument that it is the body, the sexual act, which is fundamental to the heterosexual/homosexuality dichotomy and not questions of identity/subjectivity,

"...that the genital organs are so made that in normal intercourse the man's (for the most part) fits the woman's fairly easily. This is not true of intercourse between men." (Honore, 1978: 105)

We are, it seems, reduced to a question of 'fit' of genital organs. That which does not fit, or is associated with excreting, is not natural.

"Furthermore, the passive role in buggery is like the role of a woman in normal intercourse so it is thought womanly. (Honore, 1978: 105)"

By this tautology, 'women's role' in heterosexual intercourse is established: it is passive. He continues

"A minority of homosexuals are no threat to the rest of society, though they cannot expect to be as highly regarded as those who bear the main burden of raising families and supporting women." (Honore, 1978: 105: My Emphasis)

The argument - specifically addressing male homosexuality - contains implicit assumptions about male heterosexuality. The law is, on this analysis, integral to the project of ensuring that homosexuals are not so 'highly regarded'. There are two strands to the argument: first, that heterosexual men raise families and homosexual men do not, a question of population policy, and secondly, that heterosexual men, in marriage, support women, an argument based on an implicit, though untheorised, concept of sex roles and economics which Honore assumes rests on a differentiation in activity (the traditional sexual division of labour) between male and female. Men take the initiative in sexual relations, men support women economically, and women, it is supposed (and not argued) devote more time to bearing children and raising families [37].

As, following the argument, homosexual men are less likely to marry and support wives, Honore argues that male homosexuality undermines the economic position of women who would otherwise turn to their husbands for economic support. The assumption is that homosexually orientated men should nonetheless marry if only to 'support' women, whatever the consequences for the sexual relationship in marriage. It is the marriage, not the quality of the relationship within it, which counts. Yet, what of married heterosexual men who are 'unfaithful' to their wives? According to Michael Ross (1983) in his study of 'The Married Homosexual Man',

"...one of the major factors underlying the marriages of homosexuals has been demonstrated to be a highly anti-homosexual expected peer and societal reaction...the consequence of homosexuals marrying in terms of psychological adjustment are not at all obvious: while a

low degree of maladjustment or situationally produced problems are apparent in some respondents, it seems clear that there is a high degree of compartmentalisation in the lives of married homosexuals, thus minimising such problems. If marriage had any effect on their homosexuality, it was to increase its importance..." (1983, 146)

It is interesting that on Honore's analysis sex between women does not undermine the economic position of men, which might account for differential treatment in law. To follow this, it could be argued that when women are in an inferior position economically and socially, then male homosexuality will be increasingly tolerated. On this analysis, when women are 'more equal', though dependent on men economically, there is more likely to be opposition to homosexuality. Does this therefore mean that if women are economically independent, then homosexuality is be more tolerated? The argument reproduces the familialist ideology discussed in Chapter 1 (p 9 - 11) and fails to account for societies where women are in substantial numbers economically **independent** of men.

What is the essence of the objection to homosexuality presented by Honore? First, homosexuality is a threat to marriage.

"...homosexuality is condemned because it tends in general to frustrate population increase and the support of women in marriage. The fact that in a particular case it may not do so because the homosexual in question marries and has a family is thought of as of no more than a mitigation, if indeed it does not make matters worse." (Honore, 1978: 104)

We then come to a leap in Honore's argument which brings out the implicit theorising of male sexuality: the differentiation, based on the preceding construction of male heterosexuality, between the sexual expression of 'normal' and homosexual men. I have argued so far in this Chapter that there are similarities,

connections, which may be made between heterosexual and homosexual sexuality. The basis for the distinction, the difference between the two, is premised on a reductionist model of male sexuality and the notion of the male sexual urge [38].

"Homosexual men are more promiscuous than homosexual women or heterosexual men, perhaps because men are in general more inclined to seek variety in sex than all but a small percentage of women." (Honore, 1978: 85)

Therefore,

"It is no surprise, then, that though some form long-term attachments, and even think of themselves as 'married', the relations between men and men are usually not as stable as those between men and women or between women." (Honore, 1978: 85)

Homosexuals can pretend to marriage, but cannot achieve the stability of the heterosexual union **because of their sexuality**. This is the crucial point. **Sex cannot be denied**. It is male sexual desire which Honore is here dividing into two - heterosexual and homosexual, a bifurcation which is fundamental to the negation of homosexuality. Honore proceeds to turn to mother-blaming accounts of homosexual orientation through focussing on the over possessive mother, or absent or weak fathers [39] (1978: 88), asserting that

"...at any rate homosexuals seem more inclined than heterosexuals to describe their parents in this way."

It is **sex** which is central, constructed as a threat to public order and to marriage, the overpowering force so central to masculinity and to male identity. In answer as to why the moral rules relating to sex should be stronger than those relating to property or violence, he contends

"This is [because] sexual urges are particularly strong, and are not likely to be held in check by anything short of clear, unconditional rules and attitudes." (Honore, 1978: 104-5)

We are reduced, it seems, to an essentialist model of male sexuality underlying the legal treatment of homosexuality. The male urge is still, it seems, **natural**, it just happens to be homosexual. The argument is contradictory. Implicitly, and ironically, Honore accepts the normality of homosexuality and the same time as he seeks to deny this normality.

Honore's analysis is simply not good enough. If analysis of the law relating to homosexuality is to contain no more than positivistic description and prejudiced assertion, legal studies is failing to account for the constitution of masculinity - heterosexual and homosexual - in a most fundamental way. For, if it is correct that theorising heterosexuality and homosexuality are part of the same project (that is, they are defined in relation to each other), then legal scholarship which fails to understand homosexuality will fail also as regards the constitution of heterosexuality in law.

I have argued that political, social and economic as well as religious considerations inform regulation of homosexuality. Social and historical variations are now well established. It is clear that societies may have very different attitudes to homosexuality, and here contrast is frequently made with ancient Greece, where pedagogic homosexual relations were accepted as part of societal sexual mores (Dover, 1978). Yet the avowedly Christian-Judaic taboos against homosexuality are not reflected in any **consistent** level of legal sanction in the western tradition and there has occurred considerable variation in the criminal law's treatment of homosexuality (see, generally, Weekes, 1977: West, 1977: Boswell, 1980: Oaks, 1978) as an analysis of the history of the legal regulation of homosexuality makes clear.

Law and Homosexuality: A Historical Perspective

Until the Criminal Law Amendment Act 1885, the law concerning homosexual behaviour was constructed in terms of the offence of sodomy. The definition of sodomy to be found in Chief Justice Coke's 'Institutions of the Laws of England' [40] is of

"A detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the creator, and order of nature, by mankind with mankind, or with brute beast or by womankind with brute beast."

Significantly, this definition omits references to carnal knowledge of womankind with women, and does not actually name the sin to which it is referring. An effect of this silence was to cultivate an official and popular ignorance as to just exactly what the sinful sexual acts were and, according to Caplan (1981:149), 'sodomy' thus became a generic term for a catalogue of nameless vices as the love that dares not speak its name. The sodomitical tradition in law continues to be beset by definitional problems. Coke's definition remains today, it might be argued, the basis of the law on homosexuality and was taken up in secular statute during the Reformation in 1533 in the Act of Henry VIII which codified the law, bringing buggery within the ambit of statute law which would then take precedence over the ecclesiastical jurisdiction. The ecclesiastical definition was adopted and the penalty was to remain death (at least formally) until 1861.

Crucially, what the law during this period was concerned with sanctioning was not so much a particular person, the 'homosexual', but rather a catalogue of acts. As Weekes argues,

"The central point we must grasp was that the law was directed against a series of sexual acts, not a particular type of person, although in practice most people

prosecuted under the buggery laws were probably prosecuted for homosexual behaviour (sodomy)." (Weekes, 1981: 99)

Viewing homosexuality as a potential expression of human lust, as a form of non-procreative sex, sodomy thus fell among a range of other sexual practices which the law rendered criminal. The sodomy laws concerned men, while lesbian sexuality, though condemned, continued to attract **relatively** no legal sanction in Anglo-Saxon culture [41]. The homosexual act was not simply a 'homosexual offence', as a consideration of the difference in meanings of sodomy and buggery reveals. Whereas sodomy in law constitutes intercourse when a man's penis enters the anus of another (this would also apply to anal intercourse with a woman: sodomy is not sex specific), buggery, in contrast, seems to be wider, covering both sodomy and intercourse with an animal (R v Cozins (1834) 6 C & P 351). The terminology is, therefore, far from clear. Until 1861 buggery (sodomy or bestiality) remained punishable by execution [42]. Attempts were made to repeal the death penalty in 1826 and 1841 and, though it was not applied in practice after the 1830's, when it was finally removed in 1861 it was replaced with sentences of between ten years and life imprisonment by the Offences Against the Person Act [43]. As to what the offence entailed, it is interesting to note that, unlike marital rape, buggery can be committed by a husband with his wife (R v Jellyman (1838) 8 C & P 604), in which case penetration must be proved, but emission need not (R v Reekspear (1832) 1 Mood CC 342; R v Cozins (1834) 6 C & P 351).

The 1885 Act must be seen in the wider context of social, economic and political shifts of the mid to late nineteenth century. Sodomy and buggery, twin signifiers of deviancy and unnaturalness, are no easier to pin down their place within legal discourse than the relatively recent concept of 'gross indecency' introduced by the Labouchere Amendment to the Criminal Law Amendment Act 1885 [44] which brought all forms of homosexual activity within the criminal law. The Act widened the range of offences covered by statute. By bringing into the

gaze of the law the new (though undefined) category of gross indecency, as Caplan (1981: 151) points out, masturbation as an intersubjective act now came within the criminal code. It is also important to note that the Sexual Offences Act 1967 did not abolish the offences of the 1885 Act as such: it merely excluded consenting adult males in private from the operation of this law [45].

In law, any act which involves contact with the genitals of another man (unless justified by some good reason, for example, a medical examination) is an act of 'gross indecency'. This means that masturbation in the presence of another man, even without contact taking place, will count as gross indecency. It is clear from R v Hunt [1950] 2 All ER 291 that there is no need for actual physical contact, if the two men behave in an 'indecent manner' and quite what gross indecency constitutes is far from clear. What is clear is that it is immoral and to be condemned [46]. The 1885 Act continues to have bearing on the law contained in Section 1 of the Sexual Offences Act 1967, which states that homosexual acts between men are not criminal if they take place between consenting adults over twenty one years old and in private. Such a seemingly straightforward section, open to a liberal interpretation, says much about the legal control of homosexuality, and is worth unpacking in some detail.

The notion of 'consenting adults' is a concept fraught with legal and philosophical problems and the age of consent itself might be read as a barometer of attitudes towards homosexuality [47]. While in 1967 (the year of the Sexual Offences Act) the age of majority was twenty-one, s 1 of the Family Law Reform Act 1969 has subsequently reduced the age of majority to 18. To date, the differential age of consent for homosexual and heterosexual acts remains controversial. By 'private' homosexual act the assumption would seem to be that the homosexual act in public will render the actor liable to charge under one of a range of public order offences such as that of indecent exposure. Legally, an act is in public if it

is in a place where more than one member of the public could see it being committed, whether or not anyone actually did see the act (R v Bunyan (1844) 1 Cox. 74: R v Thallman (1863) 9 Cox 388). It would seem that the act will not be illegal if it occurs in the bedroom of a house [48], and thus 'private' homosexual acts are no longer criminal. However, just because homosexuality is not criminal per se does not mean that it is lawful. In this respect it is similar to prostitution - not a crime, but clearly undesirable and contrary to public morality [49].

First, it is significant that a range of homosexual acts may well fall outside the 'protection' of s 1: male homosexual behaviour is, in many contexts, subject to sanctioning [50]. Secondly, where the act is itself deemed to be criminal, the person may then be charged before the 'homosexual act' takes place, that is, the person may be charged with intention that he, or another, should perform a homosexual act. This notion of the 'preliminary homosexual act' points to the general problem of legally defining what a 'homosexual act' in fact is. If the meanings of the act itself is far from clear, then what is its prelude? A glance, a stare, a touch or kiss? [51]. Definitional problems also pervade the of indecent assault [52] and, by s 32 of the Sexual Offences Act 1956, the crime of persistently soliciting or importuning in a public place for immoral purposes [53].

It is not simply that the law is concerned with the body, with sex, desire and male genital interaction. The historical shifts in both the form and content of the regulation of the male body and, in particular, the legal changes in relation to male homosexuality in the nineteenth century, are all fundamental to the construction of homosexuality per se. Together, these developments constituted a nexus of the new medical categorisations of homosexuality and the new legal prescriptions of the time. While the secularisation and codification of the law in European states followed different patterns, and with different structures (and different

influences of the catholic and protestant churches) by the end of the nineteenth century all male homosexual behaviour was subjected to some legal sanction. In this transition, the fusion of medical and legal discourses underscored the new conception of 'the homosexual' as a specific type of person, and it is this shift from a concern with acts to a concern with a type of person that is crucial to theorising masculinity.

The Homosexual Personage, Marriage and the Emergence of Hegemonic Masculinity

Though I have argued in Chapters 2 and 3 in favour of a de-centring of law when approaching relations between gender, power and the family, this is not to say that legal/juridical forms of regulation might not have a considerable power and effect at the level of producing structural shifts in the constitution of sexualities brought about by specific historical, social and economic changes. The criminalization of male homosexuality outlined in this Chapter constitutes a crucial moment in the establishing of a hegemonic form and a historic redefinition of masculinity itself. The 1885 Criminal Law Amendment Act represents an important moment in the transformation of men's relation to their own bodies as well as in relation to women. This transformation was produced in part through the activation of criminal sanction and through the legal redefinition of masculinity inasmuch as the Act can be said to have been symptomatic of the social production of a new type of person - the homosexual.

In 'The History of Sexuality' (1981) Foucault addresses the making of an individual, identifying techniques of examination and surveillance and the polarities of normal and perverse which are used to fit people out with sexuality. In particular, Foucault is concerned with how the human sciences have an active part in a 'perverse implantation' (1981: 43-4) whereby perversion becomes inner nature, everywhere present in the individual. Homosexuality, Foucault argues, was put

together as a "psychological, psychiatric, medical category" around the 1870's. The homosexual,

"...became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with a discreet anatomy and possibly a mysterious physiology. " (1981: 43)

Foucault terms this an "incorporation of perversions and a new specification of individuals". He continues

"Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle." (Foucault, 1981: 43)

This positing of the body and its activity as prior to the mental and social world it inhabits is compatible with the relation between law and the family presented in Chapter 3 (p 76 - 98). By taking a wider historical context, it is possible to locate the shifts in the gender order of the transition from feudal to early capitalist economy, and the subsequent changes in productive and social relations, as integral to shifting forms of regulation of homosexuality. This process has a clear socio-economic dimension. Foucault argues that, in the context of the bourgeois class struggle at the end of the eighteenth century, the bourgeoisie set its own body and sexuality "against the valorous blood of the nobles" (1981: 127-8). The concerns however were to change as the bourgeoisie subject "sought to redefine the specific character of its sexuality" against the working class (Foucault, 1981: 128) Such a position clearly points to the relation between the object of legal intervention (homosexuality) and its observers and legislators/researchers as complex and deeply problematic. It is, above all **historical**. At the level of legal intervention the categories and concepts such as 'homosexuality' and 'heterosexuality' are created in the very process of

classification, definition and giving meaning to peoples lives, be they heterosexual or homosexual. Foucault notes how

"Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species."(Foucault, 1981: 43: My Emphasis)

The discursive construction of the homosexual 'person' took place in and across legal, medical and psychological discourses [54], a new subject to be observed, policed and examined which demanded new ways of describing those who were 'inverts' or 'homosexuals', those who different from the normal and, to refer back to McIntosh's theorising of 'The Homosexual Role', not heterosexual. The shifting sexual economy involved not only changing definitions of homosexuality but also changing definitions of childhood and the family (as discussed in Chapter 3, p 85 - 98), of sanity and illness [55]. Taken together these developments are central to the constitution of this homosexual personage in the nineteenth century.

What do these developments mean therefore for the theorising of male **heterosexuality**? First, as we have seen, in the nineteenth century the law in relation to homosexuality changed significantly becoming, it may be argued, harsher and more punitive. Secondly, the construction of the homosexual personage, identified by Foucault and theorists informed by his work, involved a shift in conceptions of male sexual desire, and in particular the notion of male sexual desire as premised on a reductionist model of potential lust in all men. Bray (1982) concurs with Foucault's thesis, arguing that while homosexual encounters did occur in the sixteenth and seventeenth centuries (and before), the participant was viewed differently, both socially and legally. That is, though they may be treated 'badly', they were not systematically persecuted. Significantly, homosexual behaviour was seen more

as a potential lust in man (in all men) rather than a sexuality who spoke of the essential deviancy of its bearer.

This brings us to a third point, and the important step in considering the historical transformation in male heterosexuality these developments involved. The re-mapping of the male body which occurred in the latter part of the nineteenth century involved also a shift in the meaning of sexuality itself. That is, Foucault's argument must be seen as of wider implication than just the constitution of the homosexual and homosexuality; **it is the construction of sexuality and subjectivity itself, with heterosexuality as well as homosexuality, with which we are concerned.** As Weekes (1981: 107) argues

"Homosexuality only becomes a matter for social concern when sexuality as a general category becomes of major public importance. The debates on 'natural' sexuality in the nineteenth century, and particularly the focussing on the sanctity of the marital bond in social-purity discourse, by a necessary rebound demands the more refined control of extra-marital sexuality."

This point is fundamental, and it is the technologies, the sexual economy, of this marital sexuality that I shall proceed to analyse in Chapters 6 - 8. The "more refined control" of extra-marital sexuality" involved also the systematic valorising of the marital, the privileging of the 'natural' conjugal sexuality and the denial of the legitimacy of other forms of sexuality which marks out familial ideology (Chapter 1, 9 - 10). In this process the negation of homosexuality was (and remains) most important. Sodomy may be understood therefore as a 'catch-all', marking a distinction between non-reproductive and reproductive sexuality. The exhortations to normative (hetero) sexuality by judges, the dangers of deviancy stressed by sexologists and the general advocacy of the pleasures of heterosexuality addressed reproductive sexuality and privileged heterosexual intercourse, a sexual

relationship which is, I shall argue in Chapter 6, legally grounded in the marriage relationship. As sex, Weekes (1981: 107) notes, became ideologically privatised, within the legal institution of marriage (the sacrament the control of which became the mark of respectability),

"...so its variant forms needed ever more refined definition and control - and ever more discussion and debate and analysis...The inevitable contradictory effect was that a growing awareness of homosexuality, and ever-expanding explosion of works about it, accompanied its more detailed organisation and control. And this, in turn, created the elements of resistance and self-definition that led to the growth of distinctive homosexual identities." (Weekes, 1981: 108)

Interwoven with this shift in control of homosexuality is a both preoccupation with and a transformation within male sexuality and masculinity in legal discourse. The 'refined' social regulation cannot be understood as a straightforward programme of 'social control' of a particular population. It must be located within the wider network of familial powers addressed in Chapter 3. The 1885 Criminal Law Amendment Act may be read as a crucial moment in the constitution of heterosexuality as a 'normative' sexuality within law. However, we must not lose sight of the complexity of these powers, accord too much power to legal regulation nor reproduce the unproblematic dualisms of male/female, heterosexual/homosexual. As Foucault comments,

"...the idea that there have been repeated attempts, by various means, to reduce all of sex to its reproductive function, its heterosexual and adult form, and its matrimonial legitimacy fails to take into account the manifold objectives aimed for, the manifold means employed in the different sexual politics concerned with the two sexes, the different age-groups and social classes." (Foucault, 1981: 103)

There is no one universal marital sexuality, though I shall proceed to argue that this does not mean that it is not possible to identify aspects of what the law considers marital sex to entail. Power, I have argued, involves also resistance and Weekes refers to, with regard to the late nineteenth century legal changes on homosexuality, "elements of resistance and self-definition" as taking place: a

"contradictory effect was that a growing awareness of homosexuality, an ever expanding explosion of works about it accompanied its more detailed organisation and control..." (Weekes, 1981: 107-8)

For Foucault the discursive categorizing of homosexuality in part

"made possible the formation of a reverse discourse, homosexuality began to speak on its own behalf, to demand that its legitimacy or 'naturalness' be acknowledged" (Foucault, 1981: 101)

Legal discourse is part of this process. Following the theoretical position developed in Chapters 2 and 3, the law must be seen as part of a complex unity involving the opening up of the body to speech and to practice, not simply of constructing homosexuality and heterosexuality per se, but of **speaking of the body**, speaking of self and subjectivity and of constituting the body and desire as objects of power and resistance. The male body is, I have argued in this Chapter, fundamental to this process and nineteenth-century legal changes are an important factor (though not the **only** factor) in the constitution of a new range of homosexual identities, part of the historical circumstances in which shifts in male subjectivities took place. Similarly, legal developments in the twentieth century, for example in the 1970's and 1980's in the area of family law also testify to the dialectical, symbiotic, relationship between legal changes and dynamics within the gender order in which historic definitions of masculinity and

produced and contested (see, for example, Chapter 1, p 24 - 6 in relation to financial provision on divorce, custody and unmarried father's rights).

This point is most important, and has bearing on the following analysis of law with regard to heterosexual relations. The emergence of 'new man' (Chapter 4, p 122 - 3) indicates not simply a cultural shift in images of masculinity but also a historical reconstruction of masculinity at the level of subjectivities which is also oppositional, a resistance, to a form of masculinity against which it has been defined as alternative. That it might share with an authoritarian 'traditional' masculinity certain characteristics is not really the point for, as Carrigan et al (1985: 591) argue in relation to subordinated masculinities generally,

"In some historical circumstances, a subordinated masculinity can be produced collectively as a well-defined social group and a stable social identity, with some well recognized traits at the personal level."

This, it might be argued, is the case with 'new man', though recognising that this masculinity may well be limited to a specific social and economic cultural milieu. In relation to homosexuality, Foucault argues that if a divide is imposed at the prevailing ideological level, which the 1885 Act and the construction of the homosexual personage across legal and medical discourses did, it is necessary to explore the other possible forms of contestation which might emerge. One form was at a level where individual and collective processes fail to correspond, whereby stable masculinities might then fail to receive a social definition. This, I believe, is the case with many forms of 'effeminate' heterosexual masculinity and the kinds of anti-patriarchal masculinities envisaged by proponents of 'men against sexism' (Chapter 4, p 126 - 133).

There is, therefore, no one 'homosexuality', but rather 'homosexualities'. The nineteenth-century construction of the

homosexual and homosexuality must be considered alongside a recognition that it was at this time that sexuality itself, as a general category, became of public importance. The use of the plurality 'masculinities' developed in Chapter 4 applies equally to homosexuality: there is no such things as the homosexual or the heterosexual, and

"There is no question that the appearance in nineteenth-century psychiatry, jurisprudence, and literature of a whole series of discourses on the species and subspecies of homosexuality, inversion, pederasty, and "psychic hermaphrodisism" made possible a strong advance of social controls into this area of "perversity"...There is not, on the one side, a discourse of power, and opposite it, another discourse that runs counter to it. Discourses are tactical elements or blocks operating in the field of force relations; there can exist different and even contradictory discourses within the same strategy; they can, on the contrary, circulate without changing their form from one strategy to another, opposing strategy." (Foucault, 1981: 101)

The construction and regulation of sexuality occurs within an interdiscursive nexus of moral, legal and sexual considerations, a nexus of differentiated languages which address the body and are articulated at particular times and in particular forms. Certainly, social and economic transformations provide both preconditions and limits to legislative change. In this case, the 'official' definitions of a normative sexuality inscribed in law connect with wider economic and social shifts in society whereby male 'homosexuality' has become defined and recognised as deviancy from the heterosexual norm. This is carried through the twentieth century for, while recommending the decriminalisation of male homosexuality for consenting adults over the age of 21 in private, the Wolfenden Report (1957) continued a strategy of legal regulation whereby homosexual activity remains inherently unnatural and of a lower order to

heterosexual sexual expression (This strategy is most recently seen in Section 28 of the Local Government Act 1989).

It is now necessary to relate the above discussion of homosexuality to the analysis of masculinity in Chapter 4, particularly with regard to the attempts to define masculinity (p 110 - 119). This is to return to the question of theorising masculinity per se but in a way which is able to integrate both questions of subjectivity and the experience of the body within an analysis which accommodates the feminist insight that relations between men and women are ones of power and that in this network of power masculinity is most important. In so doing, it is necessary to recognise men as a individual social agents as well as a collectivity, to transcend the limitations of both 'men against sexism' and 'men's liberation' (Chapter 4, p 126 - 37) in terms of praxis, and to theorise masculinity in such a way as to avoid collapsing into a reductionist essentialism.

Conclusions

Theorising Masculinity:

Law and the Construction of Hegemonic Masculinity

Connell (1987) argues that hegemonic masculinity is produced not so much to stabilize a social order but rather as part of a "collective project of oppression."

"The subordination of women and the marginalization of homosexual and effeminate men are sustained neither by chance nor by the mechanical reproduction of a social system, but by the commitments implicit in conventional and hegemonic masculinity and in the strategies pursued in the attempt to realise them...The collective project of oppression is materialized not only in individual actions but in the building up, sustaining and defence of an

institutional order that generates inequalities impersonally." (Connell, 1987: 215)

The law is fundamental to this institutional order. The concept of 'hegemonic masculinity', developed in particular by Carrigan et al (1985) and Connell (1987), takes as its basis those social and legal relations which constitute the gender order, and is concerned to explain the processes whereby and within which one particular form of masculinity assumes a social 'hegemony'. This requires some explanation. Masculinity and femininity, I have argued in Chapter 4, are not settled by biology, but produced historically. In questioning the nature of the relation between the biological and the social

"...the evidence about masculinity, and gender relations at large, makes more sense if we recognise that the social practice of gender arises - to borrow from the terminology of Sartre - in contradiction to the biological statute. It is precisely the property of human sociality that it transcends biological determination. To transcend is not to ignore: the bodily dimension remains a presence within the social practice. Not as a 'base', but as an object of practice. Masculinity invests the body. Reproduction is a question of strategies. Social relations continuously take account of the body and biological process and interact with them. 'Interact' should be given it's full weight. For our knowledge of the biological dimension of sexual difference is itself predicated on the social categories..." (Carrigan et al 1985: 595)

Thus, in the field of interaction sexuality and desire are constituted as both pain and pleasure by social injunction and prohibition. This is consistent with the theorising of law and power in Chapters 2 - 3 (eg, p 76 - 85). I believe masculinity might usefully be viewed as a process, rather than as a fixed entity [56]. Masculinity is not an object that we might reach out and touch, or examine in laboratory conditions. Masculinity understood as a process is constantly constructed within a

historically evolving social structure. Understood in this way, the construction of masculinity is a complex process taking place over the length of time. Certainly, it might seem, empirically, that the majority of boys would want to acquire a form of masculinity which is socially acceptable. Connell (1983: 22) makes the point that, in relation to an adolescent repudiation of femininity on the part of males, that it would be

"...wrong to presume, just because there are acute anxieties involved in the formation of hegemonic masculinity, that they persist unchanged as a permanent insecurity within masculinity...I disagree profoundly with the idea that masculinity is an impoverished character structure. It is a richness, a plenitude. The trouble is that the specific richness of hegemonic masculinity is oppressive, being founded on, and enforcing, the subordination of women. Most men do become secure in their physical masculinity. It isn't just a matter of the end of puberty, the first 'nocturnal pollution'..., the breaking of the voice and the pleasure of having to shave. **It is crucially, a social process, a matter of the social practices that head boys into adulthood.** (Connell, 1983: 22: My emphasis))

Even in Honore's (1978) analysis of law and homosexuality, which I have discussed above, it is recognised that homosexual sexual identity is not necessarily dependent on an essentialist biological predisposition (though at points Honore comes close to arguing this, eg p 87), and that social and cultural factors might influence the construction of gender identity. Within such a social construction of gender, the law has a crucial role to play in either the encouragement or resisting of homosexual gender formation. According to Honore,

"As with any process of learning there are various ways in which the process of learning to be heterosexual **can go wrong**. A boy may take his mother than his father as a

model of behaviour of a certain stage of his development, or a girl her father rather than her mother." (Honore, 1978: 88: My emphasis)

This implies a normative direction: it can go 'right' and some masculinities may be more 'correct' than others. This is consistent with the notion of 'masculinities' I have presented in Chapter 4 (p 119 - 121) and brings us to a point which is most important, for to accept the plurality 'masculinities' is not to say it makes no sense to speak of forms of masculinity as being more or less dominant both legally and culturally than others. Not all ways of being a man are accorded equal worth. In particular, the structural and psycho-sexual tensions within hegemonic masculinity are themselves difficult to resolve within emotional patterns of exclusive heterosexual attachment, and it is here that I believe the discussion of male homosociality discussed above and, in particular, the exclusion of women from all male practices, must be seen as significant. Ultimately, the abstract determination of 'male' and 'female' are themselves at issue in the construction of 'masculinity' as heterosexual, normative and natural:

"For male sexual response to be aroused by any member of a large category of women does not require free-floating affect, ie, a quantum of lust roaming around looking for an object, so much as a capacity for ready physical response coupled with **a massive blocking out of men as emotional objects.**" (Connell, 1983: 29-30: My emphasis)

The dynamics involved in the (re) negotiation on a daily basis of the individual male's forming gender identity within the culturally dominant and socially prescribed forms of masculinity are far from stable. This is not to present a model that is in any way fixed (social expressions of sexual desire are not given), but it is to locate the range of possibilities in a process involving the negotiation of male gender identity.

Masculinity may therefore be understood as in a continuous process of (re)negotiation. The embedding of masculinity is social, with all the contradictions that this entails; it is , historical and permanently in flux. As Connell argues (1983: 30-1)

"The most striking thing about the construction of hegemonic masculinity is the length and the complexity of the process...it is not achieved in early childhood, nor in the Oedipal period, nor even by the end of schooling, but over a span, usually of twenty-years or more."

It is in this context that the concept of hegemonic masculinity may be understood, Connell (1987: 248) suggests, as a crucial device at work in the setting up of a dichotomised sexual ideology. The starting point for the use of the concept of hegemony in relation to masculinity can be found in Gramsci's concept of hegemony in the notion that a class and its representatives exercise power over subordinate classes by means of a combination of coercion and persuasion [57]. By 'hegemony', therefore, is meant the ability to impose a particular definition on other kinds of masculinity. 'Hegemony' in this sense is referring to a specific historical situation. As a culturally exalted form, hegemonic masculinity may or may not actually correspond to individual men's lives, but that is not the point.

"'Hegemony', then, always refers to a historical situation, a set of circumstances in which power is won and held. The construction of hegemony is not a matter of pushing and pulling between ready-formed groupings, but is partly a matter of the formation of those groupings. To understand the different kinds of masculinity demands, above all, an examination of the practices in which hegemony is constituted and contested - in short, the political techniques of the patriarchal social order." (Carrigan et al, 1985: 594)

The familial ideology of romantic love is premised on a naturalised sexual dichotomy and is reproduced in the cultural nexus in such a way as to involve specific representations of masculinity which conform to, or fail to live up to, suitably 'romantic' ideals of gender and expectation [58]. For this reason I have, in Chapter 4 (eg, p 123), discussed the cultural dimension in which representations of masculinity have been produced. Sexual difference is reinforced not just legally but also culturally by numerous exhortations to the appropriateness of a certain form of heterosexual male response. These cultural resonances of 'hegemonic masculinity' are identified by Connell as a form of masculinity naturalised, for example, in such representations as the cultural 'hero' [59]. For Connell, a focus on such 'exemplary' individuals becomes a way of justifying the privileges which are shared by the unheroic majority of men (1987: 249). Connell is concerned to present a distinction between hegemonic masculinity and forms of masculinity that are heterosexual without being directly organised around domination. The latter are termed conventional masculinities, and these notions of hegemonic/conventional/subordinated masculinities have, I believe, an important bearing on the analysis of gender, law and power presented in Chapters 2 and 3. Both hegemonic and conventional masculinity are founded on a claim to power which the hegemonic form carries through in all its consequences, but which 'conventional' masculinity does not.

"Conventional masculinity is, to an extent, hegemonic masculinity in bad faith. Men can enjoy patriarchal power, but accept it as if it were given to them by an external force, by nature or convention or even by women themselves, rather than by an active social subordination of women going on here and now. They do not care to take responsibility for the actions that give them their power. Hence their often slightly shamefaced admiration for the heroes of hegemonic masculinity, the footballers, jet-pilots, wife-beaters and poofter-bashers who do." (Connell, 1987: 215)

This depiction of conventional masculinity as "hegemonic masculinity in bad faith" is compatible with and effectively describes the 'men's liberation' perspective (Chapter 4, p 133 - 7). It also highlights the weakness of 'role theory' (Chapter 4, p 111 - 13) in its reification of the external processes which are deemed to construct gender and negation of human agency. To transpose the concept of hegemony to the study of masculinity, as Connell and others have attempted, hegemony is turned to signify relations between classes of men and the social forces in which masculinity is constructed. Hegemonic masculinity thus is identified as having the consent of the 'class' of men generally through the creation of alliances through political and ideological struggle. Feminism presents a fundamental political challenge to the power of hegemonic masculinity and it is constructions of this hegemonic masculinity which is to be found systematically in areas of legal discourse concerned with the regulation of familial powers.

While I shall examine this with regard to marital sexuality in Chapters 6 - 8, constructions of hegemonic masculinity have already been seen in this thesis: for example, in relation to the 'breadwinner masculinity' and the linking of masculinity and employment (p 20 - 23), in relation to property entitlements and cohabitation (p 27 - 28) and the exclusion of homosexual relationships from the definition of 'family' in law (p 13). It is precisely such a conventional masculinity which underlies the campaigns of Families Need Fathers for joint custody [60], the reassertion of a traditional masculine authority which is espoused by the Campaign for Justice on Divorce in seeking legal reforms of financial provision [61] (p 24 - 5) and an institutionalised hegemonic masculinity which is fundamental to the gendering of the state (p 71 - 73) and the public/private dichotomy (p 67 - 68). Family law is an important political technique in both the constitution and contestation of hegemonic masculinity and reproduction of patriarchal relations. The strategy of hegemonic formation involves law in a variety of forms in ascribing **normative**

sexualities through legal means. The legal structuring of heterosexual familial relations (Chapters 6 - 8 below) is fundamental to this project. The central normative sexual bifurcation, I have argued in this Chapter, is between heterosexuality and homosexuality at the level of definition of hegemonic masculinity in the first place. The mappings of the male body in legal discourse in the following chapters may 'fine tune' male sexuality in specific ways in familial relations, but this primary dichotomy is fundamental.

In conclusion, homosexuality represents a starting point for an analysis of masculinity which might locate fully the historical character of the construction of gender. Crucially, the construction of homosexuality is the history also of the construction of heterosexuality, the norm against which the deviancy is to be measured. Homosexuality is a historically specific phenomenon and its social organisation distinguishes between homosexual behaviour and homosexual identity. In so much as the 'homosexual' is a historically specific type of adult male, the notion of the 'homosexual career' is indicative, not just of a development within a deviant grouping of men, but of a significant change in masculinity per se [62].

Within the structuring of legal discourse around a series of binary oppositions, the homosexual/heterosexual dichotomy can be understood alongside and in connection with oppositions such as vice/virtue, cleanliness/disease, natural/unnatural and ultimately public/private. These divisions are fundamental to the liberal legal discourse discussed in Chapters 2 - 3. Constructed in opposition to the 'natural' order of the marital as the legitimate site of sexual activity (if not pleasure), the legal construction of homosexuality fractures masculinity in a manner whereby a fundamental division in the hegemonic process might be achieved. Hegemonic masculinity is heterosexual, and the 'homosexual' (outside marriage, outside the familial) transgresses both nature and law.

I have argued that psycho-sexual dynamics between men relate also to shifts in the relation between men and women. It is not surprising that women's liberation should often be linked with the emancipation of homosexuals, though this is **not** to say that the two projects are co-terminous [63]. Changes in defining homosexual men by reference to hegemonic masculinity are related to changes in the social position of women and, as Carrigan et al (1985: 598) argue, the reconstruction of the history of homosexuality has taken place within the context of feminism and the emergence of new sexual movements concerned with a politics of diversity [64]. Perhaps this should not be so surprising for, as Weekes notes (1981: 117)

"The striking feature of the 'history of homosexuality' over the past hundred years or so is that the oppressive definition and the defensive identities and structures have marched together...In terms of individual anxiety, induced guilt and suffering, the cost of moral regulation has often been high. But the result has been a complex and socially significant history of resistance and self-definition..."

Alongside feminism, theorists of gay liberation [65] have contributed crucial insights to the sociology of masculinity and gay liberation has sought to affirm homosexual identity as positive, arguing that it is social definitions of masculinity which are the 'problem' and not an 'essential' deviancy on the part of gay men.

Analysis of masculinity has now reached a crucial stage. Masculinity, as analysis of the construction of the homosexual in this Chapter has made clear, is historically contingent and is constructed within legal discourse as having a normative character: what I have termed hegemonic masculinity. It is the institutionalisation of heterosexuality in the family which is fundamental not only to women's oppression but also to power of this masculinity, and it is the nature of these sexual relations in marriage to which I now wish to turn in the

following Chapter. The position we have reached is one where it is **heterosexuality** as it is presently organised within which a central dimension of the power that men exercise over women is to be found. The significance of law is that it is through the mode of legal regulation that processes of naturalization - as motivated collective practices - are institutionalised in the (valorized) legal discourse to override biological facts. The appeal to nature - to deny homosexuality, to privilege heterosexual relations - occurs by way of justification rather than explanation. Techniques of naturalization in law work in part by the laws exclusion of that which does not fit the implicit narrative of familial ideology. This naturalization is particularly clear when considering the place of male sexuality in marriage. The ways in which the law excludes at the moment of definition/articulation homosexuality from marriage and establishes a legal definition of what 'sex' actually involves is evident in the consideration of transsexualism in law. If the law is part of the assigning of a social definition with regard to homosexuality, then the question needs to be reversed: what does the law also tell us about male heterosexuality?

CHAPTER 6

MARRIAGE AND MALE SEXUALITY I: TRANSSEXUALISM AND THE FORMATION OF MARRIAGE

Introduction

"Many years, it seems, must pass before the general public and it's lawgivers will base their actions on the fact that men are animals and that sexual misdemeanours may be caused by the excessive production of a hormone or by a deficient education whereby the natural sexual stimuli may be controlled. Both these factors may be responsible for a single sexual aberration, and neither is under the individual's control. We do not apply our biological knowledge to the treatment of nymphomania in girls, nor to the homosexual or homicidal tendencies which sometimes occur in men. In this field of humanism we have advanced only a very small way from the time when a woman with a beard, the consequence of adrenal hyperplasia, was regarded and treated as a witch; or a patient with a disease of the brain was put in chains and punished." (Burrows, 1949: 169)

Concluding with this quotation from Burrow's discussion of the 'Biological Action of Sex Hormones', Bartholomew's 1960 article '"Hermaphrodites" and the Law' pleads for the courts and lawyers to "...take some account of the facts known to every medical student." (Bartholomew, 1969: 112) What these biological 'facts' known to students are, however, is far from clear. I have argued in Chapters 4 and 5 that masculinity is socially constructed, and that while physical/biological differences between 'man' and 'woman' may ground their respective places in the world as gendered males and females, this does not occur in fixed or pre-determined ways. I have sought to integrate within a social theory of gender the inevitability of human choice, of praxis, agency and

possibility. This perspective is very different from the 'progressive' humanism envisaged by Burrows, in which he bemoans the fact lawgivers fail to recognise that 'men are animals': instead, he turns to an explanation of 'nymphomania...homosexual and homicidal tendencies' as resulting from a 'deficient education'.

The claim to scientific 'fact' this reasoning involves - to law to control 'natural' sexual stimuli - constitutes a hierarchic discourse which negates, rather than valorizes, human agency. To recognise biology and the human body as a base/site of praxis is not to privilege human consciousness and superstructural determinations of behaviour to the extent of 'losing' the body in a social theory of gender, but is to integrate the politics of the body within such a theory. It is in this context that an analysis of transsexualism and law questions not simply the legal construction of sexuality in marriage but also the very constitution of sex and gender in law per se. It is also the starting point for analysis of the sexed male body in law.

Taking as a theoretical premise Simone de Beauvoir's comment that "One is not born, one rather becomes a woman" (1972: 295), recent feminist scholarship [1] has addressed indeterminate sex and the law, unpacking those constructions of femininity which inform debates in this area. Raymond (1980) argues that transsexualism is a consequence and symptom of a rigid gender dichotomy, a result of patriarchal stereotyping of women and femininity [2]. O'Donovan (1985: 1985a) contests the 'primary dichotomy' of the polarisation of the sexes into 'male' and 'female' in the law's treatment of transsexualism, a dichotomy which she argues is based on physical difference (the possession, or absence, of a penis). It is the construction of this physical difference in law which I wish to investigate in this Chapter. An analysis of the law with regard to the formation and annulment of marriage involves a questioning of the inter-relations of marriage, gender and law, and the relation of all three to the structure of power relations

between women and men. Transsexualism is firmly within the terrain of sexual politics and constitutes an important part of the study of family, law and gender.

Legal regulation of the formation of marriage has been subject to considerable historical variation [3], and a full discussion of the history of marriage laws is outside the scope of this Chapter. Contemporary texts on law and the family have argued that legal regulation of marriage - in the sense of the rules governing the entry to and exit from legal marriage - is decreasing [4]. Citing the repeal of statutes and the increasing autonomy of individuals in choosing whether to marry or not, it may seem that there exists an increasing freedom of choice and social acceptance of alternative forms of household structures which may render the decision whether to marry less pressing. Trends in cohabitation generally have been taken as indicating that marriage is a fading institution [5], while it might alternatively, and plausibly, be argued that marriage remains a popular institution, at least in the numerical sense that the vast majority of adults do marry.

In this and the following Chapters I will analyse aspects of the concepts of the void and voidable marriage, of who can marry and of what constitutes a legal marriage at both the procedural and substantive levels. The plight of the group of people termed 'transsexuals', although numerically relatively small among the general population, is of crucial significance in understanding the law's treatment of the concepts of 'sex' and 'gender'. What unites this and the following Chapters is a concern to analyse the meaning of sexual intercourse in this area of law and address the wider significance of the legal issues raised by transsexualism and the non-consummation of marriage. It is not my purpose (nor would it be practical) to overview in detail the multifarious methods presented for determining sex and assess their relative viability and merits with a view to presenting some 'conclusive' final and purportedly objective determination of what actually does constitute a 'man' and 'woman'. Rather, it is my intention to

focus on the interrelation and effects of those discourses which do purport to address such questions and, in particular, the constructions of masculinity within the interdiscursive nexus of law and medicine in legal judgments, articles and monographs which, in different ways, concern themselves with transsexualism.

The Void Marriage

The wider effects of sex signification in law transcend issues of who may and may not marry. In particular, transsexualism and the issue of assigning sex generally has implications within the criminal law [6] and defining male and female for the purposes of employment [7], social security, sex discrimination and taxation law [8]. While I will address these areas in as much as they relate to my immediate concerns, it is important at the outset to recognise this wider context.

By s 11 (c) of the Matrimonial Causes Act 1973 a void marriage [9] will be one in which, celebrated after 31st July 1971, "the parties are not respectively male and female." Further restrictions in the section relate to prohibited degrees [10], over which recent years have seen a considerable relaxing [11], age [12] and bigamy [13]. The present law governing the procedural regulation of the formation of marriage is to be found in the Marriage Act 1949 [14], as subsequently amended [15]. The complex regulations require the registration of marriages, the establishing of legal requirements relating to the preliminaries of marriage and the place and method of solemnization [16]. The legal 'nature' of marriage is open to many interpretations and definitions, and the following constituents to a legal marriage might be isolated: that it is a heterosexual and monogamous union (that is, two people of the opposite sex who engage in intercourse with each other) and that the parties have freely consented to a marriage in which there is at least a minimum sexual relationship. As clear from s 11, the parties must not be related to each other in a

particular way, must have the appropriate capacity to marry and must have complied with the necessary formalities. Though 'marriage' may not be defined in legislation, it's judicial definition has been referred to as "the voluntary union for life of one man and one woman to the exclusion of all others" (Hyde v Hyde and Woodmansee (1866) L.R. 1 P & D 130, 35 L.J.P. See further Poulter, 1979)

As the model of legitimate marital relations sanctioned by the provisions of ss 11-16 of the Matrimonial Causes Act 1973, compliance with these provisions brings about the legal consequences which accompany entrance to the married state. Canon law concepts continue to retain a significance [17] in this area, and while there exist a number of important differences between the void and the voidable marriage [18], there are also similarities and, it may be argued, the distinctions are becoming increasingly blurred [19]. Indeed, both retaining the concepts and the necessity for formalities per se have been questioned in recent years [20].

Men Only Marry Women

S 11 (c) applies to homosexual 'marriages'. In English Law, a man may not marry a man and a woman may not marry a woman. That is to say, women only marry men. Heterosexuality in marriage is thus legally compulsory in that the institution of marriage is preserved and reserved for women and men. However, a distinction may be made here between homosexual acts and legally recognised relationships. The law that homosexuals may not marry does not exclude homosexuals from marrying, provided that individuals with a homosexual orientation marry someone of the opposite sex [21]. Section 11 (c) is not so much concerned with homosexuality in marriage (which may be dealt with by the law on consummation/nullity, or under the divorce grounds of the Matrimonial Causes Act 1973 depending on the circumstances) as with the exclusion of certain types of relationship at the point of entry to marriage. Marriage is the

privileged institution for adult heterosexuality, an institution in which there is at least the potential for heterosexual sexual intercourse.

Cases have arose where the parties to the marriage have not being 'respectively male and female'. That is, there is no question of sex re-assignment surgery, though there may have occurred deceit which then allowed the marriage to take place. In Talbolt (Otherwise Poyntz) v Talbolt (1967) 111 Sol. J. 213 a widow married a 'bachelor' who, it transpired, was a woman. The petitioner discovered the true state of affairs on the day after the ceremony, but lived with the respondent for almost a year. Four years later proceedings for nullity were issued. It was held, by Ormrod J, that the marriage was void - there was no marriage. In the judgment in the Canadian case of Re North et al and Matheson [1975] 52 D.L.R P 280 [22] the validity of a homosexual 'marriage' was denied through reference not simply to cases such as Hyde but to dictionary definitions and what the court took to be the 'universally accepted meaning' of marriage. The court considered that

"It is of equal importance in the determination of the issue before me that the meaning of marriage is universally accepted by society in the same sense. "Marriage" is defined in Webster's Third New International Dictionary (1961) as: 'the state of being united to a person of the opposite sex as husband or wife; the mutual relation of husband and wife; wedlock; the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family'."

The judgement in Re North et al and Matheson collapses in a tautologous determinism [23] in which it is then held to be 'self-evident' by Philp. Co.Ct. J that "...the ceremony performed on February 11, 1974, was not a ceremony of marriage, it was a nullity. There was nothing before the respondent to be registered..." (P285). On this view marriage is predicated on

biological imperatives which exclude entry to the institution from same-sex relations regardless of the considerable legal problems which might follow from such a position [24]. Advocates of legal reform which would enable homosexuals to 'marry' argue that the criteria for establishing a test for validity of a marriage should be based on commitment to a relationship, and not matters of chromosomes and genitals or of 'biological sex'. That homosexuals may not marry establishes marriage as an institution for heterosexual sexual activity and reinforces the arguments advanced in Chapter 5.

The Legal 'Problem' of the Transsexual

By law [25] the birth of a child must be registered within 42 days, and the infant's birth certificate will record the sex of that child. In the majority of cases the assignation is correct and it would seem that sex classification is an unproblematic and uncontentious question. Where a mistake of assignation is made, it is possible for a certificate to be amended in cases of medically certified error [26]. In establishing sex classification, the customary answer to the straightforward question of whether the child is a male or female is established by a simple look at the baby's external genitalia.

However, a number of possible errors may occur. First, a straightforward error of entry may be made. The registrar may enter 'male' when the child is in fact 'female', or vice versa. Secondly, and more understandably perhaps, the sex of the infant may be indeterminate, that is to say it may seem to be a simple matter of examination of external genitalia, yet on further examination the biological sex of the child may itself be indeterminate. Sex classification errors may occur, for example, because of the presence of gonads of both sexes, too few or too many sex chromosomes, a confusion over the assigned sex or perhaps due to missing internal sex organs. This has arisen in the case of the 'hermaphrodite' [27] and here it is

not simply that the sex assignment is incorrect, but that there actually exists the biological signifiers of more than one sex.

Thirdly, as in the case of the transsexual, an individual may be dissatisfied with her/his assigned sex category at birth. Here the person believes, despite the 'biological evidence' to the contrary, that they are psychologically not a member of sex indicated on the birth certificate. The 'fixed' content of the certificate is therefore of great importance, for it is the law which, by holding that the birth certificate cannot be changed, constitutes a cause of distress to those transsexuals who wish to live their lives according to their post-operative sex, perhaps wishing to marry (and unable to do so by virtue of s 11 (c)). For these transsexuals the status of the birth certificate is central to their legal status in many areas of life. As perhaps the most celebrated of all transsexuals put it,

"The fact that I have proved that I have been a woman for the past 20 years and that I have been a very happy person for that time shows that they should catch up with events." (April Ashley, The Times 7/6/80)

The medical determination of sex signification is both complex and contentious. O'Donovan argues

"English law's approach to issues of sex and gender proceeds on untested assumptions about biological determinism. From the entry on the birth certificate to the drawing up of the death certificate persons are assigned to category female or category male." (O'Donovan, 1985a: 9)

There are a range of possible ways of 'testing' sex and alternative 'explanations' vie for acceptance. O'Donovan (1985: 64-70) concludes that

"...there is no clear test for sexual classification, but there are a variety of practices that vary according to the branch of the law in question."

According to Smith (1971: 965) a number of variables affect sex determination: chromosomal sex, gonadal sex, hormonal sex, the possession of internal accessory organs (the uterus in the female, prostate in the male), external genitals, assigned sex and the gender role. Within all of these it is possible for there to exist considerable variation (for example, in the quantity of the hormones testosterone and oestrogen present in the body, which vary both from person to person and within individuals according to psychological state, hormonal cycles etc.) There is, Smith argues, not necessarily any predominance of any of these variables. All vary according to contingent factors and all are constructed differently in different areas of law [28].

As we shall see in relation to non-consummation of marriage, opinions differ as to whether the final determination of sex assignation is a 'medical' or 'legal' fact: does the medical finding determine the legal outcome, or vice versa? According to Bartholomew (1960: 88) the question of 'what is sex' is to be best left to those who know of such things, that is, the medical profession, it being impractical for the law to abandon the two-sex assumption and debate the highways and byways of sex determination literature. Smith concludes (1971: 972)

"Ultimately it is not for the law to decide the sex of an individual. The law must accept medical decisions in this area and give them the legal effect that is in the best interests of the individual and society. What those best interests are is difficult to determine, especially since the issues are clouded by conventional morality and religion."

One problem, of course, is that 'medical decisions' are not necessarily consensual. Edwards concurs:

"The law must largely depend on and follow the lead and guidance of medicine, but in the last resort the law has to be satisfied that the particular medical classification is consonant with the legal principles applicable in each case for the law cannot adopt definitions and classifications, however academically flawless, if they are out of line with the practical relationships of everyday life. " (Edwards, 1959 :127)

Ormrod (1972) recognises that medical decisions do not ultimately give an answer to the question 'what is sex'. Nonetheless, in the case of transsexualism the 'practical relationships of everyday life' to which Edwards refers are ones of considerable confusion and complexity. It is necessary to examine in more detail the phenomenon which presents such difficulties and has so concerned legal and medical academics.

Transsexualism

According to Bowman and Engle (1957) the first scientific discussion of the impulse to dress in the clothing of the opposite sex, was made by Krafft-Ebbing, the term 'transvestism' being first used by Hirshfeld [29]. Legal regulation of cross-dressing certainly has a long history. Bowman and Engle (1957: 584) note how the earliest section of the Judaic code of sex morality prohibited the wearing of the attire of the opposite sex:

A woman shall not wear that which pertaineth to a man, neither shall a man put on a women's garment; for all that do so are an abomination unto the Lord their God. (Deut. 22, 5)

Though the authors note that "...very few reports describe the surgical transformation that is demanded by certain male transvestites...", it is clear that transvestism and transsexualism are not the same thing. The transvestite may

obtain gratification from dressing in the clothes of the opposite sex, but this is not transsexualism.

"The term transsexualism has been applied to the person who hates his own sex organs and craves sexual metamorphosis. Transvestism in the broad sense may cover a wide range of cross dressing and sexual behaviour and feelings. At one extreme the individual may occasionally like to dress up in clothes of the opposite sex, but without overt deviant sexual behaviour. At the other extreme, he dresses and lives his whole life in so far as possible as a member of the opposite sex. At this extreme, too, impulses vary. One person may consider life useless without sexual transformation while another contents himself with fantasised changes." (Bowman and Engle, 1957: 583)

A degree of 'transvestism' is culturally sanctioned [30], and Bowman and Engle conceded in 1957 that

"...in our country, the wearing of jeans, overalls, slacks, shirts, and other male attire is a matter of convenience and custom to girls and women at various times and places. Similarly, men's styles in certain eras copy the silks, ruffles, elaborate hair dress and jewelry used by women in other eras." (1957: 583)

Just as expressions of cross-dressing are historically variable therefore, transsexualism is a phenomenon which must be viewed in the social and historical context in which a range of signifiers of gender are accorded meaning. Transsexualism has at least two dimensions to it: the medical/scientific and the social/psychological.

Transsexualism has usually been regarded by the medical profession as of psychological rather than organic origin [31], and from Benjamin's celebrated 1966 study 'The Transsexual Phenomenon', both doctors and lawyers have produced on the

subject a voluminous literature addressing the medical and legal anomalies of 'gender-role disorientation' [32]. What is clear is that the **realisation** for the transsexual of those varying impulses towards sexual transformation which Bowman and Engle identify depends on the sophistication and availability of the surgery which might bring 'sex change' about. As medical techniques have progressed sex-change operations have occurred and attitudes to transsexualism have shifted as associated legal problems have emerged as a topic for debate [33]. (For example, in the light of the U.S Civil Rights Act 1964 and the Sex Discrimination Act 1975, sex discrimination law is of particular relevance [34]). The developments of drug treatment, (oestrogen, testosterone and androgen) and surgery (vaginoplasty, penis-graft and mastectomy) must be placed within the wider context of provision of health care services [35].

Psychologically, the argument that transsexualism might involve a gender 'dysfunction' is premised on a male/female polarity and the establishment of a rigidity in sex roles at birth. For the transsexual there is a subjective confusion when faced with a rigid dichotomous structure of man and woman whereby an individual must belong to either the male or female sex. Thus, the transsexual may be anatomically of one sex but believe that s/he belongs to the other sex. Transsexualism is neither a simple matter of sexual preference or necessarily 'about' modes of sexual conduct but should rather be located in the terrain of experiential psychology, subjectivity and identity. The transgression of transsexualism is the subjective confusion it involves and not the sexual behaviour which it (possibly) involves. As we have seen, while the law is concerned with excluding particular relationships from the institution of marriage, when it comes to transsexualism an individual may 'seem' to be one thing and yet be another.

It is perhaps for this reason that the law has found transsexualism such a difficult subject to deal with. The psychological and cultural dynamics within gender construction valorise questions of identity, subjectivity and desire and the

(super)structural determinants by which they are constructed. The structuring of emotional cathexis is central to the case of the transsexual: emotion, cathexis and the forces of desire and the body for the transsexual override all other considerations, such as biological sex and the legal 'fact' registered on the birth certificate. For the transsexual, any notion of a coherent, unified and 'stable' subjectivity/gender identity structured around a dichotomous sex/gender system is fractured, 'blown apart' by the lived tensions of sex, gendered expectation and desires.

In the light of the arguments of Chapters 4 and 5, the 'plight' of the transsexual can be seen as of fundamental importance to hegemonic masculinity (p 168 - 177). I have argued in Chapter 5 that hegemonic masculinity is premised on the establishment of dichotomy and hierarchy - between male/female and within the sexes. A paradox underlies the transsexual: for the transsexual, social gender expectations (cultural norms of masculinity and femininity) are both misplaced and denied. They are rejected. Yet at the same time, hegemonic masculinity and an emphasised femininity are also confirmed and enforced. We are not so much here dealing with 'subordinate' or 'alienated' masculinities (p 173) therefore as with the concept of masculinity itself. The male to female transsexual is denying all the cultural forms and structures of masculinity on offer per se, to the extent of wishing to physically change that most marked indicator of gender itself, the human body.

Sex, Gender and Marriage

Though the number of transsexuals may be small relative to the general population, there has occurred a "persistent trickle" (Bradney, 1987: 350) of cases since the first (apparent) reported British case of Re X [1957] Scots Law Times 61 [36]. The sorts of problems which transsexualism may raise in the area of matrimonial law are evident in the case of Dolling v

Dolling (1958) The Times 23/5/58 [37], a case in which a sex-change after marriage was held to not constitute cruelty for the purposes of establishing grounds for divorce. Similarly, in the earlier case of Re Swan (1949 Unreported [38] property was left to a woman who had, during the course of her life, changed sex and died as a man. The court held that the estate could be dealt with on the footing that they were the same person, commenting "There is nothing very terrible about this, it is a peculiar case, but not unknown." From these two cases it might seem that there is nothing so very disturbing and unnatural about transsexualism at least when the main issue is divorce grounds or inheritance provision.

The most controversial and certainly the most frequently debated legal problem that has arisen around transsexualism is that of the validity of postoperative transsexual marriages and, related to this, the ability of the transsexual to change their birth certificate, passports and other documents of legal significance to accord with their new identity. At the heart of the various legal problems which these raise is the legal status of the 'new' sex of the transsexual, a problem which has arose across jurisdictions [39]. In English law since marriage is, following s 11 (c) Matrimonial Causes Act 1973 between two people of opposite sex, the law has sought to pass judgment on the legal sex of the post-operative transsexual. The post-operative transsexual who marries might have believed that their relationship is heterosexual, valid and thus 'normal' only to find that it is in fact homosexual, 'unnatural' and thus void by s 11(c) .

Corbett v Corbett (Orse Ashley) [1971] P 83, [1970] 2 All E.R. 33 is perhaps the most celebrated and influential of the cases on transsexualism (despite its status as precedent), in which Ormrod J. (as he then was) laid down what is often taken to be the fundamental definition of sex and gender in English law. George Jamieson was registered at birth and raised as a male. After employment as a merchant seaman and female impersonator, and after a suicide attempt, in 1960 at the age of 25 he

underwent sex-reassignment surgery and adopted the name April Ashley. April Ashley worked as a female model, and was recognised for National Insurance purposes as a woman. Arthur Corbett, a transvestite who had sexual relations with 'numerous men', then married Ashley. Thus, though Ashley was classified as male at birth, both married with full knowledge of the operation. The respondent, Ashley, possessed male external genitalia, and had then been treated with female hormones involving the removal of male genitalia and the construction of an 'artificial female vagina' (P 90), though a chromosome test after the operation showed the cells were male. The 'marriage' proved a failure and action was brought to have it declared null and void on the grounds that both of the parties were male, and of incapacity or wilful refusal to consummate.

After the presentation of expert medical testimony regarding sex-determination, the court held the marriage to be null and void. The application was granted by Ormrod J., holding that at the time of the marriage ceremony both respondent and petitioner were male and therefore there could be no marriage in English Law. *Corbett v Corbett* makes clear not just that marriage is not permitted in such cases but also that, at least in respect of matrimonial law, surgery and hormone treatment do not constitute a change in the sex assigned to a person at birth. In reaching this decision, the law in *Corbett* is not slow to 'look outside itself in order to seek the criteria to judge sex' (Bradney, 1987: 351), to turn to the 'truth' of medical discourse to establish what does, and does not, constitute the sex of a person. Of course, however much the legal discourse may valorise the medical, in the last instance the determination will be judicial for the medical criteria are not the legal basis of sex determination but, according to Ormrod, 'merely of assistance (p100). Of the 9 doctors called to give evidence, all agreed that there were at least four separate criteria which might be used in judging sex: that is, the chromosomal, genital, psychological and gonadal factors outlined above (Some would have added hormonal factors).

Finding the psychological and the biological tests not to be congruent (indicating, respectively, that Ashley was male and transsexual), Ormrod's first task was to investigate the nature of the decision he was about to reach. The decision, he concluded, was about the nature of sex in the relationship of marriage. Thus, having presented the criteria, or rather the context within which he would be establishing the sex of an individual (the purpose of marriage), he concluded that

"Having regard to the **essentially heterosexual character of the relationship which is called marriage**, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce **a person who is naturally capable of performing the essential role of a woman in marriage**. In other words, the law should adopt, in the first place, the first three of the doctor's criteria, ie the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said, that **the greater weight would probably be given to the genital criteria than to the other two**. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex, must be left until it comes for decision. My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been since birth." (P 106: My emphasis)

Ormrod neatly sidesteps the necessity of giving a judgment as to Ashley's sex *per se*. 'Marriage' here becomes a 'catch-all' concept for Ormrod whereby he may twist and turn the

definitions he wants to suit his purposes and argument. When reason fails, the 'nature of marriage' glosses over both contradiction and inconsistency, a rhetorical 'glue' which holds together this particular coupling of sex, law and gender. Ormrod is a medical doctor himself (see the letter from James Gomyr Q.C, attorney for April Ashley to the Cornell Law Review Jan 5 1971), and there are a number of strands to this argument, each of which may be unpacked to reveal their implicit ideological assumptions.

(i) The Test is Biological

First, sex is to be determined according to biological criteria and in cases of conflict 'greater weight' is to be given to the genital criteria. In reply to the contention that as society recognised the transsexual as a woman for the purposes of National Insurance it would be illogical not to do so for marriage, the court considered

"...these submissions, in effect confuse sex with gender. **Marriage is a relationship which depends on sex and not on gender.**" (P107: My emphasis)

Biological sex, therefore, is at the core of the marriage relationship. Subjectivity, social appearance, gender identity and psychology are irrelevant in determining whether a person is a male or a female and the surgery cannot change sex.

"It is at least common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest) and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, **cannot affect her true sex.**" (P 104 : My emphasis)

Such a view is, as O'Donovan (1985: 66) argues, essentialist. The psychological traits are determined by a biological

imperative and, whether an individual is a man or a woman, sex is to be determined at or before their birth. Thus, an individual born with male genitalia and a male chromosomal structure will be, as far as the purposes of marriage are concerned, a male. Whatever the gender identity, the post-operative existence of female genitals or social appearance, the individual will be classified as a biological male. If an individual has the genitals, gonads and chromosomes of one sex, then even if life is lived as a member of the other sex, for legal purposes sex classification cannot be changed.

It is questionable whether this is now correct, even within narrow doctrinal terms. English law now provides, in s 11 (c) Matrimonial Causes Act 1973, that it is gender and not sex which determines whether parties may marry: the contracting parties have to be **male** and **female**, and not a man and a woman. If marriage is couched within gender and not sex, then arguably Corbett can only be of persuasive authority. That an appellate court may be loathe to admit the point is another question. The basis of the decision is also intellectually dubious, and it is most important to recognise the implicit assumptions of Ormrod's argument. 'Sex' as signifier of a biological category (man/woman) and human activity (intercourse) is distinguished from gender and this enables Ormrod to disregard that which is most troubling about Ashley's life - that she regarded **herself**, on her own testimony, to be a woman even though the birth certificate testified otherwise. While public law might consider sex to be to be mutable, matrimonial phallocentrism renders sex fixed for the discursive polarities which regulate entry to marriage (man/woman, sex/gender) to remain in place. What it is that marks this difference between the public law determination of sex for National Insurance purposes, and the place of sex in marriage is, I shall argue, the status of sexual intercourse in legal discourse.

Other objections may be raised. It is not clear that sex is fixed 'at birth'. Ormrod gives no reason for adopting this as

the test beyond mere assertion. Take away the fundamental premise - that marriage is heterosexual - then, assuming the 'primary significance' of the genitals (a genito-centric view) it is arguable that the law should take into account the removal of the most important organ (the penis), and the substitution of another (female) genitalia. If the genitals are of primary importance, what happens when the genitals are removed? If the penis becomes an (artificial) vagina, why not look to the vagina?

Ultimately, a penis **cannot** be removed, at least for the purposes of sex signification. Born a man, Ashley remains a man despite surgery. The definitional process is here characterised by a 'lack', the absence/removal of the penis which may render intercourse possible. Ormrod is saying the genitals are the primary test: they are the most important criteria. Yet he is also denying the significance and legal status of the wholesale removal of the male genitals and the construction of an (artificial) vagina which might mark a transsexual out as a woman. Men may seek to enlarge, perfect and project the penis in multifarious ways. Men might undergo surgery to 'cure' impotence [40] and 'work on' the penis in positive actions. To 'improve upon' a penis may enhance marriage and heterosexual (and homosexual) lovemaking. But to 'lose' the sexual use of the penis, metaphorically in the case of impotence, literally in the case of the male to female transsexual, is in this sense at least legally impossible. Once a man, always a man, even if incapable of the sex act on which the institution of marriage is built.

There is a certain irony in the decision therefore. Ormrod is claiming to concentrate on biological factors as the conclusive proof of legal sex. Yet he is also denying the legal relevance of the operation on the genitalia which has taken place. Thus, even if the biological test is to be accepted, the test must be of an uncertain status when it denies a complete change in the most important factor of the test itself, that is, the genitals. It may be argued that the postoperative transsexual

would continue to lack the secondary/internal female organs which a sex-change operation might not provide. Yet could it not then be countered that many women themselves lack such organs?. Such a 'lack' does not mean they cease to be women.

Ormrod's denial of legal sex reassignment is not based upon any coherent theory of sex and gender, nor is it based on the practical ramifications of allowing such a legal change to be made. Rather, it rests upon a fundamental confusion as to what sex and gender actually mean. Ormrod objects, in the last instance, to legal sex reassignment per se. What he is saying is that a man is a man and a woman is a woman. The disruption entailed by a fundamental questioning of the meanings of man and woman, masculinity and femininity, would upset a fundamental dichotomy of the sex/gender system fundamental to the institution of marriage. Ostensibly, Ormrod is concerned with the private relationship of marriage, with what goes on in Corbett and Ashley's wedding bed. Yet the policy questions have wider application. As obvious as it may seem, it is important to state that marriage is not a private matter to be somehow 'negotiated' between individuals but is rather a public institution for heterosexual intercourse. It is the institution with reference to which other relationships/structures of cathexis are defined and, ultimately, denied.

(ii) 'The Essential Role of Woman in Marriage'

The reason for holding that Jamieson is and always has been a man is that he would be incapable of 'performing the essential role of a woman in marriage': the argument hinges on this 'essential role' which the transsexual cannot meet. It is to be presumed that Ormrod did not mean, by the 'essential role of woman in marriage' the ability to look and to act 'like a woman' (criteria a transsexual might meet).

"Socially, by which I mean the manner in which the respondent is living in the community, she is living as,

and passing as a woman, more or less successfully. Her outward appearance at first sight was convincingly feminine but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator. The evidence of the medical inspectors...is that the body in its post-operative condition looks more like female than a male as a result of very skilful surgery. Professor Dewhurst, after this examination, put his opinion in these words; "The pastiche of femininity was convincing". That, in my judgment, is an accurate description of the respondent." (P 104: My emphasis)

Ashley is really not 'good enough' at being a woman. It is possible, Ormrod admits, to socially pass as a woman, but Ashley is only able to achieve a "pastiche of femininity". Might even more 'skilful surgery' improve on this? As Smith (1971: 1007) notes [41]

"The 'essential role of a woman in marriage' under this view is simply being a woman from conception or birth."

Ormrod's criteria are ultimately phallocentric, resting, on a denial of female characteristics and a celebration of the possession of a penis as the essential validating factor in and of the institution of marriage. As Pannick (1983: 294) states,

"...why should sex assignment in difficult cases depend upon those criteria stated by Ormrod J **rather than upon the absence, at the date of marriage, of external male genitalia** and the existence at that time of secondary female sex characteristics, female sex hormones and a social and psychological female role?" (My emphasis)

The essential role of the woman presumably relates to her sex, for it is sex which

"...is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of the opposite sex. There are some other relationships such as adultery, rape and gross indecency in which, by definition, the sex of the participants is an essential determinant." " (P 105: My emphasis)

Marriage may be many things but it is above all an institution in which there must be, as an 'essential element', the 'capacity for natural heterosexual intercourse'. This, it is to be presumed, Ashley could not achieve. What therefore is the 'essential role'? A capacity to have intercourse? An ability to procreate? If this were the case those countless marriages which do not beget children would, presumably, be void. Many women and men, for various reasons, cannot beget children. The ability to procreate children is not essential to a valid marriage. So, if procreation is not the purpose of marriage, what is?

"Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman. I think, with respect, that this is a more precise way of formulating the question [than alleging] that the respondent is a male...The question then becomes, what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large. " (P 105: My emphasis)

In the end, there is no answer. One is trapped within the tautologous logic Ormrod establishes. We return again to the 'woman question' and de Beauvoir's 'absolute vertical' (p 4) remains in place. Once again, the riddle is asked: what is a woman? [42] It is surely significant that we are not here concerned to ask what is a **man** in marriage, what is masculinity and what might be **his** essential role. Again, questions of masculinity fade from view just as they emerge. While it is possible that Ormrod's casting of the problem in such terms is because Ashley, after all, held out to be a woman, I remain unconvinced that this is all there is to be said in accounting for the construction of the judgment in this way. Had the case concerned a female to male transsexual, though conjecture, it is doubtful that we would be engaged in debate as to the 'essential role of a man in marriage'.

(iii) The 'Essential Determinant' of Marriage

The 'natural heterosexual sex' to which Ormrod refers is the essence of marriage. It is intercourse which makes the determination of sex and gender in Corbett different from employment law. Ormrod continues,

"In some contractual relationships eg life assurance and pensions schemes, sex is a relevant factor in determining the rate of premium or contributions. It is relevant also to some aspects of the law regulating conditions of employment and to various state-run schemes such as national insurance, or to such fiscal matters as selective employment tax. **It is not an essential determinant in these cases because there is nothing to prevent the parties to a contract of insurance or a pensions scheme from agreeing that the person concerned should be treated as a man or as a woman, as the case may be.** Similarly, the authorities, if they think fit, can agree with the individual that he shall be treated as a woman for national insurance purposes, as in this case." (P 105: My emphasis).

Genital connection itself signifies the matrimonial 'context': sexual intercourse establishes marriage as a relationship of a different order from, for example, the sex-blind contract relationship. It is hardly surprising therefore that a marriage between two men would not be possible. What this connection - sexual intercourse - involves will be explored in the following Chapters, but it is to be noted at this point that the essence of the marriage relationship is that there occurs, or at least may potentially occur, heterosexual intercourse.

This poses a number of legal difficulties. Marriages which are not consummated may be voidable by s 12 (a) and (b) of the Matrimonial Causes Act 1973 but, by s 16, they will remain valid until the decree of nullity is actually made. If intercourse and marriage are inseparable, this is not backed with any evidence that marriages actually are contracted with the intention of having legal sexual intercourse. Of course, such 'evidence' may be impossible to establish, but this is the assumption underlying Ormrod's stance. People do have sex outside marriage and do not have sex inside marriage. How justifiable is this legal definition of marriage therefore? [43] Smith (1971: 965) has argued that

"A careful analysis must be made of the parameters of human sexuality. The object of such an analysis would be to arrive at an administrable and equitable legal standard by which to test a person's sex while preserving the traditional sexual dichotomy."

In *Corbett v Corbett* at least an 'administrable and equitable' analysis of the 'parameters of human sexuality' is sorely lacking.

Recent Developments: The European Court

The most significant developments in relation to the law on transsexualism of recent years concern Articles 12 [44] and 8 [45] of the European Convention for the Protection of Human Rights. When transsexualism in UK law comes to court in the future it is likely that the arena in which the decisions will be made will be the European Court, though, on the basis of decisions so far, whether the transsexual will fare better in this jurisdiction than before *Ormrod J.* is open to question. The 'rights' given by the Articles are restricted and the 'margin of appreciation' given to member states might well be considerable. Permissible and impermissible restrictions [46] have been characterised in terms of a distinction between those formal rules, which concern matters such as notice, publicity and formalities whereby a marriage is solemnized (the permissible restrictions), and rules of substance based on considerations of public interest (impermissible restrictions). To exclude individuals or groups is not the same as excluding types of relationships from the institution of marriage.

In the case of Van Oosterwijck v Belgium (1980) 3 E.H.R.R 557, the European Commission of Human Rights held it to be a violation of private and family life to require the transsexual to carry documents of identity which were held to be manifestly incompatible with personal appearance. On the refusal of such an application for rectification, Van Oosterwisck appealed to the European Court that this constituted a breach of Article 12, maintaining that the failure of the Belgian authorities to take account of the change of status as a result of the sex change infringed on his right to marriage and respect for family life, guaranteed by Articles 12 and 8 [47]. The Court found that

"The State has...not interfered with the applicants behaviour and the relationships into which he has freely

entered and which express and compose his personality. But it has refused to recognise an essential element of his personality: his sexual identity resulting from his changed physical form, his psychical make-up and his social role. In doing so, it treats him as an ambiguous being, an 'appearance', disregarding in particular the effects of a lawful medical treatment aimed at bringing the physical sex and the psychical sex into accord with each other. As regards institutionalised society, despite all the formal concessions to the 'appearance' it restricts the applicant to a sex which can not scarcely be considered his own." (P 584)

Thus, with specific regard to Article 8

"In the Commission's opinion, the failure of Belgium to contemplate measures which would make it possible to take account in the applicants civil status of the changes which have lawfully occurred amounts not to an interference in the applicants exercise in his right to respect for private life, but a veritable failure to recognise the respect due to his private life within the meaning of Article 8 (1) of the Convention. The Commission, therefore, unanimously concludes that article 8 has been violated in the instant case." (P584)

The contrast with Corbett is striking, though it is important to recognise that different consequences of civil registration under Belgian law:

"It would appear scarcely compatible with the obligation to respect private life to force a person who on the recommendation of his doctor and by undergoing a lawful treatment has taken on the appearance and, to a large extent, the characteristics of the sex opposite that which appears on his birth certificate to carry identity documents which are manifestly incompatible with his appearance." (P 584)

Pannick (1983: 298), writing after Van Oosterwijck, expressed optimism about what the future may hold for transsexuals.

"It is to be hoped that, if and when an English Court needs to determine the sexual status of a transsexual for the purpose of the Sex Discrimination Act 1975 (or for any other purpose), the reasoning and the principles stated [by]....the European Commission, and not the reasoning in Corbett, will be adopted"

However, it was to be the European Court which was to deliver another blow to the transsexuals case in Rees v UK [1987] Fam Law 157: 9 E.H.R.R 56: [1987] 2 ELR.111 [48]. Rees applied to the European Court of Human Rights contending the UK government's breach of Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms for the Registrar-General's refusal to amend the birth certificate, notwithstanding that surgical sexual conversion had taken place under the National Health Service (and could thus be said to be approved by the British State). He contended that failure to amend the birth certificate brought him embarrassment and humiliation, and furthermore that the prohibition of his marrying a woman constituted a violation of Article 12. As Rees himself says,

"For me the idea of marrying a man is ludicrous...It would have been so even before re-assignment therapy. I would very much like to marry and be able to adopt a child within a legal relationship. All transsexuals have to accept that reassignment surgery means they will not be able to procreate. In itself that is no bar to marriage under our law. Marriage is not denied to men or women who through accident or injury are sterile. Other aspects such as caring companionship are important too." (Rees, quoted in Cooper, 1986) [49]

The Court held that such determinations constituted a decision within the 'margin of appreciation' of a member state whereby

some balance would be struck between the two concerned competing interests - those of a particular individual (Rees) and society as a whole. Noting that the wide margin of appreciation constituted an area where municipal laws of the signatories to the convention may well differ, accordingly the court rejected Rees' case with regard to both Articles. Unlike Van Oosterwijck, where the court failed to find on procedural grounds, in Rees the court explicitly rejected the argument on substantive reasons [50]. Rees re-affirms Corbett in stating that the law only recognises the sex of a person at birth.

However, the case does offer a note of optimism for the transsexual in that the Court noted that practices among contracting states were by no means uniform, and that the law in this area appeared to be in a state of transition. Bradney (1987 : 353) suggests that the effect of Rees on Corbett is actually contradictory; that though in the short term Rees clearly affirms Corbett in the light of the European Convention, substantially following Ormrod's reasoning, in the long term it opens the door on Corbett and at least potentially undermines the decision. It was noted in Rees that other signatories to the European Convention have made significant attempts to accommodate transsexuals' desires to be categorised with reference to their post-operative sex. Indeed, increasing official acceptance is marked in the UK's treatment of transsexualism. It might be difficult to predict the future direction of social trends, and it might certainly be coherently argued that the contemporary moral climate is not, in some respects, sympathetic to liberal sexual mores. However, it is possible that attitudes to transsexuals may well become more tolerant. Bradney concludes,

"...to insist, for any purpose, on sex at birth rather than post-operative sex is to take up a weak position. As transsexualism becomes more and more acceptable, both officially and socially, so the Corbett position becomes more difficult to sustain. It is clear that the attitudes illustrated in Corbett will, at some unspecified point

in the future, fall outside the margin of appreciation identified in Rees." (Bradney, 1987: 353)

Nonetheless, Rees makes clear that the right to marry which is protected by the Article is the right to marry those of the opposite biological sex. The only 'marriage' protected by Article 12 is to be a 'proper' marriage. The court found, by a majority, that the Registrar-General in not altering the birth register did not constitute a breach of Article 8 for respect for private family life. In a statement which could have come straight from Corbett, the court concluded that

"...the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the working of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family".

We return again, it seems, to a defence of marriage and familial ideology.

The Wider Effects of the Decisions

Corbett v Corbett, despite much criticism, has attracted some support and the decision is not without its merits and consistencies [51]. In terms of matrimonial law, Ormrod himself recognised [52] the problems which might result from a change of legal sex in the already existing marriage of a transsexual who might have children by that marriage. There are arguments in favour of maintaining the rigid male/female dichotomy, not least that it promotes certainty. Corbett, as Smith (1971: 1007) considers, concerned not just a transsexual marriage but also a sexual scenario of polymorphously perverse dimensions: transsexualism, heterosexual, homosexual desire and transvestism all figure in the case. It is arguable that a court might treat a more 'stable' and 'normal' relationship differently [53].

It might further be argued that there remain biological functions which it is only possible to be performed by one sex [54]. Ormrod (1972) himself felt the necessity to elaborate on his own reasoning and at length respond to criticisms of the decision [55]. Legal reasoning arguably requires conclusive determinations and, while the law is not totally unsympathetic to transsexuals, it remains the case that transsexuals are, compared to the general population, most certainly 'abnormal' [56]. Transsexualism is statistically insignificant (Ormrod, 1972: 87) and, for Ormrod at least,

"Apart from marriage, I cannot see how this matter arises, except insofar as it will, in some strange way, gratify somebody for it to be said that, 'Legally you are male, although you are female.' 'You have had three children and you are a male', or 'You were the father of three children but are now female'. If that is a conclusion which appeals to anybody, I say go on and draw it, but it does not appeal to me." (Ormrod, 1972: 87: My emphasis)

As to the wider effects of the decision,

"The only branch of law...in which problems of sex-determination may arise in practice is family law and in this branch it will only arise where the validity of a marriage is in issue...It can arise in two ways. To constitute a valid marriage the parties must be of different sexes, for the simple reason that that is what the word means. A permanent homosexual relationship cannot be a valid marriage even if by some trick the parties have gone through a marriage ceremony, simply because marriage is by definition a union between man and woman...The relative unimportance of sex determination in the law is demonstrated by the fact that there has only been one case in the history of the English Law in which the question had to be decided. That case was *Corbett v Corbett* 1970..." (Ormrod, 1972: 85: My emphasis)

Ormrod is wrong on two counts. First, far from it's 'relative unimportance', the decision in Corbett has major implications within family law, for example with regard to ss 23-25 Matrimonial Causes Act 1973 [57], inheritance [58] and the matrimonial home [59]. What 'appeals to' Ormrod brings with it its own legal difficulties. Secondly, to hold that the only branch of the law in which problems of sex-determination arise is family law is, quite simply, incorrect. Cases following Corbett have concerned areas of law apart from 'family' matters. In R V Tan and Others [1983] 2 All ER 12 the Court of Appeal were called upon to determine the legal status of a person with a view as to whether they were liable to conviction for a crime where the sex of the parties was an essential determinant of the offence. The Court of Appeal applied the Corbett decision to an area of the criminal law, specifically, s 30 of the Sexual Offences Act 1956 whereby it is an offence for a man to live on the earnings of prostitution [60]. In Tan, Parker J expressly approved of the judgment in Corbett, despite Ormrod's own assertion that he was not concerned with determining the 'legal sex' of the respondent at large. In stressing what he saw as "both common sense and the desirability of certainty and consistency", Parker rejected the argument that if a person was "socially female" then they should not be held to be a man [61].

Pace (1983) has since questioned the arguments for 'certainty' and 'consistency' by which Parker justified following Corbett in this area of criminal law. His conclusion makes a telling point

"Had the Court of Appeal in Tan been faced with an hermaphrodite appellant, and with no readily accessible civil law decision as a refuge, it would have had to get to grips with the issues involved in a much more convincing way than it did when confronted with the relatively easy problem of transsexualism. " (Pace, 1983: 321)

One of the implications of Tan is that the decision will apply to all the other crimes where the sex of the participants will be an essential determinant of liability. Ormrod's definition therefore does go beyond the marriage context and in other areas of the law evidence as to gender identity will be ignored. The implications of the decision are far reaching. A male to female transsexual prostitute can be convicted of male homosexual soliciting and thus attract even more harsher penalties (Sexual Offences Act 1959 s 1, Sexual Offences Act 1956 s 2) and furthermore, a female to male transsexual cannot be guilty of an offence of unlawful sexual intercourse with a girl under 16 (Sexual Offences Act 1956, s 6). On this reasoning, it also follows that the post-operative male to "female" transsexual is incapable of being raped. The transsexual is thus denied basic legal protection. Interestingly, noting that the degree of penetration of the vagina by a penis necessary for marriage consummation is greater than that required for rape (R v Lines (1844) 1 Car & Kir 393), Pace argues (1983: 320)

"The 'inconsistency' may be seen to arise where a wife refuses to consummate and is forced by her husband to have sexual intercourse with him. Assuming marital rape to be possible on the facts, a slight degree of penetration would support a rape conviction yet the marriage would remain unconsummated."

This brings us to the construction of this penetration in the legal meaning of sexual intercourse, which I shall proceed to analyse in Chapters 7 - 8. What is clear is that the reasoning in Corbett is not just theoretically questionable, but that even within the terms of doctrinal pragmatics it leads to confusions and uncertainties across areas of legal discourse and is not simply confined to 'family law.'

Conclusions

The presence of the penis pervades the legal construction of sex, constituting the signifier of difference which makes possible the division of the sexes and, ultimately (for it is 'essential' to it) grounding the institution of marriage in legal discourse. In *Corbett v Corbett* Ormrod J assumes that there is a unique link between sex and marriage. Yet marriage is not the only context for sexual intercourse and sexual relations, and nor is it true to say that the sexual element is necessarily going to be the most important component within a marriage. Ormrod may be able to assert this, but he does not know this.

Two issues are at stake here. First, by assuming that all sexual intercourse takes place within marriage the law is valorizing and giving primacy to an institution, which has itself been defined by reference to the possibility to engage in sexual intercourse. The transsexual cases, basing marriage on a biological dichotomy, ignore the 'social' aspects of the marriage relationship and focus instead on the sexual. If marriage 'depends on sex and not on gender' then legal discourse valorizes one particular medical interpretation of the relationship of sex and gender. Compassion, consideration, empathy, the ability to love and understand, these are subordinated within an economy of masculinity in legal discourse which privileges intercourse above all else in the constitution of a marriage relationship, denying other forms of human contact/pleasure.

In this process gender is denied purchase as the subjective reality and personal happiness of the transsexual is negated. As Smith has argued,

"...provided the psychological choice of the individual is medically sound, not mere whim or caprice, and irreversible surgery has been performed, society has no

right to prevent the transsexual from achieving personal happiness." (Smith, 1971: 972)

This itself is ironic when it is considered that, in other respects, the law is concerned with consent and conscious understanding in the formation of a marriage. In the absence of fraud or duress, both parties are assumed to fully intend to become married. Yet here, whatever the beliefs of the transsexual, marriage is impossible.

It is not simply that the reasoning is essentialist - it's implications are far reaching. O'Donovan (1985a: 20) points to the wider issues transsexualism raises, that

"...the organisation of society on a gender basis exacerbates gender dysphoria as exhibited by transsexual."

This point is crucial. Corbett presupposes the fixed and immutable categories of male and female and negates gender as a social construct. It assumes two closed categories of femininity and masculinity each possessing certain biological characteristics. It is not just that this is incorrect in that the social and psychological traits themselves, as I have argued in Chapters 4 and 5, are socially constructed. A minority of individuals cannot be so classified biologically [62]. Ormrod himself noted (1972: 86) that the decision leaves open the determination of the sex in marginal cases, for example, testicular feminization and testicular failure. In such cases the biological tests of the decision would lead to conflicting results. Ormrod has claimed the decision would lead to certainty as to sex in all instances. The problem is that it does not lead to certainty at all. Leaving aside whether the decision is 'good law' [63], it might be argued that the claims of liberal legal discourse to impartiality and the constitutional equity of 'treating like cases alike' collapses when faced with the complexities of transsexualism [64]. Corbett is also inconsistent with other cases. The medical examiners pointed out "...there is no impediment on 'her part'

to sexual intercourse" It is ironic that while there is no physical impediment on Ashley's part to intercourse taking place, the transsexual as a post-operative woman (or man) is **incapable**, a priori, of intercourse and, indeed, would be incapable of intercourse even if the post-operative sex was accepted as the legal sex. Corbett is at the very least "difficult to reconcile" (Pannick, 1983: 293) with the judgment in S.Y. v S.Y. (1963) P 37 where Willmer L.J. in the Court of Appeal found that a woman who had abnormal sexual organs which prevented intercourse would be capable of intercourse after

"...the creation out of nothing of an artificial vagina, sufficient in size to enable full penetration to be achieved..."

Ormrod is presumably basing the argument that a transsexual cannot consummate a marriage by referring to the 'ordinary and complete intercourse' elaborated on by Dr. Lushington in D-e v A-g (1845) Rob Ecc 279 at 298 (see further Chapters 7 - 8) , a 'perfect' intercourse which an artificial vagina would not allow. To distinguish S.Y. v S.Y., it may be argued that Corbett concerned a **wholly** artificial vagina. Yet how can it be that the wife in S.Y.v S.Y was capable of natural intercourse whereas the wife in Corbett was not? In both cases the sexual organs were artificially constructed. Dewar (1985:61) suggests that if there is a distinction it might lie, not in the 'natural' quality of intercourse but 'somewhere else'. However, this would not account for the clear emphasis on a capacity for 'natural' intercourse which is a prerequisite for legal sex and Dewar does not make clear what the 'somewhere else' might be. Again, to maintain the argument Ormrod is left falling back on a priori statements of biological determinism and doctrinal tradition, the word of the law and of the body which 'speaks' it's own truth.

To argue that a distinction may be drawn between an anatomically 'normal' woman (S.Y. v S.Y.) and the transsexual, both of whom have had surgical treatment to the vagina, might

make some sense if those biological components which somehow constitute the **difference** between the two (perhaps hormone levels, ovaries) were themselves 'of the essence' of the act of intercourse taking place. This is not however the case. As I shall argue in the following Chapters, the act of 'consummation' entails penetration of the vagina by the penis. Any subsequent consequences of the act, such as conception, which involve the 'secondary' sexual organs/biological features other than a vagina/penis, are not fundamental to the legal definition of intercourse. Ormrod's distinction is illogical and in contradiction to other parts of his argument.

In the end, there can be no answer to the question of whether an individual is 'really' a man or a woman. All that can really be said with certainty is that certain sex organs are differentiated in different ways and by different discourses and that this 'biology', thus signified, bears some, though not specific, relation to social gender. The formal equalities promoted by Sex Discrimination Act 1975 and the Equal Pay Act 1970, both laws against discrimination on the grounds of sex, are concerned with 'sex equality'. Yet it is important to recognise that 'sex equality' is meaningless, unless we have some conception of what 'sex' actually signifies in law. It is perhaps ironic that on the one hand we have laws concerned to abrogate reliance on stereotyped notions of sexual roles (eg the Sexual Discrimination Act 1975), and yet when it comes to determining sex assignment in law, the law continues to both embody and perpetuate a dichotomy whereby all individuals are either male or female. The irony is particularly brought out in a case such as E.A. White v British Sugar Corporation (1977) IRLR 121 where, on the one hand the tribunal is concerned with legislation about discrimination based on stereotyping, yet it can also consider that (p123) "...the laws of this country and the [1975 Act] in particular envisage only two sexes, namely male and female."

The law in relation to transsexualism and marriage replicates the essentialism and categoricalism I have argued against in

Chapters 2 - 4. The dichotomous biological and social classification into women and men is reflected in a further dichotomous classification between biology (a material base) and social and legal classification. Part of the explanation may simply be that legal reasoning has failed to keep up with developments in medical research. This is not a sufficient explanation. The inability of the law to treat sex and gender with any coherence says much about the patriarchal and phallogentric nature of legal discourse, and about the nature of legal reasoning. This point is brought out by Smith (1971), though it is interesting to note that Smith nonetheless concludes by stating that it remains necessary to "preserve the traditional sexual dichotomy". (P 965)

"It is probably impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities, not medical niceties, and most people are clearly male or clearly female. In light of present medical knowledge however, it is improper for the law to continue to rely on outward appearances for the determination of an individual's sex, considering the determination's important legal implications." (Smith, 1971: 965)

Alternative perspectives do exist. A 'sex as continuum' thesis [65] does not conceive biological sex as a matter of the polar opposites of male and female, but rather sees sex as a continuum where individuals may be placed at some point along a scale. The consequences which follow from biological sex typing (for example, that you are a male at birth and will therefore legally be a 'man' for the rest of your life) can be separated from what might be termed 'contingent' consequences of social gender classification, though it is by no means clear what the connection between the two is. In other jurisdictions [66] a psychological test together with surgical reassignment has been held to be the correct legal standard, and a psychological, gender-related, test has a number of advantages. Smith (1971: 966) puts the point well:

"[T]he chromosomal sex is merely of abstract, scientific and theoretical interest in the case of transsexuals...To insist that a person must live and be legally classified in accordance with his or her chromosomal sex violates common sense as well as humanity. It reduces science to a mere technicality and an absurd one at that. With the same justification, one may insist that Rembrandt's works are not paintings but pieces of canvas covered with paint."

Perhaps the most straightforward reform would be to overrule Corbett and hold that legal sex depends on gender and not biology, in which case legal sex reassignment would take place on the completion of the surgery and hormone treatment. Such an approach has the advantages of objectivity and of identifying a certain point in the complicated process at which 'sex change' can be said to have taken place, and would not require legislation. However, it also has a number of difficulties [67], not least that the law would continue to operate on an assumption that the two sexes are different categories: what would be different would simply be the process whereby the categories are defined. Dewar (1985: 63) suggests the implementation of a form of administrative procedure would enable the transsexual to apply for state recognition of their legal change of sex for all purposes (and not just for some), though this too faces problems [68]. Any such reform would also have wider legal effects which might not be deemed desirable [69], and would have to take into account s 11(c) of the Matrimonial Causes Act 1973 so that marriages would become void at the date of the sex reassignment. It is important to recognise that the legal 'problems' follow only insofar as they contravene marriage as an a priori heterosexual institution. If there is to be no reason why two people of the same sex, male or female, should not be able to marry - be they pre or post-operative transsexuals, it is difficult to see what some of these difficulties are.

In the end, it is the heterosexual nature of marriage which transsexualism renders problematic and it is the nature of

these heterosexual relations in the institution of marriage that I wish to consider in the following Chapters. In this Chapter I have addressed the wider significance of transsexualism and law. As Pace (1983: 321) has argued,

"The phenomenon of transsexualism is not going to disappear and the time is fast approaching, if it has not already arrived, for an investigation into the legal meaning of "man" and "woman" for the purposes of both the civil and the criminal law. This is clearly not a task which lends itself to a court in view of the difficult policy , social and moral considerations involved."

It is to the legal meanings of 'man' in law and the construction of masculinity in relation to marriage and sexuality, which I have argued are under-researched in legal scholarship (see Chapters 1 - 2), to which I now wish to turn. The policy, social and moral considerations to which Pace refers are, I shall argue, inescapable.

CHAPTER 7

MARRIAGE AND MALE SEXUALITY II: THE CASE OF NON-CONSUMMATION

Introduction

"Is it any coincidence that, from Sparta to Nuremberg, the most disastrous ideologies have been founded largely upon a coherent mythology of virility? The analogy is neither forced nor gratuitous; to condemn an individual in the name of sexual normalisation is to issue an untenable dictate...Must we continue to condemn to silence those who, by virtue of an ill-matched marriage, are exposed to sexual misery? If so, the trap is laid, and the fatal mechanism activated." (Darmon, 1985: 229)

Darmon (1985: 1), in his analysis of those groups of individuals who suffered at the hands of the Ancien Regime in France - the poor, the insane, sodomites, alchemists and blasphemers - notes that the impotent have been forgotten in the subsequent scholarship of legal academics and historians. They were, he argues, 'crushed in the wheels of indifferent legal machinery', treated as hardly human. A critique of male sexuality constitutes a recurring theme within both feminist scholarship and the sociology of masculinity [1], and a number of contemporary writers have suggested that that an increased incidence of male impotence [2] is symptomatic of contemporary pressures on men and, in a rapidly changing economic and cultural climate, have depicted the commercialization of sexuality generally as leading to increased tensions between images of masculinity and male subjective experiences [3] which might lead to impotence. Male impotence itself stands in an uneasy relation to accounts which locate male heterosexuality as fundamental to the reproduction of patriarchal relations, for it both confirms and sustains at the same time as it

challenges and undermines the mythology of male sexual potency. In the condemnation of the impotent in cases of the 'ill-matched' unconsummated marriage to which Darmon refers, the legal construction of male virility in the name of sexual normalization tells us much both about the legal nature of marriage and the place of male sexuality in law.

This Chapter is concerned with those men and women who are adjudged to be 'impotent' in law and, while it's perspective is historical, it has considerable bearing for analysis of the contemporary 'crisis' of masculinity (discussed in Chapter 4, p 124 - 6). The treatment of the sexually deficient at the hands of ecclesiastical and civil law is a neglected topic within legal studies. Yet such analysis is, I shall argue, fundamental to the study of masculinity and law. In particular, the construction of male virility as a normative focus of the ecclesiastical and secular judicial gaze tells us as much about those who are doing the judging as those who were being judged; that is, the story of the law's treatment of sexual inadequacy is also the story of 'functional' and 'normal' sexuality in law; to study male impotency is also a study of male potency and male heterosexuality [4]. It involves investigation of the complex interrelation between legal and medical/scientific discourse. In so doing, I wish to question the meaning of sexual intercourse and it's relation to the polymorphous potential of the body within the general context of male sexuality as expressed within the legally sanctioned marriage relationship [5]. I wish to place sexual intercourse within the historical context of the emergence of strategies of normalisation concerned with the constitution of subjectivities outlined in Chapter 3. In particular, I wish to address the relationship between forms of legal regulation and the formation of ideological and experiential commitments to family life and the institution of marriage. The double-edged nature of the threat of impotence, I shall argue, is proof that patriarchy can turn on those who betray it's power and, most importantly, it's secrets, and that when it does so, the law is it's weapon.

The Unconsummated Marriage

(i) Context

One possible approach to non-consummation would be to analyse the development of the law relating to sex and marriage within heuristic classifications: for example, one might focus on the history of the void and voidable marriage in law [6], the importance of ecclesiastical law [7] or the doctrinal development and multifarious technicalities of the law relating to formation and annulment of marriage [8]. The annulment of marriage is an established subject within the substantive jurisprudence of 'family law' with its own historical and procedural issues which have formed the subject for considerable analysis and debate [9]. Such an approach would however be inadequate for my purposes and it is not my intention to present either a history or detailed doctrinal analysis of the law in relation to nullity. While there are clear differences between the treatment of the impotent by ecclesiastical and civil law, there are nonetheless a number of recurring themes in the law's regulation of consummation of marriage and it is my intention here to draw out these themes.

It is important to place the voidable marriage in a wider social and legal context. Legally, that marriage is and should be the only recognised site for sexual intercourse may be justified by a variety of arguments which do not necessarily derive from the Judaeo-Christian tradition [10]. In law, sex should take place in marriage and not outside the institution. What is it therefore about the non-consummated marriage that should enable the law to state that there is indeed no marriage at all? This must be placed in relation to the wider social context in which sexuality is expressed and constituted.

Multifarious texts address the achievement of sexual fulfilment for the 'married couple' [11] and it has been argued, most notably by feminists, that the conjunction of penis and vagina in phallogentric culture is subject to

considerable ideological, social and legal support and encouragement. Indeed, it is a critique of phallocentrism which may be seen to be central to feminist sexual politics [12]. The twentieth-century gamut of sexual advice, guidance and assistance epitomise in their central themes the holy consummation of the sexual trinity: erection, penetration and orgasm, the 'perfect' sex act [13].

There may be seen to be two dimensions to the unconsummated marriage therefore. First, the underlying teleology of perfection of sex technique is marked: sex is something to be achieved and sustained, to be 'worked for' and in this project both men and women have essential, though very different, roles to play. Within the sociology of masculinity it is a recurring theme that not only is male sexuality the source of considerable anxiety and pressure but also that the 'pressure to perform' sexually is one of the leading causes of psychological impotence in men [14]. The unconsummated marriage occurs within the social structure of emotional/sexual cathexis, in the terrain of psycho-sexual development, gender and subjectivity in which 'sex' is often equated with 'intercourse'. Impotence negates this sexual ideal.

Secondly, sex is something which takes place in marriage. If sexual intercourse is an 'essential' part of the marriage relationship (as argued in Corbett, Chapter 6 p 191 - 201), the non-consummated marriage renders problematic both the nature of the sexual relationship (intercourse) and the legal institution of marriage itself. In the unconsummated marriage therefore the abstracted legal concept and the experiential are integrated: failure to achieve sexual intercourse entails failure to enter the truly married state. In this context, the unconsummated marriage transgresses the legal/institutional (conjugal) and social/subjective (experiential) norm, be the 'cause' of the maladaption on the part of husband or wife.

The 'sexual misery' of the 'ill-matched marriage' is socially reinforced in ways which concieve of male and female sexuality

as very different. Addressing the sex lives of married couples, Wright (1937) had no doubt that in the unconsummated marriage, if due to incapacity on the part of the wife,

"..the woman, never having been awakened, does not know what a woman's life may be, and yet inwardly she feels dissatisfied and disappointed. On the other hand the man remains conscious of definite and unsatisfied sex hunger, and, unless restrained by very strong motives, he is apt to seek from some other woman what he now despairs of obtaining from his wife - even though his wife may remain the one woman he really loves" (Wright, 1937: 11)

The law relating to the annulment of marriage is concerned in part with these "mistakes and sufferings which have darkened married life for thousands of couples..." (Wright, 1937: 9) and it is in cases of non-consummation of marriage that that the judicial gaze is cast - perhaps more blatantly than in any other area of family law - over the marriage bed and over the sexuality and bodies of men and women.

(ii) The Law

First, the voidable marriage is to be distinguished from the void marriage [15] (Chapter 6, p 181 - 2) and these concepts have developed in the context of theological concern with marriage and, in particular, in relation to the notion that marriage is an indissoluble institution [16]. Marriage and divorce are in a sense inseparable, both substantively and procedurally [17], and it is important to recognise the broader context of Christian sexual morality when considering non-consummation [18]. Historically, the ecclesiastical courts had been, in effect, the only tribunals before which questions relating to legal marriage might be heard. The jurisdiction of the court to grant decrees of nullity (void or voidable) had been transferred from the ecclesiastical courts to the Divorce Court set up by the Matrimonial Causes Act 1857 [19]. After extensive debate, the state succeeded in breaking down the

sovereignty of the church in matrimonial matters and hold in check it's exclusive jurisdiction on matrimonial legislation [20].

There were ways out of a marriage in ecclesiastical law [21], and the existence of a category of 'diriment impediments' (of which impotence was one) alongside the 'prohibitive impediments' (essentially procedural faults in the formalities [22]) together constituted a repudiation of the notion of 'conjugal indebtedness' [23] in ecclesiastical law. These canonical divisions between the void and voidable marriage have been carried over into statute law and in contrast to the void marriage, a marriage is now to be **voidable** depending on whether one of the grounds of Section 12 of the Matrimonial Causes Act 1973 is made out. These grounds include whether

"A marriage celebrated after 31st July 1971 shall be voidable on the following grounds only, that is to say - (a) that the marriage has not been consummated owing to the incapacity of either party to consummate it; (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it..."

In the often quoted words of Lord Greene M.R. in De Reneville (Otherwise Sheridan) v De-Reneville [1948] P100, 111.

"A voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it is pronounced by a court of competent jurisdiction."

The voidable marriage has come to occupy a position which might be termed (Bromley and Lowe, 1987: 70) somewhere midway between the void marriage and the valid marriage in that the effects of the decree are in some ways similar. To annul a voidable marriage, like a divorce, is to change the status of the parties in a way similar to a divorce decree and both constitute means of terminating a marriage which has broken

down. A crucial distinction between the void and voidable marriage lies in the necessity of obtaining a decree as to the voidable marriage [24]. A voidable marriage is valid until a decree annuls it. It is clear from Nash v Nash [1940] P 60, 64-5 that the petitioner's knowledge of the respondent's own impotence before the marriage is not necessarily a bar to the petition, though if s/he knew impotence was a ground for nullity then the act of marrying might amount to conduct might allow the latter to invoke the statutory bar which has replaced the common law approbation rule [25]. If the complaint of the petitioner is that sexual relations are been denied, then after one act of 'full and complete' intercourse (what constitute a consummated marriage will be considered below) the power to petition for nullity on the ground of non-consummation goes, in which case a petitioner may have to make out the grounds for divorce [26]. The wilful refusal to consummate connotes a settled and definite decision come to without just excuse, and the whole history of the marriage must be looked at [27].

To summarise, historically in English law the 'impediments' to marriage can be seen to have been of two kinds, that is, civil and canonical. In the case of a civil impediment (eg, on the grounds that one party was already married to another), the marriage would be taken as void ab initio, and the status of the marriage could be made an issue by any person at any time, regardless of whether or not the parties were still alive. However, if the impediment were canonical, (eg, the marriage had not been consummated), then the validity of the marriage could not be put into legal question after either of the parties had died. Thus, the marriage will be regarded as valid unless it was annulled during the lifetime of the parties. It has the capacity to be turned into a void marriage, that is, it is voidable. The decree of nullity, once pronounced, would act retrospectively, the marriage being regarded legally as void from the beginning. The parties would revert to their pre-marital status and the children (if any) would be bastardised. Though there have been subsequent amendments this remains the

basis of the distinction between the void and voidable marriage to this day.

The significance - intellectually if not numerically - of the nullity cases based on these grounds is considerable. The cases I intend to examine are concerned primarily with s 12 (a) and 12 (b), whereby a marriage will be voidable if the marriage has not been consummated owing to the incapacity or wilful refusal of either party to consummate it. The law's ambit is wide enough to cover both physical capacity to consummate as well as intellectual capacity. As the grounds of inability and wilful refusal to consummate a marriage are so closely related, I shall consider them together in the following section.

Defining 'Sex' in Marriage

The word 'consummation' originates around the fifteenth century from the Latin 'consummare', meaning to complete, and from 'summus', the highest, utmost: sexual intercourse thus brings to completion or perfection, legally and spiritually, a solemnized marriage through the act of intercourse. Consummation 'brings into being' a marriage. The form legal relations between husband and wife generally take is that of 'rights' and 'duties', duties which have been taken to involve at least the following; to consummate the marriage by having sexual intercourse at least once, to develop and maintain a mutually tolerable sexual relationship, and to be 'faithful' to one another in matters of sex [28] (see also Chapter 6, p 181). Husbands and wives are not legally bound to come to the 'marriage bed' a virgin, nor are they bound to disclose to their spouses their previous sexual experiences. The law is however concerned with sexual activities before marriage to the extent that S 12 (e) Matrimonial Causes Act 1973 will render a marriage void if a spouse were to be suffering from venereal disease in a communicable form at the date of the marriage or if, by s 12(f) the wife was at the date of the marriage

pregnant by another man. It would not matter that the respondent did not know of their condition at the time of the marriage [29], and it is interesting to note that a woman cannot have a marriage put aside on the ground that another woman is pregnant by her husband [30].

The case of D - e v A - G (falsely calling herself D - e) (1845) 1 Rob. Ecc. 280, at 1039 is the cornerstone of the cases on consummation, and in particular it is the judgment of Dr. Lushington on the place of sexual intercourse in marriage to which following judgements have referred. It was later to be described (Per Willmer L.J. in S.Y v S.Y (Orse W) [1963] P 55) as "a statement of commanding authority". D - e v A - g provides a useful point from which to begin analysis of the cases on consummation because of its undoubted influence on later cases (Chapter 6, p 212). The case concerned an application to the court by the husband that the marriage which he had entered be declared void by reason of the natural and incurable malformation of the wife which was said to be such as to render carnal consummation impossible. What actually constituted 'natural consummation' therefore lay at the heart of the case. The ensuing analysis was located by Lushington in the wider context of the marriage bond itself. Bowing to precedent, he was concerned that he must

"...endeavour to find out what are the true principles of law and reason applicable to the case, following, as far as practicable, or rather not contradicting, former decisions." (1845 at 298)"

On his construction of these cases therefore depends the answer which he is then going on to give to the question he has set - what is consummation? For Lushington the place of sex in marriage is clear, for

"I apprehend that we are all agreed that, in order to constitute the marriage bond between young persons, there

must be the power, present or to come, of sexual intercourse. " (1045 at 298)

For Lushington 'sex' is a central to the marriage relationship. However, the polymorphous possibilities of 'sex' are to be ordered in a specific way and what Lushington establishes in *D - e v A - g* is that for legal sexual intercourse to take place, a particular interaction of the male and female body (genital connection, penis/vagina) is called for. It is not simply that consummation is a particular genital connection, it is an activity which takes place in the context of the marriage relationship. 'Consummation' is thus a 'key' to the legal construction of marriage, a construction which occurs within a particular 'genital/penile economy' [31]. For there to be a marriage, a penis and a vagina must come together in a particular way. If they cannot do so, there can be no marriage. The problem in *D - e v A - g* arose from the facts of the case - could there be intercourse and could it be cured?

"There is, I think, some ambiguity in the evidence. The two witnesses are both agreed as to the connexion being imperfect; but I am not satisfied as to the true meaning of their evidence as to incurability. In one sense of the term, there can be no doubt, namely, that as relates to conception, the malformation is incurable; but it is to me doubtful whether they mean that it is incurable as to the mere coitus. **In this difference, I think, lies the true distinction.** If there be a reasonable probability that the lady can be made capable of a vera copula - of the natural sort of coitus, though without the power of conception - I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural coitus, I would pronounce the marriage void." (p 298: My emphasis)

Lushington establishes that coitus may be 'natural' or 'unnatural'. In this case the connection is 'imperfect', so we have established a form of connection which is 'perfect': the

normative case (genital heterosexual intercourse) has been set. This is the 'true distinction' to which Lushington is referring. The marriage cannot be pronounced void if she can be made capable of natural coitus. If the best that could be achieved is an unnatural coitus, then the marriage may be declared void. No coitus is better than unnatural coitus.

This natural/unnatural distinction is to be found also in the case of G v G [1924] AC 349, in which a husband brought an action against his wife for a decree of nullity of marriage on the ground of her impotency. In evidence it was proved that the husband, who had made frequent attempts over a protracted period at intercourse (his potency admitted) failed due to the 'unreasoning resistance' of the wife, a resistance continuing after her agreement to perform her 'conjugal duty'. She was, on medical examination, found to have no structural impediment to intercourse and thus, unlike in D - e v A - G, Lushington's 'ordinary and natural' intercourse would have seemed possible. Lord Dunedin quoted from himself in A.B. v C.B. (8 F. 603, 606, 609), where he stated that

"It has long ago been settled that impotency on the part of one spouse at the time of the marriage continuing thenceforth is a ground for the avoidance of the marriage at the insistence of the other...Further, it is now well settled that a person is in law impotent who is incapax copulandi, apart from the question of whether he or she is incapax procreandi. **The only difficulty, therefore, that arises, is in the proof - a proof as to which the Court is bound to be satisfied, lest marriage should be avoided either by collusion or in cases where the fact that there has been no copulation is due to wilful refusal.**" (p 353: My emphasis)

He proceeded to affirm the words of Lord Penzance in the earlier case of G v G (1871) L.R. 2 P & M 287, 291:

"The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted; but the basis of the interference of the Court is not the structural defect, but the impracticability of consummation" (p 291)

It is therefore a question of the 'proof' - 'the only difficulty' - about which the court is 'bound to be satisfied'. In the following cases it becomes clear the extent to which the court will go to establish 'the impracticability of consummation' and the degree of difficulties and complexities involved in seeking an essential definition of sexual intercourse.

Pleasure, Procreation and the Purpose of Marriage

The relationship between **pleasure** and **procreation** has constituted a recurring tension within the ecclesiastical view of sex. By the end of the sixteenth century [32] at least some theologians began to consider that the married couple who have coitus, albeit not with any particular intention of conception, would be deemed to be committing no sin so long as nothing is done to impede procreation [33]. This shift in the church's view of marital coitus entailed a separation of 'pleasure' and 'procreation' as distinct concepts within the emerging ecclesiastical discourse, and this has informed the development of the law in relation to nullity. While the genital connection envisaged by Lushington in D - e v A - g (op.cit.) is not necessarily concerned with procreation alone, it is clear that the genital economy within marriage does have a teleology. Lushington recognises the theological dimension to this, stating that

"Without that power [to consummate] neither of two principle ends of matrimony can be attained, namely, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children,

according to the evident design of Divine Providence."
(Lushington in *D - e v A - g*, 1045 at 298)

Marriage has 'two principle ends', pleasure and procreation, yet Lushington is far from clear about the relation between the two. Both reproduction and pleasure are depicted as products of genital connection, and this nexus of fertility/reproduction and desire/pleasure is entwined within the construction of marital sex in the non-consummation cases. In Baxter v Baxter [1947] 1 ALLER 387 the court explicitly considered the place of contraceptives in sexual relations of marriage while making clear just what pleasure entails in the concept of intercourse set up by Lushington.

In *Baxter v Baxter* the wife, throughout her marriage to her husband, invariably refused to allow him to have intercourse unless he wore a contraceptive sheath. While he expressed his objection to this, he complied with her request believing that if he did not do so there would be no intercourse at all. The husband sought an order that the marriage was null and void on the basis of the insistence on contraception. The court held that he was not entitled to a nullity decree on the ground that she had wilfully refused to consummate the marriage, even though artificial methods of contraception were being used. The House of Lords thus affirmed a decision of the Court of Appeal to overturn decisions of the inferior courts, which had regarded themselves as bound by the Court of Appeal's previous decision in the earlier case of Cowen v Cowen [1946] P. 36. In *Cowen* the court had declared

"We are of opinion that sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. To hold otherwise would be to affirm that a marriage is consummated by an act so performed that one of the principal, if not the principal

end, of marriage is intentionally frustrated." ([1946] P 36, 40)

In reaching his decision, Jowitt L.C. made reference to the submission of counsel that fertility/conception (and therefore emission of seed without contraception) was irrelevant in nullity disputes such as Baxter which were based on non-consummation. It was argued on behalf of the appellant that

"The gratification of sensual pleasure without the consequences of procreation is a form of intercourse which he [the husband] repudiates and which is not approved by any church. The Christian institution of marriage according to the Book of Common Prayer, exists (a) for the procreation of children; (b) for a remedy against sin, and (c) for mutual society, help and comfort. This draws a careful distinction between pleasure and procreation as ends of marriage. **Marriage is not consummated by an act designed merely to satisfy carnal lust while avoiding the possible consequences of procreation...**A marriage is consummated by one act of ordinary full and complete intercourse between husband and wife, ie, **penetration followed by emission of semen and deposit thereof within the vault of the vagina.**" (p 276: My Emphasis) [34]

At least according to counsel in this case, 'full and complete' intercourse involves ejaculation without contraception. Thus,

"The penetration is merely a preparation for consummation. At common law a man charged with rape could not be convicted without proof of actual emission, but this was dispensed with by the Offences Against the Person Act , 1828 (9 Geo. 4, c 31), s 18. In some cases in the animal kingdom nature dispenses with the preliminary of penetration: eg, in the case of the salmon, the male fertilizes the eggs already laid by the female." (p 277: My emphasis)

This is an attempt to valorize ejaculation over penetration, and therefore when it came to the use of the sheath the argument was clear: emission does not amount to consummation and, curiously, lack of ejaculation without a sheath denies the parties **pleasure** in marital coitus [35].

"In the case of the use of a sheath, however, there is clearly no full and complete intercourse; the parties are deprived of the satisfaction of **actual contact** and **the woman does not enjoy the circulation of the seminal fluid**. Nevertheless the accidental tearing of a sheath during intercourse would produce consummation, even though the factor of wilful refusal was still present, and accordingly there could be no decree of nullity" (p 277: My emphasis)

Consummation is still a matter of 'actual contact', an empirically verifiable 'fact', but on this argument it is to be the contact of seminal fluid with the body of woman which is constructed as producing sexual pleasure from male emission. Such were the arguments on behalf of the husband. For the wife, the King's Proctor relied less on ecclesiastical references and the appeal to naturalism but turned instead to doctrinal authority to lead to a correct decision on what constituted 'actual contact'. The argument is very different, but it still entails the search for a verifiable essence to consummation. Arguing that in cases of wilful refusal, the courts are not to be bound by canon law but by statute law [36], counsel for the wife contended that

"The essentials of consummation are erectio, intromissio and ejaculatio, viz, emission in the body of the woman. Once these are present there is full intercourse and it **does not matter that happens afterwards to the semen**. The test of consummation is **whether the parties get full physical satisfaction from it, for example, whether an orgasm is produced in the woman**." (p 279-80: My emphasis).

This is a clear statement of 'full physical satisfaction' taking precedence over what 'happens afterwards to the semen'. However, it remains the essential conjunction of 'erectio, intromissio and ejaculatio' from which the parties derive sexual pleasure - **without male erection, there can be no sexual pleasure**. Leaving aside the question of whether it is here being claimed that consummation depends on the existence of female orgasm [37], it is clear that pleasure does have a central place within marital sex.

In judgment Viscount Jowlitt considered these arguments as to the place of sexual pleasure in marriage, as had Lushington before him, and reflected on pleasure/procreation in relation to marriage:

"In any view of Christian marriage, the essence of the matter, as it seems to me, is that the children, if there be any, should be born into a family, as that word is understood in Christendom generally, and in the case of a marriage between spouses of a particular faith that they should be brought up and nurtured in that faith. But this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage. Counsel were unable to cite any authority where the procreation of children was held to be the test in a nullity suit. On the contrary it was admitted that the sterility of the husband or the barrenness of the wife was irrelevant." (p 286)

Jowlitt therefore felt able to quote the following words, from Lord Stair's Institutions (1681 ed: Book I., tit. 4, para 6) as his own:

"So then, it is not the consent of marriage as it relateth to the procreation of children that is requisite; for it may consist, though the woman be far beyond that date; but it is the consent, whereby ariseth that conjugal society,

which may have the conjunction of bodies as well as minds as the general end of the institution of marriage, is the solace and satisfaction of man."

It is clear from Baxter that what is required in seeking 'the conjunction of bodies as well as minds' as the end of the institution of marriage is 'the solace and satisfaction of man'. Pleasure is given priority over procreation, though sexual pleasure is to be derived from heterosexual intercourse. Curiously, Baxter reflects wider shifts in sexual and social mores, and on one level the decision can be seen as pragmatic and even progressive. Jowlitt finally conceded,

"...it is also a matter of common knowledge that many young married couples agree to take contraceptive precautions in the early days of married life. I take the view that in this legislation Parliament used the word 'consummate' as that word is understood in common parlance and in the light of social conditions known to exist...(p 290: My emphasis).

In Baxter the court concluded that the frustration of the reproductive function of marriage would not amount to non-consummation, and Baxter may be read as consistent with *D - e v A - g* in placing sexual pleasure as the key component of consummation. It was implicitly decided that the sheath did not impinge on such pleasure. A rather different question however, which figures in both *D-e v A-g* and Baxter, is with whose pleasure is the court concerned? The husband's or the wife's?

Whose pleasure?

In *D-e v A-g* (op.cit.) the medical witnesses, and the judge, concluded that the consummation was imperfect. Lushington continues, stating his reasons for so finding:

"In the case first supposed, the husband must submit to the misfortune of a barren wife, as much when the cause is visible and capable of being ascertained, as when it rests in undiscoverable and unascertained causes. There is no justifiable motive for intercourse with other women in the one case more than in the other. But when the coitus itself is absolutely imperfect, and I must call it unnatural, there is not a natural indulgence of natural desire; almost of necessity disgust is generated, and the probable consequences of other connexions with men or ordinary self-control become almost certain. I am of the opinion that no man ought to be reduced to this quasi unnatural connexion and consequent temptation, and, therefore, I should hold the marriage void. The condition of the lady is greatly to be pitied, but on no principle of justice can her calamity be thrown upon another."
(1045-6 at 299: My emphasis)

This passage is revealing in several respects. If the intention behind intercourse is to pursue pleasure, then infertility would seem to not negate the husband's capacity for at least some of the pleasure of intercourse - the husband must submit to the 'misfortune of a barren wife'. However, Lushington's concern with male sexual pleasure is more general. He is concerned that the husband should indulge in 'natural desire'. This is set up as against an (unspecified) range of 'quasi-unnatural connexions' to which the husband, faced with 'unnatural' intercourse, may be tempted to turn. Indeed, for a man with 'ordinary self control' (such as Lushington?) such unnatural connections become 'almost certain' and, accordingly, 'disgust is generated'. In this passage a conception of male sexual desire is central to the division Lushington makes between natural and unnatural intercourse he has established. The wife may be barren, but so long as he may still experience pleasure, he will not be tempted elsewhere. However, where the natural genital connection is impossible, as it was deemed to be on the facts of *D - e v A - g*, then to make the man remain in such a marriage would mean he might not experience such a

'natural indulgence in natural desire'. First therefore, it is the absence of male pleasure from the sexual relationship in marriage which is established as problematic.

This is not all. Secondly, Lushington is clear that not only would the inevitable extra-marital relations constitute a threat to the stability of the first relationship, they might also take the form of 'unnatural connexions with other men', connections which are 'almost certain' (such is the force of male sexual desire). There is an implicit assumption in Lushington's argument as to the dynamic which motivates the expression of male sexuality, and it is a force which might be realised in 'unnatural' forms. What is meant by 'quasi-unnatural connexions' is not stated, though presumably such connections might include adultery and homosexual relations, or any sexual activity which is not coitus (eg unnatural connexions would be oral/genital, genital/anal, oral/anal connexions). Lushington is here concerned with the possible consequences of male desire **not** being satisfied. It is male pleasure which constitutes Lushington's focus. On the one hand Lushington is presenting a natural ordering of the male body where all is in its place - desire, connection, cathexis and where the 'natural' (though this is not explained) power of male sexuality demands satisfaction. At the same time, the temptation of 'unnatural connexions' is ever present.

A similar construction of male sexuality is to be found in Clarke (Otherwise Talbolt) v Clarke 2 All.E.R. [1943] 540,

a case concerning the rare occurrence of 'fecundatio ab extra'. In this case it was established that in law a decree of nullity may in some circumstances be obtained despite the birth of a child of which the husband is admittedly the father, and it is clear from Clarke that pleasure through penetration is of a higher status in determining consummation than conception and reproduction. As to whose pleasure, it appears that consummation is, above all, phallogentric

In Clarke the parties married in 1926 and, until 1940, cohabited. In 1930 the wife gave birth to a son who, it was admitted to the court, the husband was the father. In 1942 the wife petitioned for a decree of judicial separation on the grounds of the husband's adultery, the husband answering by alleging that, for physical reasons, the marriage had never been consummated despite the birth of the child. Not in dispute in the case was the fact that, at various dates after the beginning of 1940, the husband had intercourse with another woman, and therefore committed the matrimonial offence of adultery. It might seem, on these facts, that the husband would have a difficult time proving his case. He was, after all, the father of a child by his wife. The court recognised that

"The only issue of fact in this case is whether the husband is right in saying that, notwithstanding that, after four years of married life his wife has borne a child of which he is admittedly the father, and notwithstanding that the parties thereafter cohabited for some ten years, the marriage has never in fact been consummated...In cases of this kind there is always a presumption that the marriage has in fact been consummated, and where, as here, the wife has borne the husband a child, such presumption is, of course, strong. The onus of satisfying the court that the marriage has not been consummated lies heavily upon the husband." (p 541 at C-E)

To establish the 'proof', the court assessed the 'facts' of the case. In addition to the evidence given by the husband and the wife, a gynaecological specialist called by the husband, a Dr Burns, explained that it was well known in the medical profession that conception may take place without penetration of the vagina. Indeed, both sides admitted that fecundatio ab extra was possible. In the husband's evidence he declared that the wife had made no secret of the fact that she was not fond of children, and alleged that his wife appeared to regard the sex act as a 'disagreeable necessity.' Repeated failures to

achieve penetration, with and without a condom, resulted in failure. After the breaking of the sheath on one such occasion, she became pregnant and after a particularly difficult and protracted labour the son was born [38].

"According to Dr. Dunlop, the position and size of the baby made labour difficult. He said that during her labour Mrs. Clarke experienced muscle spasms which resisted the progress of the baby, and he added that he had come across the same kind of thing with "frigid" women whose sex life had been abnormal." (p 543 at G-H)

While the position and size of the baby 'made labour difficult', the difficulties of birth are taken as suggesting a sexually abnormal relationship which **preceded the conception**. In short, the difficult birth was the wife's fault: 72 hours of labour and an instrumental delivery were thus taken to constitute evidence as to her "frigidity". Like Baxter v Baxter, Clarke is a case in which a concern with male pleasure is explicitly foregrounded.

In the case of R v R (otherwise F) [1952] P 1194 the husband again was the party petitioning for nullity of marriage, only in this case on the ground of his own incapacity to consummate. In R v R the husband was by his own admission able to effect an erection and a full penetration of the wife, but was **unable** to produce emission of semen into the body of the wife. This, counsel for the husband in Baxter would have argued, would not result in consummation, though in the light of Baxter and Clarke it might seem that consummation has indeed taken place, as it is penetration and not emission which results in consummation. The wife pleaded just this in her answer that the marriage was valid and subsisting, denying that the marriage had not been consummated and stating that the parties had engaged in sexual intercourse for about six months after the celebration of the marriage, intercourse in which full penetration had been achieved by the husband. Thereafter, she contended, they had had sexual intercourse on numerous

occasions with the husband achieving full penetration. If emission into the wife's body is not necessary for consummation (Baxter), then the marriage was indeed consummated.

In *R v R*, after nine years of marriage, the husband informed his wife he had fallen in love with another woman, and on the husband's evidence, a year later he had achieved both penetration **and** emission with the other woman. As in *Clarke*, the husband is denying his legal 'adultery' by alleging non-consummation. After the 'adultery', the husband asked the wife to acquiesce in a petition for nullity of marriage that they might be free to marry the woman with whom, he stated, he had achieved 'penetration in the fullest sense'. Like *D - e v A - g*, *Baxter v Baxter* and *Clarke v Clarke*, the issue turned on the meaning of the word 'consummate'. In the judgment, Bush James drew what he considered to be three important distinctions. First, with reference to *Baxter*, that between wilful refusal to consummate and incapacity to consummate, arguing that as the post-nuptial defect of wilful refusal differs from the old ecclesiastical ground for annulment, the husband's alleged impotence must be seen to have existed at the time of the marriage. Secondly, a distinction was drawn between the practice of withdrawal before emission (coitus interruptus) and whether or not 'emission' is necessary per se to prove a man potent according to the old ecclesiastical laws. Thirdly, regarding the purpose of marriage, as *Baxter* had clearly refuted the idea that the first reason of matrimony was to produce offspring, Bush James and the court were to be concerned simply with

"...whether the husband or wife...in fact consummated their marriage in the manner and to the degree which would have convinced the ecclesiastical lawyers that the marriage had been consummated." (p 1197 at A)

Bush James cites the judgment of Willmer J in *White (otherwise Berry v White)* [1948] 2 All.E.R.151, where it was declared (p 155) that a 'true conjunction' was to be achieved

"...as soon as full entry and penetration has been achieved. What follows goes merely to the likelihood or otherwise of conception."

Bush-James felt able to conclude, quoting such suitable authority, that

"Vera Copula consists of erectio and intromissio. Once this has been achieved, the fact that consummation, in the sense of potential conception, has been made impossible by the use of one or both of the parties of contraceptives, is irrelevant. Only intercourse in the sense of vera copula is necessary to 'consummate a marriage'. A person is in law impotent who is incapax copulandi apart from the question of whether he or she is incapax procreandi."

Regarding the husband's adultery

"I wish to make it clear that the fact that the husband has been able to achieve consummation in the fullest sense with another woman...has not affected my view in the slightest, as the medical evidence demonstrates that this case is a perfect example of impotence quoad hunc or hanc." (p 1198 at a, E)

The court thus held that the marriage had been consummated by the erectio and intromissio, and therefore no decree would be granted. Consummation and male pleasure, it is clear, involves penetration, but not necessarily emission. Pleasure, presumably, is to be derived from penetration.

What therefore is it about penetration which produces male pleasure? In S.Y v S.Y (Orse W) [1963] P 37, a case concerning the construction of an artificial vagina, Karminski J. considered the sexual pleasure of the husband in intercourse.

"I next have to consider from the husband's point of view what the effect would have been on him. If the

operation had been successful, he would have been able to insert his penis a great deal further than he would ever have been able to do before. It was said on his behalf that sexual intercourse into an artificial vagina of this kind would not be satisfactory or successful and would not, in any event, amount to consummation of the marriage...[the medical inspectors] agreed that the man would obtain a large degree of satisfaction. It is suggested that satisfaction would be limited by the fact that the woman was deriving little if any pleasure from it, but again the consultant took the view that, although probably the woman would have not quite the same satisfaction as she would do if she was normal and had an ordinary vagina, she would get pleasurable sensations which would in turn communicate themselves to the husband. I accept the point at once that a man is not very likely to get very much enjoyment from a sexual act if the woman does not share at any rate in some degree with his feelings, but I have no doubt that he would in this case, if the operation had been successful, have been able to obtain real sexual satisfaction from it." (p 42: My emphasis)

Implicitly, not only would the man derive sexual pleasure from such intercourse, but the degree of pleasure experienced by the wife would relate to such 'real sexual satisfaction' on his part. A degree of reciprocity is therefore accepted by the court, and it might be argued the subjective experiences of sex are taken into account to this degree. However, in establishing whether consummation has taken place, it is the physical conjunction of penis and vagina which is of far more relevance than such psycho-sexual questions. The vagina, it is clear, must be capable of 'complete' penetration which will itself depend on the facts of the case. In invoking the criteria as to what 'ordinary' male pleasure might involve, so that male pleasure may be judged /measured, in D - e v A - g Lushington had constructed male sexual pleasure not simply with reference to genital connexion with the vagina, but in such a

way as to calibrate male desire through an anatomy of pleasure located in the penis itself. The test is not complicated: male pleasure can be measured by reference to inches of penetration in the vagina. The greater the penetration, the greater, on this reasoning, the pleasure. It is not good enough simply for some penetration to be possible. It must be ordinary and complete. From *D - e v A - G* and the subsequent cases it would seem that 'normal and natural' male pleasure is produced by penetration of somewhere between 3 and 4½ inches of the vagina. Less than 2 inches is unnatural and no intercourse. So, male sexual pleasure really becomes a matter of inches of penetration, regardless of whether the woman is able to 'share in some degree his feelings'. In determining whether or not a marriage has been consummated in law, the question is - can, and has, a penis be inserted into her vagina?

The taxonomy may be further complicated by judicial consideration of the time of insertion. In *W (Orse K) v W* [1967] 1 W.L.R. 1554 the husband was able to penetrate the wife on occasions for a short time, but soon after penetration his erection 'collapsed' and he withdrew, there being no emission either inside or outside the wife. The wife left the husband after three years of marriage and filed a petition for a decree that the marriage be declared null and void on the grounds of non-consummation. The court held that such a penetration of the wife for such a short time and without emission did not amount to ordinary and complete intercourse and was therefore insufficient to consummate the marriage. Brandon. J. found that

"...penetration maintained for so short a time, resulting in no emission either inside the wife or outside her, cannot without violation of language be described as ordinary and complete intercourse. I do not think that there is any authority which binds me to hold that any penetration, however transient, amounts to consummation of a marriage..." (p 1555)

Penetration per se is not good enough. Indeed, Brandon J is hinting that emission might be of some relevance. Over a hundred years later Lushington's conclusions in *D - e v A - g* are still referred to as providing the test of "ordinary and complete intercourse". In addition to time of insertion may be added frequency of attempts at intercourse on the part of the husband. In *G v M* (1885) L.R. x A.C 171, on cross examination as to the frequency of the husband's attempts at intercourse in the four month period following marriage, the wife believed them to have been "at intervals of two or three days, sometimes less." The penis, it is clear, is to penetrate for a certain length of time and, in establishing whether consummation has occurred, the court will look to the frequency of such attempts at penetration. As to the degree of penetration, it is the medical examination of the wife which has determined how much pleasure a man might obtain from intercourse with a particular woman.

The Medical Examination

Judicial investigation and assessment of marital coitus has a long history, and theological examinations of the mechanics of the sexual practices of husband and wife are striking in the extent of their obsessive surveillance of the sexed body [39]. Canon law accorded much significance to sex and sexual morality, and the Church Fathers expounded at length on the constitution of natural and unnatural sex. Archival sources and collections of court records from the sixteenth century onwards reserve a central place for sexual impotence. The dissemination of printed books, confessors manuals and theological treatises and factums made cases of sexual impotence common knowledge and this ecclesiastical obsession was carried into secular law. Darmon (1985) describes how the Church transcended intellectual onanism with an intensive testing of erectile capacity with the intention of establishing proof of consummation, and the establishment of legal procedures to determine cases of the annulment of marriage on the grounds of impotence provided

judges with the opportunity to engage in intensive enquiries into the private lives of individuals [40].

Genital examinations are, therefore, not a new phenomenon. The Romans had resorted to genital examination to establish virginity, and in the West at least systematic recourse to examination of the genitals in consummation disputes had become common by the twelfth century, though they were not to be institutionalised in canon law till the thirteenth century (Darmon, 1985: 142) [41]. It is important to remember that genital examination occurs in other contexts relevant to this discussion, perhaps most notably with regard to defamations, rape [42], pre-marital defloration [43], child sexual abuse [44] and bestiality. Within the terminology introduced in Chapter 3, the derogation to the 'psy' professions - doctors and surgeons and (later) psychologists and psychiatrists - of the right to investigate couples involved in the dispute tells us much, I believe, of the power of both medical discourse and of law. As Foucault (1981) has argued in relation to the Confessional, what marked the period as different to that which preceded it was the establishment of regulatory and administrative mechanisms whereby sexuality might be, in Foucault's terms, 'put into discourse'. While the discourse - its form and content - had been formulated by the Church, its manifestation in the new epistemic order, the establishment of an apparatus for minute investigation was, in part at least, legal in its form. It is not just the obsessional nature of the questions asked of the sex lives of wife and husband which is important: it is the **assumed right** to ask such questions in the first place, the fact the law has this power to dictate normative sexual behaviour and morality and to order the medical examination to decide whether or not a marriage had been consummated.

The examinations are recounted in legal texts in a manner which raises complex questions about the voyeuristic nature of such a public account of inspection of the genitals. Beatrix Campbell writes in the context of child abuse, but her argument captures

well the pornographic/voyeuristic dimension to such evidential requirements in the following judicial assessments of conjugal relations. The context is different, but the implications are equally disturbing. As feminists have argued, ultimately all representations of women are sexualised [45].

"Here were photographs of sexual anatomies, and it is worth wondering how far their features - anuses and vulva, prone, open, available to our gaze and to our fantasies - crossed the boundaries between 'evidence' and 'pornography'...These forensic photographs face the viewer...with a challenge: with whom will she/he identify?...They are difficult pictures to see because what they show is not only a body but a relationship. They may cause you grief or they may work on your fantasies, but either way, you have to work out who you are as you watch, if you are to know what to think." (Campbell, 1988: 80-81)

Above all, the medical examination in non-consummation cases should be seen in relation to the power of law and the sexed bodies of men and women. Bearing in mind the voyeurism of the judicial gaze, Carol Smart (1989: 113) has argued,

"Not only has law been concerned with the 'ownership' of the produce of women's bodies through laws on illegitimacy and inheritance (and now with the ownership of gametes and fetuses), it has also used women's bodies as a point of entry for social values and norms...The woman who refuses this regulation is defined as pathological, a difficult patient...The interface of medicine and women's bodies is also the interface of law and women's bodies...law maintains its traditional approach to women's bodies, seeing the biology of bits of these bodies as encompassing a nature which must be sustained and celebrated even against the women themselves." (cf Shorter, 1984)

In the non-consummation cases the 'social values and norms' to which women's bodies are used as a point of entry are most clearly revealed as phallogentric and heterosexual. The power to speak may be inseparable from voyeuristic and fetishistic fascination and, within psychoanalytic terms, linking voyeurism to the scopophilic instinct involves a transfer of male pleasure in his own sexual organ to the pleasure of other people having sex (Freud, 1981: 109 - 111). If these legal texts rely on this instinct, then an analysis of consummation in law is also open to the charge of voyeurism and objectification.

The evidential problems to which non-consummation gives rise are, in a sense, obvious. Whereas bigamy or clandestine marriage could be ascertained by evidence or testimony, the 'facts' of impotence are not immediately apparent to the eye. Impotence was something to be presumed, rather than proven, and the preliminary procedures to establish whether or not consummation had in fact taken place could not leave matters to chance. The medical examination itself, justified through reference to the power of law, is extreme, insensitive and emblematic of a double standard in relation to male and female sexuality. In D - e v A - g (1885) (op. cit.) three medical experts, a Dr's Bird, Lever and Cape were appointed and sworn

"...to examine particularly the parts of generation of Maria D., and whether she is capable of performing the act of generation, and of being carnally known by man, and if she be incapable of performing that act....whether such incapacity can be so remedied as to enable her to perform that act, and to so be known." (1040 at 284)

The reports which follow share in common an understanding as to what constitutes and brings about pleasure within marriage: sexual intercourse. Their conclusion was that

"...we are unanimously of opinion that she is undoubtedly capable of performing the act of generatio, and of being

carnally known by man. We are further of opinion that although sexual intercourse can occur, yet conception cannot result". (1040 at 284)

It was agreed in D - e v A - g that the external sex organs of the wife were developed and that her internal organs were undeveloped. She might, it was clear, both give and receive pleasure from genital connection. In a passage worth quoting at length for the insights it gives into the nature of the medical examination, Dr. Bird states that,

"I have examined the private parts of the ministrant, and concluded that she is capable of having connexion with and being carnally known by a man, meaning thereby that although there is a total absence of the uterus, and a malformation of the vagina...still a very small portion of the penis can be undoubtedly introduced and connexion by that means take place; and the appearance of her sexual organs afford very, very strong presumption, if not positive evidence, that to such extent sexual intercourse has taken place...there is every evidence of the ministrant's capability for receiving sexual gratification; there is nothing attending on her state to prevent it; those parts tending to that result being with her fully developed; as to her power or capability of imparting it, I can offer no opinion." (1042 at 288: My emphasis)

The length of her vagina was described as being between 3/4 of an inch and 2 inches, which is presumably sufficient 'for receiving sexual gratification'. Bird continues with reference to his technique of 'admeasurement',

"...internally I found that the vagina, which ought naturally to have been of an internal depth of about three inches, was in fact, as I ascertained by admeasurement, only three quarters of an inch in depth...I then [later] found that the vagina had become considerably elongated,

being now of a depth of two inches, ascertained, as on former occasion, by actual admeasurement; and this extension having taken place, I cannot, therefore, depose that that it is absolutely impossible for the vagina to a further elongation...I further depose that such the formation of the sexual organs of the said Maria D. is decidedly an unnatural formation and is irremediable..." (1041 at 287)

For Dr. Bird the sexual organs, though they might be subject to 'further elongation', constitute an 'unnatural formation'. However, it is clear that medical evidence may be contradictory. According to a Dr. Lever, who did not resort to admeasurement, he

"... learnt from the said Maria D., who was at such time, I believe, about twenty-three years of age, that she had never had any of those periodical illnesses to which females are naturally subject." (1042 at 290)

He continues

"Upon examination I found...upon introducing the finger into the vagina, an impediment at once presented itself, and I discovered that the vagina, instead of being, as it ought naturally to have been, of the depth of four inches, or thereabouts, was in the said Maria D of a depth of only one inch and a quarter, so far as I could judge without positive admeasurement...I have admitted my conviction that sexual intercourse had taken place, and that the ministrant is capable of receiving sensual gratification, and of so far imparting it as to afford the ordinary excitement to the male organ..." (1042 - 3 at 290, 292)

Unlike Dr. Bird, Dr. Lever felt able to consider her capable of imparting 'the ordinary excitement to the male organ.' According to the third of these experts, who had been summoned by the court to provide the 'conclusive' third opinion

"...on introducing the finger into the vagina I found the same in a very contracted state as regarded it's depth...She is capable of coition, but **the male organ being restricted from its full natural insertion** I can hardly designate such coition perfect, **though it is beyond incipient coition, as personal gratification can be afforded and actual emission ensue** ; exclusive of such restricted admission of the male organ, the act of coition is perfect, the only distinction as regards such act in the case of Maria D being that the male organ can only be inserted to the limited extent which I have already set forth..." (1046 at 302: My emphasis)

Thus, though 'the male organ is restricted from it's full natural insertion' 'she is capable of coition'. It is more than 'incipient coition' and 'actual emission' might ensue. It might seem in D-e v A-g, the wife being capable of such coition, that the husbands case would necessarily fail. The size of the vagina is uncertain, despite the 'admeasurement' of these medical men, but coition is possible. This was not, of course, to be the case.

Similarly, in S.Y v S.Y (Orse W) [1963] P. 37 the 'experts' reported that

"The vagina was short and measured only about two-inches from the orifice (the normal measurement is about three and one-half inches...On vaginal examination, however, the vagina would only admit one finger to two inches...presumably two-thirds of the vagina is missing."
(p 40 - 41)

In S v S (Otherwise C) [1954] P. 736 the wife, having being served with the petition, consulted a Dr. L, whose examination

"...found her to be a perfectly healthy woman, who was co-operative on examination and showed no signs at all of

frigidity or hysteria during his examination of her sexual parts." (739 at H)

It is not simply the bodies of women in such detail that the judicial gaze is concerned to examine in non-consummation cases. The 'marital life' itself is open to scrutiny and assessment and, indeed, a willingness to be examined in the first place may be taken as indicating 'frigidity or hysteria'. In G v G [1924] AC 349 the court undertook an extensive examination of the periods of the marriage where the spouses did, and did not, live together. The court examined the spouses evidence and turned to correspondence and other witnesses to find if consummation had been attempted and why consummation may have been refused. The accounts of the spouses personal lives are remarkably detailed though, as in D - e v A - g, it was not an investigation the court felt could be undertaken lightly in order

"...to determine, as we have to do, whether we are entitled to draw the inference that refusal has been due to incapacity and not merely to wilfulness...[it is] a matter of delicacy and difficulty; none the less the difficulty must be faced and a determination come to according to the view that we take of the evidence. It necessitates, however, a somewhat minute examination of the married life of the parties, and I make no apology for having to bring before your Lordships that history in very considerable detail." (p 355: My emphasis)

This brings us to the purpose of the examination. The theologians had resorted to medical discourse to establish just what impotence was. As Darmon notes (1985: 13), finding a precise definition of impotence was not so much a medical imperative as a legal and theological necessity. To declare a marriage null and void on the basis of a medical examination would render bad a union which the Church had elevated to the status of sacrament. The subjective nature of the judicial determination as to what does, and does not, constitute

'evidence' is therefore most important. In G v M (1885) L.R. X A.C. 171 the wife raised a defence of non-consummation of the marriage to the husband's divorce petition based on the grounds of the wife's adultery. On the relation between law and medicine the Earl of Selbourne L.C. states that,

"...I should not have been able myself to have drawn any conclusions of that sort; but with the medical evidence before me, I am obliged to say that there is evidence..."
(p196)

In a sense, science here gives to the judicial gaze a reputable mesh through which to view the workings of the human body, as we have already seen in relation to transsexualism (Chapter 6, 186 - 7). The law is 'obliged' to respond to the empirical evidence, the 'hard facts' provided by the medical 'experts'. However, the law's capacity to speak of the body is not derived from within medical discourse itself. Rather, it comes of the law's own status, the law's own inherent ability to so dissect the significance to be accorded to particular forms of pleasure. In the end the power of law is derived from its own claim to scientific status (Chapter 2, p 38 - 41, Chapter 3, p 77 - 80). Medicine may clarify the workings of the law, or it may provide the law with a 'way out' from the bonds of its own internal logic (doctrinal exegetical method), but ultimately the decision is legal. In the non-consummation cases it is clear that medical discourse enables both the parties to a case to 'speak the truth' of their own bodies, but to do so in a way which is acceptable to the court and is framed within the terms of legal discourse. When the parties fail to present their sexual knowledge and experiences in a form in which the court/law finds appropriate, the evidence is doubted. To a degree, both parties are limited in their resistance to the power of law and the all consuming judicial gaze. Referring to the examinations which took place during the impotency trials of the Ancien Regime [45], Darmon notes how, alongside serious accusations, came the insinuations which would be made as to the sex lives of the husband and wife. He concludes that

"An insurmountable prejudice hung over any individual submitted to the cross-examination. Resistance was futile; the questions fused into a single monotonous cry of denunciation. For how long had he known himself to be impotent? What was the origin of his impotence? What were the symptoms? Had he consulted a physician? Did he know he was impotent at the time of his marriage? Was he aware that he had profaned the sacrament?...Relentlessly, and impelled by a kind of sadistic relish [the judge] would ponder the smallest details. The same treatment was reserved for an impotent wife." (Darmon, 1985: 133)

In establishing whether or not there is a marriage, the medical examinations in these cases, sanctioned by reference to law, appear brutal and insensitive. Though concerned with how the parties met, the marriage celebration and the opinions of friends, the most prolonged attention is reserved for the marriage bed, and it is here the medical examination came into its own as the conclusive source of evidence as to consummation and capacity. However, what is notable in these cases is how when it is the husband who is claiming nullity on the basis of the wife's incapacity to consummate, the courts have systematically **preferred** his evidence to that of the wife.

An example of this is Clarke (Otherwise Talbolt) v Clarke [1943] P. 540, in which the husband alleged that the wife generally refused to allow intercourse. When she did so permit, it was submitted on behalf of the husband that she remained passive and regarded the proceedings with distaste. The wife however maintained that some penetration had been achieved. The evidence of husband and wife was clearly contradictory regarding conversations which were alleged to have taken place. While the wife admitted that sexual relations were 'difficult', Pilcher J. made clear what he thought of her evidence:

"I did not consider Mrs. Clarke a satisfactory witness. She affected to have no recollection of a number of

matters which she cannot possibly have forgotten. Many of her answers on other matters were evasive...and I formed the view that she was not being entirely candid. I think Mrs. Clarke remembered a good deal more than she was inclined to admit. I accept the evidence of Mr. Clarke that his wife always showed repugnance to the sexual act. I do not think that she cared for children as a whole or that she wanted a child of her own. I think Mr. Clarke's account of the circumstances in which the child was conceived is accurate..." (543 at a-b: My emphasis)

It is to be remembered that in this case it was not that the wife suffered from any physical malformation which would prevent consummation, though it was noted that before the birth of the child the vaginal orifice was small. The medical evidence attested that, on digital vaginal examination, it was unable to state categorically whether or not the marriage had been consummated. A second specialist expressed the view that the wife, from her husband's description at least,

"...appeared to be suffering from "sexual anaesthesia", or, as it is more commonly known, "frigidity". This state was...characterised by an aversion to the sexual act ...clinically this condition was often accompanied by resistance to the male ...in some cases, it was accompanied by a desire for personal adornment and material possessions" (543 - 4 at H).

So, her 'aversion' to intercourse is taken as evidence of 'frigidity'. As to the 'personal adornment' and 'material possessions', there is no elaboration. The medical inspectors appointed by the court found that Mrs. Clarke was not a virgin and that there was no impediment to intercourse. However, in making a case for the husband

"In re-examination [Dr. Milligan] ...said that vaginismus would be more likely to persist after the birth of a child

if the woman had experienced a very difficult labour." (p 544 at D)

Not only has the difficult birth being taken to constitute evidence of a reluctance to consummate **before** the birth, it is also here taken as resulting in vaginismus **after** labour. As we have seen, despite the birth of a child, the marriage in this case was held not to be consummated. The birth does not matter: what does is the use of husband's penis.

"...it seems certain that she was still a virgin when Dr. Dunlop carried out his digital examination in September 1929. On all the evidence I have no doubt that Mrs. Clarke was suffering at all times from 'frigidity'..." (p 544 at F)

The decree of nullity was accordingly granted to the husband. What the court had done in *Clarke v Clarke*, in effect, was to dismiss the wife's evidence (though the medical justification for so doing was dubious) and justify reaching the decision it had wanted to: that is, in favour of the husband and based on the wife's 'frigidity'. Pilcher J. admits as much.

"There is nothing in the medical evidence **which precludes me from finding that Mr. Clarke is telling the truth...** This marriage was never consummated. It was not consummated because Mrs. Clarke had a repugnance to the sexual act which she was quite unable to overcome." (p 545 at A: My emphasis)

Pilcher does not wish to be precluded by medical evidence from reaching the conclusion he feels instinctively perhaps is right. Only a penis - 'full and natural intercourse' - may lose virginity in a woman, and not conception and the birth of a child. This may seem obvious, but the phallocentric focus here negates the wife's psychological experience in its entirety. Yet the facts of the case tell a very different story if considered from the wife's perspective. After 16 years of

marriage and the birth of a child, the court has declared there to be no legally recognised relationship. What is striking about *Clarke v Clarke* is not just how the penis/vagina genital connection displaces reproduction as determinant of a legally recognised relationship (even if a child is born, if intercourse does not take place there will be no marriage). It is that after 16 years and giving birth to a child, the court states that Mrs. Clarke had never been married, and in coming to this conclusion 'there is nothing which precludes' the court from rejecting Mrs. Clarke's evidence.

Though it is only mentioned once, it is interesting to wonder the part Mr. Clarke's 'new relationship' played in the decision. Is Pilcher saying in effect that any reasonable man would do as Mr. Clarke in such circumstances? That is, to turn to where sexual 'ordinary and natural' gratification, the gratification espoused by Lushington in *D - e v A - g*, may be met? Had instead a decree of judicial separation and a case of nullity not been granted (the wife's argument) then the court would have had to admit that adultery had taken place. By reaching this conclusion, however tortuously, the matrimonial offence is avoided and the sacrament of marriage unoffended. There was no marriage to offend.

Similar doubt is cast on the evidence of the wife in *B v B* [1955] P. 42, where in judgement Commissioner Glazebrook declared

"Applying what was said in *D - e v A - g*, it seems to me that there cannot be said to have been proper consummation in the present case... It follows from what I have said that, in the first place, I accept the husband's evidence rather than that of the wife in regard to the matters in which there is variance between them, and I am satisfied that this marriage was not consummated." (P 47. My emphasis)

Similarly, in S v S (Otherwise C) [1954] P. 736 Karminski J wished to

"...make it clear at the outset that I preferred in general the evidence of the husband, whom I thought to be a more reliable and convincing witness." (p 738 at G)

In S v S the court accepted that the husband urged the wife to see a doctor.

"The wife denies that the husband told her about this time to consult a doctor, but I prefer the husband's version of this part of the case." (739 at B)

I have in this Chapter placed non-consummation of marriage in both a social and legal context, and have sought to introduce the problematic nature of male impotence. I have located the 'essential' place of sex in marriage, identified a range of meanings which have been given to (specifically male) pleasure and to procreation, and have begun to investigate the meaning of sexual intercourse in law focussing in particular on the medical examination. These questions will be continued in the following Chapter, in which I shall expand on these arguments, draw together the issues raised and conclude the analysis of marriage and male sexuality presented in Chapters 6-8. Having introduced non-consummation of marriage, I shall now explore in more detail the meaning of impotence and intercourse in law and seek, in particular, to address the complexity and interrelation of forms of regulation of the male body in this area of legal discourse in the light of the theoretical developments in Chapters 2 - 5.

CHAPTER 8

MARRIAGE AND MALE SEXUALITY III: LAW, IMPOTENCE, AND THE BODY

'True' Sexual Intercourse and Female Incapacity

It is clear from the the previous Chapter that there is in law a 'true' sexual intercourse which is capable of consummating a marriage, whereas other 'unnatural' connections are not. It is in a succession of cases concerned with the incapacity of the wife to consummate a marriage, and in particular those cases concerned with the surgical construction of an 'artificial vagina', that clarification of this distinction between 'natural' and 'unnatural' intercourse' is to be found. Analysis of these cases brings into clearer focus two issues which have emerged in Chapter 7. First, the meaning of this 'true' sexual intercourse in law, and secondly, the construction of the sexual male body in this area of legal discourse. Though, like Clarke v Clarke [1943] P. 540, these cases concern the incapacity or inability to consummate on the part of the wife they nonetheless, I shall argue, tell us much about the construction of male sexual pleasure in this area of law.

As we have seen, in D - e v A - g (1845) 1 Rob. Ecc. 280, at 1039, Lushington could not avoid attempting to define intercourse (Chapter 7, 225 - 227). If forms of intercourse are to be 'unnatural', then what is it that constitutes 'natural' sex? It is necessary to look at this in more detail.

"...the existing difficulty...lies in the meaning of the term "sexual intercourse". How is it to be defined? This is a most disgusting and painful inquiry, but it cannot be avoided". (D - e v A - g, 1045 at 298)

Lushington proceeds to define sexual intercourse in a passage which is worth quoting at length:

"Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet, I cannot go to the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all. I can never think that the true interest of society would be advanced by retaining within the marriage bonds parties driven to such disgusting practices. Certainly it would not tend to the prevention of adulterous intercourse, one of the greatest evils to be avoided." (1045 at 298)

This is at the crux of Lushington's reasoning in *D - e v A - g*. First, intercourse (giving pleasure) is not in itself sufficient. It is admitted that intercourse has taken place, but it was not 'real' (ordinary/proper/natural) intercourse. 'Ordinary' and 'natural' must therefore have some meaning. Secondly, the 'disgusting practices' which might follow from 'unreal' intercourse are one of the 'greatest evils', against the 'true interest of society'. These are the consequences of a legal recognition of 'imperfect' sexual intercourse in marriage.

In considering impotence an important distinction may be made between structural impediments, as in *D - e v A - g*, and psychological inability to consummate a marriage. Canon law recognised three types of impotence: accidental impotence [1], respective impotence and relative impotence [2]. The psychological impotence in *G v G* (1871) L.P. 2 P&D 287 related to what the husband termed the 'excessive sensibility' of his wife, a woman for whom he claimed genital connection was anathema. There was no structural defect which prevented consummation, though there was a question of whether a nullity

decree could be granted merely where the barrier to consummation was the psychological state of the wife. The court held that it could. Both structural/'biological' and psycho-sexual/superstructural causes of non-consummation come within the judicial gaze for the purposes of determining whether consummation of marriage has occurred.

'Impotence', therefore, may be a psycho-sexual state sufficient to bring about judicial investigation of pleasure. In considering which impediments - structural or psychological - should activate the judicial gaze and prompt 'the interference of the court', Lord Penzance (at 291) put forward what he took to be the true test of incapacity which would necessitate such interference [3].

"If...a case presents itself involving the impracticality (although it may not arise from a structural defect) [of consummation] the reason for the interference of the court arises....It cannot be necessary to show that the woman is so formed that connection is physically impossible if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect cannot be sufficient to render a marriage valid if it be shown that connection is practically impossible, or even if it be shown that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to." (My emphasis)

Just because there is no physical structural defect therefore it does not follow that the marriage will be valid. What counts is the 'practicality' of consummation. The problem, however, which Penzance identifies relates to what may be done about the practicality? What if it is possible 'after a remedy has been applied'? Does it matter if the wife will not 'whether wilfully or acting under the influence of hysteria' submit to such a remedy? *G v G* was decided in 1871. Subsequent medical and

surgical developments have made the legal treatment of female incapacity to consummate all the more complex in that surgery now means that something might indeed be done.

The different treatment in law of male and female inability to consummate has a long history. Canon law experts took a long time to recognise the existence of female impotence at all, and when it was recognised care was taken to specify types. First, it was believed the vagina may be too narrow to allow intromission - 'arctitude'. Secondly, a membrane might close over the vagina rendering penetration impossible, and thirdly, texts refer to a blocking of the neck of the uterus by a growth of flesh which might again render penetration impossible [4]. Evidentially, female impotence causes difficulties. According to the French jurist Coquereau in 1749

"Frigidity in women does not figure among the diriment impediments, for it is not possible to examine what takes place internally, in those parts which are in women the active parts." (Quoted in Darmon 1985: 38)

Psychological incapacity on the part of the wife was to figure in the case of M v M (Orse B) [1957] P. 139 in which, it was alleged, the wife was suffering from vaginismus. It was submitted on her behalf that since there was the possibility of a cure there should be an adjournment for her to undergo treatment. It was held by Karminski L.J. that while there was a 'mere possibility' of successful treatment, on investigating the history of the marriage the wife had made no attempt to remedy a difficulty about which she knew. The wife was, Karminski held, incapable of consummating the marriage.

What, however, if subsequent surgery might be able to remove and/or cure such an incapacity? In S v S (otherwise C) [1954] P. 736 the husband petitioned for a decree of nullity on the grounds of the wife's incapacity and wilful refusal to consummate the marriage. The court accepted that both parties had made genuine but unsuccessful attempts at consummation of

the marriage. The husband suggested that the wife see a doctor, though he did not, the court noted, offer to take her and nor did he see a doctor himself. After three years of marriage, the husband began an adulterous association with a woman who then borne a child by him. The wife argued that she was not subject to any physical or mental deficiency other than a thickened hymen, which might be removed by minor surgery which she "is and was at all material times ready and willing to undergo". By cross-petition, she sought divorce on the grounds of the husband's adultery, alternatively claiming a nullity decree of the grounds of the husband's incapacity or wilful refusal. Karminski concluded his review of the cases on incapacity asking

"Was the consummation of the marriage between the husband and the wife practically impossible at the date of the hearing of this suit...? The answer to that question must be no. At that hearing the wife said that she was willing to undergo an operation, and she did, in fact, subsequently undergo it. It is true that consummation is now improbable, but that is at least due in part to the fact that the husband is living with another woman; but the impractical and the improbable must not be confused, since I have no reason to believe that the wife would refuse an attempt to consummate the marriage if the husband left the woman named and offered to start married life afresh with the wife. I find, therefore, that the husband has failed to satisfy me that the marriage was not been consummated owing to the incapacity of the wife". (p 743 at B)

Central to S v S was the medical evidence: what treatment can a party be expected to undergo to consummate a marriage? In this case the wife was 'abnormal' only in the sense of having a thick hymen, which could be corrected with minor surgery with no danger to life or health. The medical inspector testified that up to the time the parties separated, the marriage had not been consummated and the wife was a virgin, and it was

accepted by both parties that the cause of the failure was "due to the structure of the wife's parts" [5]. However, what if the surgery entailed radical transformation of the genitals, connection of which, as we have seen, is 'essential' to consummation? Ultimately, the 'natural' quality of the genitals is inseparable from the 'natural' intercourse, and what this 'natural' quality entails becomes itself questionable.

The required surgery in *S v S* was slight. In *B v B* [1955] P.42 however the wife had been born with certain male organs, which were removed by operation when she was 17 years of age. She possessed no vagina, her general physical appearance being inconsistent in some respects with being female, and she did not menstruate. As to her marriage ceremony with the husband, there was a conflict of evidence as to whether or not he knew of her incapacity, although it was admitted he knew she could not have a child. Attempts at penetration were unsuccessful. Though it was agreed that she was then "incapable of consummating the marriage" owing to the malformation of the structure of her sexual organs, she alleged the incapacity was curable and, after an operation, an artificial passage of four to six inches was created. Following the operation there were frequent attempts at penetration. The husband petitioned for nullity of the marriage on the ground of the wife's incapacity stating that, following the operation, he was unable to penetrate more than two inches, there existing despite the surgery a considerable closure of the passage. The wife however alleged that complete, or almost complete, penetration of the passage had been affected.

Counsel for the wife submitted that provided the wife did have a vaginal passage of sufficient length to permit 'normal' penetration (as understood in *D - e v A - g*), she would be capable of consummating the marriage notwithstanding that the passage had been artificially created. On the facts therefore, full penetration had been achieved. Even if this case was not made out, counsel argued that the wife's defect was shown to be

curable and therefore consummation remained possible. The judge summarised the evidence.

"It is said on behalf of the wife that it is sufficient if it is possible for a husband to have an erection and penetrate into the female body. On the other hand, it is submitted on behalf of the husband that it cannot be said that there is consummation of a marriage where the husband's erection penetrates into an artificial passage which in effect has no relation to the organ which should be there in the wife. It is carried further on behalf of the husband, and submitted that if the court were to hold that a connexion in those circumstances was consummation of a marriage it should hold that there was consummation in a case where a man who had no sexual organ was provided with a sexual organ with which he could penetrate the wife." (p 46)

In other words, if the court were to hold the 'artificial' vagina to be capable of being penetrated, it would follow that a marriage could also be consummated by the use of a similarly 'artificial' penis. Were this to be the case, then it would be necessary to ascertain what 'providing a man with' such an artificial organ would entail. If a man's inability could be overcome with such an artificial organ, it is possible that the 'essential' role of the penis in intercourse might be made redundant. It would also involve judicial assessment of what exactly constitutes an artificial penis. It was further submitted for the husband that even if the artificial passage permitted, or could be made to permit, full penetration, such penetration could not amount to "ordinary and complete intercourse" if, following Lushington, such relations are so imperfect as scarcely to be natural. Whereas in *D - e v A - G* the vagina was natural, in *B v B* it was to be wholly artificial and be created by surgery.

In judgment, Commissioner Glazebrook declared it to be clear to him on the evidence that at the time of the ceremony the wife

was incapable of consummating the marriage. Again, it was affirmed that

"The husband, in order to succeed in his petition, has to satisfy the court that the marriage has not been consummated and...any impediment is incurable." (p 45)

In answering the question as to whether or not there was consummation of the marriage, it was concluded

"This was a mere connexion between the parties if it occurred to the extent suggested by the wife and was nothing which could be said to be vera copula or proper coitus between husband and wife. I do not consider that it [penetration] could be held to be consummation in the circumstances having regard to the artificiality of her organ." (p 46-7: My emphasis)

There was a 'mere connexion', and the reason for so deciding (leaving aside the preference for the husband's evidence in the case) was 'having regard to the artificiality of her organ'. In this case the constructed vagina transgressed nature: the genitals were not 'real'.

In the later case of S.Y.v S.Y (Orse W) [1963] P.37 however, though on similar facts to B v B, the court were to reach a very different conclusion. In S.Y v S.Y, the marriage of the parties was never consummated owing to a defect on the part of the wife such that full intercourse was prevented. Again, as in B v B, she never menstruated and had no uterus and was incapable of conceiving children, though her external sex characteristics were found to be 'perfectly normal'. The defect was termed 'vaginal astresia', meaning that she had no more than an incipient vagina in the form of a cul-de-sac (as had been the case in D - e v A - G). The cul-de-sac could be extended by way of a plastic surgery, and the impediment thus removed so as to enable full penetration by the husband. She was willing to undergo such an operation.

Before the marriage intercourse had been attempted. The husband, who had a child by another woman, was informed that she could never have a child, and agreed to accept marriage on these terms. The wife said in evidence that

"He did not mind the way I was. He said he did not mind because he said it made it quits, like, the same, being as he had got a child and I could not have them, maybe other girls would not like to go with him." (p 39)

The husband petitioned for nullity, alleging the marriage had never been consummated and the wife was incapable of consummating it. The wife denied she was so incapable, and alleged in the alternative that if the marriage was not consummated, the husband had consented to and acquiesced in it's non consummation. Karminski J. attempted to distinguish B v B on the facts from S.Y v S.Y, stating

"...I do not myself find as a matter of law that the fact that the vagina is artificial negatives the possibility of vera copula taking place...It is possible to have marriage consummated in this case where a woman has had created for her an artificial vagina." (p 46)

Karminski stated that the wife, if given medical treatment, was capable of consummating the marriage, and accordingly dismissed the husband's petition. The husband appealed. On appeal counsel for the husband attempted to deny that the calibration of male pleasure should be of significance in the case, though nonetheless were prepared to refer to the pleasurable sensations in the penis of intercourse with a real, as opposed to an artificial, vagina. It was argued that, whatever might be the outcome of surgery,

"...it would be no more than a cavity in the tissues of the body....A connection in this way would no more constitute sexual intercourse than other forms of sexual gratification not within the vagina...there is nothing

capable of being cured. The defect - lack of vagina - is irremediable. To amount to consummation there must be normal and natural intercourse, which can only occur within the natural vagina." (P 48: My emphasis)

On this view, a vagina is a vagina and surgery cannot create that which is, by definition, part of human biology. It is not simply being argued that such surgery is an affront to nature and that 'there is nothing capable of being cured'. Male pleasure might be affected by such a mere 'cavity in the tissues of the body'. Connection, it would seem, has both a qualitative and quantitative character to it.

"The fact that the husband might obtain sexual gratification is not relevant. He could have gratification through unnatural practices or in other orifices of the wife's body, but that would not be sexual intercourse. The test of vera copula is not whether he derives sexual satisfaction but whether he substantially penetrates the vagina provided by nature for that purpose...Penetration of the cavity in this case would be nothing but masturbation inside the wife's body and it no more creates sexual intercourse than masturbation outside her body. In effect he would masturbate himself in an artificial passage. Were this form of connection to be held an act of intercourse, the courts would be inviting perverted practice...In this case there could not be a true union of bodies in the way intended by nature. The joinder would be unnatural." (p 48-9: My emphasis)

The setting up of the 'ordinary/perverse' dichotomy establishes what counsel hopes the court will agree is the 'true union' of bodies. It might seem that counsel is denying wholesale the place of male pleasure in determining consummation - it is "not relevant" (which is certainly different to Lushington's calibration of pleasure in the penis, where pleasure is relevant). Counsel argues that pleasure has no role in the sexual connection. Yet this argument is not consistently held.

Underlying the artificiality of the passage in which he would 'masturbate himself' is a concern with the 'natural' pleasurable sensations of intercourse. Male pleasure is implicit but unspoken and is inseparable from the establishment of what 'true' genital connection might be. If male pleasure has no place it is difficult to see what the relevance could be of the following musings on the qualitative differences between the natural and the artificial vagina. For, according to counsel for the husband, the signifier of difference between the real and the artificial is the potential capacity for male pleasure as experienced in and through the penis. In attempting to define the natural 'vagina', male (genital) pleasure constitutes the primary mode of signification.

"What is contemplated in this case is not a real vagina but an imitation one. A natural vagina is lined with membrane, has extreme elasticity, produces secretions, has a special muscular structure of walls, and possesses a quality of sensation. The imitation vagina, which is contemplated, has virtually no elasticity, does not produce secretions, lacks a special muscular structure of walls, and has no quality of sensation. It is not lined by natural membranes but by thick insensitive skin taken from the thigh. The only common characteristic is that they are both cavities. Otherwise they are totally different in nature and in kind. A great many men would be repelled by a connection of this kind and would be incapable of penetrating the imitation vagina. Moreover, gratification obtained in the imitation vagina would not be sexual gratification as it is ordinarily understood. The artificiality of the imitation vagina is all important. There would be the same difference as that between a natural nose and an artificial nose or between natural limbs and artificial ones. The best illustration is an artificial eye. It looks alright, but one cannot see with it, and the man with an artificial eye is still commonly regarded as a one-eyed man." (p 49 - 50: My emphasis)

Counsel sets up as the normative case the erectile capabilities of the 'ordinary' man. Whereas Lushington had sought to calibrate male pleasure through 'inches of penetration', here the 'measurement' of male sexual pleasure is altogether more complex. We have a presentation of medical/scientific facts on the anatomy of the vagina in a discourse which is subsequently ordered around the possibilities of a) male pleasure and b) male pleasure experienced in the penis. Thus, on this argument the husband's experience of sexual satisfaction **is**, contrary to counsel's assertions, of fundamental significance to their argument. We are told that 'a great many men would be repelled' and that 'the artificiality of the vagina is all important': in the end, it is the natural **function** of an artificial vagina, as it would have been with an artificial eye, which would be thwarted. This function is, presumably, to engage in intercourse.

This mapping of pleasure on the male body, even though this case ostensibly concerns female anatomy and physiology, constitutes the key moment in the discursive construction of the legal definition of consummation. The male body (specifically the penis) is, in relation to the artificiality of the female genitals in the above cases, presented as the signifier of what is 'natural'. It is not that counsel are only concerned with 'biological' (in the narrowest sense) masculinity, for here the psycho-sexual dimensions of masculinity are actually valorized: a man might be 'repelled' by such an organ. The connection would not be sexual gratification as it is understood, for sexual intercourse is the conjunction of the natural penis and vagina. To paraphrase the latter part of the quotation, an artificial vagina looks alright, but one cannot have intercourse with it and therefore presumably, seen as how 'the essential role of the woman in marriage is intercourse' [6] **the woman with an artificial vagina is not a woman at all.**

Counsel's arguments are in keeping with the decision in *B v B*, but in *S.Y v S.Y* they were to be rejected by the court. This

does not mean however that the final decision was not to rest on a similar essentialism. For the wife, it was submitted that an incipient vagina is not a bar to consummation "If by art or skill it can be sufficiently extended".

"If...the lack of a womb does not preclude consummation, the all important thing is the **initial entry** into the vagina." (p50: My emphasis)

Yet surely initial entry is not, in the last instance, what determines whether consummation has taken place? It has to be 'full and complete'. Counsel for the wife noted that D - e v A - g was a nineteenth century case and knowledge has advanced such that surgery might be contemplated which would not have been heard of to Lushington.

"Surgical art and skill have always been contemplated by the law as methods of cure, and as soon as surgery is introduced there is artifice and artificial organs. It is accepted that sexual gratification in other orifices of the body would not constitute intercourse. But in the present case the surgically extended vagina **would be in the right place.**" (p 50-1: My emphasis)

Of course, in cases such as Corbett v Corbett (Chapter 6, p 191 - 201) and Rees v UK (Chapter 6, p 204 - 206) the artifice is denied. Here, it is the vagina which is the site of male sexual gratification unlike 'other orifices', and the surgically extended vagina though an 'artifice' is capable of being penetrated because, it would seem, it is 'in the right place'.

"Vera copula is a connection between two bodies, male and female, which can exist even if it be created by a wholly artificial plastic vagina, **provided that it occurs in the part of the body where the vagina is normally located.** The sufficiency of the connection in any case is a question of fact." (p 52: My emphasis)

In the end, it is a matter of whether or not the artificial vagina is to be located 'in the part of the body where the vagina is normally located'. That is, between the legs of a woman. What determines capacity and consummation would appear to be the **physical location** of an orifice. It is no longer that it must be a 'real' vagina or that consummation depends on a calibration of pleasure in the penis: rather it must be in the right place, a matter of geography. The correct place of sexual gratification, the court concluded, was "an element to be considered when deciding whether vera copula exists". (p51)

"If the husband were right and the whole problem were to be solved by deciding if the wife had half an inch of natural vagina or none at all, the courts would be faced with the intolerable burden of dealing in inches...If the husband were right the consequences would be startling. The wife would be incapable in law of being raped nor could she be guilty of adultery; common sense would revolt against that." (p 51)

As we have seen, in other cases consummation has indeed been held to be the 'intolerable' matter of 'dealing in inches'. Willmer L.J. continued, in rejecting counsel for the husband's arguments,

"If it is to be held that a wife with an artificial vagina is incapable in all circumstances of consummating her marriage, it can only be on the basis that such a woman is incapable of taking part in true sexual intercourse. If that were right, the strangest results would follow...such a woman might be to a considerable extent beyond the protection of the criminal law...What is perhaps even more startling would be that a woman with an artificial vagina would be incapable in law of committing adultery. Consequently, the wife of a man engaging in intercourse with such a woman would be left without remedy.." (p 60-1)

This is clearly contrary to Ormrod's judgement in Corbett v Corbett (op. cit. p 191) [7] in which, as we have seen, the transsexual at least is beyond the protection of the criminal law. It is, according to Willmer L.J., 'even more startling' that adultery could not be committed - a husband might be "left without remedy". Determining whether or not consummation may be accomplished where the vagina is artificial, Willer L.J. concludes

"...I find it difficult to see why the enlargement of a vestigial vagina should be regarded as producing something different in kind from a vagina artificially created from nothing. The operation involved in either case is substantially the same...In either case the resulting passage has substantially the same characteristics, at any rate for so much of its length as is artificially created. In either case there is no more than a cul-de-sac, and there can be no more possibility of a child being conceived...It is also admitted that the degree of sexual satisfaction that may be obtained by either or both of the parties makes no difference." (p 59: My emphasis)

The court accordingly held that the marriage was consummated and the husband's argument that the wife has no natural vagina was to be rejected. Despite the statement that no relevance is to be attached to 'the degree of sexual satisfaction', it is noted that there was really little difference between D - e v A - g and the present case and the pleasure to be received from the artificial and real vaginas is comparable. Addressing the Corbett scenario, Willmer states

"But in case I am wrong...let it be assumed that this is a case in which the wife has no natural vagina at all. Would the creation out of nothing of an artificial vagina, sufficient in size to enable full penetration to be achieved, enable the marriage to be consummated, so as to preclude the husband from saying that the wife's incapacity is incurable?...Once it is admitted that sexual

satisfaction is not a determining factor, it appears to me that these distinctions are largely irrelevant... According to the evidence of the consultant the degree of sexual satisfaction to be obtained by the husband would not be very materially affected." (p 59 - 60: My emphasis)

In Corbett the construction of the artificial organ could truly be said to have been 'out of nothing'. It has been stated that male pleasure does not determine whether intercourse takes place and it is 'not relevant'. Yet Willmer then goes on to state that the husband's satisfaction 'would not be very materially affected'. Donovan L.J. proceeds to argue, while agreeing generally with Willmer, that

"...if the surgically treated vagina will admit all the male organ and give it's possessor sexual satisfaction, which is the probability here, what ground is left for saying that the wife is incapable of consummating the marriage?" (p 62: My emphasis)

So, if penetration and 'sexual satisfaction' for the man occurs 'what ground is left for saying that the wife is incapable'? Despite rejecting counsel for the husband's argument, and despite protestations that pleasure is not relevant, in the end it is a matter of male sexual satisfaction to be experienced through intercourse. The resulting definition of consummation is literally phallocentric: it is all in the penis.

These cases concerning female impotence contain a host of representations of both female and male sexuality. Female sexuality under the judicial gaze is viewed from a masculine objective stance and systematically in these cases judges have expressed considerable sympathy for the husband of the impotent wife, while proceeding to examine and construct the female body and female sexuality in a genitally fixated manner. In the end, there is an ambivalence to female sexuality per se, possibly because it is female sexuality which renders problematic, which brings to light, questions of male potency

in these cases. A more worthwhile question is to ask what is it about the 'shameful parts of women' which so disturbs men? Why should penetration signify entry to the married state? [8] As Karen Horney (1932) has argued from a psychoanalytic perspective, the sexualization of women may be identified as more concerned with negating the threat that women's (as the 'castrated' possessor of a feared organ), sexuality represents for men: men

"...have never tired of fashioning expressions for the violent force by which man feels himself drawn to the woman, and side by side with his longing, the dread that through her he might die and be undone". (Horney, 1932: 134) [9]

I have discussed so far cases in which the husband alleges female impotence. In those cases in which it is the man himself who is deemed to be impotent, the legal treatment of impotence shifts considerably. If the simultaneous objectification and disparagement of women displays a male dread of women's sexuality, then the fear of impotence itself displays the 'undoing' of the normative male heterosexuality which, I have argued, is fundamental to hegemonic masculinity.

Male Impotence

What is perhaps most evident in cases of male impotence is the way in which the impotent man is depicted in legal discourse as offending against both religion and the happiness, or potential happiness, of his wife. I have argued above that there is evidence to suggest that judges have tended to prefer the evidence of husbands in cases of female impotence. In cases concerning male incapacity however, judges have instead expressed a considerable degree of sympathy for the problems which befall the wife of an impotent man and have systematically reproduced the 'coherent mythology of virility' to which Darmon (1985: 226) refers (p 217, above). For example,

according to Pearce J in R.E.L. v R.E.L (Otherwise R) [1948] P. 211

"She seemed to me to be a woman who had tried nobly under very trying conditions to make a success of the marriage, under conditions which inflicted a considerable strain and humiliation which few women can endure indefinitely without serious injury to health, and to return to which, after the break, for further attempt would probably have been intolerable." (p214)

The strain and humiliation inflicted by an impotent husband are such as to lead to ill health. He continues

"The wife admitted two motives in conceiving the child: a woman's desire for motherhood and the hope that a child would help her and her husband to have proper intercourse, because she thought that it might relieve the tension caused, possibly, by her over-urgency, and so help the husband to overcome his trouble." (p 215)

The court held in this case that the wife's conduct in allowing herself to be artificially inseminated with her husband's seed, and the consequent conception of the child, did not amount to an approbation of the marriage. Nor was the court prevented on any ground of public policy from pronouncing the nullity decree even though the result would be to bastardize the child. The wife had showed no acquiescence in the marriage to an impotent husband, having made it consistently clear that she desired and intended to have a 'normal' marriage. However, it is important to recognise that it is her 'woman's desire for motherhood' which is central to her desire for such a 'normal' marriage: **not** her desire for sexual satisfaction per se. Writing in a different context, Darmon (1985: 103) notes how the 'worthiest sentiments' of the unsatisfied wife were presented to the court in terms of "...a burning desire for motherhood". It would be incorrect to state that procreation has been fully displaced by pleasure therefore. When it comes

to the wife of an impotent man, it is the joys of motherhood as much as sexual pleasure which she is denied. It is also clear that while the courts may have expressed some sympathy for the position of the wife, this does **not** mean that the law is no longer concerned to scrutinise her behaviour in the marriage, or that the law can be said to be generally 'favourable' to women in this respect. The objectification and assessment continues unabated. In *R.E.L (Otherwise R) v R.E.L. Pearce* J begins his judgment by stating

"In most nullity cases there comes a moment when the most forbearing wife becomes sickened by the role, so unnatural to a sensitive woman, of trying to stimulate an impotent spouse sufficiently to enable him to achieve penetration."
(p 214)

That she should stimulate a man so he might achieve erection would be 'unnatural' to a 'sensitive woman'. Indeed, she would be 'sickened'. Implicitly, the erection is to occur without such manual assistance and the male is active while the 'sensitive' female at least is depicted as passive. Similarly, in *G v M* (1885) A.C 171, the court considered the husband's claim that

""If I have time, and if I have opportunity, and I have encouragement and assistance, I believe that all will come right in the end." But is that the kind of capacity a wife seeks for in a husband? One of the doctors speaks of "due encouragement". Nay more, the wife is to submit to the degradation of "assisting"; and he adds, "If you supplement that by a bottle of champagne he may possibly effect his purpose." (p 207)

It would be a 'degradation' for a wife to provide such 'encouragement and assistance'. It is important to recognise that in both *R.E.L. v R.E.L.* and *G v M* the courts are concerned with the behaviour of the wife and her role in sexual intercourse. Specifically, she is constructed as the passive

recipient of male initiation. Furthermore, while the wives in these cases may be presented as suffering from the lack of physical and spiritual pleasure derived through intercourse, it would be mistaken to argue that the courts are concerned to encourage female sexual activity per se. Rather, it becomes clear that it is sex in marriage which is seen as the least offensive way of accommodating the (male and female) demands of the flesh and that the sexuality of the wife is passive (as opposed to male activity in the marital sexual economy). Unlike Lushington's appeal to the 'unnatural connexions' which he sees as inevitably following a denial of male pleasure through intercourse, no such licence is given for female sexual expression, whether through adultery or not.

The husband's active role relates not just to initiating sexual relations but also to the seeking of assistance where there is difficulty. In S v S [1954] P.736, a case concerning female incapacity, though the husband urged his wife to see a doctor, Karminski J. believed that the present unhappiness might have been avoided if the parties had sought a doctor's assistance with their sexual difficulties. In particular, the judge was concerned with what an 'ordinary' man might do in such a situation.

"Dr. L further expressed the opinion that if the husband had in the early days been more persistent in his efforts to consummate there was a bare possibility that by intercourse he could have penetrated the wife's hymen." (p 739 - 40 at H)

He was, unfortunately, not so 'persistent'. Having been judicially encouraged to be the active party and to take steps, it is perhaps not surprising to discover the lengths to which men have indeed gone to seek a 'cure' to both physical and psychological impotence. The desperation and ingenuity, as well as the prevailing sadness of these measures, have been recorded within a number of articles within the sociology of masculinity [10], and the imaginative absurdity of some of

these purportedly 'medical' techniques appear in R.E.L (Otherwise R.) v R.E.L. [1948] P. 211. In this case the medical examinations showed that there was no physical impediment to consummation on the part of either spouse: the problem for the husband was psychological. For the first three years of marriage he made no attempt at intercourse, evading the matter till it was broached by the wife. On her urging, the husband did eventually seek psychological help. However, the course of treatment suggested would be, in the husband's view, "almost impossible for him". A Dr. L put forward the following alternative.

"Dr. L's treatment was intended to eradicate from the husband the sense of failure caused by his repeated failures to consummate, but it did not make the efforts to consummate any more effective than they had been in the past. But the treatment had an unfortunate result. It consisted largely in instilling confidence in the husband by giving him a card on which was written the information that, after reading the card, his arm would become rigid and thereafter he would feel desire. Twice he tried to consummate the marriage with that help. They were in bed, he read the card, his arm, became rigid and he felt desire. Unfortunately the desire was not sufficiently strong or long-lived to achieve its purpose. These attempts differed only from the earlier ones in that they were rough and crude, and appeared to the wife to be just the attempted satisfaction of a physical need." (p 212-3).

The desperation is perhaps understandable when one remembers that male impotence shatters the penile economy established by Lushington in D - e v A - g (1885). For there to be penetration (pleasure) there must be erection, and without erection there can be no pleasure. In attempting to establish whether or not the husband does possess the requisite capacity, the courts have embraced a wide range of factors from which they might gather together the 'proof' on which to base a decision, and in so doing have brought in a range of evidential

criteria more complex than simply proof of erection, penetration, emission and pleasure. As in R.E.L. above, they have looked to his attempts to remedy the situation and in G v M (1885) A.C. 171 the court were concerned to investigate the sexual practices of the husband **before** the marriage, which might then in turn provide evidence as to what happened between the husband and wife. Lord Bramwell (p200) considered that

"It is incredible to my mind that there would have been [no sexual intercourse over a thirty year period] if he had those conditions of body which would have enabled him to perform his duty to this unfortunate lady."

So, the **absence** of use of the penis is relevant and the lack of penis use in penetration signifies a lack of sexuality per se. In responding to the evidence of the wife on the husband's genital performance, the Earl of Shelbourne L.C considered

"...one would suppose that the attempts [at consummation] were frequently repeated, and occurred twenty times or more during that period; and I must say that I think the probability is rather that it would be so, because if I accept his statement that, when their affections were still unchanged, during the honeymoon, **he only made those endeavours twice, it would be so extraordinary that from that fact alone I should be disposed myself to draw the inference that there was some conscious inability...**" (p 193: My emphasis)

The fact he 'made those endeavours twice' is therefore sufficient 'to draw the inference' that there was an inability. A 'reasonable' man would endeavour more. It is not necessary here to resort to medical 'fact', for we are dealing with 'what everybody knows' about male desire. According to Dr. Bell, commenting on the husband's masturbatory activities when younger,

"Vicious practices [masturbation] tends to premature exhaustion of the sexual organs. The appellant [husband] had an erection on each of two unsuccessful attempts, and an emission on the second, that was just the common case, insufficient erection and a too early emission." (p176)

The earlier masturbation therefore has an effect on the husband's later capacity to consummate the marriage, leading to 'premature exhaustion' of the organs. The genital economy does thus not encourage use per se, but rather a particular manifestation of use. Lord Bramwell continues,

"...I am not sure that that which took place in his youth may not have had something to do with this matter, but I will only say about it that it is remarkable that he should have discontinued that practice giving no reason why he did so. It may possibility have been from an inability to continue it." (p 200)

In a sense, the husband is in an impossible position. Masturbation is depicted as an abuse of sexuality, yet the giving up of the abuse indicates an inability to achieve erection. The abuse of sexuality is preferable to no sexual activity at all and the penis is there to be used.

A clearer picture of the psychology and physiology of the non-virile male emerges in R v R (Otherwise F) [1952] P. 1194, when the court again considered the husband's past. His character and sexual history was summed up by "one of the many doctors and psychologists whom the husband and wife consulted over a period of two years" as follows:

"Prior to the age of seventeen he appears to have had numerous illnesses, including bronchitis, pneumonia, an operation on his ear, removal of glands in the neck, and 'a complicated operation on the right groin'... There seem to be two aspects of his problem - (i) The real and initial one - to obtain emission at the correct time and

normal intercourse, (ii) Failing this, attempts to produce pregnancy in his wife." (p 1195 at A)

The medical evidence noted that the husband had been brought up in "rather strait-laced circumstances" in a family where any discussion of sex was taboo. He was found to have being subject to the usual involuntary nocturnal emission of semen as an adolescent, "...but apart from that he showed very little interest in matter of sex." Despite initial difficulties, intercourse did take place in the marriage, though the husband failed to achieve emission and, in spite of treatment and recommendations, the conditions persisted. It had been suggested that there may have been a 'leakage' by the husband "when their bodies were joined" as opposed to a proper, full ejaculation, with or without semen, though there was no evidence on the point (p 1196 at H). The picture which emerges is of ill-health, repression and considerable sadness at the failure to ejaculate (though bearing in mind the case of *Baxter v Baxter*, op. cit. p 229, ejaculation is not necessary for consummation to take place).

In G v M (1885) A.C. 171 (Chapter 7, p 242) a similar assessment of the husband's character took place. The court established that the parties had slept in the same bed for about nineteen months following the marriage, but only during two and a half months of that time did the husband make any attempts to consummate the marriage. The reason for not so enforcing his marital right, he explained to the court, was his wife's increasing coldness and repugnance to him. Both parties admitted that the marriage had never been consummated and after two years of marriage the parties separated, the wife then living on her own income with relations and with the husband giving nothing to her. Three years after the separation the wife gave birth to a child, of whom the husband was not the father. G then instituted an action for divorce on the grounds of M's adultery which the wife defended, raising an action of declaration of nullity on the grounds of the husband's impotence. She alleged

"...the defender was, at the time when the pretended marriage between him and the pursuer was entered into, and still is, impotent, and unable to consummate marriage by carnal copulation..." (p173)

At the time of the marriage the man was about forty-nine, the wife twenty years of age. On examination of the husband, no malformation was found from his appearance, though the husband spoke of his failure on the marriage trip, attributing it to nervousness and his comparative weakness of health at the time. He maintained that his wife's behaviour to him had been antagonistic, insulting and disagreeable, so that attempting intercourse would have been "the very last thing he would have thought of". On cross-examination, it was established that the husband was a virgin. His wife was a "very handsome young woman". She alleged she never resisted him in any way, the only remark made by him been that he was nervous. She had never made complaint to anyone about her husband until asked after he had left her. She had only raised the present action because of the action brought by him against her, it been unfair that she should bear all the blame for the end of the marriage. Her treatment of her husband, she explained, had arisen from his failure to consummate the marriage, that is her 'adultery' resulted directly from the non-consummation. The doctors who examined the husband considered

"...the opportunities recorded in the evidence were far too numerous to account for failure without a distinct defect in virile power. The worst cases of impotence in the male were...transient erections with emission before there is time for penetration."(Dr. MacDonald, p 176)

Indeed,

"It was not at all unusual for a man to fail within the first few weeks of his marriage, and it was especially likely to occur where a continent man marries later in life." (Dr. Gardner, p 177).

The husband's character was summarised by his counsel as follows.

"The character of the appellant was that of a nervous bashful man, of delicate feeling, quiet and retiring, and it may be with want of passion and want of will, and therefore more easily repelled than a man of more violent temperament; but this was not impotency." (p 178)

Selborne himself considered that the husband had "never really tried" the medicine prescribed for him. On the basis of the medical evidence it was concluded that "...the appellant was incapable of performing a husband's duty". In view of his past, a continent man of fifty years,

"...it appears to be the opinion of all these medical men that the habit of body which might result from the fact...strengthens the inference to be drawn from the direct evidence of his want of success in performing a husband's part, that he was incapable if doing so." (p196)

In view of the facts,

"She has the most cogent motives for asking a competent Court to declare the truth - motives of an innocent, and to some extent of a laudable kind. " (p 188)

Lord Bramwell concluded

"... this man was impotent, not merely in the sense in which my learned and noble friend opposite (Lord Watson) has put it...but I should come to the conclusion without doubt he was incompetent not only with respect to this particular woman but with respect to all women...If he is liberated by the decree which has been pronounced against him, and if he marries another woman without informing her of what has happened with reference to this one, will

any one doubt he would be guilty of a most wicked and abominable act?" (p 281: My emphasis)

Moreover,

"In my opinion a man who has inflicted this cruel wrong upon a woman ought not to be heard to object to her complaining, when she comes forward with her complaint of this wrong that he has done her...This poor creature comes here, driven by the conduct of the appellant, for a reason which is, I think, perfectly intelligible." (p 202)

The similar sentiments of two French Jurists are quoted by Darmon (1985: 62):

"...a husband that is emasculate, cold, languid, frozen to the marrow, and who can do nought of what he has promised his wife, is the very quintessence of misfortune." (D'Arrerac)

Faced with the possibility of the 'wicked' and 'abominable' act of an impotent man knowingly 'marrying',

"Never shall I be persuaded that a new bride should derive pleasure from lying with a husband who, after the festivities and solemnities of a perfect wedding, and during the first embraces - accompanied by strong caresses though without ever coming to the principal point of the operation - does set to discoursing in praise of virginity, and who, colder than all ice, does become heated in philosophising on chastity." (Anne Robert) [11]

After reference to the difficulties he has heard that women face in reporting cases of rape (an ironic sensitivity considering the realities of the medical examinations which befell women in these cases: Chapter 7, p 242 - 255), Bramwell continues,

"Read that which the respondent had to give in this case, and see how distressing it must have been to her. She puts up then with the wrong which has been done to her by the appellant until she is driven to bring this suit by calling her an adulteress, and seeking a divorce from her, which divorce would be followed by a forfeiture of her property if she chose to insist upon it...[if a man and woman lived together], he being clearly impotent, his regard for her, if he had any (and I suppose he must have had, otherwise I cannot see why he should have married her), had failed and had he taken to ill-using her, beating her, would it then have been open to the objection of insincerity if the woman brought a suit for a declaration of nullity?" (p 203)

Impotence may be, it seems, equated with domestic violence - had he ill-used her and beat her the legal remedy would not be denied. Lord Fitzgerald speaks in a similar vein, though apparently confused as to the legal nature of marriage.

"The procreation of children being the main object of marriage, the contract contains by implication, as an essential term, the capacity for consummation...No doubt she [the wife] did exhibit, after a certain period, the strongest unwillingness; and I would ask, **how could it be expected to be otherwise? For two months this woman had submitted to what I should call treatment degrading in the highest degree**, especially in reference to the later statements which the defender has brought indicating that he thought there was a recommencement of his virile power; and she certainly would not have had the feelings of a woman if she had been willing that that **disgusting treatment** should continue." (p 206: My emphasis)

In assessing whether the husband's repugnance to his wife was indeed 'reasonable', the court considered what a reasonable and objective male sexual response to her might be. Invoking again the 'ordinary' (potent) man, Lord Fitzgerald asked

"...let us...ask ourselves as reasonable men and applying our experience of the ordinary circumstances of life to the case, ought there to be a doubt upon this subject of permanent impotence?...This gentleman up to the time of the marriage not only had no sexual knowledge of women, but, according to his statement to a friend just before his marriage, he did not even understand what his marital duties would be...when a man of fifty or in the fiftieth year of his life under these special circumstances marries a young woman of twenty, described as handsome, desirable, and one who is likely to create passionate sensation, and lives with her for a period of at least two months...and makes not only one effort but repeated efforts to accomplish the duty of a husband, and in every instances with complete failure, from that the fair inference is the non-existence of marital capacity."

Fitzgerald concludes

"From the defenders history, from his two months of abortive attempts, from his one year and six months of lying beside this desirable young woman without even making an attempt to exercise his rights, I come to the conclusion clear and plain to my mind, not alone that he was incapable as to her, but that he was impotent at the time of the marriage, and that that impotency was permanent." (p208)

In the end, she is young, 'desirable and one who is likely to create passionate sensations'. A potent man lying beside this 'desirable young woman' would 'exercise his rights'. How far should he go therefore in so 'exercising' his rights? Within marriage male sexuality exists only within the parameters of heterosexual genital connection which valorizes male activity and female passivity and in G v G [1924] A.C.349 the court considered further the form the husband's initiation of sexual intercourse should take. Quoting with approval Sir Francis Jeune in F. v P. (75 L.T. 192), Dunedin considered

"...that it be satisfactorily proved that repeated endeavours of a potent husband , who has tried all means short of force, had been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife." (p 357: My emphasis).

Having tried 'all means short of force', on the facts of this case

"...it is sufficient to say that they were animated by such excitement of desire on his part as to entail on occasion ejaculatio ante portam, and conducted in such a manner as to leave no possible doubt as to his object" (p 357)

It is not whether he made these attempts at intercourse which was in question, so much as whether he made the correct sort of attempt.

"It is indeed permissible to wish that some gentle violence had been employed; if there had been it would either have resulted in success or would have precipitated a crisis so decided as to have made our task a comparatively easy one. But the husband's answer to the complaint that he did not so act...is that he was very anxious to awaken the sexual instinct; that he had found her on many occasions hysterical and tearful, and that he felt any attempt with even mild and gentle force would only hinder and not help the end which he desired." (p 357: My emphasis)

Dunedin J. empathises with what he presumes to be the husband's sexual urge. There is no question that it could or should be refused or resisted. 'Even' mild and gentle violence he felt would have assisted his desired end.

"...I feel satisfied that the husband's advances were sufficient to awaken any sexual instinct that there was in the wife. I can put it further. They were sufficient to show her his desires which she should if she could gratify, and which she had intended to gratify. " (p 375)

Particular discussion in G v G took place around the intent behind the husband's loosening of his pyjamas.

"She then admits being in bed on the nights specified, but denies that any advances were made or repelled. When pressed with the pyjamas incident she admits that he loosened his pyjamas, but no more..." (p 362)

Having made his sexual intent clear to his wife, the judge declares that

"I for myself can only come to this conclusion, that the reason she did not consent in fact, as she had in mind, was that she was unfortunately the victim of such an invincible repugnance to the physical act as to paralyse her will power to carry out what she had promised." (p 364)

In the cases discussed so far in this Chapter it has become clear that while the law may be loathe to admit adultery as a fact, it is also, unlike in the cases of female impotence, at times hesitant to consider incapacity to consummate on the part of the husband. In S v S (Otherwise C) [1954] P. 736 counsel for the husband referred approvingly to the observations of Denning L.J. in Morgan v Morgan [1949] W.N. 250; 93 Sol Jo. 450; 27 Digest (Repl.) 276, 2213, that

"...the wilful refusal of the wife to consummate the marriage was a cause - one of the causes - of the marriage not having been consummated. It was not necessary that it should be the sole cause. It might be that there was

another cause , viz. the impotence of the husband; but that did not matter." (My emphasis)

The treatment of impotence in these cases is double-edged. On the one hand the law is defining the norms by which implicitly **every** man might be able to confirm his potency, while excluding the impotent man who is, in this sense, not really a man at all. The impotent man is, by definition, the man who is not potent. The law may be seen to be expressing a degree of sympathy for the wife of the impotent man. Yet the law is also concerned with the surveillance of both the male and female bodies in ways which are consistently phallocentric and which involve very different roles for men and women in sexual relations. Implicitly, the judges declare what the potent man in marriage should be doing: initiating, using 'gentle force', not accepting the 'disgusting practice' of female activity, and sexually responding to the 'desirable' young woman (it is not clear what would happen were the wife not so 'desirable'). It might be argued that these cases belong to a different era, and that attitudes have changed since. This much is certainly true. However, leaving aside the fact that these constitute the substantive law in relation to consummation, they also reflect aspects of a form of masculinity which continues to inform judicial determinations throughout family law (see Chapters 4 - 5). Theoretically, just as sociological accounts of male impotence refer again and again to the feeling that the impotent man is not really a 'man' at all, these cases tell us a great deal about heterosexual 'potent' masculinity and the conjugal institution in which it can (only) be legally expressed: marriage.

Conclusions:

Law, Power and Men's Bodies

Berger (1972) has argued that the social presences of men and women are different, with men having a presence which is

dependent on the promise of **power** which they embody. This potential for activity constitutes an organising principle in a range of social practices which concern the male body. Though writing in a different context [12] Connell (1983) argues that the combination of force (the irresistible occupation of space) and skill (the ability to operate in certain ways on that space) may be understood as an expression of power (as a capacity to achieve certain ends even if opposed in this by others). To be an adult male, Connell argues, is to occupy space and to have a particular physical presence in the world, and in the area of legal discourse discussed in this Chapter male sexuality and male physicality are constructed in such a way that both force and sexual skill become embodied in a construction of a heterosexual genital taxonomy. This nexus of body, space and power pervades the legal treatment of impotence. The law is able to construct men as being 'over aggressive', 'over/under sexed' 'undersocialised' or 'sexually inadequate' precisely because male sexuality has never been conceptualised as a problem in the first place.

In the above cases the deviant 'unnatural' masculinity of the impotent man denies the potency of all men, in so much as he testifies that all men might potentially be impotent. There exists an implicit vulnerability on the part of the judges themselves in these texts which both negates yet simultaneously testifies to the potency of the mythology of virility. The **threat** of impotency is not to be underestimated. The legal/judicial concept of 'sex', far from signifying the polymorphous potentiality of the body, constructs sexual intercourse as entwined with the proscriptions of 'conjugal duty' which are then mapped onto the marriage bed and the bodies of husband and wife for examination and investigation by the judicial gaze. While an **empowerment** of the male body is reflected in the non-consummation cases through the construction of male activity and 'natural' sexual desire, at the same time masculinity is constructed as fragile, predictable and as something to be achieved and worked for within the sexual economy outlined in Chapter 7 (p 219 - 221).

This is something which does not empower men. Masculinity here is not something which just 'happens', however 'natural' it is said to be: it is ordered, sustained, and regulated through rigorous assessment and examination. Crucially, to such a degree that a failure to live up to the normative case denies entry to the 'truly' married state.

Through reference to normative criteria, sexual pleasure is ordered through a mapping of the geography of the body in such a way as to legitimate and delegitimise certain sexual relations. The criteria by which this takes place are not sufficiently sophisticated as to begin to engage with the experiential/subjective nature of the structuring of cathexis in any way which might integrate the complexities and contradictions within the psycho-sexual constitution of subjectivity I have addressed in Chapters 4 and 5. The ordering is more precise, simple and clear-cut than that. For example as we have seen in *S.Y. v S.Y. (Orse W)* [1963] P 37 (op. cit. p 225, 248) for the purposes of consummation what is significant is the location of the vagina. The sexual practices of the body in defining 'true' intercourse thus become a matter of physical geography.

"...what else, it may be asked, remains to differentiate between intercourse by means of an artificial vagina and intercourse by means of a natural vagina artificially enlarged? In either case full penetration can be achieved, and there is thus complete union between the two bodies...What would be created would be a vagina, albeit an artificial one, and it would be located precisely in the position where a natural vagina would be. In such circumstances, I do not see why intercourse by means of such a vagina should not be regarded as amounting to "vera copula", so as to satisfy the test laid down by Dr. Lushington." (p60)

The normative mapping of the body constitutes the parameters of the consummation dispute. Within such parameters, sexuality

is organised according to a code in which hegemonic masculinity is valorized and male sexuality is organised in such a way that the relationship of men to their bodies is above all **genitally fixated**. This particular organisation of the body is not confined to legal discourse, and the same political economy of the body and organising principles can be seen, as I have argued in Chapter 4 (eg, p 121 - 124) to be culturally embedded and historically specific in a more general sense [13]. Ultimately, and in the wider context, we are, as Foucault (1981) has argued, incited to 'speak' the truth of ourselves and our lives through our sexuality, to speak of sexuality, across many discourses. In rendering problematic the 'sex lives' of men and women within the 'modern episteme', homosexuality, fetishism, autosexualism, hyperaesthesia, frigidity, impotence, onanism, transvestism and transsexualism together constitute the range of the perverse within an 'immense verbosity' addressing the 'unnatural' sexual practice, and yet 'speaking' at the same time of the natural and the normal.

Heath (1982: 2 - 3) identifies in the conjunction of penis and vagina a 'sexual fix':

"We have, it seems, been 'catapulted out of the dark ages into a glittering age of sexual enlightenment and pleasure'...what we have experienced and are experiencing is the fabrication of a 'sexuality', the construction of something called 'sexuality' through a set of representations - images, discourses, ways of picturing and describing - that propose and confirm, that make up this sexuality to which we are then referred and held in our lives, a whole **sexual fix** precisely; the much vaunted 'liberation' of sexuality, our triumphant emergence from the 'dark ages', is thus not a liberation but a myth, an ideology, the definition of a new mode of conformity (that can be understood, moreover, in relation to the capitalist system, the production of a commodity 'sexuality'.)

The sexed male body is integral to the discussions in Chapters 6 and 7 of transsexualism and consummation. The modernisation of hegemonic masculinity (Chapter 4, p 135 - 136) is part of the 'new mode of conformity' to which Heath refers. As Smart (1989: 90-92) has argued, the body has traditionally not been defined as a suitable object of study within sociology. Referring to Turner's (1984: 30) recognition of sociology's reluctance to acknowledge the physicality or corporeality of human agents ('the most obvious fact of human existence'), Smart has questioned the law's 'power' over the bodies of women, referring to feminist contributions to work on the body [14] (for example in the areas of sexuality, rape, prostitution, sexual abuse, and reproduction). Such a foregrounding of the **sexual politics** of the body is essential, for the constitution in law of the bodies of both women and men in discourse is a form of power in the hierarchical structuring of gender. In relation to non-consummation of marriage, the power of law is evident in constituting the bodies of both men and masculinity and women and femininity in systematically patriarchal ways.

The body, as a distinct realm of political engagement, constitutes a nexus of a range of discourses which 'address' it: for example, legal, pedagogic, medical, religious, epidemiological, criminological and so forth (Foucault, 1981) [15]. A nexus for the physical and the cognitive realms of human existence, the experiential dimension may be said to be rooted, or 'embedded', in the body as the site within and on which the polymorphous potential of pleasure may be realised or denied. This is not to fall into a crude sociobiologism or reductionism, nor to declare a libertarian orgiastic potency (eg, Reiche, 1972), but is to 'reclaim' the body from the natural sciences and to recognise the place of the body in sociology. The politics of pleasure are concerned primarily with the subjective interpretations of the workings of the human body, not with how the body works in science or in law, but **how individuals experience their bodies**. This experiential focus is central to a consideration of psychological impotence,

for it is the non-potent subjectivity which the law deems to be unfit to enter the married state. To question the establishment of normative criteria in legal discourse involves deconstructing that which is 'natural', how 'bits' of the body are addressed by particular discourses and how bodies, in an abstract sense, constitute the nexus of individual desires and the processes by which this nexus is formed. The constitution of the body, as I have argued in Chapter 3, may meet certain ends at certain historical junctures [16]. While feminists have addressed the ways in which the bodies of women are constituted in discourse, it is important to recognise also that different ideas about men's bodies are involved in the construction and practice of family law.

CHAPTER 9

CONCLUSIONS

The Need to Transcend Doctrinal Conceptions of Law

This thesis has presented (tentative) arguments on the prospects of and limitations to men in legal studies of 'taking feminism seriously' (Bottomley, Meteyard and Gibson, 1987). I have argued that legal studies have much to gain from the convergences within the histories and sociologies of social practice; from feminism, gay liberation, psychoanalysis and theories of discourse, all of which remain at present marginal to the dominant methodology of the legal academy. I have sought, throughout this thesis, to analyse the limitations of doctrinal positivist conceptions of law with regard to developing a coherent theoretical base from which to begin the study of gender, law and the family. In such a project it is essential to also engage with the power of doctrinal legal reasoning. The relation between law as doctrine to those discourses attuned to the visibility of the legal profession within legal education, to the exclusion of alternative discourses which may challenge doctrinal exegesis and the denial of the co-existence of reason and desire within hegemonic masculinity are all related.

With regard to legal education, if law learning is no more than a narrow mental pursuit of rule handling techniques and retaining amounts of knowledge ('black letter' law), the relationship between law and power is further enforced and law students will be oriented towards participation in hierarchical structures in a process of inculcation into legal professionalism which is at present the dominant model within legal education (Chapter 2, p 34 - 38). It is within an explicitly feminist legal scholarship that a gendered critique of law has taken place and within legal education the study of masculinity and law remains notably undeveloped. So long as

legal education remains primarily an instrument for the production of lawyers, the tensions between academic 'rigour' and legal professionalism will continue to be played out at the core of law teaching in the UK and legal education - a potential way of seeing the world - will remain, as Stanley (1985: 85) has argued, a way of not seeing: "It is neither truly educational nor academic".

It is necessary to transcend a doctrinal conception of law which produces such a misrecognition, or else a silencing, of the politics of the gender and the masculinism of both the law and of the law school. The dominant legal method, doctrinal exegesis, involves the denial of emotion and the exclusion of questions of sexuality in the constitution of a normative, univocal and masculinist dominant epistemology within which the law is studied and taught. Such a legal method proclaims the law a science unto itself, self-referential and seeking no justification other than it's own claim to Truth and it's own hierarchic status (Chapter 2, p 38 - 42). Crucial to the power of legal method is the question of what constitutes a 'fact' and of whose reality it is that the law seeks to valorize. It has been clear in this thesis that practitioners working within the same theoretical frameworks may, on examining the 'facts' of a case, come to opposing conclusions. What constitute the 'facts', be they legal or medical, is by no means clear (eg, Chapter 6, p 186 - 187).

To challenge doctrine is to challenge the exclusions engendered by this model of understanding the law. Feminism's challenge to law's exclusions is also a challenge to men to deny the 'truth' of the experiential, of desire, of power and of sexuality. In particular, and in relation to gender, I have addressed the processes in which both law and hegemonic masculinity are able to deny that which would challenge their own legitimating power, and the ability of each to transform within their own terms the experience of those who are excluded from their discourse. The exclusion of questions of gender and power has been central to this thesis. That which might

challenge both the power of law to define and the power of the hegemonic phallogentric masculinity which it inscribes - for example a feminist sexual politics - is denied legitimacy within the doctrinal conception of law: (on the power of legal method, see Chapter 2, p 38 -42, p 50 -59). The law does not only confirm it's own legitimacy and authority, but also the claims of the medical and 'scientific' discourses it appropriates (eg, in relation to transsexualism, Chapter 6, p 179, p 186 - 187: on consummation, Chapter 7, p 242 - 245). It is important to recognise the relations of power/knowledge and the discursive context in which the textual readings of the cases I have discussed in this thesis are located. These readings of male sexuality are culturally ordered and the oppositional readings presented in this thesis draw on both feminist discourse and what I have termed an emerging sociology of masculinity (Chapter 4) which has sought to foreground questions of masculinity and male sexuality. Both such 'resistant' knowledges are excluded so long as one remains within the confines of traditional legal method.

Related to doctrinal conceptions of law, it is necessary to rethink the concept of the state, so often invisible in debates around the family (Chapter 3, p 69 - 76). The gendered politics of the state and of law are central to the politics of masculinity and a gender blindness in mainstream political science is evident across a range of debates couched in terms of liberal constitutional theory (eg, the discussion of liberal legal reforms, Chapter 1, p 23 - 25). As Connell has argued in relation to state violence, masculinity pervades the institutions of the state:

"The military and coercive apparatus has to be understood in terms of relationships between masculinities: the physical aggression of front-line troops or police, the authoritative masculinity of commanders, the calculative rationality of technicians, planners and scientists."
(Connell, 1987: 128)

In terms of the construction of strategies of reform based around the state and law, the articulation of interests and the organisation of political forces involve transformations within the gender order in which masculinities and femininities are constituted. The politics of masculinity are also the politics of institutional resources: even within the terms of positivist conception of law and a juridical understanding of power, law facilitates, or negates, the powers of the state to regulate cultural definitions of gender. However, while it is essential to recognise the 'gender of the state' in this sense, it is necessary to treat cautiously accounts of masculinity, law and the state which reduce the state to an expression of male interests and male omnipotence. I have rejected such 'grand theories' of the state, law and power (Chapter 2, p 46 - 50), be they feminist or marxist and, while accepting the force and analytic utility of a concept of ideology (Chapter 2, p 43 - 46), have questioned accounts of ideology which rest on essentialist 'real' relations of power which the law is conceived of as universally expressing and which are there to be magically revealed by the 'critical' legal scholar via the methodology of critique.

Rather than focus at the level of the state (as conceived within liberal legal discourse), it is necessary to integrate such a 'macro-politics', of law, institutions and political engagement, with a politics of subjectivity and lived experience (Chapters 2 - 3). It is the achievement of feminism to show, in study after study, that gender relations constitute a dynamic of power in all social relations, and that any adequate theoretical approach to the study of social phenomenon should be able to accommodate this fact. That doctrinal understandings of law are unable to do so entails seeking an alternative perspective from which to theorise the relation between law and masculinity. To this end, I have focussed on and discussed (Chapter 2, p 50 -59) those recent developments within legal theory which have foregrounded the rhetorical status of legal discourse, and have sought to

develop an approach to law, gender and the family which transcends the limitations of doctrinal law and legal method.

On Law, Power and the Family

First, it is necessary to recognise the power of and yet also to reject a theorising of the relations between the family, law and state intervention in terms of the dichotomy between the public and the private spheres (Chapter 3, p 69 -76). This has implications for strategies of engagements with law, in that a 'suffrage model' of legal reform which construes law in terms of 'public law' and 'private law' relations between the state and the citizen (eg, Chapter 1, p 23 - 27) will remain limited by a reliance on concepts implicit within liberal legal discourse, such as equality, rights and duties, difference and discrimination. In public/private terms, such signifiers conceive of full participation in public life as simple matters of either having, or not having, a place in the public and juridical world of law: one does, or does not, have certain 'rights'. As feminists have argued, such concepts are deeply problematic and may be used equally for anti-feminist purposes. It is also important to recognise that the emotional economy of hegemonic masculinity (Chapter 1, p 20 - 23: Chapter 4, p 119 - 126) - and in particular the bifurcation of reason and desire - is itself premised on the theoretical dualisms of the separation of work/home and family/market which are tied up within notions of the public and the private spheres.

Rejecting the public/private dichotomy has major implications for how we understand the law/family relation in terms of analytic concepts rather than for heuristic purposes. In the end it is necessary to rethink the sub-discipline 'family law' itself. It is not a matter of replacing one atheoretical conception of family law with a new, ideological, perspective (on familial politics, Chapter 1, p 16 - 20). I have argued (Chapter 1 (p 11 - 14) that while there is no one 'family' in law, this does not mean that there does not occur a systematic

privileging of a family form via the promulgation of a familial ideology which pervades the areas of legal regulation I have addressed in this thesis (eg, in relation to property entitlement, Chapter 1, p 26 - 29: on domestic labour, p 20 - 23: generally, p 9 - 11). As Freeman has argued,

"Existing law does, of course, embody some theory...The social function of much of that theory, whether implicit or articulated, has been the defence of the status quo and thus of the interests of those who are dominant in society." (Freeman, 1985: 154)

Such is the case with regard to functionalist accounts of law (Chapter 1, p 6 - 8), and as an approach to the study of law and the family functionalism is, like the public/private division, to be rejected. Freeman has argued that what is needed is a 'critical family law'.

"...I am asserting that law needs to be socially located and that family law cannot be understood as if it is assumed to operate neutrally, ahistorically or cocooned from indices of power. Just as existing theory is designed to shore up the status quo, so critical theory has, I believe, a particular goal as well. Critical family law is an integral part of a struggle to create a more socially just society." (Freeman, 1985: 154-5)

Such a family law must, I believe, account for the power of men. The 'critical family law' envisaged by Freeman is in fact an amalgam of a range of developments in relation to feminist and discourse theory, critical legal studies and poststructuralism (though Freeman does not couch it in these terms, and there remain internal inconsistencies in his formulation of the 'critical' project). Law is dynamic, not static, and in this thesis I have sought to address and contribute to an understanding of 'family law' which may be part of such a "struggle to create a more socially just society." Such a project which does not account for and turn

it's gaze to the power of men and masculinity as the object of study (Chapter 1, p 3 - 4) would, however, be seriously flawed, and one of the central weaknesses of 'grand theories' of law is the failure to address the 'here and now' of the lived realities of women's and men's lives. It is necessary to question both the positive and the negative dynamics of family life (Chapter 1, p 16 - 20).

Masculinity, like the family, is neither all 'good' nor all 'bad'. It is clear from the analysis of this thesis that representations of masculinity in law are not necessarily consistent. They may overlap, contradict, accord, and translate in different ways and in different contexts. To focus on subjectivity within discourse, and to address these tensions and complexities, is ultimately to privilege ontology over epistemology; that is, law's claims to validation as a science with its own method, language and logic are subverted by a focus which seeks to challenge such univocality, and by the rendering visible of that which was hitherto invisible - the masculinity of the law and its institutions. Gender divisions are collectively constituted in legal discourse, not in the sense of clear, factual and empirical division, but at the level of the discourse in which they are formulated, and to begin to analyse the relationship between law and the subjectivities of men and women involves utilisation of a conceptual apparatus which is not part of the theoretical baggage of doctrinal exegesis or 'black letter' law. It involves transcending the theoretically limited functionalist and public/private approaches to law and the family and instead adopting a broad framework of analysis which has marked 'familialist' studies.

The focus which emerges within what I have termed 'familialist' writings on law and the family (Chapter 3, p 85 - 98) is concerned more with the effects of than the intentions behind law. This perspective locates multiple sites of oppression within the family, breaking from holistic theories (such as reductionist marxism, forms of 'radical' feminism) which locate

power relations as principally explicable by reference to an overarching theory of oppression (the 'grand theory'). If the experiential dimension - the activation of subjective commitments, hopes, aspirations and beliefs - are to be integrated into an analysis of law and the family, then it is necessary to analyse a range of regulatory apparatuses whose discourses make claims to knowledge both about law and about masculinity. The liberal conception of 'state intervention' is not a matter of a zero-sum calibration of quantities of intervention or power deployed in unitary forms. As Rose argues,

"Domestic, conjugal and parental conduct is increasingly regulated not by obedience compelled by threat of sanction but through the activation of individual guilt, personal anxiety and private disappointment. Husbands and wives, mothers and fathers themselves regulate their feelings, desires, wishes and emotions **and think themselves through the potent images of parenthood, sexual pleasure and quality of life.**" (Rose, 1987: 73. My emphasis)

Within the theorising of legal regulation and the family presented in Chapter 3, the constitution of subjectivities in the processes of familialisation and the installation of relations of power within the familial sphere locate the body and sexuality as crucial in the moment of historical transformation of familial relations.

Central to this project is a rethinking, what I have termed the 'de-centring' (Chapter 3, p 77 - 80), of the significance to be given to the law itself and, related to this, of the juridical model of power and attendant concepts (such as welfare, protection and rights) which underlie positivist conceptions of law. It is not simply that such concepts legalise social relations and processes and legitimise and extend the power of law still further. Rather, rethinking law in this way relates not simply to the epistemological status of doctrinal exegesis but also involves re-assessing the institutions and practices

of the law and re-locating and celebrating the diversity rather than the homogeneity of regulatory practices. This is not to argue that juridical forms of power are not still relevant (on homosexuality and criminal law, Chapter 5, p 156 - 160), but that a

"Critical analysis of family law must re-locate legal regulation within the complex network of powers which link up domestic, sexual and parental relations with social, economic and political objectives. Laws and statutory duties, statuses and obligations are very important here, but are neither primary nor constitutive." (Rose, 1987: 74)

Law has a central, though I would argue neglected, role in such 'activation', in how we 'think ourselves'. Law is too important to be neglected, but it is not important enough to constitute the sole object of analysis.

Speaking of Sex

Throughout the non-consummation cases discussed in Chapters 7 - 8 there is an identifiable reluctance to name the abnormality which had given rise to the proceedings, the abnormality which rendered the men and women in the cases impotent and the marriage un-Godly. This silencing, seen also in relation to the homosexuality which dare not speak its name (Chapter 5, p 156), relates intimately to the incitement to speak of sex in the cases and to the power/knowledge relations which surround sexuality. Knowledge of sex and sexuality is, in the impotence cases, at once both a necessary and a dangerous thing, with a cursory apologia for the questions which must unavoidably be asked the mark of the obsessive nature of the judicial gaze. Attraction and repulsion, desire and fear appear at times entwined in the treatment of sex. Addressing the sex lives of married couples, Wright states

"...some of you who are about to be married may shrink from reading such plain talk about the details of bodily intercourse, and the way in which to use the sex organs..." (Wright, 1937: 11)

Plain talking is often unfortunate, but necessary. Nature, it seems, is not enough to determine the 'proper' way for sex to take place. Wright, in what is but one of many such texts addressing the perfection of sex technique which have emerged throughout the twentieth century, ironically recognises that that which is so very 'natural' might at times be in need of some education and assisted 'technique'. Such a call for 'assistance' is certainly evident in the impotence cases I have discussed in this thesis.

"And the cause of all this is not want of love. It is want of knowledge. Love alone is **not** enough. We also need to know. Lasting and satisfying happiness in marriage...is also a very great achievement, and to make it ours we need to learn and practise the art of living the married life. And that art is like all other arts in one thing: it has to be based on knowledge. There is a technique of married life, and husbands and wives need to know that technique just as surely as a painter needs to know the technique of his art." (Wright, 1937: 11-12)

The theorising of masculinity (Chapter 4, p 110 -119) must be placed in a wider historical and cultural perspective which accommodates such shifts in ways of 'speaking of sex', and debating sexuality is not a modern invention. However, the object of the debate within secular moralism is different from medieval and Reformation concerns with the theological dimension to sexual relations between men, women and God, and the changing of the debate from what people **ought** to do to what people actually **did** has constituted an important shift in the construction of the 'modern episteme' in which Man is the author of his own thoughts, actions and speech. What has been termed a feminist poststructuralism (Chapter 2, p 59 -61) has

fundamentally questioned the gendered assumptions underlying traditional humanism and the masculinist nature of the abstracted 'society' of secular moralism, as well as the notions of coherent subjectivity and rationality with which it is associated.

The arguments of this thesis must be seen in such a wider historical context. From the questioning of gender relations conceived within the liberal legal terms of equal rights and debating the origins, processes of sustaining and justifications of oppression, social theories of gender have now begun to question the 'natural' nature of the categories of men and women, masculinity and femininity, per se. It is at this level, of seeking to engage with the social construction of 'man' and 'woman', that I have sought to address legal discourse in this thesis (eg, in relation to transsexualism, Chapter 6). Within the argument presented in Chapter 5, the emergence of the homosexual personage (p 160 -168) and the construction and institutionalisation of marital (hetero) sexuality has taken place in the context of the historical transformation of sexuality itself (Chapter 5, p 175 - 177). As Foucault (1981) has argued,

"Why has sexuality been so widely discussed and what has been said about it? What were the effects of power generated by what was said? What are the links between these discourses, these effects of power, and the pleasures that were invested by them? What knowledge (savoir) was formed as a result of this linkage?" (Foucault, 1981: 11)

Such an approach questions the coherence of concepts such as 'sexual identity'. 'Identity', if taken as in any sense 'fixed' and transhistorical in theorising gender, fails to accommodate the cognitive dissonances in subjective experiences, the fractured and often contradictory nature of human experience. The linkage which may be made with feminist accounts of the relation between masculinity and traditional humanism is

explicit in the questioning of the centrality of the function of sex in the process whereby human beings become subjects: this process, it has been argued by Foucault (1981: 155-6), may be understood as part of a process in which

"...each individual has to pass in order to have access to his own intelligibility (seeing that it is both the hidden aspect and the generative principle of meaning), to the whole of the body (since it is a real and threatened part of it, while symbolically constituting the whole), to his identity (since it joins the force of a drive to the singularity of a history."

The historicism of Foucault's approach makes it possible to locate the historical development of discourses about and around sexuality - for Foucault, from the mid-Eighteenth Century a class constituting itself an identity,

"...creating it's own sexuality, and forming a specific body based on it, a "class" body with it's health, hygiene, descent, and race; the autosexualisation of its body, the incarnation of sex in its body, the endogamy of sex and the body." (Foucault, 1981:124)

This approach is both consistent with the theoretical developments in Chapters 2 and 3, and offers, I believe, a solution to the problems surrounding the search for origins and definitions of masculinity which have plagued the sociology of masculinity discussed in Chapter 4. Crucially, it becomes possible to locate the transformations of the nineteenth century in relation to homosexuality and heterosexuality (Chapter 5, p 156 - 160) within a historical perspective which does not lose the dynamics of praxis, agency and choice. The discourses I have addressed in this thesis - in relation to law, medicine, psychology and psychoanalysis, religion, science and sex - all (though in different ways) speak of the body as the surface upon which these multifarious discourses provide a vocabulary, a way of talking, about the body and about sex. In

the language of familialisation (Chapter 3, p 85 - 98), the historical shift in discourses addressing sexuality accompanied a shift from law as a discourse of right (the juridical model) to a process of regulation through a complex of mechanisms of surveillance and normalization. It is not that law is 'irrelevant' to regulation, but that law is now seen as part of a 'tutelary' complex of surveillance (Donzelot, 1980).

The 'episteme' here addressed conceives of law as part of a method of regulation and surveillance. Certainly, law may be punitive, allocating rights and penalties, but law also regulates through the incorporation of medicine, social work, psychiatry and so on. In the cases on consummation (Chapter 7) and transsexualism (Chapter 6) we have seen how medicine may 'extend' the power of the law into new terrains. The marriage bed and the sex lives of husband and wife in the impotence cases constitute objects for scrutiny and surveillance, to be questioned, probed and above all **discussed**, by both the judges and the parties to the case. We speak the 'truth' of ourselves through the body, through our sex and, as Foucault observes, the act of speaking, of confessing, becomes itself a form of power.

"We have since become a singularly confessing society. The confession has spread its effects far and wide. It plays a part in justice, medicine, education, family relationships, and love relations, in the most ordinary affairs of everyday life, and in most solemn rites; one confesses one's crimes, one's sins, one's thoughts and desires, one's illnesses and troubles; one goes about telling, with the greatest precision, whatever is most difficult to tell." (Foucault, 1981 :59)

Foucault (1981) argues that sexuality should be seen as a primary locus of power in contemporary society, constituting subjects and governing them through exercising control through bodies.

"We, on the other hand, are in a society of 'sex', or rather a society 'with a sexuality': the mechanisms of power are addressed to the body, to life, to what causes it to proliferate, to what reinforces the species, its stamina, its ability to dominate, or its capacity for being used. Through the themes of health, progeny, race, the future of the species, the vitality of the social body, power spoke of sexuality and to sexuality: the latter was not a mark or a symbol, it was an object and a target". (Foucault, 1981: 147)

The sexual aspirations of men and women are paraded before the court in the non-consummation cases, to be assessed, scrutinised and judged according to the dictates of a norm of male potency. If we are 'speaking of sex', what is it that is being said? What has the law to say about sexuality, masculinity, femininity and the body?

Marriage, Sex and the Body

Human experience is constituted in discourse by various strategies and representations which may realise - or deny - the capacities of the body, and a range of such discursive strategies are to be found in legal discourse: for example, the power to name human experience, to construct silences (that which cannot be said) and to valorize a range of bodily activities (that which can, and will, be said). The representations of sexuality, masculinity and femininity which I have addressed in this thesis do not exist merely at the level of pure ideas but constitute a nexus of the physical and cognitive realms, of knowledge and experience of self and society, and of those ideas in which individual subjectivity is articulated.

The structuring of gender therefore has a physical as well as a cognitive dimension, and I have sought in this thesis to locate the body within a productive process in which gender is

constructed. As I have argued above (Chapter 4, p 118 - 119) the property of human sociality is to transcend biological determination. Locating the body as a presence within social practice, masculinity may be understood to invest the body and in this construction of desire and sexuality, constituted through injunction and prohibition, pain and pleasure, law has an important - but not determining - place in the modalities of power. The body is fundamental to a critical analysis of masculinity (Chapter 4, p 119 - 120: Chapter 7, p 242 - 245), and legal discourse is one site within which representations of male sexuality and masculinity are produced and reproduced. Strategies of discipline constrain the body organised through a discourse on sexuality which finds expression, not totally but at least in part, through law. The hegemonic pattern of masculine sexuality presented in Chapters 4 - 5 (and in particular pp 168 - 177) is not automatically given, but it is 'socially sustained' (Connell, 1983: 25), and the law regarding the formation and annulment of marriage is, I have argued, an essential - and neglected - part of this project.

The cases on consummation I have considered in Chapters 7 and 8 reveal a complex economy of pleasure. We have seen how modes of pleasure and bodily sensation have been valorized within legal discourse in such a way as to construct, and enforce through the law in relation to nullity, a normative mapping of the bodies of both male and female. At this point it becomes possible to identify the normative focus of this mapping and to begin to define components of marital sex in this context.

(i) Sex is Natural

The mapping of a normative sexuality on the male body is achieved in legal discourse via a number of manoeuvres. First, **sex is natural**, and sexuality expressed in marriage is a natural phenomenon. Naturalism denies any alternative organisation of the male body, for what is natural is inevitable and cannot be questioned. I have argued throughout this thesis against naturalist and essentialist presuppositions

which underscore both feminist and non-feminist writings on gender and law. For example, both Mackinnon's (1982: 1983) depiction of a 'grand theory' of the law, state and women's oppression (Chapter 2, p 46 -50) and Ormrod J. 's conception of sex and gender in Corbett v Corbett (Chapter 6, p 190 - 202) both share and presuppose a divided biological sex, male and female, which entails for each certain determinate consequences. It might be argued that

"The law must predominantly, but by no means exclusively, refer to classes of persons, and to classes of acts, things and circumstances." (Hart, 1961: 121)

This does not, however, mean that such categoricalism and reductionism is intellectually justifiable. The construction of masculinity in the transsexual and impotence cases, as well as in relation to homosexuality (Chapter 5), is profoundly essentialist: it rests on a reductionist model of male sexuality, it is driven by a natural force which must be met. Throughout this thesis I have rejected such essentialist understandings of sexuality and have sought to integrate both biology and human agency in a social theory of gender (eg, in relation to law and the power of men, Chapter 2, p 46 - 50: on reductionism and defining masculinity, Chapter 4, p 110 - 119: on a naturalist theorising of homosexuality, Chapter 5, p 149 - 156). This 'essential force' of male sexuality may be controlled (as in doctrinal conceptions of sex, Chapter 2, p 32 - 34) but, in last instance, might transcend state control and the institution of marriage which is it's natural location. In directing this sexual instinct to marriage (and away from 'unnatural connections' of which Lushington was so mindful) the law might minimise the damage done by uncontrollable male sexuality and the law might then regulate the drive into the 'natural' and acceptable form: marriage. Were the law to be out of step with the dictates of nature, disorder might ensue threatening not only this normative economy of pleasures but the institution of marriage itself and ultimately social order

(as, for example, in the case of prostitution, where similar constructions of male sexuality are to be found [1].

(ii) What is Natural is Heterosexual

Secondly, what is natural is also **heterosexual**. Male pleasure is achieved through contact with the body of another, but the other is a woman. Male/male pleasure is unnatural and is not to be allowed in the institution of marriage (Chapter 6, p 182 - 184). It is to be criminalised and is lawful only within certain limits (Chapter 5, p 156 -160). An organising moment in the construction of hegemonic normative masculinity is the valorization of heterosexual intercourse within the context of marriage and the activation of subjective commitment to the emotional environment of heterosexual familial relationships. As Connell has argued,

"An emotional commitment of any force comes to structure not only our social interactions but also our fantasy life, our self-concepts, our hopes and aspirations."
(Connell, 1987: 212)

It is clear that the structuring is heterosexual, but we may be more precise than that, for it involves a **certain kind** of heterosexual relation.

(iii) The Primacy of Genital Sex

Thirdly, the form that this connection is to take is **genital**: a connection of penis and vagina. The law denies legitimacy to other connections outside the genital economy eg genital/oral, genital/anal, anal/oral. The genital fixation of law would appear to be reflected in those accounts of the impoverished nature of male sexuality which appear within the sociology of masculinity literature discussed in Chapter 4. Here intercourse has been presented as resting on a pattern where man's arousal and control of movement is central, as

"...a practice of sexual encounter that begins with erection and ends with ejaculation, and in which the woman's pleasure is marginal to what the man does or is assumed to be guaranteed by powerful ejaculation. In eroticism focussed on the penis and on penetration, passive or gentle contact is likely to be dispensed with or hurried through, for fear of losing the erection, failing; and the man may be quite unable to come to climax, except when moving, thrusting." (Connell, 1983: 24)

This neatly summarizes the construction of male genital sexuality expressed by the judges in the impotence cases. Reynaud (1983: 43) goes further, characterising the 'myth of the phallic orgasm' as a result of the fact that

"Man does not allow his sexuality to develop fully, he stifles it by confining it to his penis. He projects it onto woman by making her a sexual creature."

The result of this is that

"Stifled by his mind and crammed into his penis, his sexuality wants to spread: his body, which he controls and desensitises to send it to be destroyed in the struggles for power, is only waiting for the control to slacken so that it can live." (Reynaud, 1983: 70)

The theoretical categoricalism underlying the sex/gender dichotomy is replicated in the law's treatment of sex and gender, as in the case of Corbett v Corbett (Chapter 6, p 190 - 202). In this case Ormrod's primary aim appears to have been to establish a relationship called marriage, rather than some to some definitive legal meaning of what constitutes a woman or a man. Nonetheless, defining sex and gender in matrimonial law becomes an inescapable part of the decision and it is clear from this case that not only does the biological supersede gender but that in this test the genitals constitute the "true

test" of sex (Chapter 6, p 194 - 197). Ultimately, for the purposes of marriage at least, the removal of the male genitals do not matter: once a man, always a man, and only a particular genital connection - penis and vagina - can consummate a marriage.

(iv) The Penis

It is not just that the mapping is genital: one may be more specific than that. At the heart of this mapping is pleasure as realised in and through the penis; it is, literally as opposed to metaphorically, **phallogentric**. Within this penile economy the law reifies the polymorphous possibilities of the body, structuring cathexis into a particular act (intercourse) and a particular part of the male body (the penis). Other alternative sites of pleasure, for example, the face, arms, mouth, hands and anus are denied purchase for they lack the potential for pleasure which, it is to be presumed, can only be realised through the penis. The polymorphous desires of the body are thus organised in one specific and ideological way. Within the legal determination of consummation presented in Chapters 7 -8, the calibration of inches of penetration within the conjugal union of penis and vagina are subjected to detailed systematic analysis by the judicial gaze.

(v) The Context is Marriage

The context in which the ordinary and natural is sanctioned, and against which the unnatural and deviant are defined as such, is the **heterosexual institution of marriage** (Chapter 6, p 182 - 184). Marriage is not simply a context however, it is integral to the definitional process. The construction of the legal concept of marriage throughout these cases enables a) the mapping to be achieved - whether the parties are married depends on consummation and therefore the investigation of the court is called for (Chapter 7, p 221 - 224) - and b) the institution of marriage is to be that which defines all sexual relations outside of it as legally illegitimate.

Ultimately therefore, it is necessary to question marriage itself. The 'problems' which transsexualism raises about the void marriage (Chapter 6, p 184 - 187) are inescapable consequences of the law's structuring of emotional cathexis in, and only in, the institution of marriage. While contemporary marriage may confer fewer status rights than at other historical junctures (in that the law confers rights which may be said to be exclusive to the married couple), the regulation of the point of entry to marriage ensures that marriage is an exclusively heterosexual institution. As regulation of de facto unions has increased there has occurred a relaxation of the rules as to who is eligible to marry (on general developments Chapter 1, p 10 -11, 15 - 16: on void marriages, Chapter 6, p 181 - 182). Nonetheless, legal marriage continues to have a major significance in the lives of the majority of adults. There is no 'essence' to marriage: in a sense, it may be all things to all women and men (Chapter 1, p 4 - 11). However, the normative focus is legally sanctioned. Dicta in Hyde v Hyde (1886) LR 1 P & D 130: 133) declared that marriage is a union of one man and one woman for life. Marriages contracted are not for life, though they may be **potentially** for life (Poulter, 1979). As far as it goes, Hyde's relevance to contemporary law on marriage specifies that marriage is between a man and a woman and no more.

These issues around marriage are central to consideration of the law and transsexualism. The institution of marriage is grounded in gender and society, and not biologically (and randomly) fixed categories of sex. Marriage is social in the most profound sense of being an institution created by human beings (for whatever varying purposes) and is not the functional product of biologically determined acts: legal marriage, I have argued in Chapter 1, is a particular, historically and culturally specific, manifestation of socially negotiated gender roles. The significance of law is, in part, in the activation of subjective commitments to the institution and the consequent structuring of gender and expectations within the family, and it is at this level, rather than in the

production of a doctrinal debate as to matrimonial rules, that I have sought to engage an analysis in this thesis. The 'law' relating to who may and may not marry is cultural, ideological and profoundly patriarchal. In 1971 Smith concluded his influential article on transsexualism by arguing that the guidepost of legal decision making in relation to transsexualism should be "what is in the best interests of the transsexual, for those interests and the interests of society are not in conflict." (Smith, 1971: 1008-9) Mark Rees continues to share such optimism in the face of the attitudes expressed through law.

"Transsexualism is not a whim or neurotic quirk. One does not choose to be a transsexual any more than one chooses to be diabetic. The total conviction that you are living in the wrong body has never been shown to yield to psychiatric treatment. The alternative of sex-reassignment is a tedious, emotionally exhausting, often embarrassing and always painful business. But the reward is release from the awful conflict of mind and body, and freedom to be one's real self. ..The battle I have been fighting has not been just for myself, but to help all transsexuals out of the legal limbo to which they are condemned in this country. It is a battle that in the end must be won." [2]

However, so long as the institution of marriage is preserved for men and women and is based on one particular sexual act, the victory Rees' envisages may be a long time coming. A different, and more difficult, question is why it should be the case that a major structure of emotional cathexis, sexuality, should be channelled within legal discourse into one institution. Marriage is the organising concept by reference to which human sexuality, desire, the body and to be understood. Ormrod considered in *Corbett v Corbett* (Chapter 6, p 190 - 202) that it would be illogical if

"...marriage were substantially similar in character to National Insurance and other social situations, but the

differences are obviously fundamental. These submissions, in effect, confuse sex with gender." (My emphasis)

The differences are not 'obviously fundamental'. They need to be stated, explained and justified. If marriage is to be privileged as the exclusive site for a major structure of human cathexis, then it needs to be explained why it should so be, and statements of this kind are insufficient.

(vi) The Wider Context

The analysis of consummation I have presented in Chapters 7 -8 must be placed in the wider context of legal engagement with the body. The law, I have argued, is intimately concerned with the body to a point which may be more accurately presented as obsession. The body is studied and medical knowledge is relied on to frame appropriate legal issues in other contexts than just with regard to the family and marriage. In the criminal law, the establishing of forensic evidence involves assessment of the causes and degree of harm to bodies, for example involving examination of hair, fingernails, teeth and semen. In the legal treatment of rape feminists have identified a process within which not only does legal discourse assume pornographic and voyeuristic overtones [3], but in which the subjection of women's bodies within a penile economy involves the framing of questions strikingly similar in tone and content to those in the consummation cases I have discussed in Chapters 7 and 8. In establishing whether intercourse has taken place for the purposes of proving rape [4] or adultery [5], the law also seeks details about degrees of penetration of the vagina by the penis and whether emission has occurred. The orifices of the body are mapped, the distinction established between those which do and do not constitute penetration. As we have seen, the requirements to legally establish consummation are stricter than for rape. Rather than the husband penetrate the wife's vagina, if not to full extent, then to a certain depth and for a reasonable length of time, in cases of rape or adultery the slightest penetration is enough. However, the essential

conjunction of penis and vagina remains. The law continues to refuse to recognise penetration with objects other than a penis as sufficient to constitute rape and phallocentrism is not therefore confined to matrimonial law.

(vii) Nullity: A Continuing Relevance

In the end the law relating to nullity is itself in a state of confusion. It's repeal and reform have both been recommended [6]. While the impotency cases I have discussed may be things of the past, they nonetheless, as I hope to have shown, constitute a rich source of representations of male sexuality and masculinity in legal discourse. It may be argued that 'the law' I have discussed is constructed out of cases centuries apart and that contemporary judges would not use the same language. Nonetheless, these cases are not only commonly referred to as forming the substantive law in contemporary 'family law' textbooks (eg, Bromley and Lowe, 1987: 82 - 7) but they also involve representations of masculinity and male sexuality which, I have argued throughout this thesis, pervade the law relating to the family in a general sense. Analysis of these cases is not, therefore, an archaic exercise in doctrinal exegesis, but is rather, I believe, an informative and necessary part of the study of masculinity and law. Such a study - regardless of whether it is labelled a contribution to a 'men's studies' project (Chapter 4, p 103 - 110) - seeks to both address the politics of male sexuality put onto the agenda by feminism and to integrate in a coherent and consistent analysis the theoretical perspectives in relation to law, gender and the family which have been developed in Chapters 2 - 5.

Hegemonic Masculinity: Potency, Power and Male Sexuality

While the meanings of masculinity may vary across different discourses, depending on what aspect of male experience is taken as the primary object of analysis (Chapter 4, p 110 -

119), this does not mean that it does not make sense to talk of a general politics of masculinity. In this thesis I have sought to address some of the ways in which one particular form of masculinity assumes an hegemony in law, and the processes whereby this hegemony is reproduced in areas of law relating to the family. My principal focus has concerned male sexuality. Within the writings of the 'new men's studies' discussed in Chapter 4 (and in particular from the 'men against sexism' perspective, p 126 - 133) male sexuality has been presented as

"... a maze of pleasures and pains, guilts and confusions...sex for men who are challenging or who have been forced to challenge traditional men's roles, is no more a clear, flowing stream than for anyone else, maybe not less clear, but probably more full of hazards, because the 'shoulds' and 'oughts' do remain potent, and can actually grow in the process of unlearning fixed patterns." [7]

Perhaps more than any other subject, the sexuality of men constitutes a recurring theme of the literature written by men in direct response to feminism. An 'Achilles Heel' (Chapter 4, p 128 - 129) issue specifically addressing the subject sought to avoid "much reference to current philosophical or sex-political theory" and seek instead to explore the reality of sexual relationships for men. Accordingly, the issue included articles on the frequency and location of male homosexual encounters, poetry ('Why we stick our cocks in other people'), the masculinity of mining, book reviews, gay pornography, fiction, sexuality and the law, therapy, photography, contraception, childcare, incest, dance and information on Men's Studies courses. The ideology of sexual difference expressed in the cases I have referred to in Chapters 6 - 8 is, of course, reinforced in many areas apart from the law [8] and for this reason I have, in Chapter 4, sought to address the wider cultural nexus within which representations of gender are constructed which includes such texts as 'Achilles Heel'. The range of perspectives, themes and issues within the sociology

of masculinity I have discussed in Chapter 4 also testify to the diversity and eclecticism within the study of masculinity.

The systematic denial of emotion and the promulgation of masculine competence (which relate to the perceived impoverishment of male sexuality) are antithetical to the lived experience of gender, of sex and desire, yet remain crucial to the perpetuation of the hegemonic masculine norm. A stress on the 'sexual performance' aspect of heterosexual sex, on male 'perversions', the fetishistic nature of male sexuality and the power/domination dimensions to masculinity have formed a common theme within a feminist literature which has been deeply critical of both heterosexual and homosexual masculinity [9]. Feminists have contended that heterosexual men have an excessive reliance on genital sexuality, and that men engage in sex for sex's sake (sex without interpersonal meaning) to a greater degree than women. Whether or not one agrees with such a depiction of socially constructed male sexuality, it is, I believe, one of the 'mutual resonances' (Smart, 1989: 86) of the constitution of both law and masculinity in discourse that the power of each negates irrationality, emotion and subjectivity, though in the case of male sexuality as depicted in the 'men's studies' literature it would appear that this exclusion takes place at considerable emotional cost. If men do express an excessive reliance on genital sexuality, then it would seem, at least from the impotence cases, that this reliance is legally supported.

In the end, these cases produce meanings of potent masculinity which are systematically phallocentric. Darmon (1985:13) is writing regarding the impotency trials of pre-Revolutionary France, but the conclusions apply equally in this context:

"...phallocentric indoctrination was so pervasive that it generated an irresistible need to reaffirm the figure of the virile male, and so the normal and the abnormal were systematically polarised."

This polarisation of the normal and abnormal in the consummation cases, the encouragement of male activity (it is to be remembered that a response to refusal of intercourse may be forced intercourse, that is, rape) and the judicial endorsement of the inseparability of sex and marriage have all been achieved through appropriation of both theological and medical discourses. In particular, the transition from an ecclesiastical to secular treatment of impotence entailed a shift in the form of legal regulation whereby, as in relation to homosexuality discussed in Chapter 5 (p 160 - 165), a man's impotence came to 'speak the truth' of his essential sexual identity. What his impotence/homosexuality declared was that he was not really a man at all. With the development of cases involving the citation of 'injurious non-consummation', in which impotence is regarded as having itself been produced by a conscious act of will, and in expansion on the meaning of 'wilful refusal' in later cases, it is as if sexual identity itself becomes a matter of simple choice, and incapacity has come to entail the annulment of marriage on the grounds simply of a mistaken choice of partners [10]. The phrase 'non-consummation' is itself significant in that, unlike impotence, it does not imply stigma and an *a priori* sexual incapacity, instead bringing within it's ambit the deliberate act of will.

On another level, it is necessary to rethink what impotence means and what impotence tells us about male potency. Male impotence is a crucial organising moment within the construction of male sexuality and hegemonic masculinity. By a curious paradox of patriarchy, male power and powerlessness are entwined, located within perhaps the most vulnerable part of a fragile male anatomy: the penis. Within this area of legal discourse, the phallus is at once the physical and psycho-sexual nexus of essential manhood, the quintessence of virility. The penis is also, on the above reading of the cases, the foundation upon which is built the marriage institution. **Without a functioning penis, there can be no marriage.** Upon male pleasure, to be realised in a certain form, marriage depends. Though female sexuality is not denied in the

consummation cases (it is present), it is controlled, regulated and channelled in specific ways and, I would argue, is to be expressed in a mode qualitatively different from male sexuality, but in a form which remains phallogentric and ordered around penis-use. Of course, human agency remains. Alternatives are always possible, and what the law says is not necessarily what people actually do, either inside or outside marriage. **It is not that genital heterosexuality is inherently oppressive or patriarchal**, and I do not wish to fall into such an essentialist position (though some may argue this [11]). That the institution of marriage should be based on such sexual activity is, however, a different matter.

Consideration of male potency in heterosexual relations brings us to the fundamental importance of the dynamics within relations between men and the male/female power axis, and this has been brought out perhaps most clearly in the discussion of hegemonic masculinity and male homosexuality in Chapter 5 (esp. p 160 - 177). If impotence is constructed as signifier of the non-masculine (in it's separation of those men who are, and are not, potent), then how does this relate to the dichotomy between heterosexuality and homosexuality? The law in relation to homosexuality constitutes a nexus of other discourses, notably medical and psychological and the 'scientific sexology' which proclaimed homosexuality to be deviancy. In the field of force relations, adult male heterosexuality has undergone a profound transition, as one form of hegemonic masculinity embodied in legal discourse was to be supplanted in the nineteenth century with another. Crucially, and in tandem with shifts in medical 'knowledge', in attitudes to childhood, with imperial decline and perceived family instability, male sexuality and male lust (the dangers of which were articulated most clearly by social purity campaigners [12]) assumed the status of indicator of social concerns. **The extent to which an essentialist conceived male lust is controlled itself becomes an indicator of social order.** For example, both prostitution and homosexuality were seen by the social purity campaigners of the 1880's as the results of a (natural) undifferentiated male

desire. The legal changes outlined in Chapter 5 themselves constitute on one level a general moral restructuring and also a (legal) embodiment of a form of male sexuality and masculinity which is naturalist and essentialist.

In the denial of the social, legal discourse can be seen as both controlling the undifferentiated lusts of men and establishing the locale for 'natural' sex expression in the institution of marriage. Within the network of power relations, this is never stable and finally settled however. It involves reinforcement and encouragement, activation and the channelling of desires in specific ways:

"In short, it is a question of orienting ourselves to a conception of power which replaces the privilege of the law with the viewpoint of the objective, the privilege of prohibition with the viewpoint of tactical efficiency, the privilege of sovereignty with the analysis of a multiple and mobile field of force relations, wherein far-reaching, but never completely stable, effects of domination are produced." (Foucault, 1981: 102)

The social construction of masculinity must be located within a network of power relations whereby 'normal' adult heterosexuality is but one path through which a gender identity might be negotiated. The constitution has an overall, legally sanctioned, normative focus. To go further is to dismantle the 'archaeology' of the constitution of heterosexual identity itself. I have argued in Chapters 1 - 5 that masculinity is constantly constructed within a process which contains both resistances and marginalization, contestation and exclusions. The exclusions of legal discourse, discussed in Chapter 2, are an important part of this history. What we witness in law is the fissuring of the categories of men and women, the heterosexual and homosexual. This fundamental dichotomy is not merely constructed at the level of discourse. To argue as much would be to confer too much power to the law which, I have argued in Chapters 2 and 3, would be an error.

Rather, this dichotomy is supported within relations of power and their interplay with the division of labour and the structure of emotions. The differentiation of masculinities, inasmuch as it is institutionalised, is inscribed in legal discourse and takes effect at the level of state policy. The historical construction of masculinities and femininities is also a struggle for resources and of power, as I have argued in Chapter 3.

The law, across a range of areas, is important not simply in producing structural shifts in the constitution of sexualities, but in the constitution of the dichotomy between heterosexuality and homosexuality per se, a division which is fundamental to the construction of hegemonic masculinity. There are similarities in the social expressions of homosexuality and heterosexuality, but these are negated in the legal promulgation of an ideology of natural sexual difference between male and female. Crucially, the structure of power relations between men exists in a dialectical relationship to a male/female axis in that the construction of women as the only legitimate sex objects within hegemonic masculinity denies men as sexual objects and constructs the sexed male body in legal discourse in specific ways. Men only marry women, and only men and women have sexual intercourse. As we have seen in relation to transsexualism, where public law considers mutable that which matrimonial law fixes in phallocentrism. Ultimately, it is necessary to question these essentialist definitions of both homosexuality and heterosexuality in which masculinities are explained through reference to a reductionist model of male sexuality. 'The homosexual' is constructed both as threat to social order and threat to the institution of marriage, and the construction of social and legal homosexuality constitutes a crucial moment in the establishing of a historical redefinition of masculinity and the legitimacy of the hegemonic masculine norm.

Possibilities For Future Research

I have argued in this thesis that a critical engagement with masculinity is a necessary part of gender politics and of a legal studies which is to take seriously the relation between the power of law and the power of men. It is hoped that the analysis of masculinity which has been presented constitutes more than a turn to 'generic feminism' for assistance out of an 'intellectual malaise' (Bottomley et al 1987: 48), a plundering of the productive terrain of feminist jurisprudence in the furtherance of another masculinist project. I have sought throughout to address the reasons **why** masculinity and law is an important topic for study, how such research might be justified as well as what the methodological and epistemological implications and ethics of paying yet more attention to men may be.

To locate the political significance and hence possibility of transformation of the social construction of masculinity is to, in a most profound sense, question the modes and meanings of men's power; not as part of a political project to empower further those who already hold power (to make the dominant more so), but to stress the inevitable degree of **choice** men have as to the modes of masculinity available to them in different situations, of the possibilities, however limited, of shifting between and within the discourses which invest masculinity with its meanings and its power. At the very least masculinity involves both the embodiment of passive security (of immobility) and of a positive re-negotiation of and/or obedience to the rituals of the hegemonic masculine norm (activity). Masculinity may be as much about modes of contestation and resistance to, as well as modes of confirmation of, the phallogentric order and the authoritarian enterprise of law.

Masculinity - as something which has and gives meanings to women's and men's lives - cannot go away. But we can choose to

ignore it. To dismiss the emergence of the study of men and masculinity informed by feminism as no more than a reactionary response on the part of men would, however, be mistaken (though this is not to deny that studies I have discussed in this thesis are not reactionary in several respects). Rather, I believe it is clear from the literature discussed in Chapter 4 that men - individually and collectively - have sought to socially sustain forms of masculine sexuality alternative to the hegemonic norm. Foucault has argued that the construction of homosexuality

"...made possible the formation of a 'reverse' discourse...homosexuality began to speak on it's own behalf, to demand that it's legitimacy or 'naturalness' be acknowledged." (Foucault, 1981: 101)

Is it possible, therefore, that such 'resistant' masculinities might also demand that their legitimacy or 'naturalness' be acknowledged? Is it the case that such demands have been, or may be, reflected in legal discourse?

Answers to these questions are beyond the scope of this work, but some tentative conclusions may be made at this point and in the light of the preceding analysis. This thesis has, I hope, raised important questions and opened up a field of legal study for future research. Crucially, it is necessary to examine further this question of whether the 'anti-patriarchal praxis' espoused by proponents of 'men's studies' (be it is the form of 'men against sexism' or the 'men's liberation' perspectives discussed in Chapter 4, p 126 - 137) constitutes an identifiable part of, a significant development within, the transitions in - or modernizing of - masculinity outlined in Chapter 4 and Chapter 5, p 168 - 177. This modernizing, I have argued, is certainly related to the impact of feminism and changes in the position of women and in men's place in familial relations. However, it is not reflected in any coherent way within legal discourse. Current developments within law and the family have involved significant shifts in the gender order in

a number of areas - for example, in relation to custody and the legal rights of unmarried fathers [13], finance and property on divorce [14] and moves to conciliation in the decision making process [15] - and it is arguable that the changes which have and are occurring are taking place in systematically anti-feminist ways. This raises the fundamental point that shifts in masculinity - and the academic study of the subject which such transformations relate to - are not necessarily pro-feminist and might well take the form of a further assertion of men's rights and power. It is imperative that future research on masculinity and law seek to establish whether or not there can be identified in law a 'reverse discourse' (in the sense discussed in Chapter 5, p 165) of a non-patriarchal male heterosexuality which demands that its legitimacy is acknowledged by the law.

In the end, the social construction of gender is itself part of the problem the law is seeking to address. The law can only fail to 'do something' about the problems associated with hegemonic masculinity so long as it remains premised on the discursive structures which produce and reproduce the hegemonic formations of a male gender which constitutes the problem. To elaborate, male and female, I have argued in Chapter 6, are not fixed and immutable in the pre-operative transsexual, but are fractured, dispersed, profoundly social and open to continuous processes of re-negotiation, transformation and resistance. The theory one adopts has major implications for how one conceives of reform strategies [16].

The politics of gender do not negate an interest in state policy and legal reforms. Far from it, how the law and policy influences family forms remain central to the possibilities of devising alternatives. Likewise, 'family' cannot be understood as a simple entity which may be talked of in global terms. The historical changes in family structure I have discussed in this thesis (eg, Chapter 1, p 14 - 16) have had implications for the construction of masculinity and femininity as will future developments around the family. A few tentative

conclusions may be made. The law must establish ways in which women can survive without dependence on a husband (and vice versa). As feminists have argued, such an objective entails not only equal pay, educational and job opportunities for men and women, but also state provided nurseries and financial and legal independence. This has clear implications for the funding of the welfare state, for hospitals, nurseries [17], children's homes, mental hospitals, homeless and elderly shelters. Current trends towards 'community care', far from placing care into the community, privatise the family further and present the family as the solution to problems which are social and economic.

There remain contradictions and tensions within the 'family policies' of the Conservative governments, from 1979 to date, and it is always possible that transformations in family ideology might promote a 'family' no longer presupposing a married heterosexual couple with children who are dependant on the 'breadwinner' male. 'Family policies' might recognise and support a variety of households. Central to this however are a number of themes which have recurred in this thesis: men assuming equal responsibility in childcare [18], domestic arrangements and the care of dependent people, the provision of adequate incomes, child benefits and shorter working hours [19]. I have argued in this thesis that a questioning of the construction of masculinity is a most important part of developing a culture in which the ideology of familialism might be questioned.

I hope the analysis and studies I have presented in this thesis are part of that project. Male impotence has for centuries confused jurists, theologians and doctors, as well as lawyers. It seems that it might finally have been banished from the courts, in that there are today very few nullity cases raising the question of impotence. Yet the legacy of the earlier cases and an unquestioned assumption about masculinity and male sexuality remains with us today. It is there in rape trials [20], in the legal treatment of child sexual abuse [21] and the

legitimation of male violence against women and children in domestic violence [22]. It is there in accounts of pornography [23] and prostitution [24]. At root, the legal treatment of impotence is about the confused nature of male sexuality itself; it's silences, prohibitions, it's mythology and, in the last instance, it's power. The prohibitions surrounding, and the silences which engender, legal discourse (such as the challenges of feminism and other 'disqualified' knowledges to the legal method of doctrinal exegesis) are sustained in part by the power of an ideology of hegemonic masculinity. While excluding feminist challenges to the power of law, 'traditional' legal method entails a systematic negation of questions of subjectivity, in both it's methodology and epistemology; this involves the denial of the legitimation of any (sexual) political engagement with 'scientific legal method' which might question the silences of gender, and which might call men to account for their actions and their privilege. To recognise the personal as a necessary part of theory is not to turn to 'the personal' issues focussed by feminism as political issues through some pragmatic appraisal of their 'fashionable' status in these eclectically hedonistic postmodern days, nor to desperately seek what Goodrich (1986: 212) terms "...therapeutic consolation for the somewhat neurotic dissatisfaction with the state of the legal discipline". It is, I would argue, part of the rethinking of that discipline.

POSTSCRIPT

"The professor may love his wife, and fully appreciate her qualities as a housekeeper, but he passes a more interesting evening with some male friend whose reading is equal to his own. Sometimes the lady perceives this, and it is an element of sadness in her life...although he would open his mind with the utmost frankness to a male acquaintance over the evening whiskey-toddy, there was not whiskey enough in all Scotland to make him frank in the presence of his wife." (Hamerton, 'The Intellectual Life' 1929: 234-5) [1]

This thesis has been about masculinity and law. The bulk of the research has been carried out in institutions of higher education in the UK. In the light of the arguments of this work, perhaps it would be invidious to leave unstated some thoughts about the politics of the research process in which this academic text has been produced, or to leave unstated my own position as a man within the legal academy. In this brief postscript (by way of a concluding endnote) I wish to engage in a kind of study envisaged by this thesis, in an attempt to deconstruct the masculinity of a particular male subject. I wish to, briefly, address the reason, desire and the power of the men of 'fine minds' within the legal academy, to investigate the processes by which these masculinities are constructed and the relation of these masculinities to the power of law and to the power of men generally. In part, I wish to draw on my own experiences and observations in this postscript, and address some personal doubts about 'The Intellectual Life' of the legal academic. In bringing together a number of themes of this thesis, I cannot exclude myself from the following comments. Nonetheless, I believe that the marginalization of the politics of masculinity within law schools says much not only about the power of men but also the power of law itself. It is said that legal education is facing

a crisis [2]. Whatever the nature of this crisis, it is clear that feminism remains marginal within the law school. There is, I believe, a significant relation between the rhetorical status of legal discourse and the constitution of male subjectivity within the institutional setting of the law school [3].

The constitution of masculinity, I have argued in this thesis, has been identified by a number of feminist writers as central to a deconstruction of the power of law. In her analysis of 'Hegemonic Masculinity and the Academy', Thornton (1989) speaks of a 'personal dimension' which privileges all men. This, she argues, is premised on a liberal conception of the self as 'public persona', a persona maintained by an elaborate silencing of questions of men's lives and masculinity, a systematic denial of the

"psycho-sexual power flowing from the maintenance of women in subordinate roles as wives, mistresses, secretaries and research assistants" (1989: 118)

Thornton (1989: 118) describes with clarity and insight aspects of this male public 'persona' as inimical to women's success within the academy. What Thornton is not concerned to do, however, is to address those mechanisms whereby this institutionally specific psycho-sexual constitution of male subjectivity takes place. It is her task to describe the forms and effects of masculinity, not its construction within discourse [4]. Thornton's focus may be narrowed therefore - from 'the academy' in general, to the constitution of the masculine authority of a particular group of those men who pursue a 'career in law': the male legal academic. It is possible to take Thornton's analysis slightly further and provide an interpretation of the constructions of social, economic and psycho-sexual influences which might bear upon the constitution of masculinity in the subjectivities of the law school. What might such an approach derived from an attempt to foreground masculinity say of gender in the law school? A number of questions may be asked. How do the parameters of the

legal academic career promote, if they do, a historically and culturally specific negotiation and re-negotiation of gender, and how does this relate to a continuous process of giving meaning (and power) to men's lives? How do these masculinities relate to the production and reproduction of patriarchal relations, both within the legal academy and within the law generally? The point may be simply put. While men academics debate 'the oppression of women' in the forging of academic careers, it may be more worthwhile to ask a rather different question of such men.

"What are the mechanisms linguistic and otherwise, whereby these men are able to evacuate questions of their sexuality, their subjectivity, their relationship to language from their sympathetic texts of "feminism", on "woman", on "feminine identity?" (Jardine, 1987, 56)

I have argued In Chapter 4 that as a discourse which claims to speak the 'truth' of men, 'Men's Studies' will necessarily exercise, will be justified by, forms of power which value it's own particular notions of truth. I have argued that it is difficult to believe that those discourses which would render to 'Men's Studies', as an academic subject in it's own right, a claim to scientificity within the academic discursive hierarchy, could be other than patriarchal in that they would at the same time rank feminist 'knowledges' as inferior, and divert scarce resources within the academy once again to men. This applies as much to the legal academy as to any other. Nonetheless, there are some men in law schools, albeit that they appear to predominantly be in the groups I have identified above [5], who are 'sympathetic' to feminism. For some sympathies may amount to no more than altering their terminology in speech and writing from the universal 'he' to 's/he'. For others, self-policing and self-interest in setting the parameters of 'politically correct' liberal discourse may determine the times and the places of what, and what not, to say. This may be seen as a sign of feminism's presence within the academy [6].

What is evident in legal scholarship is that some men have found it necessary to make explicit declarations of support for feminism(s) project(s) in their work, to acknowledge the centrality of feminist thought to the revolution in the social sciences and to progressive developments within their own sub-category of the legal discipline. Yet it is common for men to proclaim their sympathy for feminism without analysis of their own place within the patriarchy they deplore [7] (I am not sure to what extent, if at all, I have achieved this in this thesis). It is common to find references to, for example, the 'ideology of patriarchalism in law' [8], with scant reference to the author's own positioning within the patriarchy, or conceptual elaboration on these contradictions. Patriarchy, as with law, so often remains something 'out there', a property of abstracted society rather than product of individual and collective behaviour. It becomes a concept to be utilised by the male academic in his 'critical' approach to law, though we find no elaboration on his own positioning within patriarchy [9]. 'Patriarchy' becomes, like 'alienation', 'false consciousness' and 'oppressor', something outside the confines of the law school. I am not saying patriarchy can have no meaning for men, but it is necessary to recognise and address the contradictions.

A related problem is evident in the subjective confusions, the (inherent) contradictions occasionally expressed by male legal academics engaging with feminism. The literature purporting to be sympathetic to feminism is (frequently) extremely self conscious in its declarations of the academic/personal aspirations and good faith of the author. If we look upon the legal academy as dependent on a 'market' for the research produced (publication determining career progress, or obtaining employment), 'taking feminism seriously' may amount to no more than another method of reproducing the individual and collective power of men. Academics in the production of meanings seek new markets, new forms of expression and new things to express in the tortuous path of the academic career. Research on masculinity may therefore

amount to no more than the seeking out of another 'market', a sub-field within gender studies to be exploited by male academics excluded from feminism, but who find themselves ill at ease within mainstream scholarship such as traditional marxism. Indeed, the climate is most propitious for men to force their way (back?) onto centre stage, albeit that this is achieved under the guise of postmodernism and within the fashionable methodology of deconstruction [10].

Men's 'engagement' with masculinity therefore may in itself constitute a perpetuation of the status quo. There nothing inherently progressive or pro-feminist about men addressing masculinity, as Fraser's (1988) self-obsessed deliberations on his sexuality in the law school testifies. It would be naive in engaging in research of men and masculinity to be blind to the politics of the production and reproduction of 'knowledge' in the law school, and to write with no more than a,

"...boyish enthusiasm for anything new combined with an age old thrust to colonise, particularly if it looks like a field where no angel has yet trodden or at least registered a thesis topic." (Bottomley et al, 1987: 48)

The point is well taken with regard to the present work. If masculinity is to be of relevance for legal studies, the questions it involves - about power, desire, sex and reason - cannot remain 'out there', somehow the attributes of 'other men'. If the sociology of masculinity is of potential relevance to an analysis of legal discourse, it is necessary to recognise that the foregrounding of masculinity envisaged by any such 'new men's studies' outlined in Chapter 4 brings with it a catalogue of possible dangers throughout the academy. These dangers are clear in the work of Fraser (1988) who bears out the point that men do seem to feel tensions between their academic and their personal aspirations, to keep 'good faith' with feminism and yet to simultaneously 'explore' the politics of masculinity in their own academic careers. As an example of the appropriation of feminism, egocentric self interest and the

power of the hegemonic masculinity he is supposedly critical of, Fraser's text is perhaps unsurpassed.

"Questions plague me. Does she desire me or her "law professor and his power?" Can the two be separated?...If I, as professor, approach a student, I engage in sexual harassment, for I cannot escape "professor" status...This is my experience in law school. I want connection...As a white, male, heterosexual, CLS law professor I...struggle for the politically correct position on love in the law school." (Fraser 1988: 80) My emphasis.

It is not clear what the 'politically correct' position on love in the law school is. What is it? One which does not subordinate women, or one where Fraser will be able to know if she desires him or his professorial power? He wants 'connection', and turns to feminism for assistance. If this is the face of legal studies 'taking feminism seriously', then we are better off without it. Legal method may be passionless, but to turn to feminism for 'authentic connection' (assuming there is such a thing) is a misguided appropriation more akin to the proponents of men's liberation thesis discussed in Chapter 4 (p 133 - 137). Fraser does point to a more general problem however, the confused and contentious nature of the relation between critical legal studies and feminism discussed in Chapter 2 (p 42 - 43).

Bright Boys and Fine Minds: Class and Gender in the Law School

In feminist writing on the academy, a number of themes emerge as to the effects of masculinity on the reproduction of patriarchal relations in institutions of higher education. First, masculinity is seen as aggressive [13]. This is particularly clear in the work of Ramazanoglu (1987: 61), for whom

"The contradictions between liberal ideology and scholarly aims of higher education, and the realities of competitive academic careers in male-dominated hierarchies, leads to institutionalized forms of violence."

A second theme relates to the comments of PG Hamerton, with which we began. Hamerton's 1929 reflection on 'The Intellectual Life' in fact tells us much about the dynamics of men's power. 'The bonds of men' to which he refers are at once both loyal and precarious. To refer back to the discussion of homosociality in Chapter 5 (p 145 - 147), in identifying the psychodynamics of institutionalised segregation in the structured domains of work and leisure homosocial behaviour presents an important dynamic within male heterosexuality (eg, Lyman, 1987: Easthope 1987: Fine, 1987: Sherrod, 1987: Hammond and Jablow, 1987: Carrigan et al, 1985: Pleck, 1980). At the descriptive level, the concept of 'homosocial' might serve as an accurate reflection upon any number of social institutions of the legal and political world, from the university senior common rooms and law conferences ('critical legal' or otherwise), to the House of Lords and Commons, the barristers chambers and the upper echelons of the Law Society and firms of solicitors (generally, see Rogers, 1988). The psychodynamics of male homosociality as institutionalised in the patriarchal structures of higher education are evident in systems of deference, patronage and resource allocation.

'Homosocial reproduction' is most glaringly evident Thornton (1989: 122) argues, in the recruitment process of the academy itself. Class confidence and the financial security of impending inheritance or a supportive background might negate or fuel militancy about the poor level of academic wages, while the men appoint the men in their own image who have developed the similar social skills and betray the same confidence, reference points and presumptions: in the words of the academic quoted by Thornton, the recruitment process is rather like "looking in the mirror at a younger self". The 'boy's club' ethos thus replicates itself through the practices of

appointment [15]. Women have thus identified a working environment suffused with the 'male club ethos' and masculinism, emphasising exclusivity, the accumulation of resources and the exclusion of women whose presence "...would dilute the atmosphere and function of these bastions of male homosociality" (Lipman-Blumen, 1976: 30). While this is not to argue that things have not, and are, changing dramatically, the continued existence of such bodies as 'University Wives Clubs' testifies to the gendered segregation of the academy.

Lipman-Blumen is here, I believe, making an important point. Men's power depends on the **exclusion of women**. The competence and authority of the male 'fine mind' within this hierarchical institutional setting is a social construct which depends in part on the exclusion and ideological subordination of women. Women's presence within the legal world, albeit partial and the result of hard struggle, has, perhaps not surprisingly, met with systematic resistance from men (Sachs and Wilson 1978). Feminism meets similar resistance within law schools today (eg, Graycar 1986; Thornton 1986, 1989; Bottomley 1987; Smart 1989). One technique of exclusion is the statement of men's familiarity with feminist projects, in the sense that (I have heard men say) we live in 'post-feminist' times (or at least the enlightened men in the academy do). A male academic who would proudly espouse a 'contextual' approach to 'English Legal Scholarship' declares that 'everyone knows about feminism now'. This is simply not true. It is staggering to realise, on reflection, just how little feminist research is actually carried out in institutions which, for reasons of their historical development, proudly espouse a contextual approach to law, let alone those which remain rooted in the 'black-letter' tradition.

In the distancing of those aspects of the social world which threaten institutionalised (male) power (such as feminism and, I believe significantly, female sexuality and male homosexuality), the space - both physical and discursive - is achieved in which it is possible to adopt the mantle of

integrity and worth, the 'intellect' of the academic man. I would also note, in addition to aggression (not assertion) and homosociality, the problematic nature of rigorous academic discourse itself and the notion of the 'intellectual hero' which permeates academia. Brittan (1989) perceptively argues that the university "glosses violence more successfully." [16] One way this 'gloss' is achieved is through legitimating forms of aggression within liberal humanist discourse according to the dictates of academic interaction. Rigorous legal method - the scoring of points and convincing of others - is inimical to the 'false' knowledges of experience, faith and emotion, and is conducive to modes of interaction premised on hierarchy, competence and force (Thornton 1986: 1989). Aggression may take both physical and verbal forms, as even the most cursory analysis of 'how men talk' illustrates. Though concerned with 'couples talking', and presented in a light-hearted manner, the following captures well the forms of many an academic debate it has been my (unfortunate) experience to take part in in a number of different institutions:

"...it is my conviction...that we are going through a profound crisis in Intersex Conversation, and that this crisis has been the subject of a vast systematic cover-up...Various diagnostic categories leap to mind: "Conversational Impotence" (total inability to get a subject off the ground); "Premature Ejaculation" (having the answer to everything, before anyone else gets a chance to utter a sentence); "Conversus Interruptus"; and so forth..." (Ehrenreich, 1984: 76)

This captures well aspects of much male behaviour in seminars, conferences and staff meetings. It is possible to identify a conversational mode of discourse infected with an ideology of masculinism and hegemonic masculinity. Its implications go beyond personal interaction between law teachers for they constitute both a fundamental component of the structure of masculinity within the academy, and a discursive mode of exclusion and inclusion in the promulgation of the dominant

epistemology whereby law is taught in law schools. Students learn, or rather have offered to them, a discursive mode which is suffused with an ideology of masculinism, though this remains unstated.

This brings us to the relation between masculinity and the process of learning the law. There is a connection between the constitution of a particular structure of masculinity constituting the hegemonic norm, and the training which is offered by legal education; this training is itself a locus for class, gender and race specific initiation into ritual and social skills. This process - what Kennedy has called 'legal education as training for hierarchy' (1982) may be usefully characterised as one particular but politically significant site for the culturally and historically specific construction of (hegemonic) masculinity. The notion of the 'Academic Man', pushing back the frontiers of knowledge is sustained only by massive subterfuge. The subterfuge is part of masculinity's power, and it's deceit.

This is not to say there are no alternatives within the legal academy. The development of the academic career in the legal educational institution entails the inculcation of historically specific values, ways of belonging and, within variable parameters, lifestyles. For the law teacher and student, for those who accept the 'gift' of the legal educational institution (their salary or degree, prestige and passport to greater things), this is to become engaged in a process of initiation, if not indoctrination, into legal discourse. It is certainly to be engaged in a process of 'training', for the concept of 'professionalism' necessarily entails the inculcation of normative criteria, a physical and cognitive nexus of social construction where gender differences are ideologically bifurcated to the normative criteria of (hegemonic) masculinity and (emphasised) femininity (Connell 1987).

Kennedy's 'training for hierarchy' has assumed a certain fashionable status within the legal studies community. Indeed, it seems to be assuming the status of an 'organising concept' (Stanley, 1988) if one wishes to understand the power structure of legal education. Yet the **gendered** dynamics of the inculcation into hierarchy remain curiously unexplored. Indeed, the Kennedy-paradigm, however often quoted, may itself be said to connote a specifically masculinist practice. When masculinity and authority/hierarchy are so clearly entwined, the connection should be made explicit. Kennedy does not address masculinity, and is in this sense gender-blind. For Hantzis (1988:157, 161) the 'Kennedy-paradigm'

"...has become, even for those of us who do not agree with it, part of the shared vocabulary and symbolism with which we think and talk about our roles as law school teachers...The theory is not only marginalizing to nonwhite male faculty, it is also disempowering to students."

In a rather crude formulation therefore, 'learning' masculinity is really a matter of learning one's place as a man within, or learning the techniques of moving around, the hierarchy (Pleck 1980). In a hierarchical institution (which unquestionably law schools are: anyone who has worked on temporary contracts might testify to this), where progress is measured within the career paradigm, structures of deference and patronage pervade the law school community. I am aware that to talk of the 'legal community' generally is to draw together a range of institutional sites and practices which together produce the discursive field of the 'legal academy' itself. 'Law' covers a range of institutions and personnel. What is shared by this community, even if its members live in 'bad faith' within it, is a commitment to that foundational rationality whence the legal system derives its authority and its power (Goodrich 1986). Legal method, I have argued in Chapter 2, is grounded in hierarchy and authority. Lawyers are not born 'lawyers'. They derive their authority from these structures of

hierarchy and deference, legitimated by the self-enclosed quasi-scientific epistemology of doctrinal 'legal method'.

To return to the incantation of familiarity with the concerns of sexual politics, removed from the realm of the rational, the acceptable, questions of gender are denied objective purchase. 'They're at it again, leave them alone' 'It's not law, you would be happier doing sociology'. To be 'passionate' connotes the irrational, the feminine: the antithesis of the 'reasoned' and 'logical', the academic 'fine mind': the male. Law excludes gender as it excludes those who do not play it's game. Legal discourse disarms alternatives at the moment of their articulation. The iconographies of male authority and competence, the projection of professional male 'asexuality', entail above all an elaborate pretence; hegemonic masculinity is based on deceit and denial (if not repression), a 'mask' rather than 'myth' of masculinity which underscores the men of 'fine minds'.

Those who teach and study the law are not immune from the 'problems' of forms of social regulation which are not strictly juridical. It is easy to see how the subjectivity of the liberal legal academic might be fractured and contradictory, just as the 'pro-feminist' male academic might simultaneously deny, and depend, upon a system which legitimates the power of all men. Law school modifies, it draws upon and transforms, structures of power which derive and are legitimated from elsewhere. The discursive separation of work and home, the dualisms of public and private central to liberal legalism pervade the law school as they do the shopfloor, solicitors offices or banks. Just because the academic may be able to spend more time at home does not refute Thornton's analysis of the 'public persona'. The reclaiming of the body within a sociological analysis of masculinity applies with force to the masculinity of the male legal academic, rendered problematic by feminism's engagement with the law and the law school. Masculinities are never and can never be emotion free. Indeed, the power of the hegemonic masculine norm derives in part from

the denial of sex, from naturalist accounts of gender. So long as the structure of gender in the law schools which produce legal scholarship is invisible and denied, the research which those institutions produce will be all the poorer as a result.

NOTES

CHAPTER 1

[1] Limited by length, this thesis will not present a detailed analysis of paternity in law, though a study of the constructions of fatherhood, of legitimacy and illegitimacy, marriage and social parenthood is, I believe, a particularly productive site of representations of masculinity in law. Within feminist scholarship, analysis of the 'father's rights' movement (Eg Families Need Fathers) and masculine authority in familial relationships has been central to the gendered politics of child custody: eg, Smart, 1989a: Smart and Sevenhuijsen, 1989: Brophy, 1985, 1989. See p 20 - 30.

[2] This is not to say that constructions of masculinity are not central to much feminist legal scholarship. I know of no monograph which takes as its **principle** object of study the relation between masculinity and law. Thornton's (1989) article 'Hegemonic Masculinity and the Academy' is an exception. Relating masculinity to the play of power relations within the academy and to the possibilities of developing strategies for women to challenge male power and privileges, Thornton utilises concepts which have emerged within the 'sociology of masculinity': Chapter 4.

[3] Though my focus is sexuality and the law relating to marriage, it is impossible to separate the legal structuring of marital relations from relations between adults and children. This is perhaps most evident in relation to custody disputes: s1 Guardianship of Minors Act 1971, s 1 Children Act 1989. There will, to a degree, be a certain crossover between themes and issues in the course of this thesis, perhaps most evident in relation to shifts in parental authority and contested custody cases.

[4] This literature will be referred to throughout this thesis: Eg, Rifkin, 1980: Scales, 1980: 1986: Mackinnon 1982, 1983: Olsen, 1986: Thornton 1986: Littleton, 1987. Smart (1989) argues that the search for a feminist jurisprudence signifies a shifting of the debates within feminist engagements with law, away from concentrating on questions of law reform and 'adding' women to the political agenda to a profound questioning of the gender of the basic concepts of debate - for example, the gendered dimensions to legal logic, justice, neutrality and objectivity.

[5] See Postscript for comments of masculinity and law schools. The concept of 'masculinism' is discussed in Chapter 4.

[6] It is 'with' the grain in that it is written by a male legal academic in an empirically male dominated institution. It is 'against' the grain in that studies of gender and feminist related scholarship are systematically marginalized within doctrinal conceptions of law as well as institutionally within legal education in the UK: Chapter 2, p 34 - 42.

[7] The notion of the 'objective male stance' bears similarities with the work of Mackinnon (1982, 1983): Chapter 2, p 46 - 50. On 'otherness' as a fundamental category of human thought, Sartre, 1958: 1976.

[8] It is a central proposition of this thesis that the silence, the invisibility of masculinity, and the exclusion of that which would question the power of men (such as feminist knowledges) is fundamental to the power of men.

[9] Combining, for example, quantitative and qualitative methods. The research on family and sexuality to be discussed in Chapters 1 - 3 covers such diverse methodologies as participant observation, interviewing, questionnaire and historical, statistical and documentary analysis. While this thesis is largely a library based study, experiences in workshops and conferences, discussions and correspondences - the experiential

dimension to any research project - is very much part of this research.

[10] Roberts, 1981: Stanley and Wise, 1983: Smart, 1984, 149-159: Graham, 1983. Bowles and Klein, 1983.

[11] Eg, on interviewing mothers, Oakley, 1981. On interviewing men in families, McKee and O'Brien, 1983: See further Chapter 3, p 85 - 98.

[12] Eg, Wilmott and Young, 1962. Working within the positivist tradition, the authors attempt to integrate sociological and anthropological methodologies and, through an analysis of the impact of rehousing schemes on working class families, present a community study in which the interviewees speak for themselves. What emerges from the research is a community in which husbands and wives have clearly differentiated roles, a differentiation also found in other studies of working class communities at the time: Kerr, 1958: Tunstall, 1962: Wilmott and Young, 1960: Komarovosky, 1964.

[13] Interactionist sociologists focus on the internal workings of the family and many studies of the family may be said to be interactionist in form: eg, Komarovosky, 1964: Parsons and Bales, 1956: Tunstall, 1962: Pahl and Pahl, 1972. However, they may well have their location and origin in other perspectives, for example feminist, marxist or psychoanalytic.

[14] If the population of a society is to be understood as a result of a balance between birth and death rates, of patterns of migration and immigration, analysis of demographic patterns, for example by charting age structures, has provided important information which has then fed into debates around the family, in particular at government levels relating to the planning and distribution of resources.

[15] By 'historical social science', I mean the application of legal and historical data, the use of demographic trends,

statistical and documentary evidence within the social sciences generally (with sub disciplines such as historical sociology, legal history, historical geography). In the context of historical changes in family structure, ref Anderson, 1971: Aries, 1973: Laslett, 1977: Goode, 1963: Laslett and Wall, 1972: Shorter, 1977.

[16] Parsons and Bales, 1956: Parsons, 1964.

[17] For example, it is not clear whether the relationship between institutions and functions is necessary or contingent (Giddens, 1984). Might other institutions perform equally well the 'functions' of the family? What are these functions? Such core functions are presented as universal and to be found in all forms of family structure. Other functions for example, educational, political and religious may be important, but are of lesser significance. On one argument, the welfare state is seen as having taken over the non-essential functions, leaving the family free to concentrate on the essential functions of socialisation and stabilisation of adult personalities: Fletcher, 1966.

[18] Functionalist theory describes the family 'as it is' assuming that it has always been so. As such it fails to account for historical change and to integrate human agency into the theory - where **does** the change come from? Role theory (Chapter 4, p 110 - 119) plays down social differences based on class, gender and race, and side-steps the crucial question of power relations.

[19] For example Fletcher's (1966) study 'The Family and Marriage in Britain', is an optimistic functionalist account and defence of the family and may be read as showing a broad support for the moral and social improvements in post-war British society, depicted as creating a stronger and more functional family. The 'heyday' of functionalism is marked by consensus and conservatism, and of latent crisis tendencies in

the development of capitalism and society which were to emerge in the 1960's: Segal, 1983a, 28.

[20] Naturalist and essentialist conceptions of law, gender and the family will be addressed throughout this thesis. Wilmott and Young (1973) present an analysis of 'The Symmetrical Family' in which structural functional assumptions are underlaid with presuppositions as to male and female roles. Integrating sociological and historical perspectives, it is argued that the family has 'evolved' to a state of symmetry, a balance, in which the 'ideal typical' symmetrical family is one in which both husband and wife work, where each contribute to the family income and domestic tasks are shared. Such a family form is presented as having diffused down from the middle classes to become the most common pattern among families: See also Berger and Berger (1983). Part of the 'success' of the modern family is seen in a presentation of men's emotional needs as being met primarily through his instrumental role as breadwinner, women's through the expressive roles of mother and wife. Despite the historical perspective, there is an implied evolutionism in such works with family development one of a 'march of progress'.

[21] For example, in failing to account for the effects of mass immigration on family forms variations in terms of ethnicity: see note 28, below.

[22] Eg, Wilmott and Young, 1962. There is no guarantee that the conclusions, and in particular the family development model (note 20), apply equally to rural communities: Res, 1950: Williams, 1956: Williams, 1963.

[23] Note 17, above. That is, the 'functions' are presumed and then institutions are identified as meeting these 'functions'. The logic is circular: Morgan, 1975, 57. While the concept of 'dysfunctionalism' engages with the question of conflict (Merton, 1957), it continues to do so from within a functionalist framework. If something is dysfunctional, there

is presumably a function it might otherwise perform. Functionalism is, in a sense, 'pathological': the law responds to things 'going wrong'. That law might actually be constitutive of the social order (see below) is not considered.

[24] One of the troubles is, of course, that any list of such 'rights' may be never ending. The search for some **essential** defining characteristic remains, however long the list. One might define the 'family' as a social group which is characterised by common residence, economic cooperation and reproduction for example. Such a family might include adults of both sexes, at least two of whom maintain socially approved sexual relationship, who have one or more children, their own or adopted, of sexually cohabiting adults. Such a definition, however, fails to include as a 'family' units headed by one parent, those where couples have no children and relationships between members of the same sex. Many similar definitions of the 'family' might be put forward, each with their own limitations. Whether the family is considered to be 'universal' or not, depends on the definition of 'family' which is used.

[25] Note the presumption of legitimacy following marriage and the 'statutory legitimation' contained in the Legitimacy Acts 1926, 1959 and 1976: Knowles v Knowles [1962] 1 All. E.R. 659: Gordon v Gordon and Granville Gordon [1903] P 141: S v S, W v Official Solicitor [1972] A.C. 41: Cohen v Cohen [1940] 2 All. E.R. 331. Hoggett (1981: 19) argues,

"The institution of marriage may well have been devised in early societies in order to establish a relationship between man and child. A man may derive spiritual, emotional and material advantages from having children, but whereas motherhood may easily be proved, fatherhood may not. A formal ceremony between man and woman, after which it is assumed that any children she may have are his, is the simplest method of establishing a link. It

also enables him to limit his relationships to the offspring of a suitable selected mate."

On this view, marriage is a relationship established between a woman and man which provides that a child born to the woman under circumstances not prohibited by the rules of the relationship is accorded full birth status rights common to all 'normal' members of the society or social stratum.

[26] For example, seeing marriage as a licence to beget children, focussing on the activities of the individuals within the marriage. Such a perspective is at least praxis based. Harris (1979) argues that it is really irrelevant whether the term marriage is defined by a single criteria or a 'bundle of rights': the question is how to arrange for the orderly procreation of rearing of future generations and the transmission of material and cultural possessions.

[27] Lermisch (1983) argues that increases in numbers of elderly people will present particular problems early in the twenty-first century as a smaller proportion of the workforce face supporting an increasing dependent population not only of young, but also of old. The legal implications of families coping with the elderly are far reaching, and recent developments in the direction of community care will only add to the considerable amounts of support and assistance presently given to elderly relatives (Parker, 1982). The care of elderly is itself a gendered process with much of the burden of care falling on women.

[28] I do not wish to argue that the following analysis applies in the same way across family forms of ethnic groups in Britain, nor that the analysis which follows excludes ethnic groups. It is necessary to remain sensitive to ethnic differences, particularly writing in and about the legal system of a country which has a long history of population emigration and immigration. Immigration has brought a number of family forms to Britain which place different emphases on the duties

and demands of kinship, and the sexual politics of which vary greatly. While I would not wish to argue that the family structure of many ethnic groups is not patriarchal and hierarchical, the dynamics within families transferred to British setting must be seen in the context of institutionalised racism: Ballard, 1982: Oakley, 1982: Diver, 1982: Barrow, 1982.

[29] It is clear from anthropological studies that there is no one universal and transhistorical family form which does not vary according to tradition and culture: Mead, 1935, 1942, 1943, 1950: Shapera, 1971: Fox, 1975: Malinowski, 1955. Such social anthropological research has developed separately from sociology, focussing on the study of small scale societies rather than an abstracted 'society'.

[30] See further Chapter 3, p 85 - 98. In the study of types of households in Great Britain (Social Trends 17: 1987), 'household' is taken as a unit that lives together in one residence. This might be one person or many, one, two or more families. While many nuclear families may, on this definition, constitute households in their own right, the family is wider than the household. There has occurred in the past twenty years a marked fall in the average size of households in Great Britain, from 3.09 people per household in 1961 to 2.64 people in 1983 (Social Trends 17: 1987).

[31] Rising from 12 % (1961) to 24 % (1983) and rising: see Jackson, 1982, for discussion of the different routes to single parent family status: Social Trends 17: 1987: Social Trends 19: 1989.

[32] There are many different situations in which cohabitation takes place: eg, younger people living on their own, the result of broken marriages and, interestingly, a growing number of older people living on their own. Legal differences between marital and quasi-marital relationships include the fact that in the latter case there is no duty to support, no financial

provision (on divorce: See 23-5 Matrimonial Causes Act 1973), and with reference to those legislative provisions which give a spouse with no legal or equitable interest in the home various rights, the position of the unmarried party is more precarious: Matrimonial Homes Act 1983. Nonetheless, cohabitees may have rights of occupation derived from an equitable or contractual licence: Tanner v Tanner [1975] 3 All E.R. 776, or based on estoppel: Pascoe v Turner [1979] 2 All E.R. 945. On establishing an equitable interest see Cooke v Head [1972] 2 All E.R. 38, Eves v Eves [1975] 3 All E.R. 768; Grant v Edwards [1986] 2 All E.R. 426 (See p 23 - 30), Midland Bank Plc v Dobson and Dobson [1986] 1 F.L.R. 171 See further, Montgomery, 1988. On cohabitation contracts, see Kingdom, 1988. In relation to domestic violence, Davis v Johnson [1978] 1 All E.R. 113. For an argument that the privileged status of marriage should be retained, see Baker P in Campbell v Campbell [1977] 1 All E.R. 1, 6 who states "...rights, duties and obligations begin on marriage and not before". But see Weitzman, 1981: Freeman and Lyon, 1983, Ch 7: Deech, 1980: Schultz, 1982.

[33] According to Margaret Thatcher ('Independent' 18/1/90) "One out of every five children experience the break-up of their parents marriage before they are 16: and one in every four children are now born outside marriage...children are in danger of seeing life without fathers, not as the exception, but as the rule...This is a new kind of threat to our whole way of life, the long term implications of which we can barely grasp."

[34] This will be clarified in Chapter 5. See Hanscombe and Humphries, 1988.

[35] Cf. Hawes v Evenden [1953] 2 AER 737, in which 'family' was held to include a cohabiting couple who have children.

[36] In this case the defendant lived with the tenant of the house for 21 years until his death in 1961. They never married, and there were no children. On the death, the defendant lived

in the house and paid the rent as if she were his widow. On bringing proceedings against her as a trespasser, the defendant pleaded that at all times after the commencement of the tenancy and before the death of the tenant she had resided with him as a member of his family.

[37] In this case a partner who and lived with and looked after a tenant for the last three years of his life was considered not to be a member of the family. According to Stamp LJ,

"They lived together, sharing a bed. They shared expenses, the life of each being bound up very closely with the life of the other. They went out together. They went to shows together. They went, I think, to the cinema together. As she got more ill, as unhappily she did, Mr. Rafferty did all the things for her that a loving husband might be expected to do...

Stopping here, it might appear to be the same situation as *Dyson Holdings v Fox*. There was, however, the question of sex. Note also *Watson v Lucas* [1980] 3 All ER 647.

[38] On homosexuality and marriage, Chapter 6, p 182 - 184. The Court of Appeal in the *Harrogate Borough Council* case held that a woman who lived in council accommodation with another woman (who was a secured tenant), and with whom she shared a "committed, monogamous homosexual relationship" not a "member of the tenants family" within the meaning of s 113(1)(2) of the Housing Act 1985 and was therefore not entitled to succeed to the tenancy the death of the tenant. According to Watkins LJ, if Parliament had intended homosexual relationships to come into the lawfully recognised state of living together as husband and wife, Parliament would have said so.

"It would be surprising in the extreme to learn that public opinion is such today that it would recognise a

homosexual union as being akin to a state of living as husband and wife."

See also the opinion of Ewbank J. In the Windestedt case the Court of Appeal held that a homosexual relationship was not a relationship capable of recognition within the relevant immigration rules (s 8(3) Immigration Act 1971, whereby Immigration provisions should not apply to any person who is "a person who is a member of the family and forms part of the household of such a member." A homosexual partner was not a 'close relative', and therefore did not qualify for admission for settlement on the application of the sponsor.

[39] Fox, 1967: Shorter, 1977: Wilmott and Young, 1962. The concept of kinship is bound up with the notion of the extended family. Membership of a 'family' involves relations with those who are seen as 'kin'. However, just who constitutes a member of a kinship network is not necessarily clear. On one view, kin involves those who have a family relationship because of blood or marriage ties. Generally, kinship relations are said to involve a sense of responsibility and obligations. Legal obligations and responsibilities will be explored further below.

[40] The concept of the 'extended family' distinguishes a wide range of kin who may live and work together. Traditionally, in the 'extended' family the needs of the whole family group are taken as more important than the individual or smaller group needs within it. The child growing up in an extended family, it is argued, learns to accept the authority of the older members of the family. Marriage is a matter for the whole family, involving both economic and emotional obligations to another extended family.

[41] Fletcher, 1966: Stone, 1977: Shorter, 1977. Further, not 46, below.

[42] It is not suggested that there exists, or might exist, a 'pure' form of the nuclear or extended family, and the meaning of these ideal types is itself controversial and problematic. They may be understood more in the way of guides for analysis, and not descriptions of family life. Historical evidence should not be taken as showing a straightforward shift from extended to nuclear family forms and modern society has in it a range of family forms which accord to both nuclear and extended models.

[43] Laslett, 1965.

[44] Mortality and birth rates must also be placed alongside increases in longevity, changes in the status and position of women in the work force and a range of other factors which have implications for societal and individual attitudes towards sexual behaviour, for example changes in techniques and availability of contraception, the introduction of public health measures which provided clean water and efficient sewage disposal, and the growth of knowledge and sophistication in obstetric techniques and improvements in medicine: On general developments in the nineteenth and twentieth centuries, See Weekes, 1981: Chapter 3, p 85 - 98.

[45] Note in particular the excellent study by Thompson, 1982.

[46] Anderson, 1971, 1980 : Aries, 1973 : Laslett, 1977: Laslett and Wall, 1972: Shorter, 1977: Macfarlane, 1978: Macfarlane, 1986: Stone, 1977: Wrightson, 1982.

[47] The work of Peter Laslett (1965) is most important in the development of historical social science in relation to the family. Through an analysis of English rural life in the seventeenth century, Laslett found, through parish records data, that there was little evidence of the existence of marriage at early ages (which may have accounted for extended families). The combination of a late age of marriage, low levels of fertility and low life expectancy meant that the

childbearing phase of family life would be reduced. Laslett (1971) argues that the widely held belief that the pre-industrial family was large was in fact a myth, with the household size remaining constant at around 4.75 persons per household from the late sixteenth century to the early twentieth century. See further Laslett, 1983. It is Laslett's contention that life in pre-Industrial Britain revolved around the nuclear family. When industrialisation arrived, it was this family, Laslett argues, which was 'lost'.

[48] Anderson, 1971, 1980. Anderson's (1971) study of family and household structures based on data from the 1851 census concludes that at a time of urban growth there occurred also an increase in the proportion of households where parents lived with their married children, there being considerable advantages to co-residence for both parents and children. The model presented is one of exchange, whereby kinship obligations also provide the best economic reward. The family, Anderson argues, rather than becoming more nuclear as a result of industrialisation, provides an example of a move towards an extended family structure. It is argued that it was the presence of the nuclear family which enabled the industrial revolution to develop rather than the reverse: See further Rosser and Harris, 1965: Sussman and Burchinal, 1962. Anderson's later (1980) account argues that such a 'stem family' was both common in rural families throughout Europe and strongly patriarchal.

[49] For a clear overview of this, see Weekes, 1981.

[50] A view echoed in Fletcher, 1966. See Segal, 1983a. On the post-war consensus, Marwick, 1982: Ryder and Silver, 1970, Part 2.

[51] See Smart, 1984, 27-53: Royal Commission on Marriage and Divorce 1951-55 Report (1956) Cmnd. 9678.

[52] Bowlby, 1965. Also 1971, 1975, 1979.

[53] Cohen, 1972.

[54] See National Deviancy Conference, 1980, especially Hall, 1980.

[55] Note 32, above.

[56] The numbers of remarriages reflects a continuing belief in marriage as an institution: on the Matrimonial and Family Proceedings Act 1984 and material and ideological support for remarriage, Alcock, 1984.

[57] On illegitimacy, Davis, 1939: Deech, 1980: Derrick, 1986. For historical perspectives, Laslett, 1977: Laslett et al, 1980: Lambert and Streather, 1980: Gill, 1977: Elisofon, 1973: Finer and McGregor, 1974: Wimperis, 1960: On the background to the Family Law Reform Act 1987, Law Commission (1979) Working Paper on Illegitimacy, comment by Hayes, 1980, National Council For One-Parent Families, 1980: : Law Commission Report on Illegitimacy (1982): Law Commission Second Report on Illegitimacy (1986). On illegitimacy statistics, Leete, 1978: Werner, 1982.

[58] In 1961 this group constituted 2% of households, by 1983 5% of households. 1/8 families with children are now one parent households. Of these, 87.4% are headed by women, 12.6% are headed by men: Family Policy Studies Centre (1984). In relation to welfare benefits, finance and one-parent families, see the proposals for the Guaranteed Maintenance Allowance, shifting the focus of legal and social policy away from marriage and towards parenthood (Finer, 1974), comment by Eekelaar, 1976. See further Lister, 1982: National Council For One Parent Families, 1983: Townsend, 1981. On the ineffectiveness of poverty campaigns, note Croft and Beresford, 1988.

[59] Barrett and McIntosh (1982: 14 - 20) discuss the complexities and contradictions within responses to New Right

family politics in the US. Lasch (1977, 1979) pictures the growth of the capitalist state as bringing with it a form of scientific management, a regime of regulation through professional welfare expertise, which has destroyed a hitherto private security and closeness of families. His work, in this sense, accords with a New Right political perspective. On familialisation arguments generally see Chapter 3, p 76 - 101. Segal, 1983:

[60] On the public/private dichotomy, Chapter 3, p 67 - 76.

[61] While Lasch identifies the family as a product of human agency, Barrett and McIntosh argue that to depict the family as a **defence** of the individual against a hostile socio-political system has, from a feminist perspective, reactionary implications: Barrett and McIntosh, 1982: 114.

[62] Mount, a one time advisor to Margaret Thatcher, presents an account full of praise for the nuclear family which constitutes "...the ultimate and only consistently subversive organisation." The family, Mount argues, has continued throughout history and serves to undermine the state; it is the family which is the enemy of hierarchy, church and ideology. To prove the transcendental existence of the family, Mount refers to diaries, literature and letters and, in particular, to the work of Laslett (above, note 47).

[63] Leach's views perhaps ironically were supporting, through the institutional setting of the annual BBC Reith Lecture, the views of those radical psychologists who were arguing that the family was subject to too much, not too little, privacy: Segal, 1983a.

[64] See Engels, 1884. Engels traces the development of social institutions such as the family within a materialist politics, arguing for a correspondence between capitalist modes of production and family forms and relations. It is concluded that the abolition of private property would be the precondition for

achieving ideal personal relations: 'sex love' would replace the possessive love of the capitalist family. On this analysis women's oppression is inseparable from the development of capitalism, with the first division of labour that between men and women. While Engels work remains valuable in its historical perspective and awareness of power relations between men and women, in the end - in the notion of idealised 'sex love' - Engels advocates a superior form of heterosexual monogamy. The continuation of male domination within the post-capitalist order is not envisaged, and sexuality remains untheorised as an autonomous source of oppression. Within such reductionist (unreconstructed) marxism, class is presented as the only important consideration and sexual inequality, it is supposed, will result from the destruction of capitalism: eg, Cliff, 1984. See further on 'grand theories' of oppression, Chapter 2, p 46 - 50. Thus, women's liberation depends on the class struggle, with capitalism theorised as the root cause of all women's disabilities.

[65] Later marxists have located the family as an important political institution (eg Althusseur, 1969, 1970), noting the functions the family performs within capitalist society. In particular, the production and reproduction of labour power within the family is identified as performing a supportive role for modern capitalist society. There is, it should be stressed, no one marxist approach to the family, just as there is no one representation of law and legal systems within marxist jurisprudence. On the domestic labour debate, Chapter 1, p 20 - 3.

[66] Laing, 1960, 1970 and especially 1964, 1976. The basic premise of Laing and his co-workers in 'anti-psychiatry' was that the family is, far from beneficial, actually bad for the individual. Through reference to work with schizophrenic patients, Laing argues that the family damages the development of individuality by producing a restrictive and destructive environment. For example, what is perceived to be 'madness' may in fact constitute a way of negotiating conflicts inherent in

family life. Implicit is a notion of an 'unoppressed' personality. Segal, 1983a, argues that the convergence of themes from feminism, the 'new left' and the counter culture of the 1960's which included the anti-psychiatrist perspective were to come together in a number of radical feminist critiques of the family.

[67] Adopting a similar approach to family dynamics as Laing, Cooper's (1971) 'The Death of the Family', argues that the family destroys the 'inner life' of a person. Far from the conjugal unity presented by writers such as Stone and Shorter, for Cooper it is 'love' which destroys the opportunity for an independent and individual existence. The conception of the oppressed individual is similar to that in Marcuse, 1964 and Reich, 1972. The politics to which Laing and Cooper's earlier work leads is, I would argue, far from clear.

[68] For an excellent overview of critical theory and the family, specifically from a psychoanalytic perspective, see Poster, 1978. Also Reich, 1972: Marcuse, 1964.

[69] Rowbotham, 1977 (On Stella Browne): Carpenter, 1896, 1952: Weininger, 1906: Belfort Bax, 1897: Yeo, 1977: Taylor, 1983: Note the 'New Moral World' envisaged by the Owenites in the 1830's and 1840's: Generally, see Weekes, 1981, 167-8. The sexual egalitarianism in the utopian socialist movement of the early nineteenth century was to later emerge into the mainstream socialist tradition through the work of writers such as Engels (1884) and Bebel (1885).

[70] See further p 20 - 3 on domestic labour debate. It is common to marxist-feminist writings, that patriarchy and capitalism are best understood as two historically separate structures: struggles against the two, though related, may not necessarily coincide (Barrett and McIntosh, 1982 : Barrett, 1980: McIntosh, 1978). Note 72, below.

[71] See Chapter 2, 46 - 50: Chapter 4, 126 - 133.

[72] Note the debate between Rowbotham (1981) and Alexander and Taylor (1981). There is now a voluminous literature on the interrelations of class and patriarchy: eg, see Eisenstein and Hartmann, 1978; Hartmann, 1979; Eisenstein, 1979. Though the concept of 'patriarchy' came into currency within the politics with the second wave of the women's movement, it is a concept that has a long history. Rowen quotes (1987: 3) Swain and Koen (1980), who explicitly link a definition of patriarchy to masculinity:

"When the intellect and the dominating, controlling, aggressive tendencies within each individual are defined as the most valuable parts of their being, and those same attributes are emphasised in the political and economic arena, the result is a society characterised by violence, exploitation, a reverence for the scientific as absolute, and a systematic 'rape' of nature for man's enjoyment. The result is patriarchy."

[73] Particularly evident in relation to maintenance on divorce and with regard to custody. In Tovey v Tovey (1978) 8 Fam. Law 80 the court reduced a husband below the subsistence level to impress that his primary duty was to his legitimate children and not the children he lived with. The court stated (p 80),

"It seems, even in these days, a startling proposition that a man who [is] in regular work should be required to make no contribution at all to the maintenance of his own children...as a pure matter of public policy it [is] very undesirable indeed that a man should not, even in a purely formal sense, continue to contribute to the children who are his primary liability."

That men should work to support children was evident in a succession of cases in the 1970's seeking to establish guidelines in this area. See further, for example, Billington v Billington [1974] 1 All.E.R.546; Williams v Williams [1974] 3 All.E.R. 377; Campbell v Campbell (1976) 3 W.L.R. 572; Clarke v Clarke

(1980) 9 Fam Law 15. Assumptions that men should be in paid full time employment pervade custody determinations: eg, see B v B [1985] FLR. 462, per Heilbron J who considered the circumstances before her were

"...not a case of a father who has deliberately given up work in order to go on social security...Through no fault of his own the father is now unemployed. It so happens that it puts him in a position whereby he can devote even more time to looking after his child".

Tied up with male employment are conceptions of masculine authority: see May v May [1986] 1 FLR. 325.

[74] The evidence for this is now incontrovertible, questioning the notion of the 'alimony drone': Eg, Edwards and Halpern, 1987, 1988: Eekelaar, 1982: Eekelaar and Maclean, 1986: Gibson, 1982: Land, 1976, 1983: Smart, 1984.

[75] Asking such questions as how does the family support itself, how does it handle family resources and how are these passed on to the next generation? Such relations are clearly gendered. Eg, Association of Market Survey Organisations, 1987: Family Policy Studies Centre, 1984: Gowler and Legge, 1982: Land, 1976: Pahl, 1980, 1984: Law Commission, 1985.

[76] Eg, Dalla Costa and James, 1973: Molyneux, 1979: Gardiner et al, 1980: Barrett and McIntosh, 1980. McIntosh (1980) argues that the capitalist economy needs to have women working in the home, with the housewife servicing the husband's needs and rearing children. The domestic labour debate has several dimensions and asks many questions and familial relations: for example, should housework be considered productive or unproductive? Is it an integral part of capitalist mode of production, or does it bear an indirect relation to the economic base? Should all housewives be considered part of the working class, and could housework ever be socialised under capitalism?

[77] Oakley, 1974; Malos, 1980. Oakley argues that marriage is an institution in which, while in certain areas there may have occurred a greater equality between husband and wife with respect to legal rights, the 'roles' of mother, father, housewife and husband remain distinct. Women, Oakley argues, are allocated to housewife role which continues despite apparent changes such as increased female employment and the pseudo-egalitarian 'dual career marriage', to limit the capacity of the wife to find employment.

[78] Particularly evident in the work of Delphy, 1976.

[79] Clear, for example, in McIntosh, 1978. See Himmelweit, 1983:

[80] Hartmann (1979) argues that the enactment of protective legislation for women and children itself depended on prior arrangements which had been made between capitalists and working class men, the interests of each converging in keeping women out of well paid, skilled work so that women might continue to service men in the home. Though the concept might have in fact influenced bargaining in limited areas of production, the 'family wage' in fact served to both weaken and divide the working class and divide men from women (Barrett and McIntosh, 1980). It is not difficult to reject the suggestion that all husbands support their wives and 'equal pay' is incompatible with calls for the family wage. Land, (1976) argues that the welfare state was itself premised largely on the assumption that women and children are and should remain, dependent on a man. Bell and Newby (1976) argue that the determination of tasks as respectively male or is itself a consequence of men's ability to define the situation of wives. See also O'Donovan, 1979.

[81] For a constructive yet critical overview of these debates, see Himmelweit, 1983.

[82] Eisenstein, 1984, 15-27: On legal reform strategies, Brophy and Smart, 1985a: Eisenstein, 1981. Note 84, below.

[83] Liberal feminism has a number of strategic strengths, not least that within the liberal, utilitarian framework, it is often difficult to object to claims for women's citizenship: Mill, 1929: Woolstoncraft, 1975. While liberal individualism presupposes the potential for individual fulfilment unconstrained by gender, feminist campaigns have nonetheless recognised women's collective interests and identity: see Brophy and Smart, 1985a.

[84] A fuller analysis of liberal legalism will be found in Chapter 3, pages 65 - 76. A liberal feminist perspective provides, I would argue, no grip on the sexual division of labour either amongst the personnel of the state or in relation to the gendered structuring of state violence. Liberal feminism's own origins lie in the liberatarianism of the Enlightenment and, while the equal rights doctrine has fuelled the feminist mobilisation in Europe, North America and other countries, the precursor to the 'rights of women' can be traced to the French Revolution of 1791-2. In a sense, the call for the 'rights of women' followed on from the rights of man: Mill. 1929: Woolstoncraft, 1975. There is a logical presumption for equality - under whatever conditions men are admitted to suffrage, women should also be admitted. For such writers therefore early women's suffrage was not a **diversion** from social issues but an attempt to address major contradictions in state politics. On early feminist critiques of the family, Nava, 1983. From the first political mobilisation of women on a significant scale based on the liberal doctrine of equal rights (the 1848 Seneca Falls convention in the United States), the language of legal discourse has been used to articulate the changing relations between men and women and the law has been located in such debates both as the catalyst for women's resistance, as well as the major solution to the oppression of women.

[85] See further, Chapter 2, p 32 - 42. Smart, 1989: Eisenstein and Jardine, 1980. Debates around these notions, according to Smart (1989: 82) "have dogged feminist politics since the nineteenth century." Both approaches share an assumption that women are to be measured against a male norm. Against this norm, women are either to be equal or different, but regardless the 'male objective stance' is legitimated (Mackinnon, 1983: 1987). Smart (1989: 82) argues that a focussing on equality vs difference debates has the effect of 'narrowing' the focus on law, on incorporating feminism into law's own paradigm. Thus, law presents 'equality' and 'difference' as two competing conceptions which necessarily exclude each other.

[86] Smart, 1989: Smart and Sevenhuijsen, 1989: Smart, 1989a: Brophy, 1989: Sevenhuijsen, 1986.

[87] As argued by Smart, 1989a.

[88] Eg, in relation to abortion and 'a woman's right to choose', Kingdom, 1985. Smart, 1989, argues that if feminism is to achieve its objectives of full equality between the sexes then it is necessary to transcend the focus on individual rights that remains at the core of liberal legal ideology. As Rhode has argued,

"...to rely on that paradigm [of individual entitlements] as a framework for true sexual equality is to misread the legacy of liberal legal ideology. Equal rights are, at this historical moment, too restricted in legal content and too divisive in political connotations to serve as an adequate feminist agenda" (Rhode, 1982: 150)

[89] See the arguments of the Campaign For Justice on Divorce, criticising the Matrimonial Causes Act 1973. The argument was effectively put by such pressure groups acting for ex-husbands and second wives that the values underlying the operation of property adjustment on divorce were wrong. Note in particular the place on marital conduct in these arguments, that

maintenance orders were being made against men who did not see themselves responsible for the breakdown of their marriages. and the provisions of the Matrimonial and Family Proceedings Act 1984: Law Commission, 1981. Cf Alcock, 1984.

[90] Alcock, 1984: Smart, 1984.

[91] Forcefully argued by Smart, 1984.

[92] O'Donovan (1979) argues that

"Legal institutions support the ordering of society on a gender role basis...At present the law defines and reinforces gender roles for individuals which do not necessarily have an inevitable connection with sex differences. In so doing the law is inhibiting change and causing hardship to those who do not adjust their personal lives to the gender stereotyped expectations of legal institutions." (1979: 135)

[93] On the common law unity doctrine, Williams, 1947: Hoggett and Pearl, 1987, 53. According to William Blackstone,

"By marriage, 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 the husband under whose wing, protection, and cover, she performs everything." 7th edition, Oxford Clarendon Press 1775 Bk. 1 p 442: Quoted in Finer and McGregor, 1974.)

[94] At common law a wife was unable to enter a contract in her own right. O'Donovan (1979:17) notes however that married women in the seventeenth century did take part in economic life of the community, and did engage in commerce and act independently of husbands. At common law a married women had the contractual capacity to enter into contracts as an agent for the husband, in certain circumstances, and if she entered

into a contract before marriage, then on marrying her husband would take on liability for the contract (Abolished by the s 3 Law Reform (Married Women and Tortfeasors Act 1935). Husband and wife can now enter into contracts with each other (Hunt v Hunt (1903) 25 TLR 132: Balfour v Balfour (1919) 2 KB 571.

[95] At common law for a wife to sue or be sued in tort her husband had to be joined as party to the action and it would make no difference if the liability had in fact arose before the marriage. The 1882 Married Women's Property Act removed the requirement that the husband be joined as party to actions in which the wife was the plaintiff (MWPA s 13 - 15 1882) and in which the wife was a defendant (s 3 LR (MWT) A 1935). The rule that a husband and a wife could not sue each other in tort was gradually eroded (eg s 12 MWPA 1882) and finally abolished by the Law Reform (Husband and Wife) Act 1962. However, the court retains a discretion to stay an action where it appears that no substantial benefit would accrue to either party. At common law a husband and wife could not be convicted together of conspiracy to commit a crime: but see now Midland Bank Trust Co. v Green (No. 3) [1981] 3 ALLER 744

[96] See below, p 26 - 28: Note 100, below.

[97] A legal consequence of marriage is that the husband and the wife have a mutual duty to cohabit, though they cannot be compelled to against their will: R v Reid [1972] 2 ALLER 135. A husband who steals, carried away or secretes his wife against her will is guilty of the common law offence of kidnapping her: Nanda v Nanda [1967] 3 ALLER 401 and a wife has no greater right to force herself on her husband than he has to compel her to cohabit with him: Best v Fox [1952] AC 716, 2 ALLER 394 It is impossible to spell out what constitutes consortium, an approximation being "a bundle of rights some hardly capable of precise definition." Consortium might include a wife's right to take the name of the husband, a mutual right to choose the matrimonial home and a mutual duty of marital confidence. Consortium may be lost, for example by an agreement to live

apart or a decree of judicial separation or a decree nisi of divorce or nullity.

[98] O'Donovan, 1979.

[99] See further Chapter 2, note 39.

[100] The Act for the first time recognised a married woman's property and income as distinct from her husbands: See Deech, 1984. Subsequently, the 1911 National Insurance Act stipulated that females would retire at 60, meaning a subsequent five years loss of earning power compared to men, the 1918 Representation of the People Act gave women the vote, but only at the age of 30, while the 1919 Sex Disqualification (Removal) Act opened the professions to women, including higher grades of the civil service, with the Qualification of Women Act allowing female MP's for the first time (though the voting age for women was not lowered to 21 until 1928). It was not until the 1935 Law Reform (Married Women) Act that wives for the first time would be able to bequeath their property as they choose. In 1988 the government announced that married women were to be, for the first time, independently taxed and from April 1990, married women have for the first time their own personal allowance. Thus, a non-working wife with savings and investments would, theoretically, be able to receive income tax free on savings which fall within the allowance. Before, such an income would be taxed as if it belonged to the husband.

[101] Family relationships are lengthy, intense, constituting a nexus of emotional and economic dynamics and assertions of power and independence (Barrett and McIntosh, 1983: Segal, 1983): See further Chapters 7 - 8.

[102] Eg, Dinnerstein, 1976: Chodorow, 1978: Gilligan, 1982. See further Chapter 4, p 110 - 119.

[103] Aries (1962) traces a transition in the treatment of children, from a position whereby in the seventeenth century

children would be treated very much as 'small adults' from about the age of 7, to the twentieth century in which adulthood may be delayed until the late teens and early twenties. Aries work points out that that stages of childhood and adolescence are a relatively new development; childhood, as we know it, hardly existed in the middle ages.

[104] Shorter, 1977: Stone, 1977: Fletcher, 1966.

[105] On romantic love, Sarsby, 1983. Goode (1959) argues that while the notion that love is a universal psychological potential is deeply problematic, the utilisation of a concept of love which entails an individualisation of emotional expression is rooted deep in western culture and is to be found in social historical accounts of the development of the family such as Shorter (1977). The valorization of individual freedom and romantic love is particularly evident in the work of Edward Shorter, who presents the emotional and market capital relationships as follows;

"For young people in late-eighteenth century Europe, the sexual and emotional wish to be free came from the capitalist market-place. In the domain of men-women relations, the wish to be free emerges as romantic love. The desire to find personal happiness, to commence that long voyage of personality development and self-discovery that constitutes the Inner Search, rises to the conscious surface as romance; you look into another's eyes in the hope that you'll find yourself." (1977: 254)

[106] Lawrence Stone (1977:282) argues that the key elements of the 'romantic love' are to be found in the idea that there is only one person with whom one is able to 'unite' with at all levels: that is, the personality of this person is so idealised that while their faults disappear, love transcends all other considerations. Rather than such behaviour being anti-social and destructive it is, for Stone, "the giving of full rein to personal emotions is admirable, no matter how exaggerated and

absurd the resulting conduct may appear to others." The 'companionate marriage' indicates nothing less than a new family type, involving fewer practical functions and sexual commitment. The urban middle class have been presented as in the vanguard of married modern love (Weekes, 1981).

[107] Stone (1977) argues that the labouring classes are the last to develop these internal bonds based on the companionate marriage. The companionate marriage is not at first a working class phenomenon, but the changes were to create a

"...diligent, thrifty and sober labour force, mobile in relation to parents but centred around the home, which was the ideal of every industrial entrepreneur." (1977: 664)

[108] There is, in both Stone and Shorter's work, a certain degree of teleology in the assumption that the modern middle class family constitutes the ideal state of humanity. An argument which espouses the development of 'democratic spirit' and 'economic individualism' underscores a liberal legal argument premised on individual equality, the march towards freedom which is constitutionally based. It is not clear why Shorter should measure degrees of affection and sympathy within the modern family by reference to illegitimacy and divorce rates, which, it might be argued, represent a breakdown of the romantic love ideal. It is also questionable whether it was in fact the case that loveless marriages were more typical of early modern England: Sarsby, 1983: 34. Sarsby argues that love was indeed common in early modern England. Furthermore, implicit in Stone's historical account is a notion of 'swings' from repression to permissiveness and back again.

CHAPTER 2

LAW, DISCOURSE AND GENDER

[1] This Chapter will place recent developments in legal theory, particularly with regard to feminism and 'critical legal studies', in the broader historical context of the late twentieth century cultural and intellectual climate. While the term 'crisis' might inaccurately indicate a collapse of doctrinal positivism in legal education, I shall argue that the philosophies of modernity and postmodernity, of discourse and deconstruction, have opened up law to analyses in terms of gender and power: Chapter 2, p 50 - 64: Chapter 3, p 76 - 101: See generally on law and modernity, Goodrich, 1986, Ch. 7 p 209 - 223: 1987. For an overview of English conceptions of the role of theory in legal analysis, Cotterrell, 1983.

[2] It is arguable whether critical legal studies is any more than an updated legal realism. See Altman, 1986. On legal realism, Llewellyn, 1931, 1941: Dewey, 1924: Goodhart, 1933. On Scandinavian Legal Realism, Olivecrona, 1971: Hagerstrom, 1953.

[3] Feminist analyses of legal method will be considered in detail below: Eg, Minow, 1988: Mossman, 1986: Thornton, 1986, 1989: Mackinnon, 1982, 1983, 1987: Menkel-Meadow, 1988: Bottomley et al, 1987: Bender, 1988: Bottomley, 1987: Banks, 1988: Hantzis, 1988: Wildman, 1988: Cain, 1986: Smart, 1989, 20 - 25.

[4] See, for example, Rights of Women, 1985. On women in the legal profession, Spencer and Podmore, 1987, empirical research which revealed a common currency of attitudes which militate against women's success in the profession. Implicit in the research are representations of masculinity, as the following comments testify:

"I can fill a court, I can make the magistrate listen...I suppose my size helps there...But it's much more difficult for a woman." (p 115):

"The most important attributes in my view [are] objectivity, ability to listen, and the ability to be logical and pragmatic and also not to lose your objectivity." (p 116)

See also Smart, 1989, 67. A feminist account which integrates theory and the practice of law is Stang Dahl, 1987. On the 'radical tradition' in law, Rabinowitz, 1982. Goodrich, 1987 stresses the practice of law with regard to the methodology of deconstruction in approaching legal texts -

"[positivist jurisprudence] ...is not simply the philosophical doctrine but equally the organisational practice from which and to which that philosophy leads that is the object of critique...It is not the theory but rather it is the practice by which critical legal studies will eventually be judged." (Goodrich, 1987, 209).

[5] Smart (1989) takes up in a feminist political context the development of deconstruction of legal discourse: for Goodrich,

"...the concept of legal discourse is a methodology for the reading of legal texts which places the communicative or rhetorical functions of law within their institutional and socio-linguistic contexts...a critically adequate reading of the law should take account of the various levels of law as social discourse...which requires reading within the legal text precisely those facets or meanings of legal regulation and discipline which its self-protective doctrines of unity, coherence and univocality have traditionally endeavoured to exclude." (Goodrich, 1987, 205 -206).

See further below, Chapter 2, p 50 - 59 on the legal text. Smart's (1989) broadly poststructuralist approach in 'Feminism and the Power of Law' is in marked contrast to the theoretical elaboration of 'patriarchal relations' (Smart, 1984, Ch.1)

[6] On positivism, analytic jurisprudence and the concept of law, generally, see Lloyd, 1979, 170-344: MacCormick, 1978, 1985 and the response by Hunt, 1986: Edgeworth, 1986. For positivist accounts of law, Hart, 1958, 1961: Commentary by Morris, 1962: Also, King, 1963: Summers, 1963: On Pure Law Theory, Kelsen, 1965, 1966, 1967, 1973.

[7] Austin, 1954: Bentham, 1970: Raz, 1970, 5-43.

[8] Hart, 1958, 1961: Also, Morris, 1962: King, 1963: Summers, 1963. For a critical analysis of Hart's jurisprudence, Goodrich, 1986.

[9] Dworkin, 1963, 1965, 1978a, 1978b, 1986. On the Hart-Dworkin dispute, Pannick, 1980: Soper, 1977: MacCormick, 1978. The form of the debate has been set around whether Dworkin's critique is within the tradition of Hartian positivism, or represents a critique of its core content. Implicitly, Hart is presented as the orthodoxy.

[10] The inter-relations of developments within both feminist and non-feminist legal theory in part constitutes the object of analysis in the Chapter. Both are concerned with a critique of doctrinal positivism: Freeman, 1987.

[11] Finnis, 1980: Hart, 1961, Ch. 9: Oppenheim, 1957: Beyleveld and Brownsword, 1988. Generally, see Lloyd, 1979, Ch. 3. Also, Goodrich, 1986.

[12] Fuller, 1975, 96. Also, Fuller, 1971, 1969, 1958. Also, Beyleveld and Brownsword, 1988 : Unger, 1976, 66-68.

[13] This will be discussed below in relation to child sexual abuse. Specifically on masculinity and social work, see Bowel, 1985. On the role of social workers in relation to child abuse and the law, Lyon, 1989: Mitchell, 1989: Hoggett and Pearl, 1987, 342-349. Also, Dingwall, Eekelaar and Murray, 1984.

[14] In relation to child sexual abuse and masculinity, Campbell, 1988. On the evidential problems faced by doctors, Speight, 1989. With regard to inter-agency co-operation, Hoggett and Pearl, op. cit. note 13. See further Chapters 6 and 7 in relation to transsexualism and non-consummation of marriage.

[15] This point, I believe, is indisputable. Masculinity is a 'social problem' not just specifically in relation to issues placed in the agenda by feminism, eg rape, domestic violence and sexual assault, but throughout criminological literature. On feminism and criminology, Smart, 1976. On critical legal studies and criminology, De Haan, 1987. A 'new realist' account, such as Lea and Young, 1984, implicitly concerns the social effects of masculinity. Accounts which do engage with masculinity include Brown, 1986: Thornton and James, 1979: Allen, 1987, 1988, 1989. According to Allen, 1989, 36,

"If, for some projects and causes, the way forward is the deconstruction of the criminological enterprise...it might, nonetheless, be interesting, possibly even useful, to know what a criminology of the sex men could look like. For a feminism concerned with male practices currently classified as crimes against women, it may be critical."

[16] Positivist texts dealing with the law relating to sex, concerned mostly with criminal justice, include; Slovenko. 1965: Huntington-Cairns, 1929; Honore, 1978: Ploscow, 1951: Calverton and Schmalhausen, 1929: Kanowitz, 1973. For a mock-serious account, Bressler, 1988.

"The methods of legal control of sex expression have varied widely...the doctrine behind the law, the doctrine of sexual morality has varied not at all. The doctrine is the doctrine of chastity which was developed by the early Christian Fathers out of the customs of primitive peoples and out of their enunciation in Ancient Hebrew Law...to which English law has sought again and again to give expression for English peoples..." (May, 1930, quoted in Comfort, 1963: 138)

[17] It is this model of law as science which is criticised by Goodrich, 1986: 1987. Smart, 1981, Ch. 1 questions 'the power of law', noting that the claim to truth of science is that it is closed off from other knowledges:

"Defining a field of knowledge as science is to claim that it speaks a truth which can be favourably compared to partial truths and untruths which epitomise non-scientific discourse." (Smart, 1989: 9)

[18] Eg, Stanley, 1988: Hunt, 1987, 1986: Goodrich, 1986, 1987: Kennedy, 1982.

"It is precisely such lack of imagination and lack of political will which underpins the refusal seriously to debate the political values, choices and future possibilities contained within legal texts and available to a critical reading of those texts." (Goodrich, 1986, 217).

Thus, the doctrinal curriculum is depicted as teaching

"...a mixture of low level skills and high grade sophistic techniques of argumentative manipulation is all that there is - all there is and can be - to legal analysis and, by implication, to the many methods by which professional expertise influences the exercise of state power." (Unger, 1983 quoted by Goodrich, 1986, 216)

[19] Viewing the legal institution as a totality of discourses and practices, Goodrich (1986: 218) argues that the challenge to positivism is also to challenge the values established in legal texts and legal practices and to question the doctrinal equation of law with reason. Here, the critique of doctrinalism is itself part of displacing the transcendental values which are legally established with the historical consciousness of becoming: see further, Chapter 5, p 160 -177.

[20] Twining and Miers, 1982.

[21] On critical legal studies and the curriculum, Hunt, 1985, 1986, 1987. Generally, Stanley, 1988. For a marxist account of curriculum expansion in the 1970's and the growth of the law centre movement, Bankowski and Mungham, 1978. On the distinction between socio-legal studies and the sociology of law, Campbell and Wiles, 1975. Also, Gordon, 1985: Barnett and Yach, 1985.

[22] Socio-legal studies are subjected to extensive critique by Campbell and Wiles, 1975: Bankowski and Mungham, 1978. For readings in the sociology of law, Campbell and Wiles, 1979. On the theoretical weakness of empirical socio-legal studies in family law, Freeman, 1985 and the reply by Eekelaar, 1989. Campbell and Wiles, 1975, 548, present socio-legal studies and the sociology of law as

"...two competing intellectual orientations [which] have remained consistent and important since the beginnings and continue to inform research activity and academic discussion. They were institutionalized at an early stage."

Quite how critical legal studies differs from the sociology of law envisaged by Campbell and Wiles is open to question.

[23] This is not to say that there has not been socio-legal research of major importance in relation to family law. For

example, with regard to maintenance after divorce, Smart, 1984: Eekelaar and Maclean, 1986: Davis, Macleod and Murch, 1983: Edwards and Halpern, 1987. These and other examples of socio-legal research will be referred to further in the following chapters.

[24] Stanley, 1988: Ormrod Report, Cmnd. 4595, 1971: But see Law Society Green Paper on Legal Education, 1989: SPTL Working Paper Report, 1989. For Goodrich (1986, 219) the debate in legal education is about

"...whether or not it is desirable to allow the profession to continue to transmit those values and doctrines, that ideology and those myths, without being made explicitly accountable for the political choices underlying the development of the law."

[25] Eg, Bankowski and Mungham, 1978.

[26] Discussed in detail Chapter 2, p 38 -42, 59 - 64.

[27] These questions are particularly pertinent in the light of the Law Society's planned changes in the education and training of solicitors: note 24, above.

[28] Note Kairys, 1982. Also, Stanley, 1988: Bankowski and Mungham, 1978: McDonald, 1982. Bankowski and Mungham, 1978, 82, argue that

"Professional socialisation provides the initiate with a knowledge (tacit or explicit) of the norms and values of the occupational community. Socialisation also serves as a source of formal and informal social control within the profession. Clearly, the formal system of education and training for law provide the recruit with a certain definition of this professional role."

Though from a very different theoretical and political position, this analysis is similar to that of Goodrich, 1986, 1987.

[29] On the progression, and gender politics, of academic careers, McAuley, 1987: Ramazanoglu, 1987: Thornton, 1989. See further the Postscript to this thesis. On academic feminism, Currie and Kazi, 1987.

[30] On the confused role of law teacher as academic, Twining, 1980. Twining identifies a paradox, in that teaching fulfils the requirements of the external profession (eg, the production of textbooks), yet is not academic in the classic sense. Also, Sugarman, 1986.

[31] A discussion of Foucault's conception of power will be found in Chapter 3 (in particular, p 76 -85). In contrast, this is Honore, 1978, in an analysis of 'Sex Law' conceptualizes power relations:

"...the changes in the law which would be needed to give effect to a right of sexual freedom or self-rule are numerous but not radical...The threat to sexual freedom comes not from that source [the right] but from the source that threatens all other freedoms, namely Marxism, which, wherever it seizes power, uses it to thwart private initiative, to suppress brothels, and to turn men's minds from personal happiness to the production of material goods. In the last resort, sexual freedom depends on other freedoms, and political tyranny will mean sexual repression." (Honore, 1978: 180. My Emphasis)

[32] There is a voluminous feminist literature addressing the constitution of women in law; eg, O'Donovan, 1985: Brophy and Smart, 1985: Edwards, 1986: Hoggett and Atkins, 1984: Smart, 1984, 1989: Mackinnon, 1982, 1983, 1987: See 'Feminist Perspectives in Law', International Journal of Law and

Society', 14, 1986: Sachs and Wilson, 1978. These, and other works, will be referred to in the course of this thesis.

[33] The 'Women and Law' approach is perhaps exemplified by Atkins and Hoggett, 1984. See criticisms by Brown, 1986. For Bottomley et al, 1987, 49-50,

"The greatest disadvantage of such work is that it presumes that the contribution of feminists is simply that of placing women on the agenda...such work often takes as the categories to be studies discrete subject areas, as traditionally defined...If proper space is not taken to overview the construction of gender relations in law then whether certain aspects of women's experience are or are not met within legal definitions is not addressed, neither is the choice of category."

[34] This question has been explored further, in particular by French feminists: note Irigaray, 1977: 1985: The collected works in Marks and de Courtivron, 1981: 'Woman' is itself constituted through a language which may be said to be male. See the definition of phallogocentric discourse in Smart, 1989, 27, 86. On French Feminist Theory, Robinson, 1981: Cixous, 1975, 1976: Kristeva, 1974a, 1974b, 1974c, 1981, 1986: Generally, see Marks and de Courtivron, 1981. Note also Lacan, 1977, 1979

[35] On 'Women's Studies' in relation to the study of masculinity in the academy, see Jardine and Smith, 1987. Also, Journal of Women in Culture and Society, 'Reconstructing the Academy', Signs Vol. 12 No.2 Winter 1987. On feminist research methodologies, Chapter 1, note 10.

[36] Bankowski and Mungham, 1978, refer to the socio-legal scholar as like the monk who finds to his/her horror that they no longer believe in God. For an argument that critical legal scholars should indeed, leave the academy; Carrington, 1984, 1985.

[37] This classic liberal position is clearly expressed in Wolfenden, 1957. See Smart, 1989, 12-3 for example of the implicit moral aspects to Denning's judgements. That sexual matters arouse moral rhetoric is clear in Weekes, 1981, study of the regulation of sexuality: also, Weekes, 1985. The morality of male sexuality is clear in Knulier v DPP [1973] AC. 435 and Shaw v DPP [1962] AC.220: See Chapter 5.

[38] Adler, 1987: Blair, 1985: Chambers and Millar, 1983: Smart, 1989, Ch 2: Burgess and Holstrom, 1979: Brownlee, 1989: Mackinnon, 1987: Clark and Lewis, 1977. On the dangers of abolishing the category of rape, Snider, 1985, and on reform and ideology in relation to rape, Wells, 1985. On rape in England in the eighteenth and nineteenth centuries, Clark, 1987. On rapists, Scully and Marolla, 1984.

[39] Gettes, 1979: Marsden and Owens, 1975: Dobash and Dobash, 1980: Binney et al, 1981: Pahl, 1985: Faragher, 1985: Radford, 1982: McCann, 1985: Davidson, 1977: Horley, 1986. Hanmer and Stanko (1985) examine the rhetoric of protection and women's experience of violence from men in the United States and Britain, arguing that the rhetoric of protection arises out of male social and interpersonal domination. Freeman (1985: 52) argues that

"Violence by husbands against wives should not be seen as a breakdown in the social order...but as an affirmation of a particular sort of social order...domestic violence is not dysfunctional: quite the reverse, it appears functional."

[40] On the background to the Punishment of Incest Act 1908, Bailey and Blackburn, 1979. On child sexual abuse and the law generally, Woodcraft, 1988: Mitra, 1987. Mitra found from her study of father-daughter incest appeal cases that the court readily accepted evidence that the daughter may have behaved in a 'promiscuous' manner, and that where 'domestic stress' was due to a break-down of relations between husband and wife, it

resulted in a reduction of sentences in just over 80% of cases, Mitra, 1987, 144-5. Also, Dominelli, 1987: For a feminist theoretical perspective on child sexual abuse, Macleod and Saraga, 1987, 1988; Smart, 1989. Ch. 3. On law and procedure, Speight, 1989: Bazell, 1989: Barton, 1987: Young, 1987. On Cleveland, Butler-Sloss, 1987: Priest, 1988: Bishop, 1988: On 'parent abuse', Sharron, 1987, and on the problems of 'fathering daughters', Samuels, 1989. On press reporting of Cleveland, Nava, 1988. Also, Campbell. 1988: 1989. Campbell, 1988, presents an account of events in Cleveland from a feminist perspective which explicitly raises masculinity and male sexuality as problematic:

"Sexual abuse of children now presents society with the ultimate crisis of patriarchy, when children refuse to protect their fathers by keeping their secrets" (Campbell, 1988: 71).

On the role of the police and their refusal to accept photographic evidence of sexual abuse, Campbell writes,

"For the police their is a particular problem: as a praetorian guard of masculinity, sexual abuse faces them with an accusation against their own gender. Police and judicial mastery over evidence has for over a century enabled them to banish the sexual experiences of women and children. Was that mastery threatened in Cleveland?"

Macleod and Saraga (1987: 12) argue that

"It can only be understood by looking at masculinity and male sexuality. Boys learn to experience their sexuality as a powerful and often uncontrollable force...They learn that if they are to feel truly masculine they must feel powerful, and that they can overcome feelings of powerlessness and inadequacy by using their sexuality to control someone weaker."

Elsewhere (1988: 16-7) they point out that

"Why then is there evident in political, professional and journalistic writings, such a curious absence of discussion on why abuse occurs?...it enables an avoidance of the most glaring feature of child sexual abuse; it is something that, overwhelmingly, men do to children. The men come from every social class, and from all kinds of families and cultures; they are brothers, uncles, babysitters, friends, strangers, grandfathers, stepfathers and fathers. they have in common that they are men, but little else that we know. Very little attention has been paid to studying them, and none to the study of non-abusive men."

[41] I shall take issue with this point, arguing in the following Chapters that it is indeed possible for anti-patriarchal discourses to 'evade' the power of law.

[42] Goodrich (1987: 208) argues that

"...the re-reading of the law and the rewriting of the legal textbook in the space opened up by the concept of law as social discourse...the language and text of the law must be studied not simply as a discrete logic of intradiscourse but as an accumulation and crystallisation of interdiscursive meanings."

In a passage which is worth quoting at length, the interdisciplinary study of law is depicted as

"...the correlate of a conception of legal expertise and practice which aligns and articulates specialism in legal discourse with knowledge and experience of other disciplines and practices. The purpose of this interdisciplinary study would not be that of juxtaposing other, essentially separate, knowledges (pluridisciplinary), nor would it be that of absorbing

other disciplines or sciences into legal expertise (transdisciplinary) for the purposes of providing a further technical dimension of legitimation to legal discourse. The interdisciplinary study of law is aimed rather at breaking down the closure of legal discourse and at critically articulating the internal relationships it constructs with other discourses. An interdisciplinary philosophy of law does not exist to make the legal text speak in a monologic and univocal way, it exists to analyse the interdiscursive status of legal texts and to conduct a critical and constructive dialogue with the law." (Goodrich, 1987: 212)

[43] Biologically essentialist constructions of gender will be discussed in Chapter 4 with regard to masculinity, p 110 - 119. Mackinnon's, 1982, 1983, 1987 depiction of the power of masculinity may be termed essentialist: p 46 - 50, below.

[44] On 'Men's Studies', Chapter 4, p 103 - 110: Jardine and Smith, 1987: Brod, 1987. Carrigan et al, 1985, place the study of masculinity in a historical perspective sensitive to both feminism and gay liberation theory. In relation to the methodology of such studies, see the development of feminist methodologies in Roberts, 1982: Stanley and Wise, 1983: Chapter 1, note 10.

[45] In the United States: Trubeck, 1984: Gordon, 1982 on developments in critical legal theory. On the origins of CLS, Tushnet, 1986. Kairys, 1982: Kelman, 1984: Gabel and Kennedy, 1984: Kennedy, 1982: Klare, 1979. For a distanced commentary on CLS in the United States, Lichterman, 1984. In the UK: note in particular Goodrich, 1986, 1987: Fitzpatrick and Hunt (Ed.) , 1987: Thompson, 1987: Hunt, 1986, 1987. Gordon (1982: 290) in a progressive critique of positivist scientific theories, concludes with a formulation of critical legal studies which integrates the personal politics of masculinity in a perspective which echoes the genealogical method (Chapter 3, p 85 - 101) of Foucault and co-workers:

"It may be that the place to look is somewhere quite different - in the smallest, most routine, most ordinary interactions of daily life in which some human beings dominate others and they acquiesce in such domination. It may be...that the whole legitimating power of a legal system is built up out of such a myriad of tiny instances."

For Hunt (1985: 11) critical legal studies represents a

"trend of analysis that, while drawing significantly on the marxist tradition, is primarily identified by the political project of intervening in the scholarship and practice of legal education."

Goodrich (1985: 243) argues that it is "incontestable" that legal studies could gain considerable insight by taking into account recent developments in poststructuralist philosophy and literary theory. There appears to be little unity of critical legal studies, though in both the US and UK the movement has an organisational framework. As Goodrich, 1985, 243 notes, poststructuralism is here understood in terms of critical issues and practices, not in terms of trying to dismiss a 'school' of 'tradition'. The use of the concept 'critical legal studies' is, accordingly, hesitant.

[46] Though this, of course, depends on the place from which you view the project. From outside CLS both feminism and CLS can seem part of the same project. From inside CLS, there may be many projects. This relationship has proved uneasy; see Bottomley et al, 1987: Rhode, 1988: Wildman, 1988: Bender, 1988; Hill, 1988; Menkel-Meadow, 1988: Minow, 1988: Banks, 1988. On feminist theory in the classroom, Nelson (ed.), 1986, especially Treichler, 1986. Themes of the relation will recur throughout this thesis.

[47] It is important to be sensitive to the different intellectual traditions with regard to critical legal studies

in the US and the UK, and in particular the tensions between the marxist and neo-marxist, and poststructuralist and postmodern strands within critical legal studies literature. In terms of a debate between these two 'positions', feminism may well be marginalized: Bottomley et al, 1987. In the US, the background to CLS has been identified (Gordon, 1982: 281) as in the humanist intellectual concerns of liberal, civil rights and anti-war political movements, bringing together radical activist, neo-marxist versions of socialist theory and the experiences of socialist legal practitioners. However, in both the US and the UK, a focus in critical legal studies literature has been the practice of teaching law and the political effects of doctrinal analysis. Hunt (1985: 1987) identifies the background to CLS in the UK as the breakdown of social democratic policy in the 1970's, the 'failure' of legal educational expansion and the rejection of objective laws of social change in social theory.

[48] Goodrich, 1986: 1987: Douzinas and Warrington, 1987: Rose, 1987. In particular, note the influential dismissal of 'meta-narratives' by Lyotard, 1982.

[49] On Marx and Engels on law, Cain and Hunt, 1979: Cain, 1974: Lloyd, 1979, Ch. 10: Phillips, 1980. On the thought of Marx generally, McLellan, 1971, 1979. Also, Poulantzas, 1975, 303-7: Pashukanis, 1980, 1978. For Pashukanis, the bourgeoisie character of law stems not from the substantive content of its rules, but from its very form, itself a necessary expression of capitalist social relations. Sugarman (1983: 256) argues that

"...there was no single 'capitalist' form of law - whether we call it contractual, commodity form or absolute private property. It is more accurate to view each as one of several forms of capitalist law which co-existed over long periods, complementary and conflicting with one another."

See Hunt, 1975: Hirst, 1979. For analysis of marxist conception of law, Kinsey, 1983: Sugarman, 1983, 256: Hirst,

1979: Fitzpatrick, 1983: Collins, 1982: Bankowski and Mungham, 1978: Beirne, 1975. For an overview of marxist theories of law and the state, Hall and Scraton, 1981: Hirst, 1985: Fine, 1984 on democratic theories and the rule of law. Generally on western marxism, Callinicos, 1982: Anderson, 1976, 1983.

[50] On neo-marxist accounts of law, Cain, 1983: Gramsci, 1971: Simon, 1982: Sumner, 1983: Mouffe, 1979: Showstack-Sassoon, 1980, 1982. On anarchist theories of law, Bankowski, 1983: Bradney, 1985. On the Frankfurt School, Habermas, 1972, 1976, 1984: Adorno, 1980: Colletti, 1972, 1973. Marcuse, 1955, 1958, 1964, 1972, 1979. Also, Sartre, 1974, 1976. For a Green political perspective, Barho, 1978.

[51] Bocoock, 1986: See note 50, especially Gramsci, 1971: McLellan, 1983, 120.

[52] Note 50, above. Sugarman, 1983: Hunt, 1986: Nelken, 1982. On the concept of Ideological State Apparatus, Althusseur, 1969, 1970, 1971, 1976. Generally on Althusseur, Callinicos, 1976. On ideology generally, Thompson, 1986, Hall et al 1977: 'On Ideology', Centre for Contemporary Cultural Studies, University of Birmingham, 1977, especially McLennan et al, 1977: Burniston and Weedon, 1977. For an excellent overview of the concept of ideology, McLellan, 1986: In relation to law, Sugarman, 1983.

[53] Eg, Rhode, 1985: Polan, 1985: Taub and Schneider, 1985. For a discussion of the concept in feminist thought generally, Barrett, 1980. Note especially, Griffin, 1982, in Keohane et al, 1982.

[54] Freeman (1985: 71) argues that

"...given the position of women in society the behaviour of violent husbands is rational, if extreme. It is not necessary for husbands to have formal rights as such to chastise their wives. That they once had this right and

exercised it is sufficient. It helped to form and then to reinforce an ideology of subordination and control of women. The ideology remains imbricated in the legal system...The legal system has been committed to a patriarchal ideology. It is this which must be challenged if violence against women is to diminish and ultimately to cease."

Ideology is therefore central to Freeman's argument that

"...not only does the law serve to reproduce social order, but it actually constitutes and defines that order. The legal form is one of the main modalities of social practice through which actual relationships embodying sexual stratification have been expressed. Law defines the character and creates the institutions and social relationships within which the family operates. The legal system is constantly recreating a particular ideological view of relationships between the sexes, best expressed as an ideology of patriarchalism." (Freeman, 1985: 55).

[55] Chapter 1, p 20 - 30. O'Donovan (1979, 135) argues in an analysis of 'role allocation by law' that legal definitions of women result in women becoming a 'male appendage' on marriage. The analysis is similar to Freeman in that it recognises the ideological power of law. This point will be explored further in relation to transsexualism in Chapter 6.

[56] On critique, see Hunt, 1987, 13-16: Rose, 1987, 66-69.

[57] Rose (1987: 66) argues that

"If we are to understand the politics of familialisation, and the transformation of political concerns into personal and familial objectives which it entailed, we need to fragment, disturb and disrupt some of the central explanatory categories of critique."

For Hunt however (1987: 13),

"...the project [critical legal studies]...involves going beyond 'criticism' to the pursuit of 'critique' as the approach or methodology of a critical theory of law."

Critique, Hunt argues, starts with the internal criticism of existing theories of law, then generates the conceptual equipment necessary to overcome the weaknesses of the original theory, thus presenting a 'better' theory. Poststructuralist accounts of law are sceptical of the possibility of ideological critique and 'better' theories which do not themselves import an implicit theory and their own claims to power.

[58] Mackinnon (1983: 253) locates sexuality as "...the primary process of the subjection of women" whereby

"the substantive principle governing the authentic politics of women's personal lives is pervasive powerlessness to men, expressed and reconstituted as sexuality" (Mackinnon, 1983, 247: My emphasis).

For Mackinnon, sexuality is conceived as similar to class in a marxist analysis, as both the form and content of power. Mackinnon clearly envisages a 'true' 'authentic' feminism and, presumably, false and inauthentic feminisms which do not share her analysis of male omnipotence.

[59] Consciousness raising is central to Mackinnon's politics, in which talking about experiences constitutes the feminist theory of knowledge. For a discussion of consciousness raising, see Smart, 1989. In relation to men, Chapter 4, p 133 - 137.

[60] According to Mackinnon (1983: 646)

"the more feminist view to me...sees sexuality as a social sphere of male power of which forced sex is paradigmatic." (My emphasis).

Consciousness raising implies the illusion of false consciousness.

[61] Mackinnon (1983: 658) argues that

"If objectivity is the epistemological stance of which women's social objectification is the social process, its imposition the paradigm of power in the male form, then the state will appear most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity. When it is most ruthlessly neutral, it will be most male."

While Mackinnon correctly identifies the myth of judicial neutrality, the concept of the 'male form of power' and the male state affords little grasp on the construction of masculinity. The essentialism in Mackinnon's analysis has forcefully been pointed out by Smart (1989) who argues that

"...Mackinnon constructs male power as omnipotent...women are completely overdetermined...How is feminism possible at all? How is it possible to think otherwise if male power determines us all?" (Smart, 1989, 77).

[62] Lyotard, 1984, 1986-7, 1985: Baudrillard, 1983: On postmodernism generally, Rorty, 1979: Frisby, 1985: Hassan, 1985: Jameson, 1984: Featherstone (Ed.), 1988a, 1988b. For a feminist view which questions the masculinism of approaches, Moore, 1988.

[63] It is important to recognise that an argument against grand theorising is not an argument against theorising itself. See Smart (1989: 66-89) who argues that the search for a "feminist jurisprudence", if understood by way of a grand theory, may itself be a false quest. That is, 'feminist jurisprudence' may itself amount to little more than substituting one abstraction of law (be it marxist or liberal)

with another. In the end, the very premise of the search for a feminist jurisprudence is problematic.

"The search for a feminist jurisprudence is generated by a feminist challenge to the power of law as it is presently constituted, but it ends with a celebration of positivistic, scientific feminism which seeks to replace one hierarchy of truth with another" (Smart, 1989: 89)

[64] Goodrich, 1986: Strong, 1984, on Neitzsche's critique of epistemology: Baudrillard, 1984. Goodrich argues that

"...the nihilist attack upon the objectivity and unity of a divinely given real world was to clear the way for a movement beyond the old community and values, the tradition and establishment of the late twentieth century." (1986, 214).

Also, Rose, 1984. Goodrich argues that nihilism captures the absurdity of existence, a perception of nothingness and the recognition of the contingency of all values, the fragility of all claims to objectivity (1986, 213). Such a conception of nihilism is clearly related to the existential tradition and irrationalism: See Seidler, 1987.

[65] The debate is at times bitter and intemperate. On CLC in the UK, Journal of Law and Society, Vol. 14 No 1 Spring 1983.

[66] An introduction and analysis of discourse theory is outside the ambit of this research. On the written character of law and the exegetical character of legal studies, Goodrich, 1986: 1987. For a historical introduction to law and language, Goodrich, 1983. Discourse theory has radical implications not only for the humanities but for all knowledge whereby dialogue is conceived as a primary condition of knowledge and all speech and writing is located as social. In relation to law, the discourses of knowledge in the legal institution are hierarchical, it becoming necessary to account for the

positions and viewpoints from which people speak and "the institutions which prompt people to speak." (Foucault, 1979, 11) The concept of discourse has been applied to a number of areas of law, for example labour law, Wooddiviss, 1985.

[67] Arising from the seminal work of Derrida, discourse theory presents a fundamental critique of humanist discourses, subjectivity and language, rejecting in particular the notion of unitary intentional subjectivity. Derrida, 1976, 1978, 1975: Norris, 1982: Culler, 1983, 1988: Shapiro (ed.), 1984: Connolly, 1984: De Man, 1984: Leitch, 1986: Goodrich, 1986, 1987: Douzinas and Warrington, 1987. On feminism and poststructuralist theory generally an excellent overview is Weedon, 1987. Discourse theory locates meanings as existing in texts and their relation to other texts; that is, meaning is plural and constantly deferred in (never ending) webs of textuality in which specific texts are located.

[68] Jackson, 1985, reviewed by Goodrich, 1987b, MLR p 117.

[69] Note 45, above.

[70] For an (early) overview of structuralist and poststructuralist theories, Sturrock, 1982. A discussion of postmodernism is outside the scope of this thesis, though I will refer to such texts in a number of areas. On postmodernism in film theory (where theories have informed debates on masculinity in the cinema), Creed, 1987: Collins, 1987: Allen, 1987: Merck, 1987: Williamson, 1987. On postmodernity and sexual desire, Lash, 1985: Alford, 1987. On the relation between postmodernity and marxist conceptions of ideology, Hall 1985: Callinicos, 1985: In relation to late 1980's political climate, see Hebdige, 1989: Mall and Jacques, 1989.

[71] Kelman, 1984.

[72] Derrida, 1976, 1978, 1975. Debray (1984: 116-128) argues that Derrida's critique should be located in a rhetorical

tradition of philosophy, a pre-Kantian dialectic, in which arguments to necessity are displaced by arguments based on probability, and the concept of truth is displaced by that of dialogue and discursive effects.

[73] Said, 1980; Goodrich, 1986, 1987; Douzinas and Warrington, 1987. Goodrich (1986: 218) argues that

"The conjunction of writing and law is intrinsic to the foundational value of western legal order: writing places the law beyond the spatial and temporal limitations of oral tradition and unwritten power. The written texts of law...provides the legal order with an objectified existence independent of any specific historical institutions sustaining that tradition. In short, it is because it is written, because of ideational unity which the written law claims to represent, that the textual tradition of the law manages to maintain its status of incontestable professionalism guaranteed by a priesthood of interpreters empowered to gloss, but never to create the law."

[74] The methodology of deconstruction leads to a very different conception of judicial neutrality than for Griffiths (1985: 186), for whom,

"...the public position adopted by judges in the controversy about creativity is not consistently reflected in their judgments and that more important are their reactions to the moral, political and social issues in the cases that come before them."

[75] See notes 66, 67 above. On feminist discourse, meaning and power, Elshtain, 1982; Weedon, 1987.

[76] The doctrinal community places 'boundaries' by the discursive techniques of inclusion, exclusion, orthodoxy and

heterodoxy. These are the boundary definitions referred to by Mossman, 1986.

[77] The law student who reads the text in an impermissible way will, of course, fail the examination.

[78] Notes 66, 67 above. On the use of linguistics for understanding the historical semantics of legal texts, Goodrich (1987: 3)

[79] On other influences in the formation of judgements, see Stanley, 1988. Such other influences may include the obtaining of a desired result with a view to clients and practitioners, the known views of significant others, a concern with just results, the desire to promote certainty or to implement a particular policy, and to introduce new legal concepts or to re-examine others.

[80] Foucault, 1980.

[81] Several arguments have been presented couched in terms of 'for' and 'against' precedent. For a definition of precedent, see Mr. Justice Peake in Minehouse v Rennell (1833) 1 Cl and Fin 527, 546:

"Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents...and were not at liberty to reject them, and to abandon all analogy to them."

[82] Lord Mackay "Who Makes the Law", The Times Dec 3 1987. On the common law and civil tradition generally, Goodrich, 1986, 24-48. On precedent, Zander, 1980, 39-101.

[83] A narrow, semantic interpretation in which the words are taken to mean what it is deemed they originally intended:

Hilder v Dexter [1902] AC 474: Re Rowland [1963] a Ch. 1:
Whiteley v Chappell [1868-9] 4 LRQB 147: See Hopkins, 1937.

[84] Willis, 1938, 13-4: Zander, 1980, 56-7: See the comments of Baron Parke in Becke v Smith [1936] 2 M & W at 195.

[85] Black-Clawson [1975] AC 591: Davis v Johnson [1979] AC 317, in particular the comments of Scarman, LJ at 347-8:

"...the question which I consider crucial to a correct understanding of the scope of the section... (is) what is the mischief which parliament has provided the remedies specified (for)..."

[86] This is a recurring theme in Chapters 7 - 8, and will be discussed in detail in Chapter 4. See note 34, above. 'Phallogocentrism' is here employed in the same sense as by Smart (1989): that is, that the combination of phallogocentric (masculine heterosexual imperative), and logocentric (meaning that knowledge is not neutral but produced under conditions of patriarchy). Smart argues (1989: 86) that the elision of these two concepts into 'phallogocentric' "allows for a recognition that these two fields of sexuality and knowledge are interwoven."

[87] On the relation between masculinity and rationality, Seidler, 1987. Connell (1987: 131) argues that the rationality of industrial capitalism constituted a shift in masculinities as well as in class dynamics, which

"...created conditions for new versions of masculinity that rested on impulses or practices excluded from the increasingly rationalized and integrated world of business and bureaucracy."

According to Benjamin (1983: 101),

"...male rationality and individuality are culturally hegemonic...Further...male rationality and violence are linked with institutions that appear to be sexless and genderless, but which exhibit the same tendencies to control and objectify the other out of existence that we find in the erotic form of domination. That is, the male posture in our culture is embodied in exceedingly powerful and dangerous forms of destructiveness and objectification."

Seidler (1987: 82) argues that since the Enlightenment of the seventeenth century men have associated rationality with the maturation of masculine identity. The appropriation of rationality has become embedded, Seidler argues, in the experience of language;

"For men , language often seems universal and objective, as if it were always a matter of following an impersonal set of reasons. Men, confident in the superiority of the impersonal modes of argument they have inherited, become deaf to the different terms in which women often conceive issues." (Seidler, 1987, 85-6).

Such a feminist perspective linking a scientific world view to male psychology and dominance is also reflected in Easlea, 1981.

[88] Foucault, 1971, 1975, 1978, 1981a, 1981b. For discussion of the 'History of Sexuality', Hussain, 1981: McHoul, 1986: Poster, 1984, and the commentary on this by O'Brien, 1986. On Foucault generally, Hoy, 1981: Rorty, 1986: Walzer, 1986: Said, 1986: Smart (B), 1983, 1985.

CHAPTER 3

THEORISING LAW AND THE FAMILY

[1] For example, as discussed Chapter 1, p 20 - 30.

[2] On state intervention, note Dingwall, Eekelaar and Murray, 1983: Freeman, 1983, 1985: Goldstein, Freud and Solnit, 1979. Goldstein, Freud and Solnit are concerned to stress what they see as the costs of state intervention with regard to child care, emphasising parental autonomy and the need for parents to feel "...comfortable and confident about their child rearing. Anything that undermines this sense of competence will have serious effects on the children" (1973, 644). The family becomes, for Goldstein, Freud and Solnit, a private area, seemingly outside the law. On contemporary debates on the public/private dichotomy, Olsen, 1985: O'Donovan, 1985: Rose, 1987: Freeman, 1985: Glendon, 1978, 316-27: Bottomley, 1984: Horowitz, 1983. See further below.

[3] I believe these are 3 approaches which are of use. I am not saying that other approaches may not have considerable analytic utility too. The functionalist, public/private and familialist approaches are used by Dewar (1987: 3-7) as 'ways of thinking about the family', which is approach I wish to adopt here. They represent the three principal frameworks within which contemporary questions about law and the family have been framed.

[4] Goldstein, Freud and Solnit (1973) capture one particular (and influential) view of state intervention and the public/private dichotomy:

"The child's need for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to state intrusion upon

parental autonomy in child rearing. These rights - parental autonomy, a child's entitlement to autonomous parents, and privacy - are essential ingredients of 'family integrity.' (Goldstein, Freud and Solnit, 1973: 9)

[5] The classic liberal statement of personal morality as not the concern of the law is to be found in the Report of the Wolfenden Committee on Homosexual Offences and Prostitution, 1957. See further Devlin, 1959 and the response by Hart, 1963. For an excellent overview of the legal regulation of sexuality and morality, Weekes, 1981. On Wolfenden and the liberal strategy, Weekes, 1981, 239 - 249; Weekes, 1985, 54 - 5. On law and morality, Blom Cooper and Drewry, 1976.

[6] On the history of divorce law, McGregor, 1957. For an excellent background to the Divorce Reform Act 1969 and the Matrimonial Causes Act 1973, Smart, 1984, 54-71. Note in particular, Law Commission (1966) Report on the Reform of the Grounds of Divorce 'The Field of Choice' No. 6 London, HMSO: Archbishop of Canterbury's Group (1966) 'Putting Asunder: A Divorce Law for Contemporary Society', London, SPCK: Family Law Sub-Committee (1979) 'A Better Way Out', The Law Society, London: Law Society (1982) 'A Better Way Out Reviewed' Standing Committee on Family Law, Law Society, London: Law Commission (1988) 'Facing the Future: A discussion Paper on the Grounds of Divorce' Law Commission No. 170 HMSO London. For an argument in favour of retaining the grounds of matrimonial fault which is couched in terms of state intervention, Davis, 1987.

[7] Note 61, below:

[8] Chapter 2, note 40.

[9] This is particularly evident in the debates around cohabitation and whether it should be treated like marriage. See Kingdom, 1988: Deech, 1980: Chapter 1, note 32. Also, Weitzman, 1981: Freeman and Lyon, 1983 Ch 7.

[10] See further Chapter 7, p 219 - 221: Chapter 9: Generally, see Weekes, 1981: 1985: Segal, 1987, 70-162: Chapter 4..

[11] On the place of the state in maintenance debates, Smart, 1984a: 1984b: Eskelaar and Maclean, 1986: Finer and McGregor, 1974: Cretney, 1986: Deech, 1977: Gibson, 1982: Land, 1976, 1983. Also Chapter 1, note 74.

[12] See Chapter 2, notes 39, 54. A useful contrast may be made with the development of functionalist theory by Morgan (1985) in relation to domestic violence. Morgan's use of 'contradiction' in the notion of 'dysfunction' carries with it the connotation that the particular occurrence is abnormal and can be ameliorated in family life. The contradiction, within Morgan's typology, is that the family is at once both a relatively self-enclosed unit, and also part of a wider society. Though not presented in these terms, Morgan is here attempting to address the dichotomy between the public and the private in theorising the family. A contradiction may occur where the internal family relationships are in contradiction with the demands of the outside world, for example where the expectations of gender are in contradiction with individual aspirations. Though presented in different terms, I believe Morgan is getting to a similar position which is later argued by Freeman (1985); that is, that what might appear to be dysfunctional might in fact be inherent. For both Morgan and Freeman (Chapter 2, note 54) domestic violence is a product of the family system itself.

[13] Abel, 1982: Bottomley, 1984, 1985: Parkinson, 1983, 1986, 1987.

[14] Note 2, above. From a feminist perspective, see Elshtain, 1981: Jaggar, 1983: O'Donovan, 1985: Olsen, 1985: Garminkow et al, 1983. Crucially, the distinction is located within feminist politics as fundamental to the power differentials between male and female (Taub and Schneider, 1982), whereby a result of the distinction is held to be that it masks the injustice of

existing sexual relations. Feminist writings on the public and the private have moved on from the structuralist assumptions underlying the arguments of Rosaldo (1974), who contended that the public private dichotomy is universal, and posited a relationship between the degree of subordination of women in a society to the degree to which the realms of the public and the private are separated (Eisenstein, 1984). All societies, Rosaldo argued, ascribed men to the public sphere, women to the private. In rejecting marxist accounts of the emergence of the division of labour as the product of transition in capitalist relations of production, feminists have identified a dichotomy which pre-dates capitalism. Such an insight is crucial. Nonetheless, what both feminist and non-feminist conceptions of the public and private ironically share is an implicit acceptance of the very dichotomy which is purportedly being rejected as instrumental in the reproduction of patriarchal relations. This point has been elaborated in relation to feminist theory generally. The argument that the law serves to reproduce a family form which sustains patriarchal relations is evident in the work of Smart, 1984: Barrett and McIntosh, 1982: O'Donovan, 1985; Olsen, 1985: Janeway, 1971: Rosenberg, 1982. For accounts of patriarchy and the unregulated private by men, Freeman, 1985: Rose, 1987. On the nature/culture debate generally, Ortner, 1974 and, in particular, the influential work mentioned above of Rosaldo and Lamphere, 1974.

[15] On rape, Chapter 2, note 38. In relation to marital rape, it is clear that notions of privacy and the private sphere underscore the Report of the Criminal Law Revision Committee on Sexual Offences (15th Report) Cmnd 9213. For a review of the report, Adler, 1984: Leny, 1985. Also, Patullo, 1984, 16-23. See further R v Clarke [1949] 2 AER 448: R v O'Brien [1974] 3 AER 663: R v Steele (1976) Cr. App. Rep. 22: v Miller [1954] 2 QB 202. On male sexual violence from a historical perspective, London Feminist History Group, 1983: Chadwick, 1986. For an analysis and overview of the law, Atkins and Hoggett, 1984, 124: O'Donovan, 1985, 119-122.

[16] Chapter 2, notes 39, 54.

[17] For a fuller discussion, p 80 -85. Based on this juridical theory of power, the state is presented as the sole point of reference, the location for political, judicial, and administrative functions which had hitherto been distributed among other elements of the polity. In terms of liberal legal discourse, the dichotomy of the public and private spheres, of the juridical-discursive legitimation of the state, has had powerful effects in the delineation of the family as private space.

[18] 'Gemeinschaft', in traditional sociological theory, sums up the values associated with the private sphere, as opposed to 'Gesellschaft' with commercial, market society in which laissez faire contractual relations is the model for all law. For an excellent discussion of the concepts developed in relation to the emerging Bureaucratic-Administrative State see Kamenka and Erh Soon Tay, 1975. Also, O'Donovan, 1985, 4-5.

[19] On the middle class family and the domestic roles of women, Weekes, 1981, 81-96. On the 'Angel in the House' and Victorian masculinity, Vance, 1985.

[20] On essentialist conceptions of difference between men and women, Chapter 2 p 46 - 50. On categorical theories generally, notes 53, 54 below. Note the criticisms of essentialism by Segal, 1981, 1-37.

[21] See Freeman, 1985, 166. On the history of the distinction generally, O'Donovan, 1985. The public world of employment, politics, the state and the market is considered to be the world of men for, according to Aristotle, men by nature were intended to live in a 'polis', in which the highest good might be attained. Women, however (along with slaves and children), being unable to so participate in this public world, were confined to the 'oikos', the household, the non-public sphere, whereby only a lesser good might be achieved.

[22] Quoted by C. Whitbeck 'A Different Reality: Feminist Ontology' in Gould, C.C. (Ed) 1982, 70. See Elshtain, 1982, 1981: Okin, 1984.

[23] Locke, 1970.

[24] Mill, 1910, 1912, 1929: Mill and Mill, 1970.

[25] This is particularly clear with regard to contract law. See further on marxist accounts of capitalist development and contract law, Collins, 1982: 59, 69, 79.

[26] Gardiner, 1983, terms 'binary thinking' as itself a mechanism of oppression. In relation to men and women and binary thinking, see Gilligan, 1982.

[27] Note 26. Also, Katz, 1978.

[28] Kennedy, 1982: Klare, 1982: Horowitz, 1982: Polan, 1982: Taub and Schneider, 1982: Rifkin, 1982: Olsen, 1982.

[29] Rethinking, for example, child care practices, the legitimated domain of masculine privilege and authority in the home, and the bifurcation of men's lives into the familial and the world of work all follow on from rethinking the constitution of public and the private spheres.

[30] For an excellent overview, Weekes, 1981. See note 36 below.

[31] Chapter 5, p 149 - 160.

[32] Chapter 5, p 158.

[33] Note the Sexual Offences Act 1985 concerning the criminalising of the male client of the prostitute for the first time. Enforcement has, it seems, proved ineffective: Edwards, 1987: On the passage of the act and the assumptions

which pervaded parliamentary debates, see Standing Committee C, Wednesday 6 March 1985: 27th February: 2nd Reading 17 May 1985. For an excellent discussion of the Act and the law relating to prostitution, Matthews, 1985. Also, Criminal Law Revision Committee, Sixteenth Report 'Prostitution in the Street' (1984: Cmnd. 9329).

[34] For example, the Equal Pay Act 1970, which came into force 29 December 1975, giving employers 6 years to adjust their workforce patterns to its minimal obligations. The act did not cover taxation and social security laws and provided equal pay for broadly similar work. See also the Employment Protection Act 1975, by which women became entitled to maternity leave, and a requirement is made that employers give back jobs to mothers within 29 weeks of childbirth. The act marked the acceptance of a woman's right to combine motherhood with paid employment and extended to pregnant employees the legal protection against unfair dismissal introduced by the Industrial Relations Act 1971. The Social Security and Pensions Act 1975, another of the reforms of the 1974 - 9 Labour Government in this area, abolished lower rates of sickness and unemployment pay for women.

[35] The Sex Discrimination Act 1975 made it unlawful to discriminate in the areas of education, employment and housing, goods and services, setting up the Equal Opportunities Commission to offer legal advice and assistance. While public policy may be against discrimination between the sexes, EOC research continues to reveal stereotyped attitudes towards the roles of men and women which lead to discrimination. The SDA 1975 is pitched at an individualistic level, requiring the individual to complain of discrimination by comparison with another individual. By s 1 a person discriminates directly against a woman/man when "...on the grounds of her sex he treats her less favourably than he treats or would treat a man." Like the EPA 1970, the SDA 1975 shows an advocacy of formal equality of rights in liberal political thought to be realised through the removal of de jure barriers to women's

participation. As history has shown, rights which are given can be just as easily taken away: Chapter 1, p 23 - 25.

[36] To present an overview of literature theorising the state would constitute a thesis in itself. In a sense, the state covers all the substantive areas of concern to this study of family, law and gender. On the fact that the state is untheorised in relation to gender generally, see Connell, 1987: 125-132. In relation to marxist and post-marxist conceptions of the state, Chapter 2, notes 49, 50. Aside from these works, see further Carrigan, 1977: Fine and Harris, 1977. It is not possible to distil a single, coherent unitary theory of the state and the law, either from the writings of Marx and Engels, or from within the marxist tradition generally. On alternative theoretical traditions: on pluralism and theories of contemporary corporatism, Jessop, 1979: Middlemas, 1979: Panitch, 1981 (a powerful critique of corporatism), Westergaard, 1977. On the Rechstaat tradition, Neumaan, 1957 esp. Ch 2: Gamble, 1979. On the minimalist state and 'Thatcherism', Barry, 1979: Hayek, 1960: Hall, 1980: Thatcher, 1985 (on the minimalist state and community care): Finch and Groves, 1985. On right wing feminism, Benton 1986, and for an excellent account of patriarchy, capitalism and the New Right, Tusscher, 1986. On Thatcherism, Hall and Jacques, 1989: Leadbeater, 1989: Murray, 1989: Hall, 1989. For a criticism of 'New Times' theory, Rustin, 1989: Hirst, 1989. On socialism and the New Right generally, see New Statesman, 6 March 1987; For an overview of state theories which show a total blindness to gender relations, Hall and Scraton, 1981.

For a feminist attempt to address the politics of the state, Wilson, 1977: O'Donovan, 1979: McIntosh (1978, 255) argues, in relation to the domestic labour debate discussed in Chapter 1, p 20 - 23, that:

"...the state does not [oppress women] directly but through its support for a specific form of household; the family household dependent largely upon a male wage and

upon female domestic servicing. This household system is in turn related to capitalist production in that it serves...for the reproduction of the working class and for the maintenance of women as a reserve army of labour, low paid when they are in jobs and often unemployed...state effort cannot achieve a perfect fit between the household and the various needs of capitalism. State policy is thus constantly juggling to keep several balls in the air at once."

See further, Evans, 1982: 297-302. Ungerson, 1985, presents a feminist analysis of state policies across a range of issues, such as housing, social security, marriage motherhood, education, health and social services. For an excellent overview and discussion of the place of the state in feminist literature, see Barrett, 1980 Ch 7, 227-245, for whom

"...the state occupies a curious, contradictory position in the theory and practice of the British Women's Movement."

Barrett continues to cite examples of how

"...the state, through its own repressive mechanisms and through the practices of the semi-autonomous professions that it closely regulates, plays an important part in the structures and ideology of women's oppression." (Barrett, 1980: 239).

Such 'semi-autonomous professions' includes the law. On sexuality and state regulation, Weekes, 1981. On masculinity and the state, Hearn, 1987, 31-103, who attempts to theorise gender and state from a materialist perspective. On Mackinnon, 1982, 1983, 1987 and the state, Chapter 2, p 46 - 50.

[37] This is not to say that 'Sex, Politics and Society' is not a major contribution to the history of legal regulation of sexuality, not that it is not a work with many strengths. Nonetheless, there remains a disjuncture between Chapter 1 and

the following historical analysis. On sex in history generally, see Bullough, 1972: Rattray-Taylor, 1953. In particular, note Padgug, 1979, who adopts a similar approach to Weekes in Ch. 1. For a more sophisticated theoretical discussion, Weekes, 1985: 5-15.

[38] For an excellent discussion of the construction of masculinity and male sexuality in feminist literature in relation to war and aggression, which is not essentialist and which succeeds in bringing out the horrors of war for men as well as women, Segal, 1987: 162-204. See also, Poole, 1985. On the women's protest at Greenham Common and the relation between masculinity and nuclear weapons, Cambridge Women's Peace Collective, 1985: Caldecott and Leland, 1983: Cook and Kirk, 1983: Harford and Hopkins, 1984: Thompson, 1983. On the armed forces and women, Enloe, 1983: Chapkis, 1981. On masculinity, nuclear weapons and scientific rationality, Easlea, 1981, 1983, 1987 and on militarism and capitalism, MacKenzie, 1983. Easlea (1983) presents an admirable wide-ranging piece of historical research which identifies the links between masculinity, control and power in the emergence of those sciences and technologies which brought about the production of nuclear weapons.

[39] This is not, however, pointed out by a straightforward legalistic analysis of police powers, and the structure of gender is invisible in much work on the legal regulation of policing practices. At this point essentialist conceptions of masculinity might be countered with an alternative: the above analysis of this component of the 'core structure' does not lead to a conclusion that, for example, male dominance of the armed forces is determined by an essential masculine propensity for aggression. Rather, the fact that a particular form of masculinity is socially destructive is a result of a particular historically specific social machinery of the state apparatus.

[40] Cockburn (1983) presents an insightful analysis of structures of gender relations within a rapidly changing

working environment. These changes themselves have had legal implications. For example, the mobilisation of the female workforce around sexual harassment has itself led to the establishment of collective grievance mechanisms such as the Sex Discrimination Act 1985, however ineffective it might be in practice. The location of sexual harassment as a problem of masculinity has led not only to the setting up of feminist groups to promote a consciousness of the problems of harassment, but led to a succession of sexual harassment cases before industrial tribunals. Within the rhetoric of workplace politics, the ideology of male physical superiority is evident in the male 'right to work'.

[41] In a sense, this component is the most important in that it provides a possible mass base to a politics of transformation of gender relations. Accounts of 'corporatism' within legal theory (eg Lewis and Wiles 1984), however pertinent in many respects, do not account for the alliances between the state and corporate elites and working class hegemonic masculinity which the traditional corporatist structures of power making constituted and reproduce. Such an analysis points to an almost complete exclusion of women from the major centres of policy and decision making in institution of power in Britain.

[42] In this sense it makes sense to speak of the state as 'male'. The 1980's have witnessed an increasing questioning of traditional forms of labour organisation. In part, this is a consequences of Thatcherism's restructuring of Union power and the changing industrial base of the British economy: Hall and Jacques, 1989. These contemporary developments in turn have consequences for the gender order.

[43] The public/private dichotomy has been constructed within a language of analysis as a way of conferring unity on an interdisciplinary study of family, law and gender. Unger captures the dynamics of the two spheres, whereby "In our public mode of being we speak the common language of reason,

and live under laws of the state, the constraints of the market, and the customs of different social bodies to which we belong.. In our private incarnation, however, we are at the mercy of our own sense impressions and desires." (Unger, 1975: 59, quoted by O'Donovan, 1985: 8) Current tensions within the structured domain of work, such as the prevalence of sexual harassment, bear out perhaps the social tensions which accompany female struggles to gain access to the rewards of men. What is evident also, of course, is that men are resisting such demands: Chapter 1, p 23 - 25.

[44] As in positivist and, I believe, regressive traditional constitutional theory. See Dicey, 1959: De Smith, 1984, 27-60: Jennings, 1959: Marshall and Moodie, 1967: Wheare, 1966: Mitchell, 1968. With the collapse of the nineteenth century constitutional assumptions, various attempts have been made to locate centres of decision making in the British State. See further, note 36. On Post-Corporatist theory, Thatcherism and the constitution, Lewis and Wiles, 1984. On a Bill of Rights, Jaconelli, 1980.

[45] See note 36, above. In addition to these theoretical traditions, note also the conception of the state, law and norms in the work of Durkheim, 1964, 1965a, 1965b esp. Ch. 1-3: See further, Lukes, 1973, esp. Ch 3, 10, 20: Giddens, 1977. On Durkheim and law specifically, Lukes and Scrull, 1983. On evolutionary theories and the state, see Burrows, 1970, Ch. 5-6: Hirst, 1976, esp. Ch 2: Maine, 1912, Ch. 5: Nisbet, 1980, esp. Part 2 Ch 6-7, and on pluralist methodologies and the state, Bell, 1960: Lipset, 1963: Wilson, 1981: Breed, 1965. Note the critique of the American pluralist tradition by Wright-Mills, 1959, Ch. 11-15. On the sociology of Max Weber and state bureaucratization, Weber, 1949, 1967. On Weber's sociology of law and culture, see Freund, 1972: Kronman, 1983: Andrews, 1983: Wolin, 1981. In relation to religion, the rise of capitalism and theorising the state, note in particular Trubek, 1972: Tawney, 1962: Marshall, 1982: Green, 1959.

[46] Collins, 1982, 116-8: 119, 145-6: McLellan, 1980, 117-134.

[47] The notion of patriarchal relations has been discussed above in relation to finance and property on divorce. The concept is used by Smart (1984: 13-23) to get around the 'patriarchy debates'. Smart argues (1984: 22) that

"...legislation does not create patriarchal relations but it does in a complex and often contradictory fashion reproduce the material and ideological conditions under which these relations may survive."

'Patriarchy' is, of course, a contentious concept itself. See the debate between Rowbotham, 1981 and Alexander and Taylor, 1981. In relation to the issues of family property discussed above, see further Atkinson, 1979. On the concept of patriarchy in socialist-feminist theory, see the excellent discussion by Eisenstein and Hartmann, 1978. Also, McDonough and Harrison, 1978.

[48] For example, the more recent work of Smart, 1989, differs in both the implicit concept of the state and patriarchal relations from the earlier analysis in 'The Ties That Bind' (1984). See also the rethinking of the concept in the work of Freeman, 1985: Rose, 1987, and note the influence of Donzelot, 1980. Connell, 1987, is concerned to question gender blind accounts of the state through developing an analysis in terms of the structures of cathexis, labour and power, though Connell continues to believe that the concept has analytic utility.

[49] This is particular evident when considering the work of Donzelot, 1980. See further p 96 - 98: Barrett and McIntosh, 1982, 95-105: Bennett et al, 1981. The strategies of the 'familialist' approach are various, and derived from different writers who would not necessarily link themselves. It is most important to recognise this diversity. Also, it is necessary to recognise the debt which is owed to feminism in this

respect. I have argued that it is feminist studies of law which have attempted to integrate the instances of oppression, the experiences of women's lives within networks of social power which might both theorise the power of law and also work towards strategies of reform.

[50] Featherstone, 1988, Kellner, 1988, Weedon, 1987. For an introduction to postmodernism. Also, Harland, 1987. For a discussion of 'New Times' from a post-marxist left position, Hebdige, 1989. This is not the place to outline in detail tenets (if there can be said to be any) of postmodernism: Lyotard, 1984; Rorty, 1979.

[51] For an readable overview of the concept, Harland, 1987: Note 50, above.

[52] Donzelot, 1980: Rose, 1987, 69-75: Minson, 1985: Rose, 1985: Miller and Rose, 1986: Smart, B, 1985, 54-60 for a clear summary of genealogy as a method of analysis. See the definition of Donzelot, p 86. Also, Foucault, 1977. For the limits of a genealogical analysis, see Dreyfus and Rabinow, 1980, 79-100.

[53] Extrinsic, or categorical, theories are subject to a number of criticisms. Feminist essentialist writings theoretically draw on biologism, structuralism and the rhetorical appeal of easy categories and answers to difficult questions. Dworkin's (1981) analysis of pornography for example, is in part a rallying call to mobilize women. If academically flawed, it may be politically effective. Connell (1987: 54) terms the theory implicit in radical feminist approaches as 'categorical', characterised by the identification of opposed interests in sexual politics with specific groups of people - men, for example, as 'the natural enemy of women.' This is clear in the work of Mackinnon, Chapter 2, p 46 - 50. Men and women here become undifferentiated general categories in an analysis in which the categories themselves are pre-determined, pre-theoretical.

Categorical theories, Connell argues, explore the relations between groups, but not the processes by which the groups are themselves are constituted. This is clearly limited for an analysis of masculinity which is concerned with its constitution. This will be taken up further in relation to transsexualism: Chapter 6.

[54] For example, Dworkin, 1981: Daly, 1984, 1979: Coveney et al, 1984: Solanas, 1971: Mackinnon, 1982, 1983, 1987: Rich, 1980, 1977: Firestone, 1970: Leeds Revolutionary Feminist Group, 1981: Friedman and Sarah, 1982. On categoricalism in pornography debates, see further Lederer, 1980: Lesbians Against Pornography, 1984. On lesbianism from this perspective, Rich, 1980: Johnstone, 1973.

[55] For a discussion of crude economic determinism and a class instrumentalist categoricalism in relation to law, Collins, 1982, 17-35. See further Chapter 2, note 49, 50. It is not clear why gender effects, in marxist feminist theory, are essential for the reproduction of capitalism. If the state is characterised as repressive, in the Althusseurian sense, then the main objects of physical repression are, arguably, men.

[56] Aside from the cases to be discussed and subject to analysis in the following chapters, note here the Marriage Acts 1823, 1836, 1886 and the law now contained in the Marriage Act 1949 (27 Statutes 470). Also, the Marriage Act 1983 (27 Statutes 559): Marriage (Enabling) Act 1960 (27 Statutes 539): Marriage (Prohibited Degrees of Relationships) Act 1986 (27 Statutes 562): Marriage (Registrar Generals Licence) Act 1970 (27 Statutes 546): Clandestine Marriages (1753) (Lord Hardwicke's Act).

[57] Matrimonial Causes Act 1973 (27 Statutes 700): Matrimonial Homes Act 1983 (27 Statutes 585): Matrimonial Homes and Property Act 1981 (27 Statutes 583): Matrimonial Proceedings and Property Act 1970 (27 Statutes 652).

[58] Inheritance (Provision for Family and Dependents) Act 1975 (17 Statutes 344): Inheritance Tax Act 1984: Family Provisions Act 1966 (17 Statutes 329): Finance Acts 1971, 1972, 1973, 1974, 1986 and 1988: Insolvency Act 1986: Intestates Act 1952 (17 Statutes 315).

[59] Children and Young Persons Act 1969 (6 Statutes 227): Also, Children and Young Persons Act 1933, 1963: Children Act, 1948, 1975: Child Care Act 1980: Children Act 1989: Also, see Child Abduction Act 1984 (12 Statutes 933): Child Abduction and Custody Act 1985.

[60] Domestic Proceedings and Magistrates Courts Act 1978 (6 Statutes 517, 27 Statutes 791): Domestic Violence and Matrimonial Proceedings Act 1976 (27 Statutes 788): Matrimonial Homes Act 1983 (27 Statutes 585): Offences Against the Person Act 1861 (12 Statutes 98): Police and Criminal Evidence Act 1984 (17 Statutes 207) s 80: Sexual Offences Act 1956 (12 Statutes 271).

[61] Custody of Children Act 1839: Matrimonial Causes Act 1973 (27 Statutes 700): Matrimonial and Family Proceedings Act 1984 (27 Statutes 853): Family Law Reform Act 1987 (37 Statutes 782): Family Law Act 1986: Children Act 1989: Guardianship of Minors Act 1971 (6 Statutes 305): Guardianship Act 1973 (6 Statutes 338).

[62] Surrogacy Arrangements Act 1985, esp. s 1, 2: Abortion Act 1967 (12 Statutes 414): Infant Life Preservation Act 1929 (12 Statutes 222): On Birth Registration, Births and Deaths Registration Act 1953 (37 Statutes 722).

[63] Abortion Act 1967, s 1, s 5: See further note 62. Gillick v West Norfolk and Wisbech Area Health Authority (1986), below note 81.

[64] Education Act 1944 (15 Statutes 106): Education Act 1980 (15 Statutes 265): Education (No.2) Act 1986.

[65] Public Health concerns may be seen to be an issue related to general welfare and social provision. On public health and the population question, Weekes, 1981, 122: Rose, 1985. See Health and Social Security Adjudications Act 1983: Local Authority Social Services Act 1970: Social Security Act 1986: Supplementary Benefit Act 1976: National Health Service Act 1977 (30 Statutes 805).

[66] On postmodernity and architecture, see Rose, 1988. The term postmodern is taken from architectural history. In the sense employed here, housing provision is understood as central to the constitution of family forms.

[67] Housing Act 1985 (21 Statutes 29): Housing and Planning Act 1986: Rent Act 1977 (23 Statutes 405). On housing policy from a feminist perspective, Austerberry and Wabor, 1985: Coates and Silburn, 1985.

[68] Bottomley, 1984, 1985. Note the role of the probation service as part of the divorce court welfare service, and the role of independent volunteers in social work and in Relate/Marriage Guidance Council.

[69] For example, Chapter 2, note 14 in relation to child sexual abuse. The medical profession covers a range of different issues, for example in relation to child care, child abuse and contraception.

[70] On Ultra Vires and Judicial Review of Administrative Action, de Smith, 1985, ch. 28 esp 571 -610. On remedies, pp 610-626. On local government generally, de Smith 1985, 404-427: Wade and Phillips, 1979 Ch 21, 350. The legislative framework for local authorities social services departments is to be found in the Local Authority Social Services Act 1979. See the range of duties contained in Child Care Act 1980, Children Act 1989. On developing a 'critical public law', Prosser, 1982: McAuslan, 1983.

[71] Seen perhaps most clearly in the last years of the Greater London Council. See Livingstone and Ali, 1984: Livingstone, 1984. On feminism and local/class politics generally, Rowbotham, 1968: Rowbotham et al, 1980: Campbell, 1986, 1985: Weir and Wilson, 1984: Lovendreski, 1985: Segal, 1987, 236-46.

[72] Smart (1989: 15-20) argues that

"It is not correct to depict this historical development in terms of law being 'challenged' by the new discourses: Rather, law attempts to extend its sovereignty over areas constructed by the discourses of the human sciences as significant to the disciplining of the social body. But law extended its legitimacy by embracing the objectors of this discourses."

Smart proceeds to argue that law retains its 'old' power, its ability to extend rights, while exercising new contrivances of power in the form of surveillance and modes of discipline.

[73] The relationship between these new and old forms of power is, Smart argues, **sybiotic**, whereby

"This transformation of power conflicts into the language of rights enables law to exercise power rather than abdicating control to the 'psy' professions and the mechanism of discipline." (Smart, 1989: 20).

It is argued that law proceeds by way of an 'uneven development', whereby a growing legalisation of everyday life is simultaneously extending the influence of the law, for example, in relation to foetal rights and determination of brain death (Smart, 1989: 8). This notion of 'uneven development' is introduced in Smart, 1986.

[74] For accounts of power conceived in this way, see Foucault, 1971, 1979a, 1981, 1980: Rose, 1987: Smart, 1989: Donzelot,

1980. Also, chapter 3, note 32, 104. See further Smart, B, 1985, 71-115: Smart, B. 1983: Garland and Young, 1983.

[75] Note 74, above, In particular, Foucault, 1981, 85-91, 44-7,

"Underlying both the general theme that power represses sex and the idea that law constitutes desire, one encounters the same mechanism putative mechanisms of power...it is a power that only has the force of negatives on its side, a power to say no...it is a power whose model is essentially juridical, centred on nothing more than the statement of the law and the operation of taboos. All the modes of domination, submission and subjugation are ultimately reduced to an effect of obedience." (Foucault, 1981: 95).

Tracing the process whereby pro-capitalist forces demanded the removal of constraints on economic activity, Foucault argues that, in the absence of a modern police force, the authority which had been imposed and had sought to bind members of the lower classes to the political order and to control their conduct was no longer sufficient.

[76] See further on the Foucauldian conception of power and resistance, Smart B. 1985, 132-136.

[77] Foucault, 1981, 86: Smart, 1989, 14-20. Note 74, 75 above.

[78] On the formulation of rights in liberal legal discourse, Smart, 1989: 138-59. The problems of rights discourse are posed clearly in relation to abortion law reform and reproductive politics by Kingdom, 1985, 1986.

[79] In relation to the sociology of masculinity, see further Chapter 4, p 119 - 124. Smart (1984: 19) has argued that there are three main problems in assuming law unproblematically serves the interests of all men. First, the approach itself treats law as an entity unto itself: "It suggests that having

identified male interests it operates conservatively to protect them in all circumstances" (Smart, 1984: 19) How might undoubted progressive 'victories' be explained? Thus, if everything is reduced to serving male power, it is difficult to see what explanatory power the concept of patriarchy has. Secondly, is it correct to assume a readily identifiable set of male interests? Do all men have the same interests, which may be unambiguously served? Thirdly, it is argued by Smart that an argument that law serves the interests of all men ignores the impact of class which mediates the impact of legislative changes. As Rose (1987: 72) points out, it is problematic to apply ex post facto 'explanations' on such complex events. Explanations in terms of interests based on categorical theories of gender serve only to obfuscate the dynamics of power in everyday life.

[80] Related to the construction of the sphere of the social, Donzelot is concerned to describe the change from government of families to government through the family. It is the expert discourses of the 'psy' professions which resolve the problems resulting from the definition of the 'social' and the constructed family. On the role of these discourses in the 'tutelary complex', Donzelot asks,

"How could the family be divested of a part of its ancient powers - over the social destiny of its children, in particular - yet without disabling it to a point where it could not be furnished with new educative and health promoting tasks?" (Donzelot, 1980: 199)

On the family/social relation, Donzelot argues that the social overshadows the family in a process in which "...the family is both queen and prisoner." Crucially, a distinction is made between the processes of familialism in the social and the place of the family as protagonist, arguably a key to the familialisation approach generally in which discourses of sexuality and reproduction address the reconstituted family form.

[81] According to Lord Templeman in Gillick,

"The effect of the consent of the infant depends on the nature of the treatment and the age and understanding of the infant. For example, a doctor with the consent of an intelligent boy or girl of 15 could in my opinion safely remove tonsils or a troublesome appendix. But any decision on the part of a girl to practice sex and contraception requires not only knowledge of the facts of life and of the dangers of pregnancy and disease...I doubt whether a girl under the age of 16 is capable of a balanced judgment to embark on frequent, regular or casual sexual intercourse fortified by the illusion that medical science can protect her...There are many things which a girl under 16 needs to practice but sex is not one of them."

The contingencies of sex and age are clear in this passage.

[82] Dingwall, Eekelaar and Murray continue however to conceive of the state as an entity unto itself "which cannot opt out". That the state is not accountable, even in the terms of liberal discourse, to the population is not here considered.

[83] This is similar to Donzelot's argument, though Donzelot conceives a particular role for women/mother in the family: "...the strategy of familializing the popular strata rested on the instruction of the woman, who was given the weapon of social housing...and told how to use it: keep strangers out so as to bring the husband and especially the children in." (Donzelot, 1980: 40) The anti-feminist connotations of this will be considered below. It is ironic that underlying Donzelot's presentation at this point is a pre-given notion of the male role in the family. Where this comes from, like the mothering status of women, is not explained.

[84] Chapter 1, note 73, also p 20 - 23. In relation to statutes and cases, see, for example, Affiliation Proceedings Act 1957 (6 Statutes 106) and, related to this, Attachment of

Earnings Act 1971 (22 Statutes 302): Ashley v Ashley [1968] P 582; Barnes v Barnes [1972] 3 AER 872; Tovey v Tovey [1978] 8 Family Law 80. On the Matrimonial and Family Proceedings Act 1984, see further Smart, 1984. On the Finer proposals for a Guaranteed Maintenance Allowance, Eekelaar, 1976. For evidence of a widespread non-compliance with maintenance orders, Gibson, 1982; Eekelaar and Maclean, 1986, ch. 4; Edwards and Halpern, 1988.

[85] Dingwall, Eekelaar and Murray, 1984. On the construction of childhood as a social problem generally, Aries, 1973; Dingwall, Eekelaar and Murray, 1983; Pinchbeck and Hewitt, 1969. In some senses, the study of childhood undertaken by Aries reflects a familialisation approach. Aries identifies a range of discourses of childhood, transmitted through a variety of means, to parents, and locates education as central to a system of constructing childhood. Indeed, the new sciences of psychoanalysis, paediatrics and psychology devote themselves to the problems of childhood. Education itself is seen as significant in the transformations, the familialisation, of society, whereby the family becomes no longer simply the institution for the transmission of a name or estate but as fundamental to the assumption of moral and spiritual concerns by its members. In this family, children become the objects of care and emotions. With the school replacing the apprenticeship as the instrument of discipline, the family and school together served to remove the child from adult society. This is not, of course, to argue that within the school and family severe discipline did not take place; this is not to write power relations out of view. If the child had before enjoyed the freedom of the relations of adults, the child now faced the discipline of a range of moral administrators concerned, far from indifference to children but now with an obsessive love.

[86] Barrett and McIntosh (1982) take issue with what is seen as Donzelot's anti-feminism, in particular questioning the role Donzelot ascribes to women in the strategy of

familializing. In identifying the pathological family, it is argued that Donzelot also establishes

"...the guilt of the wife - it is she who is in alliance with the doctors, collaborating with the experts and technicians. Feminism was at least partially responsible for this...The authoritarian patriarchal family is mourned, and women are blamed for the passing of this organic basis of social order. The text is incipiently anti-feminist, and even at times conjures up for the readers sympathy the 'poor family' and the henpecked husband." (Barrett and McIntosh, 1982: 104)

Barrett and McIntosh (1982: 99) also take issue with the tone of 'The Policing of Families', describing it as full of

"...self-conscious literary pretensions and...intellectual inflation...It is inaccessible and elitist in more than its dense and idiosyncratic vocabulary and syntax."

See further Bennett et al, 1983. For a discussion of Barrett and McIntosh's analysis of Donzelot, see Murphy, 1983.

[87] See Seidler, 1987.

[88] Hirst argues that Donzelot refuses to judge and that this is a virtue. In keeping with much feminist theory, Barrett and McIntosh question (1982: 99) this attempt to be objective and apolitical. Hirst's review sparked controversy and resignation from the board of 'Politics and Power' in a debate which brought out clearly the problematic nature of men's relation to feminism. In reply to Hirst, Bennett et al (1983:83) argue that the article

"...has proved that, for feminists, there is no ready basis for an alliance with socialists who have criticised so-called reductionist marxism...The review damns the extremists of 'lifestyle politics' and appeals, with a

tedious familiarity, to the 'ordinary woman' who only wants the best for her man and children..."

Donzelot's review ends, they argue, "...with a reactionary prescription for the salvation of liberal capitalism." The authors take issue with Donzelot's historical account, an analysis of 'history from the male standpoint.'

[89] Barrett and McIntosh argue, in questioning Donzelot's functionalism, that the acts of choice with which families are formed

"It is, in its concern with individual affection, need and choice, a question that can arise only in a humanist perspective. No anti-humanist theoretical discourse could ever answer it, and to pose it is therefore inappropriate, even opportunist". (1982: 101)

Feminist poststructuralism would, however, question the humanist presuppositions of Barrett and McIntosh's argument: see Weedon, 1987. On the limits of Donzelot's analysis, see further Bennett et al, 1983. Barrett and McIntosh conclude that (1982: 103) "The family is historically deconstructed...but it is not theoretically deconstructed."

[90] For an elaboration of the relation between these structures, see further Connell, 1987: 91-119.

[91] For an excellent historical analysis on the relation between law, state and prostitution in the nineteenth century, Walkowitz, 1980a, 67-147, summarised in 1980b. See also Walkowitz, 1984: Weekes, 1981, 81-96, 239-249. On prostitution and Victorian sexuality generally, Chesney, 1972, Ch.10: Pearsall, 1969, 341-366, Ch.6: On the relations between the police and prostitution, Storch, 1977. On Victorian sexuality generally, Harrison, 1974, 1979: Barker-Benfield, 1976.

On prostitution in the twentieth century, and in particular the Sexual Offences Act 1985 and its implementation, Edwards, 1987: Sexual Offences Act 1985, Standing Committee C, Wed 27 Feb. 1985: Hansard (2nd Reading of the Act) 17 May 1985 Col 658: Home Office Criminal Law Revision Committee, 1982, Part 1 Introduction 1-8: Home Office Criminal Law Revision Committee, 1984, Report on Prostitution in the Street. See further the widely reported trial of Jeffrey Archer, The Times 24/7/87. On the construction of male sexuality in debates around prostitution, note in particular McIntosh, 1978. As McIntosh argues (1978: 54),

"What is seldom questioned is that it is men who must resist or exploit the possibility of using their sexual attractiveness for profit. It is taken for granted on all sides in the moral debate that men 'demand' sex and women 'supply' it."

McIntosh continues (1978: 54), noting that "The cravings of men constitute...the overt, socially recognised problem. Men consciously experience and express sexual needs that go beyond monogamy."

From a feminist perspective, note in particular Millet, 1975: McLeod, 1982, who presents a sociological account of the reality of prostitution as experienced by prostitute women and the clients of prostitutes: Wilson, 1983: Jaget, 1980: Gouldman, 1970, esp. 'The Traffic in Women': Smart, 1985: Atkins and Hoggett, 1984, 77-80. See further, Matthews, 1985.

[92] In relation to transsexualism, see further Chapter 6. Discourses of masculinity and male sexuality informed the 'Cazenova's Charter' arguments surrounding the passing of the Divorce Reform Act 1969. See further Morton Commission Report 1956: Archbishop of Canterbury Group, 1966. With regard to discourse informing debates around the doctrine of matrimonial offence, Dewar, 1988, 169-173: Smart, 1984, 59-67.

[93] See Chapter 2, note 40. In relation to events in Cleveland, Campbell (1988: 153) argues that

"Not in 100 years had patriarchal society been so profoundly and publicly confronted by the scale of men's sexual abuse of children. Male sexuality was the problem but that was almost unsayable."

Campbell makes the point clearly -

"...what the Cleveland Inquiry would not contemplate when it considered the bodies of children was what exactly they revealed about the behaviour of men." (Campbell, 1988: 65)

[94] This is discussed in detail in Chapter 5. See Weekes, 1981, 96-122; Foucault, 1982, 36-51.

CHAPTER 4

THE SOCIOLOGY OF MASCULINITY

[1] This scholarship attempts to construct men and masculinity as the object of study. The work is often interdisciplinary and, in particular, recourse has been made to feminist, gay, psychoanalytic and discourse theories. The wider legal academic audience addressed by the concerns of a political economy of masculinity traverse and could not be confined within disciplinary categories such as Women's Studies, Gender and the Law, Human Rights, Civil Liberties, Criminal and Family Law, Sociology of Law and Jurisprudence. Indeed, a politics of masculinity has been established by feminism as being central to an adequate understanding of, for example, criminology, sociology and political science, as well as under the general rubric of sexual politics.

Contemporary analysis of the construction of masculinity is particularly developed in literary theory, for example, Woodcock, 1984: Todd, 1980: Rieman, 1987: Schwenger, 1984: Sedgwick, 1985: Heath, 1982. More general works which will be referred to in this Chapter and which I would classify under the umbrella 'sociology of masculinity' include: Farrell, 1979: Fasteau, 1974: Pleck and Sawyer, 1974: Reynaud, 1983: Hoch, 1979: Tolson, 1977: Connell, 1987: Zilbergeld, 1980: Kimmell, 1987: Easthope, 1986: Metcalf and Humphries, 1985: Pleck, 1981: Stearns, 1979: Ingham, 1984: Goldberg, 1976: Rowen, 1985: David and Brannon, 1976: Snodgrass, 1977: Hite, 1981: Ehrenreich, 1983: Morgan, 1981: Snodgrass, 1977: Kriegel, 1979: Franklin, 1984: Kaufman, 1987: Hearn, 1987: Jardine and Smith, 1987: Brod, 1987: Brittan, 1989: Brittan and Maynard, 1985 Ch 6: Bowen, 1985. For a review of some of the more recent US literature, Banner, 1989. On masculinity and Victorian literature, Vance, 1985: On National Service and autobiography, Morgan, 1987b. For an excellent historical study of middle

class masculinity in Britain and the US 1800-1940, Mungan and Walvin, 1987. Bowen (1985: 28) writes,

"Masculinity is neither 'normal' nor outside power relations; neither a general history nor the transcription of experience is adequate to its devious exercise of power. To attempt more or less than this social, historical analysis would be an evasion."

This thesis is an attempt at such a historical, social analysis.

[2] To overview feminism and feminist literature is outside the scope of this work - there exists a voluminous literature on the 'origins' and history of feminism. On 'first wave' feminism, see Sarah, E. 'Re-Assessments of 'First Wave' Feminism' (1982), especially the contributions by Sarah, 1982: Caine, 1982: Billington, 1982: Spender, 1982. On 'first wave' feminism and sexuality campaigns, Jeffreys, 1982. On 'second wave' feminism generally, a (highly selective) overview may be found in Delmar, 1986a: 1986b: Mitchell and Oakley, 1986: Mitchell, 1986: Segal, 1987: Eisenstein, 1983. Note on black feminism and ethnocentrism, Bhavnani and Coulson, 1986: Barrett and McIntosh, 1985 and the reply by Ramazanoglu, 1986. Delmar (1986: 9) argues that feminism cannot be pinned down, it's fragmentation

"...bears ample witness to the impossibility of constructing modern feminism as a simple unity in the present or of arriving at a shared feminist definition of feminism."

What marked the 'radical' feminism of the 'second wave' was, I would argue, the development of questions, categories and analyses which challenged the dominant epistemologies and ontologies of social theorising and which in turn entailed a fundamental critique of masculinity.

[3] The sociology of gender has, of course, a long history and broadly conceived might encompass data derived from anthropological evidence and social and economic history. Chapter 1, 29. On origin theories generally, Childes, 1925: Godelier, 1981: Reiter, 1977: Gough, 1971. Also, Burton, 1985, who argues that such origin theories fail to establish facts about the remote past. On the history of sex., generally see Rattray Taylor, 1955: Bullough, 1979: Padgug, 1979: Foucault, 1981. Debating sexuality is not a modern invention, though the form of the debate has changed: see further, Chapter 9. The epistemological framework of secular moralism provides the framework for explanations, if not the beginnings of a social sciences of gender, and constitutes the background to the sociology of masculinity.

[4] The arguments of this Chapter are historically and culturally specific. The wider context of capitalist development is fundamental. As Segal (1987: 72) notes,

"...the truth of our lives in the West is also the truth of a capitalist market, and how it has been able to harness sexuality for its own ends, creating and stimulating new 'needs' and desires."

[5] A point made by Carrigan et al, 1985, 551. On the methodological and epistemological assumptions of this literature, see generally the Carrigan et al article, reprinted in shorter form in Brod, 1987.

[6] For an excellent collection of essays on the relation of men, and the study of masculinity, to feminism see Jardine and Smith, 1987:

"Men's relation to feminism is an impossible one...Women are the subjects of feminism, its initiators, its makers, its force...Men are the objects, part of the analysis, agents of the structure to be transformed..." (Heath, 1987: 1)

Hearn (1987: 21) goes as far as to present 'ground rules' for men's relationship to feminism, stating first that

"Men must not seek to appropriate feminism or feminist theory...Men engaged in research, teaching, learning, theorising and academic discourse about masculinity need to subject their own practice to scrutiny."

[7] Stanley and Wise, 1983: Bowles and Klein, 1983: Klein, 1983: Roberts, 1981: Morgan, 1981: Chapter 1, note 10.

[8] See Chapter 2, note 15. A critique of masculinity is central to feminist criminology. Compare with a traditional account of heterosexual aggression, for example, West, 1987: Ch 7.

[9] For example, Downes, 1966 Ch 7: Cloward, 1959: Matza and Sykes, 1961: Cloward and Ohlin, 1960: Taylor et al, 1973, 133-158 and, in particular, Cohen, 1955.

[10] Miller, 1958: Whyte, 1943: Thrasher, 1927.

[11] Note 8, above. On later subcultural theory, note especially the work of Hall and Jefferson, 1976 : 9 - 74: 'Resistance Through Rituals' constitutes a fascinating study of masculinity in culture, the construction of symbols and interpretations. Cultural studies bring out the exaggeration of sexual difference through the social practices of dress. For a more contemporary analysis, see Rutherford, 1987: Mort, 1987: on subcultures note also the influential work of Cohen, 1972, esp Ch 1.

[12] Theories of father absence continue to inform the politics of child custody: Smart and Sevenhuijsen, 1989. On such theories in 'old' sociology of masculinity, Carrigan et al, 1985: 554-9. From a men's liberation perspective, Fein, 1974.

[13] For an excellent discussion of this point see Morgan, 1981. This is evident in the work of Thrasher (1927): Whyte (1943): Wilmott, 1969. Crucially, such research (eg, Hartley, 1959: Hacker, 1957: Sexton, 1969: Riesman, 1953: Komarovsky, 1964) constituted research about masculinity but without explicitly stating so.

[14] On gender roles generally, Lipman-Blumen, 1984 esp. Ch 1: For a powerful critique of sex role theories, Carrigan et al, 1985: also, below, p 110 - 119. Central to the development of a functionalist theory of sex roles is the work of Parsons, 1956, who presents a psychoanalytic view of the construction of gender integrated within an analysis of the division of labour understood in terms of sex/gender roles. 'Role' is fundamental to Parson's sociology, the analysis of the family taking place in terms of a dichotomy between expressive and instrumental roles. This conception of sex roles is to be found in various accounts of masculinity, for example Pleck and Pleck, 1980: Stearns, 1979.

[15] The article is, I would argue, one of the strongest examples of reflective work within the sociology of masculinity. According to Brittan (1989: 4), clarifying the meaning of 'masculinist',

"Masculinism is the ideology that justifies and naturalizes male domination. As such, it is the ideology of patriarchy. Masculinism takes it for granted that there is a fundamental difference between men and women, it assumes that heterosexuality is normal, it accepts without question the sexual division of labour, and it sanctions the political and dominant role of men in the public and private spheres."

[16] 'Malestream' is used by Hearn, 1987, 35-6 to indicate the masculinist mass of sociological research. This point is particularly brought out in Hearn's work. The study of

masculinity is to take place in connection, and not antithesis to, the mass of men:

"...dominant theorising...produced largely by men is itself part of dominant practices and constructions of men. Critique is thus in contradictory relation to, both part of and not part of, dominant theorising." (Hearn, 1987: 13)

[17] To be clarified below, p 119 - 124.

[18] This might usefully be contrasted, for example, with the work of Charver (1983), a man who in his analysis of feminism and women's liberation, seems unaware of his own positioning as a man within patriarchy or of the objectification of women's concerns his assessment of feminism entails. Feminism becomes, for Charver, an ideology paralleling liberalism, set apart from women's experience and the realities of women's (and men's) lives (Hearn, 1987: 13). According to Jardine (1987: 55)

"What is striking is that most of these Anglo-American men tend only to speak of 'women' or 'feminism' in order to speak about 'something else' - some 'larger issue'".

Jardine notes (1987: 57) that just as the 'bandwagon effect' whereby men jump on the feminist theory bandwagon takes off, the political context becomes more reactionary for women and others every day. In relation to men's movement, see Lamm, 1977.

[19] This is very different from the essentialism underlying Dworkin's assertion (1981: 51) that "...male aggression is rapacious. It spills over not accidentally, but purposefully. There is war. Older men create wars." While Dworkin recognises the importance of cultural contexts (analysing pornography), the interaction between culture and biology is seen as inevitable: "For men, the right to abuse women is elemental,

the first principle, with no beginning unless one is willing to trace the origins back to God and with no end plausibly in sight." A letter to the Guardian by D. Burnham 4/6/85 p 10 I believe captures well an aspect of the relation between masculinity and violence. Writing with regard to accounts of football hooliganism and the events at the Heysel Stadium , it is argued that

"...These young men do not lose control because they drink; the drink in order to lose control, to numb the fear of battle...Football hooligans are not a brutish or manipulated or misunderstood minority; they are normal young men passing through a phase of heavy drinking and fighting; an elongated rite of passage in which manliness can be reached through swaggering and brawling and the oblivion induced by alcohol. The problem will not go away unless we rethink the way that we teach boys to be men and consider anew what maleness is all about."

See Brod, 1987: 51 on masculinity therapy in relation to violence.

[20] Hearn, 1987: 5-16, 177-185.

[21] Brod, 1987; 50 - 52 of men's studies and the reconceptualization of previous data. See further, Hoch, 1979: 118-120.

[22] Particularly clear in Brod's argument for men's studies: 1987: 51.

[23] A central proposition of feminist critiques of men's studies: see the arguments in Bowles and Klein, 1983: Bennett et al, 1981. From men's studies perspectives, see Shiffman, 1987: Kimmell, 1987: Harrison, 1978: Brod, 1987.

[24] Brod takes on these points: 1987: 56-57. The conclusion is that

"As a feminist, I believe men's and women's sex role problems can be resolved only by the empowerment of women that women's studies represents. Such empowerment requires women's leadership on appropriate questions." (Brod, 1987: 59: My emphasis).

It is not clear what is, and is not, an appropriate question however.

[25] The definitional problems pervade the literature. See, for example Hearn 1987, 1-31: Brittan, 1989, 1-19.

[26] For example articles addressing mining (Devaney) Relationships (Metcalf and Morrison), Boyhood (Channer and Channer), Contraception (Weld and Gould), Pornography (Lavender, Rowan) Dance (Wolf) Homosexuality (Crane), Poetry and Therapy (Cooper) all appear in one issue of 'Achilles Heel Issue 6/7). This diversity is reflected in the monographs and articles listed in note 1 which address these aspects of male experience.

[27] Eg, Brittan 1989, 46-77: On heterosexual masculinity, Mishkind et al, 1987: Herek, 1987. Sex/Gender theories will be discussed further below. The concept of 'gender identity' is itself complex and contentious, and remains central to a concept of masculinity as psychological counterpart of the socialised sex role. For an effective critique of gender identity, Connell, 1987, 194-5.

[28] See p 119 - 124. For a broad analysis of lifestyle and culture, Featherstone, 1987. An excellent discussion of feminism and cultural politics, Barrett, 1982.

[29] P 110 - 119. In relation to the double standard and behaviour expectations, Eichler, 1980: Ch 2 esp. 48-60.

[30] For a forceful critique of the concept of androgyny, Eichler, 1980: 69-72. Such notions of a 'third sex' suppose a

physiological basis for homosexuality which has not been proved, though it is important to recognise that in the context of late nineteenth century/early twentieth century sexual political debates androgyny at least can be seen as politically defensive explaining the stability of homosexual desire, as, for example, in the work of Edward Carpenter. In relation to masculinity/femininity scales in sexual character, on the Minnesota Personality Inventory, see Connell, 1987: 171-5: Helmrich and Spence, 1978. In particular, note the influential work of Bem, 1974. Implicit in gender scaling is a notion of masculinity and femininity as homogenous concepts which might be universally measured. See the criticisms of Constantinople, 1973, 1979. For a while, the Bem (1974) scale of androgyny assumed a particular popularity in sociological accounts of masculinity, positing the co-existence within male and female certain traits (eg, instrumental/expressive) which correlate with 'masculine' and 'feminine' behaviour, a balance, an androgynous state, premised as the healthiest position to attain.

[31] The critique of humanist essentialism is central to postmodernism: Moi, 1985: 8: See further Chapter 9. Feminists have argued that women's absence from post-Renaissance history and social theory fundamentally questions the notion of ungendered humanism: Weedon, 1987 forcefully critiques the liberal humanist assumption that subjectivity is a coherent authentic source of the interpretation of the meaning of 'reality', questioning in particular the masculinism of rationality and 'scientific' objectivism.

[32] A point argued by Carrigan et al (1985: 570) in relation to the work of Pleck.

[33] Pleck is also concerned to present a programme of empirical research which contains practical arguments for change in gender politics and it would be wrong to claim that Pleck makes no attempt to theorise power relations. In part, in 'Men's power with women, other men and society' (1980) it is

argued that there exists a connection between men's subordination of women and hierarchies of power between men, a hierarchy related to male access to resources through the division of labour. According to Carrigan et al (1985: 572) Pleck's political stance varies according to his readership, which is indicative not only of academic pragmatics but also of an underlying intellectual incoherence in his approach to masculinity.

[34] See the excellent analysis of biologic influences on masculinity by Treadwell, 1987. To accept the body as a site of practice is not to argue that social definitions of the nature and function of masculinity can be ascribed to a fixed and unchanging natural order guaranteed by the body independent of social factors: see Archer and Lloyd 1982, 211-212: See further Chapters 7 - 9.

[35] Darwin (1874) has an important place within the emerging social sciences of gender, in that his work marks a transition from questions of sex/gender understood in terms of theology/morality to the 'scientific' testing of the behaviour of different species. While the solutions Darwin found involved the evolutionary stages of reproduction, sex and gender are at least presented as something in need of explanation.

[36] Eg, Lorenz, 1967, who argues that all animals are 'status seekers' and innately aggressive, deriving from pre-historic times. Lorenz states that male submissiveness (1967: 109) is abnormal. Such populist 'naked ape' reductionism, related to evolutionary biological arguments, construct 'natural sex' as a limit of social behaviour. Tiger, 1969, resorts to such arguments by way of explaining homosocial bonding. For an excellent critique of this position, Segal, 1987. The explicitly anti-feminist 'The Inevitability of Patriarchy' by Goldberg, 1973, attempts to link physiological research which is taken as 'proving' biological differences to existing social inequalities. It is hormones, for example, which give men the 'aggressive advantage', resulting in the sexual division of

labour and a patriarchal power structure. In this process Goldberg constructs average differences as categorical differences. The social structuring of human interaction is negated in preference of a context-free individual disposition approach. The actual mechanisms of the biological determination remain vague as the Darwinian notion of 'survival of the fittest' is taken to operate at both individual and kin levels. Note also the (influential) work of E.O. Wilson, 1975; Dawkins, 1976, who argues that all human behaviour is governed by the impulse to see one's own genes survive in children. For an anthropological alternative view, Kessler and McKenna, 1978.

[37] On eugenic arguments, see Weekes, 1985, 76, 242; Weekes, 1981, Ch. 7 'The Population Question'.

[38] Segal (1987: 70) argues that radical feminism may be seen to have had a 'disastrous' effect on a feminist analysis of heterosexuality:

"It was disastrous in my view because it encouraged 'all women' to identify themselves as the victims of 'all men.'"

Rich (1980: 191) for example argues that for women heterosexuality may not be a preference but "composed, managed, organized, propagandised and maintained by force." Such an approach fails to recognise the differentiation in female experiences, results in totalizing strategies resting on essentialist concepts of femininity and, I have argued above, ascribes to 'patriarchy' and masculinity an inescapable omnipotence.

[39] Eg, as seen in Chapter 2, p 46 - 50 in relation to Mackinnon. A critique of essentialism recurs in the following Chapters.

[40] I am here attempting to locate the varying constitution of sexual difference into different groups, paradigms and

methodologies. These appeals to science/nature, psychoanalysis and social and historical accounts of its meaning have been mobilised by conflicting interest groups and social interests in legal discourse.

[41] The involvement of the medical profession, and in particular various doctors who became, most notably in the latter part of the nineteenth century, interested in sex and gender has been central to the emerging problematic of sexuality in the emergence of the semi-medical, quasi-scientific, discipline of 'sexology'. The knowledge base of sexology was built primarily around medical and medical-legal case histories for the ensuing investigations into human sexuality. Thus, law can be seen as part of the claim to truth of the entire sexological enterprise; law, the determination of deviancy, abnormality, of that which was in need of investigation. Weekes (1985) provides a thorough and critical account of sexology as practice, its methodology and scientific credentials and contemporary implications: note especially the work of Krafft-Ebbing (1886) and the later (on one level more sensitive and humane) Havelock Ellis's 'Studies in the Psychology of Sex' (1897). For a feminist critique of Ellis, see Coveney et al, 1984. Note the centrality of the investigation of homosexuality in sexological literature: see further Chapter 5. Sexological work did not necessarily lead to conservative or reactionary politics: eg, the work of Karl Ulrichs and Magnus Hirschfeld, committed to reform of laws and to changing attitudes to sexuality.

[42] See Freud, 1981, which contains the seminal 'Three Essays on the Theory of Sexuality' and other selected works on sexuality. The importance of the questions asked by Freud are noted by Carrigan et al, 1985, 596:

"The psychodynamics of masculinity...are not to be seen as a separate issue from the social relations that invest and construct masculinity. An effective analysis will work at both levels; and an effective political practice must

attempt to do so."

[43] For an excellent and readable introduction to psychoanalysis and the cultural acquisition of sexuality and subjectivity, Burniston et al, 1978. On feminism and the developments of psychoanalysis, Sayers, 1986.

[44] It is my intention here simply to highlight the relevance of Freudian concepts for a social analysis of masculinity. I cannot stress enough that the following discussion of psychoanalysis is limited to my immediate concerns.

[45] Psychoanalysis takes the life history as the object of analysis rather than the meta-theoretical species of social Darwinism. Classic psychoanalysis at least understands gender formation as an effect of encounters with power. As Foucault argues (1977: 2-3),

"It is as though discourse, far from being a transparent, neutral element allowing us to disarm sexuality and to pacify politics, were one of those privileged areas in which they exercised some of their more awesome powers. In appearance, discourse may well be of little account, but the prohibitions surrounding it soon reveal its links with desire and power. This should not be very surprising, for psychoanalysis has already shown us that discourse is not merely the medium which manifests - or disassembles - desire: it is also the object of desire. Similarly, historians have constantly impressed upon us that discourse is no mere verbalisation of conflicts and systems of domination, but that it is the very object of man's conflicts."

[46] On the relation between repression and neuroses, Sayers, 1986: 120-38. On non-psychoanalytic psychology generally, see also Sayers, 1986: Ch 1-3 and, in particular, the critique of biological determinism in Chapter 1. Freud argues (1930) that as civilisation is built on a renunciation of instinct, the

dynamic of civilisation is a repression of libidinal energies which has an effect in psycho-sexual development through activation of such repressions. Neurosis is thus, like 'alienation' for Marx, material and social, and not simply a metaphysical state.

[47] On the super-ego, note also the construction of the clinical case history in the work of Jung constitutes an alternative account of psycho-sexual development Jung, 1928, 1953, argues that a strong, authoritative masculine persona may be based on weakness and repression of vulnerability. It is the complex of these repressions which constitute, for Freud, the unconscious and the primary and secondary processes of the Id and the Ego: that is, an amalgam of unconscious impulses which cannot be directly expressed in consciousness.

[48] Marcuse, 1955, 1958, 1964, 1972, 1979.

[49] A key moment in psychoanalytic theories of development, a process Freud believed to be structured differently for boys and girls: Freud, 1981, 45 - 155 for elaboration of this process. The concept theorises patterns of emotion in adulthood as resolutions of conflicts in the child's development whereby different childhood situations produce variations in adult emotional life. Note the vexed question of whether the complex is universal, transhistorical and transcultural in anthropological and comparative studies: eg, Parsons (1964) study of a non-Oedipal nuclear complex in Naples of a family pattern where the mother is the central figure and the father has little domestic authority. Note also the centrality of the boy/father relationship based on fear, sexual desire and castration anxiety. Repressing sexual feelings towards the mother, the super-ego becomes an internalised moral agency. On one reading, sex, castration and obedience to the laws of the father are entwined. Law, like sex, is a matter of repression, violence and desire. Generally, problematic father/son relationships are endemic in culture. Gay theorists who have addressed cross-sex relationships have come to very different

conclusions: eg D'Emilio, 1984: Kinsman, 1987: Weekes, 1977: Kleinberg, 1987: Edwards, 1988.

[50] In particular, note Mitchell, 1975: Lacan, 1977, 1979: Mitchell and Rose, 1982. For an excellent introduction to psychoanalysis and feminism, Sayers, 1986, 167-182: in particular on post-Freudian psychoanalysis, Sayers, 1986, Ch 4. On Lacan, Sayers, 1986: Ch 7. On Object-Relations theory, Sayers, 1986, Ch 6. For a readable overview of psychoanalysis and feminism, in particular with regard to French Feminist Theory, Weedon, 1987, 87-92 and the excellent collection of French Feminist Theories by Marks and de Courtivron, 1981. Also, Kristeva, 1974b, 1974c, 1986: Irigaray, 1977, 1985: Cixous, 1975, 1976. This work, and the concept of 'phallogocentric culture' is beginning to be integrated into legal scholarship, eg Smart, 1989, 27. On the relation between sexual politics and psychoanalysis Coward, 1982: Coward et al, 1982. A readable introduction is to be found in Weekes, 1986, reviewed by Seidler, 1988. While Mitchell, 1975, criticises Freud's essentialism and naturalist assumptions, his views are understood as part of a (phallogocentric) culture within which they make sense. If the culture is changed, so will the phallogocentrism/centrality of the penis to accounts of the development of sexuality. Patriarchal authority, demanding a denial of polymorphous sexuality, is thus located as embedded in the unconscious within this process. Mitchell's analysis integrates a feminist analysis of male power within a modified, Freudian paradigm. For criticism, see Connell, 1987, 202 who argues that such attempts to construe Lacanian psychoanalysis in terms of Althusserian theories of ideology are, in the end, ahistorical and rest upon pre-determined characteristics. In relation to feminist analyses of the politics of childcare, note in particular Chodorow, 1978 (a synthesis of psychoanalysis and sociology in an analysis of why men do not mother', and Dinnerstein, 1976.

[51] Weedon, 1987: 74 - 106.

[52] This is, of course, one particular interpretation of psychoanalysis. There is no 'one' school of psychoanalysis just as, I have argued, there is no 'one' feminism. Both may be said to share certain constituent assumptions however.

[53] Freud, 1981: 52 - 60, 142 - 143.

[54] In relation to law Foucault argues (1981: 17-49)

"At the level of discourses and their domains...there was a steady proliferation of discourses concerned with sex - specific discourses, different from one another both by their form and by their object; a discursive ferment that gathered momentum from the eighteenth century onward...the multiplication of discourses concerning sex in the field of exercise of power itself; an institutional incitement to speak about it, and to do more and more, a determination on the part of the agencies of power to hear it spoken about, and to cause it to speak through explicit articulation and endlessly accumulated detail." (Foucault, 1981: 18)

On the secondary significance of formal legal sanctions within the new technology of power identified by Foucault,

"The forbidding of certain words, the decency of expressions, all the censorings of vocabulary, might well have being only secondary devices compared to that great subjugation: ways of rendering it morally acceptable and technically useful." (Foucault, 1981: 21)

[55] See note 48, above.

[56] Reich, 1972. See further, Grossman, 1984: Mitchell, 1975, 137-52: Weekes, 1985, 160-5.

[57] Altman, 1971. On Meili, see further Chapter 5.

[58] For an excellent account psychoanalytic perspectives of 'Sexuality as the Mainstay of Identity', Person, 1980. Person (1980: 626) concludes that

"...relative gender fragility in men fosters excessive reliance on sexuality. Men appear to engage more in sex for sex's sake (sex shorn of interpersonal meaning) than women, yet sex carries many hidden symbolic valances for men. One can conclude that it is just as meaningful to talk about male hypersexuality as it is to talk about female hyposexuality."

For an interesting analysis of the sexual diary and identity, Coxon, 1988. Generally, Weekes, 1985, 185-209. On child care and male identity, note in particular Chodorow's 'The Reproduction of Mothering' (1978) in which it is argued that the pre-Oedipal attachment in boys creates different masculinities. Chodorow contends that masculinity is a problem for boys in a way that femininity is not for girls. To acquire a masculine identity it is argued that boys must reject former pre-Oedipal attachments and dependencies, and repress those qualities taken to be part of the 'feminine' self in the (patriarchal) social world. Childcare is crucial in this argument, for the male desire for merger with the first object to desire connects men with mothers and not the (absent) father. Thus, it is argued that it is men who emerge from the pre-Oedipal attachments with the fragile masculine identity and inability to meet women's emotional needs:

"...the very fact of being mothered by a woman generates in men conflicts over masculinity, a psychology of male dominance and a need to be superior to women."

It is boys who develop as 'not females' (p 13). See further Gilligan, 1982. Though from a very different perspective, this

is echoed in Mackinnon's (1983: 643) assertion that criminal sanctioning of acts of violence

"...punishes men for expressing the images of masculinity **that mean their identity**, for which they are otherwise trained, elevated, venerated and paid. They must be stopped." (My emphasis).

[59] Freud, 1981, 20 - 22 on the development of the unconscious. Generally, see 'Three Essays on the Theory of Sexuality': Note Weekes, 1985, 127-156 for an excellent discussion of the concept of the unconscious in relation to the construction of sexuality.

[60] See further Chapter 5. Pleck has argued that

"Men need to deal with the sexual politics of their relationships with each other if they are to deal fully with the sexual politics of their relationships with women." (Pleck, 1980: 427).

For an excellent discussion of homophobia generally, see Goetz, 1987:

"...to assume that counter-cultural groups or 'progressive' groups are free of homophobia is a major step in the perpetuation of heterosexism. We can 'choose' to be 'new men'. We have the leisure and the privilege to be able to choose to be changing men."

See also T. Edwards, 1988.

[61] Eg, Ehrenzweig, 1971.

[62] Sayers, 1986: Person, 1980. The psychoanalytic method is premised on a hierarchical power relationship. Psychoanalysis is an empirical (but not experimental - it makes no appeal to public criteria of relevance) method for investigating

unconscious mental life. It may be argued that the Oedipus complex is simply wrong and that gender identity is formed much earlier: Eg, Archer and Lloyd, 1982, 92: Ullian, 1976. See the 'cognitive development' model of Kohlberg, 1966: Also, Money et al, 1957: 333-36: Freud, 1905.

[63] Feminist criticisms of Freud are far reaching, stressing in particular the sexist and phallocentric assumptions of the theory: see Eichenbaum and Orbach, 1982. Breast and vagina envy is hinted at in the accounts of male sexual fantasies presented by Friday, 1983. Note especially the subsequent work of the psychoanalyst Melanie Klein, 1930, 1945, 1946, 1952 and the significance of the role of the mother in contrast to Freud's valorisation of the father. This is echoed in the analysis of Eichenbaum and Orbach (1982: 32) and Dinnerstein, 1976. The process of the resolution of the Oedipus Complex is contentious and to locate the child as passive receiver of structures of socialisation is environmentally reductionist. Feminist appropriations of psychoanalysis replicate these weaknesses and the methodology of psychoanalysis lacks any theory of social structure, according to Barrett, 1980.

[64] Davidson and Gordon, 1979: Foucault, 1981: Weekes, 1982: On the cultural construction of sexuality, see the collection of essays in Caplan, 1987. Especially, on gender identity, Weekes, 1987: On Sexology and Heterosexuality, Jackson, 1987: On Masculinity and rationality, Seidler, 1987 and for a fascinating study on gender iconography in relation to the vagina, Ardener, 1987. On the 'sex gender' system, Rubin, 1975, who develops an anthropological view on systems of relationships within which women are subordinated. From a theoretical perspective of discourse theory in relation to feminism. Cousins, 1978. For an excellent and wide-ranging discussion of sex differences, covering the biological base of differences, the importance of statistics eg on death, health, life expectations, social security, employment crime and political participation, see Reid and Wormald, 1982: Also,

Gerson and Peiss, 1985, a review essay on social and behavioural constructions of female sexuality: Also, Miller and Fowlkes, 1980. Maccoby and Jacklin, 1975. Generally, the genre of sex differences is more concerned with difference and its explanations, though the main finding continues to be the similarity between male and female.

[65] Such work has been developed in the context of 1980's sexual politics, and may be placed in context with general shifts in definitions of 'the political'. See, for example, the excellent collection of essays in Snitow et al, 1984: Vance, 1984: Vance (Ed.), 1984; Cartledge and Ryan, 1983. Also, Coward, 1983: Segal, 1987: Dobois and Gordon, 1983: Coward, 1982: Eisenstein, 1984 esp pp 96-105 on masculinity. Such work is concerned to reject essentialist arguments. Segal (1987: 186) argues that "...our biological states are always transformed by the social practices surrounding them, and experienced through the social meanings attached to them."

[66] Brittan, 1989: 46-77: Brod, 1987a.

[67] The masculinity of boys, adolescents and older men does of course vary. Unemployment, for example, will be experienced differently by a sixty-year old man (who may look upon it as early retirement), than by a forty year-old father with dependants and by a seventeen-year old who has no experience of employment and who may be living with his parents. Masculinity negotiates the meaning to be given to such bodily changes at the subjective level, but within social and economic constraints. On the relation between boys and sexism see Hargreaves, 1976: Lester, 1974: Lees, 1983: Wood, 1982: Willis, 1977. Wood (1982) identifies an acute objectification of women by boys underlied by a process whereby boys and men look for the most obvious and available explanations and come up with a rationale for sexism which corresponds with the subjective realities of everyday male experiences. On 'Boys and Sexism' in education and the juvenile justice system, Hudson, 1988: Bowel, 1985. According to Askew and Ross (1988: 67)

"Many of the behavioural problems women teachers face from boys in the classroom are directly related to issues of sexual harassment. Women have difficulty in asserting authority because of not being taken seriously as a woman."

On sex differences between boys and girls, Maccoby and Jacklin, 1974, 239 conclude that

"...girls and women are less often the objects as well as the agents of aggressive action...Males aggress primarily against each other, and seldom against females."

See also Gilligan, 1982: Best et al, 1977, in which five to eight year olds identified women as emotional and weak: Kuhn et al, 1978, who identify gender stereotyping in two and three year olds and Mischel, 1970: Smith and Lloyd, 1978: Lewis, 1975: Fagot, 1977: Rhiengold and Cook, 1975: Fling and Manosevitz, 1972: Lamb, 1977: Barkley et al, 1977. Generally, see the compendium on sex differences research compiled by Maccoby and Jacklin, 1975 in which it is concluded that block differences between women and men appeared consistently in studies of traits such as verbal ability, aggressiveness and spatial and visual ability. Other traits however found no such differences.

[68] The notion that while hegemonic masculinity (see Chapter 5: Chapter 9) retains a conceptual usefulness, it is more accurate and productive to discuss masculinity in the plural. The fracturing of masculinity in recent works on masculinity as a homogenous entity is a common theme. Brittan (1989: 1) commences his monograph on masculinity:

"My aim in this book is to challenge this assumption [that masculinity is timeless and universal]. My position is that we cannot talk of masculinity, only masculinities. This is not to claim that masculinity is so variable that we cannot identify it as a topic..."

See also Brod, 1987a: Connell, 1987. This is particularly evident when considering differences of race/ethnicity. See Sinha, 1987: Gary, 1987: Cazenave and Leon, 1987: Mercer and Julien, 1988: Franklin, 1987: Franklin, 1984, 207 argues that traits of masculinity associated with white men (eg, inarticulate, unemotional) are often very different to those expressed by black men. The debate is similar to that within feminism as to whether the concept 'woman' is able to carry the weight of meanings ascribed to it.

[69] For example, in relation to rape, Rutherford (1986: 13) argues that rape

"...is about male sexuality and the cultural values it has produced. Men remain very quiet about their sexuality because it is an area of anxiety. Get behind any sexual bravado and there will be a mire of uncertainty, confusion and fears. Men are brought up to deny these things..."

This discussion takes place in the context of a general debate on 'Page Three' of tabloid newspapers such as 'The Sun'.

[70] White, 1985: Vittachi, 1985. White quotes Popplestone:

""When I take my knitting out on a train, I know I will feel some shame initially. But there are ways of dealing with it. I can envisage the man opposite in conversation and he will eventually talk about it. The feelings of shame go eventually." When Mae West felt like a new man she may not have had Mr Popplestone in mind, but she could do a lot worse."

[71] Eg, Smart, 1989a: Smart and Sevenhuijsen, 1989: Rutherford, 1988: Chapman, 1988.

[72] Wernick, 1987, specifically addresses images of masculinity in advertising. Also, see Mort, 1988: Chapman, 1988: Chapman and Rutherford, 1988.

[73] In the cinema, the construction of masculinity in the work of a number of directors (eg of Martin Scorsese (Wood 1987), in relation to postmodernism, David Lynch (Denzin, 1988)) and actors (on Cary Grant, Brittan, 1985)) has produced interesting work on the tensions within forms of masculinity. Note also Jordan, 1983. Generally, on the influence of Lacan on film theory, Merck, 1987: On modernist discourse, Allen, 1987 and on postmodernism and gender in film theory, Collins, 1987. For an excellent analysis of tensions between male heterosexuality and homosexuality in British film, Finch and Kwietniowski, 1988. On masculinity and the cinema generally, Green, 1987. On feminism, postmodernism and film theory, Creed, 1987.

[74] On the nude male, see Walters, 1978. Note Vance, 1985 on 'Christian manliness' and religious thought. Schwendigger (1984) in his book 'Phallic Critiques' presents an interesting overview of masculinity in American literature. cf Millet's (1970) study of Genet, Lawrence, Mailer and Miller.

[75] For example, in relation to women and the cinema, Kuhn, 1982.

[76] For an excellent overview of feminist theory in relation to pornography, Eckersley, 1987: Also, Mackinnon, 1987, Ch 13. For a traditional doctrinal analysis of obscenity law, Robertson, 1979. On masculinity and pornography, Moye, 1985.

[77] Brittan, 1989, 25-36: Hearn, 1987, 16-31: Carrigan et al, 1985. The idea of crisis is assuming the status of an organising concept within the new men's studies. Connell's (1987) formulation of hegemonic masculinity (Chapter 5 below) might appear to contradict the notion of crisis, though Connell prefers to speak of 'crisis tendencies'. Brittan, 1989, 186, distinguishes between 'general and sub-crises':

"...hegemonic masculinity is able to defuse crisis tendencies in the gender order by using counter and oppositional discourse for its own purposes. This is not

to say that it defuses all crises. There are local crises which have disturbing consequences for various groups of men..." (Brittan, 1989, 187)

On progressivism and American legal reforms see Dubbert, 1980.

[78] Hearn, 1987: 10 argues that while international relations may be a genderless language (though political rhetoric itself is far from ungendered), global changes in the world order have implications for the production of masculinities. Tolson (1977: 113) identifies the experiences of the two world wars and post imperialism as part of a general 'masculine crisis'. Hearn (1987: 16-9) states that, faced with the human sacrifices of two world wars, for considerable sections of British society the experience of war was to shatter the remnants of an imperial masculinist prestige. Post-war, the experience of National Service has had deep resonances for many men: Morgan, 1987. Alongside the equation of masculinity with violence, weapons and jingoistic nationalism, there is also a personal discourse of masculinity which speaks of emotion, vulnerability, and a refusal to accept without question forms of masculinity which are personally and socially destructive. According to Poole, 1985, 78 (quoted in Segal, 1987, 162)

"War is not so much the construction of a new and virulent form of masculinity, as the recovery for masculine identity of that relational form of identity constructed within the family. It is, in this sense, the return of the feminine."

[79] See further Morgan, 1987: On male violence from men's studies perspective, Journard, 1974: Kaufman, 1987. On nuclear warfare, Easlea, 1987: 1983: 1981. Feminist engagement with international politics of warfare and the nuclear state have made masculinity and warfare inseparable: note Segal, 1987.

[80] Cockburn, 1983: Gorz, 1982: Gray, 1987. Also the earlier work of Tolson, 1977: Willis, 1977. See 'Mending the Broken

Heart of Socialism' in Chapman and Rutherford, 1988, 249: Cockburn, 1988.

[81] Cockburn (1988: 328-9) argues that feminists

"...might only agree to join with those men on the left so long as those men themselves are committed simultaneously to meeting and working with each other on issues concerning their own masculinity and the quality of their relationships with women and each other. More - on what those perceptions mean for a socialist agenda."

[82] For an excellent discussion of heterosexual relations from a feminist perspective, Holloway, 1983.

[83] According to Rowen (1987: 19), by 1973 conferences were held in London under the auspices of Men Against Sexism, and similar conferences occurred in the cities of the UK in the following years. On the US, Bliss, 1986: Weisberg, 1984. The acceptance of the subject (to a degree) within the academy is testified to not only by the presence of men's studies courses, special issues on masculinity in academic journals and bibliographic sourcebooks on men (eg Hearn and Ford, 1988) but also by numerous day courses, study units and taught units within formal education programmes. According to Carrigan et al (1985: 568), there existed at least 38 English language non-fiction books published wholly mainly on the subject between 1971 to 1980. This number, I would estimate, has at least doubled since.

[84] For a time magazines such as 'Achilles Heel' constituted the only public forum for discussion about masculinity. However, masculinity is now a subject which spreads across the newsstand, from 'Cosmopolitan' to 'The Guardian', 'Gentleman's Quarterly' and, indeed, 'Penthouse' and 'Playboy' which have for decades now identified, if not analysed, the tensions of contemporary masculinity: see the excellent analysis of such

magazines by Ehrenreich, 1983. The 'Men's Anti-Sexist Newsletter', according to its editorial statement,

"...exists to provide a means of exchange of news, information, ideas and feelings, for men who are challenging sexism and patriarchy, and for people who wish to find new and challenging roles for men in society. This magazine is open to contributions from anyone and we are eager to print a wide variety of opinions."

In an effort to do just this the same issue printed the following from the Lesbian and Gay Youth Magazine, which reviewed the previous issue as,

"...one of the most self-indulgent things I've ever read. Also one of the most sexist, heterosexist, and offensive...what funtime we're all having being jolly sensitive wallflowers, hounded by society...[it] seems like a mutual and exclusive men's club...what they are dishing out is a sugar coated brand of misogyny...straight, middle class 'sensitive, wooly liberals...don't take it too seriously."

Each edition of 'MAN' is written and published in different cities and by different groups of men, collectively produced, distributed and financed. Whether such magazines, and the groups of men who purchase them and read them, have had a significant effect on the gender order beyond a specific milieu is open to doubt, but their presence, alongside the academic shift to the study of masculinity outlined above, testifies to the social impact of feminism and to uncertainties within masculinity, or at least the masculinities of such men as read 'MAN' and 'Achilles Heel'. The latter grew from an informal network of men's groups and occasional men's conferences in the 1970's. The first issue appeared in 1978, its sales (estimated in Issue 6) to be three to four thousand per issue, a readership 'probably nearer' 15, 000. Subsequent issues of the

magazine covered specific topics: Men and work, sexuality and violence.

[85] As Segal (1987: 46) states,

"The prescription that women should suppress heterosexual desire to further the cause of feminism is one I believe to be strategically and morally wrong."

This may be contrasted with Mackinnon's statement that

"Radical feminism is feminism. Radical feminism - after this feminism unmodified - is methodologically post-marxist." (1983: 639).

See Chapter 2, p 46 - 50. Eisenstein (1984: 105-145) argues that a woman-centred analysis has brought radical feminism to a practical and theoretical impasse, arguing that while the analyses of Rich (1980) and Chodorow (1978) contributed to an analysis of the social construction of gender initiated by Millet (1970) and Firestone (1970), later developments, in particular the work of Daly (1973, 1978) and Griffin (1981) by implicitly attributing 'female superiority' to psychological causes, have renounced rationality as male and ironically characterised women as innocent and passive victims of omnipotent patriarchy.

[86] 'Holy Virility' has many strengths. It is, however, marked by what has been termed male 'masochismo', and aspects of radical feminist critiques of male sexuality are carried through:

"...what pleasure can he really feel with a weapon between his legs?...Man does not allow his sexuality to develop fully, he stifles it by confining it to his penis. He projects it onto women by making her into a sexual creature...he represents it as self-control, struggle and a means of asserting his power." (1983: 42-44)

[87] All are constructed as social pressures of 'being a man'. For example, on taking the sexual lead, Jackson, 1987. This theme runs throughout the literature, and will be taken up in more detail in Chapters 7 - 8. See, for example Zilbergeld, 1980, esp. 273 - 333: Hite, 1981. Zilbergeld, 1980, 273, quotes 'Sam':

"A man without the erection sees himself as being less than a man, as an unworthy, as a fraud. It is as if the flag of his manhood must remain furled for lack of a mast. Thus the terror, the shame, the withdrawal spurred by the dysfunction far exceed the reaction to almost any other medical condition..."

See further Carlton, 1980: Tiefler, 1987: Stekel, 1971. For an overview of contraceptive techniques for males, see Bremner and de Kresher, 1975.

[88] Stearns, 1979.

[89] For example, on anti-sexism and work, Five Cram, 1987. Gould, 1974, relates masculinity and work as a matter of 'Measuring Masculinity by the size of a paycheck': On middle-age and work, Miller, 1974: On the male career role, Ochberg, 1987. Hearn, 1987, Connell, 1987 and Tolson, 1977 make masculinity and employment central to analyses of gender and power. Professionalism, Connell (1987, 181) argues,

"...has been constructed historically as a form of masculinity: emotionally flat, centred on a specialist skill, insistent on professional esteem and technically based dominance over other workers, and requiring for its highest (specialist) development the complete freedom from childcare and domestic work provided by having wives and maids to do it."

Connell makes the crucial point: the masculine character of professionalism has been supported by the simplest possible

mechanism - the exclusion of women. Women's long struggle to get even basic training, for example in the legal profession (Sachs and Wilson, 1978), supports this point. According to Five Cram (1987, 34)

"If men looked objectively at the unnecessary sacrifices they make on the altar of work, antisexism would suddenly seem relevant to many more men than the few involved at present."

[90] For an interesting, and person, account of male friendship, Miller, 1983. In relation to homosexuality, Kinsman, 1987.

[91] There are clear links here with the political perspective of Lash, 1977 (See Chapter 1, p 16 - 20) and the notion of the family as 'haven in a heartless world': also, Mount, 1983.

[92] Carrigan et al, 1985, make this point forcefully.

[93] As I have discussed in Chapter 1, p 23 - 6.

[94] For example, in relation to abortion see the construction of 'men's rights' in C v S [1987] 1 AER 1230, (1987) 2 WLR 1108: Paton v British Pregnancy Advisory Service Trustees (1979) 1 QB 276, [1978] 2 AER 987. See further discussion in Smart, 1989, 90-114: Smart and Sevenhuijsen, 1989: Brophy, 1989: Smart, 1989a.

[95] In the application of consciousness raising to men, with groups of men meeting regularly over period of months to discuss their emotions, in the 1970's the men's movement found a practice in which men began to work on their own sexist attitudes and behaviour: see Connell, 1987: 234. Consciousness Raising constituted a theoretical project in its own right, in that it was concerned with repairing the damage done to men by patriarchy. Certain of the limitations to consciousness raising as a methodology by itself which feminists have noted apply

with perhaps even more force to its use by men. That is, the utilisation of a particular technique of empowerment on the part of those who already are in positions of power is profoundly suspect.

[96] Eg, Goodwin, 1987: Pleck, 1987: Jump and Hass, 1987: Biller, 1971: Richards, 1982: Parke, 1979: Rotundo, 1987: Stoltenberg, 1977: Hearn, 1987, 151 - 159: Smart, 1989a: Smart and Sevenhuijsen, 1989.

CHAPTER 5

LAW, HOMOSEXUALITY AND HEGEMONIC MASCULINITY

[1] Ecclesiastical regulation of sexuality will be considered further in Chapters 7 - 8.

[2] See, for example, s 28 Local Government Act 1988: Hansard, 15th Dec 1987, Col. 987-1026: Standing Committee A, 8th Dec. 1987.

[3] Generally, see Weekes, 1977: Hocquenghem, 1978: Plummer, 1975, 1981: West, 1977: Bullough, 1977: Bray, 1982: Altman, 1983. On legal-medical aspects of homosexuality, Mort, 1987.

[4] See the discussion of sex roles, Chapter 4, p 111 - 113. Others (eg Whitam, 1977: Trumbach, 1977) have contested the notion that sexual orientation as not in any respects pre-given.

[5] On the social construction of lesbianism, Kitzinger, 1984.

[6] In particular, male homosexuality is often presented as a threat to children, notably in media reports of homosexual offences. See the coverage of the Brighton Boy sex case: 'A Town Without Innocence', Daily Express, 22 August 1983: 'Gays in Revenge Terror', The Sun, 20 August 1983.

[7] Honore, 1978: 89.

[8] According to the British Government, a reason for the absence of legislation on lesbianism is that "...the question of homosexual acts by females has never - so far as the government of the United Kingdom are aware - been generally considered to raise social problems of the kind raised by

masculine homosexuality". Quoted in Gay News, No. 144 June 1-14, 1978 p 3, and Weekes, 1981, 118.

[9] Honore (1978: 100) states that "There is nothing to show that homosexual acts between women have ever been regarded as crimes at common law...[lesbian acts] are criminal in England only if performed by one woman on another without her consent or in a case in which the other girl or woman is not legally capable of consenting." But see Rich, 1984.

[10] The survey undertaken by Rights of Women (1986) found a significant failure of women to obtain care and control of their child in circumstances where, were they heterosexual, it would be surprising for them not to and it is clear that, for male and female, when a parent is homosexual then conduct is a material factor in ascertaining the welfare of the child: s 1 Guardianship of Minors Act 1971.

[11] See Weekes, 1985, Ch 4 for an excellent overview of sexology. Also, Chapter 4, note 41: Ellis, 1946: Krafft-Ebbing, 1931: Forel, 1908:

[12] This depiction of homosexuality is in marked contrast with Greek society: see Dover, 1978. Crucially, as in Plummer's interactionist account (1975), it is the social meanings which are given to behaviours which are significant. See further, Hocquenghem, 1975: Bray, 1982: Altman, 1983: Plummer, 1981: Marshall, 1981: Fernbach, 1981.

[13] See the excellent (and humorous) study of heterosexuality, Hanscombe and Humphries, 1987, which makes some of the connections between the two clear through ridiculing homophobic attitudes. Heterosexual and homosexual relationships both cover a range of forms of relationships, the main pattern being the genitally organised couple, but with a similar range of variations, for example, transvestism, masochism, sadism, dominant submission etc. Homosexual masculinity, as a form of sexuality, tends to cover a similar range of relationships as

heterosexuality: on bisexuality and male fantasy, note Friday, 1983: Hite, 1981.

[14] Speaking specifically in relation to the body, Connell (1983: 21) argues that homosexuality must not be equated with a feminization of the body or body image, but rather that like heterosexual masculinity, homosexuality involves a particular relationship to one's body, and not a distinct form of body itself. What this relationship is, however, is contingent and open to interpretation. On repression see further, Chapter 4 p 110 - 119.

[15] Forcefully argued from a psychoanalytic perspective by Person, 1980. It is possible that the power of the subjective sense of gender identity is all the more acute in a society where other identity-stabilizing features such as class, kinship and geographical location are not there to anchor personality: Chapter 4, note 58.

[16] Evident in accounts of 'coming out': eg, see the subversion of this by Crawford, 1987: Hanscombe and Humphries, 1987.

[17] This point is, I believe, incontestable. The range of homosexual derogations is considerable and do not need to be repeated here. See Broker's (1976) aptly titled - 'I May Be a Queer, But at Least I'm a Man: Male Hegemony and Ascribed versus Achieved Gender.'

[18] This concept is frequently used in feminist literature addressing the power dynamics of male bonding. I am using the concept in the sense developed by Lipman-Blumen, 1976. See also Rogers, 1988.

[19] For example, according to Tiger (1969) it is perfectly natural that men should need a 'boy's night out'. While Tiger's argument is based on essentialist presuppositions, he at least

addresses the dynamics of male homosociality. On homophobia and homosociality, see Goetz, 1987.

[20] What erotic interaction means is open to question. Easthope (1988) argues that it is not confined to genital contact, but might encompass a range of gestures of camaraderie.

[21] Lipman-Blumen (1976) locates male homosociality as fundamental to the oppression of women. In the context of higher education and research processes, the concept figures also in the work of Morgan, 1981; Thornton, 1989. See further the Postscript to this thesis.

[22] It is important to not overstate the concept of homosociality: Lipman-Blumen is not contending that all male relationships are oppressive for women per se. On developing male friendships, Miller, 1988. From a gay liberation perspective, Kinsman, 1987. On homosociality and humour in male bonding, Lyman, 1987.

[23] But see the study of married homosexual men conducted by Ross, 1983.

[24] This point is most important: male bonding functions to exclude women. In relation to the academy, see Thornton, 1989; Ramazanoglu, 1987; Morgan, 1981. Also Brake (1980: 151). According to Stoltenberg (1977) while under patriarchy the cultural norm of human identity is (by definition) masculinity, this cultural norm exists in male power, prestige and privilege over and against the gender class women. 'Male Bonding' is thus an institutionalised learned behaviour where men recognise and reinforce one another's bona fide membership of the male gender class. Male bonding, it is argued, is thus the way in which men learn from each other they they are entitled under patriarchy to power within the culture. If male bonding is how men get power and male bonding is how it is kept, it is perhaps logical that men should enforce a taboo

against unbonding. Stoltenberg argues that heterosexuality, homosexuality and bisexuality are ultimately

"...bad words. They are words of a masculinist culture. They are the vocabulary of male domination. They come from a language devised by men in order to perpetuate a system in which men are conditioned to be the pursuer, the aggressor, the possessor, and the fucker." (Stoltenberg, 1977: 36)

[25] Rogers (1985) study is one of the best studies of male homosociality: on education, the City, the Church and other 'very important men's clubs', Rogers, 1985: 129-257.

[26] Hey, 1985: Rogers, 1985, 3-32.

[27] This is brought out in Easthope's (1988) study of masculinity and culture: Rogers, 1985: 32-51: Kidd, 1987.

[28] Eg, Campbell, 1983: Cockburn, 1988.

[29] Thornton, 1989: Moran, 1987: Spencer and Podmore, 1987. See further the Postscript to this thesis.

[30] Freud writes in 'General Introduction to Psychoanalysis' that 'perversions' such as homosexuality are feared "as if they exerted a seductive influence: as if at bottom a secret envy of those who enjoy them had to be strangled." Quoted in Hoch (1979: 79). The dangers, the lure of the homosexual, attendant on institutionalised male bonding are such there there has emerged 'aversion therapy rituals of the locker room culture' as, he terms, 'protest masculinity' and 'male obsession' with demonstrating strength or unity through sport. See further Freud, 1981: 186, 194.

[31] This will be taken up in Chapter 6 with regard to transvestism and transsexualism: note in particular the arguments of Reynaud, 1983.

[32] Homosexuality is usually conceived in terms of criminal law, and criminal law textbooks frequently cover homosexuality under sexual offences. Generally, on gays and law, see the excellent 'Gays and the Law' by Crane, 1983.

[33] Reference may be made in support of this view to the Israelites in the Bible, a tradition revived by Christianity. Exodus 22.19 states that

"Whoever has unnatural connection with a beast shall be put to death".

Leviticus 18. 22 continues

"You shall not lie with a man as that with a woman. That is an abomination":20.13.

"If a man has intercourse with a man as with a woman, they both commit an abomination. They shall be put to death; their blood shall be on their own heads. Cananites: Leviticus 20.23: 1 Kings 14.24: 15. 12, 22.

[34] 'Homosexual Acts Are Not Sinful', The Independent on Sunday, 22/4/90: According to Romans Chapter 1, verse 27 - "The men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error."

[35] This argument might be countered in a number of ways. It is easy to refer to societies where homosexuality has been tolerated or encouraged (for example, ancient Greece and some Islamic and Buddhist countries) (Licht, 1953) The argument that toleration of homosexuality is related to birth control is weak and rests upon a crude functionalism.

[36] Honore (1978: 103) suggests that the link is more than mere historical connection. The term 'bugger' was originally

the word for religious heresy, supposedly of Bulgarian origin. The link between immorality and treason is now well established, articulated by Lord Devlin in 'Enforcement of Morals' (1959: 14) and remaining very much a theme within political discourse. It is, I would argue, plausible to take the political resonance of homosexuality into contemporary party politics, with the 1987 British General Election making explicit linkages between political extremism and sympathetic attitudes to homosexuality. The connection between political, religious and sexual dissent continues: on homosexuality and tabloid journalism's support for Conservative Governments, Johnson and Lloyd, 1987.

[37] See Chapter 1 p 20 - 30. This is part of the familial ideology discussed in Chapter 1, p 16 - 20.

[38] See McIntosh, 1978: See further Chapter 4: Chapter 9.

[39] It is by no means clear that a close mother/son relationship is a 'cause' of homosexuality, though images of a male lacking in self confidence in relations with women are often attributed to the 'over-possessive mother': see Chapter 4, note 12.

[40] Quoted in Caplan, 1981: 149

[41] In England the terms 'bugger' and 'gross indecency' continue to be used in a quite general way to describe homosexual acts. In the USA, the term 'unnatural offence' is considered suitably vague to cover both sodomy, buggery and gross indecency. In English law, 'buggery' appears to consist in intercourse 'per anum' by a man with a man or woman (R v Jacobs (1817) Russ & Ry 331 suggests other unnatural forms of intercourse would not come within the meaning of the term: See also R v Wiseman (1718) Fortes Rep 91). Buggery will also cover intercourse per anum or per vaginam by a man or a woman with an animal (R v Bourne (1952) 36 Cr App Rep 125).

[42] The substantive law does not however indicate to what extent the laws against sodomy and buggery were enforced. It appears that enforcement varied (Weekes, 1981: 100), in time and between classes, with a spate of convictions at the end of the seventeenth century and in the 1720's. According to Weekes (1981: 100) an increase in prosecution occurred in the first third of the nineteenth century, when over 50 men were hanged for sodomy. It is further estimated (Harvey, 1978), that in 1806 more executions for sodomy took place than for murder, in 1810 four out of five convicted sodomists facing the gallows. Compton (1979) argues that in no other western country was the law so severe, with no executions for sodomy recorded after 1784.

[43] Actual sentencing to death, whether or not carried out, continued to the repeal of the laws: between 1856 and 1859, 54 men were sentenced to death for sodomy, though never eventually hung. If there is a pattern to this, increases in prosecutions appear related to whether Britain was at war or in particular social turmoil. Weekes (1981: 100) suggests homosexuality may therefore be seen as an indicator of wider social anxieties (an argument also applied in relation to prostitution: Smart, 1985). Weekes (1981: 102 and 119) notes the 'opinions of certain judges on Unnatural Offences Cases' (Public Record Office: HO 144/216/A 49134/2, in which a Mr Justice Hawkins noted of bestiality that "for the most part that crime is committed by young persons, agricultural labourers etc out of pure ignorance. The crime of sodomy with mankind stands on a different footing...")

[44] There was opposition to the Act. Weekes (1981: 103) notes how the Director of Public Prosecutions expressed concern in 1889 that 'the expediency of not giving unnecessary publicity' to cases of gross indecency, and noted that an argument could certainly be made for allowing 'private persons - being full grown men - to indulge their unnatural tastes in private.'

[45] The Vagrancy Act of 1898 amended the law in relation to importuning for immoral purposes, making harsher a law which was applied almost exclusively to homosexual men. Whereas under the act the penalty for female prostitutes was a forty shillings fine, for men the maximum sentence was six months imprisonment under the same provision: On the development of the law, Weekes, 1977 Ch 1: Ives, 1922: West, 1977.

[46] It must not be induced, forced or threatened: R v Price (1875) LR 2 CCR. The Sexual Offences Act 1967 puts the onus on the Crown of proving that the act was either not done in private, or without consent or if a party was under 21 years.

[47] The Campaign for Homosexual Equality has campaigned, without success, to remedy this iniquity. On geographical and historical variation, note 3, above.

[48] By the Sexual Offences Act 1967 s 1 (2) (a), however private the place, the act is not to be treated as private if more than two people take part. With regard to public lavatories, by s 1 (2) (b) of the 1967 Act, if a homosexual act is committed in a public toilet (even if it is locked cubicle, which cannot be seen into), this will not be treated as taking part in private. It appears from R v Reakes [1974] Crim LR 615 that it is for the jury to decide as a question of fact whether or not a place was in fact 'private' with regard to all the circumstances of the case.

[49] Clear from the curious judicial invention of conspiracy to corrupt public morals by facilitating homosexual acts. An agreement to provide facilities for homosexual acts where a third person takes part will constitute conspiracy to corrupt public morals, even if the act itself falls short of procuring a homosexual act. It would not here matter that the acts would be between consenting adults and would be in private. For example, public advertisements in magazines would render liable to punishment. Knulier v DPP [1973] AC 435 also makes clear that agreement or publication would not in itself amount to

conspiracy to outrage public decency, or mutual outrage. See also Shaw v DPP [1962] AC 220. . R v Bishop (1975 2 QB 274) had established clearly that imputing homosexuality is an attack on a persons character.

[50] First, the law outlined above does not apply to Scotland and Northern Ireland which are governed by their own laws in this matter. Secondly, if over the age of twenty-one but in the armed forces, it is still possible to be charged with homosexual offences under the Army, Air Force and Naval Discipline Acts (Sexual Offences Act 1967 s 1(5)). Thus, in these cases it does not matter whether the parties are over twenty-one and the act is committed in private. The law has a history of severity when it comes to homosexuality in the armed forces. Weekes (1981: 100) cites the example of Ensign John Hepburn and Drummer Thomas White, who were 'launched into eternity' before a 'vast concourse of spectators', including many notables and members of the Royal Family. It may be argued that homosexuality in the armed forces raises the possibility of abuses of authority in employment based on discipline and regulations; homosexuality may be best treat by internal regulations and proceedings within the institution.

[51] What 'gross indecency' actually is is not clear. 'Gross' indicates something beyond the realm of that which is normal. Is it, therefore, gross for a man to kiss another man with sexual intentions, or in a manner which has clear sexual overtones? According to evidence put to the Wolfenden Committee (1957, Cmnd. 247, p 38)

...the offence usually takes one of three forms; either there is mutual masturbation; or there is some form of intercural contact; or oral-genital contact (with or without emission) takes place; Occasionally the offence may take a more recondite form; techniques in heterosexual relations vary considerably, and the same is true of homosexual relations."

See R v Preece [1977] 1 Q.B. 770 CA: also R v Hornby & People [1946] 2 All E.R. 487: R v Hunt [1950] 2 All E.R. 291). Smith and Hogan (1982:422) suggest that two males kissing each other in circumstances which "showed the act was immoral and unnatural" would constitute gross indecency, though this, of course, is open to many interpretations: See R v Hall [1964] 1 Q.B. 273: R v Hornby and People [1946] 2 All E.R. 487).

[52] By ss 14 and 15 of the Sexual Offences Act 1956 a man might commit the offence of indecent assault on another man or woman. This need not necessarily be a homosexual offence, and a woman can indecently assault a man. As the offence originally stood in the 1956 act, the punishment for indecent assault was two years if committed on a woman, and ten years if committed on a man. Section 16 of the Sexual Offences Act 1956 states that "It is an offence for a person to assault another person with intent to commit buggery." On attempts to procure homosexual acts: R v Cope [1921]: R v Miskell [1954] 1 All E.R. 137: R v Woods [1930] 143 L.T.R. 311. On what constitutes indecent assault, R v Rolfe (1952) 36 Cr App Rep 4: R v Burrows [1952] 1 All E.R. 58: Beal v Kelly [1951] 2 All E.R. 763: R v Kilbourne [1972] 3 All E.R. 545: R v Leeson (1968) 52 Cr App Rep 185 p 419.

[53] By s 32 of the Sexual Offences Act 1956, it is a crime for a man persistently to solicit or importune in a public place for immoral purposes: on the meaning of persistently, Dale v Smith [1967] 2 All E.R. 1133: R v Burge [1961] Crim LR 412 Crook v Edmondson [1966] 2 Q.B. 81. On indecent exposure see R v Crunden [1809] 2, Camp. 89: R v Bunyan (1844) 1 Cox. 74: R v Malyin [1963] 2 Q.B. 717.

[54] See Weekes, 1981: Ch 6: Plummer, 1981: Further, Chapter 9.

[55] Foucault, 1967, 1978.

[56] See in relation to Chapter 4, p 110 - 119: Further, Chapter 9. At the level of the constitution of individual subjectivities, Connell (1983: 31) suggests three moments of

particular importance in a succession to hegemonic masculinity whereby paths might diverge and the possibility for structural change enter. First, at the point when the determination of physical masculinity by social definitions of gender comes into contradiction with the emotional implications of intimate relations. This is in contradiction to the arguments of Mitchell (1975), which presuppose the possession, and cathexis, of pre-existing cultural definitions of masculinity. Changes in patterns of parenting would change the contradiction, and its consequences. Secondly, the importance of physical maturation, the formation of the sexual powers of adulthood and the accompanying physiological upheaval, which together might produce profound disturbances in the acquisition of masculinity. At this level, social and legal injunctions against sex education, masturbation, and the correlation of children and sex generally complicate the transition inasmuch as such adult-imposed control (possibly through resort to legal sanctioning - Gillick: Chapter 3, note 81), might serve to exacerbate existing anxieties as to developing sexual awareness. Thirdly, 'economic adulthood' is identified as the end of adult-surveillance of adolescent and childhood sexuality. It is at this point that other forms of regulation of confirming masculinity come into their own. I have in Chapter 1 (p 20 - 30) addressed the wider legal context to hegemonic forms of masculinity; so long as work can only be experienced as worthwhile when men pride themselves on hard work and the making of personal sacrifices as breadwinners, the masculine role of provider in the family is reaffirmed.

[57] Hegemony entails a relation not of domination by means of force, but rather of the activation of consent by means of political and ideological leadership (which is to be distinguished from the Greek meaning of the word, signifying the predominance of one nation over another). In the 'Prison Notebooks' (1971) Gramsci in fact makes use of the word 'direzione' (meaning leadership, direction) which is then interchanged with 'egemonia' (hegemony), in contrast to 'dominazione' (domination). Gramsci characterises the

distinction between domination (coercion) and 'intellectual and moral leadership' as follows:

"A social group can, indeed must, already exercise leadership before winning governmental power (this is indeed one of the principal conditions for the winning of such power); it subsequently becomes dominant when it exercises power, but even if it holds it firmly in its grasp, it must continue to 'lead' as well." (Gramsci, 1971: 57-68)

The Gramscian use of 'hegemony' is not as a strategy (the Leninist sense), but rather a concept which becomes a tool for understanding society in order to change it: Gramsci, 1971: Simon, 1982: Mouffe, 1979: Showstack Sassoon, 1980: 1982.

[58] Discussed in Chapter 1 in relation to the work of Shorter (1977) and Stone (1977).

[59] See further Hoch, 1979: 132 - 145.

[60] Chapter 1, p 23 - 26: Smart, 1989a: Smart and Sevenhuijsen, 1989: Brophy, 1989.

[61] Chapter 1, p 24 - 26.

[62] Within the sociology of masculinity discussed in Chapter 4, all too often mainstream masculinity is taken to be heterosexual masculinity, with homosexuality either an embarrassment or unfortunate diversion to the perceived real business of the men's movement (Carrigan et al, 1985).

[63] However much the men's movement in the 1970's might have found difficulty with gay liberation, the gay movement has turned to an analysis of sexuality fundamentally concerned with the construction of masculinity within an overall context of sexual politics. In particular (eg Mieli, 1980: Fernbach, 1981), it is manifestations of homophobia which have been

singled out as fundamental to the promulgation of an ideology of sexual difference between men: that is, as the 'unnatural' homosexual transgresses the normative standards (which are legally sanctioned) of men and women, so the homosexual constitutes a threat to the basis of the gender dichotomy itself. Mieli (1980) argues in 'Homosexuality and Liberation', that 'universal homosexuality' may be theorised as a 'revolutionary potential' for a homosexual consciousness, a consciousness which unites, at the interpersonal and structural level, with other liberation projects against the oppressions of heterosexuality and patriarchy. Ultimately, the institutionalisation of gender dichotomy/difference 'male' and 'female' is itself threatened. Though Mieli's arguments certainly tend towards a form of 'grand theorizing', the point that homosexuality must be understood within sexual politics generally, a politics of relations between men and women, as well as within the sexes, is undoubtedly correct.

[64] For Mieli (1980) the politics of homosexuality are the key to understanding the possibilities of emerging forms of liberated sexualities. From the earlier, and influential, work of McIntosh discussed above (1968) to Sargent (1983).

[65] Eg, as at note 3, note 63 above.

CHAPTER 6

TRANSSEXUALISM AND THE FORMATION OF MARRIAGE

[1] Eg, Raymond, 1979: O'Donovan, 1985, Ch 3: 1985a. Raymond argues that transsexualism is itself a symptom of rigid role stereotyping. In proposing a new 'ethic of integrity', Raymond concludes (1979, 163) that

"...the constant unfolding of personal and social processes that has the potentiality of generating for all of us a future vision of becoming, beyond a gender defined society."

Raymond's account covers an analysis of law, medicine, psychology, biology, theology and therapy. Medicine, as 'the new secular religion' is crucial: ultimately, she argues, "Male to constructed female transsexuals attempt to neutralise women by making biological women unnecessary - by invading both the feminine and the feminist fronts." (1979, xix): "All transsexuals rape women's bodies by reducing the female form as an artefact, appropriating this body for themselves..." (1979, 104).

[2] Raymond's conclusion neatly summarises the starting point of this Chapter on law and transsexualism:

"The issues that transsexualism highlight should by no means be confined to the transsexual context. Rather, they should be confronted in the 'normal' society that spawned the problem of transsexualism in the first place." (1979, 185).

[3] Macfarlane, 1986, Ch 4: Glendon, 1977: Ch 1: Chapter 1, p 14 - 16: Finer and McGregor, 1974: O'Donovan, 1985, 44 - 50: Parker, 1987.

[4] Eg, see Glendon, 1977, 45: Glendon, 1981.

[5] Weitzman, 1981: Freeman and Lyon, 1983: Eekelaar and Katz, 1980: Deech, 1980: Shultz, 1982: Kingdom, 1988.

[6] Eg R v Tan and Others [1983] 2 All E.R. 12, see below p 206 - 210.

[7] E.A. White v British Sugar Corporation, [1977] IRLR 121, see below p 206 - 210.

[8] For further discussion, O'Donovan, 1985: 71 - 72: p 206 - 210 below.

[9] "A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties without the necessity of any decree annulling it." per Lord Greene M.R. in De Reneville (Otherwise Sheridan) v De Reneville [1948] 1 All E.R. 56.

[10] See Hoggett and Pearl, 1987, 21-5. No one sort or one group of relations which are universally prohibited and exclusion takes different forms: See Segalen, 1986, 56-61. In English Law a person cannot marry his or her parent, child, grandparent, sister or brother, aunt or uncle, nephew or niece. (S1 and Schedule 1, Part 1 Marriage Act 1949) Prohibited relations include illegitimate and half blood relations.

[11] With regard to affinity, the 'zone of tolerance' (Glendon, 1977: 40) has shifted with time. The Deceased Wife's Sisters Marriage Act 1907, Deceased Brother's Widows Marriage Act 1921, Marriage (Prohibited Degrees of Relationship) Act 1931, Marriage (Enabling) Act 1960 have culminated in the Marriage (Prohibited Degrees of Relationship) Act 1986. This Act came into force in November 1986, amending the Marriage Act 1949 (s

1 (2) (3)) in relation to the rules relating to affines, the basic principle now being that marriage with relatives by affinity is now permitted, allowing 'step' relatives to marry in cases where they would previously have constituted a void marriage. Thus, the marriage would not be void by reason only of affinity in certain circumstances (though this is subject to conditions: Hoggett and Pearl, 1987, 21). See further Sections 1 - 4 Schedule 1 of the Marriage Act 1949 for details of the amendments.

[12] This applies regardless of whether the parties knew the facts. In this respect English law has in fact become more restrictive. The Age of Marriage Act 1929 raised the age to 16 for both male and female (it had been 14 for a boy and 12 for a girl) and made the marriages void rather than voidable. There is certainly an argument that such marriages should be made voidable: there would be no doubt as to the status of the marriage, and it would bring a consistency with the criminal law that consent to sexual intercourse by s 6 Sexual Offences Act 1956.

[13] It will be a defence if it was reasonably believed that the previous marriage had been terminated by death. It is necessary to look at the facts at the date of the ceremony: R v Sayoo [1975] QB 885: Bigamy will only be committed where the first marriage was monogamous rather than a polygamous one: See Poulter, 1986.

[14] Before the 1949 Act the law relating to the formalities of marriage could only be found with reference to over 40 statutes, leaving aside the case law which had developed around its interpretation. The 1949 Act attempted to consolidate these developments into one act. Around 20 statutes were repealed and the rest repealed in part, though few changes were made in the substantive law.

[15] Note in particular the reduction in the age of the majority from 21 to 18 by the Family Law Reform Act 1969,

whereby any person can now marry if over the age of consent without the consent of another person.

[16] The complex regulations can be found in Pt IV Marriage Act 1949, as amended. Registration is fundamental, of concern to the spouses, third parties and the state; ref Law Commission Report no 53 on Solemnization of Marriage, Annex, para 104; Bromley and Lowe, 1987: 39 - 53: On proposals for reform, Bromley and Lowe, 1987: 56.

[17] Though the law relating to nullity had once come from the jurisdiction of the ecclesiastical courts over marriage (prior to the establishment of the Divorce Court in 1857), in 1971 the law was reformed by the Nullity of Marriage Act and is now to be found in the MCA 1973. See further Chapters 7-8. The current legislation is a codification of the already existing English law.

[18] The grounds on which a marriage is void/voidable are different (s11, s12 MCA 1973), and a voidable marriage is a valid marriage unless/until a decree of nullity is granted (see s 16 MCA 1973, for decrees granted after 31 July 1971). Statutory bars to a decree of nullity of a voidable marriage do not apply to void marriages. By s 13 (1) MCA 1973, the court may refuse a decree if the petitioner, with knowledge that it is open to him to have the marriage annulled, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so and it would be unjust to award the decree. Further, by s 13(2) (5) MCA 1973 time restrictions are placed on all but two of the voidability grounds. Thus, a decree of nullity can be pronounced at any time for a void marriage, even when the parties are dead) but the voidable marriage can only be attacked during the lifetime of both parties. By s 13, if a marriage is void then any interested person may take proceedings and petition that a marriage is void (Bromley and Lowe, 1987: 73-4) but if it is voidable only the parties to the marriage can take proceedings to have it annulled.

[19] Whatever the ground, a petitioner for a decree of nullity may invoke the powers of the court to make orders for income and property and the custody of any children (s 21(1) MCA 1973, s 42 (10) MCA 1973). Thus, so that hardship might be avoided, many of the legal consequences of a valid marriage have become attached to a void marriage provided that the decree of nullity is awarded.

[20] Law Commission, 1970, paras 21-8. In 1973 the Law Commission considered the following to be some of the reasons for retaining formalities of marriage law today: to guard against clandestine marriages; to ensure an opportunity for legal impediments to be discovered; to publicly solemnize marriages; and to record the marriage in an official register. (Law Commission 1973a, Annex Para 4: In para. 12 the Commission recommended a uniform civil procedure).

[21] A cursory look at cases on divorce and the testimonies of homosexuals who have 'came out' show that people with homosexual orientation (be it evident before or after the marriage) do get married: Ross, 1983.

[22] In this case the question before the court concerned a 'marriage' within the meaning of s 12(3) of the Vital Statistics Act 1970, whereby the Registrar is empowered to register marriages if satisfied "as to the truth and sufficiency thereof". The court held it was within the power of the Registrar to refuse to register a 'marriage' between two males notwithstanding that all the formalities of the marriage had been met by the applicants.

[23] The judgement continues:

"In the natural history sense, marriage may be defined as a more or less durable union between one or more husbands and one or more wives, sanctioned by society and lasting until after the birth and rearing of offspring. In the legal sense, marriage is a contract between one or more

males and one or more females for the establishment of a family...Human beings, like all higher animals, multiply by the union of the two sexes...The further advanced the animal in the order of evolution, the longer the immaturity and the helplessness of the young and the greater the need for prolonged parental care and training. It is thus the combination of mating with parenthood which constitutes marriage in the higher animals, including man." (P 285)

[24] For example, the position is unclear in those cases where if the court were to grant a nullity decree regarding a union between a couple of same sex, the court would then also have the power to make orders for financial provision and property adjustment. The Law Commission (1970: Para 32) had originally being against including the s 11 (c) provisions of the Matrimonial Causes Act 1973 as possible grounds of nullity specifically because it might involve this extension of the ancillary powers of the court to homosexual unions. This could then be interpreted as attaching to the homosexual commitment similar legal consequences as the heterosexual.

[25] The Births and Deaths Registration Act 1953, s 2.

[26] S 29 (3) of the Act.

[27] According to Bracton's thirteenth century treatise 'On the Laws and Customs of England' (1968, translated by S.E Thorne. Vol 2, pp 31 - 2) "Mankind may also be classified in another way; male, female or hermaphrodite...a hermaphrodite is classified with male or female according to the predominance of the sexual organs." (Quoted in Pannick, 1983: 298. See further Bartholomew, 1960). In particular, note the case of Re C and D (Falsely called C) (1979) 28 ALR 524: 35 FLR 340: (1979) FLR 90-636, concerning an intersex hermaphrodite who had an ovary and fallopian tube on the right side, nothing internal by way of sexual organs on the left, and was classified as a male at birth because of a small penis and testicle on the left side.

The child grew up psychologically and socially as a male and, as an adult, sought surgical treatment for correction of penile deformities and to improve on his male characteristics. The court decided that whatever the bisexual gonadal structure, the possession of female chromosomal arrangement, female internal genitalia, a male psychological orientation and the possibility of conversion of the genitals into male should the choice be to continue in the sex reared. The court held that the patient was neither male nor female for the purposes of marriage. Rebecca Bailey (1979) 53 ALJ. 660 provides a pertinent critique of this case. See also W v W [(1976) 2 S.A.L.R 308. in which "...the issue is not whether, after the operation, the plaintiff was an effective male, not whether she looked like a female (which she does), nor whether society has accepted her as a female, nor whether she is capable of having sex with a male; the issue is whether the plaintiff at the time of the marriage was a woman." (P 313-4: My emphasis)

[28] Cole (1978: 355) argues in a US context that the constitutionality of chromosomal testing may well render biological determination illegal:

"In both the marriage and birth certificate contexts, using the chromosome test to determine a transsexual's sex violates his right to equal protection from the law...The courts should therefore reject the chromosome test and instead adopt the gender-anatomy test of sex."

See further, Smith, 1971: 965-972.

[29] Hirschfeld, M (1952) 'Sexual Anomalies and Perversions', Encyclopedic Press, London: On sexology, Chapter 4, note 41.

[30] The meaning of 'cross-dressing' is by no means clear. For example, early Judaic codes of sexual morality forbade the wearing of clothing of the opposite sex. Indeed, Joan of Arc was adjudged heretic in part because her transvestism was found to violate spiritual law (Smith, 1971: 964). Yet the markets

of consumer capitalism have positively promoted 'gender bending', at least within certain limits and in particular ways: Mort, 1988.

[31] For a fuller discussion of definitions of transsexualism, Smith, 1971: 963-965

[32] See Benjamin (1969: 13), who argues that sex reassignment was not termed 'transsexualism' until 1953, though the phenomenon is reported in various anthropological studies: eg Egerton, 1964.

[33] Smith, 1971: David, 1975: Strauss, 1967: Pannick, 1983: Bradney, 1987: O'Donovan, 1985: 1985a: Dewar, 1985: Pace, 1983.

[34] In the US, note in particular cases under Title VII of the U.S. Civil Rights Act 1964. From Grossman v Bernards Township Board of Education 11 F.E.P. Cases 1196 (1975): 538 F. 2d 319 (1976): 429 U.S. 897 (1976) it would appear that only a man or a woman can be discriminated against on the basis of sex. See also, Powell v Read's Inc 436 F. Supp. 369 (1977): Holloway v Arthur Andersen & Co 566 F.2d. 659 (1977). In the latter case the court accepted that it is not that transsexuals have no protection at all in law, for if they were to claim discrimination on the basis of their sex, be it male or female, then they would have a cause of action. However, in this case the cause was denied because it rested not on discrimination because of sex, but because of being a transsexual who had chosen to change sex. In the case of Sommers v Budget Marketing Inc. 27 F.E.P. Cases 1217 (1982) the court similarly dismissed the claim of a plaintiff who, though anatomically a man, claimed to be a female but had not undergone a sex-change operation. Transsexuals were held to be not to be included within the ambit of sex-discrimination protection. Interestingly, in this case the court discussed the responses of other female employees who threatened that they would leave the firm's employment if the plaintiff was allowed to use the women's lavatory.

This factor also figured in the UK case of E.A White v British Sugar Corporation [1977] I.R.L.R 121, case in which the complainant was anatomically female but who wished to be treated as a male. On discovering that she was in fact female the employer dismissed her, and she then proceeded to claim under the Sex Discrimination Act 1975 claiming unlawful dismissal on the grounds of sex. The industrial tribunal held that she was a woman and thus had no cause of action. as the question to be considered was whether

"...the applicant on the ground of her sex was treated less favourably than they would have treated a man? If the applicant had been a man and he had held himself out to the respondent as a female and been employed as such and used the female toilet facilities and the like and it had then been discovered that he was a man, the Tribunal had no hesitation in deciding that in the circumstances the respondents would have dismissed him. Accordingly in the present case there was no discrimination on the ground of the applicant's sex." (P 123)

What, for the tribunal, classified the applicant as a woman was the fact that

"The applicant had the physical attributes and sexual organs of a female. She had a soft voice and did not grow facial hair. She admitted that physically and biologically she was a woman but not in any other respect eg outlook...The applicant regarded all things and matters feminine as repugnant. She dressed as a man." (P 122)"

Paradoxically, the court is both asserting a form of biologism in the determination of sex while simultaneously looking to cultural manifestations of gender for some 'proof' of sex. On not finding such evidence, (eg voice/hair/dress/outlook) the original biological test is confirmed. The only indicators of masculinity considered by the court were psychological and social factors, such as D.H.S.S. registration, driving licence

and certificate of motor insurance, all in male names. Toilet facilities figured in the reasoning of the tribunal, for

"The men's changing room and lockers were separate from their toilet facilities. **There was evidence that some men changed down to their underpants in the changing room.** The toilets comprised wash basins, urinals, closets and showers and there was evidence that **to get to closets one had to walk past the urinals.**" (P122: My emphasis)

See further Pannick, 1983: 289-292: .

[35] In 1957 Bowman and Engle had considered

"Some male transvestites desire breast enlargement and perhaps castration: a few insist on both castration and penotomy, with the construction of a urethra: a very few may request a plastic vagina. So far, no one has been reported to request the implantation of ovaries, fallopian tubes and uterus, although a female patient is said to have arranged for the implantation of testicles. Male parthenogenesis does not yet seem to be within the realm of possibility...The treatment of choice is probably intensive, prolonged psychotherapy in suitable cases, in order to relieve tension and bring about a better adjustment..." (Bowman and Engle, 1957: 588)

[36] It is estimated that there are at least 11 cases either reported, recorded on LEXIS database or noted in newspapers. (Bradney, 1987 :350) Bartholomew (1960: 83) states that though "...only some fifty cases (of 'the true hermaphroditic condition') have been reported in the world literature - the occurrence of intersexual conditions as a whole is very much more widespread."

[37] See further Bartholomew, 1960 p 83

[38] See Cowell, 1954: Bartholomew, 1960: 84.

[39] Note Articles 8 and 12 of the European Convention on Human Rights (see below, p 202 - 206). In the U.S the institution of marriage is protected by the fourteenth amendment to the constitution. On the treatment of hermaphroditism in Australian Law, Bailey, 1979. On other jurisdictions, see Horton, 1978: Walz, 1979: Bowman and Engle, 1957: 585-586: Ford and Beach, 1951, note the antiquity of cross dressing, its appearance in almost every culture or society. In the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Poland, South Africa, Canada and the majority of states in the USA transsexuals have a right to amended birth certificates or the issue of a new certificate. The Federal Constitutional Court of the Federal Republic of Germany has upheld the right of transsexuals to correct their sexual identity in the birth register. (Bundesverfassungsgerichts 49, 286 (Beschluss vom 11. Oktober 1978). It has further been held by the Constitutional Court that the provisions of the Act which forbade persons under the age of 25 from undergoing sex change operations was unconstitutional on the grounds that to so do would restrict a persons freedom of identity and discriminate on the basis of age - Bundesverfassungsgerichts 60, 124 (Beschluss vom 16, Marz 1982). Note also the New Jersey Case of MT v JT 355 A2d 204 which explicitly rejected the reasoning in Corbett (p 191 - 202):

"Against the backdrop of the evidence in the present record we must disagree with the conclusion reached in Corbett that for the purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjusting the capacity to enter marriage, sex in its biological sense should be the exclusive standard."(p 209)

The Court felt "Impelled to the conclusion" that

"If...sex reassignment surgery is successful...we perceive no legal barrier...to prevent the persons identification at least for purposes of marriage to have the sex finally indicated...Such recognition will promote

the individuals quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality." (p 209-11, quoted in Pannick 1983: 296)

[40] Zilbergeld, 1981. Note the depiction of penile prosthesis in Tiefier, 1987. Moye, 1985, describes the lengths to which men have gone in pursuit of the perfect penis as a 'netherworld of phallic failure'. See further Chapters 7 - 8, esp. p 272 - 287.

[41] Though Smith himself finds that, leaving aside the determinism, Ormrod's search for an objective 'standard' is in itself viable (1971: 1007).

[42] Discussed in the context of 'Men's Studies', Chapter 4 p 103 - 110.

[43] See further Poulter, 1979: O'Donovan, 1984.

[44] Article 12 provides

"Men and women of marriage age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

[45] Which states that

"1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention or disorder or crimes, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[46] A distinction may be made between those restrictions which may be made so as to exclude particular individuals or groups of individuals from marriage (likely not to be permitted by Article 12 eg preventing particular ethnic minorities from marrying), and between restrictions on particular types of relationships, for example homosexual, bigamous, polygamous, within the prohibited degrees which are more likely to be permitted. The above view would be supported by Hamer v U.K. (1982) 4 E.H.R.R. 139 where it was held by the European Commission of Human Rights that the right of a prisoner to marry under Article 12 had been breached by the Home Office by their refusal to make arrangements for a temporary release from prison so he might marry elsewhere.

[47] The Belgian government, for their part, objected claiming non-exhaustion of domestic remedies and stressed the remedies which would be available were adequate for redressing the applicants complaints (that is, Van Oosterwijck should have appealed to the Court of Cassation against the original judgment). Although the European Court of Human Rights held that the claim could not be determined on its merits, as domestic remedies had failed to be exhausted, the European Commission of Human Rights, which does have power to refer cases to the Court, proceeded to rule upon on the merits of the claim.

[48] Rees' sex-reassignment took place under the National Health Service, on realising that he was in fact suffering from a medically recognised disease. The refusal to alter the register of births, or at least to issue an amended birth certificate, Rees argued made his complete integration into society impossible. For Rees the matter was particularly pressing in the light of his chosen vocation for the church, for which he would be completely blocked: "Applying for modest church posts, he is often told he is over qualified and anyway, as he says, 'Who wants a bearded deaconess?'" (Cooper, 1986) Guardian 18/11/86

[49] See also the autobiographical account of transsexual life by Jan Morris, 1984.

[50] The Court held that there had been no violation of Article 12, as the provision referred to the traditional marriage between people of the opposite biological sex. It was accepted by the court that a duty was at least owed to Rees with regard to Article 8. Such documentation, in the eyes of the court in Rees, constitutes a historical fact and not a statement as to the current identity of the person. It was relevant in Rees that British law has no integrated system of civil status registration (unlike other contracting states, such as Belgium). Thus, the court found that in Britain anyone could have their names changed with minimum difficulty, such a change being reflected in official documentation. The court therefore found that in this respect British citizens in fact had an advantage over other contracting states. The UK had, as far as possible, tried to meet Rees demands. Falling within the margin of appreciation, Article 8 could not require the UK to alter the system as in the UK the register had only a limited legal significance, unlike the more general legal importance of the documents in the Van Oosterwijck case.

[51] To recognise a legal change of sex, in cases where there has been no legislation to accommodate such changes, may itself present at the very least administrative and technical difficulties. If sex reassignment is to take place, then on what criteria and how? The legal basis of sex-reassignment raises complex (though not insurmountable) questions of determination of individual's subjective states of mind by some resort to 'objective' evidence.

[52] Corbett, P 107.

[53] The parties only lived together for 14 days. It seems that during the three year courtship no sexual 'intimacy' took place other than kissing and 'very mild petting'. Corbett maintained that Ashley continued to resist consummation, while

the latter maintained full penetration took place on several occasions. The 'facts' are, it may be argued, unusual.

[54] For example, menstruation, gestation and lactation. On the relation between these and legal protection and paternalism, O'Donovan, 1985, 76-80.

[55] 'The Medico-Legal Aspects of Sex Determination' (Medico-Legal Journal March 9 1972). On Ormrod's conception of the interrelation of legal and medical discourse, 1972, 78 where he considers

"The law, which is essentially an artefact, is a system of regulations which depends upon precise definitions; medicine is a biological science and therefore depends upon the facts of biology. The law is obliged to classify it's material into exclusive categories; it is therefore, a binary system designed to produce conclusions of the Yes or No type. Biological phenomena however, cannot be reduced to exclusive categories so that medicine often cannot give Yes or No answers...living organisms refuse to fall into clearly defined groups; all their characteristics vary about a mean. People are not either tall or short, they are taller or shorter or about average. This fundamental conflict lies at the root of all the relations between medicine and law."

[56] Ormrod, 1972, 83.

[57] If an unmarried male to female transsexual contracts a marriage with a male that, apart from the 'sex' of the wife, is valid in every other respect, and then the wedding ceremony is then followed with a substantial period of cohabitation it seems that the legal remedies available would be the same as if the marriage had been a valid one. However, if the only parties to a 'valid marriage' might sue, then presumably the transsexual could not.

[58] Likewise, the reference to 'husband' and 'wife' in the Inheritance (Provision for Family Dependents Act 1975 s 1 (a) (b) presumably refers to the parties of valid marriages, and thus the transsexual would not be able to claim in such circumstances.

[59] It is unlikely that a transsexual couple would be classified as spouses for the purposes of s 1 Matrimonial Homes Act 1973. Whether they would be "a man and woman living with each other in the same household as husband and wife" for the purposes of s 1 (2) of the Domestic Violence and Matrimonial Proceedings Act 1976 is perhaps more questionable. 'Living together as husband and wife' seems to imply some 'role' which equates with the status of husband/wife and, indeed, it could be argued that living as a husband and wife is precisely what the transsexual couple are doing, that is, holding out to be something they are not, a 'pretence'. The same reasoning could apply to the Rent Act determinations of 'member of a tenants family' and, by s 50 (3) Housing Act 1980, the meaning of 'live together as husband and wife' (Chapter 1, p 11 - 14). For my purposes here, it is sufficient to note that within the area of matrimonial law determinations of sexual status may be of far wider concern than simply in relation to annulment of marriage.

[60] The court held that a person who is born male and then undergoes sex-reassignment surgery continues to be male for the criminal law purposes which may render him liable to conviction for living on the earnings of prostitution contrary to section 30. He is also liable to conviction by s 5 Sexual Offences Act 1967 as the transsexuals 'husband' living on the earnings of male prostitution by the transsexual.

[61] It is interesting that in the context of prostitution, the transsexual is providing sexual services as a female. It might be asked where this leaves Parker's 'once a man always a man' stance? If there is a coherent presupposition underlying s 30 of the 1956 Act it is the (persisting and legally

legitimated) idea that it is only men who exploit women for sexual purposes. Could Greaves, as a woman, so exploit another woman? Men's involvement in organised prostitution is, it would seem, legally accepted.

[62] As clear from Re C and D (falsely calling herself C) (1979) 28 A.L.R. 524, 35 ELR. 340: See Bailey, 1979: Note 27, above.

[63] The Law Commission themselves noted, with some concern, that the effect of a nullity decree in such cases as Corbett would be to allow a court to exercise the ancillary powers within their jurisdiction over property as they would have in 'straightforward' divorce cases, a valid marriage with or without children. (Report on the Nullity of Marriage, Law Com. No. 33 para 30-2), though this is a

"...situation is one which, happily, will arise only very rarely...Unless financial relief is to be extended from marriages to homosexual unions...we can see little reason why it should be available merely because the parties have succeeded in deceiving someone into celebrating the marriage in the belief that they are of opposite sexes." (Para 32).

See Bradney, 1987, 352.

[64] Couples who separate for the same reasons may face differing jurisdictions if one of the couples is transsexual. A 'heterosexual' couple (within Ormrod's meaning) within the divorce jurisdiction may find themselves unable to prove that their relationship breakdown falls within s 1 (2). Thus, they may only divorce after two years separation. The transsexual couple, Bradney (1987, 353) argues, may separate for any reason which does not necessarily in law have to be the reason for decree of nullity.

[65] O'Donovan (1985) argues that social and legal gender constructions involve a bipartite, fixed division between the sexual categories of male and female. Alternatively, sex and gender may be conceived as at points on a continuum: Chapter 4, p 110 - 119.

[66] Note 39, above. In 1945 a Swiss Court held that the psychological test together with surgical reassignment was the correct legal standard:

"Now that the patients psychic association with the female sex is strongly supported by anatomical changes it appears to us impossible to go back. It would therefore be advisable to recognize legally a state which the law did not prevent from coming into existence." (In re Leber, Neuchatel Cantonal Court 2 July 1945)

[67] To insist that the gender should be conclusive of legal sex is in direct contradiction to an 'objective point for assessment' based on a surgical operation (that is, a biological transformation) which is taken as constituting the transformation from one legal sex to another. In a sense, this is having it both ways as sex and gender are taken as determining. While it could be argued that some point earlier than the 'completion' of the surgery (whatever that might be) could be taken as objective proof of the change, to so allow would presumably lose the objectivity of having a definite point to define change of sex.

[68] A prerequisite for such an authoritative determination might be the testimonies of 'experts' (for example, verification by doctors/psychiatric experts) that the applicant is a 'genuine' transsexual. However, as Dewar notes (1985, 63), such ostensible dejuridification of sex determination in fact places the decision in the hands of such 'experts', and may thus be said to constitute not so much deregulation, as a shift in the form of the legal regulation of transsexualism. Just as medical opinions may depend on value judgments, what

constitutes a 'true' transsexual, I would suggest, is by no means clear and is certainly open to interpretation.

[69] For the spouse of a transsexual, it would seem that their marriage could be unilaterally changed by the transsexual partner. While in terms of private law, the law would protect the spouse to degrees, in areas of 'public law' the consequences could be far reaching, for example, with regard to social security provisions, taxation, immigration status and nationality. To render such marriages void on a certain date would, in effect, be a functional equivalent of a divorce. For the spouse to have such protection would require legislation. Thus, for the unmarried transsexual a judicial overruling of Corbett is all fine and well, while for the married transsexual certain problems are raised which may require legislation. However Dewar (1985) who considers this point nonetheless concludes that "...Ormrod was probably right to decide Corbett the way he did, but he was right for the wrong reasons." (p 65)

CHAPTER 7

THE CASE OF NON-CONSUMMATION

[1] Eg, see Chapter 4 p 129 - 131: 119 - 124. Also note 38, 85 - 87. In a sense, Campbell (1980: 1) captures what I would take to be the starting point for the analysis of consummation in Chapters 7 and 8:

"Heterosexuality has to feature in our politics as more than a guilty secret; indeed, in order that women mobilize any political combativity around it, it must be restored as a legitimate part of feminism's concern. It is, after all, the primary sexual practice of most women."

It is also the primary sexual practice of most men.

[2] Zilbergeld, 1980: 273; Tiefert, 1987; Bancroft, 1982; Elliot, 1985; Krane et al, 1983. See further Chapter 4, note 87.

[3] The commercial exploitation of male sexuality, while of a different order than that of female sexuality, has remained a common theme in writings on masculinity. It is particularly evident in Hoch, 1979; Metcalf and Humphries, 1985 especially Moye, 1985; Ehrenreich, 1983; Tiefert, 1987; Ochberg, 1987.

[4] To conceive of impotency necessarily entails a concept of what a 'potent' man might be. As Kelly (1981: 126) writes,

"The word impotent is used to describe the man who does not get an erection, not just his penis. When a man is told by his doctor that he is impotent or when the man turns to his partner and says he is impotent they are saying a lot more than that the penis cannot become erect." (Quoted in Tiefert, 1987: 165)

In this Chapter I am concerned in part with just what else impotency does signify. See further Chapter 8, p 272 - 287: Chapter 9, 315 - 321.

[5] This is in keeping with the analysis of sex and gender in Chapter 6 (esp. p 182 - 184) and the discussion of homosexuality in Chapter 5. The only sex which is lawful is sex within marriage. As the definition of legal sex in marriage determines sex outside marriage, criminal law sanctions attach to various 'unlawful' sexual practices: for example, rape, homosexual relations, indecent assault, prostitution. Heterosexual intercourse outside marriage, while not a crime, is not 'lawful'. A man may not be convicted of raping his wife (though the Home Office has referred this issue to the Law Commission: 'The Guardian' 13/2/90: see further Chapter 2, note 38, 39).

[6] This would constitute a thesis in its own right. For a doctrinal law account, see further, Bromley and Lowe, 1987, 69 - 103: Also see above Chapter 6, note 9, 18.

[7] The ecclesiastical influence informs the wider context in which sexual relations in marriage take place: for example, the church's teaching on contraception and the notion that the purpose of marriage is the procreation of children have informed the development of consummation law. On the canonical tradition in Western Europe, see Darmon, 1985. While it is true that in divorce cases the courts are not concerned with the doctrines of the Church of England: Weatherley v Weatherley [1947] A.C. 628, in cases of nullity the courts now exercise the jurisdiction of the old ecclesiastical courts: Matrimonial Causes Act, 1857, s 2 and Supreme Court of Judicature (Consolidation) Act, 1925, s 21 and ss 176 to 184: See further below, Chapter 6, note 17.

[8] See Bromley and Lowe, 1987, Ch 3: Davies, 'Duress and Nullity of Marriage' 88 LQR 549: Jackson, 'Formation and Annulment of Marriage' (2nd Edn).

[9] Nullity of marriage remains a topic on most University and Polytechnic family law courses and is well covered in doctrinal legal analyses: for an overview, see Law Commission, 1970. Note 6, above.

[10] Honore (1978: 9), for example, argues that marriage should be the only legally recognised site for sexual intercourse because

"Men and women are in sexual competition...no one is entitled to compete with the husband for the wife or with the wife for the husband. In the sexual competition marriage is a restrictive practice."

[11] Wright (1937: 62) asks

"What makes two human beings perform the sex-act together? There are two chief reasons, both of which may be in action at once. They may desire to have a child, or they may have such a strong affection for one another that they feel an overwhelming need for giving it some satisfying outward expression. **Nature has endowed every normal person with sex powers, and needs; the institution of marriage exists to satisfy all of them..**" My Emphasis

Wright's analysis of 'The Sex Factor in Marriage' is just one of a plethora of books 'for those who are or are about to be married.' See also, for example from the same period, Van der Velde, 1928: Exner, 1932: Lindsey and Evans, 1928.

[12] Eg, Campbell, 1980: Echols, 1984: Rich, 1980: Vance, 1984: Rubin, 1984.. On phallocentrism in French Feminist Theory Marks and de Courtivron, 1984: Chapter 4, note 38, 65, 50, 87.

[13]. At various lengths and detailed description of the 'sex act', the joys of marriage and the joys of sex it seems are entwined:

"As the act proceeds, the intensity of pleasure rises, thought is abandoned, a curious freeing of the spirit, very difficult to describe, takes place. It is as if there were, hidden among the sensations of the body, a spiritual counterpart, a pleasure of the soul, only attained for a few seconds, bringing with it a dazzling glimpse of the Unity which underlies all nature." (Wright, 1937: 4)

Also, Heath, 1982. On sexual advice literature, Altman, 1984.

[14] Zilbergeld, 1980: Chapter 4, note 87.

[15] Bromley and Lowe (1987: 69) notes that by the seventeenth century the Royal Courts were becoming concerned at the ease with which marriages were being set aside on the nullity grounds, and the apparently legitimate children of such marriages thus being bastardised. Of particular concern was the fact that after the death of the parties, relevant evidence may not be available to contest the assertions of nullity. It is possible that such material considerations influenced moves towards secularization in the law on nullity. The importance of the decree is made clear in in the American case of Estin v Estin [1948] 334 U.S. 541, 553 per Justice Jackson:

"If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married, and if so, to whom...The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation. their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude. It is therefore important that, whatever we do, we shall not add to that confusion."

[16] Tenets of canon law which decree the indissolubility of marriage are to be found in the New Testament accounts of Christ's sermon on the Mount, and also in the answers given by him to the Pharisees. According to the Gospel of St. Matthew, divorce was to be allowed for adultery while according to the gospels of Mark and John, it seems that divorce was never allowed. The doctrine of the indissolubility of marriage was reiterated by the Council of Florence in 1439 and officially proclaimed by the Council of Trent in 1563, becoming the applicable law of England and the European continent. As marriage was forever, annulment as a 'way out' must be understood alongside the development of divorce law. Darmon (1985: 9) suggests that until the middle of the eleventh century there existed considerable toleration of the dissolving of marriage, there being no legislation specifically addressing marriage at this time. Till the thirteenth century, the Church of Rome continued to advise impotent husbands to live with their wives as brothers. However, recourse to annulment would seem to bear a direct relation to the possibility of obtaining an absolute decree of divorce. The doctrine of the indissolubility of marriage meant that the courts were unable to grant decrees of divorce. They were, however, able to declare marriages to be null and void and so, for the parties, there may at least be a 'way out' of marriage. That is, even though the parties may have gone through a ceremony of marriage, an impediment would stop them from taking on the legal status of husband and wife.

[17] The non-consummation cases arguably concern marriages which have broken down and it may be possible, on individual facts, for the divorce grounds to be made out, for example alleging cruelty or unreasonable behaviour: Matrimonial Causes act 1973 s 1 (1) (2). In proceedings before the court the issue of both divorce and nullity may be raised by the parties. The significant difference of course is that divorce does not act retrospectively. So, for example, one of the parties may have been having intercourse with another. If the marriage were to be declared voidable, then this would not constitute a

'matrimonial offence'. In divorce the parties would be regarded in law as been husband and wife up to the date at which the decree was made absolute, and thus adultery would have taken place, as will be seen in the cases below. Perhaps most notably since the introduction of the 'Special Procedure' in divorce and the Matrimonial Causes Act 1973, nullity cases are numerically, if not intellectually, insignificant.

[18] While it is necessary to be sensitive to denominational differences, aspects of a broadly Christian morality may be identified. Despite the breach with Rome in the sixteenth century, English courts continued to apply canonical principles regarding annulment and one of the most productive sources of details on sex in marriage comes from treatises on moral theology and records of cases of conscience and confessional manuals. For a detailed analysis, see Flandrin, 1985. The basic tenet of Christian morality may be said to be a disapproval of sexual pleasure, which prevents the soul in the body from aspiring towards God. 'Sinful carnality' therefore is an anathema to spiritual cleanliness.

[19] The 1857 Act established civil jurisdiction in matrimonial matters, creating civil courts and providing for absolute divorce. With the exception of lack of consent, the only ground on which a marriage could have been made voidable after the subsequent 1929 Age of Marriage Act rendered a marriage void if either party was under the age of 16, was that if one of the parties to the marriage was impotent. The Matrimonial Causes Act 1937 added four new grounds to the constitution of a voidable marriage: wilful refusal to consummate the marriage, mental disorder of either party, the venereal disease of the respondent, and the respondent wife's pregnancy per alium.

[20] The secular law was based on a different set of criteria to ecclesiastical law. While marriage of the impotent was a profanation of a holy sacrament, the Church could not proclaim the nullity of such union without assuming at the same time to give rulings on the civil status of citizens within the civil

and political order. Thus, the determination was also a civil matter and the concern of the secular courts. In relation to grounds of impotence, it is important to remember the implications of holding that Parliament must have intended that the word "consummate" be understood in the sense in which it had hitherto been employed by judges dealing with matrimonial causes. The Court for Divorce and Matrimonial Causes set up by s 22 of the Matrimonial Causes Act 1857 enacted that in all suits and proceedings, other than proceedings to dissolve any marriage, the court shall proceed and act and give relief on principles and rules which shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted. In the case of Baxter v Baxter [1948] AC. 285, Viscount Jowitt interpreted this as applying to suits for nullity on the grounds of incapacity:

"The practical importance of this provision is illustrated, for example, by the fact that mandatory orders for medical inspection are still made in suits for nullity on the ground of incapacity since it was the practice of the ecclesiastical courts to make such orders..." (p 285)

The transition from ecclesiastical justice to secular justice did involve major difference however and the treatment of impotence in the ecclesiastical jurisdiction cannot be strictly compared to modern law suits for impotence. Marriage as a civil contract must be seen in the context of divorce laws.

[21] From the twelfth century the Gallican Church admitted marriage annulments in cases of impotence (Darmon, 1985: 65), and it appears to be from this time that the notion of indissoluble marriage, and the exclusion of the impotent from the marriage sacrament, begins to emerge. Canon law had considered it part of the implied terms of a marriage contract that the parties had consented to consummate it, that is, had

consented to partake in heterosexual intercourse; if you could not partake in intercourse, you could not marry.

[22] Such as failure to publish banns or celebrating a marriage on a feast day: In statute, see the relevant provisions of the Marriage Act 1949, Marriage (Registrar General's Licence) Act 1970.: Also, Chapter 6, note 14.

[23] The notions of there being in married life a creditor and a debtor may be found in ancient injunctions about couples and sex. Flandrin (1985: 117) traces the notion back to St. Paul in his first epistle to the Corinthians -

"The wife cannot claim her body as as her own; it is her husband's. Equally, the husband cannot claim his body as his own; it is his wife's. " (1 Cor 7, 2-4).

While theologians elevated marriage to a sacrament, from the end of the sixteenth century at least, jurists in the secular tradition were increasingly viewing marriage as a secular, civil transaction. This tension between secular and canonical law runs through the law's treatment of impotency, and is evident in the notion that the impotent man who marries is guilty of contractual 'fraud': in the words of a jurist quoted by Darmon (1985: 60), the impotent

"...are mockers and affronters who have committed the crime of steliionnat [fraud], having passed off false wares for true, and having committed an imposture."

The wife who discovers her husband to be impotent might be thus seen to be entitled to claim for damages, a justified step if meaning that her value on the marriage market had depreciated.

[24] In order for a marriage to be voidable, a decree is needed, only the parties themselves can challenge a marriage and on the death of one of them a voidable marriage becomes unimpeachable. Despite a decree which says that the parties

have never been married, the effect of the decree will be prospective only. By s 16 Matrimonial Causes Act 1973,

"A decree of nullity granted after 31 July 1971 in respect of a voidable marriage shall operate to annul the marriage only as respects any time after the decree has been made absolute, and the marriage shall notwithstanding the decree, be treated as if it had existed up to that time."

The necessity for a decree is therefore a crucial distinction between a void and a voidable marriage. See further Chapter 6, note 18, 19.

[25] S 13(1) Matrimonial Causes Act 1973: the the court shall not, in any proceedings instituted after 31 July 1971, grant a decree of nullity on the ground that a marriage is voidable if the respondent satisfies the court that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he would not seek to do so and that it would be unjust to the respondent to grant the decree. This, in effect, replaces the old common law rule as to approbation.

[26] S 1 Matrimonial Causes Act 1973. At common law the position had been that impotence would be a ground for avoiding a marriage only if it existed at the date of the solemnization and there was no practical possibility of the marriage been consummated at the date of the hearing. Thus, if the party was capable of having sexual intercourse at the time of the ceremony but became impotent later, for example through injury, it would be doubtful whether a petition for nullity could have succeeded. See further note 15, 17 above.

[27] The Matrimonial Causes Act 1937 enacted that that a marriage should be voidable if it had not been consummated owing to the wilful refusal of the respondent to do so (eg Kaur v Singh [1972] 1 AER 292). Wilful refusal must have

existed up to the date of the presentation of the petition. According to Lord Jowitt in Horton v Horton [1947] 2 All E.R. p 874 the words 'wilful refusal' connote

"I think, a settled and definite decision come to without just excuse, and, in determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage".

Wilful refusal may be distinguished from neglect which may be no more than a failure to do what has been suggested.: see also Dickinson v Dickinson (otherwise Phillips) [1913] P 198, in which wilful persistent refusal to allow intercourse was sufficient ground for nullity of marriage: overruled in Napier v Napier [1915] P 184 per Sir Samuel Evans (p 204)

"By wilful refusal I do not mean a mere temporary unwillingness due to a passing phase, or the result of coyness, a feeling of delicacy, affected or real, or a nervous ignorance which might be got rid of or cured by patient forbearance, care and kindness; but a wilful, determined, and steadfast refusal to perform the obligations and to carry out the duties which the matrimonial contract involves."

[28] Honore, 1978: 16. cf Dewar, 1989: 29.

[29] The implications of AIDS for such grounds are by no means clear, though it might be assumed that were a spouse to be knowingly HIV positive at the date of the marriage 12 (e) would apply. It is clear from s 13(1) that if the husband finds out about the wife's pregnancy and nonetheless 'approbates' the marriage, his petition will fail, approbation barring all claims for nullity on the ground that a marriage is voidable.

[30] There are alternatives to this: see New Zealand MPA 1963 s 18(2)(d))

[31] Moran, 1986 introduces the notion of 'penile economy'.

[32] By this time an acceptance of pleasure as a component of sexual intercourse was beginning to emerge, expounded in particular in the writings of Thomas Sanchez, to be cited in D - e v A - G 1044 at 294: See Sanchez de Matrimonio, lib.7, disp. 92. 'Pleasure' itself seems for at least some theologians to have been experienced automatically for both male and female at the moment of male ejaculation: see 'Homme et femme dans le lit conjugal' in J.L. Flandrin 'Le Sexe et l'Orient, ch 8 pp 127-36.

[33] At least after the fifteenth century, so long as nothing was done to impede procreation, some theologians no longer considered it to be sinful for a husband and wife have intercourse with the intention of pleasurable sensations. If there were to be no other recognised and legitimate purpose for intercourse other than the procreation of children, then a priori any contraceptive or abortive device would be immoral and 'against God'. In advocating marital sex 'for pleasure alone', Sanchez and other theologians significantly and paradoxically split pleasure and procreation in the very process of advocating their inseparability to marital coitus. It is not surprising that Lushington replicates the confusions around pleasure and procreation in D - e v A - g.

[34] Theologians expanded at great length on the question of whether female 'semen' was necessary for procreation: see Flandrin, 1985, 119. Generally, all agreed that there was some form of female semen emitted at the moment of orgasm, that it was not necessary for the birth of a child, but that it was of assistance and made the child more beautiful. There seemed to be no reason for God making sex enjoyable for women other than to propagate the species. It is interesting to note that several theologians considered it to be a moral obligation for the husband to prolong copulation until the wife emitted her semen.

[35] The theologians in Flandrin's (1985) study considered also whether or not a husband and wife should orgasm simultaneously, and whether or not it was lawful for the wife to achieve an orgasm by masturbation when the husband had withdrawn. Theological investigations into the physical mechanics of sex are striking in their detailed and unrelenting depictions of bodily functions. That consummation does involve emission as well as penetration has been referred to in several works on medical jurisprudence: Oughton's *Ordo Judiciorum* (1738), vol. 1, tit. 193, para. 17, p. 286; Paris and Fontblanque on *Medical Jurisprudence* (1823), vol. 1, p. 204; Chitty's *Practical Treatise on Medical Jurisprudence* (1834), part 1., p. 375; Shelford's *Treatise of the Law of Marriage and Divorce* (1841), pp. 201, 206; Beck's *Elements of medical Jurisprudence* (1842) p. 56 and Coote's *Practice of the Ecclesiastical Courts* (1847), p. 370 et seq: see also Bayle's *Historical and Critical Dictionary* (1737), 2nd Edition, vol. IV, p. 800, n. 4 for the procedure known as *Le Congres* in a nullity suit in France in the sixteenth century.

[36] Noting that before the Act of 1937 there was no remedy at law for wilful refusal to consummate a marriage, the only ground for nullity of marriage based on non-consummation of marriage which was recognized by the old ecclesiastical courts was such non-consummation as referred back to incapacity subsisting at the date of marriage. See note 7, 17, 20.

[37] For an excellent overview on the female orgasm in sexual politics from a feminist perspective, Campbell, 1980. See further the influential 'The Myth of the Vaginal Orgasm', Koedt, 1970: Also Sichtermann, 1986.

[38] In fact, as was noted in the medical evidence in passing (no significance attached to the point), labour ended after 72 hours by an instrumental delivery under a general anaesthetic.

[39] See Chapter 8 p. 287 - 292; Chapter 9, p. 306 - 315. Note 34, above. Ecclesiastical law's treatment of impotence is not

homogenous, and canon law's attitudes have been subject to historical shifts. The dynamics of such changes appear complex, though it would seem that the changing status of 'fraternal cohabitation' (marriage without intercourse) has a symbiotic relation to legal impotence. Darmon (1985: 3) argues that, at least in France, 'fraternal cohabitation' had been exalted (a preferable alternative to the dissolution of marriage) up to the middle of the sixteenth century. With the perceived deterioration of the institution of marriage around the end of the sixteenth century however, coupled with the 'explosion' of discourses about sexuality, impotence provided a focus for obsessional discussion about sex and the body, and of the institution of marriage itself: see Flandrin, 1985.

[40] It is worth quoting at length some of the questions considered by Father Sanchez in 'De Matrimonio' (quoted by Darmon, 1985: 4): They included

"Is it lawful to think of another woman while in the act of fulfilling the conjugal duty?

Is it lawful for each partner to ejaculate independently of the other?

[At this time, female secretions during coitus were thought to be equivalent to the ejaculation of semen]

Is it lawful to have relations with a woman without arriving at the emission of semen?

Is it lawful to help the impotent partner by all manner of fondling and lures?

Is it lawful to practice intromission elsewhere than in the appropriate orifice?"

Sanchez even considered

"Did the Virgin Mary emit semen in the course of her relations with the Holy Spirit?"

God's law is clearly concerned with the body; it calls for minute and systematic detail. Within this sexual economy, the

mysteries of impotence are perhaps understandable: why should a man 'function', according to God's law, in one situation, but not in another? Or not at all?

[41] According to a document of the period

"Any woman that desires severance or separation from her husband because he cannot be of company to her flesh or cannot deflower her must be examined." (Darmon, 1985: 142)

[42] See Chapter 2, note 38, and in particular Adler, 1987.

[43] It is interesting to note that Joan of Arc, when presenting herself to Charles V charged with divine mission, had claimed to be a holy woman by reason of her virginity. On examination by midwives, her virginity was confirmed. It seems that the earliest reference to examination of genital parts occurs in 'Proposuiti de Probationibus', composed by Pope Gregory VIII at the end of the eleventh century as an epistle to one of his bishops. The form of the medical examination, which is essentially the form taken in the cases discussed in this Chapter, is that of attempting to prove the impotence of a particular man by establishing that his wife was still a virgin. Darmon (1985: 75) cites the initiative by Innocent III (1198-1216) which finally legitimised such examination.

[44] Chapter 3, note 40: see especially Campbell, 1988: 69-113.

[45] Eg, Coward, 1982: Kaplan, 1984: Eckersley, 1988: Kuhn, 1984: Kappeler, 1986: Dworkin, 1981: Moye, 1985 (on male responses to pornography): Griffin, 1981.

[46] Darmon's study (1985: 100) presents the impotency trial as for the most part quite short, based on a formalistic and hierarchic framework which, at least in earlier forms, was straightforward: the petition would be lodged, followed by a summons requesting the parties to appear before the ecclesiastical courts to undergo cross-examination. The

evidence, confessions volunteered by the parties, would be interpreted in such a way as to favour the party injured by the impotence of their spouse. However,

"Frequently diverted from it's ostensible aims, the impotence trial became a facade for the most sordid transactions, and an ideal melting pot in which to concoct every variation on the basic theme of a spouse in search of freedom or collaterals excluded from their inheritance." (Darmon, 1985: 107)

The final verdict would depend on the report which followed the forensic examination of the genitals. It seems that the costs of litigation in impotence trials was not such as to exclude all but the very rich. The verdict could be one of three types: either the medical reports would support the accused impotent spouse, in which case the parties would continue to live as man and wife: or, if deemed impotent as charged, the marriage would be annulled and the parties prohibited from consorting with each other. Or, a third alternative, the couple could be ordered to undertake a triennium, a three year period of enforced cohabitation.

CHAPTER 8

LAW, IMPOTENCE AND THE BODY

[1] According to Darmon (1985: 22-3) 'accidental impotence' afflicted men who were by nature well-formed, resulting from injury, illness or surgical operation. This would constitute a diriment impediment only when the accident had occurred prior to the marriage, though it had no power to dissolve a marriage if the accident occurred after the nuptials. In cases of accidental impotence, with no (or a lesser) stigma attaching to the man who befalls such misfortune, attitudes expressed by the judges in Darmon's study tended to be more lenient.

[2] These are intermittent and selective forms of impotence, relative impotence affecting only one of the partners. Theologians considered at length (see Chapter 7, note 35, 34, 40) the problem of the too large or too weak penis to force entry to a female virgin, as well as those women who tired of undersized husbands and sought 'more substantial pleasures'.

[3] A test to be followed and applied by the Court of Appeal in H. v H. (1954) (The Times March 31 1954 Unreported)

[4] See Chapter 7, note 34, 35, 40. Darmon (1985: 35) quotes Vincent Tagereau in 1610, who writes that a husband could lodge a suit against his wife 'if she be so narrow that she cannot be rendered large enough to have carnal relations with a man', but since this 'this almost never happens...we do encounter no complaints on the part of husbands, but many on the part of wives.' (termed 'clausura' in canon law texts). Apart from these, at canon law no other condition was recognised as rendering a woman unable to perform coitus.

[5] Regarding the date as to which the 'structure of the wife's parts' was to be ascertained, the court held that they must take into account future medical or surgical treatment

which might remove the cause of the disability in deciding whether a state of impotency at the date of the marriage and continuing to the date of the action was remedial. Thus, the test of impossibility must be applied at the date of the hearing of the suit when the wife had been willing to undergo surgery and therefore the husband's failed to prove the marriage had not been consummated owing to her incapacity.

[6] Chapter 6, p 197 - 200.

[7] The distinction with Corbett v Corbett [1971] P 83 is that she must be biologically female to begin with. Nonetheless, Ormrod is concerned to reject gender per se: see Chapter 6, p 190 - 202 for fuller discussion.

[8] The hymen , according to Darmon 1985: 148, inspired a poetic vein in the physicians and magistrates concerned with impotency cases, the hypothetical membrane serving as a universally powerful symbol. The 'flower of maidenhead', according to the surgeon Severin Pineau in 'De integritatis et corruptionis virginum notis', published in 1598, was not composed of a single membrane but of four small pieces of flesh which meet, thus hermetically sealing the 'passage of modesty'. According to the proverb of Solomon, there are four things that surpass human understanding, and of which hardly a trace can be discerned: the passage of the eagle through the air, the path of a snake across the earth, the traces of a ship across the water, and the path that a man has made inside a young girl.

[9] Also, Hoch, 1979, 68 - 71: Further, Sayers, 1986: Horney, 1924: 1926: 1931: 1935.

[10] Chapter 7 note 2: Chapter 4, note 87, 86: In particular, see Tiefert, 1987: Hoch, 1979, 65-77. On the construction and insertion of inflatable penile prosthesis, Apse et al, 1984: Joseph et al, 1984: Fallon et al, 1984: Collins and Kinder, 1984. On erectile surgery, Melman, 1978: From a sex therapy

perspective, Perelman, 1984: Zilbergeld, 1980, 273-306. Hoch (1979: 77) integrates an analysis of impotence within a materialist/marxist perspective, concluding:

"...male potency is threatened not by the woman who seems to be a man's immediate judge and opponent but by those social institutions, like the sexually repressive nuclear family...that limit the male's exercise of potency and creativity in his work, leisure and everyday life, especially all those institutions of capitalist production and consumption which require the stimulus of diverted sexual energies to enforce their authority and promote this form of economy."

Reynaud (1983) is more concerned to locate impotence as itself a result of patriarchy. On sexuality as integral to male gender identity, Person, 1980: Nelson, 1985. Tiefert (1987: 166) argues that

"...the persistence and increased use of the stress inducing label of impotence reflects a significant moment in the social construction of male sexuality. The factors that create this moment include the increasing importance of life-long sexual activity in one's life, the insatiability of the mass media for appropriate sexual topics, the expansionist needs of speciality medicine and new medical technology, and the highly demanding male sexual script".

[11] Darmon also refers also (1985: 63) to a De Bray and De Langey, who were described as employing iron fitments to crack the virginity of their wives. Some husbands were prepared to place matters in the hands of other men. In 1894 a court in France referred to a husband who 'instead of fulfilling his conjugal duties', was guilty of, 'having substituted illicit, shameful and unnatural practices, libidinous caresses and fondlings which no honest woman could support'.

[12] Connell is referring to sporting practices, but his arguments I believe apply to the male body in social practice generally.

[13] Heath, 1982: Moye, 1985, brings this out in the context of male responses to pornography. From a psychoanalytic perspective, Person, 1980. See generally Chapter 4 110 - 126.

[14] Smart (1989: 94-95) refers to the work of Walkowitz (1980), Edwards (1981) and Smith (1981) as illustrations of the insights to be gained from an historical perspective on the relation between the law and women's bodies. See Chapter 9, p 306 - 315.

[15] On postmodernism, social theory and the body Kroker and Kroker, 1988: Generally, see the excellent collection of essays, Gallagher and Laqueur, 1987.

[16] Chapter 3, p 85 -98. Note also Chapter 5, p 160 - 177.

CHAPTER 9

CONCLUSIONS

[1] Note especially in relation to prostitution, McIntosh, 1978. As discussed Chapter 3, note 91.

[2] Quoted in Cooper, 1986: The Guardian, 18/11/86. Chapter 6, p 202 - 206.

[3] See Chapter 7, p 243 - 245.

[4] Chapter 2, note 38.

[5] Clarkson v Clarkson (1930) 46 TLR 623: Adultery, for the purposes of s 1 (2) (a) Matrimonial Causes Act 1973 is defined as voluntary sexual intercourse between two people who are not married to each other, but at least one of whom is married to a third party. Dennis v Dennis defined sexual intercourse as the penetration by the male of the female genitalia. On the standard of proof, Serio v Serio (1983) 4 F.L.R. 756.

[6] See the Law Commission Report, 1970: No 33.

[7] Achilles Heel, Double Issue on Sexuality No. 6/7 Editorial Statement.

[8] See Chapter 4, p 119 - 126. In keeping with the arguments of Chapter 3, p 77 - 80, law is of course not necessarily the only place to start to begin to address sex differences in society. I have throughout this thesis sought to render problematic the wider cultural nexus.

[9] Generally, Chapter 4: note 38, 86, 87.

[10] Chapter 7, note 27: Horton v Horton [1947] 2 All E.R. 871: S 12 (b) Matrimonial Causes Act 1973: S v S (Otherwise C) [1954] 3

AER 736: Potter v Potter (1975) 5 Fam Law 161: Kaur v Singh[1972] 1 AER 292: Jodla v Jodla (Otherwise Czarnomska) [1960] 1 AER 625.

[11] Eg, the range of texts which have been termed 'radical feminist' and which have been referred to throughout this thesis. On feminism generally, Chapter 4, note 2.

[12] In relation to prostitution, see Chapter 3, note 91: Generally, Weekes, 1981, 81 - 96: Walkowitz, 1980a: Walkowitz, 1980b: Pearsall, 1969.

[13] Smart and Sevenhuijsen, 1989: Smart, 1989a: Brophy, 1989: Sevenhuijsen, 1986: Note s 4 Children Act 1989.

[14] See Chapter 1, p 23 -26: Alcock, 1984: Smart, 1984.

[15] Bottomley, 1984, 1985: Note the relation between conciliation and proposals for a Family Court: Hoggett, 1986: Gerard, 1984: Roberts, 1983: Davis, 1983: Yates, 1987: Szwed, 1984:

[16] For example, Smith's (1971) argument in relation to transsexualism is in some respects liberal, but it is interesting to note how his attitude differs to the pre and postoperative transsexual. In relation to the postoperative transsexual, Smith argues

"Common sense dictates a recognition of a psycho-social criterion for sex-determination, at least after surgical intervention...The converted transsexual should not be denied the inner tranquillity and normality of existence to which all are entitled..." (Smith, 1971: 970-1)

However, when it comes to the preoperative transsexual, Smith (1971: 959) concludes

"The law is concerned with man's relations with other men and with society as a whole. Because society considers them crucial, factors other than a person's psychological sex cannot be ignored. In fact, they must be held to be **controlling** if overwhelmingly contrary to the assumed sex role. Thus, a preoperative transsexual would **have to be** classified according to his anatomical sex. Society would consider a fully anatomical male to be male regardless of a convincing feminine appearance or the individuals inner beliefs. **Society has a rightful, dominant interest** in seeing that the female impersonator is legally considered just that - regardless of motive. **The dangers inherent in having a procreatively functional male classified as female are apparent.**" (My emphasis)

What are these dangers? On Smith's argument, the post-operative transsexual is to be accepted: he/she confirms the dichotomies of male and female, sex and gender. The pre-operative transsexual however is a mere 'female' (or male) impersonator', a threat to the hegemonic masculinity and the sex/gender system on which it is based. Not just in relation to transsexualism, but throughout the concerns of this thesis, it is important to recognise that the theoretical perspectives I have discussed each contain implications for practical reforms.

[17] For example, while 1990 saw the scrapping of the tax on workplace nurseries, it would be inaccurate to represent this as a major step forward for working mothers. As the EOC stressed, it will do little to meet the problems in providing good quality child care; while a working mother with one child at a subsidised workplace nursery would be, typically, £520 a year better off, there are only around 3 000 places in such nurseries: there are 5.5 million under-fives. The Child Poverty Action Group have called for, direct subsidies for local authorities to set up nurseries for all mothers and father may be the way forward. It is also interesting to note the extent to which Britain lags behind EEC members in providing state child care provision. In France, for example, employers pay a

levy, similar to National Insurance, towards higher standards of child care, while in Denmark 44% benefit from state day care, compared with 25% in France and Belgium. In Britain, it is estimated that fewer than 2% of under 2 year olds attend publicly funded day care, and these places are saved for children seen to be in particular need. In the 3 to 5 age group, while 44% of this group in Britain attend nursery, many are part-time nurseries in schools, which do not help working mothers. This figure may be compared to 95% of French 3 to 5 year old in full-time state care (Hunter, 1990).

[18] But not at the cost of eroding female autonomy in childcare practices, which is arguably what trends towards joint custody (as advocated by Families Need Fathers) involve: Brophy, 1989: 1985: Smart and Sevenhuijsen, 1989. Note the influential Wallerstein and Kelly, 1980 on the effects of divorce on children. Also, Maidment, 1984.

[19] The latter is crucial and relates to the 'breadwinner masculinity' discussed in Chapter 1, p 20 - 3 and throughout this thesis. The European Parliament has attempted to develop policies to deal with the family in all member states (European Parliament, Committee on Social Affairs and Employment Working Document PE 709: 147 'Family Policy in the EEC'. Generally on the politics of the family, Chapter 1, p 16 - 20.

[20] Chapter 2, note 38.

[21] Chapter 2, note 40.

[22] Chapter 2, note 39.

[23] Chapter 7, note 45.

[24] Chapter 3, note 91.

POSTSCRIPT

[1] 'The Intellectual Life' consists of a series of essays 'addressed to a young man' who is considering the 'life of the mind'. It is a wealth of such comments and advice on physical and mental hygiene which, unfortunately, serve as accurate descriptions of aspects of academic life today: on male homosociality, Chapter 5, p 139 - 149.

[2] McAuslan, 1989. Generally see Chapter 2, p 34 - 38 on critiques of doctrinal orthodoxy: also Hunt, 1986, 1987 on contemporary developments.

[3] On law as a social discourse, Chapter 2, p 50 - 59. I am here referring to law schools of involved in higher education in the UK and recognise that the tentative comments in this postscript entail a considerable degree of generalisation. Nonetheless, I believe it is possible to identify in the law school

"...the maintenance of practices that institutionalize men's dominance over women. In this sense hegemonic masculinity must embody a successful collective strategy in relation to women...hegemonic masculinity can contain at the same time, quite consistently, openings towards domesticity and openings towards violence, towards misogyny and towards heterosexual attraction." (Connell, 1987: 185 - 186)

[4] Thornton uses the concept of hegemonic masculinity, developed by Connell (1987) and Carrigan et al (1985): further, Chapter 5, p 160 - 177: Chapter 9, p 315 - 321. Smart (1989) refers to the construction of masculinity in discourse, but by way of suggestions for future research rather than presenting an analysis in its own right: Noting that law is constituted as a masculine profession both on empirical grounds (there are few women lawyers or judges), and that 'doing law' (whatever that

is) and being identified as masculine are congruous, Smart does not argue that men are most suited to law because of some biological determinism. Rather, law is constituted as rational "as are men, and men as the subjects of a discourse of masculinity". In challenging law, Smart argues feminists are not simply challenging legal discourse but also naturalistic assumptions about masculinity. (Smart 1989, 86 - 7). I have in this thesis sought to challenge such assumptions. This is a very different approach to masculinity and the academy from, for example, McAuley (1987), who having found that women are rare in the higher reaches of administration, research and teaching where the political power to influence policy decisions lie, concludes that

"...embedded in the values and attributes of many men in the institution were strong features which militate against the development of equality for women." (McAuley, 1987: 158)

To account for this it is said there may be 'explicable' historical, social and economic reasons which have determined the hierarchical distribution of men and women between and within faculties.

[5] In relation to men's studies, Chapter 4, p 102 - 104: that is, tertiary educated, middle-class and predominantly white: those who make up the majority in law schools in the UK. Fraser (1988) seeks to address these contingencies, the contradictions and futility of his professorial status and his search for sexual intercourse: he has

"...long talks with friends about [the] law school and love and I write this because I live the contradiction, futility and alienation of being a white, male, heterosexual, CLS law professor. I detest hierarchy and seek authentic connection with my fellow humans, including love and sexual intercourse with women." (Fraser, 1988: 70 - 1)

On the theoretical and political limitation of a 'men's liberation' perspective such as Fraser's, Chapter 4, p 133 - 137.

[6] Though I would not wish to overstate this. Resistant discourses may have effects at multifarious levels, but not necessarily entail significant structural change in terms of policy reforms. Feminist critiques of legal method have far reaching implications for the practice of law. In relation to law's exclusions of questions of subjectivity, Seidler (1987: 85) raises an interesting question:

"...it can hardly be surprising if they (men) feel drawn to intellectual traditions...which would seek to banish that very category of experience."

Connell describes the combination of theoretical knowledge and technical expertise which is central to the professions claims to competence and monopoly of practice as follows. It is, I believe, an apt summary of the professional male legal career.

"This has been constructed historically as a form of masculinity; emotionally flat, centred on a specialised skill, insistent on professional esteem and technically based dominance over other workers, and requiring for its highest (specialist) development the complete freedom from childcare and domestic work provided by having wives and maids to do it." (Connell, 1987: 181)

Hearn (1987: 140) would agree, arguing that professional emotional control is located primarily through others in interpersonal relations in the form of

"...an institutionalised defence structured in interpersonal relations and other persons. These professions and their masculinities are havens of occupational extroversion and projection."

[7] Particularly evident in Fraser, 1988. There is, perhaps a certain paradox here, for self-reflection can easily turn to the kinds of introspective guilt which pervades much of the 'men against sexism' literature, discussed in Chapter 4, p 126 - 133. The wider question relates to whether feminism is really about "tearing the agenda up: We don't yet know" (Bottomley et al, 1987: 49) and the project of 'Women's Studies':

"We are all, as members of a university, guardians of the Law - people who assure a tradition, who maintain a heritage, who are critics and evaluators, and at the same time who are men from the country, naive in front of the text, in front of the Law. Does that situation repeat itself for women's studies or not? Is there in the abstract or even topical idea of women's studies something which potentially has the force, if it is possible, to deconstruct the fundamental institutional structure of the university, of the Law of the university?" ('Women in the Beehive: A Seminar with Jacques Derrida' in Jardine and Smith, 1987: 192)

[8] Eg, Freeman, 1985. Freeman is notable as a man working within the sub-discipline family law who has integrated feminist theory into his scholarship and has produced challenging work supportive of feminism and with a clear political commitment.

[9] On this question generally, Jardine and Smith, 1987. As Hearn (1987: 20) has argued, the recognition of the personal dimension is a **necessary** part of theory. Academic theory which ignores important facts of existence is simply poor theory.

[10] Chapter 2, p 50 - 59. 'Fashionable' does not imply influential. Masculinity constitutes an important (and neglected) dimension to analyses of the 'postmodern condition' (Lyotard, 1984). The linkages have been explicitly made in feminist texts: eg Weedon, 1987; Moi, 1985.

[11] Ramazanoglu (1987: 61) stresses the awareness women in academia have of the problematic nature of features of the institution and their working relationships with men. These are relations which might result in

"...insults, leers, sneers, jokes, patronage, bullying, vocal violence and sexual harassment..."

Ramazanoglu's use of undifferentiated 'violence' to describe a range of behaviour has its own problems, but her analysis of gender relations in the academy makes clear that unquestioned presumptions as to the communality of understanding between men and women as to the nature of the institution need to be treated, at the very least, with caution. On such a broad definition of violence, Morgan, (1987: 181) comments:

"...violence may be recognised as such but may be excused or rendered as 'understandable in the circumstances', given the pressures, the provocations and so on. Men and masculinity are implicated in all these processes to do with the construction of violence...men play a crucial role in defining the parameters within which violence is defined and understood."

[12] Thornton (1989: 12) argues

"...senior men see youthful images of themselves as the ideal candidates within the recruitment process; they, after all, are the successful products of the status quo. Indeed, one male decision-maker, when asked what was in his mind during the university selection process ingeniously replied, "Well, it's like looking in a mirror". That is, the young man who went to the same university, or a similar one, and who pursued a similar career path must necessarily be the most meritorious."

[13] Brittan (1989: 6) states,

"...the point I am making is what we all know. Namely that the university is not a community of democratic scholars disinterestedly pursuing the quest for truth. Like other organisations, it is a morass of petty jealousies and betrayls. Those of us who make the grade, who get to the top of the academic pile, spend a great deal of our time denigrating the work of others. We compete with each other in ways that are no different from the cut throat world of business. We resent the preferential treatment of some of our colleagues at the expense of our own claims. We spend countless hours gossiping about this or that persons 'private life'. In our dealings with students we pay lip-service to impartiality, but we continuously favour the 'intelligent' over the 'average'. Moreover, we resent some of their abilities. We see them as potential rivals in scholarship, as possible threats to our academic reputation. Perhaps, more significantly, we have not recognised our masculinism, our commitment to gender inequality, our sexual objectification of women. The university is no different in this respect to any other institution, except that it glosses violence more successfully."

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