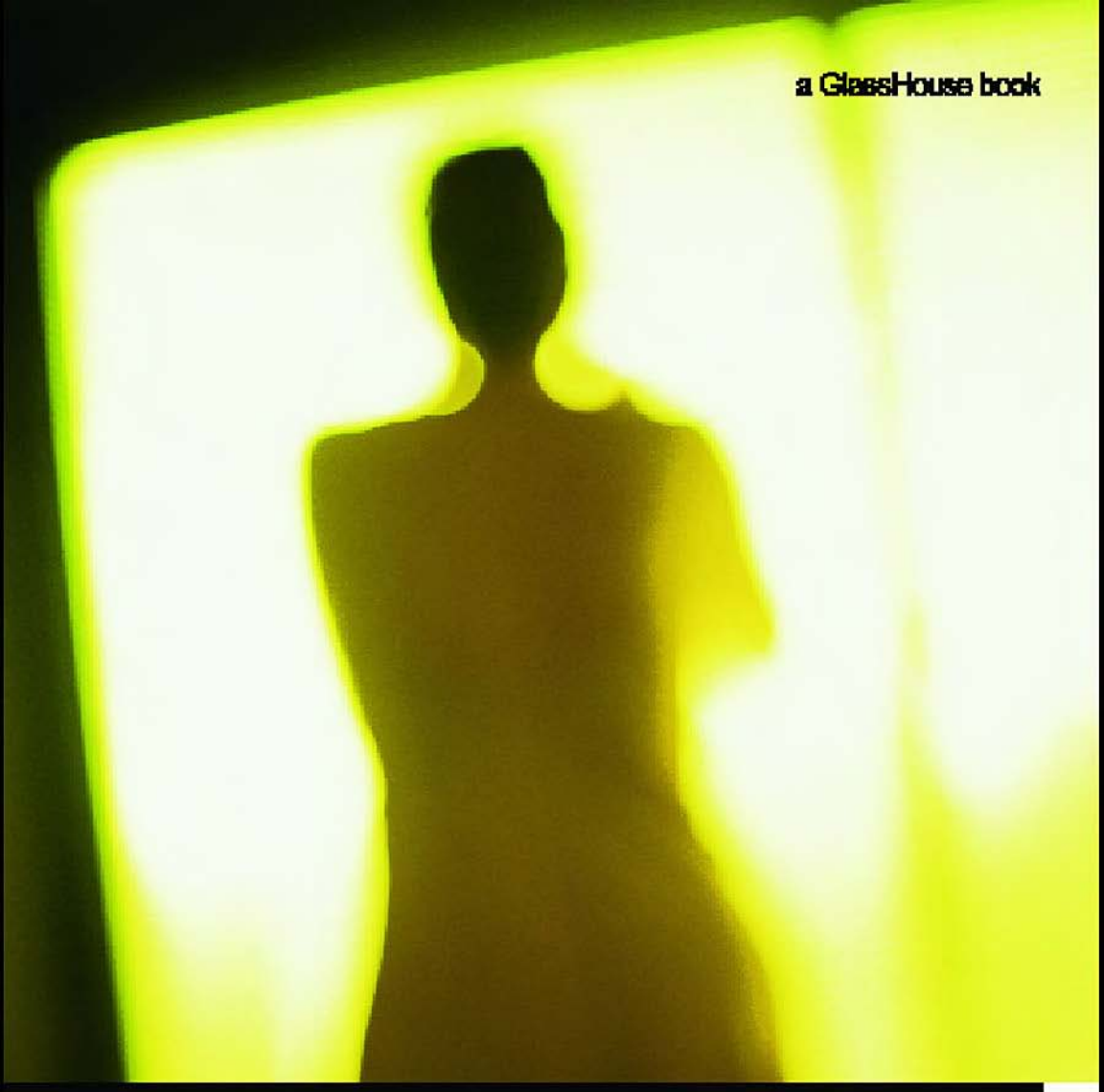

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FEMINIST PERSPECTIVES ON FAMILY LAW

Edited by Alison Diduck and Katherine O'Donovan

FEMINIST PERSPECTIVES ON FAMILY LAW

Feminist Perspectives on Family Law assesses the impact that feminism has had upon family law. In addition to issues of longstanding concern for feminists, it examines issues of current legal and political concern, such as civil partnerships, home-sharing, reproductive technologies, and new initiatives in regulating the family through criminal law, including domestic violence and youth justice. Deliberately broad in scope, it takes the view that family law cannot be defined in a traditional way.

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Alison Diduck
and
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Alison Diduck and Katherine O'Donovan
December 2005

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Introduction

While feminist perspectives on all areas of life and law are crucial to achieve a just, nuanced and comprehensive understanding of them, some might think that the family and family law are the first, or at least most obvious, places to start. After all, feminism is concerned to ask questions about the lives of women, and the lives of women have traditionally centred upon their families. In fact, feminist perspectives have been offered upon family relations since a recognised feminist movement began centuries ago. From these, its 'first waves', the feminist movement was concerned, among other things, to secure not only women's political equality with men, but also women's (special) rights to custody of their children; the second wave's campaigns in the mid-twentieth century to promote women's financial self-sufficiency and independence from men also aimed to reveal an ideology of the family that inhibited that goal. Family relations and family law have thus always been as important to women, and therefore to feminism, as have claims to civil, political or legal rights. And importantly, in always asking the 'woman question' and thus rendering both visible and valuable the concerns of women in law, feminist legal theory has also been able to link family law and family relations to women's abilities to make those claims.

Of course, family relations and family law have always been important to men and children also and to their political status, economic activity and claims to citizenship and rights, and it is a feminist perspective that has made this link explicit. The importance of feminist perspectives on family law, therefore, is to bring to light the ways in which the legal regulation of private, *family* relations are also about the regulation of *social and political* relations; they are about the nature and value of dependence and independence, about the balance of social and economic power and about the part that law plays in this regulation. A feminist perspective emphasises the personal as political, and, born as it was of feminist activism, feminist theory is also about the possibility of the transformation or reconstruction of both.

The contributions to this collection about family law are thus feminist in orientation or character not because they necessarily agree about the advantages or disadvantages of, or the causes of or solutions to, gendered living, but because they explore the ways in which law is implicated in that living. And they adopt a range of feminist methodologies to do so. Method, as Maleiha Malik[1] points out, is critical. Feminist methods are about critique: they aim to disrupt; to question; to render problematic the 'objective', the 'neutral' and the 'normal'. Feminist perspectives challenge not only law's claims to objectivity and liberalism's foundational

1 Chapter 11.

claims of autonomy[2] and equality,[3] but also legal and social norms[4] and the forms of reasoning that sustain them.[5] Like other feminist work, there is a breadth to the writings here. Some of the chapters draw on traditional legal sources such as cases and statutes; others look to government position papers and parliamentary discussion; yet others are based on interview material and the internet. Contributors adopt conceptual feminist methods,[6] hermeneutic methods,[7] queer theory,[8] discourse analysis,[9] empirical analysis,[10] critique,[11] futurology[12] and social policy analysis.[13] Sometimes they discover that law is amenable to feminist disruption and critique, but often they uncover its resistance and the difficulties that resistance creates in the day-to-day family lives – the family practices[14] – of individual men, women and children.[15]

The perspectives offered in this book can also be called feminist because they address one or more of the themes that many scholars of family law have identified as currently important in transforming the lived reality or material effects of gendered family living.[16] The changing landscapes of family, of feminism and of law mean that the concerns of the twenty-first century are different from those of other times, as are the conceptual and practical tools with which we can engage with them. In the 1970s, campaigns for 'wages for housework', questions like 'why be a wife?', or references to 'the rapist who pays the rent' generated a long moment of challenge to gendered conceptions of family, self and society. Although this challenge was initially directed at perceived male dominance and at the silence and invisibility of women, both sexes came under scrutiny, which led to analyses of dominant and accepted norms in family and personal life.

Different concerns dominated the 1980s. A form of 'pro-family' feminism came to celebrate gender differentiation, including women's roles as mothers. Elements of this pro-familialism remain today, with the expression by some women of a 'you can't have it all' philosophy once they become mothers. Indeed, there is something almost unfashionable for many young women today about the claims their mothers made, and it is feminism that is often blamed for creating unreal

2 See, for example, Malik, Chapter 11; O'Donovan and Marshall, Chapter 6.
3 Lacey (1998); in this volume see Smart, Chapter 7; Stychin, Chapter 2; Kaganas, Chapter 8; Piper, Chapter 9; Mumford, Chapter 10.
4 See Stychin, Chapter 2; Jackson, Chapter 4; Bottomley and Wong, Chapter 3.
5 See Jackson, Chapter 4.
6 O'Donovan and Marshall, Chapter 6; Bottomley and Wong, Chapter 3; Jones, Chapter 5.
7 Malik, Chapter 11.
8 Stychin, Chapter 2.
9 Smart, Chapter 7; Kaganas, Chapter 8; Piper, Chapter 9.
10 Piper, Chapter 9; Jones, Chapter 5; Smart, Chapter 7.
11 Collier, Chapter 12.
12 Jackson, Chapter 4.
13 Mumford, Chapter 10; Piper, Chapter 9; Stychin, Chapter 2.
14 Morgan (1996).
15 See, eg, Piper, Chapter 9; Jones, Chapter 5.
16 Collier, Chapter 12; and see Boyd and Young (2004).

expectations for women who try to live their family lives differently, perhaps by 'having it all' and combining paid work with family work.[17]

In contemporary times, questions of labour and political economy and 'who does care and caring?' remain as material as they were twenty or even forty years ago, but feminist theory has also raised new questions. Focus is now also on the ways in which both concepts and material realities are constructed or given meaning, so that previously taken-for-granted concepts like autonomy, rationality, justice, or sex/gender can themselves be unsettled.

Feminist engagements with law and policy have also undergone a form of self-reflection or self-interrogation. While nineteenth- and early twentieth-century feminists relied firmly on the authority of law to effect social and political change, formal law's centrality in maintaining the gender order seems no longer to be so clear.[18] To modern feminists, law is still important, but even it must be redefined, and it must be analysed in terms of the part it plays in conjunction with other regimes or 'discourses' to regulate our familial and gendered lives.

As a result of the work of feminists in all of these times we have been able to bring to light not only inequalities at the material and symbolic levels of the private, but also their spillover effects into politics, paid work and public life in general; the terms of the debates in politics, in fiscal and social policy and in the labour movement have shifted accordingly. We *can* now ask, for example, if it is the structure of the labour market or, as Ann Mumford[19] suggests, the tax and benefit system, rather than the individual choices of women, which means they 'can't have it all', and we can also ask how we contribute in our day-to-day performance of gender to its material effects.[20] This shift, we argue, this legitimation of previously unvoiced and unvoiceable concerns and observations, can be counted as another of feminism's success stories in the family law field.[21]

We have also become able to redraw the boundaries around *ways of thinking about* ourselves and the ways we live. Contributors here, for example, illustrate the importance of entirely new ways of thinking about intimate and affective connections in their proposal for a new paradigm from which questions can be posed about relationships of care and support.[22] Even apart from the question of why the dyadic relationship is privileged over others, Anne Bottomley and Simone Wong[23] and Carl Stychin[24] ask: 'When does a couple become a shared household and when does a shared household become a couple?' For our purposes, we could also ask 'when do they each become a "family?" ' and, for this question, we could also draw upon Caroline Jones's[25] and Emily Jackson's[26] challenging of the

17 Douglas and Michaels (2004).
18 See, eg, Smart (1989).
19 Chapter 10.
20 See, eg, Collier, Chapter 12.
21 Philipps (2004).
22 Chapter 3.
23 Chapter 3.
24 Chapter 2.
25 Chapter 5.
26 Chapter 4.

'naturalness' of parenthood. In the twenty-first century, the meaning, value and *politics* of terms such as 'couple', 'parent' and 'family' lend themselves to feminist scrutiny and challenge.

The terms of the legal debates have also shifted, and it is certainly important to note that we now have a woman Law Lord: Baroness Hale's contribution to ideas of equality and justice in family living has been considerable.[27] Even before her appointment, however, judicial statements such as those in *Gillick v West Norfolk and Wisbech Area Health Authority*,[28] *R v R*,[29] or *White v White*[30] dramatically changed the discourse around legal obligations, roles and responsibilities in intimate living. While serious difficulties remain with many of these decisions, and while legal change certainly cannot be a guarantee of behavioural or attitudinal change, it would be puerile, if not irresponsible, to suggest that these cases have not opened up a space for a feminist reconsideration of family living.

Feminist challenges have also had an impact upon legislation. While much remains problematic about the ways in which it is interpreted and implemented, as Felicity Kaganas notes,[31] Part IV of the Family Law Act 1996 clearly reveals a feminist influence. Further, although there are other difficulties about the way they are framed and experienced, provisions for maternity, paternity, adoption and parenting leave arguably also owe their credibility to a feminist influence in creating a space in which conversations about them could be held. But although family law has sometimes responded to feminist challenges, as we shall see, sometimes it has not. Consider, for example, the fact that only one half of female pensioners are entitled to a full basic state pension, compared with 90 per cent of men, and that of these, approximately only one third receive the pension as a result of their own contributions; the remainder rely upon entitlement through their husbands' contributions. Only 30 per cent of women have an additional private pension provision, compared with over 70 per cent of men.[32] And so, while women have the same ability formally to accrue retirement pensions as men, because their patterns of work differ markedly from the 40-year full-time model on which pension accrual and entitlement are based, women, disproportionately to men, tend to face the real possibility of poverty on retirement. It is not by chance, recognised the Minister of State for Pensions, that two-thirds of those benefiting from Pension Credit (the means-tested top-up to state pension provision) are women.[33]

At other times, the legal response to the feminist challenge has taken the

27 See, for example, *Ghaidan v Mendoza* [2004] UKHL 30; *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

28 [1986] AC 112.

29 [1991] 4 All ER 481.

30 [2001] AC 596.

31 Chapter 8.

32 Wicks, The Rt Hon Malcolm, MP, Minister of State for Pensions (2004), Speech to TUC Conference, 'Women and Pensions'.

33 *Ibid*.

form of a type of backlash, similar to the formal equality backlash that was part of the 1984 amendments to the Matrimonial Causes Act 1973,[34] while at still other times, the gulf between symbolic legal statements and behavioural change remains vast. In other words, whether there has been a fundamental re-ordering of family living both inside and outside the home remains open to question. As Richard Collier[35] says, men and women do not come to law or to their families as fixed, gendered subjects; rather, the meaning and effects of gender are created, constructed or shaped by what we do. Both law and family living are gendering processes that have profound material consequences for men, women and children.

The gendering effects of family living are difficult to disentangle from law, but are as complicit as law in claims to and ideas of justice. Susan Okin observed in 1989 that the family 'is not conducive to the rearing of citizens with a strong sense of justice'.[36] Looking at gender-related role allocations in a family through the eyes of children growing up therein leads to interesting perspectives. Okin argued that injustice resulting from the division of labour between the sexes destroys 'the family's potential to be the crucial first school where children develop a sense of fairness'.[37] Okin's themes are familiar from feminist work of the past forty years: the division of household and paid labour by sex; the gendered practices of family life; unequal pay in paid work; and assumptions about workers as free individualists. Given developmental theory on the identification of children with the parent of the same sex and the assignation of primary parenting within the existing gender structure, it is not surprising to find mothering reproduced in girls.[38] But although girl-children may see a model in their mothers, they may also be aware of power and inequalities. For all children, a perception of inequalities of power and resources in their families may be an education in injustice.

How far have we come from Okin's powerful observations? Collier's[39] concerns with materialist and power aspects of gender relations and his implied criticism of neglect of these in recent feminist work challenge us to reflect upon this question. Whereas Okin's vision of a genderless society seems as far away today as it was at the time of her writing, her emphasis on the material conditions of the conventional division of labour between the sexes remains pertinent today, notwithstanding its expression in the new discourse of individual choice. Conventional gender performances still exert a pull once a woman becomes a wife and mother, and this pressure may come as much from within, with love and dreams for their children taking precedence over other work roles. Too often, however, this is represented as 'choice', whereas what lie beneath are power differentials and conventional gendered assumptions. As Bren Neale and Carol Smart wrote in 2002, the identities of mothers tend to be bound up primarily with their children

34 Smart (1984).
35 Chapter 12; and (2001).
36 Okin (1989), p 170.
37 *Ibid*, vii.
38 Chodorow (1978).
39 Chapter 12.

while fathers' identities tend to be bound up primarily with their employment.[40] Placing these findings within the rhetoric of 'choice' simply masks this, the normalising power of gender and family roles. Neale and Smart conclude that 'a strong element of choice is still associated with a mother's decision to enter or stay in the labour market, and the same element of choice is still associated with a father's decision to care'.[41]

For law's part, it is true that since the 1970s there has been a shift of emphasis away from the couple relationship towards the regulation of parenting, particularly where families are not co-resident, and that there has been a simultaneous privatisation of the couple relationship, with emphasis on negotiation of the conditions of living together and splitting up. The Human Rights Act 1998 has injected a public element of rights and justice into intimate relations and has led to extensions of marriage to transsexual persons[42] and to recognition of same-sex relationships which are registered.[43] The notion of 'family' may thus appear to have become complex and contested and infinitely extendable, and one way to describe our family living may be as 'chaos'.[44] But when one looks closer at the partnerships and relationships that attract 'family' recognition, there is less scope for diversity than first appears, and law's response can be characterised perhaps less as chaotic[45] than as normalising.[46] Crucially, and particularly in an era of privatisation, this extension of the notion of family serves the economic and social interests of the neo-liberal state.[47]

Statutory provision in family law is now gender neutral, but as we and other contributors highlight, this may obscure its role as a gendering strategy and give rise to 'a search for equivalence' where there is none.[48] Power in both private and public spheres seems to remain resistant to equitable distribution between the sexes, despite the appearance of gender neutrality. It has not been so easy to get away from the symbolic or the material structures of gender. In addition, whereas in the 1970s all women seemed to share a common subordination, it became apparent in the 1990s that differentiation according to economic resources, race, religion and ethnicity make universal claims about the conditions of women difficult to sustain. The modern challenge for feminist family lawyers and for the contributors to this book, therefore, is to reveal the ways in which law is implicated, in the twenty-first century, in all of these complicated, sometimes sophisticated, but always resolute structures of gender.

And so, drawing upon our own recent work and that of other feminist scholars including Martha Fineman and Susan Moller Okin in the US and Brenda

40 Neale and Smart (2002), p 196.
41 *Ibid*.
42 Gender Recognition Act 2002.
43 Civil Partnership Act 2004.
44 Beck and Beck-Gernsheim (1995); Dewar (1998); Diduck (2003; 2005).
45 Dewar (1998).
46 Diduck (2003; 2005).
47 Cossman (2002); Boyd and Young (2004); Fineman (2004); Diduck (2005).
48 Collier, Chapter 12; Piper, Chapter 9; Kaganas, Chapter 8.

Cossman, Claire Young and Susan Boyd in Canada, we have grouped contemporary concerns for feminist family law under three headings: autonomy and the shape of identity; equality and equivalence; and familialisation and privatisation. In conceiving of the issues in this way, we and the contributors to this book are indebted to perhaps the greatest legacy that feminist scholarship has left to family law: expanding the range both of what can be known and the questions that can be asked about the world.[49]

What is family law and what does it do?

In positivist terms, family law can be defined as a collection of statutes and cases regulating the family. Such a definition hides more than it reveals, however. Family law can also be said to have a functional role in relation to dispute resolution and the protection of children. It also constitutes some families in particular ways and excludes others.[50] It constitutes individuals in particular ways, as well; it is 'an arena for the ideological struggle over what it means to be a mother, daughter, wife and so forth'.[51] If 'family' has become an ambiguous or at least flexible concept in law, it follows that the concept of family law is also potentially extendable. If family law is about the regulation of what it means to be, and the public or social, as well as the personal, consequences of being, a mother, father, son or daughter, then family law is also employment law,[52] criminal law,[53] youth justice,[54] tax law,[55] immigration law,[56] public and constitutional law,[57] property law,[58] social security law[59] and EU law.[60] In addition, a pluralist approach to law also locates family law in the social as much as in the state,[61] at the level of conscience, feeling and expectations. Family law, as a form of regulation, is about the manipulation of social norms as well as legal ones, and the idea of family law must now grow also to encompass all the ways our family practices are captured by both formal and informal regulation.[62]

In the light of the many roles or functions family law can serve, then, we must try to be as clear as we can about what we want it to do and what we do not want it to have any part in doing. While, for example, many feminists would agree that

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49 Philipps (2004), p 605.
50 O'Donovan (1993); Diduck and Kaganas (2006).
51 Olsen (1992), p 209.
52 Employment Act 2002; Work and Families Bill 2005.
53 Domestic Violence, Crime and Victims Act 2004, s 5; *A v UK* [1998] 2 FLR 959.
54 Piper, Chapter 9.
55 Mumford, Chapter 10; Philipps (2004); Boyd and Young (2004).
56 Immigration Rules; and see, for a discussion of the concept of family life under Article 8 ECHR, *Singh v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075.
57 *I v UK* [2002] 2 FLR 518; *Goodwin v UK* [2002] 2 FLR 487.
58 Bottomley and Wong, Chapter 3.
59 See, eg, Jobseeker's Act 1995; New Deal for Lone Parents; New Deal for Partners.
60 *Grant v Southwest Trains* [1998] 1 FLR 839; *Webb v EMO Air Cargo* [1994] ECR 1–03567. See, generally, Salford, 2002.
61 Cotterrell (2002).
62 See O'Donovan (1993); Diduck (2003).

there is some value in law playing some role in encouraging and supporting caring relationships including the care of children, we must remain aware, first, that there is a difference between supporting relationships and supporting only certain acceptable forms of relationships, and second, that family law's concurrent role, 'the public enforcement of private responsibilities of individual family members', acquires a new importance in 'an era of privatization'.[63]

At the same time, while we may wish family law to promote some idea of justice in the 'family' group and ensure that the social, economic and political consequences of belonging to that group are not disproportionately distributed according to gender, generation, sexual orientation, class or culture, we must remain alert to the ways in which feminist ideas of equality or justice may be hijacked in a number of ways. They may, for example, be incorporated into the mainstream where they lose their feminist character.[64] Carol Smart observes how the feminist ethic of care has become transformed 'from a potentially progressive concept into a new form of governance over family life' by its elision with responsible caring in New Labour's family policy agenda.[65] Alternatively, or additionally, feminist ideas may be adopted by those working outside a feminist frame,[66] again, as Smart observes, by fathers who position themselves against mothers and make their claims to fatherhood within a combination of narratives that includes an ethic of care. As Smart states, 'no longer can the ethic of care be seen as a feminist corrective to the influence of the ethic of justice'[67] formerly promoted primarily by fathers and by law and social policy. Feminist ideas may also be hijacked by 'family traditionalists' or by their conversion into claims to formal equality, as Kaganas[68] shows in the context of men's groups' claims to be equal victims of domestic violence.

Family law is, therefore, about the regulation of individuals *and* the regulation of the relationships those individuals form, and one of the tensions inherent in feminist family law is the treatment of the family rather than the individual as the unit of analysis. Looking at both simultaneously, or leaving the choice to persons as to where they situate themselves, seems to be desirable. For feminism this has meant that, while the 'family' is often a closed door behind which power is exercised and abuse takes place, belonging, intimacy and a private life also remain important. And so the critique of family undertaken by feminists in the 1970s was of marriage as an unwritten contract, the terms of which were dictated by male power and upheld by the state through a liberal non-interventionist policy in the private sphere.[69] The feminist response was to open up family and open up silences about intimacy and the individual, about the body, sexuality, emotions, personal identity and private life, and the power of those who draw lines between

63 See Diduck (2005); Fineman (2004).
64 Philipps (2004).
65 Chapter 7.
66 Philipps (2004), p 605; Kaganas, Chapter 8; Smart, Chapter 7; Stychin, Chapter 2.
67 Chapter 7.
68 Chapter 8.
69 Weitzman (1981); O'Donovan (1985).

the hidden and the revealed.[70] Much work has been done, therefore, and things are not the same for families as they were even twenty years ago, but there is still much left for family law to do. We hope to continue the project here, by offering tools for analysis of the three themes that preoccupy those in the new millennium who are critical of family law as part of a process of the normalisation or regulation of gendered lives in ways that sustain, rather than expose, the silences.

Issues in family law: (Third wave) feminist concerns[71]

The individual and her autonomy

One of the concerns identified as important in feminist work on families is the way in which particular ideas of individualism, autonomy and agency have been incorporated into family laws. Women's legal autonomy was hard-won by early feminists and is still important, but now it is an autonomy that bears only passing resemblance to the autonomous, 'rational' agents of liberal individualism. Unlike the detached autonomous individual of liberalism, the self in feminist thought is a situated, related and connected self who makes decisions about her life and her self with a rationality that is not exclusively economic. It is a self that not only reacts to situational stimuli, but is created by her situation and her active choices within and constitutive of that situation. This feminist self claims the space to choose who and what to be and to refuse to be confined or contained by structures or meanings about identities.

Anne Barlow and Simon Duncan's[72] work demonstrates how different rationalities may work in making these choices. Often, they say, women with children choose whether or not to engage in paid labour on the basis of more than a simple financial calculation. They exercise a complicated negotiation of moral and economic considerations that are specifically linked to their ideas of being a 'good mother' and belie New Labour's characterisation of them as the economically rational individuals of liberal thought. And Mumford[73] shows that this economically rational individual is also at the heart of tax law, in which the taxable unit is the individual rather than the family and through the way in which the provision of tax credits is given to this unit, government aims to encourage the financial independence of women (as mothers). The problem with the 'rationality mistake' in both these contexts is that it merely encourages women to enter low-paid work and reinforces their dependence upon the male-patterned market, while at the same time discrediting their own moral rationality.

Respecting autonomy may mean understanding the subject from her own perspective. This way forward is advocated by Malik[74] in her approach to a feminist multiculturalism. What Malik shows is how a woman out of tune with her

70 Lacey (1998).
71 See also Boyd and Young (2004).
72 Barlow and Duncan (2000).
73 Chapter 10.
74 Chapter 11.

community's traditional norms is caught in a conflict. It is simplistic to argue that she can leave. For minority women, group membership is a critical aspect of their identity. They seek autonomy within the group. The challenge for those who wish to support minority women facing injustice within their family or their community is to strike a balance between showing support and maintaining a critical distance. Malik's chapter is an illuminating example of how a feminist methodology can be crucial to identifying new theoretical and practical concerns. Malik's feminist methodology is to try, so far as this is possible, to see from within the subjectivity of the other.

From this perspective, we can see that differing traditions of family living, including child rearing, may give rise to differing perceptions of justice. We can also see why family law is often central to claims for accommodation made by traditional minorities and consequently why the regulation of women's lives is also central. Women are the reproducers and socialisers of future members of the community, and so it is not only their individual identities which are at stake; the re-creation and maintenance of the collective identity depends upon them. This role may lead to the control of women in relation to sexuality, marriage, divorce and child rearing, and to their bearing a disproportionate burden of any policy of accommodation of cultural or religious practices.

Katherine O'Donovan and Jill Marshall[75] are also concerned about women's autonomy. They make the point that identity is a work in progress and thus stress the importance of the ability to make autonomous choices in shaping that identity. In their argument, the meaning or identity of 'mother' has not been sufficiently challenged, even by feminist scholars. Mother is an identity, they say, that women must be free to remake. And so, while one may argue that much feminist work has already been done to reveal and challenge the 'good mother' of law, the self-sacrificing full-time nurturer of the traditional family,[76] they go further. They argue that women must be free to separate the incidents of motherhood – maternity and mothering – that have for so long been inseverable as one.

Finally, shaping and remaking identity is also a theme in Jones's and Jackson's work. In demonstrating technology's effect upon making families, they demonstrate both the effect it can have upon making family identities and law's resistance to these innovations. They wonder if law's understanding of 'parent' is not fundamentally misguided. Jackson[77] challenges law's continued reliance upon a form of binary reasoning in which one either is or is not a parent and Jones[78] also criticises this dichotomy in her work with lesbian parents, who are often frustrated by the discord between their experience of mothering a child and law's myopia in acknowledging that experience.

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75 Chapter 6.

76 See, eg, Silva (1996); Diduck (1997); Fineman (1995). Motherhood's association with care and nurture is so ingrained that the lesbian mother is now more acceptable in law than the mother who chooses not to mother. See, for example, discussion in *Re G (Children)* [2006] UKHL 43.

77 Chapter 4.

78 Chapter 5.

Equality and equivalence

In 1974, Finer and McGregor wrote that 'all major developments in family law from [the mid-nineteenth century] onwards' have been directed to 'equality within the law for women [and] equality within the law for people of small means'.[79] In some ways this is true, but while equality always was and still remains an important goal for feminists, it has become a disputed concept. Formal equality or sameness of treatment may have been the goal of first-wave feminists, but since then feminist theorising about equality has shifted enormously. Many feminists have, for example, criticised sameness of treatment as reinforcing a norm which might be better disputed. Formal equality resolves only the 'problem' of treating people or situations differently; it does not redress dominance, nor does it always recognise that different treatment may sometimes be required to compensate for disadvantage created by institutions or structural conditions.

Finer and McGregor may be correct, however, at least to the extent that the language of equality or equal treatment has become important in family law.[80] As Stychin observes, for example, formal equality was a driving principle behind the passage of the Civil Partnership Act 2004. As he also observes, however, the Act fits precisely within New Labour's 'third way' political discourse and can be seen as much as a method of disciplining family living as a celebration of 'alternative' family living. Arguing that same-sex partnerships are 'the same' as heterosexual married ones can thus serve to marginalise and 'other' those who wish to live outside the family norm while remaining within the politically acceptable discourse of equality.

Christine Piper also observes the ways in which gender neutrality, or formal equality, operate to the disadvantage of young girls and women. Young female offenders are different from young male offenders in their backgrounds and in the offences they commit, yet the expectations of and responses by the authorities are all 'gender neutral'. Rather than resulting in equality and justice for all young offenders, however, Piper shows how sameness of treatment simply renders girls invisible to the youth justice system. They are subsumed under the category 'youth'. Piper asks the 'woman question' in the context of youth justice policy, and sees it failing young girls and women.

Equality has also resurfaced as an important standard by which to judge relations between individual members of the family itself. While treating fathers and mothers equally in custody disputes was a goal for early feminists who campaigned against the patriarchal system of 'father right',[81] formal equality between parents seemed to fall out of favour in the mid-twentieth century. As the reality of gendered roles in child care during cohabitation were given legal recognition in residence and contact arrangements on separation, feminist concern shifted to ensuring that women and children were not financially or socially disadvantaged by those arrangements, and it has been fathers who have regenerated claims for

79 Finer and McGregor (1974), p 101.
80 Diduck and Kaganas (2006).
81 *Ibid*; Maidment (1984).

parents to be treated equally. To feminists it is clear, though, that formal equality for mothers in the nineteenth century was a different claim and had different effects from fathers claims for formal equality in the twenty-first century. Further, achieving a form of equality in the distribution of the financial consequences of family living is also a goal that law has adopted. But, again, this form of equality too often has resulted in disadvantage for women. Let us consider the movement toward equality, or equivalence, in both financial matters and child-care matters.

One area regularly written about in feminist legal theory is the plight of the single mother. Where she has gone through divorce 'precipitous downward mobility both economically and socially'[82] was identified as the outcome. This was partially due to applying principles of formal equality to women who were economically dependent upon their husbands during marriage.[83] The English courts now appear to have parted company with those in the United States by attempting an equal valuing of roles in marriage, whether as primary carer or wage earner. Indeed, the decisions in *White v White*[84] and *Miller v Miller; McFarlane v McFarlane*[85] mark an effort by the judiciary to bring some substantive, rather than merely formal, equality into post-divorce financial provision. Together, these cases introduce into the objective of 'fairness' the recognition of family work as work of equal significance with market work, non-discrimination between husband and wife as a 'principle of universal application' and the need for compensation for economic disparity arising from the way the parties organised their family lives, including, but not exclusively, their responsibility for the (pre- and post-divorce) care of children. But even these apparently progressive decisions may be only symbolic for the majority of single mothers, as they apply only to families with sufficient assets to share. For most single mothers, the failures of the Child Support Agency to ensure financial help in raising children remain a national scandal.[86]

Further, as Susan Boyd has recognised, compensation of a woman's unpaid labour in the home is only achieved if she has a former husband or civil partner against whom to make her claim. The benefit that all of society receives by the unpaid labour of a woman without a (former) partner, or by one who does not wish to make a claim against him or her, is thus neither recognised nor compensated, and 'ideologically, heterosexual relationships – and women's roles as wives and mothers within them – are thus reproduced'.[87]

It is arguable that the rhetoric of formal equality has been taken also into discussions of parenting.[88] We see it operating in recent amendments to the Children Act 1989, which give fathers parental responsibility over their non-marital children, and in the new 'truth' that the welfare of children demands that

82 Weitzman (1981), p 323.
83 See, for example, the Supreme Court of Canada's remarks in *Moge v Moge* [1992] 3 SCR 813.
84 *White v White* [2001] 1 AC 596.
85 [2006] UKHL 24.
86 *R v Secretary of State for Work and Pensions ex parte Kehoe* [2005] UKHL 48.
87 Boyd (1994), p 69.
88 Diduck and Kaganas (2006), ch 7.

(arguably only) at the end of their parents' relationships, fathers should be assumed to be equal carers.

Twenty-four per cent of children live in a lone-parent household; nine out of ten of these live with their mothers. Of the 76 per cent of children in households headed by a couple, not all are living with both birth parents. Of children living in a stepfamily household, 83 per cent live with a stepfather.[89] Thus children are most likely to encounter family law through contact and divorce cases, and these cases are most likely to concern claims by fathers. Kaganas examines discourses utilised by some fathers' groups who consider the courts to discriminate in favour of mothers. They deploy the discourse of formal equality or equivalence in debates about domestic violence, but Kaganas argues that use of this discourse may merely be a strategy employed to control their ex-partners and children while relieving them of the need to resort to unacceptable patriarchal claims to do so. Just as in the financial provision cases that do not involve 'big money', we can see in Kaganas's work how women may be hurt by the hard choices they make between family work and market work, and that men's specialisation in market work may hurt men also when it comes to remaining part of their children's active families.

Smart argues also that a new narrative of fatherhood, based on claims to care as well as to justice and rights, repositions the father within the post-separation family. Her suggestion is that although some fathers may engage in gendered blaming and a denigration of motherhood, others express an emergent change in how fathers wish to relate to their children. This links to Collier's analysis of the deconstruction of masculinities and femininities in academic debates. He argues that models of both genders are outdated and that gender identities are in the process of being freed up. What is needed is a return in feminist theory to material conditions, where issues of power, interest and political economy are central. The contribution of post-modernist feminist debates has been to create awareness of the diversity of family forms and practices, and of identities as performed. Smart's and Collier's work here highlights the importance of bringing together insights on creating identities and exclusions with an analysis of material inequalities in the relative positions of women and men, as a way forward from debates about formal equality.

Familial ideology, familialisation and privatisation

While the theme of equality runs through family law, it is almost paradoxical that, at the same time, the families to which this principle is applied retain their normative, status-based traditionalism. As Stychin and Bottomley and Wong point out, they are still dyadic and (usually) sexual relationships. They are economically self-sufficient and are said to be entered into by choice. And so, while there has been a movement in family law to extend the notion of 'family' beyond its traditional limits, same-sex relationship recognition was achieved in part because these relationships were argued to be 'the same' as marriage relationships, and unmarried

89 Office for National Statistics, *Social Trends 2005*, Tables 2.4, 2.10, 2.13.

or unregistered cohabitation soon may be attributed with some legal rights and obligations partly for the same reason.[90] The extension of the notion of the marriage-like 'family', to *stabilise and discipline* relationships, has been a recurrent theme in much feminist work on family law[91] and is considered here by Bottomley and Wong and by Stychin in the context of adult relationships.[92]

Jones also demonstrates that, while family status may be extended to same-sex parents, law has not conceded a name for those parents; parenthood remains framed through a hetero-normative lens. And with the advent of new medical technologies, the question 'who are the parents?' has become ever more complex. Jackson argues that cell nuclear replacement, which takes genetic parenthood beyond the union of female and male gametes, requires us to rethink the exclusivity of 'one mother/one father' taking the familialisation project into entirely new territory.

Notwithstanding these difficulties with parenthood, the familialisation of society – that is, the ever-increasing range of relationships that are captured within the regulatory net – continues apace, and because the net retains its traditional contours, familialisation has profound and gendered consequences. It can be seen as a part of New Labour's neo-liberal modernisation project, which includes a re-ordering of the ways in which responsibility not only is exercised, but is felt or conceived. In this project, one's responsibility to society, usually called the taxpayer, and even one's responsibility to self is increasingly framed within the discourse of family. Familialisation thus affects one's economic and social responsibilities as much as it does one's personal ones.

In Canada, Judy Fudge and Brenda Cossman say that there is a whole new set of assumptions about the role of government and the rights of citizens:

> In the new political and social order, governments are no longer responsible for the social welfare of their citizens but only for helping those citizens to help themselves. The social citizen is giving way to the market citizen who (quoting Brodie, 1996) 'recognizes the limits and liabilities of state provision and embraces her obligation to become more self-reliant'. This new market citizen recognizes and takes responsibility for her own risk and that of her family.[93]

Within this frame, old certainties become re-ordered. Formerly social or political problems become recast as private, family problems, solvable by individual family members. Child poverty, for example, could be solved if non-resident parents simply acted responsibly and paid their child support.[94] Unemployment can be solved by reframing the 'good' of employment less as a social one than as a matter of the welfare of one's child,[95] which adds a new perspective to Mumford's work on child tax credits as a means of encouraging mothers into low-paid work. The

90 Barlow *et al* (2005); Law Commission (2006).

91 See, eg, Smart (1984); Cossman and Ryder (2001); Day Sclater and Piper (2000); Diduck (2005).

92 See also Diduck (2005), who argues that this extension also disciplines society.

93 Fudge and Cossman (2002), p 16.

94 HM Treasury (2004) *Child Poverty Review*.

95 *Ibid*.

problems of youth crime and disaffected youth generally can be solved if parents accept appropriate parenting training, are employed outside the home and take responsibility for their children's criminal, anti-social and truanting behaviour.[96] Myriad social problems, it seems, can be solved by people simply taking their *family* responsibilities seriously. But, as we have seen, a disproportionate burden for meeting these privatised social responsibilities lies upon women as carers and workers. Piper notes both the privatisation and the gender of these responsibilities in the context of juvenile justice. In remarking upon the elision of civil/family justice with criminal/youth justice, she recognises a policy trend to support or discipline the family 'as a means of strengthening the moral basis for an ordered society',[97] and that 'more children are being drawn into an increasingly important system in which the risk of offending normally takes priority over the risk of harm, or the latter risk is subsumed into the former'.[98] She also notes that 80 per cent of offenders are males and 80 per cent of parents sanctioned with parenting orders are mothers. Fathers do not seem to play a significant role.

Familialisation thus can be argued to be an important means of diverting responsibility for the welfare of society and its members from the state to individual families. It is also a means by which the state can deflect responsibility for the economic well-being of individual citizens.

> It is the family, not the state or the market, that assumes responsibility for both the inevitable dependent – the child or other biologically or developmentally dependent person – and the derivative dependent – the caretaker. The institution of the family operates structurally and ideologically to free markets from considering or accommodating dependency. The state is cast as a default institution, providing minimal, grudging and stigmatized assistance should families fail.[99]

And so, as the economic and social consequences of care and dependency are increasingly privatised, we see a shift in the balance of responsibility for the costs of social reproduction from the state to the 'family' and its individual members.[100] The implications of this shift for dependants, usually women and the children they care for, are serious because it is happening at the same time as the welfare state is being dismantled and the other concurrent structural changes which would assist them in assuming responsibility, such as job security and child care, lag far behind.[101] Familial ideology is powerful, and its implications are great for women in the current climate of privatisation.

Conclusions

Feminism's impact on family law has been mixed; almost paradoxical. Recent legal reform and the contributions to this collection illustrate this ambiguity. They

96 Piper, Chapter 9.
97 Chapter 9.
98 Chapter 9.
99 Fineman (2004), p 228.
100 Fudge and Cossman (2002), p 28.
101 Cossman (2002), p 169.

show, for example, that families or legal partnerships may now be formed by people of the same sex and legal parenthood may now be held by people of the same sex; that the employment world and the tax–benefit system make provision for parenthood; that the language of care has become acceptable in legal discourse; and that law can pay real attention to different aspects, including cultural aspects, of identity. In other words, they show that identities – or legal subjectivities – are changeable; that family practices do occur outside the home; that a moral and ethical voice can be heard by law; and that our subjectivities are made as much by our context and connections as they are by our natures. These are all feminist ideas.

And even where feminist ideas have not resulted directly in legal change, they may have laid the groundwork for progressive dialogue to occur among policy and law makers and they have certainly created space for conversations among academics, activists and practitioners. Feminism may also have had some influence at the micro level in how family life is lived at home or within individual places of work, affecting gender performances on a daily basis. And even where feminist perspectives have not influenced a majority of the court so as to be counted as a 'win', they may open that area of law to future analysis, all the more strongly if they are referred to in the reasons of the minority.[102]

Yet, on the other hand, law's resistance to feminist concerns remains strong. The underlying principles of English law mean that as much as one's legal subjectivity has changed over the years, particularly women's and children's legal subjectivity, family law either denies that changeability and pronounces the changed situation to be simply the situation that always was (as in *R v R*), or acknowledges it in ways which serve particular, sometimes anti-feminist, interests. It is consistent with current social and economic policy for all adults, even mothers, to take up paid employment, and so, with all adults now encouraged to be parent-workers, maternity, paternity and parenting leave laws make economic sense, as does the adoption of equality principles in parenting disputes. And while feminist goals of disrupting and problematising legal norms have extended ideas of family, they have not yet disrupted the (sexual) couple or the one-mother-one-father model of family, often with disheartening effects on individuals.

The same ambivalence can be seen in family law's use of the liberal principle of equality. While non-discrimination and equality have a place in feminist discourse, and legal innovations such as the equal valuing of an increasing range of caring relationships or of financial contributions and unpaid labour to those relationships can be seen as progressive, they also reinforce a particular gendered norm of family living. That norm serves to disadvantage dependants of limited financial means within the unit, as well as all those living outside it. We see here how feminist concerns of equality, non-discrimination, care and subjectivity can be adopted to further agendas which may not be feminist at all. Feminism has not yet succeeded in adequately challenging the ideology of the family, which has such profound material consequences for women's and children's economic well-being.

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102 Philipps (2004), p 606.

The feminisation of poverty continues and may in fact be reinforced by the rhetoric of equality and choice.

What a feminist perspective may reveal at the beginning of the twenty-first century, however, is that law contains the conceptual tools to promote feminist principles, even while resistance to using them remains strong. Structures of power/gender are difficult to shift. And so feminist activism to reform or transform the law must continue, but, importantly, feminist theory must also continue its journey into understanding how gender is 'done', how it is constructed, deconstructed, made, remade and performed on a day-to-day basis.

Our twenty-first-century feminist perspective may also reveal that the nature or method of law's regulation of family life is changing. We said above that family law has always been about the regulation of family responsibilities and family identities inside and outside the home. But while even fifty years ago that regulation took the form of direct prohibition or prescription of conduct, or of appeal to an absolute and assumedly consensus-based morality, much of the new regulation – the new family law – regulates by means of the normalisation of individual and social attitudes as much as individual and social conduct. We are encouraged, informed and educated to become good familial/social citizens.[103] On the one hand, the boundary between the public–private divide seems to have been breached, yet on the other, it seems only to have shifted as we make our familial selves and our families in this new context, in which our calls for respect for autonomy only appear to have been heard. Rooted in the rhetoric of choice, and located in the ethic of self-responsibility and equality with others, normalisation aims to make a good society by making good families. The feminist project must continue to be to recognise and challenge different forms of legal regulation so as to ensure that the good society and good families are good for all, including women and children regardless of their sexuality, economic means or ethnicity.

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103 See Reece (2003); Diduck (2003).

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Chapter 2
Family Friendly? Rights, Responsibilities and Relationship Recognition

Carl Stychin

Introduction

> It would be odd indeed if those who espouse and defend traditional values of commitment and faithfulness opposed giving gay couples the choice to live their lives according to those values.[1]

Families are changing. I suspect that teachers of family law have been uttering those words to their students for more years than most lecturers care to remember. Yet within the United Kingdom today, we are witnessing an unprecedented change in the way in which some families are characterised within political and legal discourse. Over the last twenty years, lesbian and gay families have been transformed. Not in the sense that the actual forms that their families take necessarily have altered; rather, what has changed so significantly is the way in which those families are characterised and comprehended within politics, the media, and the law. In the 1980s, lesbians and gays were (in)famously described as forming 'pretended family relationships', which should not be 'promoted' by local government.[2] This political delegitimation of relationships was profoundly demeaning to many, underscoring the social and psychological significance of the term 'family' within Western society. Ironically, however, that Conservative political tactic galvanised the lesbian and gay movement in the UK, which responded by articulating the richness of lesbian and gay families in the public sphere.

By 2004, much had changed. The Civil Partnership Act was enacted by Parliament, with overwhelming support, including from most of the Conservative front benches. Even opponents of the Act seemed to accept that lesbian and gay people form loving relationships that deserve respect and protection from a range of injustices. For the government, the Act represents the culmination of the quest for equality, creating a legal status for same-sex couples from which most of the benefits (and responsibilities) of marriage will flow. Lesbian and gay partnership is no longer, then, a pretend family form. Rather, it is a form of family warranting equal respect and dignity because of its value to individuals and to society. For those who have lived through the previous two decades, it is quite a remarkable journey from pretend family to civil partnership. The purpose of this chapter is to consider critically where that journey has now brought lesbians and gay men in Britain, and whether we reached quite the destination at which we hoped our journey would end.

To place the legislation in a wider political context, it is fair to say that the Labour government can point to a range of legislative and other initiatives, since its first election to government in 1997, which suggest that the Civil Partnership

1 *Hansard*, Commons, 12 October 2004, p 190: Mr Alan Duncan (Conservative).
2 Local Government Act 1988 s 28.

Act is in keeping with a 'gay-friendly' agenda. Certainly, the website of the Women and Equality Unit provides ample 'spin' for this claim.[3] As a result of the Adoption and Children Act 2002, same-sex couples can apply to adopt a child jointly. Other examples include the availability of paternity leave and flexible working hours to a same-sex partner; a right to register a death of a same-sex partner; since December 2003, anti-discrimination legislation tackles discrimination in employment and training on grounds of sexual orientation and religion (legislation which is a legal requirement for Member States of the European Union); new sexual offences legislation removes discrimination between men and women, and between those of different sexual orientations; s 28 of the Local Government Act 1988 has been repealed after much difficulty in the House of Lords (although replaced with guidance to schools, which states that 'there should be no direct promotion of sexual orientation'[4]); the age of consent has been reduced to 16 for gay men; the Criminal Injuries Compensation Scheme now includes same-sex partners; and the immigration rules have been amended to improve the situation for same-sex partners. Although many of these changes, it can be argued, fall short of perfection, they do represent a significant and real change from the many years of Conservative Party rule.

The Civil Partnership Act is seen by many as the culmination of this programme of reform. Put simply, the legislation

> creates a new legal status that would allow adult same-sex couples to gain formal recognition of their relationship. Same-sex couples who enter a civil partnership would access a wide range of rights and responsibilities, reflecting the important commitment they are making to one another.[5]

This bundle of rights and responsibilities includes: the duty to provide reasonable maintenance for a civil partner; the duty to provide reasonable maintenance for children of the family; assessment in the same way as spouses for child support purposes; equitable treatment for the purposes of life assurance; employment and pension benefits;[6] recognition under intestacy rules;[7] access to fatal accidents compensation; protection from domestic violence; and recognition for

3 www.womenandequalityunit.gov.uk/lgbt/key_facts.htm: Angela Mason, who led the campaign at Stonewall for the Civil Partnership Act, later became the head of the Women and Equality Unit.

4 These guidelines were issued on 7 July 2000.

5 www.womenandequalityunit.gov.uk/lgbt/partnership.htm.

6 The pension questions raised by the Act are complex and not entirely resolved. In particular, the issue of pension provision for dependent surviving civil partners remains a contentious issue. The argument that the survivor partner's pension should be based upon *all* of the deceased's pension contributions, and not just those made since the coming into force of the Civil Partnership Act, has not been accepted by the government. Further announcements are promised from the government on the pension implications of partnership.

7 The ability to transfer property upon death free from inheritance tax has proven to be one of the most controversial areas of debate, leading to wider questions regarding why same-sex couples should be financially 'privileged' in this way over other dependent relationships. It has also led to debate regarding the relative merits of inheritance tax more generally; an interesting question which is beyond the scope of this chapter.

immigration and nationality purposes. Couples are allowed to enter a civil partnership through a statutory civil registration procedure. A dissolution process – a formal procedure in the courts – will be created which mirrors divorce (rather than a simple ending of a contract unilaterally or bilaterally). In sum, according to the Women and Equality Unit: 'Access to a civil partnership would bring benefits to the individuals who enter them, and benefits for society as a whole. Civil partnership underlines the inherent value of committed same-sex relationships, supports stable families and shows that we value the diversity of the society we live in.'[8]

The Bill was introduced in the House of Lords, receiving its third reading on 1 July 2004. In that process, however, it was amended to extend its coverage to family members and 'carers' more generally who might wish to register and opt into the bundle of rights and responsibilities. The Bill then moved to the House of Commons, and that amendment (as well as other similar attempts to amend the legislation in order to expand its scope: for example, to siblings) was defeated. The Bill received its third reading in the House of Commons on 9 November 2004, receiving broad parliamentary support. The Commons amendments were approved by the House of Lords on 17 November 2004, and the Bill received Royal Assent the following day, making it law: the Civil Partnership Act 2004. It is now in force.

'Parallel but different'?

Arguably, the ingeniousness of the Civil Partnership Act is the fact that it can produce a legal status of 'civil partner' that does not depend upon marriage, but which displays virtually all of the characteristics of a civil marriage. This is undoubtedly a strategy on the part of the government to avoid what it perceives as the likelihood of backlash to same-sex marriage in the UK. At the same time, it can fulfil its promise of equality by granting a legal status to committed same-sex couples. The government is strongly on record throughout its term of office as supportive of the institution of marriage for opposite-sex couples – as helping to foster stable relationships and as the best means to raise children – and civil partnership provides an alternative, politically saleable route for same-sex couples. The social benefits that marriage offers can be furthered through civil partnership, while avoiding the criticism that same-sex unions undermine the institution of marriage. As Labour Baroness Scotland made clear during the debate:

> This Bill does not undermine or weaken the importance of marriage and we do not propose to open civil partnership to opposite-sex couples. Civil partnership is aimed at same-sex couples who cannot marry. . . . We continue to support marriage and recognise that it is the surest foundation for opposite-sex couples raising children.[9]

The stable couple form, it is argued, is good for the individual, for the couple, and for society (and the economy) as a whole. Long-term, traditional, stable,

8 www.womenandequalityunit.gov.uk/lgbt/partnership.htm.
9 *Hansard*, Lords, 22 April 2004, p 388, Baroness Scotland (Labour).

legally recognised relationships thus become the socially preferred option. Marriage is the ideal, but civil partnership – for those unable to marry – becomes an alternative which can further the same social policy goals. As the Government Minister Jacqui Smith explained in the House of Commons:

> [W]e seek to create a parallel but different legal relationship that mirrors as fully as possible the rights and responsibilities enjoyed by those who can marry, and that uses civil marriage as a template for the processes, rights and responsibilities that go with civil partnership. We are doing this for reasons of equality and social justice.[10]

Opponents of civil partnership, not surprisingly, argue that the Act creates 'a parody of marriage for homosexual couples'.[11] It is same-sex marriage in all but name. Moreover, the challenge offered by critics of the Act is itself ingenious. That is, if this is not marriage, then surely it is a status that should be available to others similarly situated to lesbian and gay couples, namely, all those who care for each other in an interdependent, committed relationship. Otherwise, those individuals (and groups of people, such as home sharers) are discriminated against by this legislation. When that argument is rejected by government, opponents can forcefully claim that this is a status that is marriage in all but name (and vows).

In order to bolster the argument in favour of the extension of civil partnerships to carers, friends, spinsters and spinster sisters, opponents of the Act, as it was introduced by the government, argued that the basis of the legislation should be explicitly contractual. Partnership, they claimed, should focus on recognising and supporting agreements between people to live intertwined, interdependent lives, and the state should provide its support to all such agreements. On this point, an amendment was made in the House of Lords to replace the term 'relationship' with 'contract', as part of the wider strategy of amendment to include carers, siblings and other dependent relationships. In this way, opponents hoped that the limitation within the Act to same-sex assumed sexual relationships would be rendered more difficult to sustain. If civil partnership is not marriage, then what can it be except a domestic contract? If so, then surely *anyone* can contract, including spinster sisters (or, for that matter, more than two people).

This argument has much logic. This *does* look like civil marriage in all but name designed to extend the perceived social benefits of marriage to an (assumed) clearly delineated group who most closely resemble married couples. There is no religious element (by law), and there is no possibility for an 'official' ceremony. But, even here, the material produced by the government encourages same-sex couples to plan little (or, one might imagine, lavish) ceremonies to mark the registration. One side benefit, mentioned in the Regulatory Impact Assessment that accompanies the legislation, is that with registration there 'can be expected . . . a small increase in demand for the hospitality industry as the result of couples entering civil partnership choosing to hold a form of celebration in a similar vein to a wedding reception'.[12]

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10 *Hansard*, Commons, 9 November 2004, p 776, Ms Jacqui Smith (Labour).
11 *Hansard*, Lords, 22 April 2004, p 405, Baroness O'Cathain (Conservative).
12 Department of Trade and Industry (DTI) (2004), p 22.

The conservative critique of the Civil Partnership Act is not wholly dissimilar to criticism of the legislation that can be offered from a more progressive or even radical perspective. The argument from this side of the spectrum is that if the state is going to proceed to recognise relationship forms outside of the institution of marriage, then it is an ideal opportunity to think about *alternatives* to the marriage model that might better reflect the diversity of relationship forms that exist. Such a rethink might also be an opportunity to come to terms with the feminist and other critiques of the institution of marriage which have been made forcefully for many years.[13] In other words, rather than extending marriage (in all but name), perhaps we should have thought about creating legal alternatives to marriage (open to all). However, this is explicitly rejected by government in quite a conservative fashion, through the (highly debatable) claim that such an approach might weaken the institution of marriage, which, it is assumed, would be a socially deleterious outcome.

An attempt at creating an alternative framework can be found in the Private Member's Bill introduced in the House of Lords by Lord Lester (and subsequently withdrawn) in 2003. Lord Lester's Bill was an attempt to produce an alternative, universally available model open to same-sex and opposite-sex couples. The Bill was particularly notable for the extent to which it moved away from the marriage model, allowing greater financial autonomy for couples during a relationship and on breakdown, including through contractual arrangements agreed in advance. It also created a simple no-fault procedure on breakdown, based on a two-month unilateral notice period. The Bill could be interpreted as a move away from status towards autonomy, contract, and reasonable expectations in relationships, to be negotiated and agreed by the parties, as well as easy exit (which is specifically rejected by the government in the context of marriage and partnership). There were other interesting innovations offered by Lord Lester, including a commitment period of cohabitation required before registration. The availability of this form of legal partnership to all cohabiting couples no matter what genders is particularly significant in that it would have created an alternative to marriage available to all, but which (unlike the Civil Partnership Act) was linked to cohabitation as a requirement.

For those who advocate this approach, the Civil Partnership Act can be seen as disappointing. It is the creation of a new status (in an old wedding dress) available to same-sex couples, but not opposite-sex couples, for whom it is marriage or nothing. For those heterosexual couples for whom marriage as an institution is unappealing (for personal, ideological or other reasons), this particular bundle of rights and responsibilities is not available. However, as it is virtually a marriage in all but name, it provides no real alternative anyway. Thus, an opportunity has been lost for radical reform in the family law area.

Politically, then, some liberals may view the Civil Partnership Act as a denial of equality of access to the status of marriage, rejecting the 'parallel but different' approach. Some conservatives (and radicals) see the Act as unfairly limited in its

13 See, eg, O'Donovan (1993); Auchmuty (2004).

scope to those who define as a 'homosexual couple', rather than being available to others who share interconnected lives, for whom there is no status currently on offer. The Act thereby may prove to be either a clever means of satisfying the gay 'constituency' while avoiding the alienation of 'middle England', or a strategy which does not completely please anyone at all.

The Third Way?

No matter what one's view of the political implications of the Act (if, indeed, it even registers on the political radar in a significant way), the contours of the Civil Partnership Act should not come as a surprise to any observer of New Labour ideology. I have elsewhere tried to understand New Labour's ideological construction of lesbian and gay sexualities, and I have identified six key elements of New Labour's 'Third Way' discourse:

- the centrality of the idea (and ideal) of social inclusion (as opposed to economic equality and redistribution);
- the linking of rights and responsibilities: the enjoyment of rights as being conditioned upon the acceptance of (moral) responsibilities as citizens;
- the importance of community as performing the key function of inculcating the values of citizenship, social inclusion, and the social control of deviant behaviour;
- the importance of the family in producing responsible, active new citizens, and as providing a counterbalance to rugged individualism and atomisation;
- the desirability of consensus within One Nation in which acceptance of multiculturalism and tolerance of 'difference' (within limits) prevails;
- a faith in managerialism and law, in which social problems can be solved through the state and through law.[14]

The Civil Partnership Act, I want now to argue, can be located squarely within this set of Third Way characteristics.

Social inclusion

An examination of the explanatory material produced by the Women and Equality Unit reveals, first, a strong justification for registered partnerships to be found in the importance of *social inclusion*. The Final Regulatory Impact Assessment emphasises that this is one of the benefits of partnership registration, and a causal connection between law and social change is also clearly drawn. The reform of the law is linked to social attitudes around inclusion and exclusion:

> The Government believes that the creation of a new legal status for same-sex couples would play an important role in increasing social acceptance of same-sex relationships, reducing homophobia and discrimination and building a safer and

14 Stychin (2003), ch 2. See also, eg, Bell and Binnie (2000); Carabine and Monro (2004); McGhee (2003); Powell (2000); Rose (2000); Sevenhuijsen (2000); Williams and Roseneil (2004).

> more inclusive society . . . Legislation will act as an important step in publicly valuing same-sex relationships . . . it will be much harder for people to ignore this commitment both in law and in everyday life. The Government believes that by making a public declaration of their commitment, lesbian, gay and bisexual people will feel more confident that their relationships will be respected and appreciated by society. It is not acceptable that same-sex couples still have to struggle to have their families recognised and the creation of a civil partnership scheme will be a way through which society acknowledges and values their relationships.[15]

Moreover, social inclusion is inseparable within Third Way ideology from the economic, and specifically the idea of economic inclusion through paid employment or entrepreneurship. To be in paid work is to be part of the social, and to not be in paid employment is to have exited the social. The social and the economic become largely coterminous, and there is little value added to society if the individual is not in work (with the possible exception of full-time carers and, to a much lesser extent, stay-at-home parents).

This logic is demonstrated by the economic benefits that will allegedly flow from the Act, as explained in the Regulatory Impact Assessment:

> It is hoped that businesses would see improvements in recruitment and retention from offering equal employee benefits to same-sex partners in civil partnership. Recent research by Stonewall into the attitudes of lesbian, gay and bisexual graduates found that equality of terms, conditions and benefits was one of the key factors for organisations to focus on if they were to attract high calibre lesbian, gay and bisexual employees. The Government estimates there to be between 1.5 and 2 million lesbian, gay and bisexual people in the labour force. Through the contribution to wider equality that civil partnership makes, businesses may therefore benefit by being able to draw from a wider pool of talent, and therefore attract and retain a higher calibre of staff from a range of backgrounds.[16]

Not only will social inclusion be enhanced, but we will approach something closer to an economic state of perfect efficiency, as human capital moves to where it is most highly valued. The social and the economic thus squarely meet.

Opponents of the Act in Parliament do force the government to confront the position of carers, and the citizenship value of care giving (rather than paid employment), in making the claim that the remit of the Civil Partnership Act should be extended to others. In this way, the debates usefully bring care giving and the paucity of public benefits for carers into the public, parliamentary realm. However, the government clearly rejected the vehicle of the Civil Partnership Act as a way to improve the lot of the carers more generally, falling back on the analogy between same-sex and married couples.

Rights and responsibilities

The theme of rights and responsibilities runs throughout the Act, the commentary that surrounds it and the parliamentary debates. The Act itself is characterised

15 DTI (2004), pp 16–17.
16 *Ibid*, p 22.

as 'a package of rights and responsibilities'[17] and as aiming to 'balance the responsibilities of caring for and maintaining a partner with a package of rights for example, in the area of inheritance'.[18] This ideal of balance – between, for example, care and money – is prevalent in the explanatory material. The explicit logic is that one does not receive rights without the taking on of responsibilities. Moreover, the implicit assumption is that one will be less likely to take on responsibilities towards others (such as care) unless rights are accrued. We find here a very utilitarian notion of rights and responsibilities in which the two are almost quantifiable and measurable to achieve a perfect balance. As the government makes clear: 'The registration of a civil partnership involves both legal obligations as well as legal protections. It would not be appropriate for couples to gain all the rights without any of the responsibilities.'[19]

The role of community

Within New Labour discourse, community performs the key function of inculcating the values of citizenship, social inclusion, and the social control of deviant behaviour. We can see this rationale underpinning the legislation. It is implicit in the Regulatory Impact Assessment in its discussion of the relationship between the Act and 'social attitudes', by which is meant that civil partnerships will strengthen communities and social cohesion. The deviant behaviour that is assumed to be in need of control through community is homophobia: 'The Government believes that the creation of a new legal status for same-sex couples would play an important role in increasing social acceptance of same-sex relationships, reducing homophobia and discrimination and building a safer and more inclusive society.'[20] By bringing their relationships into the public sphere – into the wider community – lesbians and gays can look forward to acceptance, inclusion and presumably full citizenship within that public space. The deviance of homophobia will (somehow) be controlled through the act of coming out as a couple. It is only through lesbians and gays entering the public sphere that homophobia is pushed out of that same sphere. Thus, gays are now required to leave the closet (rather than remain closeted) in order to advance the goal of social inclusion. While Conservative politicians once claimed that only by closeting themselves could lesbians and gays achieve acceptance and reduce homophobic violence, we now find a call to come out in order to achieve the same ends.

Family values

The importance of the family is pivotal as the ideological basis for the legislation. In particular, the family is cited for its central role in producing responsible, active new citizens, and as providing a counterbalance to rugged individualism and

17 *Ibid*, p 2.
18 DTI (2003), p 15.
19 *Ibid*, p 38.
20 DTI (2004), p 16.

atomisation. Furthermore, the family is largely indistinguishable from the importance of 'stable relationships', which have empirically *proven* benefits to individuals and to society as a whole. These familial relationships are assumed to take a particular form based on a couple dyad, with or without children, and with little sense of extended familial relationships or alternative living arrangements. Although cohabitation is not a requirement of civil registration, there is an implicit assumption that registration and cohabitation will probably go hand in hand.

The benefits of this mode of living – assumed to be facilitated and enhanced by the Act – are far-reaching and, it is claimed, empirically grounded. These advantages of stable couplehood flow both to individuals and to society as a whole:

> The availability of civil partnership status would encourage stable relationships, which are an important asset to the community as a whole. It would reduce the likelihood of relationship breakdown, which has a proven link to both physical and mental ill health. As the Government said in its 1998 consultation document *Supporting Families*, 'Strong and stable families provide the best basis for raising children and for building strong and supportive communities'. Strengthening adult couple relationships not only benefits the couples themselves, but also other relatives they support and care for, and, in particular, their children as they grow up and become the couples, parents and carers of tomorrow.
>
> Stable relationships also benefit the economy. It is expected that civil partners would share their resources and support each other financially, reducing demand for support from the State and, overall, consuming fewer resources. Increased stability would help to reduce the burden on the State in terms of family breakdown, which cost the taxpayer an estimated £5 billion in 1999.[21]

Thus, the stable couple form is good for the individual, for the couple, and for society as a whole (both socially and economically). Living outside of that form is inefficient and costly, and the breakdown of the relationship form is both unhealthy and socially expensive. As a consequence, long-term stable relationships become the socially preferred option for government.

Consensus politics

The fifth aspect of New Labour ideology is a desire for consensus within One Nation, in which acceptance of multiculturalism and tolerance of 'difference' (within limits) prevails. This message is omnipresent in the material surrounding the legislation. Lesbians and gay men become understood as another constituency that needs to be managed. This is 'their' law and it is part of the government's 'gay agenda'. The Act is aimed at social inclusion of *this* group and certainly not at rectifying injustices more broadly. This is one of the ways in which the British approach can be distinguished from the French 'solution' of the *Pacte Civil de Solidiarité* (PaCS).[22] The PaCS can be ideologically situated firmly within the

21 *Ibid*.

22 See, eg, Barlow and Probert (1999); Pratt (2002); Steiner (2000); Stychin (2003), ch 3.

French conception of republicanism and universality.[23] It is justified as a universal status to which all are equally entitled to participate on the basis of being members of the Republic. It is the antithesis of multiculturalism, which the French consistently describe as part of an 'Anglo-Saxon' mentality, which inevitably fragments social solidarity.[24]

By contrast, within the United Kingdom, the Civil Partnership Act is explicitly and specifically designed for one group – lesbians and gays – who are (problematically) constructed as another element within the multicultural mosaic. There is no expectation that the needs of other constituencies – such as platonic home sharers – can be solved by this legislation. These other groups must wait their turn.

The power of law

The final aspect of Third Way ideology is faith in law itself, and a belief in micromanagerialism through law. It is assumed throughout the documentation that surrounds the legislation that the availability of the legal status – as well as the difficulty in dissolution procedures for relationships – will encourage long-term, stable relationships. In this regard, law is thought to be a discourse of considerable power in shaping relationship forms, *granting to* lesbians and gays the very ability to live according to its norms. As well, law is assumed to be central in shaping social attitudes and, in particular, in reforming homophobia and encouraging tolerance and social inclusion.

Finally, perhaps less obviously, there is a message within the Act, I would argue, that the encouragement of the rights and responsibilities of civil partnership through law will provide a disincentive for 'irresponsible' behaviour. In the context of New Labour politics, irresponsibility seems to include promiscuous sex, relationship breakdown at will, and the selfishness of living alone (or perhaps even living with friends and acquaintances).[25] Thus, law is employed to achieve social policy ends that have been determined by government in advance based on empirical fact and science in order to help people to help themselves to lead richer lives.[26]

This analysis may provide an explanation for another stark difference between the Civil Partnership Act and the PaCS. The PaCS has been consistently characterised within French debate in terms of the values of autonomy and contract, as well as universality. It is claimed that the PaCS allows couples the freedom to enter and exit relationships with relative ease, with no expectation of sexual activity, or anything else particularly. It simply recognises a social reality, and law has a facilitative role in upholding that reality and in promoting the 'fraternity' of relationships. By contrast, the Civil Partnership Act is much more clearly a tool of social policy, and envisions relationships as possessing certain essential characteristics based upon a marriage model.

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23 On French republicanism, see, eg, Favell (1998); Jennings (2000); Laborde (2001).
24 Stychin (2003), ch 3.
25 See generally Bell and Binnie (2000).
26 See McGhee (2003).

This provides an explanation for why the government chose not to adopt Lord Lester's approach – which bears some resemblance to the PaCS – of an alternative to the marriage model. The government desires nothing that could be perceived to undermine the value of the institution of marriage. Rather, the aim is to rectify a perceived unfairness within marriage for an equality-seeking constituency. This is grounded in an imagining of community in terms of groups and constituencies that need to be managed, rather than in terms of facilitating new ways of living for all.

Moreover, the adoption of a marriage model speaks to the relationship between law in its disciplinary mode, and law as enabling people to legally structure their lives as they see fit. Throughout New Labour's family discourse, we find great faith placed in an economically, socially, sexually disciplinary role for the institution of marriage: 'The government intends registered civil partnerships to be long-term, stable relationships, so there would be a formal court-based process for dissolution. The partner applying for the partnership to be dissolved would have to show that it had broken down irretrievably' and not simply that it felt right to end it.[27] Within this ideology of the family, there is no need for alternatives to marriage. Rather, there is a need for more encouragement to marry or to partner, particularly for the raising of children. As a consequence, there is absolutely no space within the parliamentary debates for any critique (feminist or otherwise) of the institution of marriage as a status. In these respects, the Act can be seen as deeply conservative and it is therefore not surprising that it received considerable support from within the Conservative Party. The message is inclusion rather than radical institutional change.

The irony, however, is that our current historical circumstances have been described in terms of the emergence of the 'postmodern family':

> the postmodern family represents no new normal family structure, but instead an irreversible condition of family diversity, choice, flux, and contest. The sequence and packaging of romance, courtship, love, marriage, sex, conception, gestation, parenthood and death are no longer predictable. Now that there is no consensus on the form a normal family should assume, every kind of family has become an alternative family.[28]

The Civil Partnership Act, in my view, attempts to flatten out that diversity into a recognisable and disciplinable legal guise. At the same moment, as Sasha Roseneil argues, 'the married, co-resident heterosexual couple with children no longer occupies the centre-ground of Western societies, and cannot be taken for granted as the basic unit in society'.[29] After all, only 23 per cent of households in the UK in 2000 were 'traditional' families.[30] Thus, the law seems to be attempting to bolster and recentre an institution in decline.

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27 www.womenandequalityunit/lgbt/partnership.htm.
28 Stacey and Davenport (2002), p 356.
29 Roseneil (2002), p 34.
30 *Ibid*.

Queering partnership

For those who enjoy debating the politics of same-sex marriage, the Act provides a fertile source of material on which one can speculate whether the legal recognition of same-sex relationships is *assimilationist* (buying into an idealised heterosexual model of coupledom) or *transgressive* (challenging patriarchy by not conforming to a heterosexual, gendered model). However, the reason that this debate (certainly in the USA) appears interminable is precisely because it is unresolvable, in part because the regulation of sexual practice by the state is inevitably, as Davina Cooper has argued, 'complex, uneven and contested'.[31] It all depends upon the context, and there is no simple answer.

A more productive analytical approach is to look at the Act in terms of what it suggests regarding the role and function of family in law, such as the connection between relationship recognition and resources, and indeed, the public–private dichotomy itself.[32] Within the explanatory material and the debates, the role of relationships in promoting the privatisation of financial responsibility for care is apparent and explicit: 'The registration of a civil partnership involves both legal obligations as well as legal protections.'[33] Furthermore, one opts into this package of rights and responsibilities as a whole, with no possibility for 'pick and mix'. As a consequence, as the Financial Regulatory Impact Assessment makes clear, to repeat: 'Stable relationships also benefit the economy. It is expected that civil partners would share their resources and support each other financially, reducing demand for support from the State and, overall, consuming fewer resources.'[34] To receive the financial benefits of a marriage-like status, the responsibilities attach. The *quid pro quo* is explicit.

The most obvious example of this privatisation of responsibility is in the joint treatment for income-related benefits, which raises the possibility that registration will be financially detrimental for some couples. At this point, the government clearly recognises the problem of incentives. As the framework document makes clear:

> The Government proposes that civil partners should be treated as a single family unit for income-related benefit purposes. In addition, where appropriate unregistered cohabiting same-sex couples should also be assessed as a single family unit as is the case for unmarried cohabiting opposite-sex couples. The Government will ensure that this matter is handled sensitively . . . Treating same-sex couples (where registered or unregistered), in the same way as opposite-sex couples (whether married or unmarried) in relation to income-related benefits is the best way to ensure fairness and ensures that a same-sex couple who wish to register a civil partnership would not be financially worse off than they would be if they chose not to register their partnership.[35]

Consequently, even if a couple choose not to 'buy into' the package of rights

31 Cooper (2002), p 232.
32 See, eg, Diduck (2001).
33 DTI (2003), p 38.
34 DTI (2004), p 16.
35 DTI (2003), p 23.

and responsibilities, they could be determined to be liable to treatment as a single family unit. Thus, the package of responsibilities is not quite as voluntary as is originally claimed, and this demonstrates the way in which cohabitation slides into an expectation of financial dependence, and how cohabitation and partnership are merged. As a consequence, we continue to have the spectre of the state determining when an unregistered couple is a couple for the purposes of financial responsibility, when they are flatmates, and when they are 'just friends' – categories that a queer critical analysis in large measure is designed to trouble.[36] Queer politics questions why partnerships which appear to mimic the most traditional aspects of heterosexual marriage are privileged while others are constructed as less deserving of recognition and, it appears, respect: 'A lesson of queer theory is that we should resist the tendency to trivialize, infantilize and subordinate relationships which are not clear parallels of the conventional, stable, long-term, cohabiting heterosexual couple.'[37] Ironically, the parliamentary debates underscore the extent to which Conservative opponents of the Civil Partnership Act – particularly in their claims that the Act is unfairly limited in its scope to same-sex couples – construct arguments that are remarkably similar to the queer critique.

To be clear, I am not suggesting that lesbian and gay people do not construct relationships of dependence. Some do, some don't, and those that do, do so in an infinite variety of ways. However, it may well be that lesbians and gay men, because of the lack of traditional family structures which were historically open to them, have had a greater opportunity for experimentation with varieties of interdependence in different forms and guises.[38] However, there is no recognition of this rich diversity in either the legislation itself, nor in the surrounding material, nor within parliamentary discourse. Certainly, the privatisation orthodoxy remains unchallenged. A similar argument could be made with respect to the ability to gain parental responsibility for children. Judith Stacey and Elizabeth Davenport, referring to the work of Martha Fineman, have suggested the abolition of the category of 'family' in law because of the way in which it 'renders women and children economically vulnerable to the vagaries of adult erotic and emotional attachments'.[39] The Civil Partnership Act aims to strengthen rather than to deprivilege that construct and does nothing about the dependence of children on the vagaries of emotional or sexual attachment within the family unit.

Focusing on the disciplinarity of the Civil Partnership Act can lead us, then, to ask about the possibilities that seem closed off under the guise of liberal social acceptance. What has been lost? The answer perhaps is to be found in the laboratories of social experimentation that have grown up through the exclusion from the legal and social family: that is, the variety of forms of relationship that demonstrate the limited imagination behind the Civil Partnership Act. A number of social commentators have argued that lesbian and gay lives can teach much about the variety of ways of living that, increasingly, we in the West can choose from as

36 See, eg, Bell and Binnie (2000); Butler (2002); Freeman (2002); Roseneil (2004).
37 Roseneil (2004), p 411.
38 *Ibid*.
39 Stacey and Davenport (2002), p 364. See also Fineman (2004), p 135; Diduck (2001).

we construct our lives.[40] At the precise same moment, the Civil Partnership Act falls back on a traditional conception of relationships, dependence, and privatisation. In this sense, the Act is an act of legal violence that delegitimises and shames that which it does not recognise: 'Crucially, cultural and legal recognition of same-sex couples would do nothing to enfranchise the relationships that have also been fundamental to queer life: friendships, cliques, tricks, sex buddies, ex-lovers, activist and support groups, and myriad others.'[41] As queers, we might advocate 'that institutions including the state would cease to make a singular form of love and sex into the matrix for its allocation of resources. What if one could have each of the things that marriage combines with a different person or small group? What if I could live with my mother, but still give my best friend hospital visitation rights and extend my health insurance benefits to my ex-lover?'[42] As Sasha Roseneil explains, these social practices are important in that they 'de-centre the primary significance that is commonly granted to sexual partnerships and the privileging of conjugal relationships, and suggests to us the importance of thinking beyond the conjugal imaginary'.[43]

Law seems unable, or perhaps just unwilling, to provide this kind of recognition – this thinking beyond – instead reducing the world to cohabiting partners with lives totally woven through with interdependence on the one hand, and 'just friends' on the other. But the complexity of queer life undermines that vision of privatised, familial domesticity, opening up new spaces for a post-familial world in which the provision of care is itself re-imagined beyond the partnership paradigm.

Concluding thoughts

In this chapter, I have interpreted the Civil Partnership Act as an act of legal discipline, but we might wonder whether we can also understand it in terms of opening up possibilities for resistance. While law may seek to close off possibilities – to discipline and to domesticate – we also have come to recognise the limits of law's discursive power. The power of law, after all, is always open to resistance, and the Civil Partnership Act is surely no exception.

It should be remembered that the Act does not completely mirror a marriage model. In at least two respects, it differs. Within the government commentary, there are interesting passages in which it is recognised that somehow (in quite an unexplained way) lesbian and gay relationships are different from marriage. First, and perhaps more obviously, there is no provision within the Act for voidability for lack of consummation:

> Consummation has a specific meaning within the context of heterosexual relationships and it would not be possible nor desirable to read this across to same-sex civil partnerships. The absence of any sexual activity within a relationship might be

40 See, eg, Giddens (1992); Weeks (2004).
41 Freeman (2002), p ix.
42 *Ibid*.
43 Roseneil (2004), p 411.

> evidence of unreasonable behaviour leading to the irretrievable breakdown of a civil partnership, if brought about by the conduct of one of the parties. However, that would be a matter for individual dissolution proceedings.[44]

There is at least an implicit recognition here that same-sex partners may not sign up to quite the same comprehensive package of rights and duties expected within the institution of marriage.

Relatedly, there is no provision for automatic dissolution on the basis of adultery:

> Adultery has a specific meaning within the context of heterosexual relationships and it would not be possible nor desirable to read this across to same-sex civil partnerships. The conduct of a civil partner who is sexually unfaithful is as much a form of behaviour as any other. Whether it amounted to unreasonable behaviour on which dissolution proceedings could be grounded would be a matter for individual dissolution proceedings.[45]

Thus, while the supporters of the Act may imagine a particular target constituency – the cohabiting, sexually faithful and sexually active (with each other) same-sex couple – this disciplinary form of relationship is open to resistance within the terms of the Act itself. A couple need not be sharing a home to register as civil partners, nor need they be sexually active with each other, but they could be sexually active with others.

As the government makes clear, the Act is not aimed at home sharers, who may have a more financially intertwined life than same-sex civil partners. This leads to numerous questions: where does partnership end and home sharing begin? When is a couple a couple? When is it not? Is this a matter for individual autonomy or does it test the limits of the law, raising the issue of the authenticity of relationships? Might we witness the emergence of a new definition of a pretended family relationship? Perhaps, unwittingly, the Act allows us to bring to the public sphere new ways of living that might come to be recognised (or not) within the language of civil partnership.

Finally, there is surely no better place to engage in acts of resistance than at a wedding, with its abundance of rituals ripe for queer cultural appropriation. It should be remembered that the government itself recognises that there may be an important role for ceremony attached to civil registration. The importance rests not only in assisting the catering industry (an economic good), but presumably because the ceremony may further reinforce the seriousness of the occasion and strengthen the long-term emotional and financial commitment that civil partnership signifies.

We might ask what a 'queer wedding ceremony' might actually look like. First, a civil partnership ceremony is, perhaps by definition, a queer event, signifying both marriage and not-marriage at the same time. But, moreover, it may be at this ceremony – this strange heady mix of the public and the private – that the full fabulousness of queer existence can be displayed. After all, it is at the wedding

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44 DTI (2003), p 36.
45 *Ibid*, p 35.

reception that the full panoply of mixed-up relationships in which queer lives are embedded can be exposed for public viewing. What could be more queer than that? Imagine the civil partners going off arm in arm with their respective different sexual partners, or back to their separate homes with their respective home sharers. The possibilities – the queer potential – are limited only by the queer imaginary, providing an extraordinary act of resistance (and a great party to boot). Just don't get me started on the gifts.

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Chapter 3
Shared Households: A New Paradigm for Thinking about the Reform of Domestic Property Relations

Anne Bottomley and Simone Wong

Introduction

When the Civil Partnership Act 2004 was being debated in Parliament, the chance was taken by a number of members of both Houses to raise, again, the plight of the female cohabitant who, at the end of a period of cohabitation (however lengthy) does not, unlike her married sister, have access to the divorce courts and thereby to property orders, which allow for the redistribution of property between the parties (however economically vulnerable she might be).[1]

What seems to have developed over the past few decades is a process of 'normalisation' of cohabitation, in that the 'reality' of cohabitation as an alternative to marriage status is now recognised as a choice made by an increasing number of people and as a choice which no longer, it seems, is marked with a significant social stigma.[2] As the legal and social consequences of being born outside of marriage as 'illegitimate' children have radically improved, so one of the major factors inhibiting cohabitation as a choice for those still of childbearing age has been removed. More and more benefits, as well as obligations, between domestic-sexual partners are now recognised and enforced (for instance, in relation to pension rights or the inheritance of tenancies), so that, at one level, it seems that we are now in a position to choose whether to marry our partners or not, without too many negative legal consequences. And yet . . . the figure of the economically vulnerable female cohabitant returns to haunt us. No family law text can now avoid addressing her position, and how easy it is to slip into contrasting her vulnerability with the seemingly more protected position of her married sister, especially given that the canon of family law remains firmly focused on marital status. And however 'normalised' and routine the role and position of the domestic-sexual partner in the media, readers of daily newspapers, or TV viewers, are treated on frequent occasions to stories of not only the wronged partner left after a long period of cohabitation and fighting for some (legal) recognition of what she contributed as well as what she lost, but also to stories of women who thought that after a period of cohabitation they would be treated as 'common-law wives' without any clear sense (except a vague idea that it would be an equivalent to marriage) of what benefit that might bring if such a thing did, in fact, exist in this country.[3] One is left with a sense that however 'normalised'

1 See, however, how strategic litigation can bring a case into the Family Division Bottomley, (1994a).

2 See, eg, Barlow and James (2004).

3 *Ibid*.

cohabitation has become, a significant number of women enter into it without either recognising the limitations of not having access to a property redistribution regime or taking the legal steps available to them to protect themselves (as far as it is possible) in relation to the shared use and ownership of property. The reasons for not taking steps to protect themselves need further investigation, but seem to range from believing in the myth of 'common-law marriage' and lack of basic legal information and advice through to believing in their men.[4]

It is not too surprising, within this frame, that the government has decided to invest a significant amount of money in an advertising campaign to let women know that there is one remaining significant disadvantage to not marrying – and that access to the divorce courts for economic orders makes a marriage certificate a valuable insurance policy.[5] But this is more than a warning to women not to slip without a lifebelt into the treacherous waters of cohabitation. The narrative of the plight of the economically vulnerable cohabitant underlines the function of marriage as a protective institution. Subtly, and very significantly, the government has made a fundamental choice here, even if only provisionally, about the location of marriage as a socio-legal institution. For the moment, the decision has been taken to keep marriage as an exclusive site of preferential significance. The centrality (and instability) of this decision is seen when we put together two trends in current socio-legal policy issues: dealing with the demands of same-sex couples for equal treatment and dealing with the figure of the economically vulnerable female cohabitant. It is therefore significant for this paper that we begin with the evocation of the latter in debates concerned with the recognition of the former.

The references to opposite-sex cohabitation in debates focused on same-sex registration seems, at first blush, rather strange. The Civil Partnership Bill was designed to meet the requirement of creating a status for same-sex couples which would satisfy the European Convention on Human Rights (ECHR) imperative for equal treatment and anti-discrimination on grounds of sexual orientation.[6] It remains questionable whether a status which is analogous to marriage, rather than opening marriage itself to same-sex partners, will be sufficient, but it is clearly the case that the British government believes the Civil Partnership Act to be sufficient and will defend it, if required, as meeting its obligations as it understands them.[7] To bring into debates on the Bill the issue of the unmarried opposite-sex cohabitant seems rather tangential; as the government reminded us with some frequency when addressing the issue of whether opposite-sex partners

4 *Ibid* and Bottomley (1994b). See also *Oxley v Hiscock* [2004] EWCA Civ 546, [2004] 3 All ER 703.

5 See the government's 'Living Together' campaign, which was launched on 15 July 2004. For further information, refer to the Department of Constitutional Affairs website at www.dca.gov.uk/family/cohabit.htm and www.advicenow.org.uk/.

6 See also Stychin, Chapter 2 in this volume.

7 *Hansard*, Commons, cols 177–8, 12 October 2004, Jacqui Smith. The government's view is that the Civil Partnership Act 2004 provides a ECHR-compliant secular approach to recognising stable and committed same-sex relationships and for such partners to receive the same rights and take on the same responsibilities as those who enter into a civil marriage, but without undermining (heterosexual) marriage.

should be allowed to register their partnership as an alternative to marriage, it was a question of having access to a status, and opposite-sex partners already had the choice of marriage. What more could they want? Why then raise the position of those who remained unmarried?

There were two important factors at work politically here: the first involved those who had been concerned about the position of vulnerable cohabitants for some time and were looking for opportunities to remind government and the public that their position had not been addressed (as far as they were concerned) with appropriate legislation which would allow for access to the courts and the redistribution of property.[8] The presence of this lobby is particularly interesting in that in most other European and Commonwealth jurisdictions such reform has now been enacted, either in terms of treating cohabitants after a period of time as if they were married (attributing marriage status and its consequences) or, more narrowly, allowing them access to the courts for the purposes of property redistribution. These jurisdictions met what were seen as the needs of the economically vulnerable female cohabitant by extending the attributes of marriage to include her before any of them dealt with the issue of same-sex partners and the recognition of their relationships, either through registration or through attribution based on sexual-domestic cohabitation. Within this schemata, the UK is not only well behind but also, in the thinking of less progressive lobbying groups, putting the wishes of same-sex couples before the needs of vulnerable women. Thus a concern with the plight of vulnerable cohabitants became blended with a different lobby, associated with the Christian right, to raise and use this figure along with other economically vulnerable figures of carers and sharers as part of a campaign to try and derail the Bill, which they saw as legitimating a status (and sexual practices) which would undermine the centrality of marriage.[9] As the Civil Partnership Bill reached the final stages of its passage, the government announced that the position of the economically vulnerable cohabitant would be referred to the Law Commission[10] and, in the publicity surrounding the passing of the Act, made clear that civil partnership was only an equivalent to marriage, therefore maintaining marriage as an exclusively heterosexual union.

Three themes continually play through the narratives of sharing domestic lives and property as they appear in these stories: marriage, female economic vulnerability and the imperative of equal treatment. As the narratives unfold, one fundamental subtext carries the momentum forward: the question of how far the benefits of marriage should be extended to others. Whether by attribution of status, piecemeal extensions, or by more limited recognition for certain purposes, for both same-sex and opposite-sex partners the issue has been, in this country, the initial breach of the exclusive benefits of marriage. Thus, in *Ghaidan v Mendoza*,

8 Especially the Law Society; see Law Society (2002).

9 See the advertisement placed by the Christian Institute in *The Times*, 9 November 2003. See also Stychin, Chapter 2 in this volume.

10 *Hansard*, Commons col 179, 12 October 2004, Jacqui Smith. The Property and Trusts Law section of the Law Commission has already looked, over a long period of time, into the question of property and home sharing but decided in 2002 not to make any recommendations for change. See Law Commission (2002). See now Law Commission (2006).

Buxton LJ, in the Court of Appeal, asked rhetorically why, having swallowed the camel (of recognising unmarried opposite-sex partners), the court should now 'strain at the gnat' (of recognising same-sex partners).[11]

And yet, although we can bring together the trajectory of cohabitation issues with the trajectory of same-sex partnership issues, in that they both meet on the question of the exclusive nature of marriage, 'on the ground' (in politics, texts and general conversations) they are too often presented as quite separate issues and, following the construction of the Civil Partnership Bill debates, sometimes as antithetical to each other, or at least in competition for government time. Indeed, the particular and contingent factors which structured the debates in 2002–4 have had, we would argue, a negative impact on discussions in this area. Whilst the two trajectories cross-cut each other but remain presented as separate issues promoted by different constituencies and interest groups, it makes it possible to utilise and present them as being in competition with each other, at least in terms of priorities for reform or academic funding.[12] What, crucially, has been effected is a closure of any space to think more carefully about 'why' certain categories of domestic relationships should be given a special status in law and with what effect. And, further, at the bases of both trajectories, the pattern of marriage and the powers of the court in relation to divorce and ancillary proceedings are presumed, without further examination, to be valuable socio-legal assets which should be extended to, shared with, other domestic partnerships.

In this chapter, we want to begin to open up a horizon beyond a preoccupation with immediate reform issues and to cross over and through the two trajectories, in order to see at what points they intersect and what issues this then raises. We will argue that both trajectories are couched in claims to be included into the existing legal regimes of recognition, and that the basic model, which is being stretched to include other categories, is a marriage model. This presumes that the marriage model is a satisfactory model, but it also, crucially for us, carries within this pattern of reasoning a presumption that, necessarily, extension to include other groups must be based on patterns of sameness or similarity – we will call this the 'logic of semblance'. The pattern of reasoning 'outwards' to allow for inclusion is interesting, in that we can trace shifts in what are seen to be the important characteristics of a relationship, which are rendered visible in order for the argument for inclusion to bite. But this then moves us to the core of our paper – it is our argument that if we become caught in the trajectory of 'semblance logic', we can only 'see' through a frame of reference that is constructed and constrained by patterns of similarity. It closes to view a very important debate for feminists, which is, simply: why should certain patterns of domestic relations be made visible in law and not others? The 'why' here is not addressed in terms of a larger debate about the many factors which have rendered some patterns visible to date, but rather addressed to feminists as a space to consider why we, as feminists,

11 [2002] EWCA Civ 1533; [2002] 4 All ER 1162, CA at 35.

12 Conversely, too much slippage between status issues and specific concerns with property often obfuscate the debate; such a slippage is all too easy, given the diversity of legislative programmes in the many jurisdictions which have tackled these issues.

would want certain patterns of relationships recognised for certain purposes. This is what we mean by a 'new paradigm': thinking not in terms of why the present privileges of law should be extended, but rather about what patterns we may want made visible in law.

Imagine, in order to bring our paradigm into operation, that we are in a utopian moment[13] when concerns about legal regulation are absent and we are simply dealing with an argument for why the law should recognise certain patterns of relationships for, in this case, the purposes of property re-adjustment. Our starting point begins very broadly – with the notion of a 'shared household', which is not defined by either sexual partners or familial relationships, but rather by a shared emotional economy. It is our contention that we should begin by envisaging such a household and then consider the kinds of patterns within such a household which might give rise to an argument for legal recognition (intervention) in relation to property issues. We could then move backwards into a discussion about whether certain patterns of relationships merit recognition either because of the high level of shared commitment which they exhibit or because of a pattern of social or economic vulnerability which arises as a consequence of the shared household arrangement. If we hold this paradigm as a place from which to view the existing patterns and calls for reform, we could begin by using this approach to highlight the ways in which patterns of semblance have played through at the moment in terms of 'what' is being recognised and 'how' it is being recognised. We can then return to the possibilities of thinking through our alternative category of 'shared households'.

Semblance logic: Sexual partnerships

On the one hand, we have the figure of the female cohabitant left economically vulnerable at the end of a period of cohabitation. On the other hand, we have the demand from many gay rights campaigners for access to marriage or to a marriage-like status. The momentum which directs the trajectory of each interest group is distinctive and presents very different agendas.

The figure of the female cohabitant is one based on a rhetoric of economic vulnerability lacking adequate protection in law. It draws its strength both from the generally recognised economic disadvantages of women and from the presumption that marital property regimes can and should, to some extent, redress this disadvantage at the end of a relationship. Therefore this concern can be met by focusing on a regime which allows access to marital property law without requiring a recognition of the relationship for other purposes.

Conversely, the concern with same-sex recognition is not based on economic vulnerability as a fundamental campaigning issue, but rather on a right to equal treatment by the recognition of a committed same-sex relationship through marriage status or an equivalent. Indeed, in the arguments put for such a recognition, concerns about inheritance tax and being recognised as the next of kin

13 The term and our usage of a 'utopian moment' is similar to the idea of 'liminal utopias' developed by Sargisson (1996).

were regularly raised by campaigners – not access to the courts for property redistribution purposes.

These two trajectories meet at one obvious point: when the argument is put for recognising cohabitants in order to protect the economically vulnerable woman, any proposals for reform will now have to meet the criteria of equality and non-discrimination and therefore be extended to cover same-sex partners as well. Therefore a concern to address one figure, the economically vulnerable woman, becomes hidden or enveloped in a gender-neutral form and also a 'sexuality-neutral' form.

There is a second pattern in play which takes us back to the Civil Partnership Act – the demand for equality is the momentum for establishing rights for same-sex couples, and the presumption for most people is that this is based on recognising sexual relationships. However, the Civil Partnership Act does not presume or require sexual practices of any form. Any same-sex partners can register under the Act, as long as they are of the same sex. The reasons are probably to do with a distaste in making visible and examining same-sex sexual practices; but the consequences of this distaste are interesting. What is hidden, or enveloped, is sexuality – it will probably be the case for most partners that it is their sexual partnership which forms the core of their commitment and which is being registered, but in law it is merely their commitment to each other which is being registered (unlike marriage, which presumes and requires both sexual practices and sexual fidelity).

Finally, a third pattern becomes visible: a concern that a fallback position is required for those who do not marry or register their relationship. It 'piggy-backs' on marriage and registration, in that it looks to similar relationships to extend some form of protection to them, but the question is then whether such protection should be limited to property re-adjustment or should carry with it a broader gamut of rights and responsibilities equivalent to those held by people who have married or registered.

The development of these patterns is particularly visible in Australian jurisdictions. For the purposes of the paper, we focus on three: the Property (Relationships) Act 1984 of New South Wales, the Domestic Relationships Act 1994 of the Australian Capital Territory and the Relationships Act 2003 of Tasmania.

Most Australian states began with addressing opposite-sex cohabitants only – for example, the *De Facto* Relationships Act New South Wales (1984) and Tasmania (1999) – and then amending or introducing statutes to extend protection to same-sex relationships[14] by redefining *de facto* couples. Most sub-national statutes have also retained a 'cohabitation requirement'.[15] For instance, s 4(1) of the Property (Relationships) Act 1984 redefines a *de facto* relationship as one

14 The *De Facto* Relationships Act (New South Wales) was amended and renamed the Property (Relationships) Act in 1999 so as to extend to both opposite- and same-sex *de facto* couples as well as carers, while Tasmania enacted the Relationships Act in 2003 to replace the earlier legislation and extend to both *de facto* couples and carers.

15 At present, only the Domestic Relationships Act and the Relationships Act do not impose a cohabitation requirement.

'between two adult persons: (a) who live together as a couple, and (b) who are not married to one another or related by family'.[16]

References to *de facto* partners 'living together as man and wife' are increasingly rare in the Australian legislation. The move from opposite sex to same sex, although clearly based on the image of a sexual partnership, becomes 'de-sexed' in an overt way by moving towards definitions based on what has become known as 'coupledom'.[17] If we are right in thinking that this is primarily due to an unwillingness to become caught in definitions of sexual practices (which lay at the root of marriage) when moving beyond opposite-sex sexual practices, then we have here an interesting doubling-back effect. A move from marriage into heterosexual practices remains defined by recognised sexual acts. Once, however, same-sex relationships are included, not only does the lack of sexual explicitness allow the heterosexual world not to have to think about what lesbians or gay men do in bed, but it also leads to a displacement of the centrality of sex for heterosexuals too, at least in the general structure of the legislation.[18]

For some advocates of gay rights focused on same-sex inclusion, the displacement of sexual practices is one which still fails fully to signal the fullness of their sexual partnership – an argument which is in full flow in both Canada and the United States, but seems, to date, more muted in Australia.[19] This may connect with the second trend, which is that the Australian developments have been based almost entirely on 'presumptive' rather than 'registration' regimes (the only exception being recent reforms in Tasmania). Therefore, the move from opposite sex to same sex has been more incremental, more subdued and more, we would argue, entwined with the original concerns with protecting the economically vulnerable rather than, *ab initio*, being focused on a claim to a right to marriage status or equivalent.

This decentring of sexual practices opens up a space for recognising 'relationships' which might not actually include a sexual element at all and allowing for other patterns of domestic interdependency which are not 'couple' based.[20] Parliamentary debates on the Civil Partnership Bill, and developments in Australian and Canadian jurisdictions, explored and extend this possibility. But, before we move on to examine this extension, we need to return to the boundary between marriage and other domestic statuses. At this point the question is: should any benefit be retained as exclusive to marriage?

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16 *Cf* the previous definition found in s 3(1) of the *De Facto* Relationships Act (New South Wales), which reinforced the genders of the respective *de facto* partners twice in the definition.

17 See previously *De Facto* Relationships Act (New South Wales) s 3(1); *De Facto* Relationships Act (Tasmania), s 3; *cf* Property (Relationships) Act, s 4(1); Relationships Act, s 4(1).

18 The issue of the presence, or not, of a sexual relationship may well re-emerge at the level of guidelines given for, say, deciding whether a *de facto* relationship exists, or in the making of awards or dealing with case material.

19 Eg, Boyd and Young (2003); Millbank (1998); Millbank and Morgan (2001); Millbank and Sant (2000).

20 For a fuller discussion of this particular development in the Australian legislation and how this form of de-sexing is used to 'stretch' protection in relation to property matters to a wider range of relationships, see Wong (2004).

What is interesting in Australia is that earlier distinctions made between married couples and *de facto* relationships for the purposes of property adjustment orders have begun to erode, with some legislation like the Relationship Act and the Family Court Act 1997 of Western Australia demonstrating greater convergence between orthodox family law and *de facto* provisions. The Family Court Act is the most extreme example of wholesale transplantation of the marital provisions contained in the Family Law Act 1975 (Commonwealth) into legislation dealing with *de facto* relationships. As a result, the provisions applicable to married spouses on divorce are now equally applicable to opposite- and same-sex cohabitants in Western Australia.[21]

However, this convergence in terms of property redistribution retains the distinction of marriage (as an opt-in regime) and the broader rights and responsibilities carried within that status, leaving same-sex couples on a par with unmarried opposite-sex couples as in a type of informal arrangement, recognition of which would address possible economic vulnerability and allow for the question of equality to be played out rather than addressing status issues directly.

This suggests to us that the line drawn around marriage is permeable, both in the sense that it may be stretched to cover others for certain purposes, but also in the sense that it may be possible to 'let go' of certain characteristics which were once held as exclusive to those who had marriage status and therefore in part defined that status, whilst still maintaining (the possibility of) a site of 'marriage' as the 'real thing' as distinctive from the simulacra of marriage-types.

Semblance logic: Beyond sexuality

When the House of Lords first debated the Civil Partnership Bill, Lord Tebbit and others raised a simple question: why limit a right to register to same-sex (sexual) partners? If economic vulnerability arising from sharing a household – especially, for instance, when one party was caring for another – was an important factor[22] in extending legislative protection, why not allow others to register who defined their relationship not through sexual practices but through a shared commitment to live together and care for each other? There is a pattern here of Lord Tebbit *et al* trying to deflect the focus on equality onto a focus on economic vulnerability. The question was designed to derail the Bill, but it echoed concerns that had already been raised (for instance, inside the Law Society) with the economic vulnerability of domestic partners who lack a sexual nexus to their relationship. It is unfortunate that the figure of the 'spinster sister', developed by Lord Tebbit *et al*, caring for her (presumed) brother became reproduced in the gay press as the figure

21 The Relationships Act, on the other hand, does not go as far as the Family Court Act; the Tasmanian courts, for example, have more limited powers in relation to making maintenance orders. See Family Court Act s 205ZC and s 205ZD, which replicate Family Law Act (Cth) s 72 and s 75; *cf* Relationships Act s 46 and s 47.

22 This was rather disingenuous – it involved taking the focus away from equality arguments and placing it on economic vulnerability arguments.

being used to try and detract from the importance of the right to equal treatment for same-sex partners. It was argued, as it has been in Canada,[23] that this was a simple diversion from the main issue – and yet, it is our contention that it does raise some very significant issues.

Within the frame that Lord Tebbit was raising the issue, a clear attempt to wreck the Bill, it was also a badly muddle-headed approach if it were to be taken at all seriously. The Civil Partnership Act is about registration of relationships, not about the recognition of economic responsibilities for the sole purpose of property redistribution. It therefore raises issues of quite a different order to protecting the economically vulnerable through property redistribution. The narrower frame of property redistribution, and the more likely frame of presumptive regimes rather than registration, is the beginning of our examination of recent developments in Australia, which take seriously the issue of non-sexual domestic commitment.

The Domestic Relationships Act was the first Australian legislation to omit any reference to a sexual element to a relationship: it adopts a general definition, 'domestic relationship', defined as a relationship between two adult persons where 'one provides personal or financial commitment and support of a domestic nature for the material benefit of the other'.[24] No distinction (in the general frame of the Act) is made between *de facto* (sexual) relationships and others, for instance, care relationships. It further encompasses all these relationships regardless of whether the parties cohabit and 'share the same household' or not.[25] Since its introduction, no other sub-national legislation has adopted such a broad definition. While domestic relationships for the purposes of the Property (Relationships) Act and the Relationships Act cover *de facto* and other, especially 'care', relationships,[26] both statutes retain a distinction between the two types of relationships, thus affecting the convergence we mentioned above by distinguishing between rights given to *de facto* partners and lesser rights given to others. Both define a care relationship as one between two adult persons, whether or not related by family, where one or each of them provides the other with domestic support and personal care. A *de facto* relationship, however, is defined differently: s 4(1) of the Property (Relationships) Act defines the relationship as one between two adult persons who live together as a couple, while s 4(1) of the Relationships Act defines it as one between two adult persons who *have a relationship* as a couple. This means that cohabitation remains a prerequisite for inclusion of both opposite- and same-sex couples under the Property (Relationships) Act but not the Relationships Act.

The Relationships Act is significant in that it is the first Australian legislation to provide a dual (presumptive and registration) system for both *de facto* and care

23 Boyd and Young (2003).

24 Domestic Relationships Act, s 3(1).

25 Domestic Relationships Act, s 3(2)(a).

26 The qualifying relationships have been variously termed as 'domestic relationships' (as in the Property (Relationships) Act and the Domestic Relationships Act) and 'personal relationships' (in the Relationships Act). For the purposes of this chapter, 'domestic relationships' will be used, since it is the more commonly employed terminology.

relationships. The registration system under the Relationships Act is less formal than that provided in the Civil Partnership Act, which sets up registration and dissolution procedures for civil partnerships that mirror those of marriage and divorce. Under the Relationships Act, a deed of relationship may be registered upon satisfying the conditions specified in s 11,[27] and it may be revoked on the death or marriage of either party, or on the application of either or both of the parties to the Registrar, or on order of the court.[28] This means that an overtly non-sexual relationship may be registered. At one level, this seems very similar to the reforms recently introduced in Alberta (discussed later), which also allow for both *de facto* and other relationships to be registered, as well as introducing a fallback scheme of recognition. However, a crucial difference is that, whereas in Tasmania a line is drawn between *de facto* relationships and others, in Alberta they are treated in the same way and the line is drawn between married partners and others. What all these emerging patterns make clear is that extensions to cover others tend to include the drawing of lines around a central nexus of *either* marriage *or* sexual partnerships, although the unwillingness to speak of sexual practices tends to lead to a fudge which allows for slippage into non-sexual partners. This slippage has to be distinguished from the more definite moves made in some jurisdictions to extend protection to the economically vulnerable, especially carers, even if they meet at a point where a shift in focus to economic vulnerability allows detraction from the issue of equality for sexual partners.

In a sense, the recent Australian reforms not only extend to non-sexual care relationships; they also reveal an emerging trend, following the lead taken in the Domestic Relationships Act, of shifting the focus from the status of marriage and marriage-like relationships to one based instead on emotional and financial interdependence as indicators of a legally recognised relationship.

The significance of this shift is that it appears to move away from the 'sexual marriage model' as the starting point, thus providing access to the law to a wider range of relationships. However, if we are right in our arguments regarding the 'logic of semblance', this access may be questionable, as the focus of reform remains confined to relationships which are perceived by the law as 'signalling' commitment in a manner comparable to marriage.[29] In so doing, the law continues to look at bilateral relationships: that is, to forms of partnership between two persons capable of projecting the same signal to commitment and long-term

27 The parties (a) must be domiciled or ordinarily resident in Tasmania, (b) must not be married or a party to a deed of relationship, and (c) are in a significant or caring relationship. The second condition points to the need for exclusivity in order to qualify for registration of the relationship. Hence only parties in exclusive *de facto* or care relationships are permitted to register their relationship.

28 Relationships Act, s 15.

29 Rowthorn (2002), for instance, argues that marriage is traditionally seen as an institution for establishing a permanent and sexually exclusive union between a man and a woman. This 'signal' serves the threefold function of indicating: their commitment for an enduring relationship; their unavailability, sexually, to others; and the likely stability of the relationship. The application of signalling theory to marriage will have implications for any proposed reform of cohabitation and same-sex relationships, that reform calling for the recognition of such relationships would tend to favour a policy that ensures an effective signal of commitment and stability.

stability as marriage does. Further, the shift away from a sexual/marriage nexus is allowed for by re-engaging with a concern to protect the economically vulnerable, revealing a concern to strengthen ties of economic interdependency, again reproducing a marriage model or, rather, picking up on one of the major conventional functional aspects of a marriage model.

Reaching the limits of semblance logic: Constrained by bilateral thinking

Whilst we can see a stretching of the marriage model to include relationships not based within a sexual nexus, it is clear that the pattern of reform presumes a bilateral partnership.[30] If one aspect of the logic of semblance has been stretched to the point of loss, another (along with economic interdependency!) seems to remain. Why should we presume that a shared domestic household be limited to a bilateral relationship? A key question that arises is whether there is any rational and principled basis upon which the law should be limited to bilateral relationships. What potential is there in the existing Australian legislation, which exemplifies a broad approach, for moving beyond a bilateral model?

In defining all domestic relationships, whether between *de facto* partners or carers, the Property (Relationships) Act, Domestic Relationships Act and Relationships Act provide no scope for considering a wider range of home-sharing arrangements and confine the statutory regimes to bilateral relationships. The resolution of financial and property matters that arise on relationship termination have to be dealt with on a bilateral basis. This fails to acknowledge the existence of other more diverse and plural home-sharing arrangements. Cultural as well as economic factors (eg familial obligations to care for elderly parents; unmarried, divorced or widowed siblings living together or with parents; being priced out of the property market because of recent sharply increasing prices, etc) may variously affect people's reasons for sharing a household. Such arrangements clearly go beyond conventional bilateral models. For example, three unmarried friends or sisters, A, B and C, may decide to set up a shared household in the house belonging to C where they agree to provide each other with emotional and financial support and care. The application of the Property (Relationships) Act, the Domestic Relationships Act or the Relationships Act would create a complex web of legal relationships which would be unlikely to fit the emotional and financial map of the household. The presumptive system of each of the Australian statutes would permit the matrix of relationships shown in Table 3.1.

For the purposes of registration under the Relationships Act, if A and B were to register their care relationship, they would be unable to register their respective care relationships with C.[31] Likewise, if A and C were to register a deed of their relationship, they could not register their respective care relationships with B.

30 We could have employed the anthropological term 'dyad' but chose not to, given that this would have led us on to 'tryad'. However, what has been employed here is the use of 'stretch' as informed by the work of Strathern (1999).

31 Relationships Act, s 11(1)(b) and (2)(a).

Table 3.1 A, B and C: Possible relationships

	A	B	C
B	Care relationship	N/A	Care relationship
C	Care relationship	Care relationship	N/A

In addition, since A, B and C are simultaneously in other domestic relationships (see Table 3.1), none of them may register any of the relationships unless they opt for exclusivity.[32] Yet, under the presumptive system, the Act is silent on whether or not there is a similar bar on the creation of concurrent domestic relationships. Similarly, in both the Property (Relationships) Act and the Domestic Relationships Act there are no express provisions to indicate that the creation of concurrent domestic relationships is prohibited. Thus, it is arguable that the statutes envisage that possibility but only under the presumptive system.

This raises the issue of how competing claims by parties in concurrent domestic relationships are then to be dealt with. At present, little help can be gleaned from the case law, as almost all of the disputes that have gone to court have been between *de facto* partners. The experience in the Australian Capital Territory, for example, points to an under-use of the Domestic Relationships Act by other constituents, such as carers. Nor have there been cases involving claims by parties in concurrent relationships, which has probably not been helped by the way in which the statutes have been drafted to focus on claims being made on a bilateral rather than a multilateral basis.[33] That being the case, while classifying the various relationships may be simple enough, resolution of the respective and competing claims of A, B and C vis à vis one another on a bilateral basis is less likely to be so. For instance, in determining A's claim against C, there will be little, or no, consideration of the countervailing claims that B may make against either A's or C's assets. Some may argue that this is only fair, since A's entitlement, if any, should be determined by her contributions, financial and non-financial, towards C's care and support, and her claims against B or vice versa should thus be immaterial. This, however, is purist logic, as it ignores the interrelatedness of A's relationships with B and C respectively, which may not be easily disentangled and treated as separate and distinct, and abstracts A's contributions by taking them out of the context of the three-party home-sharing arrangement.

The matters which the respective sub-national courts may take into consideration in determining whether or not a property adjustment order should be made also vary. At one end of the spectrum is the Property (Relationships) Act, which, being the narrowest of the statutes, allows the New South Wales courts to take

32 See n 27 above; Relationships Act, s 15(1).

33 All three statutes refer to applications made in relation to the property of both parties or either of them, thus reinforcing the bilateral nature of the statutes. See Property (Relationships) Act, s 14(1); Domestic Relationships Act, s 15(1); Relationships Act, s 40(1).

into account only the contributions referred to in s 20(1)(a) and (b).[34] On the other hand, the Domestic Relationships Act and the Relationships Act allow the Australian Capital Territory and Tasmanian courts respectively to consider the financial needs and obligations of each party, and their respective responsibilities to support any other person as well as their future needs.[35] Reference to the parties' 'obligations' and 'responsibilities to support' may suggest that there is some scope for considering any countervailing claims which A, B and C may make as against each other when determining what order to make as between A and C. However, the extent to which such countervailing property adjustment orders will fall within the meaning of 'obligations' and 'responsibilities to support' is unclear. This leaves a gap in the existing Australian legislation about whether or not the courts can efficiently deal with multilateral relationships.

Our concern then is that the logic of semblance still holds one important aspect to it which dominates the pattern of extension and inclusion. All the legislative programmes which we have found have been based on the nexus of a 'couple': a bilateral partnership sharing a domestic economy. This may, in part, be derived from the prominence of the registration model based on a marriage model and that a presumptive model in effect generally 'piggy-backed' on this model. But it is this derivation, we shall argue, that has a major limiting effect on the development of a more progressive and informed debate as to why certain domestic arrangements should be recognised for property redistribution purposes.

A different paradigm: Beyond bilateral relationships

Should – or can – a model predicated upon bilateral relationships be extended beyond a bilateral model? To begin in the middle, the question of how far the model can, or should, be stretched is at issue only when we begin within the origins of the model itself, a presumption of the 'typical household' and the presumed patterns of economic vulnerability or shared commitment that are likely to arise. It is already clear that presumptions of a 'typical household' have to be modified to recognise a plethora of different living arrangements and the economic vulnerability or shared commitment which might arise from them. As the model is stretched to include other patterns of relationships, we have noted that it remains focused on bilateral partnerships, but that within this model what is exposed is a range of reasons for recognising such relationships – for instance, a focus on caring. If the reason for recognition is the factor of caring, quite simply, why should it be presumed that there is only one carer? If two sisters rather than one looked after their third sister, why should this model not be recognised? If four friends rather than two live together, why should this not be recognised?

A focus on caring takes us beyond sexual relationships and raises the issue of

34 These are financial and non-financial contributions made directly or indirectly towards the acquisition, improvement or conservation of any property, as well as domestic contributions for the welfare of the other party or the family constituted by the parties.

35 Domestic Relationships Act, s 19(2)(a)–(f); Relationships Act, s 47(2)(a)–(m).

protecting those who have become economically vulnerable through home sharing and especially through the role of caring. But this has now brought us full circle. The figure of the carer tends to be gendered – in both the speeches of Lord Tebbit *et al* and the responses from within the gay community (albeit echoing Lord Tebbit): 'she' is not merely daughter or sister but too often described as 'spinster sister'. It is the economically vulnerable woman who is being brought into play. Whilst we recognise that all too often it is, still, daughters and sisters who provide the function of caring in families, we are, necessarily, concerned with two aspects to this portrayal. First, to focus on a demand for law reform via this figure is to enter into the possibility that it is only active caring which will be 'rewarded' via property adjustment regimes, thus reproducing patterns of expected roles and economic dependency arising from them. The second is that it continues to construct a focus based on economic vulnerability. In fact, we think that a careful analysis of case law in both divorce cases and trusts cases shows that a crucial rethinking is already well under way, which we would want to support and sustain: economic vulnerability still plays a part, but there is now a focus on the partnership aspect of the relationship as a form of joint enterprise. Attention is paid to the vulnerability that may have arisen from that partnership, in combination with an increasing realisation that the assets of that partnership should be shared equitably.[36] Although structural economic factors will still construct this picture, increasingly the specific circumstances within which the partners constructed and acted out their partnership are now a focus.

If we take the starting point of a shared household, we can then ask whether certain types of relationship do require or merit a different level or form of recognition from others. We can, if you like, look backwards to marriage and other forms of sexual/emotional partnerships and investigate the factors which might argue for differential treatment, rather than saying: this looks like this, so, based on either an equality argument or a needs argument, it should be treated analogously.

Reaching the limits of semblance logic: Beyond economic vulnerability

What we are suggesting is that two concerns – equality and concern for economically vulnerable parties – have always been in play in the reform debates. It may seem that economic vulnerability is a very sound ground on which to argue for law reform, and that it is important, in particular for feminists, to keep open the figure of the economically vulnerable female. However, this focus limits us to looking at patterns of dependency, rather than looking beyond this to a more interactive pattern of shared commitment. It may well be that we already have the possibility of thinking of shared commitment as the key concern for intervention, as in the Australian material. All we are signalling here is that a shift to this focus is important, so that we will not continually be drawn back into looking for

36 See, eg, *White v White* [2001] 1 All ER 1; *Cowan v Cowan* [2001] 3 WLR 684; *Lambert v Lambert* [2003] Fam 103; *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24.

patterns of actual economic vulnerability as the factor for intervention. Thus, to support the trend in our own jurisdiction, in both family and trusts cases, in which the element of 'joint enterprise' is increasingly being recognised, is crucial, even if in the actual orders given, a pattern of recognising economic vulnerability continues, necessarily, to emerge. What we need to highlight is that we should not be tied to actual economic vulnerability but look rather to shared commitment as being the baseline. Hence our shared household model is not only a chance to think beyond bilateral relations but also a chance to think constructively about what it means to 'share'.

The underside of present legal reforms and of our own approach

We began, when we first introduced our notion of the 'shared household', with a reference to a 'utopian moment'. A point which has been made very succinctly by feminists in relation to the same-sex marriage debates is that it is all too easy to become constrained by the parameters which have been set by these debates into being forced to argue on one side or the other, when really one wants to begin in a very different place and to keep open the possibilities of thinking other futures, rather than being caught by the past. Butler, Boyd and Young, Stychin and Cooper, for example, all recognise the constraints and limitations of the way in which the debates are constructed within the political arena and how difficult it is to open spaces to think outside of these constraints.[37] All emphasise, Butler in particular, the closure which this can effect in trying to think more creatively about domestic relationships. But there is more than this – there is also the clear-sighted recognition that the way the debate is presently structured not only confirms present privileges in relation to marriage and marriage-like relationships, but also carries with it some very dangerous agendas. Writing with a particular concern with same-sex relationships, all are concerned that only certain types of relationship are likely to receive recognition at law – those which are most similar to a social marriage model (although through a process which de-signifies sexual practices and therefore sexuality) – and that this will therefore exclude more non-conformist practices. But all are also clear-sighted in their recognition that there are powerful forces in play that are not progressive, even if they work within, or alongside, a paradigm of equality discourse.

The first element of this is that a concern to include same-sex couples not only privileges marriage-like behaviour for same-sex partners, but also may be utilised to confirm a marriage model for opposite-sex couples and indeed the exclusivity of marriage status. In Alberta, for instance, the Adult Interdependent Relationships Act 2002 not only extends a registration model and a presumptive model to all and any 'interdependent partners'; the legislation also confirms, in its Preamble, the 'sanctity of marriage', referring to marriage as 'an institution that has traditional religious, social and cultural meaning', and draws a sharp distinction

37 Butler (2004); Boyd and Young (2003); Stychin, Chapter 2 in this volume; Cooper (2001; 2004).

between spouses and others.[38] Thus, at one legislative moment, it not only extends the marriage model but also limits 'real' marriage to heterosexual married couples. A similar move might be seen in this country in the decision to limit the Civil Partnership Act to same-sex partners, on the grounds that marriage law is available to opposite-sex partners, and a decision by the government to encourage the take-up of marriage status through an advertising campaign which focuses on the economic vulnerability of unmarried opposite-sex cohabitants. The Alberta legislation, further, does not mention same-sex partners, preferring to lose them in a more generalised package of 'interdependent relationships'. Not only is marriage preserved; same-sex recognition is also avoided. Further, as Boyd and Young[39] point out, this extension to a broad definition is clearly linked to a concern with the privatisation of welfare services – what is being accomplished here is a concern to make sure that domestic patterns are reinforced as patterns of economic dependency and where the function of caring should be either located or paid for.

Rights very rarely come without responsibilities, and 'recognition' is simply another word for 'intervention'. We referred in the introduction to one imperative on the government to reform the law in relation to same-sex couples being the equal treatment argument, but we are very aware of a second imperative: the increased use of economic modelling by academics and policy makers to inform reform proposals aimed at stabilising couples, families and households for the socio-economic good of the country. In the work of such academics as Bob Rowthorn,[40] in which legislative reform is simply one tool to achieve social ends, the use of 'family' law and the recognition of certain types of household is modelled in terms of whether it achieves its purposes: the stability of the unit. Within these terms, it is really not surprising that Tasmania has recognised care relationships or Alberta, interdependent relationships – it will help, it is thought, to stabilise them. The Civil Partnership Act, it is hoped, will stabilise male same-sex couples through patterns of regulation as much as through the privilege of recognition. In all cases, economic modelling can be used to suggest that being given a signal of commitment is a crucial factor – but it is important to remember that in both Tasmania and Alberta this signal is supplemented by the right of the state to recognise these relationships even when the partners have not chosen to utilise that signal.

Thus, it would be naïve of us not to recognise this element and further to recognise that the emergence of new patterns of household sharing may well 'require' forms of regulation which will be policed and achieved through recognition.

Social trends suggest that in this country we will see emerging households not corresponding to the 'typical type' as a response to such factors as the economics

38 The legislative process was a reaction to the Ontario Superior Court decision in *Halpern v Canada* [2001] 95 RFL (5th) 41. It included an amendment to the Preamble to the Marriage Act: 'Whereas marriage is the foundation of family and society, without which there would be neither civilization nor progress; Whereas marriage between a man and a woman has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions.' See Boyd and Young (2003) on Canadian reforms and also Butler (2004) and Cooper (2001; 2004) on wider issues.

39 Boyd and Young (2003). See also Stychin, Chapter 2 in this volume.

40 Rowthorn (2002).

of owner occupation, linked to the high cost of higher education and caring for the sick and elderly, etc. We are likely to see many more three-generation households, more friends buying together and often needing more than two members within the household economy – it may well become the case that these patterns will require, in policy terms, some recognition in order to stabilise them and minimise any economic fall-out if and when they break down in difficult circumstances.

The new paradigm: Shared households

We agree with Cooper when she argues that what we are witnessing is an extension of familial patterns into, and onto, other forms of social organisation: in this case, into the setting of households beyond those based on marriage. And we also agree with Boyd and Young that this form of disciplining not only confirms existing patterns of marriage and marriage-like relationships, but also is essentially a concern to stabilise units in order to vest the functions of economic responsibility and caring within the 'private' sphere. Any argument to extend these patterns can only seem, therefore, to be in these terms retrogressive or at least naïve. But we return to our 'utopian' moment and our model of the shared household.

Principally, we think that using the model of the shared household provides us with a frame through which we can more sharply consider present trends. The two most obvious trends we have indicated are the final constraints imposed by the 'logic of semblance': trends toward bilateral thinking and to a marriage-like model based either on the argument for equality or on the figure of the economically vulnerable party. Therefore, the only progressive move open to us, we think, is to argue beyond those limits: to argue from a perspective which takes the focus away from bilateral relationships and away from economic vulnerability.

It could be argued that in making this move we fail to address the specific issues of recognition of same-sex sexuality or a concern with actual economic vulnerability. But this does not need to be the case. By turning the argument around and taking a very broad approach we can, we think, leave open a series of questions about whether certain types of relationship should be given privileged recognition, or about when certain patterns of actual economic vulnerability should be recognised. The point is, however, not to presume that either sex or a fear of economic vulnerability is a sufficient reason for initial recognition. For instance, rather than presume that sexual partners are more economically entwined than others, we would like much more empirical work on whether this is the case. We would also like much more empirical work on whether, for instance, women are more willing to become economically vulnerable when 'protected' by the status of marriage or living in marriage-like relationships. We would also like much more consideration for why we, as feminists, might be willing to privilege sexual relationships over others and to keep open, as feminists, our concern with marriage and marriage-like models.[41]

41 See especially Boyd and Young (2003).

The strategy of thinking in terms of a shared household allows us to return to these questions; it also allows us to go further and to reclaim, in our utopian moment, the possibility of a much more diverse and fluid account of different forms of domestic sharing and to argue the validity of thinking, if not moving, beyond the limited accounts of domestic arrangements which have so constrained us in the past.

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Chapter 4
What Is a Parent?

Emily Jackson

Introduction

Because parents possess a bundle of important rights and duties, clear and unambiguous legal definitions of motherhood and fatherhood are self-evidently desirable. And yet the law has tended to assume that the existence of a parent–child link will simply be obvious. Whilst this may be true in the paradigm case of a child conceived through sexual intercourse and brought up by both her genetic progenitors, for an increasing number of children there may be genuine uncertainty about the identity of their parents. Reproductive technologies, as is commonly observed, have the potential to fragment our definitions of motherhood and fatherhood. Science, according to John Lawrence Hill, has 'distilled the various phases of procreation – coitus, conception and gestation – into their component parts, wreaking havoc on our prevailing conceptions of parenthood'.[1] Where there are a number of possible mothers and/or fathers, how should we choose between them in order to identify a child's *legal* parents?

At the outset, it is of course important to acknowledge that most children know who their parents are without any need to resort to a complex legal definition. This is because all of the various criteria that we associate with motherhood and fatherhood are crystallised in the same two people. Such parents fall within what we might refer to as the 'core of certainty' and represent what I intend to call the paradigm case. Outside of this core of certainty lies a 'penumbra of uncertainty' in which the normal incidents of parenthood are more widely distributed. Here, we may have more than one woman who has a plausible reason to believe that she is a particular child's mother. For example, following egg or embryo donation, or IVF surrogacy, a woman gives birth to a child to whom she is not genetically related. Two women might then claim to be the *biological* mother of the same child. In such cases, the identity of the child's legal mother is not obvious. Rather, outside of the paradigm case, we must *decide* which of the various candidates has the better claim to be considered the child's legal mother.

Yet framing the question in this way uncritically accepts what I believe to be the law's principal stumbling block, namely its assumption that a child can have only two legal parents: one mother and one father. Conventionally, legal parenthood has been an indivisible and exclusive status: either you are a child's mother or father, or you are not.[2] Provided that one woman is recognised as a child's legal mother, no other woman can have her 'motherhood' of the same child acknowledged simultaneously. This is, I shall argue, unnecessarily confusing for children, who may find it harder to understand that one of their 'mothers' is a legal stranger

1 Hill (1991).

2 Bartlett (1984), p 879. See also Jones, Chapter 5 in this volume.

than they would living with the reality that two women stand in a maternal relationship towards them.

In this chapter, I propose to examine what we mean by the word 'parent', both in the paradigm case and within the penumbra of uncertainty. A number of different criteria ground our definition of parenthood, and while in the paradigm case these are all present within the same two people, within the penumbra of uncertainty they may be split between different individuals. Because the law has been stymied by the principle of parental exclusivity, its response to the splitting of the normal incidents of parenthood has been to try to identify a hierarchy of criteria which will result in one putative parent's claim trumping the others. In so doing, it has become spectacularly confused and confusing, not least because different hierarchies operate in different circumstances. So, for instance, the intention to become a parent will sometimes trump genetic relatedness, while at other times, the genetic link is decisive. I will suggest that the quest to identify one mother and one father within the penumbra of uncertainty has been a profoundly misguided enterprise. If instead we were to acknowledge the reality that some children have more than one mother and/or father, I think that we might be able to reach a solution that would have both practical and symbolic advantages for children and their parents.

In addition to the existing technological and social re-ordering of family life, new pressures on the legal meaning of parenthood can be foreseen. It seems that within a few years it will be possible to create gametes artificially, the most likely source being stem cell lines which have been extracted from human embryos. This will mean that same-sex couples will be able to have children who are genetically related to both of them. It is already possible to create what are known as parthonotes: that is, eggs which appear to begin the process of cell division without having been fertilised. Parthenogenesis – from the Greek for 'virgin birth' – might involve a child having only one biological parent. If human reproductive cloning becomes a reality, there will inevitably be considerable confusion over the resulting child's parentage. Is the DNA source the child's sole parent? Alternatively, is the woman whose denucleated egg was used also a biological parent? And what about the woman who gestates the pregnancy? Could such children therefore plausibly have three mothers?

My first task in this chapter is to offer some criticism of the way in which the law has tended to approach the question of the identification of parents. I intend to argue that the law has become hopelessly muddled and incoherent, and that it is time to rethink some of the assumptions which have traditionally underpinned the legal status of parenthood.

The paradigm case: What are the defining features of parenthood?

There are a number of ways in which we might identify a child's parents. For mothers, these are currently: (1) giving birth; (2) contributing the egg; and (3) intending to raise the child. For fathers, they are: (1) contributing the sperm; (2) intending to raise the child; (3) being married to the child's mother; and

(4) being registered on the child's birth certificate.[3] Almost all mothers satisfy all three criteria, and many – although by no means all – fathers will fulfil all four. Where each of the three defining features of motherhood vest in one woman, and all four defining features of fatherhood vest in one man, we have an example of the paradigm case, in which the parenthood of a child is entirely straightforward. Of course, that child might subsequently be adopted, which would result in the separation of, *inter alia*, the intention to raise the child and genetic relatedness. Given the availability of legal adoption, even within the paradigm case, legal parenthood is necessarily potentially impermanent.

Nevertheless, where a man and a woman conceive a child sexually, within marriage, whom they intend to raise, we can unproblematically accept that they are that child's parents. Some parents who differ only marginally from this paradigm case will also very obviously be a child's parents. An unmarried father, for example, who is registered on the birth certificate, genetically related to his child and intends to raise her is unquestionably that child's father.

But what if we move slightly further away from the paradigm case. What if, for example, a child is conceived using donated sperm? Here, we might have a man who intends to raise the child; is married to the child's mother; and is registered on the birth certificate, and *another* man whose sperm was used to fertilise the mother's egg. Who is the 'father' of this child? Following a surrogacy arrangement, we will have a woman who intends to raise the child and who may have contributed the egg, and *another* woman who gestated the pregnancy and gave birth. Which woman is this child's mother? Because the principle of parental exclusivity insists that one mother and one father must be singled out, the conventional approach to answering these questions has been to try to work out which of the features that we normally associate with parenthood should be decisive. While this might be relatively straightforward if a universally applicable hierarchy could be devised through which one factor – such as the genetic link – always took priority, as we see in the next sections, the law has instead used different tests in different circumstances, resulting in an extraordinarily incoherent approach to the identification of parents.

The current law

Paternity

At common law, the husband of a married woman is presumed to be the genetic father of any child that she bears (*pater est quem nuptiae demonstrant*), and is therefore automatically treated as the child's legal father from birth. This presumption was, however, always rebuttable by proof that the mother's husband could not be the child's genetic father. Before blood tests were available, the sort of evidence that might displace the presumption would be that the husband was sterile or impotent, or that he had been *extra quatuor maria* (beyond the four seas

3 Births and Deaths Registration Act 1953, s 34(2).

of England) at the time of conception. While the presumption of paternity within marriage usually simply confirms the genetic father's identity, at times it results in a legal fiction. A child's mother and 'father' may both know that another man is the true biological father, but the presumption enables them to conceal the extra-marital conception. This common-law rule works, therefore, not to promote truth about a child's genetic origins, but rather to safeguard the traditional family unit.

Since the 1940s, blood tests have been able to assist in identifying the child's genetic father. Until fairly recently, blood tests could only rule out a man's paternity. A man who shared the child's blood group might be her father, but so might any other man with the same blood group. Only if a man's blood group revealed that he could not have fathered this child was decisive evidence available that he could not be her father. Over the last twenty years, DNA fingerprinting has enabled paternity to be proved with a degree of accuracy which now comes very close to complete certainty. Under s 20(1) of the Family Law Reform Act 1969, as amended, the court may 'give a direction for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person'. Inferences are drawn from a putative parent's refusal to be tested.[4] The purpose of a s 20 direction is therefore now to *establish* paternity, rather than to exclude it as a possibility.[5] In the past, the courts were sometimes persuaded that blood tests to establish the child's paternity might not be in her best interests, because the results might disrupt the stability of the child's family unit.[6] More recently, the courts have increasingly insisted that there could be very few cases where it would be in the child's best interests for the truth about her paternity to be suppressed.[7]

Genetics as the test for paternity is, however, routinely trumped by intention following donor insemination. When treatment is provided in licensed clinics, the sperm donor will have signed a consent form agreeing to waive his right to be recognised as the father of any children conceived using his gametes. Donation is then conditional upon the donor's clearly expressed intention *not* to become a father. If the woman being treated in a licensed clinic with donated sperm is married, the presumption is that her husband has agreed to be treated as the father of any child that may be born as a result of the treatment.[8] He can avoid being recognised as the child's legal father only if he can establish that he did *not* consent to the treatment received by his wife. If the woman is unmarried, her heterosexual partner will be the legal father of any child that may be born, provided that the couple were treated 'together'. On a literal interpretation, this latter provision is misleading because the male partner will not have received any treatment himself. Instead, what has to be demonstrated is that 'the doctor

4 Family Law Reform Act 1969, s 23(1); *In re A (A Minor) (Paternity: Refusal of Blood Test)* [1994] 2 FLR 463.

5 *Re H (A Minor) (Blood Tests: Parental Rights)* [1996] 3 WLR 505; *Re J (A Minor) (Wardship)* [1988] 1 FLR 65.

6 *Re F (A Minor) (Blood Tests: Parental Rights)* [1993] Fam 314.

7 *Re H and A (Paternity: Blood Tests)* [2002] EWCA Civ 383, [2002] 1 FLR 1145.

8 Human Fertilisation and Embryology Act 1990, s 28(2).

was responding to a request for . . . treatment made by the woman and the man as a couple'.[9]

Despite the statute's rather ambiguous wording, the purpose of this rule is clear: if the clinic is aware of the unmarried man's *intention* to become the father of any child born following treatment, the law will recognise him as the child's legal father. Because it is routine to demand that both husbands and unmarried male partners sign consent forms agreeing to be treated as the father of any child who might be born following treatment, there is usually decisive proof of intent. As a result, disputes about paternity following fertility treatment are uncommon, although, as demonstrated by *Re D (a child)*[10] and *Leeds Teaching Hospital NHS Trust v A*,[11] not unprecedented.

In *Re D (a child)*, a woman sought treatment with donated sperm after she and her partner, with whom she had previously undergone treatment, had split up. She did not tell the clinic that the relationship was over, and as a result the clinic relied upon the earlier consent forms, which had been signed by her and her ex-partner. The House of Lords held that whether a couple were being 'treated together' under s 28(3) should be judged at the time of embryo transfer or insemination, and not when the couple were first accepted for treatment. Hence, in this case, the ex-partner was not being 'treated together' with the child's mother at the relevant time, so he could not be recognised as the child's legal father. A different sort of dispute arose in *Leeds Teaching Hospital NHS Trust v A*, where Mr B's sperm was used to fertilise Mrs A's eggs by mistake. Mr A had consented to the use of his own sperm to fertilise his wife's eggs, and not to the treatment which his wife actually received, and he was therefore unable to acquire paternity under s 28(2). So, while intention can trump genetic fatherhood under the 1990 Act, this will be possible only if the facts fit squarely within the terms of s 28.

Intention is also only able to trump genetic fatherhood if the sperm has been provided in accordance with the consent requirements laid out in both the Human Fertilisation and Embryology Act 1990[12] and the Human Fertilisation and Embryology Authority's Code of Practice.[13] If these conditions are not met – for example, if a woman inseminates herself at home with sperm obtained through a private arrangement or purchased over the internet – genetic paternity takes priority over intention. Should this woman be married, her husband will be treated as the child's father, although this common-law presumption might be trumped by genetic tests which identify the sperm donor. If she registers a different man – her unmarried partner, for example – as the child's father, there is again a presumption of his paternity which could be rebutted by genetic evidence. Once identified, the sperm donor would be under a duty to maintain his child throughout minority.

Following a surrogacy arrangement with a married woman, the child's legal father will initially be the surrogate mother's husband, who is neither the intended

9 *U v W (Attorney General Intervening)* [1998] Fam 29, *per* Wilson J, p 40.
10 [2005] UKHL 33, [2005] 2 FCR 223
11 [2003] EWHC 259, [2003] 1 FLR 1091.
12 Schedule 3.
13 Human Fertilisation and Embriology Authority (HFEA) (2004), Part 6.

nor the genetic father, but acquires his paternity through the common-law presumption of legitimacy within marriage. This might subsequently be rebutted by genetic tests that reveal him to be unrelated to the child. And fatherhood can be formally transferred through either adoption or the special procedure introduced by s 30 of the Human Fertilisation and Embryology Act 1990. Nevertheless, from the moment of the child's birth, a man who did not instigate the child's conception, who is not genetically related to the child, and who usually has no desire or intention to play any part in the child's life will have the right to take decisions about her upbringing, and will be obliged to maintain the child. Conversely, the genetic and intended father will initially bear no responsibility for 'his' child.

Because neither adoption nor the s 30 procedure is straightforward, not all surrogacy arrangements culminate in the formal transfer of legal parenthood. For obvious reasons, it is impossible to tell how many unofficial transfers of children take place each year. Worryingly, however, the Brazier Report concluded that 'a substantial proportion of commissioning couples are failing to apply to the courts to become the legal parents of the child'.[14] In such situations, the surrogate mother's husband (if she has one) remains the legal father, and the man who is bringing up the child may be a legal stranger to 'his' child.

A compelling illustration of the illogicality of the UK's rules on paternity following surrogacy is provided by applying them to the infamous American case *In re Marriage of Buzzanca*.[15] In his divorce petition, John Buzzanca asserted that his marriage to Luanne Buzzanca had been childless. Luanne Buzzanca responded by claiming that a surrogate mother (SM) was expecting the couple's first child. Jaycee Buzzanca, who was born six days later, had been conceived using sperm and eggs from anonymous donors (let us call the sperm donor SD and the egg donor ED). The surrogate and her husband (SM and SH) did not seek to become Jaycee's parents. The question for the court was a complex one. Out of the three plausible candidates for fatherhood (John Buzzanca, SD, SH) and the three possible mothers (Luanne Buzzanca, ED and SM), who were Jaycee's legal parents?

At first instance, the trial judge reached the rather surprising conclusion that, despite this surfeit of possible mothers and fathers, none could be considered Jaycee's legal parents and Jaycee must be judged to be a legal orphan. This was reversed on appeal, when the court held that because Mr and Mrs Buzzanca had jointly initiated Jaycee's conception, they were her legal parents and they were both therefore under a duty to contribute to her support. As a matter of justice, this seems right. John Buzzanca had deliberately instigated Jaycee's unconventional conception, and it would seem iniquitous for the law to allow him to shrug off any legal responsibility for the resulting child. John Buzzanca is Jaycee's father because without the Buzzancas' decision to become parents through this bizarre arrangement, Jaycee would never have been born. Identifying the surrogate mother's husband as Jaycee's father (as English law would have

14 Brazier *et al* (1998), para 5.7.

15 72 Cal Rptr 2d 280 (Ct App 1998), review denied, No S069696, 1998 Cal LEXIS 3830 (June 10, 1998).

done) would absolve John Buzzanca of his responsibility for the life he deliberately created, and instead pass legal responsibility for Jaycee's well-being for the next 18 years to a man who was not genetically related to her and who never intended or wanted to become her father.

So we can see that, outside of the paradigm case, the test for legal fatherhood varies according to the circumstances. A *genetic* link will usually – though not always – determine fatherhood in cases of disputed paternity, where the mother was having sexual intercourse with two men at the time of conception. If a child is conceived using donated sperm, *intention* will trump the genetic link, provided that insemination took place in a licensed clinic. But if the sperm donation was accomplished informally, *genetic* relatedness will be decisive. Following a surrogate birth, it is the man's *relationship* with the child's mother that normally determines the identity of the child's father. Given this hotchpotch of competing presumptions and hierarchies, the identity of a child's legal father is patently not a self-evident question of fact.

Maternity

In English law, while motherhood may subsequently be transferred by adoption or the s 30 procedure, *ab initio* a child's legal mother will always be the woman who gave birth to her. Although now also given statutory effect,[16] this common-law rule derives from the maxim *mater est quam gestatio demonstrat* (by gestation, the mother is demonstrated). Or, in the words of Lord Simon in the *Ampthill Peerage* case, maternity is 'proved demonstrably by parturition'.[17] Yet we immediately have a source of confusion here. Is it gestation itself that is decisive, or does gestation merely *demonstrate* or offer proof that the woman who gives birth is the *genetic* mother of the child? So, while usually assumed to mean that legal motherhood always vests in the gestational mother, an alternative interpretation of this common-law rule could be that the test for motherhood is in fact genetic relatedness, rather than gestation. Until the development of *in vitro* fertilisation techniques, gestation simply constituted irrefutable evidence of the decisive genetic link.

The adoption of a universal gestational test for maternity is usually, of course, unproblematic. Its principal defect is its application to undisputed surrogacy arrangements, when the rule will vest maternal status in a woman who never intended to be the child's mother. Because most surrogate mothers do want to hand over the baby after birth, the practical consequence of the universal gestation-based test is that the child is born into a legal limbo which will continue until parental status and responsibility are formally transferred via judicial proceedings. And, as noted earlier, since no formal transfer will ever take place in a 'substantial proportion' of cases, this legal limbo may continue throughout the child's life. This sort of uncertainty, even if relatively short-lived, is clearly not in the best interests of the child. In the absence of a dispute, it would therefore

16 Human Fertilisation and Embryology Act 1990, s 27.
17 [1977] AC 547, p 577.

seem sensible for intention to be decisive. In the handful of cases where there is a disagreement over the child's parentage, some mechanism to resolve the dispute must be found. This could consist in a default test (gestation or intention, for example), or in some sort of 'best interests' assessment.

In England, depending upon the context, a variety of tests can be employed in order to identify a child's legal father. In sharp contrast, the definition of 'mother' is rigidly inflexible and inattentive to the different contexts in which children are conceived. Of course, women's gestational capacity is clearly a material difference between the sexes, and therefore adopting differential tests for motherhood and fatherhood is not presumptively discriminatory. But if we think about some of the reasons for gestational priority, a powerful argument against differential treatment of men and women emerges. Both men and women can, via gamete donation, voluntarily surrender their parental status prior to a child's conception. But the gestational mother's decision to relinquish her parental status will be ineffective until at least six weeks after her child's birth.[18] The only plausible explanation for the difference is that women are assumed to be incapable of making this decision before and during pregnancy, and within the first six weeks of the child's life. There is, in short, a danger that women might change their minds, and that their subsequent regret would be intolerable, which, according to Marjorie Shultz, reinforces 'the sexist stereotype that women are ruled by unpredictable emotion'.[19] For men and non-pregnant women, parenthood can be acquired and transferred by clear expressions of intent on the part of the social and genetic parents. For gestating women, 'biology is still destiny'.[20]

The advantages and disadvantages of parental exclusivity

By restricting the number of parents a child may have to one mother and one father, the law is unable adequately to accommodate increasingly complex reproductive arrangements. Children born following surrogacy arrangements, or children who have been adopted, have *two* mothers. When donated gametes are used, the genetic parent and the social parent are different people, but both are in different ways *parents*. One is a parent, in the sense that they do the job of parenting, whereas the other is the provider of half of the child's DNA. Perhaps part of the problem is that the word 'parent' itself has a number of different meanings. As a noun, it could apply to both genetic and social parents, but as a verb, it refers only to the work involved in bringing up a child.

Why has the law continued to rely upon an exclusive model of parenthood despite the technical and social fragmentation of the normal incidents of maternity and paternity? The obvious answer is itself revealing. If a child has only one mother and one father, we can be certain about who possesses the various rights and obligations that attach to the status of being a parent. Were we to recognise

18 See O'Donovan and Marshall, Chapter 6 in this volume.
19 Shultz (1990), p 352.
20 *Ibid*, p 394.

multiple parents, we would have to decide which 'parents' should be obliged to maintain the child; which should be the primary caretakers; and so on. Parental exclusivity thus appears to have the merit of certainty. Yet this superficially appealing explanation in fact presupposes what it seeks to prove.

Consider, for example, our assumption that – barring serious ill treatment – the child's parents have the right to be the primary caretakers throughout childhood. As Lord Templeman famously explained in *Re KD (A Minor) (Ward: Termination of Access)*: 'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered.'[21] If we are genuinely uncertain about who a child's parents might be, then their 'right' to be recognised as the child's primary caretakers is essentially meaningless. It will point only to a number of candidates who cannot logically *all* have the *prima facie* right to care for the same child. Where there is more than one woman with a credible claim to be considered the child's mother, there is no escaping the need to *decide* which woman should acquire the right to be considered the child's principal caretaker. To say that this right vests with the child's mother simply begs the question. With baffling circularity, then, in trying to decide between a number of possible mothers and/or fathers, the law in fact assumes that every child will have two (and no more than two) clearly identifiable parents.

The identification of parents is conventionally believed to be a question of fact rather than judgment, and so the test we employ in order to identify a child's mother and father is supposed simply to locate the truth about the child's origins. The problem, of course, is that there may be no obvious 'truth' to be discovered. Following egg donation, it is not necessarily self-evident whether the genetic mother or the woman who gives birth is properly described as the child's mother. If parenthood is not a fact waiting to be discovered, we are going to have to make some decisions about the relative importance of various different aspects of motherhood and fatherhood. But introducing this element of *choice* into the identification of parents is profoundly counter-intuitive, and, as a result, it is probably unsurprising that the law has been reluctant to abandon the idea of a clear, factual test for parenthood. Judge De Meyer advocated just such a simple, but ultimately circular, definition of fatherhood in the judgment of the European Court of Human Rights in *X, Y and Z v United Kingdom*[22] when he said that 'it is self-evident that a person who is manifestly not the father of a child has no right to be recognised as the father',[23] as if, as Andrew Bainham has pointed out, 'we all know a father when we see one'.[24] Illogically, then, when identifying a child's parents, we 'implicitly appeal to some simple preanalytic concept of parenthood',[25] when the reason why we need this definition in the first place is that genuine uncertainty exists. And of course, we can only be uncertain about who

21 [1988] AC 806, p 812.
22 (1997) 24 EHRR 143.
23 *Ibid*, p 175.
24 Bainham (1999), p 25.
25 Hill (1991), p 360.

should be considered a child's parents if our concept of parenthood is much more fluid than we may have supposed.

The decision about who should have the *prima facie* right and duty to look after a particular child is no less a decision just because we present it as a question of fact (ie, who *is* the child's mother?) rather than judgment (ie, who do we think *deserves* to have their parental claim given priority?). Admittedly, the law does not engage in a case-by-case determination of parenthood in order to allocate it to the persons who are best able to meet a particular child's needs. But making intention – rather than the genetic link – the factor which determines the paternity of children born following sperm donation is nonetheless a *decision* rather than a straightforward question of fact. Preferring to give surrogate mothers and their husbands first refusal on the rights and obligations of parenthood is a *choice* which is obscured by the law's insistence that gestation – as opposed to genetic relatedness or the intention to raise the child – is the defining feature of motherhood.

In addition to its obfuscatory function, the 'all or nothing' quality of parental status creates a further problem. Where the normal incidents of parenthood are distributed more widely than in the paradigm case, but the law has identified just one mother and one father, what is the status of the non-parents who nevertheless possess one or more of the normal incidents of parenthood? Because the law admits no middle ground here, such people are *prima facie* legal strangers to the child. So – to take IVF surrogacy as an example – the gestational mother is *the* legal mother, and the genetic and intended 'mother' is, in fact, not a mother at all. Yet on a common-sense understanding of motherhood, of course the woman whose fertilised egg develops into a child is in some important sense that child's mother. She may not ever be the child's social mother, but it makes very little sense to say that she is as unrelated to that child as a total stranger.

It might be argued that the problem here is essentially linguistic. Perhaps legal language simply has insufficient elasticity to accommodate the cultural and technological disintegration of the biological nuclear family. The principle of parental exclusivity means that the law has no concept of 'partial' or 'incomplete' motherhood or fatherhood: you either are or are not a child's legal parent. Not only does this inaccurately describe many children's parentage; it is also out of step with prevalent non-legal understandings of parenthood. It is certainly not now uncommon for children conceived sexually to have more than one man who might be identified as their father, and/or more than one mother-figure. Millions of children have a stepfather *and* a biological father. For children, the presence of multiple parents is undoubtedly less confusing than the law's denial of their existence.

In essence, the principle of parental exclusivity fails to distinguish between two related but different aspects of parenthood: the status of *being a parent* and the power (or duty) to *act as a parent*. Of course, in the paradigm case, these two features of parenthood are inevitably blurred because the power to act *as* a parent derives precisely from *being* a parent. But where the normal incidents of parenthood are distributed between a number of different individuals, while not all of

them will have the power to act *as* a parent, each one *is*, in some sense at least, a parent.

In fact, although the principle of parental exclusivity is indeed deeply entrenched, the law already distinguishes between the status of being a parent and the power to act as a parent, through possession of parental responsiblity. To be a parent is to have a connection with your offspring that will endure throughout both your lifetimes. Parental responsibility, on the other hand, is a more transitory and flexible concept. It will last only during the child's minority, and it can be acquired by a variety of non-parents. Anyone who is granted a residence order automatically also gains parental responsibility for the duration of the order,[26] so step-parents or grandparents can be granted parental responsibility despite not being the child's legal parents. Parental responsibility can also vest with a local authority after a child has been taken into care. Mothers (and in some circumstances fathers) will continue to have parental responsibility despite its acquisition by other parties. Thus, the number of people who can have parental responsibility for a child is not limited in the same way as the number of people who can be identified as the child's legal parents.

Parental responsibility is, in essence, the right and duty to look after a child during childhood. It includes, for example, the right to give consent to a child's medical treatment and to take decisions about education. In contrast to parenthood, parental responsibility – with its capacity to be shared, transferred and acquired – is flexible enough to accommodate the social reality of the child's domestic circumstances where these do not conform to the traditional nuclear family. A social 'parent' does not have to become a legal parent in order to offer a child the security and support the child needs. By severing parenthood from parental responsibility, the law has acknowledged that the biological model of family life in which each child lives with her genetic mother and father no longer fits the complex and multiple parent-like relationships that a child may form during life. My proposal in this chapter is that we should take this existing legal recognition of parental variety a stage further.

The law has tended to assume that the bundle of legal rights and duties that *normally* flow from being a parent do so *necessarily*, so that recognising someone's parental status would automatically vest that person with a range of powers and obligations which might – in the case of a sperm donor, for instance – be inappropriate. But the rule that everyone who is recognised as a parent is under an obligation to maintain their child until adulthood is a legal creation rather than a natural consequence of human reproduction. It would be perfectly possible to fix only certain parents with duties of support, or rights to be involved in the child's upbringing.

We already have an example of legislation which facilitates the purely symbolic acknowledgment of a parental bond. Under the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, it is possible for a man to be registered as the father of a child conceived after his death. The recognition of these deceased

26 Children Act 1989, s 12.

fathers' paternity is only for the purpose of registration on the child's birth certificate. None of the other normal incidents of paternity, such as inheritance rights, apply, thus avoiding the problem of testamentary uncertainty that might arise if a child could be conceived many years after the father's death. For my purposes, the importance of this Act is its introduction of a new sort of parental status which is limited to the *acknowledgment* of paternity. Obviously none of the rights and duties that normally flow from being a parent can apply to these deceased fathers; instead, the Act simply allows the reality that these children *did* have fathers to be formally recognised. Lifting the numerical restriction upon the number of parents a child might have would enable this sort of symbolic recognition of parenthood to be extended to other 'parents'.

The law has also already taken one small step away from the biological model of legal parenthood through the rules governing the paternity of children born following the artificial insemination, in licensed clinics, of women without husbands or consenting opposite-sex partners. Despite having a biological father, these children are legally *fatherless*: their mother is their only legal parent. Could we further extend this recognition that the 'natural' two-parent family is not always an appropriate way to describe the parentage of a child? Might the law additionally recognise that, in certain circumstances, a child has *more* than one mother or father?

Non-exclusive parenthood?

In sum, acknowledging that the normal features that we associate with being a parent might be distributed among a number of individuals poses two important questions for the law. First, how should we choose which of the various possible 'parents' should also acquire the right and duty to care for and support the child? And second, having singled out the principal parent(s), exactly what is the status of the other individuals who possess one or more parental characteristics? Neither question is at all easy to answer, but my point has been that we should admit that these are matters of choice and judgment, rather than hiding behind a superficially factual inquiry into the identity of a child's parents.

So, for example, making the intention to become a parent the decisive factor in allocating the rights and duties of parenthood following an IVF surrogacy arrangement would be synonymous with making surrogacy contracts specifically enforceable. But if gestation determines the identity of the principal mother, then we are deciding that surrogate mothers should always have the right to change their mind. My purpose here is not to express an opinion on either option, but rather to point out that our current preference for gestation reflects our *decision* to give surrogate mothers the right to renege on their agreements. It may be more convenient to say that the gestational mother is the only mother, and that the woman who contributed the egg and instigated the conception is therefore a stranger to the child, but the price to be paid for this simplicity is a fundamental misrepresentation of a reality of this child's parentage.

The recognition of multiple parents certainly more accurately describes the parenthood of children born following gamete donation. A sperm donor is, in an

important sense, the child's genetic father, but this does not necessarily mean that he should have parental responsibility, or owe any other obligations to 'his' child. Instead, by signing the requisite consent form, he has voluntarily agreed to give up *any* parental rights and obligations, and the couple or individual who received treatment have (also by signing the requisite consent form) voluntarily agreed to assume full responsibility for the child from birth. It is therefore only the intended parents who possess the rights and duties we associate with parenthood. Acknowledging the paternity of the sperm donor is especially important given the removal of donor anonymity in April 2005.[27] In the future, children may trace and meet their gamete donors, making acknowledgment of their parenthood, albeit only in a genetic sense, more important. But if the law were capable of recognising multiple parents, this need not displace the parental rights and obligations of the intended or social parents.

Following surrogacy, acknowledging the existence of multiple parents might also be advantageous. When a child is born as the result of a surrogacy agreement, the couple or individual who recruited the surrogate mother are the intended, and often also the genetic, parents, and either of these tests could be sufficient to allow them to be recognised as the child's parents from birth. Of course, the surrogate mother will always be the child's gestational mother, and will sometimes additionally be genetically related to the child. She undoubtedly also has a compelling claim to have her maternity formally acknowledged. In most surrogacy arrangements, where the surrogate is happy to hand over the child at birth, a non-exclusive model of parenthood would permit the commissioning mother and father to be recognised as the child's parents with parental responsibility from birth. The surrogate mother would continue to be the child's birth mother, but she would have voluntarily waived all of the rights and duties we would normally associate with parenthood. Parental duties would instead vest only in the couple or individual with whom the child will be living.

But if the surrogate mother changes her mind about handing over the child, my model would lead us to ask which of the child's parents should possess the rights and obligations of parenthood. The answer to this question depends upon whether one believes that surrogacy contracts should be specifically enforceable or not. If the arguments in favour of specific enforcement are preferred, we could say that the commissioning couple should *always* be recognised as the child's parents with parental responsibility. It might, for example, be argued that the surrogate mother agreed to waive her acquisition of parental responsibility and the other incidents of parental status, in the same way as a sperm or egg donor, and that her agreement should likewise be binding upon her. The commissioning couple's agreement to assume responsibility for the child's upbringing might also be enforceable, so that a man like John Buzzanca would not be permitted to shrug off his obligations towards a child whose conception he instigated. But if specific enforcement is believed to be intrusive, oppressive or otherwise undesirable, parental responsibility could vest initially in the woman from whose body the

27 Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511.

child emerges. She would then continue to have the right to renege on her agreement to relinquish her parental responsibility.

If a surrogate mother changes her mind about handing over the child to the commissioning parents, we cannot avoid the need to *choose* where the child should live. No test for the identification of parents is capable of effacing the human tragedy of this sort of dispute. There is no easy or obviously right solution; rather, when surrogacy agreements break down, the party who is deprived of 'their' child will inevitably suffer profound distress. Whether we decide that the 'losing' party should be the surrogate mother or the commissioning couple, their disappointment will be intense. I would, however, maintain that the 'losing' party should be entitled to recognition, albeit largely symbolic, of their parental status. If the child is to be brought up by the surrogate mother, it might nevertheless be important for that child to know something of the circumstances of her conception, especially since at least one of the intended parents will normally also be genetically related to her. When the child reaches adulthood, the intended parents' identity might be revealed. If the commissioning couple's claim is preferred, the gestational mother's identity might again be disclosed when the child reaches the age of majority. It is worth restating, however, that very few surrogate mothers change their minds. So, while I admit that my proposed shift towards the recognition of multiple parents is incapable of providing a solution to disputed surrogacy arrangements, it would solve the much more common practical problem that arises following surrogate births, namely the need for the child's parentage to be transferred formally via judicial proceedings. Because, as we saw earlier, this cumbersome legal process creates an incentive for informal transfers, unknown numbers of children are currently living with 'parents' who may not have any legal obligations towards them.

It is important to remember that the recognition of multiple parents would not only apply when the normal features of parenthood are split by collaborative reproduction. A non-exclusive model of parenthood might also add clarity to cases of disputed paternity, because it would allow us to admit that a child may have *two* fathers, one genetic and one social. Once doubt has been cast upon the genetic paternity of a child's 'father', I would agree that it is invariably in the child's best interests to have the genetic parentage revealed by blood tests. The advantage of non-exclusive parenthood would be that acknowledging the genetic paternity of the mother's ex-lover need not displace the paternity of the social father. On the contrary, as a result of his ongoing relationship with 'his' child, the social father should be formally recognised as the only legal father who *also* has parental responsibility. In *Re H (Blood Tests: Parental Rights)*,[28] Ward LJ struggled to achieve precisely this sort of result. He argued that 'the issue of biological parentage should be divorced from psychological parentage'. A direction for blood tests was issued because the child's knowing the truth about his genetic paternity would not necessarily 'undermine his attachment to his father figure and he will cope with knowing that *he has two fathers*'[29] (my emphasis). But because,

28 [1996] 3 WLR 505, p 523.
29 *Ibid*.

under English law, the discovery that the mother's ex-lover is her son's genetic father completely displaces the social father's 'paternity', the only way in which he could retain parental responsibility would be to apply for a residence order for 'his' child. A better solution, and one that Ward LJ himself appears to endorse, would be to admit evidence that the ex-lover is the genetic father, but to simultaneously affirm the social father's status as the only *father* who also possesses the rights and obligations of parenthood.

Of course, recognising multiple parents will leave us with some extremely difficult questions. We would, for example, have to devise some mechanism for choosing which of the various individuals who possess the normal incidents of parenthood should be principally responsible for the child's upbringing. My point is that we are already making these difficult decisions, but we are hiding them behind the supposedly neutral, objective and purely factual inquiry into the identity of a child's parents.

Conclusion: A right to know the identity of all of your parents?

A child's 'right to know and be cared for by his or her parents' is enshrined in Article 7(1) of the United Nations Convention on the Rights of the Child. While the Convention was ratified by the UK in 1991, it has not been directly incorporated into English law. Nevertheless, the concept of a right to know the identity of one's parents has received judicial approval[30] and may additionally be protected by the right to respect for private and family life, now guaranteed by article 8 of the Human Rights Act 1998. In the words of Wall J, '[k]nowledge of their paternity is increasingly seen not only as a matter of prime importance to children, but as being both their *right* and in their interests'[31] (my emphasis). Obviously, giving effect to this right is only possible if we have a clear understanding of what defines a parent. The UN Convention on the Rights of the Child does not offer any definition, which either could mean that its drafters assumed that a child's parentage would be a self-evident question of fact, or could indicate that states have a 'margin of appreciation' in the rules governing the identification of parents. Importantly, the right to know the identity of one's parents does not necessarily imply any numerical limit upon the number of parents that might exist. Moreover, no practical rights or obligations automatically flow from the right simply to know the identity of one's parents.

Of course, one consequence of a non-exclusive model of parenthood would be that a child's birth certificate might have to record more than one mother and/or father. However counter-intuitive this might initially seem, my point is simply that some children *do* have more than one mother or father, and that by failing to acknowledge this, and to address its practical consequences, the law is unable to adapt to the complexity of family life in the twenty-first century. While the idea

30 See, for example, *S v McC (orse S) and M (D S intervener); W v W* [1972] AC 24; *In re G (A Minor) (Parental Responsibility)* [1994] 2 FCR 1037; *In re H (A Minor) (Blood Tests: Parental Rights)* [1996] 3 WLR 506.

31 *In re O (A Minor) (Blood Tests: Constraint)* [2000] Fam 139, p 144.

of parenthood as a divisible status would, in some respects, be a radical departure for the law, given that parenthood now *is* a divisible status, rethinking the legal conception of parenthood is a necessary, albeit difficult, task. Transparency and descriptive accuracy demand that the law relinquishes its principle of parental exclusivity in favour of a model of parenthood that is capable of accommodating its social and technical fragmentation. If people no longer reproduce and raise children within the conventional biological nuclear family, the law should stop pretending that the answer to the question 'What is a parent?' is a fact waiting to be discovered. Rather, however challenging, the law should address the messy reality of multiple parent–child bonds and relationships.

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Chapter 5
Parents in Law: Subjective Impacts and Status Implications around the Use of Licensed Donor Insemination

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> The difference with donor insemination is you will never be the same again . . . *You will never ever be back in the mainstream in totality*, and it changes everything forever. Whereas IVF is a *temporary deviation* down the route to creating *your own family* and carrying off into the sunset.[1]

Introduction

Claire's comment reflects the assumption that most families have a genetic link between parents and their children and indicates her concurrent anxiety about the use of this procedure with her partner Neil. Claire suggests that there is a distinction between heterosexual couples[2] who utilise IVF (crucially when the sperm and ova of the intending parents are used) to create their *own* family, and others who use donor insemination to create families who do not conform to this norm. In construing IVF as a *temporary deviation* in creating a family of one's own, Claire's comment is an acknowledgment of the pervasiveness of 'the family' norm in late twentieth-century British society, where bio-genetic[3] relatedness provides the basis for familial relations. Bio-genetic relatedness may be *actual* – that is, genetic – or *assumed*, on the basis of the relationship between the parents,[4] whether socially or for the purpose of establishing legal parenthood. However, Claire suggests that, when using donor insemination, heterosexual couples cannot simply 'carry off into the sunset'. Rather, this procedure disrupts the bio-genetic link between social fathers and their children. Hence, bio-genetic ties are no longer taken for granted, but must be managed or negotiated.

The 'need' for the management of donor-conceived family ties has been noted in academic commentaries on kinship and the legal regulation of assisted reproduction. For example, Erica Haimes[5] argues that the 'transgression of assumed familial forms' (ie, the absence of a bio-genetic link between parent(s) and children

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1 Claire, interviewee (emphasis added).

2 When asked during the interview, Claire confirmed that she was specifically referring to couples in heterosexual relationships. For the purpose of brevity I use the phrase 'heterosexual couples' here.

3 As Day Sclater, Bainham and Richards (1999), p 15 argue, social parenting aside, Anglo-Welsh law has increasingly drawn on the concept of biological parenthood with regard to the familial relations between parents and children. However, given the distinction between genetic and gestational motherhood for example, 'biological' parenthood requires clarification in legal discourse (Johnson (1999), pp 49–58). Hence my preferred term is 'bio-genetic' parenthood.

4 Smart (1987), p 114; Bainham (1999), p 26.

5 Haimes (2002), p 444.

in families conceived through donation) requires social management. While Haimes's[6] focus is on the anonymity of gamete donors rather than naming practices *per se*, she is clear that: 'The nature of that [social] management is highly significant since it reflects and affects the way a society thinks about individuals, parents, children and families.' In the context of Haimes's discussion, donor anonymity is perceived as a regulatory mechanism which can simultaneously facilitate families with children conceived by donation to pass as 'the family' whilst arguably protecting the best interests of the child and the donor.[7] Hence, the practice of donor anonymity both mirrors and reinforces the 'problematic' status of transgressive donor-conceived families.[8] The focus of this chapter, however, is the significance of the legal ascription of parenthood, in the context of donor insemination, as a mechanism of the social management of family formation. Identifying a particular person as a legal parent, or excluding another from parental status, can clearly both affect and reflect societal attitudes to parenting and transgressive familial forms; hence Haimes's comments remain salient in this context.[9]

The focus of my discussion is the impact of the legal ascription of parenthood upon establishing familial status and associated kinship naming practices in both lesbian and heterosexual families with children conceived by donation.[9a] I begin by considering the authority of legal discourse to confer parenthood when licensed donor insemination[10] is used. Hence, I examine some of the ways in which Anglo-Welsh discourse 'matches', for the purposes of legal parenthood, social fathers to donor-conceived children and yet denies similar status to co-mothers. It is important to note the terminology used here. The kinship terms used to refer to a mother's lesbian partner who also shares a parenting role in a particular child's life have been discussed by a number of feminist commentators.[11] Where donor insemination is used, the terminology is particularly significant, as the co-mother is not replacing another parent (ie biological or social father). I have elected to use 'co-mother' rather than 'co-parent' to highlight the issue of gender, concurrently rendering visible the role of these women and highlighting the way in which Anglo-Welsh legal discourse has tended to marginalise them through a process of exclusion.

I then consider the interview accounts of four lesbian couples and two heterosexual couples who had undertaken donor insemination at licensed British clinics in the 1990s. An analysis of their accounts facilitates an understanding of the *subjective* impact of the legal ascription of parenthood (or lack thereof) for some

6 *Ibid*.

7 Haimes (2002), pp 444–6; also Haimes (1990), pp 167–8.

8 However, from 1 April 2005 donor anonymity was removed (the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511).

9 See also Jackson, Chapter 4 in this volume.

9a Elsewhere I have considered the construction of implied bio-genetic links between donor-conceived children and co-mothers, and to co-mothers' extended families, see Jones (2005).

10 This refers to donor insemination undertaken at a fertility clinic licensed by the Human Fertilisation and Embryology Authority and therefore regulated by the Human Fertilisation and Embryology Act 1990.

11 Hayden (1995); Gabb (1999); Comeau (1999).

persons using donor insemination to create their families. An examination of my interviewees' comments regarding the legal status of the (male or female) co-parent and the kinship terminology they use within their families demonstrates the normative effects of, *and* strategic resistance to, the (lack of) legal recognition for a particular parent. A clear distinction is drawn between one form of legal recognition – the statutory requirements regarding the registration of a child's birth – and its subjective effects, including the democratic processes of kinship naming practices undertaken within lesbian families by donation in different contexts (including within their families, at a licensed clinic and at a doctor's surgery). The latter practices, it is argued, are particularly revealing with regard to 'status' concerns for families that transgress assumed familial forms. These status implications raised in my interviewees' accounts pose three interrelated questions: the first is whether Anglo-Welsh family law has the necessary mechanisms for recognising the parental role of co-mothers; the second is whether the legal concept of 'parenthood' is even an appropriate status to reflect the role of co-mothers; and the third is the way in which lesbian (co-)motherhood might be accommodated under the current law relating to parenthood.

Ascribing legal parenthood

Anglo-Welsh law requires parents to register their child's birth within 42 days.[12] Where the child's parents are unmarried, the onus lies solely on the mother.[13] However, as Bainham[14] has noted, there is no requirement that the mother register the father's name. The current statutory provisions relating to the circumstances which permit unmarried fathers' registration are contained in s 10(1)(a)–(d), s 10(1A) and s 10A(1A) Births and Deaths Registration Act 1953, as amended. A child's birth certificate is a shortened version of the details provided in the birth register, including the place and date of birth, and the names of the child's registered parent(s). Consequently the registration of the child's birth provides a 'historical' (legal) claim of parental status (or 'parentage').[15] In the context of assisted reproduction where donor gametes are used, this 'historical' status simultaneously excludes others, who may be bio-genetically related to the child, from making this claim. This is particularly significant, as being named on the child's birth certificate provides an almost inalienable link between parent and donor-conceived child. Parental status can be terminated only by a successful application for an adoption order,[16] or a parental order.[17]

However, parental status is also crucially important because of the legal effects attached to being a parent, which non-parents, who may nevertheless perform a

12 Births and Deaths Registration Act 1953, s 2.
13 Births and Deaths Registration Act 1953, s 10(1).
14 Bainham (1999), p 43.
15 See Bridge (1999).
16 The provisions contained in the Adoption Act 1976 have been superseded by the Adoption and Children Act 2002.
17 Where surrogacy is involved, see Human Fertilisation and Embryology Act 1990, s 30.

parental role in a particular child's life, can neither exercise nor claim *as of right*.[18] I focus on two of these effects, namely the allocation of parental responsibility and the membership in a family.[19]

Parental responsibility is automatically accorded to married fathers[20] irrespective of whether or not they have a bio-genetic tie to the child.[21] Adoption and Children Act 2002 s 111, amending s 4 Children Act 1989, provides that, upon joint registration with the mother, unmarried fathers also have parental responsibility for their children.[22] Hence, the ascription of parental status arguably provides the simplest way of allocating parental responsibility (although it remains possible for unmarried fathers to seek a 'parental responsibility agreement' with the child's mother,[23] to apply to the court for a parental responsibility order,[24] or to be awarded parental responsibility attached to a residence order).[25] While it is possible for non-parents, including lesbian co-mothers, to be allocated parental responsibility by being granted a joint residence order,[26] this is limited to the duration of the residence order and will, in any event, terminate when the child reaches majority.[27] In contrast, *being* a parent is a lifelong status and concurrently determines which family a child is legally considered to be a member of, an issue which, as Andrew Bainham[28] points out, has often been overlooked. However, in the Court of Appeal decision in *Re R (a child)*, Hale LJ (as she then was) drew attention to this very issue, stating:

> [S]ection 28(3) [HFEA 1990] is an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage. Conferring such relationships is a serious matter, involving as it does not only the relationship between father and child *but also between the whole of the father's family*

18 Bainham (1999), pp 33–4, lists these effects.

19 With regard to the ambit of parental responsibility, see Herring (2004), pp 256–66.

20 Children Act 1989, s 2(1).

21 Human Fertilisation and Embryology Act 1990, s 28(2).

22 Children Act 1989, s 4(1)(a): see Sheldon (2001); Wallbank (2002). However, Children Act 1989 s 2A provides that parental responsibility acquired under s 4 can be removed by a court order.

23 Children Act 1989, s 4(1)(b).

24 Children Act 1989, s 4(1)(c).

25 Children Act 1989, s 12(1).

26 Children Act 1989, s 12(2): see *Re C (A Minor) (Residence Order: Lesbian Co-parents)* [1994] Fam Law 468 (unreported elsewhere); *G v F (Contact and Shared Residence: Applications for leave)* [1998] 2 FLR 799; and now *Re G (Children)* [2005] EWCA Civ 462. Co-mothers (and other non-parents) who cannot satisfy the terms of Children Act 1989 s 10(5)(b), which requires the child to have lived with that person for a period of at least three years, have to apply to the court for leave in order to make the application under s 8 Children Act 1989. From 30 December 2005 it has been possible for step-parents to seek parental responsibility under s 4A(1) Children Act 1989, as amended. However, this is limited to those persons who have married or undertaken a civil partnership with the child's parent(s).

27 Hence, the provisions permitting same-sex adoption (ie by both partners) under the Adoption and Children Act 2002 are to be welcomed, as this ensures parental responsibility *and* parental status.

28 Bainham (1999), p 33.

> *and the child*. The rule should only apply to those cases which clearly fall within the footprint of the statutory language (para 20).[29]

This judgment clearly acknowledges that the 'historical' claim to parental status goes far beyond determining the legal recognition of a particular parent–child relationship; it also determines one's kinship status in and to that parent's wider family. For the registration of the birth of a donor-conceived child, where different persons may make competing claims of 'parenthood', it is particularly significant to determine who is considered to be the legal mother or father.

Statutory provisions: the Family Law Reform Act 1987[30]

Traditionally, fathers were 'matched' with children through their marital relationship with the mother, being named as the father upon registration of the child's birth, and the concurrent assumption of a bio-genetic tie to the child. Some feminist legal commentators suggested that donor insemination was considered problematic, as the notion of the 'child of the marriage' was potentially undermined by the lack of a bio-genetic tie between husband and donor-conceived child.[31] However, Snowden and Mitchell[32] suggested that where donor insemination was used, married social fathers' names were 'almost invariably' entered as the father on the child's birth certificate. This practice was sanctioned by s 27 Family Law Reform Act 1987, which provided that, when donor insemination was used, married social fathers were to be considered the legal father of the donor-conceived child. Hence, s 27(1) Family Law Reform Act 1987 *explicitly extended* the notion of the 'child of the marriage' to incorporate donor-conceived children. It is possible to view this extension as a reiteration of 'the family' norm, in light of its potential erosion through involuntary childlessness or the (previously) illegitimate status of children conceived through the use of donor sperm. The extension of this legal concept also established connections between married men and their donor-conceived children for the purposes of property and inheritance[33] and ensured that men, as fathers, retained financial (and arguably emotional) responsibilities for children.[34] However, developments in assisted reproductive technologies, which prompted wider issues than matching children to fathers, led to the introduction of comprehensive legislation to regulate these procedures and the legal ascription of parenthood for resultant children.

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29 [2003] EWCA Civ 182, [2003] Fam 129, [2003] 2 All ER 131 (emphasis added). See Sheldon (2005); Lind (2003). The High Court decision in this case was reported as *Re D (Parental Responsibility: IVF baby)* [2001] 1 FLR 972. In May 2005, the Court of Appeal decision was upheld in the House of Lords, and reported as *Re D (a child appearing by her guardian ad litem)* [2005] UKHL 33.

30 See also Jackson, Chapter 4 in this volume.

31 Pfeffer (1987), p 94; for an anthropological account, see Strathern (1992).

32 Snowden and Mitchell (1981), p 17.

33 Smart (1987), pp 99–101.

34 Wallbank (2001).

Statutory provisions: the Human Fertilisation and Embryology Act 1990

Sarah Franklin[35] provides a feminist anthropological analysis of the parliamentary debates on the Human Fertilisation and Embryology Bill,[36] highlighting the authority of legal discourse in this respect. Franklin[37] discusses the social construction of 'natural' facts in the context of kinship and legal parenthood. She argues:

> The order of nature provides the basis or foundation for the order of law in the definition of kinship ties. True to the consistent attribution of privileged authority to clinical and scientific expertise throughout the debates, 'natural facts' . . . were seen to provide the neutral, impartial and objective facts of the matter upon which legislation should properly be based.[38]

However, Franklin cautions that the invocation of 'natural' facts in the HFE Bill parliamentary debates is limited. At times, 'natural' facts are 'displaced',[39] and at other junctures, 'lost'.[40] Franklin's argument is exemplified by reference to the meaning ascribed to 'mother' in what would become s 27 Human Fertilisation Embryology Act 1990.[41] She notes: 'Here, the dilemma of assisted nature resides in the emergence of two "natural" mothers: the genetic and the birth mother. Who is the "real" mother? Nature cannot referee.'[42] With this legislation, the birth mother is designated the legal mother, and the significance of genetic links between mothers and children is marginalised. Hence, legal discourse is able to make claims of 'truth' with regard to the ascription of parenthood. Consequently, alternative constructions of 'mother' are disqualified for the purposes of legal status and rights in relation to the donor-conceived child.[43]

With respect to the legal designation of the 'father' of donor-conceived children, Franklin states that:

> [T]he authority of nature was simply abandoned . . . gamete donors' . . . 'natural' parenthood was rendered legally unrecognisable. Likewise in granting to husbands of women recipients of donor insemination the right to register their name as father on the birth certificate, *the law takes on new powers of conferring parental status*.[44]

HFEA 1990 s 28(2) authorises women's husbands – who may or may not intend to become social fathers – to be entered as the 'father' on the child's birth certificate.[45]

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35 Franklin (1993).

36 Hereafter HFE Bill.

37 Franklin (1993), pp 103–5.

38 *Ibid*, p 104.

39 Franklin (1993, p 104) cites embryo research and the limitation of 14 days imposed in the HFE Bill (s 3) as an example. That is, the *actual* emergence of the primitive streak in a particular embryo is displaced in favour of a blanket limitation period for all embryos.

40 Franklin (1993), p 104.

41 Hereafter HFEA 1990.

42 Franklin (1993), p 104.

43 See also Jackson, Chapter 4 in this volume.

44 Franklin (1993), p 105 (emphasis added).

45 The presumption of paternity is rebuttable if the husband can show he did not consent to the insemination (see also Schedule 3 HFEA 1990; Lee and Morgan (2001), p 237).

Similarly, s 28(3) HFEA 1990 provides for unmarried male partners treated 'together' with the legal mother to be named 'father' on a donor-conceived child's birth certificate.[46] Hence, it is clear that Anglo-Welsh legal discourse may privilege a particular construction of the 'father' of a donor-conceived child. In so doing, genetic links between sperm donors and children are also disqualified as significant markers of parenthood. However, in light of the recent change in policy regarding donor anonymity it would seem that attitudes have subsequently shifted in this area.[47] Nevertheless, no legal status or obligations will be provided for sperm (or egg or embryo) donors as a consequence of the removal of anonymity. Consequently, for the purposes of the *legal* ascription of parenthood of donor-conceived children, bio-genetic ties remain marginalised under the current legal provisions.

Franklin concludes:

> To argue simply that the law in such cases explicitly supersedes (or 'assists') in the social construction of natural facts to an unprecedented degree is not enough, since, by definition, a law designed to establish regulatory control over 'human fertilisation and embryology' could do little else.[48]

It is conceded that the HFEA 1990 probably could do little else. However, it does not follow that the provisions of ss 27 and 28 HFEA 1990 were the only solution(s) to the complications of social and legal parenthood prompted by assisted reproductive technologies, nor that Anglo-Welsh law had necessarily to deal with the issues raised by these procedures in the ways that it did. As a consequence of s 28 HFEA 1990, social fathers (and their families) are clearly matched to their donor-conceived children, named as such on the child's birth certificate, and can exercise parental responsibility (subject to s 4 Children Act 1989). In contrast, lesbian co-mothers are marginalised through a process of exclusion whereby they have no route to parental status. They cannot be named on the child's birth certificate, their donor-conceived children are not legally matched to their wider families, *nor* are they automatically accorded parental responsibility. Therefore, it is clear that it is heterosexual parenthood which is privileged in Anglo-Welsh legal discourse. However, analysis of the legislation alone does not provide space for understanding its subjective impact upon persons undertaking donor insemination.[49] In the next section, I seek to address this lacuna through the examination of the subjective significance of these legal provisions for some users of donor insemination, as reported in their interview accounts. The legal ascription of parenthood was an issue raised by all of my interviewees, some of whom stated that they had sought information about the legal status of each parent when donor insemination was used.

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46 See *Re D (a child appearing by her guardian ad litem)* [2005] UKHL 33, [2005] FCR 223.
47 See also Wallbank (2004).
48 Franklin (1993), p 105.
49 Probert (2004), p 288.

Subjective impacts

Method

During the period between March and November 1999, I undertook a total of nine semi-structured interviews with women and men who had sought access to licensed donor insemination following the enactment of the 1990 Act. The sample comprised three lesbian couples and one woman in a lesbian relationship whose partner did not attend the interview; two married heterosexual couples; and three single women (whom I will not be discussing in this chapter). Consequently, this small sample is intended to be illustrative rather than representative of the 'population' of users of licensed donor insemination in Britain. I established contact with this sample through the use of gatekeepers, notably Lisa Saffron, who has published widely on self-insemination in particular,[50] and the (then) Donor Insemination Network,[51] which has been re-named the Donor Conception Network.[52] All interviewees were aged between their late 20s and mid-40s, and most presented themselves as being middle class in terms of their current standard of living. All the women interviewed were white, although one woman indicated that her female partner (who was not present) was African Caribbean. In order to maintain the anonymity of the accounts provided, all interviewees have been assigned pseudonyms.

Interviewees' responses to the legal ascription of fatherhood

Claire and Neil initially sought access to donor insemination in the late 1980s, prior to the HFEA 1990. Under the Anglo-Welsh legal provisions at that time,[53] Neil would have been recognised as the legal father of any child resulting from donor insemination. Consequently, Neil could legally be named as the father on the child's birth certificate.[54] This naming was clearly crucial for Claire and Neil, as the following exchange indicates:

> Claire: We had looked at the law and we knew that children, we knew that in April 1987 they became, you [Neil] became the legal father on the birth certificate. Prior to that you had to lie. So we knew that, which was helpful. From our point of view that was quite significant because . . .
>
> Neil: Well we didn't want to lie because we were being open [about using donor insemination].
>
> Claire: Otherwise it was illegitimate. I think it was illegitimate wasn't it? *You either lied or they wrote illegitimate on it and we didn't want an illegitimate child*.[55]

50 Saffron (1994; 1996; 1998; 2001).
51 www.issue.co.uk/dinet (last accessed 2001).
52 www.dcnetwork.org/ (last accessed September 2005).
53 Family Law Reform Act, s 27(1).
54 This aspect of the Family Law Reform Act 1987 was incorporated into HFEA 1990, s 28(2).
55 Emphasis added.

Claire and Neil highlight the legal changes made by the Family Law Reform Act 1987, which sought to remove the use of labels like 'illegitimate'.[56] As outlined above, naming Neil the legal father put him in the same position legally (in terms of his status to the child), as he would have been had the child had been conceived from his own sperm. Crucially, Neil could attain this status on the basis of his marriage to Claire.

Claire and Neil indicated that, following the birth of their first child, they were open about the use of donor sperm and had informed their son and their families of his means of conception. In addition, Claire and Neil had participated in numerous press interviews. This would suggest that they had little concern for maintaining secrecy around their use of donor insemination. Claire and Neil did not appear anxious to 'pass' as 'the family', in contrast to a family-by-donation. Rather, it would seem that they were more concerned with the possibility of openness around their use of donor sperm. In addition, given Claire's emphasis on illegitimacy, the legal status of the child and the potential stigma of illegitimacy were clearly important considerations.

A number of feminist legal commentators have noted the 'quasi-illegitimate' status of donor children prior to the Family Law Reform Act 1987 and HFEA 1990.[57] Snowden and Mitchell, on the other hand, have argued that often it is the '*charge* of illegitimacy in relation to the child [that] is more important than the fact of illegitimacy'.[58] The notion of the 'charge' of illegitimacy is significant. This indicates that discourse operates through an 'economy' of truth, whereby one form of 'truth' is privileged over alternatives. Hence, prior to the Family Law Reform Act 1987, legal discourse named the married heterosexual family as '*legitimate*', thereby normalising this particular family form and marginalising 'other' families. Claire and Neil's account indicates that the normalisation of the legitimate family in legal discourse is crucial. The 'fact' of illegitimacy is not a problem for them, it is accepted; Claire and Neil indicated they made no attempt to conceal their use of donor insemination (either within or outwith their family), but they expressed concern over the 'label' or *charge* of illegitimacy in legal, and concurrently social, discourse. This suggests that Claire and Neil attached particular importance to the authority of Anglo-Welsh legal discourse in their subjective experience of a 'legitimate' parental status.

Lisa and David also emphasised the significance of legally naming David as the donor-conceived child's 'father' on the birth certificate. David noted:

> I think I wouldn't have been very happy at all going along and registering the birth as the father *illegally* which I would have been doing until whenever it was when the Act changed that. Because there was one lady [at the Donor Conception Network] who talked about how she *broke the law* [pre-Family Law Reform Act 1987]. So I knew that legally, in the eyes of the law, [post-HFEA 1990] that was all clear cut.[59]

56 Hoggett (1993), p 28.
57 Blythe and Moore (2001), p 221; Jackson (2001), p 165.
58 Snowden and Mitchell (1981), pp 35–6, original emphasis.
59 Emphasis added.

David expresses relief that he could legally register himself as the child's father. In fact, David's actions in registering himself as the 'father' on the child's birth certificate are equivalent to those of the woman he mentions at the Donor Conception Network. In both cases, the social father was registered as 'the' father on a donor-conceived child's birth certificate, thereby occluding the identity of the bio-genetic father. However, as David's child was conceived and born following the enactment of the HFEA 1990, his actions were explicitly legally sanctioned. This clearly highlights the authority of Anglo-Welsh legal discourse to ascribe, or deny, parental status to particular legal subjects and also points to the historical specificity of discursive constructions.[60]

At the time the Family Law Reform Act 1987 and HFEA 1990 were passed through Parliament, there was considerable political interest in child maintenance[61] and the preservation of 'the family' in the context of an increasing number of single-parent families and the development of assisted reproductive technologies.[62] The established legal principles (illegitimacy/legitimacy, and the presumption of paternity in marriage) governing parental status were considered inadequate to deal with the changing demography of families. The legislative changes ensured that children could be 'attached' to fathers regardless of whether they were linked through a bio-genetic tie.[63] It is significant to note that neither Claire and Neil nor Lisa and David mentioned naming practices within their families at any point during the interview. They were pleased that law's ascription of fatherhood confirmed their subjective ascription of fatherhood. This effect lies in clear contrast to the accounts provided by lesbian couples.

Interviewees' responses to the legal ascription of motherhood

> That's another one of the issues that came up at the clinic . . . the secrecy [about the use of donor sperm]. There's an *element of secrecy about it in that normally it's heterosexual couples*, and the husband will be the *legal father*. And of course *we* [Sarah and her partner Kate] *can't pretend* that either one of us is the child's father. There'll be no pretence on that.[64]

Sarah's comment clearly highlights two issues: namely, the legal recognition of a husband's parental status in relation to his donor-conceived child(ren) and the perceived atmosphere of secrecy around the use of donor insemination by heterosexual couples.[65] I read Sarah's comment as an acknowledgment of the discursive construction of the legal 'father' in Anglo-Welsh legal discourse. Sarah implies that this discursive construction facilitates social fathers 'pretending' they are the bio-genetic fathers of donor-conceived children. She also distinguishes between

60 Foucault (1980).
61 Wallbank (2001).
62 Smart (1987); Haimes (1990); Jackson (2001).
63 Smart (1987).
64 Sarah, interviewee; emphasis added.
65 The issue of secrecy falls outside the focus of this chapter: see further Snowden and Mitchell (1981); O'Donovan (1988; 1989; 1998); Daniels and Taylor (1993); Golombok *et al* (1996; 2004); Murray and Golombok (2003).

the situation of heterosexual couples and that of lesbian couples using donor insemination. Lesbian couples (including Sarah and her partner Kate) cannot 'pretend' that both parents are biologically related to the child in the way that a heterosexual couple may. Consequently naming practices for lesbian parents must be negotiated in a different legal and social context from that experienced by heterosexual partners. It is one in which their families are marginalised and rendered 'alternative', but it is also one in which there are no pre-existing 'rules' and therefore in which the 'rules' *might* be designed from scratch. It is this space, one in which both normative hostility and transgressive potential must be negotiated, that is informative with regard to status issues for lesbian co-mothers.

Status

Andrea noted the lack of status she was afforded as the child's co-mother:

> It annoys me that [as a co-mother] *you're seen as a nothing*. Do you know what I mean? You've got no legal rights as a parent if you like, like other people have. I'd really like it if like *other couples* you could actually adopt,[66] although I'm another woman, I want to be *sort of a parent*.[67]

There are three interrelated issues raised by Andrea's comment. First, her status as a co-mother is characterised as being insignificant. Second, Andrea contrasts the lack of legal recognition of her parenting role to the rights she perceives are extended to 'other' (ie heterosexual) couples. Finally, in expressing a desire to have formal legal recognition of her parental role – '*to be sort of a parent*' – Andrea's comments highlight the negotiation of kinship terms when articulating issues relating to co-mothers.

Taking together Andrea's first two points, it is not immediately clear whether Andrea's observation that she is 'a nothing' is meant generally at the everyday level (that is, in terms of her assumption of parental responsibilities, and Louise's and their extended families' recognition of her parental role), or strictly in relation to her lack of legal status. However, she states that 'other' couples (couples which I read as heterosexual) are accorded legal recognition of their parental role in relation to donor-conceived children. Hence, it would appear that she is referring to

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66 Section 50 Adoption and Children Act 2002 provides for same-sex couples to adopt together. For the purposes of s 50, 'a couple' is defined under s 144(4)(b) as 'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship'. It is possible that permitting same-sex adoption could lead to the development of alternative naming practices. For example, a co-mother like Andrea may be more inclined to label herself a 'parent' as opposed to 'sort of a parent'. It is significant to note that the gender-neutral term 'parent(s)' is used in Schedule 1 of the Adopted Children and Adoption Contact Registers Regulations 2005, which governs the form of entry in the Adopted Children Register. Roger Errington, Head of Adoptions at the General Register Office, explains that 'this was the straightforward summary wording which the lawyers were satisfied would cover all possible combinations of adoptive relationship . . . The above use of "parent(s)" replaces the use of "adopter or adopters" currently in use as prescribed by the Forms of Adoption Entry Regulations 1975' (personal communication, 7 September 2005). It is not clear why 'adopter(s)' would not encompass all adoptive relationships. Nevertheless, the use of these gender-neutral terms suggests normative hostility to the possibility of two 'mothers' (or indeed 'fathers') within legal discourse.

67 Emphasis added.

the absence of any legal status as the child's co-mother. The emphasis she places on the significance of formal legal recognition suggests frustration at not being accorded parental status. In addition, it appears to feed into her naming practices, whereby the terms used tend to minimise her role in the child's life, notwithstanding the responsibilities she undertakes daily.[68] Thus, Andrea indicates that legal discourse has a particularly significant authority in assigning rights and status to parents.

Naming practices: 'Parent'

The terminology Andrea uses is indicative of the negotiation of kinship terms relating to co-mothers. Charis Cussins[69] has examined the strategies used by women using assisted reproductive technologies at a US clinic to determine who would be considered the mother of a child resulting from donor eggs and/or the use of (host or full) surrogacy. She has noted that 'legal and familial constraints bring their own forms of *plasticity* and *relative invariance* which are very powerful in determining kin'.[70] Two features of Andrea's account are particularly salient. First, she draws a distinction between her lack of legal rights and those afforded to parents in heterosexual relationships, whose status as 'mother' and 'father' are formally legally recognised (s 27 and s 28 HFEA 1990 respectively). Clearly, legal parenthood is limited to the recognition of one mother and one father.[71] Second, Andrea does not refer to herself as a mother. Rather, she categorises her role with the gender-neutral term 'parent'. She reiterates this later in the interview: 'Obviously Louise is his mum and he will always call Louise his mum, but I am Andrea, I am a parent. I see myself as a parent not another mum.' Therefore, it seems that the 'relative invariance' of the formal recognition of the gestational mother in legal discourse, as well as the legal exclusivity of motherhood, have a powerful normalising effect with regard to the kinship terms used by Andrea.

However, it is *not* only legal discourse which may have a powerful normalising effect with regard to the negotiation of kinship terms for lesbian co-mothers. Gillian Dunne[72] has noted 'the power of ideas about the singularity and the exclusivity of the identity of "Mum" in a social world structured by heterosexual norms that polarise parenting along lines of gender'. The gendered, heteronormative framing of parenting in social and legal discourses clearly can have powerful normalising effects. Andrea does not claim the status of 'mother' in the interview. On the one hand, this is demonstrative of the constraints of language in describing kinship relations in lesbian families resulting from donation. In fact, during the interviews none of the co-mothers claim the term 'mother', although Beverley refers to her partner and co-mother Fiona as the 'other-mother', and Jane

68 See the discussion under 'Joint residence orders' below.

69 Cussins (1998); also Thompson (formerly Cussins) (2001).

70 Cussins (1998), p 55, emphasis added.

71 See discussion in Jackson, Chapter 4 in this volume. However, the New Zealand Law Commission recently raised the possibility of a child having more than two legal parents: see New Zealand Law Commission (2005), paras 6.67–6.73 and 8.15–8.17.

72 Dunne (2000), p 24.

refers to Helen, her partner, as 'mummy Helen' (discussed further below). On the other hand, Andrea's use of the term 'parent' could also suggest the possibility that lesbian couples can re-conceptualise kinship terms in ways that are non-gender-specific.[73] Hence, subjects can resist dominant discursive constructions. Consequently, the refusal to use the gendered term 'mother' in this instance can point to the productive potential of discourse and ongoing negotiation of kinship terms. Hence, the authority of legal and social discourse is not absolute, but rather is continually negotiated and renegotiated at the capillary of power relations by particular subjects in specific circumstances.[74]

Alternative strategies for the recognition of a co-mother's parental status

Consenting to insemination

Naming practices not only are significant within families, but can potentially provide external recognition of a co-mother's parental role. Kate and Sarah discussed the strategy they used to provide the co-mother (Sarah) with a symbolic form of recognition of her intending parental role. They noted that, during the process of accessing donor insemination at a licensed clinic, Sarah signed the consent form usually signed by the male partner of a woman undertaking assisted reproductive technologies:

> Sarah: Often they [clinic officials] don't know how to treat the co-parent, like on the form you sign they use the term husband for the partner.
>
> Kate: For us they [clinic officials] crossed out 'father' and put 'parent'. We were both signing to say that Sarah also agreed to the treatment and also *recognising Sarah as a parent. It was symbolic*. It's important for the child to know that it was a joint decision.[75]

Signing the consent form is a transgressive practice, which means that subjects like Kate and Sarah are not passive in the process of ascribing parenthood. Rather, they are actively writing themselves into this process at the clinic. As outlined above, s 28(2) and (3) HFEA 1990 provides that when licensed donor insemination is used by heterosexual couples, the husband or male partner will be considered the child's legal father unless he proves he did not consent to the treatment. Hence, husbands or male partners of women undertaking donor insemination are requested to sign an appropriate consent form.[76] This is not 'to make the treatment

73 See Dunne (2000) for a discussion of parenting practices that are not necessarily mediated along gender-specific lines, a detailed discussion of which falls outside the focus of this chapter.

74 See Weeks, Heaphy and Donovan (2001) for a discussion of same-sex partners (in Britain) remaking 'family' or 'families of choice', outside of heterosexual norms and legal discourse rooted in those norms. Weeks *et al* note that, while these processes can be difficult for non-heterosexuals, the emergent 'practices of freedom' can also be liberating, and provide ongoing challenges to traditional heterosexual assumptions.

75 Emphasis added.

76 Human Fertilisation and Embryology Authority (2004), paras 7.28–29.

lawful'; rather it is to avoid any 'evidential difficulty' arising in relation to the ascription of the legal father for a resulting child.[77]

Given the significance of the consent form for the legal determination of *fatherhood*, it is clear that Kate's and Sarah's practice of jointly signing this form is transgressive, challenging 'the family' norm. Kate's comments suggest that they were aware that by signing this form, Sarah would *not* be ascribed legal parental status in relation to their donor-conceived child. However, it was clearly significant that Sarah be afforded some formal, symbolic recognition of her intention to parent. Hence, Kate's and Sarah's reported practice of signing this form indicates that they were able to mobilise and reconfigure legal consent in ways that ascribed a symbolic recognition of Sarah's co-parenting role, and may be evidence of a form of local and strategic resistance to the dominant norms of consent associated with accessing and using licensed donor insemination. By using the existing legal framework, while at the same time reconfiguring it by having the term 'parent' inserted in the place of 'father', Kate and Sarah challenged the hetero-normative assumption associated with consent for licensed donor insemination. However, there are some limitations to their practice.

The use of the gender-neutral term 'parent' on the consent form is significant. It is not entirely clear who chose this term, as Kate's comments suggest it was the clinic, rather than the couple themselves. If Kate and Sarah chose this term, it could be possible to argue that they can reconfigure the term 'parent' in a positive way. That is, as outlined above, 'parent' could be an example of lesbian couples' reconfiguration of kinship terms in ways that challenge gendered hetero-normative assumptions about mothering and fathering and gender-appropriate parenting roles.[78] However, use of the term 'parent' may also be evidence of law's inability to comprehend a gendered parental status for Sarah, once Kate became a mother. Further, if it was the clinic's choice of kinship term, it is possible to read the gender-neutral term 'parent' as providing a marginal status to subjects like Sarah. That is, those 'parents' who do not conform to 'the family' norm are excluded from claiming the identity 'co-mother' (or even 'mother') on the clinic's consent form. Second, while this practice may provide a challenge to the assumption that only heterosexual couples using licensed donor insemination will sign the consent form for the purposes of eliminating evidential difficulties in relation to the legal ascription of parenthood, because this practice was informal and invisible, insofar as the consent form would not be acknowledged outside the clinic for the purposes of establishing parental status, its transgressive effect is reduced. However, there are two other formal legal provisions which lesbian co-mothers can seek to implement in (partial) recognition of their parental role: joint residence orders and guardianship. Guardianship is significant here insofar as it provides some appreciation of the legal power to designate, even if only after death, a status they have lived and experienced.

77 Kennedy and Grubb (1994), p 789; also Jackson (2001), pp 239–40.
78 Dunne (2000).

Joint residence orders

Seeking a joint residence order was an issue raised in all four lesbian couples' accounts. In Jane's and Helen's case, the reason for seeking a joint residence order was explained with reference to co-mother Helen's lack of legal status. At the time of the interview, they had completed an affadavit but not yet begun formal legal proceedings. Earlier in the interview, Jane had noted that, as the birth mother, she had parental responsibility automatically, whereas for Helen she states:

> It [joint residence order] does need to be done, and I think it's more of an issue for you isn't it [to Helen] and also for [daughter] to know that *legally we are both her parents*. That does have a weight and standing actually for a child to know that it's not just mummy Helen who's not really, at the end of the day, *can't sign anything down at the doctor's surgery* to say she can have medication or whatever. *It's important for* [daughter] *to know that mummy Helen can do all that, as can mummy Jane you know*.[79]

Jane discusses the importance of Helen having parental responsibility in terms of both the symbolic significance and the practical implications this would have for Helen and their daughter. Jane clearly expresses a desire that their daughter would know that she and Helen are *legally* her *parents*, suggesting that legal discourse is a powerful normalising factor in signifying kinship relations within their family,[80] including the emotional and psychological security that might be provided by knowledge of that relationship. But again, in Jane's account, legal recognition is discussed by reference to the gender-neutral term 'parents' rather than in relation to the possible recognition of two 'mothers'. In contrast, when discussing the significance of the legal recognition of Helen's parental role from their *daughter's* perspective, it is interesting to note the shift to the use of the terms 'mummy Jane' and 'mummy Helen'. This subtle shift is significant, as it points concurrently to the singularity of meaning of kinship terms (ie both could not be 'mum') *and* their plasticity, inasmuch as there is the potential for both 'mummy Jane' and 'mummy Helen' to be named as such within one family, even when legal recognition is articulated in the only language in which the law can so far cope with two mothers: as gender-neutral parents.

In terms of the practical significance, parental responsibility confers a range of rights and responsibilities for the child,[81] yet Jane highlights future interactions with the medical profession. On the one hand, this indicates Jane's awareness of the absence of legal rights accorded to Helen. On the other hand, this suggests that legal status is of particular significance in dealing with professional authoritative bodies or persons including medical practitioners, as the issue of parental responsibility would be central in determining who may and who cannot provide consent for the child's (non-emergency) medical treatment.[82] Hence, the absence of legal status accorded to Helen, the co-mother, is clearly problematic when faced with

79 Emphasis added.
80 Cussins (1998), p 55.
81 Children Act 1989, s 3.
82 See Montgomery (2003), pp 289–304.

the practical considerations of caring for a child. Furthermore, one cannot assume that an application for a joint residence order will necessarily be successful. Andrea and Louise, for example, were unsuccessful in their application for a joint residence order in 1998.[83] Therefore, while provisions to confer parental responsibility on co-mothers *exist*, a joint residence order is *neither an automatic nor a guaranteed* route to attaining formal legal status in relation to one's donor-conceived child.

More recently, however, there have been statutory[84] and judicial shifts towards recognising same-sex parenting.[85] In the recent case of *Re G (children) (shared residence order: parental responsibility)*,[86] on appeal a joint residence order was granted to a lesbian co-mother following the breakdown of her relationship with the donor-conceived children's mother. In his leading judgment in the Court of Appeal, Thorpe LJ made clear that he would not countenance the marginalisation of the co-mother in the children's lives in the future. He stated:

> I am in no doubt at all that . . . the children required firm measures to safeguard them from the *diminution in or loss of a vital side of family life* . . . The parental responsibility order was correctly identified by the CAFCASS officer as the appropriate safeguard. The judge's finding required a clear and strong message to the mother that she could not achieve the elimination of Miss W [co-mother], or even the reduction of Miss W *from the other parent in some undefined family connection*.[87]

Lord Justice Thorpe does not address Miss W as a parent *per se* at any point in the judgment, referring only to the law as it relates to 'absent parents' generically,[88] or, as above, to the mother as the 'other parent'.[89] Nevertheless, his comments clearly indicate a firm recognition of the co-mother's *parental* role in the children's lives. It is hoped that with the Civil Partnership Act 2004 now in force, the emergent judicial trend towards recognising same-sex partnerships (including parenting arrangements) will continue in this vein.

In addition, as noted above, s 4A(1) Children Act 1989, in force since 30 December 2005, now enables co-mothers to apply for parental responsibility where they have entered into a civil partnership with the child's mother. While this provision extends the remit of s 4 and facilitates parental responsibility for co-mothers in the absence of a joint residence order, it nevertheless ensures that

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83 See Jones (2003; forthcoming 2007).

84 This was acknowledged by Thorpe LJ in *Re G* [2005] EWCA Civ 462, at para 7. Citing s 75(2) Civil Partnership Act 2004 (which, when enacted, will amend Children Act 1989 s 4A(1) (acquisition of parental responsibility by step-parent) to include applications by civil partners), he stated that this is 'an indication of a perceivable statutory trend towards the relaxation of the boundary originally set by section 4 [Children Act 1989]'.

85 See Baroness Hale in *Ghaidan v Mendoza* [2004] 2 WLR 113, paras 141–3.

86 [2005] EWCA Civ 462. Now see also *Re G (Children)* [2006] UKHL 43, on appeal from [2006] EWCA Civ 372.

87 Para 27, emphasis added.

88 Paras 25, 27.

89 Indeed, this issue is only addressed specifically with regard to noting the mother's evidence that 'Miss W should be viewed as an extended family member, not in a parental position', para 11. However, no further discussion of the mother's evidence was undertaken with regard to this point.

only those who adhere to the normative lesbian family, as legislated by the Civil Partnership Act 2004, can seek and be accorded this status. Thus, as Davina Cooper and Didi Herman warned in 1995: 'As some lesbians and gay men gain admittance into the status quo, familial ideology may be strengthened and others may be further marginalized.'[90] Therefore, those women who cannot or will not align themselves according to the norm of the 'good' lesbian co-mother will continue to be excluded under these provisions.[91] For these reasons, I suggest that legislative changes be introduced, as discussed further below.

Guardianship

> Part of me thinks that in the event of my death nobody would contest my partner's right to be, you know, the parent of the child.[92]

While all four lesbian couples interviewed mentioned the possible use of guardianship, with the exception of Andrea and Louise, none had put this in place. A child's legal mother can appoint the co-mother to be a guardian for the child in the event of her death.[93] With guardianship, one acquires parental responsibility, which Chris Barton and Gillian Douglas[94] point out is 'the closest a parent can come to a unilateral transfer of parental responsibility'. In the context of lesbian couples who conceive through the use of licensed donor insemination, guardianship would not take effect unless and until the legal mother dies,[95] as there is no legal father.[96] Therefore, in terms of providing legal status in relation to the donor-conceived child, it is limited to providing *possible future* rights and responsibilities. Furthermore, s 6(1)–(4) Children Act 1989 provides circumstances in which guardianship can be revoked. In addition, a court order can terminate guardianship.[97] Therefore, while a guardianship provision may provide solace for some lesbian couples with regard to the co-mothers' legal standing, it is limited. Unlike parental status, it is not automatic; it is not 'for life'; nor does it render the donor-conceived child a member of the guardian's family. Nevertheless, it remains the *only* legal provision which the child's legal mother can make in favour of the co-mother without any external (judicial or other) scrutiny.[98] However, I would suggest that this need not be so.

Status implications: The way forward?

To address the status issues raised in my interviewees' accounts, I will focus on the three questions posed in the introduction.

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90 Cooper and Herman (1995), p 176.
91 See Diduck (1998).
92 Beverley, interviewee.
93 Children Act 1989, s 5(3).
94 Barton and Douglas (1995), p 100.
95 Children Act 1989, s 5(6)–(8).
96 HFEA 1990, s 28(6).
97 Children Act 1989, s 6(7).
98 Barton and Douglas (1995), p 100.

Does Anglo-Welsh family law have the necessary mechanisms for recognising the parental role of co-mothers?

As outlined in the introduction, the legal concept of parenthood is made up of a number of components. Principally, these are: the parental status of either 'mother' or 'father' as registered following the child's birth; the concurrent allocation of parental responsibility (subject to s 4 Children Act 1989); and an (almost) inalienable link between the child and parent, and the parent's wider family. The closest analogy to the parental role of the co-mother is that of the unmarried male partner of a woman who undertakes licensed donor insemination to conceive their child. In an unprecedented move, Anglo-Welsh law provides legal parenthood for such men in the absence of the traditional markers of this status: that is, a marital link with the mother or an assumed bio-genetic tie to the child.[99] As Franklin[100] notes, this provision illustrates the exercise of new powers of legal discourse to confer parenthood. Clearly, Anglo-Welsh legal discourse can, where considered necessary or desirable (for policy reasons, for example, matching children to fathers as outlined above), change the 'markers' it renders significant to the ascription of parenthood. Therefore, I would submit that legal parenthood already provides the necessary mechanisms to recognise co-mothers' parental roles, although clearly access to this status is currently denied to them. (The policy reasons for this exclusion are discussed in the following section.)

Is 'parenthood' considered an appropriate status to reflect the role of co-mothers?

This question is more problematic, because of the ongoing debate between legal commentators as to the relative weight to be attached to genetic parentage, the intention to parent, or the ongoing care provided for a child, when ascribing legal parenthood.[101] In the context of assisted reproductive technologies, the genetic and intention models of parenthood have dominated the discussion;[102] therefore I will focus on them. Put simply, if genetic ties determined legal parenthood, only persons with a genetic relationship with a particular child would be legally recognised as her parents.[103] Clearly, a co-mother would not be able to substantiate such a

99 HFEA 1990, s 28(3). Though the case of *X, Y and Z v UK* (1997) 24 EHRR 143 involving a transsexual social father indicates that one must legally be considered to be a *man* for s 28(3) HFEA 1990 to apply. However, Gender Recognition Act 2004 s 9(1) states that after a full gender recognition certificate is issued 'the person's gender becomes for all purposes the acquired gender.' Consequently, a female-to-male transsexual could in future be legally registered as the father of a donor-conceived child. However, as s 12 of the 2004 Act makes clear, issuing a gender recognition certificate does not alter the (pre-certificate) parental status of an individual.

100 Franklin (1993), outlined above.

101 Barton and Douglas (1995); Bainham, (1999); Bridge (1999); Johnson (1999); Jackson (2001) and Chapter 4 in this volume; Herring (2004); and Probert (2004).

102 Bainham (1999); Probert (2004).

103 Currently this would mean a maximum of two parents, although Johnson (1999) discusses future possible developments in assisted reproductive technologies that could increase this number.

link. Given the increasing significance ascribed to the child's right to know her genetic origins,[104] the focus on the genetic model is unsurprising. However, as Bainham[105] concedes, as this is not the model followed in Anglo-Welsh law, it is 'too late to change course now'. Hence, the co-mother's lack of genetic relationship to a donor-conceived child should not completely undermine her potential claim to legal parenthood.

Could the intention model provide a means for co-mothers to gain legal parenthood? As the name suggests, the intention model ascribes legal parenthood in favour of a person only where that person intends to be a parent.[106] It is not without its criticisms, particularly on the construction of 'intent' in circumstances where contraception may have failed, among other examples.[107] However, as Jonathan Herring[108] notes, in the context of assisted reproductive technologies, the intention to be (or in the case of sperm donors *not* to be) a parent is '*crucial*' to the determination of parenthood, although, as Rebecca Probert[109] points out, this intention 'has to be combined with some action to bring about a birth'.

For the purposes of legal recognition under s 28(3) HFEA 1990, the action required of an unmarried male partner is to undertake treatment 'together' with a woman at a licensed clinic.[110] A co-mother's actions in attending a clinic with her partner, as the lesbian couples I interviewed reported they did, do not differ from those of a male partner, yet no legal status follows from their intention and concurrent action.

Clearly, there are policy reasons for the absence of legal status accorded to these women. First, lesbian families conceived through donation do not promote 'the family' norm, hence there is little impetus (legislatively or judicially) to provide legal recognition in the absence of the traditional markers of parenthood. This clearly evidences Haimes's[111] argument regarding the social management of families that 'transgress' traditional or 'assumed' familial forms. However, the continued potency of 'the family' norm, notwithstanding the fact that a decreasing number of persons 'experience' this form of family, has been subject to sustained criticism by feminist legal commentators.[112] I would argue that it is poor justification for the continued discrimination of co-mothers on the basis of their gender and sexual orientation. Second, as Probert[113] notes, recognising the status of the co-mother on the child's birth certificate would prove problematic to the promotion of birth registration as a record of 'historical truth'. However, in light of the provisions of s 27 and s 28 HFEA 1990, it is difficult to sustain the argument that birth certificates record the 'truth' of a child's genetic parentage. Nevertheless this

104 Wallbank (2004).
105 Bainham (1999), p 44.
106 Barton and Douglas (1995).
107 Probert (2004), pp 284–5; Herring (2004), pp 328–9.
108 Herring (2004), p 328.
109 Probert (2004), p 285.
110 *Re D* [2005] UKHL 33; Sheldon (2005); Lind (2003).
111 Haimes (2002).
112 O'Donovan (1993); Diduck (1995, 2003).
113 Probert (2004), p 278.

policy issue could, as Probert[114] suggests, prove problematic judicially if one were to seek to challenge the current provisions on the basis of discrimination on the grounds of sexual orientation.[115] I submit that legal parenthood is an appropriate status for lesbian co-mothers, and that the policy considerations outlined above provide no basis for the continued discrimination against these women. Further, legal parenthood would validate that which they have been *doing* in their families, and more accurately reflect their commitments to their children and to the relationships they have constructed with their children. While judicial resistance to such a challenge to the status quo seems to be ebbing,[116] the extent of the requisite attendant changes and the need to ensure procedural fairness dictate that legislative changes would be necessary.

How might lesbian co-motherhood be accommodated under Anglo-Welsh law?

As the main focus of this chapter was the impact of the (lack of) legal ascription of parenthood for establishing familial status and kinship naming practices in lesbian and heterosexual families conceived by donation, there is insufficient scope to consider the proposed changes in detail. Rather, the following comments are intended to be illustrative of the legislative changes one might expect in order to provide co-mothers with access to the status of legal parenthood akin to that provided to unmarried social fathers when they undertake *licensed* donor insemination.[117] I will address three possible changes: birth registration; allocation of parental responsibility; and consent provisions at licensed clinics. I begin with the most controversial proposal – amendments to the registration of a child's birth.[118] Providing co-mothers with legal parenthood would necessitate changes to ensure that they could be registered as a parent on the child's birth certificate. The kinship terminology used could prove problematic given the lack of consensus on the appropriate term used to refer to 'co-mothers', as outlined in the introduction. Nevertheless, it is proposed that the terms 'parent' or 'co-parent' might prove least contentious, given the anecdotal evidence discussed earlier in the chapter.[119]

Changes to the allocation of parental responsibility could follow the recent model under s 111 Adoption and Children Act 2002, amending s 4 Children Act 1989 to provide automatic parental responsibility for unmarried fathers upon joint registration with the mother. As outlined above, lesbian couples have successfully applied for joint residence orders, thereby providing the co-mother with

114 *Ibid*.

115 *Per Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411.

116 *Ibid*, and the decision in *Re G*, as discussed above.

117 Clearly, a number of women become co-mothers following self-insemination (Saffron, 1998), to whom the consent provisions would not apply. Class issues and the access policies of licensed clinics, which can act to frustrate lesbian women's use of licensed donor insemination, are salient considerations but fall outside the scope of this chapter: see Jones (2003, 2004).

118 Births and Deaths Registration Act 1953.

119 See also Adopted Children and Adoption Contact Registers Regulations 2005, SI 2005/924, Schedule 1.

parental responsibility for the duration of the order.[120] However, automatic allocation upon joint registration with the mother would remove discrimination on the basis of sexual orientation. Finally, to avoid any evidentiary issues with regard to the legal ascription of parenthood, co-mothers could be required to sign consent forms at licensed clinics to signal their intention to create a legal relationship with the donor-conceived child (as per Kate's and Sarah's account above). This approach is adopted in s 6A Artificial Conception Act 1985 of Western Australia for lesbian women in *de facto* relationships, and could arguably provide a model for Anglo-Welsh law to follow.[121]

Conclusion

This chapter has considered the legal ascription of parenthood in the context of licensed donor insemination and, in particular, the subjective impact of the current provisions on naming practices in British families conceived through donation. Anglo-Welsh legal discourse has (unsurprisingly) framed parenthood through a hetero-normative lens, whereby social fathers are matched to donor-conceived children while concurrently lesbian co-mothers are marginalised through a process of exclusion. This has caused difficulties in terms of their legal status as parents and of their subjective negotiations of their social status as parents, including their naming practices. It has been argued that the kinship terminology used within their families and at licensed clinics concurrently indicates the normative effects of, *and* the strategic resistance to, their lack of legal status. In particular, the democratic naming processes undertaken by the interviewees suggest that 'parenthood' can be a transgressive term, providing a readily identifiable status and relationship to the child, but also that, in some cases, 'parent' is still less than transformative because of the set of legal norms that obscure the possibility in law of co-*mothers*. In response to the limited and precarious legal recognition of co-mothers' parental roles through joint residence orders or guardianships provisions, in the concluding section, consideration was undertaken of possible ways of altering access to legal parenthood. Given the *symbolic* importance of the legal ascription of parenthood highlighted in *all* (lesbian and heterosexual) interviewees' accounts, access to this legal status is crucial, not only on grounds of equality and non-discrimination, but also because of the concurrent *practical* and subjective significance it has to family life and the day-to-day care of children.

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120 Children Act 1989, s 12(2).

121 I am grateful to both Carol Smart and Lisa Young for alerting me to the Australian provisions.

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Chapter 6
After Birth: Decisions about Becoming a Mother

Katherine O'Donovan and Jill Marshall

Introduction

Debating the nature of autonomy is central to feminist theory. Taking control of one's own life is a foundation of feminism, and, strategically, autonomy is important to feminism as it allows for agency, change and self-determination. Feminism proposes ways of knowing and being in which a self is developed – a self that is not produced entirely by socialisation.

Yet contests over autonomy continue. On the one hand, social constructionism creates a deterministic account of preferences and a denial of agency. On the other hand, concepts of autonomy have been said to assume a freedom which does not exist for many women, or which may not exist at all, for *anyone*. Conceptions of autonomy may themselves be constructed, and also gendered. As Jennifer Nedelsky reflects, feminist theory has to hold on to autonomy, whilst arguing for a contextually situated self: 'The problem, of course is how to combine the claim of the constitutiveness of social relations with the value of self-determination.'[1] Holding both views simultaneously is the strategy that has been advocated by recent theorists,[2] and reconceiving autonomy is often stated to be the goal of such discussions.

Feminist theory entered a pessimistic period in the recent past. The attack on essentialism in the 1990s created difficulties in speaking generally about women.[3] Individual biographies are unique, it was said. Yet, as women, we do have common concerns, including our potential for childbearing and mothering during a stage of life, with their attendant social meanings in the societies in which we live. In response, some writers proposed a return to norms, particularly those in the form of rights.[4] But, as has been observed,[5] it is far from clear that this is the answer. As contests take place over, and between, rights, the problem of essentialism seems merely to be shifted to another scene.

Yet, for some second wave feminists, children are still central to arguments about autonomy. Debates over issues such as abortion, extra-uterine birth, work–life balance, bodily integrity, and making a life plan are, at their core, arguments about autonomy. This chapter explores themes of autonomy in the context of reproductive decisions but focuses upon choices to take up mothering after giving birth. Like Sarah Ruddick, we wish to separate birthing labour from mothering. Honouring 'both kinds of work and at the same time' providing 'the conceptual

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1 Nedelsky (1989), p 221.
2 Jackson (2001); Nedelsky (1989).
3 See, for example, Malik, Chapter 11 in this volume.
4 For example, Nussbaum (2000).
5 Jackson and Lacey (2002).

and emotional space to raise questions about the relations between them', Ruddick argues that these labours do not necessarily have to be performed by the same mother.[6] Maternal work, undertaken in both forms of labour, might continue by the same woman after birthing, or might be transferred to others.

The recent case in the Court of Appeal of a woman who attempted to have her child adopted, having concealed her pregnancy from her husband and family, will be used as a reference point for discussions of separating 'mothering' activities from the legal and cultural structures surrounding giving birth.

Part One analyses the portrayal of women's choices in relation to bearing and rearing children in feminist literature. Although the literature is vast, the distinctions between pregnancy, childbirth and rearing children are often blurred and rarely made explicit. Part Two examines the decision to become a mother, drawing on ideas about autonomy and choice and the structural conditions within which such decisions are made. The distinction between deciding to continue a pregnancy, but not to take up mothering after giving birth, is important to this part. In Part Three, the legal position of women who wish to give birth anonymously or to place their infant for adoption in secret is examined. The recent decisions of the Court of Appeal on adoption of a child where pregnancy was concealed,[7] and of the European Court of Human Rights on anonymous birthing,[8] are explored.

Part One

This part of our paper focuses on what feminists have to say about women's autonomy, or lack of autonomy, in relation to their reproductive capacities and child-caring responsibilities. We begin by investigating the general feminist literature on women's ability to make choices and the concept of autonomy. We then move on to analyse the work of feminists who highlight what they describe as the 'natural' capacity of women to be child bearers and rearers. In our interpretation, these feminists argue that the only way for women to have autonomy is to overcome and transcend this capacity. We then consider the work of feminists who celebrate the 'natural' capacity of women as child bearers and rearers as providing women with a sense of human connection. Finally, we analyse those who critique the institution of motherhood as a patriarchal, socially constructed institution. Our analysis throughout is on whether, and if so, how, the literature makes a distinction between women's child-bearing and child-rearing capacities in the context of our ability to choose our own ways of life.

A primary theme in the feminist literature is analysis of the different spheres of public and private.[9] Women are said to be generally assigned to the latter – the domestic sphere of the home – which requires analysis of women as wives and

6 Ruddick (1989), pp 18–19. Ruddick's distinction has been made in French law since the eighteenth century.

7 *Re AB (Care Proceedings)* [2003] EWCA Civ 1842.

8 *Odievre v France* (Application no 42326/98) 13 February 2003; [2003] 1 FCR.

9 See O'Donovan (1985); Olsen (1995); Pateman (1987; 1988); Lacey (1998).

mothers in the family, rather than as autonomous persons in our own right.[10] This work highlights the political nature of the division, the perceived shortcomings of political systems, particularly liberalism, which it is claimed create and rely upon it, and the impact it has on women's lack of choices in ways of living their lives. These feminists critique the role motherhood plays in viewing women as somehow separate, meaning different or deviant, in comparison to 'normal' citizens, and they debate the meaning of, and role for, equality and an ethic of care in women's lives.[11]

Motherhood features prominently in each of these debates. An ideology of motherhood has played a part in women being seen as inferior to men, or at least as separate and distinct from them. This ideology of motherhood has an effect on women's autonomy, so that we are often not viewed as persons in our own right, with choices to make about ways of being and living.

Women's choices

While the idea of autonomy has increased in importance in many areas of law,[12] it has been subject to critique by many feminist theorists. Some have concluded that its meaning is, at worst, incomprehensible or, at best, of little value or use to feminism. At the same time, however, most agree that some idea of choice and freedom, autonomy if you like, is needed if women are to have any control over our own lives.

The idea of autonomy is most commonly associated with Immanuel Kant.[13] In Kantian autonomy, a person is capable of rational choice through exercising his or her own moral judgments governed by moral law. Many feminists have been critical of such a conception, as it is said to privilege male norms: rationality and reason being historically and conceptually associated with male ways of knowing and being and defined by the exclusion of the feminine.[14]

Other versions of autonomy see it as a way of being that is somehow independent of the context in which the individuals who exercise it are living. Accordingly, it has been presented as a quality of an independent, isolated, 'atomistic', 'unencumbered' individual.[15] Marxist and communitarian theorists have criticised this view and feminist critics have also done so. Some have observed, for example, that this 'atomistic' view of persons necessarily excludes women who are pregnant: the foetus is connected to them. Also, if women as mothers have responsibilities as the carers of dependent children, particularly if they are the sole carer, it is difficult to see how we can be described as autonomous in this sense: surely we will be constrained by dependants' reliance on us.

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10 Okin (1979; 1989).

11 Du Bois (1985); Pateman (1987); Olsen (1995); Phillips (1999); MacKinnon (1989); Gilligan (1982); Bock and James (1992).

12 This is particularly the case in medical ethics.

13 Kant (1988); see also Dworkin (1999).

14 See Lloyd (1984).

15 Taylor (1992); Sandel (1998); see analysis also by Reece (2003), ch 2.

These observations mean either that pregnant women and mothers simply cannot be autonomous beings, or that the concept of autonomy must be revised to account for them. Indeed, more sophisticated versions of autonomy demonstrate that 'atomism' is unnecessary. In these versions, feminists have sought to reconceive autonomy, aiming to retain the indispensable notion to feminism that women should be free to make our own choices, while acknowledging the socially constructed quality of the choices people make.[16] In particular, certain feminists have been keen to stress the importance of relationships and interdependence in developing the capacity for autonomy, and have questioned what it is that enables people to be autonomous, in the sense of being free to make our own choices in life. They answer that autonomy is not concerned with isolation but depends upon the existence of relationships that provide support and guidance: relatedness is not the antithesis of autonomy but its precondition.[17]

So, autonomy is *all about* the ability to make choices and those choices are all about an individual's connectedness with, rather than its isolation from, other autonomous beings. Autonomy can thus be conceived of as a quality that develops and exists *because of* the interdependency of persons and encouragement of supportive others. As such, pregnancy and child rearing are not in conflict with the autonomy of any particular woman involved in such situations. Decisions to become pregnant, remain pregnant, become a mother on birth or not must all be viewed as exercises of choice by the particular women involved in those decisions. A view that presents these as situations that happen to women without any decision on our part can be criticised for hindering women's ability to live lives of our own choosing.

As much of the impetus for feminism and feminist politics arises from women claiming the space to choose who and what we are, to refuse to be defined, contained and dictated by notions of what society means by 'woman',[18] some conception of capacity for choice needs to be retained. But how is this best done, particularly in the context of pregnancy and child care? Various feminist theorists have considered this issue. In the next three subsections, we investigate their work and interpret it in the context of women becoming mothers.

Women as mothers – a natural phenomenon that must be overcome

Certain feminists have viewed women's capacity for motherhood as a natural, biological phenomenon, but one that thereby prevents women from being capable of living a fully autonomous life. These feminists require that women overcome their 'natural' state to become free and autonomous.

In existential feminist theory, becoming a woman is a socially constructed condition.[19] On this view, 'woman' is a creation, the 'other' to man: what women

16 Nedelsky (1989); MacKinnon (1989); Nussbaum, (1999; 2000); MacKenzie and Stoljar (2000).

17 Nedelsky (1989); MacKenzie and Stoljar (2000).

18 Phillips (1993), p 43.

19 De Beauvoir (1997); Lloyd (1984).

need to do, therefore, is to contest this construction, because it prevents us from living an autonomous and self-willed life, which is the ideal for everyone. Although it is acknowledged that a *completely* autonomous life is impossible, because as part of the human condition all persons are constrained by social and moral norms and bodily needs, individuals are still capable of constantly and deliberately taking responsibility for their obedience and disobedience to authority and to their bodies. To exercise what it is called 'authentic' choice, individuals must aim to transcend the social and the physical. For women, this means transcending female biology and instead entering into public life, engaging in our own projects and exploits. In such a presentation of becoming a woman, female biology is represented as conflicting with, and in opposition to, the ideal of the free autonomous subject reaching out to transcendence. Female biology and the female body drag this free autonomous subject back to a 'merely natural' existence: the female body is an intrinsic obstacle to transcendence and 'authentic' choice.

The achievement of autonomy for women thus comes by women actively choosing not to be immersed in their biology, including choosing not to become pregnant, not to have children and not to become mothers. What is proposed instead is a new order in which woman becomes part of the world of the active other; woman becomes like man in order to escape the debilitating and endlessly disempowering impact of femininity as the condition of otherness.[20]

However, in this type of feminist work, no distinctions are explicitly made between pregnancy and motherhood. Both of these conditions need to be refused. This work can be interpreted as identifying the choices necessary for autonomy in the social world as it now exists, but different choices might be required if the experience of a female body was not culturally objectified by exposure to the male gaze as it is now. In other words, if the world we live in was different, perhaps it would not be necessary to transcend female biology in the way proposed.

Certain radical feminist thinkers, particularly in the early second wave, reach similar conclusions about transcending female biology. Perhaps the starkest example of this type of work can be seen in Shulamith Firestone's *Dialectic of Sex*. In that analysis, the natural reproductive difference between the sexes is described as the first division of labour at the origins of class.[21] It is a natural, biologically based imbalance of power between men and women. However, given that individuals are no longer 'just' animals, they can oppose nature; they can take control of it. Given this state of affairs, humanity can outgrow nature, leading to the abolition of '*a discriminatory sex class system*' no longer justifiable on the grounds of its purported origins in nature.[22]

On this view, women will never be free of the constrictions of nature unless human reproduction becomes artificial reproduction in which children would be born to both sexes equally or independently of the other. Any dependence between

20 See Evans (1997), p 45.
21 Firestone (1971), pp 8–9.
22 Firestone (1971).

the child and the mother would give way to a greatly shortened dependence on a small group of others in general, 'freeing' women from their reproductive biology.

Again, no distinctions are made between the capacity to be a child bearer and a mother. Clear boundaries are drawn between child 'production' and subsequent development, but it is assumed that this can only happen if children are 'produced' separately from the natural reproductive and gestation process. It seems to be assumed that if women continued to be child bearers in the 'natural' way, we would be mothers simply by virtue of that.

Women as mothers – a natural phenomenon that must be celebrated

Other theorists present very different views of women as mothers. While the distinction between women and men continues to be based on our reproductive capacities, instead of this being negatively viewed as a hindrance to women's ability to live freely, it is instead seen as something to celebrate.[23]

In what has been called the 'unofficial story' of legal theory, as presented by cultural feminism, women are connected to others materially and existentially, in particular at four stages throughout our lives: menstruation; heterosexual penetrative sexual intercourse; pregnancy; and breast feeding.[24]

What is valued in the 'official story' of legal theory, however, is an autonomous individual who is separate from others, left alone to exercise voluntary choices in as many spheres as possible through the satisfaction of subjective desires and preferences. Even if maximisation of self-welfare as the motivation for actions is true of men, however, and some suggest that it is not, cultural feminism questions whether it is true for women. Moreover, cultural feminism is often less concerned to question the traditional masculine story of the isolated self than it is to revalue, in the public and the private spheres, the feminine relational self. On this account, because of the sense of connection felt by women, women's lives are not autonomous, they are 'profoundly relational': women cannot be autonomous separate individuals in a way which may be true of men. Because of this, the legal system and legal language fail women: they fail to represent or even comprehend women's sense of connection, fear of separation,[25] fear of lack of intimacy, experiences and what we view as harms.

Feminist analysis in this vein appears to make no distinction between the non-pregnant woman, the pregnant woman, the woman who gives birth, and the carer of the child. Women's moral voice is described as one of (potential) responsibility, duty and care for others, because our material circumstances involve responsibility, duty and care for those who are first physically attached, then physically dependent and then emotionally interdependent.[26]

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23 Gilligan (1982); Rich (1976); West (1988).

24 West (1988).

25 According to West (1988), women fear separation from the other rather than annihilation by him, and count it as a harm, because women experience the separating pain of childbirth and feel more deeply the pain of the maturation and departure of adult children.

26 West (1988).

Often, in these feminist arguments, the mother–child relationship is presented as the essential human relationship; the family as constructed in patriarchy ruins this fundamental 'natural' human unit.[27] Proposals can then be made to abolish the patriarchal institution of motherhood, not motherhood itself, thus releasing what is described as 'the creation and sustenance of life into the same realm of decision, struggle, surprise, imagination and conscious intelligence as any other difficult but freely chosen work'.[28] Until then, however, so-called 'choices' facing women trying to be autonomous in a society which insists that we are destined primarily for reproduction, a choice presented as a mutually exclusive either/or between motherhood or individuation, motherhood or creativity, motherhood or freedom, are criticised.[29] On this feminist view, women's autonomy is *strengthened* through free exercise of their sexual and procreative choice, including choosing to become a mother, in conjunction with their claim to personhood. Women feel and are more autonomous through their own freedom to exercise their own choices in relation to maternity and motherhood; they are not to be used as a womb or a body part but to speak for themselves, in their own right.[30] In many ways, this view is similar to that presented by the next body of theorists we identify in the feminist literature: those feminists who see the structure of motherhood as patriarchal but remain more ambivalent as to the potential creativity and natural fulfilment that a more 'authentic' experience of motherhood can entail.

Women as mothers – institutional problems

Motherhood is presented in this literature as an institution or structure, usually constructed by patriarchy, in which women are portrayed as the natural carers of children. This motherhood is a socially constructed 'myth' perpetuating oppression and patriarchy, restricting women's equal opportunities[31] and constraining women's life plans.[32] On our review, this seems to be the most common approach in second wave feminists' analyses of motherhood. A common theme in the early feminist work was to stress the correlation between reproduction and production in a structural way.[33]

While acknowledging the obvious, that it is women (but not all women) who become pregnant and give birth, these feminists dispute the inevitable link that is then made to rearing children. These feminists aim for a future where, at the very least, some change to existing child-care arrangements will occur in the public and private spheres; where society, men and women share caring responsibilities;

27 Rich (1976), p 127.
28 *Ibid*, p 280.
29 *Ibid*, p 160.
30 *Ibid*, p xxii.
31 Okin (1979).
32 Cornell (1998).
33 Chodorow (1978); O'Brien (1981); Dally (1982).

and where there will correspondingly be some sort of flexibility of work and a fairer work–life balance for all.[34]

Much of this feminist work originated in the discipline of developmental psychology.[35] This research shows that as a female child grows, she develops her sense of identity as continuous with her caretaker's – usually, therefore, her mother's – while a young boy develops a sense of identity that is distinguished from his caretaker's. The reason for this is that, as the child grows older, he or she identifies with the same-sex parent, and parents reinforce this identification. The early experience of being cared for by a woman, therefore, produces a fundamental set of expectations concerning mothers' lack of separate interests from their infants and total concern for their infants' welfare.[36] Indeed, this work questions whether there is too much connection of the mother to her infant, resulting in a sense of loss of self or autonomy in the mother.

Questions are also raised by these feminists as to whether women turn to children for what is lacking in our own lives, and serve only to reinforce our lack of autonomy. If social structures existed that allowed women to carry out meaningful productive work, and to have emotionally satisfying adult relationships, it is claimed, we would be less likely to 'over invest' in our children.[37]

Even though these feminists are able to separate the biological requisites of maternity from the structural meaning given to motherhood, they still make no explicit distinction between women as child bearers and women as child rearers. It is still assumed that the first will result in the second, at least in some shared way.

A different feminist perspective, yet one that can be categorised in the same way, concentrates on the justice of the family structure. The family is analysed as a breeding ground for an unjust society: in its current patriarchal gendered form, it upholds and perpetuates the existing power imbalances in favour of men. Some feminists critique 'malestream' liberal theorists for failing to apply principles of liberal individualism to both men and women in families. It is argued that this is needed to aim for justice within the family, which would then filter into every area of life because of the family's importance as the sphere where children learn about justice and morality for themselves.[38] Distinctions are made between the mother and the child's carer, but not between mother and child bearer. Indeed, she is defined as mother because she is the child bearer, and motherhood is not seen as something women can refuse on giving birth.[39]

We see then that, while the feminist literature problematises and contextualises motherhood, it does not go as far as we would go in raising a distinction between maternity and motherhood. The balance of this chapter will explore that distinction and the consequent possibilities it would create for women to choose one status but not the other.

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34 Pateman (1987); Phillips (1993); Okin (1989); Chodorow (1978).
35 Chodorow (1978).
36 *Ibid*, p 208.
37 *Ibid*, p 212.
38 Okin (1989); Nussbaum (2000).
39 Okin (1989).

Part Two: Becoming a mother

One account of autonomy developed by feminist theory is in relation to the abortion decision. Whether this decision is seen as based on a liberal notion of choice or on a post-liberal concept of the self, there has been little contest, within feminism, about justification, which is presented as a personal choice. While the history of abortion does provide a context for a contest by women to gain control over their own bodies,[40] so does the decision to refuse motherhood after giving birth, which still remains largely unexamined.

Women who go through pregnancy are generally assumed to want a child; for otherwise, why not terminate? Conventional language conflates maternity and motherhood, with health practitioners referring to the pregnant woman as a 'mother' throughout her pregnancy. Our contention is that conceptual clarity requires a distinction to be made between maternity and motherhood, notwithstanding the assumption made currently that continued gestation signifies an intention to take up mothering.[41] Yet, as we shall argue below, there is little space for other intentions. Surrogacy, where a different intention is agreed and proclaimed at an earlier stage, might be an exception, and the surrogate appears to have been accepted as a social identity.[42] But the identity of a woman 'who gave away her child' seems to be less acceptable now for unmarried women than it was historically.

Even in feminist literature, motherhood is not often presented as a choice to be exercised *after* giving birth. Various stories are told of motherhood – of natural instinct, of altruism or martyrdom, of self-interest – and unpicking these is difficult. Not only are individual childhood stories of mother subjective and particular, but suggestions of a woman's choices after giving birth touch on fears of abandonment and rejection. Notwithstanding the contextual quality of individual biographies, mother love is taken to be universal, timeless and the same in space and time. Yet, might it not be the case, as Ruddick suggests, that a

> corollary to the distinction between birthing labor and mothering, is that all mothers are 'adoptive.' To adopt is to commit oneself to protecting, nurturing, and training particular children. Even the most passionately loving birthgiver engages in a social adoptive act when she commits herself to sustain an infant in the world . . . The work of a birthgiver is not compromised if she carefully transfers to others the responsibility for the infant she has birthed.[43]

Ruddick is here suggesting that mother-care can consist of transferring the actual care to others.

A woman's previous history, the attitudes of others, life plans, including plans in relation to the child, and the birthgiver's present identity will affect attitudes to

40 Sheldon (1997).

41 Or a resignation, again based on a conflation of the two concepts, that there is little choice to do otherwise.

42 Stumpf (1986), pp 187–208.

43 Ruddick (1989), p 51.

birthing labour.[44] It is self-evident that birthing involves a separation of a shared physical identity which has continued throughout pregnancy, during which the foetus depends on the woman. After birth, the woman regains her body to herself. Notwithstanding a claim that 'the baby is not planted within the mother, but (is) flesh of her flesh, part of her',[45] and the obvious lack of physical independence of the foetus, it is not being suggested that the foetus is part of the woman's body. As MacKinnon observes:

> Physically no body part takes as much and contributes as little. The foetus does not exist to serve the woman as her body parts do. The relation is more the other way around; on the biological level, the foetus is more like a parasite than a part. The woman's physical relation to her foetus is expected to end and does; when it does, her body still has all its parts.[46]

Having endured the birthing trauma, the woman, in Ruddick's terms, can now decide whether or not to take up mothering in relation to the now physically separate infant with whom she once shared a physical identity.

> Identity, and with it the ability to engage in moral activity, is formed in specific cultural and historical situations, and thus it coincides with subjectivity, the ability to judge and to act. The self is not conceived as an entity but as the protagonist in a biography.[47]

Yet mothering and being a mother are laden with social and historical meanings and contests. As we saw, even in feminist theory, motherhood is seen as a source of both joy and oppression. Alison Diduck notes that relationships between parent and child 'are assumed to be based upon the irrationality of ever-enduring love or upon timeless and universally understood *duty*'. This she terms 'the romantic' ideal. She contrasts this with 'relations in the ideal modern family' that are said to be based upon 'choice, flux and freedom'.[48] Once mothering is taken up, a woman is faced with both imperatives. She is subjected to advice, comment, and criticism and, in advanced Western societies, to a highly demanding standard of knowledge of psychology, first aid and education. And through it all, maternal sacrifice, maternal instinct and empathy are expected of her.[49]

The ideology of motherhood, as analysed in popular American accounts, requires a level of devotion, self-abnegation and perfection that one might think sufficient to discourage mortal women.[50] Named the 'new momism', this ideology is diffused throughout the media, including on popular television shows, with the insistence 'that no woman is truly complete or fulfilled unless she has kids, that women remain the best primary caretakers of children, and that to be a remotely decent mother, a woman has to devote her entire physical, psychological

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44 Sarah Ruddick (1989) includes the work of gestation and the trauma of giving birth in the idea of birthing labour.

45 Rothman (1989), p 161.

46 MacKinnon (1991), p 1316.

47 Sevenhuijsen (1998), p 56.

48 Diduck (2003), p 83.

49 Douglas and Michaels (2004).

50 See, eg, Crittenden (2001); Eyer (1996); Maushart (1999).

emotional, and intellectual being 24/7, to her children'.[51] 'Mom' is an identity, constructed for a market promoted in the media, containing a romanticised yet demanding view of what it means to mother. 'Mom' is a cultural icon whose standards of perfection are, in reality, unattainable.

Why might it be important to seek freedom for women to decide on whether or not to take up mothering after giving birth? Empirical research indicates that, aside from women who do not seek an abortion for personal reasons, or cannot do so because of legal prohibitions, some enter into a state of denial; others, aware of their pregnancy, cannot cope with the steps necessary to terminate.[52] Yet others choose motherhood as a positive step towards changing their lives.[53] It may be objected that teenagers who continue their pregnancies are 'non-copers', but the research shows that they exercise an element of choice.[54] A recent study of abortion decisions shows that young women from areas of social deprivation are more likely to become pregnant and are less likely to have an abortion than young women from more privileged backgrounds, who are less likely to become pregnant, but once they do, are more likely to terminate. How women view motherhood in their future lives is considered by the study as crucial to the outcome of conception. The evidence is that, where motherhood is seen as a positive change to a present way of life, pregnancy will continue, whereas 'those who are certain that future life will develop through education and employment tend to opt for abortion'.[55]

The above might seem to suggest that the only moment to exercise choice in relation to motherhood is the moment of confirmation of pregnancy. Those who enter into a state of denial, or fail to confront a decision on abortion, might be regarded as powerless and paralysed. Research on infanticide suggests that a proportion of cases can be explained in these terms.[56] However, those birthgivers who decide to refuse mothering after delivery may also be said to exercise choice. And that choice depends on many factors, including present identity, previous life experiences, and the conditions in which the subject finds herself, including social structures. This is not to say that conditions of discrimination, economic disadvantage and social powerlessness should be accepted, but rather to recognise that these may limit the possibilities within which a decision is made.

A second story, therefore, is of motherhood as a foundation of gender discrimination, both in terms of labour in gestation and delivery, and in caring for children.[57] This story is not about love of one's child, but is about structures in society. It is these structures which limit efforts to make parenting gender neutral, despite the language of gender neutrality. The introduction of norms and rights

51 Douglas and Michaels (2004), p 4.
52 Brockington (1996).
53 Lee *et al* (2004).
54 National Research Council (1987), p 27, cited in Lee *et al* (2004), p 1.
55 Lee *et al* (2004), p 21.
56 Concealment of pregnancy followed by infanticide is reported in all studies: see Brockington (1996).
57 Firestone (1971); Okin (1989).

discourse into this arena may create more problems than it solves. One senses that the debaters on gender power and parenting have retired exhausted.

Further, the decision not to take up mothering once one has given birth may be based on identity: a self unable to see a way to encompass childrearing at present. Not unlike the 'encumbered self'[58] – that is, a self claimed by inescapable duties – the 'refusing self' might be said to make a decision which is conditioned by the present and past aspects of her life.[59] These stories address hidden aspects of motherhood. It is quite possible to love one's child passionately and still kick against those social structures which relate parenting to gender. However, the romantic ideal creates social problems in the decision to renounce motherhood, and essentialist notions of womanhood contribute to a discourse of condemnation.

These essentialist notions survive even feminist accounts of the subject as an autonomous agent in charge of her own life. The decision to renounce motherhood, for example, is said to be 'inauthentic', the illegitimate result of social conditions that overwhelm and contradict the subject's self-identity. Little account is given to the possibility that internal and external factors may be liberating as well as constraining for some; an autonomous subject can make life plans, change her situation, and resist the conditions of oppression. Identity, in other words, does not float free of its context.

Moreover, recent feminist accounts of identity recognise that the self is composed of fragments, a web, or perhaps a patchwork, according to Morwenna Griffiths.[60] That self is depicted as varying according to time and space and as constrained in a myriad of ways. But despite constraints, it is an agent capable not only of action, but also of continual self-creation of identity. This self makes itself, but not in conditions of its own choosing. Griffiths is drawn to the notion of 'authenticity', where 'selves are in a process of becoming', selves are constructed, a self has agency. The construction and maintenance of self takes place with and through others in the face-to-face sense, and in the structural sense. The past leaves traces, even unconsciously on the future self. (In)authenticity therefore seems to be actions or decisions out of line with identity. This approach remains within the social constructionist tradition, despite an effort to marry it to autonomous agency.

'Authenticity', as used in this discourse, must be understood in relation to agency and becoming:

> To be authentic requires acting at one's own behest both at a feeling level and also at an intellectual, reflective one . . . authenticity has to be achieved and re-achieved. Each action changes the context and requires understanding if authenticity is to be retained. Simply acting on what you feel will not answer. Nor will acting on what you think. Both are required, and it is difficult to know which to emphasise at any stage. The re-introduction of the term 'autonomy' into the explanation may help to

58 Sandel (1998), p 19.
59 Reece (2003), ch 1.
60 Griffiths (1995).

> clarify the idea: autonomy comes from agency which takes place within a context of becoming.[61]

Griffiths argues that 'the individual can only exist through the various communities of which she is a member and, indeed, is continually in a process of construction by those communities'.[62] The communities include the wider society and its political categories, including gender. The structures of power in the society in which the self finds itself affect decisions and choices. Although these structures are themselves changing, giving rise to a diffusion of power and to plurality, nevertheless they impact on the subject, as do her past experiences. Thus a constrained subject is to strive for authenticity in her actions. If this is an account of moving towards freedom, including freedom from gendered societal expectations, it engenders hope, but if it is an idea of the 'right decision', it may mask coercion.

Identity can thus be presented as a matter of choice, but also as created by choices. The subject of post-liberal theory, 'embedded and constituted by context',[63] is the product of her relationships and experience. Although the context varies, both personal characteristics and a self develop. Yet the characteristics of the individual self are central to the achievement of self-realisation leading to autonomy and freedom. It is this achievement that leads to 'authenticity', where actions and decisions fit with one's sense of self. However, some subjects may be divided against themselves because of social experiences and the social conditions of their lives. How then can such subjects be autonomous or make authentic decisions? Difficulties in identifying an autonomous subject are evident in recent debates amongst theorists. Creating a gendered relational subject associated with some versions of feminism[64] minimises the role of agency and autonomy, but has not proved to be the way forward. The requirement of a constant effort in seeking authenticity is open to criticism as unattainable. The subject may never reach that desirable state. She may reproach herself in her reflexivity. And in the meantime, practical decisions once taken may not be revocable on re-assessment.

The traditional ideal of mother and child, instinct and the 'natural' are probably close to a communitarian version of the self. The mother–child relationship is described as 'innate'. For some feminists, this is as constructed a relationship as any other. From the child's perspective, it is one of those relationships from which personal autonomy is constructed. But is it an exaggeration to suggest that feminist theory has been reluctant to question this romantic ideal? For decades within feminist theory, notions of the natural have been scrutinised, and the commitment to a social constructionist account of mother–child relations has been sustained alongside the valorisation of those relations.[65] But the 'romantic/duty' ideal still has purchase.

The conventional reaction to a woman who 'gives away' her child is one of

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61 Griffiths (1995), p 179.
62 *Ibid*, p 93; see also Malik, Chapter 11 in this volume.
63 Reece (2003), p 14.
64 Gilligan (1982).
65 Badinter (1981).

distaste, even horror. Such an 'unwomanly' woman is more like the wicked stepmother of fairytales than a 'real woman'. Even those sympathetic to her plight may tell the woman that the decision to renounce motherhood after giving birth is a debilitating action. When it is said 'you will regret that later', or 'it is not natural', the message is that the self is divided against the self, that the proposed action is inauthentic. Yet, as the notion of authenticity is sought, it moves like mercury out of grasp.[66]

Part Three: The story of a refusing mother

This is the story told by the Court of Appeal[67] after the Family Division of the High Court had refused the applicant's plea that her birthgiving be confidential. The woman in question gave birth to a child, having concealed the pregnancy from her husband and two children. She gave the child into the care of the local authority after the birth and wanted no further contact. Her explanation was that she was raped after a night out with women friends; that her husband could not be the child's father, as he had undergone a vasectomy six years previously; and that no sexual intercourse had taken place with him at the relevant time.

The local authority applied for a care order prior to the placing of the child for adoption. As the woman wished to exclude her husband from knowledge of the proceedings, this became an issue before the High Court. The decision was that the husband should be joined to the proceedings. The rule, at common law and by statute, is that the husband of a woman who gives birth is presumed to be the father of the child.[68] There is space in the application of court rules on care proceedings for the exercise of discretion as to the parties to be joined. However, both the trial court and, subsequently, the Court of Appeal refused to exercise this discretion not to join the husband.[69] This case illustrates the gendered content given by courts to the status of marriage, but also the continuation of stereotypical assumptions about motherhood.

It is true that, had the court exercised discretion, this might be considered as tantamount to an acknowledgment that the husband was not the child's father. And in the instant case, the trial court was 'far from persuaded that the mother's account of all that [rape and relationship with the husband] was either truthful or accurate'. The judge said: 'I have no confidence that her purpose in giving

66 Reece (2003) argues that the search for authenticity, in following the right path in personal decisions, can be never-ending, and is an aspect of the therapeutic state. Eventually this search is coercive, as much so as the traditional rules it replaces.

67 *Re AB (Care Proceedings)* [2003] EWCA Civ 1842.

68 Children Act 1989, s 2. Since he was married to the mother, he has automatic parental responsibility. Nevertheless, the case suggests that a discretion does exist on the question of whether he is joined as a party.

69 In *Re J (Adoption: Contacting Father)*, Family Division 14/02/03, upon the woman's request, the father of a child placed for adoption was not contacted. In *Re M (Adoption: Rights of Natural Father)* [2001] 1 FLR 745, the father was not contacted as there was 'no established family life'. See also *Re M (Adoption: Rights of Natural Father)* [2001] FLJ 240. Where 'family life' is established the court will require that the father be contacted: *Re R (Adoption: Father's Involvement)* [2002] 1 FLR 302. In these cases the parties were unmarried.

evidence before me was to give an accurate, full and truthful account of the relevant events.'[70] The woman's statement of her fears of domestic violence was cursorily ignored, both at trial and on appeal.

The subject constructed in the Court of Appeal

There are several levels at which the court decisions above can be interrogated. On a technical level, the decisions of the social services and court authorities on how to proceed, and even on how to frame the questions, were not inevitable. The woman's placement of the infant for adoption could have been handled differently. However, it is the language used in the Court of Appeal and the image of the woman concerned, and of 'appropriate behaviour', that is of interest here.

Having disposed of the woman's plea for confidentiality in birthgiving, Thorpe LJ explained 'the consequences':

> There is a human tendency, which we all recognise, to escape the consequences of our errors and shames. The mental search for an escape route is necessarily egocentric and often inspired by fantasies. The appellant's success in giving birth to her daughter without the knowledge of her husband and her other children is surprising, leaving aside any comments on her responsibility and candour.[71]

The 'responsible subject', it seems, will face up to her errors and shames and be caring rather than egocentric. Yet, when we examine this in terms of the woman's story, it may be that her idea of responsibility is to place her child for adoption in confidence. The choices constructed in liberal discourse are linked to responsibility, but views of the content of responsibility may differ.[72] Such views and decisions following therefrom may be conditioned by context and identity. If some form of self-determination is allowed to subjects, then the notion of choice posits various possibilities for decision. It seems, however, that 'wrong' or inauthentic choices may open a space for state intervention.[73] The trouble with the notion of 'wrong' is that the next questions are 'wrong for whom?' and 'by what standards?'

The concealment of the care and adoption proceedings, as wished for by the birthgiver, 'was never a realistic conception', according to the appeal judge who supported this observation with a reference to 'the responsibilities of public authority, the rights of the child, the rights of the husband and the rights of her other children'.[74] There was no reference to the rights of the woman herself. She is depicted as a fantasist, who has failed to encounter reality and truth. The outcome was that the husband 'must be served with the proceedings'. Realistic or not, the

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70 As detailed in the appeal: *Re AB* [2003] EWCA Civ 1842.

71 *Re AB*, para 19.

72 McClain (1996).

73 Reece (2003). The writers of this chapter have debated this point. One argues that autonomy is not just about 'doing your own thing', and that people should be helped to make the right choices. The other argues that there may be a distinction between what seems to be 'right' at the time and what one sees as 'right' in later years. When under pressure, it is the present that has to be taken care of, not the future.

74 *Re AB*, para 19.

option of confidentiality, or 'concealment', is recognised in other jurisdictions of the European Union, a point which will be developed below.[75] In English law, however, the subject who has recently given birth has no right to ask for privacy.

The final note struck by the appeal judge is one of hope, or possibly fantasy:

> The local authority must provide professional support in breaking the news to the family and in managing its aftermath. I say 'must' because from the point of view of the child in the case everything turns on how that process is managed. Obviously a possibility is that the encounter with reality and truth will lead to an outcome very different from that which the mother suggested to the judge. A possible outcome is that this little girl may never need an adoptive placement and that is a possibility which needs to be explored as a matter of great urgency.[76]

In a sense, the court disposes of the issue by reference to the rights of others. We are not suggesting that the normative language of rights can always be validated in relation to anonymous birthgiving. As noted above, the rights of the child, husband and other children are relevant considerations and may have to be balanced against a right of privacy claimed by a woman. However, as one who has fulfilled the first part of birthing labour, in gestating and bringing a child safely forth, her preferences deserve more respect than that accorded by either court. Rights discourse often turns into discussions of priorities and proportionality, with 'a rhetorical reference to responsibility being set up in opposition to rights'.[77]

Giving birth is positioned in the United Kingdom as a public act. A new person enters the world, her arrival must be documented in a birth certificate, showing the name of the woman who gave birth, who is the legal mother, regardless of whether she is the genetic parent.[78] The only recourse of a birthgiver who does not want to be identified is to give birth in secret and to abandon the child, committing at least one crime.[79] Estimates of the frequency of such actions in England and Wales vary, but an educated guess is about one hundred a year.[80] Concealment of parturition from a husband or family does not necessarily involve concealment of identity from the child, who, if adopted will have access to her original birth certificate at the age of 18.[81] However, an abandoned child whose birthgiver disappears will not have the mother's name on the birth certificate. Most of the debate on abandonment has taken place around the question of the child's identity rights,[82] with little focus on the birthgiver, for the obvious reason that her identity is unknown. There remain a small number of European countries, however, where a different view prevails, as shown in a recent case before the European Court of Human Rights.[83]

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75 Scheiwe (2003), p 144.
76 Thorpe LJ in *Re AB*.
77 McClain (1996).
78 Registration of Births Act, 1953, s 2; Human Fertilisation and Embryology Act 1991, s 27.
79 Offences Against the Person Act 1861, s 27.
80 Panter-Brick and Smith (2000).
81 Adoption and Children Act 2002, s 79.
82 O'Donovan (2000a), pp 73–86.
83 *Odievre v France* (2004) EHRR 43, [2003] 1 FCR 621.

Giving birth anonymously

France, Luxembourg and Italy continue an ancient tradition whereby a woman can enter a hospital; give her name as X, indicating that she does not wish to reveal her identity; give birth; and leave her child in the hands of the authorities.[84] In *Odievre v France*,[85] the European Court of Human Rights, by a majority of ten to seven, upheld the provisions of the French Civil Code which enable anonymous birthing. Although the issue in that case is presented in terms of a right of access to information about one's origins, it can be represented as a case concerned with the autonomy of the birthgiver. It is estimated that a current 400,000 French persons were born to anonymous mothers.[86] Pressure groups exist to change the French legislation, but, whilst it has been modified, the woman's right has been maintained. The history of the French legislation has been documented elsewhere.[87] The focus here is on the construction of this right in the language of autonomy.

One approach to autonomy might argue that a woman who carries a child to full term and gives birth is not autonomous, for she is encumbered, confined, and analogous to the person portrayed in communitarian classics.[88] Even if this argument is acknowledged, it does not preclude the recovery of autonomy once confinement is over. In the French discourse of *accouchement sous X*, giving birth anonymously is positioned as a woman's right.[89] This position was upheld by the European Court of Human Rights, although the rationale for the decision was more in terms of welfare than autonomy.

In the judgment of the majority of the Court, various interests had to be weighed. Article 8 of the European Convention on Human Rights has been interpreted to cover identity rights. The interests of the applicant, now an adult, in knowing her origins and the identity of her biological mother are placed against the interests of the birthgiver, 'in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions'.[90] Further considerations are the general interest of protection of health of both child and birthgiver and the avoidance of abandonment of a child at birth. These interests are presented as the right to life under Article 2 of the Convention. The Court observed that the competing interests between applicant and her biological mother 'do not concern an adult and a child, but two adults, each endowed with her own free will'.[91] This is the only suggestion of autonomy. It is noteworthy that, in justifying the decision, the right to life is trump, with welfare and health as the best suit.

Criticisms of the judgment are based on the identity rights of the child,

84 O'Donovan (2000b), pp 68–85.
85 *Odievre v France* (2004) EHRR 43, [2003] 1 FCR 621.
86 Steiner (2003).
87 O'Donovan (2000b). See also paras 15 and 16 of the judgment in *Odievre v France*.
88 Etzioni (1988). See also analysis in Part One above.
89 O'Donovan (2002).
90 *Odievre v France*.
91 *Odievre v France*, para 44.

recognised by international conventions, and come largely from France.[92] Other jurisdictions, such as Belgium and Hungary, provide a way for mothers to give birth *discreetly*. Some German Lander have already instituted baby boxes, where babies can be left anonymously, and legislation allowing anonymous births is under active consideration.[93] The language of justification in these jurisdictions is of protection of the life and development of the child. Thus, despite a growing trend in giving birth *discreetly*, it is only in France, Italy and Luxembourg that the political justification for anonymous birthing is couched in terms of women's rights. Steiner comments on this: 'One has to place the French legislation relating to anonymous birth in the wider context of parenthood, a concept in French family law at the heart of which has always existed an adult-centred individualistic philosophy of freedom of choice.'[94] To a degree, the concept of parenthood in French law is a question of volition.

Examination of the French discourse surrounding *accouchement sous X* reveals a variety of arguments. Although the antiquity of the woman's right involved goes back to the French Revolution, utilitarian arguments based on welfare and vulnerability and the characteristics of the women concerned are also used. Against the child's identity rights, the right to life is positioned as trumps. Yet beneath these arguments lie legal and cultural attitudes to the mother–child dyad.

Could it be that becoming a mother in the new century requires a different form of self-abnegation from that of the past? This is the thesis that is advanced in popular literature from the United States:

> Central to the new momism, in fact, is the feminist insistence that women have choices, that they have autonomy. But here's where the distortion of feminism occurs. The only truly enlightened choice to make as a woman, the one that proves, first, that you are a 'real woman', and second that you are a decent worthy one, is to become a 'mom'. Thus the new momism is deeply contradictory. It both draws from and repudiates feminism.[95]

Conclusion

Arguments about the self seem to turn into arguments about liberalism, agency and autonomy. Although liberalism may stand accused of denying 'the centrality of relationships in constituting the self',[96] an emphasis on each person as deserving equal concern and being of equal worth is valuable. This includes regarding women as of worth in themselves, rather than as reproducers and care givers. The trick is said to be to hold respect for choices alongside a web of connections that have moulded identity.

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92 United Nations Convention on the Rights of the Child, Articles 7 and 8; European Convention on Human Rights, Article 8; Steiner (2003).

93 Scheiwe (2003). The situation in the United States, where anonymous abandonment has been legalised in a large number of states, is discussed in Magnusen (2001) and in Raum and Skaare (2000).

94 Steiner (2003), p 430.

95 Douglas and Michaels (2004).

96 Nedelsky (1989), p 221.

As feminists, we can fight against specific events, such as rape or abuse, and against structural conditions in the economy and social provisions that lead a woman to give up her child. But do we want to deny her the choice to do so? She may be making the best decision she can, for herself and her child. To stigmatise such a woman is wrong. Much of the post-liberal literature, with its emphasis on authenticity, suggests that choices are conditioned by socialisation, and that decisions can be inauthentic. We must be careful that such language does not hide coercion and a stereotypical idea of what it means to be a woman. Losing our analysis of the coercive nature of structures that limit lives has left feminist analysis at the mercy of the twin peaks of 'autonomy', as fleeting and only rarely exercised,[97] and socialisation, as restricting or even eliminating self-determination. Feminists must continue to fight for women's freedom to be and to become. In the meantime, recognition that decisions about motherhood are made within structures and constraints, both diffuse and direct, should not lead us to deny the ability to make them.

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97 *Ibid*, p 225.

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Chapter 7
The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood

Carol Smart

Introduction

In this chapter, I shall explore a number of themes which have come together to form the background to the re-ignition of a major gender struggle in the area of family life and family law. This struggle is ostensibly over children and, in particular, over how children's lives should be lived after the separation or divorce of their parents. However, I shall suggest that it is also a struggle to refashion and reposition fatherhood in the legal and cultural imaginary and that this has important implications for motherhood. My title, 'the ethic of justice strikes back', is, of course, a reference to the name of a relatively new fathers' rights group called Fathers4Justice, who have attracted a lot of media attention in the UK and who are influencing the direction of policy on matters of residence, contact and the relative standing of mothers and fathers in family law. The fact that they have claimed the term 'Justice' is significant, because English family law is not much concerned with justice as such and this group clearly identifies this term as one that can both reveal the injustices in the system, while also using a powerful political and moral rhetoric. But my title is about the ethic of justice and not simply the terminology of justice itself. I have chosen this formulation (in a semi-ironic fashion) because I wanted to think about whether ethical claims framed around justice still have a more powerful impact and a stronger moral imperative than claims based on care. So I became interested in the ways in which the moral hierarchy of claims within family law might be being reversed by the renewed call for justice. By this I mean that, in recent decades, English family law has been more concerned about the welfare of children, and also the importance of caring relationships, than it has been about justice or equality between spouses or adults. But clearly this can be reversed, and I began to speculate on whether the emergence of a group like Fathers4Justice could be the catalyst for just such a turnaround. However, the closer I looked at contemporary developments, the more I realised that, although the fathers' movement uses claims to justice, it also situates itself (rhetorically at least) within moral claims based on care. Now, I am not concerned with whether they *really* do employ an ethic of justice or an ethic of care in their practice; rather I am interested in how, in a popularised form, claims based both on justice and on care are being used and interwoven to create a specific narrative of fatherhood.

The themes I shall draw upon therefore include the political purchase of claims based on the ethic of justice versus the ethic of care; the difficulty of giving voice to the experience of motherhood when mothers are assumed already to be over-privileged; and the influence of new narratives of fatherhood, which are being articulated in the sphere of family law. None of these interrelated issues are new, but they come together at an important social and cultural moment to 'lock'

together to form the basis of a new inferential framework within which gender relations are being redefined. I shall first look briefly at the now-familiar debate about the ethic of justice and the ethic of care to indicate why it is important to revisit some of these issues. I shall then, even more briefly, refer to the silence surrounding motherhood in the current discursive struggle and the rise of narratives of fatherhood (particularly in form of justice and rights), before turning to the substance of the chapter, in which I seek to pursue and articulate these points through the analysis of a key case on paternity and parental responsibility and selected interview data.

The ethic of justice and the ethic of care – again

The first issue which needs some clarification is the relevance here of the framework of the ethic of justice and the ethic of care, some twenty years after the work of Carol Gilligan was first published and after much has been published which further refines and develops these ideas.[1] It might be thought that enough has been said on these ideas, and indeed this point might have some validity. But I am not going to take these concepts forward as if they can throw yet more light on issues of gender and care; rather I want to treat them as narrative devices, which have themselves become part of the social relations which need to be analysed. So, from being a framework of analysis, I am suggesting that it is the deployment of the language of an ethic of justice or an ethic of care that now needs analysis. We need, for example, to understand the way in which a changing cultural and political context can transform the idea of an ethic of care from a potentially progressive concept into a new form of governance over family life. The unintended elision between the original feminist emphasis on the (unrecognised) care work and attentiveness of women (mothers in particular) and the rise of New Labour with its emphasis on ethical self-governance[2] and its requirement that parents must act ethically and responsibly towards their children has created a wholly new set of consequences for the articulation of an ethic of care. No longer can the ethic of care be seen as a feminist corrective to the influence of the ethic of justice (to simplify the argument somewhat), when the selfless pursuit of care and caring has become a governmental expectation within family policy. Feminist work on the ethic of care was never intended to be normative; rather, it was seen as a way to introduce values already held by individuals, but which were ignored or denigrated, into the public and legal domain. However, the responsibility to care (and to care responsibly) has become a part of family policy, so that what was an attempt to introduce everyday values into policy has found itself co-existing alongside a top-down imposition of values which appear on the surface to be broadly similar. As Gillies argues, 'reasonable, rational, moral citizens, by New Labour definition, seek to do the best for their children, and according to policy doctrine, government should play an active role in guiding and supporting them to

1 Gilligan (1982); Sevenhuijsen (1998); Tronto (1993).
2 Gillies (2005).

do so'.[3] Issues about caring properly are therefore part of the mainstream political agenda, but this does not mean that the agenda is now a feminist one in the way that authors like Tronto or Sevenhuijsen would recognise it. Of course, this kind of distorted co-option is not a new phenomenon, but it does have the tendency to rob a potentially critical or radical set of concepts of their political purchase.

At a more commonplace level within family law, I am, of course, aware that there has been a long-term conflict between ideals of justice and the protection of vulnerable members of families. Thus the notion of welfare has challenged (throughout the twentieth century at least) the former strict doctrine of rights, ownership and entitlement in family matters. While this debate has been referred to in terms of rights *v* welfare,[4] it is now important to broaden this conceptualisation away from a dualistic model (in which rights and welfare struggle against one another), in order to include the dimension of care, which is not reducible to welfare. We need to understand that there is now a three-cornered debate ongoing between 'rights talk', 'welfare talk' and 'care talk'. I am emphasising these styles of narration rather than the actual people doing the talking because I want to make it clear that these structures are available to mothers or fathers or lawyers or mediators or the Children and Family Court Advisory and Support Service (CAFCASS) officers or even children. The extent to which any one of these actors may deploy these narratives will vary, but the point I wish to make is that it would be a mistake to assume, for example, that fathers speak only of rights and mothers only of care or welfare. Actors can deploy more than one of these narrative styles, or can slip and slide between them. However, the impact of the deployment will vary according to such factors as gender, status, generation and so on.

It is perhaps necessary to define what I mean by 'rights talk', 'welfare talk' and 'care talk' and to say a few words on why I think we need the third element, that is, 'care talk', rather than remaining with a rights *v* welfare formulation. By 'rights talk', I mean those claims which can be made in relation to the state or in relation to another individual for recognition of entitlement. To frame a demand in terms of rights is a way of seeking a legitimating response and follows fairly clear steps or procedures. 'Welfare talk', on the other hand, derives from the philanthropic concern for those who are more vulnerable or in need of protection – possibly against those who have rights but who do not exercise their responsibilities appropriately. Although welfare talk derives from philanthropic interventions, it has been taken up and used by individuals in disputes and is not the sole narrational prerogative of social workers, expert witnesses and others in formal or quasi-formal positions within family law. In other words, anyone may now deploy the terminology of 'the welfare of the child' in disputes in family law. Moreover, as is well established, what constitutes 'welfare' (or the best interests of the child) is a contested and constantly moving and redefinable notion.[5] 'Care talk' should not be confused with 'welfare talk'. Following Tronto,[6] we can see that 'care talk' may

3 Gillies (2005), p 77.
4 Murch (1980); James and Hay (1993).
5 Smart and Sevenhuijsen (1989); Diduck (2003).
6 Tronto (1993).

involve speech about practical aspects of caring for others (in this context, children) or talk about how much parents care about their children. 'Care talk' may have virtually no overlap with 'welfare talk', while it may even, in some contexts, be deployed to support 'rights talk'. So, for example, a father may base his rights claim (for example, to a 50:50 share of his child's time) on the basis that he asserts how much he cares for and about his child. By comparison, a mother may resist the claims deriving from the father's 'rights talk' and from the court's 'welfare talk' by asserting her care for and about the child, which gives her a prior and superior understanding of the situation.

Thus it is important to recognise that the argument which follows is attempting to draw particular feminist insights into the current struggle between motherhood and fatherhood, but I am not using the idea of an ethic of care uncritically, nor am I offering an essentialist argument, which suggests that only fathers use the register of 'rights talk' and only mothers engage in 'care talk'. Rather, there is a subtle interplay of all these forms and what may be occurring is a shift in the balance of the influence of these claims. I shall argue that if fathers made claims solely in terms of rights they would make little headway, but because their rights claims are based on care talk and because, at this particular cultural moment, fathers are redefined as central to children's welfare,[7] fathers' definitions of gender relations in families are in the ascendant.

The exclusion of motherhood from the debate

A new 'truth' appears to have been established in which all debates about children and residence after divorce or separation are premised on the assumption that courts favour mothers over fathers.[8] This 'injustice' is treated as self-evident[9] because, statistically, after divorce or separation, children are still far more likely to live with their mothers than with their fathers.[10] In the face of such an apparently incontrovertible 'truth', it is hard to compose a counter-argument which does not appear to be denying fathers their 'rights' or to be asserting that fathers cannot or should not care for their children. Mothers have thus become defined as an obstacle to justice for fathers and, to a lesser extent, as obstacles to their children's welfare if they (appear to) fail to recognise the importance of care provided by fathers.[11] Alternative arguments are defined as partial because of the highly polarised nature of the current debate. Moreover, they are seen as antithetical to fairness and ultimately as neglectful of the proper welfare of children. Themes which once

7 Advisory Board on Family Law (2002); Amato and Booth (1997); Morgan (1998).

8 See also Kaganas, Chapter 8 in this volume.

9 For example, the headline in *Guardian Unlimited*, 28 October 2004, read 'Stand up for your rights, minister tells fathers'. The minister was Lord Filkin, who has responsibility for reform of existing policies in family law. Also John Humphreys, on the BBC Radio 4 programme *Today*, 18 June 2004, stated that we all know that fathers are discriminated against.

10 Smart *et al* (2003).

11 Wallbank (1998).

spoke of the significance of the 'primary carer', for example,[12] or which construct the field of parenting and caring outside the framework of 'equality' have become virtually unspeakable, and certainly suspect within family law discourses. This is because the 'care talk' of mothers engaged in contact or residence disputes is treated either as unremarkable (it is mothers' duty to care, so this does not constitute a special claim), or as simply insignificant when compared with the combined 'rights talk' plus 'welfare talk' plus 'care talk' of the fathers' rights movement. This means that there is no way that motherhood can be legitimately positioned in the debate, notwithstanding the fact that mothers are still the primary carers of children. Moreover, because in the wider policy context 'responsible caring' has become a doctrine of good parenting, any behaviour which seems to deviate from this model is seen as requiring correction. It is mothers, therefore, who are seen to be in need of remedial intervention;[13] or, as Gillies has framed it, it is predominantly mothers who are now required to practise ethical self-governance.[14]

Narratives of fatherhood

When considering the significance of demands for equality and justice for fathers on divorce, it is important to recognise that groups such as Families Need Fathers or Fathers4Justice were forged out of a sense of loss of privilege and in competition with mothers, whom they defined as being too powerful in matters to do with children.[15] The focus on fatherhood at the time of divorce has pushed these groups into a very combative style, which seeks to harness much of the pain associated with separation into a focused anger[16] around claims to children.[17] But the movement is not simply about claiming equal rights over children on divorce or separation; it is also about making new kinds of claims to children and hence to fatherhood. This means that, although there is a specificity about their claims (for example, for 50:50 sharing of children), they are a catalyst for wider demands which are taking new forms (as discussed below), which in turn extend the scope of fatherhood and also, by definition, start to redefine motherhood. This suggests that the new articulation of the meaning of fatherhood, which is now given voice through the pursuit of legal claims, is more than the voicing of a pre-existing but silent claim, but is actually part of a new discursive construction of fatherhood.

The success of pressure groups like Fathers4Justice has been in their ability to combine narratives of 'rights talk' with both 'welfare talk' and 'care talk'. And because this has occurred in the context of a proclaimed war against the unfair

12 Smart and Sevenhuijsen (1989).

13 DfES (2005).

14 Gillies (2005).

15 Bainham (2003a; 2003b); Collier (1995).

16 In *McKenzie*, the *National Newsletter of Families Need Fathers*, Issue 58, December 2003, the front page headline read 'Get political' and featured a message from Bob Geldof. The final paragraph read: 'This law can and will be changed. Use your agony and dismay. Channel it to action. Let every humiliation and tear move you forward so that no child nor man may suffer again what you have. Good luck!'

17 Geldof (2003).

privileging of mothers, the effect of their narrative has been an erasure of narratives of motherhood. Arguably, these movements have not been progressive, in the sense of trying to transform and share the responsibilities of parenthood (by, for example, campaigning for the right of fathers to work part-time); rather, they have been constructed in opposition to motherhood.

It is important, however, not to read every claim made by fathers in the field of family law as if it is merely the mouthing of a political doctrine fashioned by the fathers' rights movement. Equally, it is important not to assume that any father who becomes a party to an action in court is motivated by the same political goals. Yet there may be some evidence to suggest that the populist narrative of groups like Fathers4Justice is entering into everyday usage, and that it may be framing the claims made by more and more fathers. It is to these more complex issues that I shall now turn. First I shall examine a particularly significant case which articulates the new claims that fatherhood now makes in the field of family law. I shall then turn to some empirical examples of how fathers are expressing their contemporary engagement with (apparently privileged) motherhood and will look at how, in everyday constructions, the new narratives of fatherhood are taking shape.

The discursive (re)construction of fatherhood in family law

A significant case

The case I wish to consider in detail is *Re R (a child)*.[18] This was a case in which a man sought to claim parental responsibility in relation to a child who was not genetically related to him. In many ways, this case is the exact antithesis of 'old' paternity suits, in which mothers who had given birth to illegitimate children went to court to try to secure a ruling that a specific man was the biological father, in order that he could be required to pay maintenance.[19] In these cases, men were typically denying paternity and seeking to avoid a long-term responsibility for a child. In *Re R (a child)*, however, the man knew he was not the biological father, yet he was seeking to take on the responsibilities (which could include financial responsibilities) of a child, notwithstanding the fact that he was not in a relationship with the mother any longer.

The elements of this case as reported were that a child (a girl) was born in 2000 as a consequence of IVF treatment involving egg removal and embryo replacement, and anonymously donated sperm. The couple was not married, but had been in a long-term relationship and had been seeking assisted conception since 1994 as a consequence of the man's infertility arising from testicular cancer. The couple underwent one course of treatment, which did not result in pregnancy, but by the time the woman returned for the second and final course the couple had split up. She did not inform the clinic of this change in her circumstances. The

18 [2003] 2 All ER 131.
19 Marsden (1969).

second treatment was successful, resulting in the birth of a daughter who was the genetic child of the birth mother, but not genetically related to her former partner. On the birth of the child, the man (known as B) applied to the court for a parental responsibility order and a contact order. At this stage, the mother was in a new cohabiting relationship.

B was granted (indirect) contact and parental responsibility by the lower court. Hedley J stated: 'Accordingly I declare that pursuant to s 28(3) of the 1990 Act he is the legal father of this child.'[20] The judge's reasoning was straightforward. He argued that the couple entered into a joint enterprise together and neither of them withdrew consent to the treatment. Although their circumstances changed, the hospital was not informed, and so the original consent form was still the legitimate legal context which governed the birth of the child. Hedley J also pointed out that not only had the man agreed to be the legal father of a child who would not be genetically related to him, but a sperm donor had been selected whose general physical characteristics would match those of the prospective legal father.[21] Not surprisingly, much emphasis was placed on the meaning of the words in the 1990 Human Fertilisation and Embryology Act, and Hedley J's reading of this legislation meant that he concluded that a core purpose was for assisted reproduction to be facilitated in the context where a child would have a (legal) father. He felt therefore that there was a clear, simple and certain approach, namely one that recognised that there had been an original agreement from which neither had withdrawn, and the man was willing to be the father, and the 'provision' of a father was one of the desired goals of the Act.

In his judgment, Hedley J stated: 'Of course in this case one must have considerable sympathy with B. He wishes to be R's father and has responsibly fulfilled his obligations under my original order.'[22] This quotation is important because it reveals the influence of a man's claim that he 'wishes to be the father'. Perhaps because judges and others are so used to single men wishing to avoid being fathers, the mere assertion of the desire places the man in a very strong position. Of course, the 'wish' alone did not sway the case, but it is treated as central. This man fulfils the New Labour dream of the responsible parent who wants to embrace his duties, even though he is not actually a biological parent at all. In Hedley's judgment, the desirability for a child to have a father, as stated in the legislation on human embryology, was also an important factor. Basically, the legislation said that children need fathers, and here was a man who wanted to be a father.

The mother appealed against the judgment by Hedley J that her former partner should be granted a parental responsibility order (although she did not appeal against the indirect contact order), and the appeal was heard by Hale LJJ and others, with Hale providing the leading judgment. This time, the mother was

20 *B and D v R* [2002] 2 FLR 843, p 846.

21 Presumably this was important because it could be speculated that the child might resemble the non-genetic father's physical characteristics to some degree and that this strengthened his claim to becoming the legal father.

22 *B and D v R* [2002] 2 FLR 843, p 845.

successful and B was not granted parental responsibility. Hale argued (in agreement with the QC acting for CAFCASS) that

> . . . s 28(3) is an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage. Conferring such relationships is a serious matter, involving as it does not only the relationship between father and child but also between the whole of the father's family and the child. The rule should only apply to those cases which clearly fall within the footprint of the statutory language.[23]

In this argument, Hale situated the parties in the context of their wider families. In other words, she did not just see it as a matter of simply establishing the man's relationship with the child, but she recognised all the other relationships which would be created by such a recognition of paternity. That is, she did not see this as an issue between two autonomous individuals, but as an issue of complex relationships involving several people. In this context, she went on to raise the question of whether the child would really benefit from the presence of her mother's former partner in her life. She notes that his presence in her life might actually harm the relationship between her mother and her new partner, so that the family in which she was being brought up might be destabilised. Finally, Hale returned to the issue of sympathy and whether it should guide legal judgment. She stated:

> . . . it is helpful to consider whether the conclusion reached in a case where one's sympathies lie in one direction would be equally attractive in a case where one's sympathies would lie the other way . . . Cases such as this, where a man wishes to assert paternity against a mother who wishes to deny it, are by no means uncommon. But had this mother been wishing to extract child support from this man, the court would have been slow to adopt a construction which would allow her to do so.[24]

Hale went on to argue that if the facts governing conception were unchanged, with the mother conceiving a child through some element of deception (as in this case), the courts would not have forced paternity onto the unsuspecting (genetically unrelated) former partner. Thus Hale proposed, by inference, that his claim to paternity should not be forced on the unwilling mother.

So, in the end, B was not declared to be the legal father of the child, but the final outcome is not necessarily the most significant issue here. This man can be seen to symbolise the new fatherhood. The fact of taking this case and arguing for a legal relationship to a child in circumstances which would have been virtually unimaginable even as recently as a decade ago provides a narrative form for the shape and substance of what good, dutiful fathers can now be like; moreover, the biological link is no longer seen as necessary to trigger this sense of responsibility. Hale located this case in the context of men's changing attitudes towards their responsibilities as fathers and pointed out that it was no longer unique that cases over paternity are now likely to be brought by men wanting to claim their legal status as fathers.[25] We cannot know, of course, whether more men want to be

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23 *Re R (a child)* [2003] 2 All ER 131, p 137. See also Jones, Chapter 5 in this volume.

24 *Re R (a child)* [2003] 2 All ER 131, p 139.

25 See also Sheldon (2001).

recognised as fathers than before, but, if Hale is right, it may be that men are articulating this desire in new ways, namely through the courts and through avenues created by new interpretations of legislation. What is more, they are able to call upon the combined impact of 'rights talk', 'welfare talk' and 'care talk'. In this case, B deployed all three. His rights were generated by the original contract with the clinic; the 'welfare of the child' element was met by the provision of a father as required by the legislation; and care was evidenced by his willingness to take responsibility and to undertake actual care of the child. Hale's rejection of his arguments was based on a disagreement over whether the long-term welfare of the child would be met and also a reluctance to concede that the rights generated by the contract with the clinic could defeat the rights of the mother to resist his claim to have a legal relationship with her biological child. She also shifted the framework of his claim away from one which envisages an autonomous legal subject (namely the father) attempting to create a legal relationship with another legal subject (namely the child) to one in which all the parties are located in their wider families and webs of relationships. Hale therefore redefined fatherhood in terms of a set of relationships, rather than a narrow dyadic relationship between father and child. Her judgment can be seen as an alternative formulation of fatherhood, which rejects the new narrative of the father as a lone, heroic figure. However, it is not clear at this stage whether Hale's more relational vision of fatherhood or the more heroic version will gain ascendancy in family law.

Everyday narratives

Reading cases can provide only a partial insight into the scope of these new narratives of fatherhood; in particular, Appeal Court cases are not a window onto everyday life. Although such cases involve 'real' people, they become stylised and symbolic, and the arguments put forward for both sides are carefully manufactured and crafted. Cases, taken over time, can of course indicate how influential new forms of narratives are becoming, and individual cases such as *Re R (a child)* can indicate significant shifts in the sorts of claims that are being put forward as social and legal contexts change. But it is important to have some knowledge of how fathers speak in person, in more ordinary circumstances, about the claims they are making around fatherhood. So I shall turn to interview data with fathers[26] to explore the kinds of account they put forward. The excerpts selected here are from fathers who have been involved in disputes over contact or residence and, although their circumstances are not identical to those of the putative father in *Re R*, these interviews capture some of the same issues. They reflect the use of 'rights talk', 'welfare talk' and 'care talk', but also demonstrate a larger repertoire of accounts which break out of this formulation and perhaps reveal that, notwithstanding the emergence of newer narratives of fatherhood, more traditional forms

26 These excerpts are from interviews carried out in 2003–4 as part of a Department for Constitutional Affairs funded project on contact and residence disputes. For a full account of the study, see Smart and May (2005). We interviewed 27 fathers and 34 mothers in three different regions in England. All had been involved in disputes over contact or residence that had gone to court.

still exist. These excerpts also show the overlap between individual stories and the more political rhetoric of the fathers' rights movement.

Rights talk

In everyday narratives of fatherhood, 'rights talk' took the form of suggesting that, in law, fathers had fewer rights than mothers, and that fathers were treated as less competent and as having less of a claim to their children.

> Michael: Well I think, well it would be nice if you knew that there was no differentiation on sex; that father and mother would be treated exactly the same. I mean there is no doubt that at the moment it is expected that the mother will get residence. And I think these days a lot more fathers have a lot more input with the kids than they used to do. And to be excluded as a second class citizen I think is that is the one thing that I would like to see change.

This claim for equal rights was a recurrent theme in our interviews with fathers; we found that even where fathers were personally content with the outcome of their legal dispute, they nonetheless felt that other men were being discriminated against. Injustice and inequality may, therefore, be said to have become a strong inferential framework in everyday perceptions. In this context, a mother's argument that she may have been the primary carer throughout a marriage (giving up work, or working part-time) is seen as irrelevant to a claim which sees equality solely in terms of treatment meted out at the point of a court order. This claim for equality is therefore a completely decontextualised one, but it has a powerful resonance in a legal culture which is uncomfortable with claims about discrimination and unequal treatment. So, although 'rights talk' alone is insufficient to shift family policy away from the paramountcy principle and its focus on children's welfare, it does shift a generalised sense of 'sympathy' away from motherhood towards fatherhood.

Welfare talk

'Welfare talk' is typically based on the argument that it is always in the interests of children's welfare that they should have extensive contact with their fathers, even to the point of shared residence. As noted above, this is in line with government policy and also reflects the leanings of the courts and CAFCASS.[27] Unlike 'rights talk', it is also a narrative which is much used by mothers and by all the professionals involved in contact and residence issues. In a way, it has become almost a mantra.

> Nadeem: I don't see those children as a trophy. I don't see those children as a kind of bargaining chip if you like. I just want to do what is best for them.[28]

It is no longer clear how to read claims about welfare, since they can be harnessed to almost any style of parenting and any kind of arrangement. However, it is

27 Bailey-Harris (2001); Cantwell *et al* (1999).

28 Contact father, contact dispute.

equally true that parents are obliged to frame their disputes in terms of which parent has the welfare of the child most closely at heart. It is therefore little more than a rhetorical device; yet if it is absent, then parents are seen as making illegitimate claims.

Care talk

As I have suggested above, it is 'care talk' that can be particularly significant in the emergent narratives of fatherhood. In *Re R (a child)*, the putative father wanted to care and, although he had no experience of so doing, the desire to do so was seen as noble. In cases of divorce, the situation appears to be different, because the fathers have lived with their children and have had the opportunity to care – yet may not have actually done so. This means that, even in post-divorce situations, fathers are frequently voicing a desire to care in the future, rather than basing their claims on an existing care relationship.

> Stuart: At the beginning I don't think I was a good father; I think I did everything I was meant to do but I was just going through the motions. It was just as I got to know this little person, I grew to love him and it just doubles up and doubles up and then it gets out of control and you cannot control how you feel about him.[29]

Care talk is therefore often based on a rights claim: that is to say, many fathers are claiming a right to start caring or to care in the future. But the assertion of the desire to become a responsible, caring parent is treated as a natural urge that springs from instinctual love; it is therefore almost unassailable.

I have argued that the combination of rights, welfare and care talk combine to create a new narrative of fatherhood which is becoming influential in family law. It is, perhaps, important at this stage to restate that my focus is on accounts that fathers give and that seem to have particular salience for policy development. I am not suggesting that fathers use these arguments cynically (although obviously some may); rather I am interested in the degree of uniformity to be found across a very diverse range of fathers (of different ethnic backgrounds, from different social classes, and from different regions). It is as if, in finding a voice, fathers have all found the same one. This might suggest the power of the fathers' movement to provide a mode of articulation for the problems that fathers now face. Indeed, we might even find parallels between the way in which fathers have come to identify as a solidaristic, self-identified, 'minority' group and the impact on women of the rise of new feminist discourses in the 1970s and 1980s. Fathers – as a group – have been gradually politicised in Britain by the growth of women's rights in marriage and on divorce; by men's campaigns against the Child Support Agency; and more recently through fathers' claims to children. Moreover, for those fathers who go to court and who find that they do not get the orders they feel are justified, there is a sense of anger which is also unifying.

But it may be possible to over-emphasise the unity of this voice or narrative. On closer inspection, it is possible to see that fathers speak through a number of

29 Contact father.

different registers, emphasising different issues and emotions. By this, I mean that, although the main themes may appear to be similar (eg equal rights, welfare and care), we need to be attentive to how these are spoken, where emotional inflexions lie and the context in which such utterances are made. So, it is necessary to be attentive to other themes to see how fathers are presenting their 'story' and to understand how they wish to be perceived. Day Sclater has identified a number of narratives to be found when people tell the story of their divorce, the most common being the 'victim narrative' and the 'survivor narrative'.[30] We found evidence of similar ways of making sense of their experiences among the fathers we interviewed. But in addition we found some constructions which had strong overtones of the themes rehearsed in the fathers' movement literature. There is not space to consider all the variations here, but perhaps two of the most relevant are what might be referred to as the 'patriarchal narrative' and the 'heroic narrative'.

The patriarchal narrative

> Richard: The simple truth was as the judge said in his own words 'It is normal for the children to live with their mother so that is where they will live.' Frankly I think that is a load of rubbish. It is not normal for the children to live with their mother. It is normal for the children to live with their father; that is the normal thing. The family follows the father. Where the father has work, the family goes with the father. That is normality. However, I lost the children who were forced to go back home.[31]

In this case, the father moved to work in another town and took his children with him, but he was made to return them to live with their mother. As he puts it, 'they were forced to go back'. Elsewhere in this father's account, he makes it clear that a mother who commits adultery should lose all her rights to the residence of the children. Not only did he argue that decisions should be made on the basis of matrimonial fault, but he argued that if they were, then women would not leave their marriages because they would not leave their children. In this account, there are very strong resonances of the debates on 'child custody' in the late nineteenth and early twentieth centuries, when it was argued that mothers should not be guardians of their legitimate children lest they felt able to leave their marriages.[32] Here it is possible to see that children are the lever that some men wish to utilise to keep women from straying. Although, in a parallel register, such fathers can claim that they have the welfare of their children at heart, the slippage into this patriarchal rhetoric suggests that welfare concerns may be secondary.

The heroic narrative

The heroic narrative has become particularly significant through the rhetoric of Bob Geldof;[33] it conjures up the image of the father taking on a hazardous battle against the odds in order to be able to play a part in his children's lives. Of course

30 Day Sclater (1999).
31 Contact father, residence dispute.
32 Brophy (1982).
33 Geldof (2003).

this image may accurately reflect the experience of some fathers who do face an uphill struggle and who have been unfairly excluded. But it is also a narrative that embraces the compulsive and manipulative father who refuses to give up his attempts to control the life of his former wife and children. The heroic narrative is therefore not spoken only by heroes.

> Philip: I kept asking through my solicitors for more time and tried to get her to see that I could not, that it was too upsetting for me and for the boy, but she would not move at all and in the end I kept going back to court and in the end I was deemed to be a vexatious litigant and they hit me with a section 91.14 which is a really draconian order; basically it means that you cannot make any more orders without the leave of a judge. And that has stayed in place until 2004. Every year I go to court asking to progress my case and he does not, and he knows what I think of him and he knows that I know his days are numbered. The man is a dinosaur.

Philip had taken his case to the Court of Appeal, had challenged the Court Welfare Officer and spent much of his time agitating against CAFCASS and family court judges. His experiences are validated by groups like Families Need Fathers, which publish such accounts in their newsletters and document similar examples of (apparent) injustice, providing a supportive context for this kind of anger. What is more, we also know that these accounts are given increasing credence in the media, which in turn provide a validation of experiences of injustice. It is clear that these 'heroic' fathers identify with a new political script and that this is empowering for them.

Conclusion

In this chapter, I have drawn together ideas about how moral claims to fatherhood are being framed into a new recognisable narrative. Claims to justice and rights are utilised to reposition (disadvantaged) fathers in relation to (over-privileged) mothers. Claims based on the welfare of the child are now routine, while claims based on care are a newer element. These draw both on assertions about fathers' love for their children and on the wider policy context in which it is held that fathers are necessary to their children's well-being and that all responsible parents should parent jointly. As Wallbank has argued, mothers who appear to resist these arguments are now castigated.[34]

At this point, however, it becomes necessary to recognise the limits of this analysis. It is possible to carry out an analysis of emergent narratives and the ways in which different 'elements' such as care or rights are put together to create a new vision of fatherhood. It is also possible to see how debates around specific issues like residence and contact are shifting in line with these evolving narratives. We can also see how some of these narratives become discursive – by this I mean they may become part of how fathers re-envision and reconceive themselves. Hence, we should not really be surprised that more and more fathers may position themselves and understand themselves in these new terms. But the problem arises when, in

34 Wallbank (1998).

tracing these developments, one's analysis fails to do justice to the experiences that fathers may be trying to articulate because some of the claims made by the fathers' movement and some individual fathers are so problematic (for children and for mothers). It is also a problem if it is assumed that the new claims that are emerging (especially claims to care) are treated as if they are cynical or politically motivated strategies designed solely to defeat motherhood.[35]

Above, I raised the issue of there being a range of registers through which the new narratives of fatherhood can be presented. I suggested that it is important to be attentive to the tone and emphasis of what is said, but it is also important to hear the quieter statements and not only those that are delivered at high decibels and in an intimidating fashion. Take for example this statement:

> Paul: Contact was stopped sometimes, it has never been as bad as some, as what some non-custodial parents have had, who I have known, some have not seen their children for nine months, over a year, some have not seen them again. It's never been that bad but contact at the moment is one weekend out of every two from the Friday night to the Sunday night, but we don't have any contact during school hours, which I find very difficult to feel involved with the children's growing process if you know what I mean. I know very few of their friends at school or their parents, so I feel slightly isolated from the children, but we do have an exceptionally good time when they do come, but you are not part of their general life.

This father is subscribing to some extent to the widely held view of vindictive residential mothers, although it is interesting that he does not gender his account; he sees it in terms of residential and contact parents, rather than in terms of mothers and fathers. In this way, he shifts the debate away from a simple gender war towards a recognition of the relative powerlessness of the contact parent (of either gender) compared with the residential parent. But he then goes on to capture, in very straightforward terms, what it means to be a parent who cannot share in the everyday life of their child or children. He depicts the sense of exclusion and the hurt that goes with this, but he is not constructing his story as a blame narrative; rather it is one of regret and sadness.

There is therefore a range of registers when it comes to fathers' voices, and it may be that, in listening, we need to become more attuned to these differences. The rise of the more aggressive fathers' rights movement may cloak some very problematic patriarchal and hostile attitudes towards women and children, and may even express a yearning for a golden age when women and children were dependent and powerless. But equally some voices may be seeking to express an emergent change in how fathers wish to relate to their children, and this may signal a shift in fatherhood which is not dependent upon a denigration of motherhood. It would, of course, be unwise to predict how the current struggles over motherhood and fatherhood will unfold. But it is interesting that fathers may be signalling a shift in fatherhood by using ethical claims which were developed in the context of trying to give a place to values associated with care. Returning to the theme originated by Gilligan, one might have predicted that fathers would

35 Fineman (1995).

seek to advance their case in relation to an ethic of justice, yet, although this is an important element in their narratives, I have argued that it is claims formulated within an ethic of care that seem to be particularly significant. Of course, whether one sees this as the cynical co-option of feminist ideas for the benefit of men,[36] or as a more complex interplay between shifting values, a recognition of the importance of care relationships and a discursive reconstruction of fatherhood will determine how these changes are viewed.

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Chapter 8
Domestic Violence, Men's Groups and the Equivalence Argument

Felicity Kaganas

Introduction

Feminism and feminist activists have made their mark when it comes to domestic violence. It is largely through feminist efforts that men's violence to women has become visible and that domestic violence is now seen as a serious social problem.[1] Since the days of the 1970s, when the Chiswick women's refuge was established, the issue has moved steadily up the legislative and political agendas; in the United Kingdom, women's organisations have played an important role in achieving this.[2] Changes have been introduced into the law with a view to increasing protection for victims and strengthening the criminal justice response to perpetrators. And, while it is true that changes to the law[3] do not necessarily lead to changes in material circumstances, it appears that, in this area, change has been more than merely cosmetic and that it extends beyond the law. Government policies have been formulated, which are directed at meeting the needs of victims, and services appear to be making some attempt to implement these policies.

The influence that feminist activism and research have had on the law, on policies and on debate concerning domestic violence has extended to definitions of domestic violence, explanations of it and recommendations on how to respond to it.[4] Perhaps most significantly, domestic violence is now seen predominantly as a problem of men's violence and as being linked to men's power and control over women.[5]

A number of men's groups, however, reject this view and are seeking to argue that it is women's violence against men that should be preoccupying the authorities. They maintain that men are subjected to domestic violence and that their suffering is being ignored. Men, they say, are the silent and silenced victims of violent women, of an indifferent state, of callous welfare agencies and of an unheeding criminal justice system. They complain about lack of resources, they call for better services and they insist that it is the punishment of women that should be the priority.

This chapter will provide a brief overview of the impact of feminist thought on policy, practice and the law. It will then turn to consider the claims of the men's groups in the light of the research evidence regarding the prevalence of male victims of domestic violence. And it will conclude that, while these groups are, to

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1 This recognition has occurred on an international scale. See Declaration on the Elimination of Violence Against Women 1993, Article 2; Council of Europe Committee of Ministers (2002), Appendix, para 1.

2 See Hearn (1998), pp 7–8. See also Mawby and Walklate (1994); Itzin (2000).

3 On feminist engagement with law, see Lewis *et al* (2001).

4 See Itzin (2000).

5 See Mullender and Morley (1994), p 7; Hearn (1998), p 11; Itzin (2000), p 360.

some extent, concerned about men who are abused,[6] they neither produce evidence to prove that abuse of men is a major social problem nor place protection and help high on their agendas. Their main interest lies elsewhere. Their primary aims, rather, are to reverse what they see as the gains that women have made and, most importantly, to store up ammunition in a gender war over shared parenting and paternal contact with children.

Feminism and domestic violence: Impact on law and policy

Since the late 1990s, a number of government initiatives have been devised to tackle domestic violence,[7] all of them focusing on women as victims; civil remedies in cases of domestic violence have been strengthened;[8] and there has been law reform[9] to address feminist criticisms of the way in which crimes involving violence against women[10] have been dealt with by the police and in the courts.

Moreover, it is not only the substantive law that has changed; official discourse and practice has also been affected by feminist research and activism. For instance, guidance issued to the police[11] and also Crown Prosecution Service policy[12] acknowledge that the majority of violent and repeated assaults between intimates are perpetrated by men on their female partners. In addition, both the guidance and the policy document refer to domination, abuse of power and control,[13] as well as to post-separation violence and to women's persisting fear. Even the judiciary, who have been criticised for not treating domestic violence sufficiently seriously,[14] may not be impervious. At least one judge[15] has recently said that there is a 'wider appreciation[16] of the profound and often long-term effects on women and children of serious and chronic domestic violence'.[17] And he himself accepts that domestic violence is a gendered problem and that it is linked to control and domination.[18]

Admittedly, it is still the case that women who are abused face enormous

6 It is not the intention here to draw definitive conclusions about the prevalence or otherwise of male victims of domestic violence. The intention is to point out that those groups contending that women's violence against men is a major problem do not produce evidence that it is.

7 See Cabinet Office and Home Office (1999); Home Office (2000a); Home Office (2003). See further Diduck and Kaganas (2006) ch 10.

8 See, for example, Family Law Act 1996, as amended, ss 1, 4 and 46(3A).

9 Domestic Violence, Crime and Victims Act 2004; Protection from Harassment Act 1997, ss 5A and 12; Youth Justice and Criminal Evidence Act 1999, s 17. See further Diduck and Kaganas (2006), ch 10.

10 Including rape: see Sentencing Advisory Panel (2002); *R v Millberry* [2003] 1 WLR 546. See also, on domestic violence in the context of domestic homicide, Law Commission (2003).

11 Home Office (2000b). See also Metropolitan Police (2001).

12 Crown Prosecution Service (2001).

13 See also Sentencing Advisory Panel (2004), para 9.

14 See, for a summary of criticisms, Diduck and Kaganas (2006), ch 10.

15 See also Mitchell (2004).

16 The judge's observations were, however, made in the context of contact disputes.

17 Hamilton (2003), p 5.

18 *Ibid*, p 7.

difficulties in getting help and protection from the law and agencies of the state.[19] But the momentum for change has been maintained and still more reforms are being contemplated. Complaints about lenient sentencing in domestic violence cases are being addressed.[20] Specialist domestic violence courts are being piloted.[21] Priority is being given to training for prosecutors and the judiciary.[22] Better information for victims is now regarded as necessary to reduce risks where a perpetrator is released.[23] Measures are being taken to ensure that child contact is safe.[24] More refuges are planned, as well as outreach and resettlement services.[25]

There can be no doubt that feminist research and the efforts of domestic violence activists have greatly contributed to these initiatives, and that feminism has had an important influence on the way that domestic violence has come to be understood. Newburn and Stanko have observed that 'certain forms of victimisation only become visible when they do, because of the campaigning work of representative groups'.[26] The role of modern moral entrepreneurs[27] in this context is one that has been fulfilled by domestic violence activists along with feminist and pro-feminist researchers. As a result of these people's efforts, domestic violence is now, to a large extent, perceived as a serious social problem and, in particular, as a problem of men and masculinity.

In order to achieve what they have, it was necessary for these 'entrepreneurs' to show that domestic violence affected large numbers of women in profound ways. This the campaigners were certainly able to do. For one thing, abused women themselves made the problem visible. They both articulated it and provided evidence of the needs it created.[28] As more and more women began to seek shelter in overcrowded refuges,[29] activists not only tried to deal with the practical challenges they faced, but also sought to raise public awareness.[30] And as the extent of the problem began to become apparent, public pressure mounted.[31]

Alongside the work of domestic violence activists, the work of researchers and scholars provided further evidence of the plight of abused women. Using in-depth interviews with women as well as analysis of official documents, they managed to 'fill out the statistics with human dimensions and make the social facts comprehensible'.[32]

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19 See Diduck and Kaganas (2006), ch 10. See also HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, 2004.
20 Sentencing Advisory Panel (2004).
21 Home Office (2003), p 28. See, on specialist courts, Cook *et al* (2004).
22 Home Office (2003), pp 26–7.
23 *Ibid*, p 28.
24 *Ibid*, pp 38–40.
25 *Ibid*, pp 42–4.
26 Newburn and Stanko (1994), p 155.
27 See Diduck and Kaganas (2006), ch 10.
28 See, for example, Dobash and Dobash (1992), pp 26 and 63.
29 *Ibid* (1992), pp 63–6.
30 See *ibid*, pp 27 and 118.
31 See, for example, *ibid*, pp 112–13.
32 Dobash and Dobash (2000), p 190.

Men as victims

The scale of the problem

Every now and then, and certainly in recent years, these feminist, and now official, accounts of domestic violence have been challenged. The challenge has come from family violence researchers and it has been enthusiastically taken up by groups campaigning for men. These groups seek to draw attention to men's victimisation and to construct domestic violence against men as a major social problem, comparable with the problem of woman abuse. At first blush, then, it might be thought that they are the new moral entrepreneurs engaged in revealing a hidden problem of violent women and victimised men, which is not being adequately addressed by the state.

However, these men's groups tend not to produce, or to produce very little, evidence of the extent of the problem. Some of them rely on American sources; there are websites that provide links to the publications of one American writer, Fontes, in particular.[33] But all of the United Kingdom groups rely primarily on the 1996 British Crime Survey in their literature and on their websites. That survey notoriously concluded that one in four women and one in six men suffer abuse, and it has had the effect that 'the message that "women do domestic violence too" now has official confirmation'.[34] Other findings reported in the survey,[35] indicating that women are more likely than men to suffer serious injury, to suffer post-separation violence, to be afraid and to lack the resources to escape, have not been permitted to mute this message.

The message, moreover, gains additional support from other research studies that show relatively high levels of abuse of men,[36] such as the Scottish Crime Survey[37] and the 2001 British Crime Survey.[38] There is also some support in the most recent British Crime Survey,[39] which reported that 67 per cent of victims of domestic violence were women and 33 per cent were men.[40]

Findings like these are difficult to reconcile with those reported by feminist

33 Fontes conducted research in the USA for his PhD and has published a number of pieces on the web on the topic of male victimisation. He claims to have dealt with abused men in his professional capacity, but restricts his evidence to an anecdote about one man and to the bald statement that he 'was surprised by the number of men who shared with [him] their stories of being physically assaulted by their female partners' (Fontes (1998), accessed 19 July 2004). However, he does rely on surveys by family violence researchers using the Conflict Tactics Scale (see Fontes (1998: 2003), 20ff, accessed 27 May 2004). See below for criticisms of this methodology. Fontes also relies on the rising arrest statistics for women, but does not explore the extent to which this might be the effect of arrest policies; in some areas in America the police have been known to arrest both parties routinely (Chesney-Lind, 2002).

34 Worrall (2002), p 55.

35 See Mirrlees-Black (1999), pp 37, 39, 61–2.

36 The research usually includes abuse by women and by other men, without providing separate figures for these categories.

37 See, for discussion, Gadd *et al* (2002).

38 Simmons *et al* (2002).

39 As was the case for the earlier British Crime Survey, these figures do not include sexual offences.

40 Dodd *et al* (2004), Table 5.01.

researchers, which show an overwhelming predominance of male-on-female violence. One explanation for the discrepancy, which is suggested by Dobash and Dobash, lies in the different research methods used.[41] They draw a distinction between 'family violence' research and 'violence against women' research.

Family violence researchers claim that intimate violence is 'symmetrical', with men and women equally likely to be perpetrators.[42] They have relied mainly on measuring discrete 'acts', such as a slap or a punch. In contrast, 'violence against women' researchers claim that intimate violence is 'asymmetrical', with men as the main perpetrators.[43] They argue that violence cannot be understood unless context is taken into account, and that purely act-based research fails to do this. When violence is considered in the context of a relationship, the evidence suggests that men's violence is often associated with a ' "constellation of abuse" that includes a variety of additional intimidating, aggressive and controlling acts'.[44] This same phenomenon is not apparent in reports about women's violence against male partners.[45] Women's violence is normally associated with self-defence or retaliation against men's violence.[46]

The research methods

It appears that when context is taken into account, and when searching interviews are part of the methodology, useful information about the prevalence and the meaning of violence can be garnered. Dobash and Dobash note that women's accounts 'reveal the nature of men's violence, the sources of conflict leading to attacks, their own emotions and reactions'.[47] Men's accounts in turn show them minimising their own violence and denying responsibility for their actions.[48] Hearn, for instance, quotes one man as saying: 'I wasn't violent . . . I picked her up twice and threw her against the wall . . . I've never struck a woman . . .'[49] Another said he had only been 'really' violent twice, although he admitted to slapping his victim frequently: 'I don't see slapping as being really violent.'[50]

Family violence research is not designed to reveal attitudes like these, and Dobash and Dobash[51] argue that family violence methodology gives rise to a skewed picture. The act-based approach relies on lists of items designed to measure conflict and abuse. The main instrument used is the Conflict Tactics Scale.[52]

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41 Dobash and Dobash (2004), p 324. See also Barnish (2004), para 2.1.
42 Dobash and Dobash (2004), p 326.
43 *Ibid*, p 327.
44 *Ibid*, p 328.
45 *Ibid*, p 328. But see *Dispatches*, shown on Channel 4 on 7 January 1998. See Dewar Research (1998).
46 Dobash and Dobash (2004), p 328.
47 Dobash and Dobash (2000), p 190.
48 *Ibid*, p 190.
49 *Ibid*, p 117. See also pp 111–12. See also Barnish (2004), para 4.3.
50 *Ibid*, p 115. See also Barnish (2004), para 4.3.
51 Dobash and Dobash (2004).
52 See further Dobash and Dobash (1992), ch 8.

This research tool does not distinguish between serious and trivial consequences. Nor can the meaning of acts and their outcome be discerned.[53] The Conflict Tactics Scale ignores motivation such as self-defence.[54] In addition, act-based measures often do not reveal frequency or seriousness.[55] The studies also conflate physical and sexual violence with behaviour such as shouting. And although Dobash and Dobash agree that non-violent acts of abuse are significant, they argue that it can be misleading not to separate them from physical violence.[56] Indeed, Dobash suggests that the 'conflation of physical attack with conflict, intimidation and threats . . . may be a primary source of the notion that men and women are equally likely to be "violent" to an intimate partner'.[57]

Examining the research

The Dobashes' contention that domestic violence is asymmetrical appears to be borne out by research examining more closely the studies showing high levels of male victimisation.

First, Gadd *et al*[58] designed a research project to assess the nature and extent of domestic violence against men in Scotland, in the light of the Scottish Crime Survey 2000. The study revealed that some male respondents included in the statistics as victims were not victims at all. In follow-up interviews, one in four denied having experienced domestic abuse.[59] Some indicated that they were referring to vandalism or theft around the home and/or acts of stranger or acquaintance violence when they reported victimisation.[60]

Of course, there were men who did say they had been abused, and there were some who reported life-threatening events. But many of the men described the abuse as 'rare and relatively inconsequential'.[61] About half of the men interviewed said they were also abusive, although some said this was retaliatory. Only a minority of the men perceived themselves as victims.[62]

Second, Walby and Allen[63] conducted a study examining responses from a questionnaire which was included in the 2001 British Crime Survey. They used a questionnaire based on the Conflict Tactics Scale,[64] but even so, their report[65] does not support the view that domestic violence is symmetrical.[66]

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53 See, for example, Dobash and Dobash (2004), p 329.
54 *Ibid*, p 329.
55 *Ibid*, p 330.
56 *Ibid*, p 331.
57 Dobash (2003), p 314.
58 Gadd *et al* (2002).
59 *Ibid*, p 1.
60 *Ibid*, p 3.
61 *Ibid*, p 3.
62 *Ibid*, p 3.
63 Walby and Allen (2004).
64 *Ibid*, p 15: albeit adapted to take account of criticism.
65 *Ibid*.
66 See, for example, *ibid*, p 37.

They[67] found that 'women are the overwhelming majority of the most heavily abused group'.[68] They report that it is largely women who 'suffer multiple attacks and are subject to more than one form of inter-personal violence'.[69] Of those respondents who had been subjected by their abuser to four or more incidents of domestic violence, 89 per cent were women.[70] Women also outnumbered men when it came to severe injury[71] and mental or emotional harm.[72] Ten times more women than men reported potentially life-threatening violence in the form of being choked or strangled.[73] The number of sexual assaults against women greatly exceeded those against men.[74] Women were more likely to be subjected to aggravated stalking,[75] by an 'intimate or former intimate'.[76] They were also more likely to suffer post-separation violence, notably in the context of child contact.[77]

Walby and Allen state that far more women then men reported being frightened of threats.[78] And fear, they say, is important 'in the understanding of domestic violence as a pattern of coercive control'.[79] Fontes, on the other hand, who contends that violence is symmetrical, argues that men are 'trained' to 'ignore or suppress fear',[80] or do not tell anyone about their plight since they feel ashamed.[81]

Walby and Allen's research findings do suggest that under-reporting is more common for men than for women,[82] although the picture changes when sexual assaults are included.[83] However, the reasons for under-reporting that Walby and Allen found to be prevalent do not bear out Fontes's theory. A more plausible explanation is that violence against women tended to be more serious.

First, there is a correlation between disclosure and the frequency and severity of the violence.[84] Because women suffer considerably more repeat violence and the violence against them is more frequently severe, it is not surprising that they disclose more. Second, contrary to the view that men are deterred by embarrassment at higher rates than women, a slightly larger proportion of women (7 per cent)

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67 See also Barnish (2004), para 2.3.
68 Walby and Allen (2004), p vii.
69 *Ibid*, p 11. See further pp 18, 29–31.
70 *Ibid*, p vii. See further pp 23 and 25.
71 *Ibid* p viii.
72 *Ibid*, p viii. See further pp 33–7. Domestic violence also appears to affect women's health but not men's (p 87).
73 *Ibid*, p 19.
74 *Ibid*, p vii. Of the women who were raped, 45 per cent were raped by a husband or partner and 9 per cent by a former husband or partner (p ix).
75 Cases where there was violence in addition to stalking.
76 Walby and Allen (2004), pp ix and 61.
77 *Ibid*, p ix.
78 *Ibid*, p 19.
79 *Ibid*, p 19.
80 See also Stanko and Hobdell (1993), pp 401 and 413; Goody (1997).
81 Fontes (1998: 2003), p 39.
82 Walby and Allen (2004), p 91. See also Barnish (2004), para 2.5.
83 See Walby and Allen (2004), p x and p 94. See also p 53.
84 *Ibid*, p 98.

than men (5 per cent) said they did not report because they did not want any further humiliation.[85] Indeed, it seems that the most common reason for not reporting among men is that the incident was not seen as serious: 68 per cent of men compared with 41 per cent of women said they did not disclose because they thought the incident was too trivial. 'No discernible percentage of men' and 13 per cent of women said that they feared more violence or that the situation would worsen if they reported to the police.[86]

It seems, then, that on closer scrutiny neither the British Crime Survey nor the Scottish Crime Survey proves gender symmetry. And the most recent research conducted by Dobash and Dobash[87] also demonstrates differences between the prevalence and consequences of violence committed by men and women.[88] Their definition of violence was framed so as to distinguish between physical abuse and what they see as less damaging emotional and financial abuse. Unlike the Conflict Tactics Scale, they distinguish serious and frequent violence from behaviour associated with conflict, such as shouting and acts such as a one-off push.

All the men in the study had been convicted of an offence involving violence against their partners. Just under half agreed that there had been no violence on the part of the woman. Men and women alike reported more male than female violence, and it appears that men perpetrate more of every kind of violent act and that they inflict more injuries.[89] However, men appeared to minimise their violence; a larger percentage of women than men reported their own violence[90] and women reported being subject to more severe and more frequent violence than their partners admitted to inflicting.[91] Nevertheless, men's violence was perceived by both men and women as 'serious' or 'very serious', while women's violence was seen as 'not serious' or 'slightly serious'.[92] Women often said they acted in self-defence or for 'self-protection'.[93] Only a few used serious or injurious violence, even though they had all been subjected to repeated physical violence from their partners. Also, women did not use the kind of controlling behaviour that characterises the 'constellation of abuse'.

The study also reveals significant differences in the effects of violence on men and women. Most women said they were usually 'frightened', and that they felt helpless, trapped and angry. In contrast, the men mostly said they were 'not bothered', or ridiculed the woman. The men found the violence inconsequential and rarely sought protection from the authorities.[94] Only a few felt 'victimized';[95] '[u]nlike the women, few of the men reacted to the violence in ways that suggested

85 *Ibid*, p x.
86 *Ibid*, p x. See further pp 101–2.
87 Dobash and Dobash (2004).
88 See *ibid*, pp 343–4.
89 *Ibid*, pp 336–7.
90 *Ibid*, p 336.
91 *Ibid*, p 338.
92 *Ibid*, p 338.
93 *Ibid*, p 314.
94 *Ibid*, p 343.
95 *Ibid*, p 340.

it had seriously affected their sense of well-being or the routines of their daily life'.[96]

The 'search for equivalence'

The available evidence does suggest that there are men who are subjected to violence at the hands of their partners or former partners. Nevertheless, it seems clear that it is primarily women who suffer as a result of domestic violence.

The question, then, is what lies behind the campaigns by men's groups seeking to establish women's violence against men as a serious social problem. These campaigns would be perfectly understandable if they were designed to draw attention to any unmet needs of male victims. Certainly, that is what groups such as Women's Aid have done and are continuing to do for women. But women's organisations have been faced with overwhelming evidence that large numbers of women are abused, that many suffer serious injuries and that women often have no means of escape.

Yet there is nothing to suggest that men's groups have been confronted with such palpable exigency. Their 'search for equivalence'[97] in relation to domestic violence appears to be driven primarily by other considerations. This seems to be a campaign based on anecdote, contested research evidence and 'rhetorical resort to notions of equality'.[98] One of the main grievances appears to be that things have changed and the pendulum has swung too far in favour of women.

A number of writers have suggested that what lies behind the search for equivalence is an attempt to obscure or divert attention from gender inequality. Feminist researchers have argued that domestic violence is a manifestation of power and control, and the demonstration of a sense of possessiveness and entitlement. To say that women are equally violent is a way of denying that inequality exists in society or that women are oppressed.

> Now what is striking is that when each discovery [of abuse] is made, and somehow made real in the world, the response has been: it happens to men too. If women are hurt, men are hurt. If women are raped, men are raped. If women are sexually harassed, men are sexually harassed. If women are battered, men are battered. Symmetry must be reasserted. Neutrality must be reclaimed. Equality must be re-established.[99]

The equivalence argument means that violence and abuse can again be legitimately analysed in terms other than those of gender inequality.[100] As Worrall, quoting MacKinnon,[101] says: ' "All of this 'men too' stuff means that people don't really believe" that women are victims of anything anymore.'[102]

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96 *Ibid*, p 341.
97 This term is borrowed from Forbes (1992).
98 Graycar (2000), para E.
99 MacKinnon (1987), p 170.
100 Worrall (2002), p 48.
101 MacKinnon (1987), p 171.
102 Worrall (2002), p 48.

Similarly Forbes[103] argues that the 'search for equivalence' legitimates a return to a gender-neutral analysis of abuse. It entails a return to explanations focusing on individual or family pathology and social pressures, rather than those focusing on inequality and the exercise of male power.[104] And the assertion of equivalence sends a message to professionals that they 'can get back to the business of understanding and treating (ungendered) deviant behaviour'.[105]

The equivalence argument may also serve another function: that of rendering men, and fathers in particular, safe. Collier observes that men's groups complain that men have become the new victims of divorce[106] and that the law has moved too far in favour of women.[107] Their vilification of women and mothers is in part an effort to defuse what has been seen as a 'crisis of paternal masculinity'.[108] Men's groups maintain that fathers are crucial to the healthy functioning of families[109] but that feminism has ousted the father.[110] In order to reinstate fathers at the centre of the family, it has been necessary to render fatherhood 'safe'.[111] For fathers to be equal partners in the family, it is important that they do not embody the 'threat of the undomesticated male'.[112] Familial masculinity, he says, has been constructed as something remote from drunkenness, violence and sexuality.[113]

Feminist research, in contrast, has of course focused on men's dangerousness and has sought to expose men's violence in the home. Research into violent men in the 1980s, say Mullender *et al*,[114] painted a picture of men who appeared to reflect little on their role as fathers. More recently, research has drawn links between violence against women and child abuse and has explored the effects on children of domestic violence.[115] This research, therefore, calls into question the fitness as parents of violent fathers.

The equivalence argument can be used to deflect such questions. To assert that women are as violent as men and as likely to abuse their children means that men cannot be singled out as a source of danger to their partners and children. The equivalence argument also enables violence to be seen in terms of mutual combat or simple conflict; something far less dangerous than sustained and overwhelming attacks on a terrified and demoralised victim. Men, therefore, are no worse than, and are as safe as, women. Accordingly, they should maintain a central role in the nuclear or bi-nuclear family.

Finally, the equivalence argument may have the effect of downgrading the

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103 (1992). She discusses the 'discovery' of the female sexual abuser.
104 *Ibid*, pp 107–8.
105 *Ibid*, p 109.
106 Collier (1999), p 126.
107 Collier (1995).
108 Collier (1999), p 127.
109 Collier (1995), p 202.
110 *Ibid*, p 177.
111 *Ibid*, p 202.
112 *Ibid*, p 202.
113 *Ibid*, p 212.
114 Mullender *et al* (2002), p 180.
115 See, for example, Mullender *et al* (2002).

importance attached to men's violence and, to some extent, substituting understanding for condemnation of it. As Rock says, becoming a victim carries rewards: '. . . sympathy, attention, being treated as blameless . . . exoneration, absolution . . . exemption from prosecution, mitigation of punishment.'[116]

An examination of the material produced by various men's groups and published on their websites suggests that they are using the equivalence argument in all of these ways. And this argument, along with others,[117] is being deployed in a bid to counter what they see as the ascendancy of feminism and the denigration and marginalisation of men.

The websites

The scale of the problem

This chapter will focus primarily on the four groups that seem to be most active in lobbying for, and offering support to, abused men.[118] The most recently established of these is the 'it does happen network', set up in September 2004. Its website states that it was first created to provide a 'safe haven for *men* to seek information, help, advice, support and a place to talk and share their experiences'.[119] It claims that within the first two weeks of its existence over 3,000 men had made contact. It is not clear, however, what counts as contact. Nor is it clear how many of these contacts were made by victims of domestic violence.

Another group, the Mankind Initiative, is an organisation concerned with fighting what it sees as discrimination against men and boys in fields such as education, employment, and 'family abuse'.[120] It has produced a document, 'The Mankind Family Abuse Campaign',[121] which sets out to draw attention to the abuse of men by women. Only seven case studies are provided, but the organisation is at pains to stress that these are 'just the tip of the iceberg'. However, even the studies that are documented are difficult to evaluate. Some are phrased in the form of simple assertions such as 'Mr B and his two children suffered years of abuse'; no indication is given of the form that the abuse took. In only three studies is any relevant detail given. One woman broke a window with a cricket bat. Another is described as abusive for denigrating her husband and throwing a table. Yet this woman is also said to have 'engineer[ed] arguments' so as to provoke 'a verbal

116 Rock (2002), p 14.

117 Some websites include material that is simply misogynous. See, for example, Manorama, Door 3: http://homepage.ntlworld.com.verismo/index.html (accessed 19 July 2004).

118 It is not claimed that any of these groups is representative of a significant segment of the British male population. However, these groups are significant in that they seek to influence law and policy and it is these groups that lobby politicians and policy makers, ostensibly on behalf of men as a constituency.

119 The 'it does happen network' at www.itdoeshappen.org/mambo/index.php?option=content&task=view&id=8&it (accessed 5 November 2004; emphasis in original).

120 See The Mankind Initiative at www.mankind.org.uk/charter.html (accessed 1 June 2004). It is also a strong proponent of the 'traditional family'.

121 See at www.mankind.org.uk/dv.html (accessed 26 November 2004).

reaction or better still a physical reaction'. She made 'false allegations' and was able to 'play the DV card' in order to get the man out of the house. A further case also involved 'provocation into an argument followed by a false accusation' resulting in cautions and, after a subsequent allegation, the man's arrest.

These descriptions, with their references to provocation, give some grounds for suspecting that at least some of the men may themselves have been violent. No information is given to substantiate the claim that the women's allegations were false and, in one case, violence by the man is conceded. In any event, the studies are insufficiently informative or numerous to make a convincing case that abuse of men is an unrecognised and serious social problem.

The Men's Aid website is no more enlightening. This organisation was originally established specifically to help male[122] victims of domestic violence as well as men engaged in contact disputes. Yet despite its central role in lobbying for, and offering support to, abused men, the organisation is somewhat vague on the question of the prevalence of male victims and the nature of their unmet needs. As regards the scale of the problem, there is no information on their newly reorganised website.[123] Until recently, however, their website included a report that, in 2002, they were receiving around 700 requests for help each month. But since changing their statistical recording methods, they were receiving fewer.[124] They say they 'support' fifty families 'with a comparable sized waiting list'.[125] It is somewhat surprising, therefore, to read in their response to the government consultation on domestic violence a reference to the 'many hundreds of thousands of men, women and children that we support'.[126]

This discrepancy in the figures is difficult to explain and the figures themselves are difficult to interpret. This is because Men's Aid, like other men's organisations, has been seeking to expand the definition of domestic violence to encompass what they see as a major problem: mothers who deny fathers contact with their children. There is no way of knowing whether the families they are 'supporting' are victims of women's violence, 'falsely' accused men or protagonists in contact disputes. On the basis of its own figures, it seems that most of Men's Aid's referrals concern contact disputes and that the number of men coming forward because of violence is relatively small. Gordon, writing the group's response to the government's consultation paper, says that '[m]ore than 60% of the men

122 Although the organisation states that it is gender neutral, Men's Aid has undergone organisational change and has completely rewritten its website since the bulk of the research for this paper was done. Parts of the website appeared to be still under construction at the time of writing, and by proof stage it contained almost no information about domestic violence on men. Gordon's paper (2003) had disappeared (see below).

123 www.crisisline.co.uk/mensaid/ (accessed 5 November 2004).

124 See at www.mensaid.org/history.htm (accessed 25 May 2004). Women constitute about 45 per cent of their contacts (Gordon (2003), p 5) and most of these are mothers, sisters and daughters of male victims of domestic violence. See www. mensaid.org/domestic-violence.htm (accessed 6 May 2004).

125 Gordon (2003), p 5.

126 *Ibid*, p 21. They also refer to 'the hundred thousand or so female perpetrators' (p 24).

that approach Men's Aid for assistance are being consistently abused by their ex-partners by deliberately refusing reasonable child contact'.[127]

There does appear to be some demand for refuge space. The 'it does happen network'[128] and Men's Aid report plans to provide 'refuge space for men and their children'.[129] The Mankind Initiative is also establishing a refuge and has set up helplines for men.[130] Yet, although men's groups complain of discrimination[131] and deplore the lack of refuges, it is not clear whether the kind of refuges that some are setting up are needed. Men's Aid, for example, says that 'most male victims would find communal refuge solutions inappropriate'.[132] In any event, none of the organisations shows the existence of a large number of men subjected to abuse that is comparable with that suffered by women.[133] Neither the numbers cited nor the broad definitions used[134] support the equivalence argument.

Nor is it apparent from the websites that all the groups prioritise domestic violence. With the possible exceptions of 'the it does happen network' and the Mankind Initiative, which are focusing on refuge provision and seeking to secure resources, they seem to be primarily concerned with agendas other than protection of victims of violence: they want to prevent men from being removed from the home; they want to place men at the centre of the family; and they want to gain control over women and their sexuality. A statement from Men's Aid neatly encapsulates all these themes:

> The state's willingness to accept a women's (*sic*) allegation as an evidential truth sufficient enough to have a man removed from his home, and have him separated from his children is unpardonable, a power arbitrarily afforded to women alone, which is often employed by female abusers to further abuse their partners. There is also evidence that many women 'let their hair down' after separation.[135]

For Families Need Fathers, as for some of the other groups, the greatest significance of the incidence of domestic violence evidently lies in its implications for contact disputes.[136] Families Need Fathers is clear about its concerns: '[T]here are attempts to create a stereotype of fathers being a danger to their children . . . If false stereotypes are believed, this will cause social policy and decisions about families to be based on prejudice.'[137] It goes on to say that: 'Secondly, our work is affected when accusations of domestic violence are raised in individual cases where residence and contact are being decided . . . Because of discriminatory and

127 *Ibid*, p 27.
128 www.itdoeshappen.org/mambo/ (accessed 5 November 2004).
129 www.crisisline.co.uk/mensaid/dv.htm (accessed 26 November 2004).
130 www.mankind.org.uk/dv.html (accessed 1 June 2004).
131 See, for example, Gordon (2003), p 12.
132 *Ibid*, p 55.
133 But see Dewar Research (1998). See also Richards (2004), para 5.1.7.
134 See, for example, The Mankind Initiative (2004), para 3.2, which refers to 'verbal' abuse, a term that could extend to 'nagging'.
135 Gordon (2003), p 14.
136 See Smart, Chapter 7 in this volume.
137 Families Need Fathers (undated), p 3.

prejudicial stereotypes many individual cases are not judged fairly and on their merits.'[138] It appears, therefore, that the main task that groups like Families Need Fathers have set themselves is to render the family man safe.

The strategies

Central to the strategy of rendering men safe and essential to the proper functioning of the family is the equivalence argument. It is also crucial to the re-assertion of equality and the move to introduce gender-neutral terminology into the debate. In addition, it is used to excuse and explain men's violence.

Equivalence, equality and gender neutrality

The 1996 British Crime Survey statistics[139] feature prominently on some of the websites, and all put forward the equivalence argument. Families Need Fathers is the only organisation to concede that there are differences in the severity of violence; the British Crime Survey, it says, 'suggests that men and women report broadly similar levels of domestic violence overall, though the majority of serious injuries are sustained by women'.[140] Nevertheless, it still invokes the notion of equivalence: 'There are perpetrators of violence of both sexes, but the propaganda is only about men.'[141] The statistics, it is alleged, are misleading, as men find it difficult to report because they are not taken seriously or they are treated as perpetrators. There are few services to which they can turn: 'These feelings of course affect the statistics, making female on male accusations a self-filling prophecy (*sic*).'[142] In reality, it is suggested, domestic violence is frequently characterised by mutual combat: confrontations are 'instigated by [the] mother or father or, as we suspect is commonly the case, by both'.[143]

Men's groups accordingly promote gender-neutral understandings of domestic violence. The 'it does happen network' proclaims that: 'It's not a Gender issue, it's a *human issue*!'[144] Families Need Fathers asserts that 'the gender assumptions in the proposals [relating to contact between children and violent parents] are both ill-founded and offensive'.[145] Similarly, The Mankind Initiative argues that the definition of abuse needs to be free of references to gender and 'free of gender politics'.[146] The language of equality is pressed into service to prove that women

138 *Ibid*, p 3.

139 The Justice for Fathers UK website links to a page entitled 'The Truth About Domestic Violence. Exposing Stanko's Big Lie of 1 in 4' (www.justiceinfamilylaw.co.uk/The%20big%20lie.htm). This webpage refers to the 1996 British Crime Survey to show equivalence (accessed 9 February 2004). See also The Mankind Initiative, at www.mankind.org.uk/charter.html.

140 Families Need Fathers (2001) (accessed 26 November 2004).

141 Families Need Fathers (undated), p 3.

142 *Ibid*, p 4.

143 *Ibid*, p 4.

144 The 'it does not happen network' at www.itdoeshappen.org/mambo/ (accessed 5 November 2004, emphasis in original).

145 Families Need Fathers (1999), p 3. See also Families Need Fathers (1999), p 9.

146 The Mankind Initiative at www.mankind.org.uk/dv.html (accessed 1 June 2004).

and men hold power in equal measure and that women must surely abuse it in the same way:[147]

> Domestic abuse is no longer about the subjugation of women by men; . . . it is time the government recognised that women are not inferior and have the same capacity for creation and destruction as men.[148]

This insistence on equality and gender neutrality is designed to shift the focus away from men's dangerousness.

Rendering men safe

One strategy aimed at downplaying the threat that some men present is to suggest that the problem of violence, and male violence in particular, is being exaggerated. Fathers4Justice, for example, suggest that domestic violence may be being used as a 'bogus argument and smokescreen to remove fathers from their children'.[149] Families Need Fathers, in turn, warns that children's relationships with their fathers 'should not be imperilled by excessive reactions to other problems'.[150] The numbers involved are not as great as they seem: 'The behaviour of a minority in each sex is generalised to other members of that sex.'[151] And in any event, violence, as long as it is not severe, is normal and is something that women engage in as well as men: 'Domestic violence is, if some definitions are used, common but gender neutral, or, if other definitions are used, male on female but affecting a small minority.'[152] The incidence of domestic murders, perpetrated predominantly by men, does not 'indicate any need for concerns about violence to be the drive contact arrangements (*sic*) in the hundreds of thousands of families who divide each year without violence'.[153] So, extreme violence is sufficiently rare to be discounted in formulating policy, and less extreme violence is common and gender neutral, and, therefore, presumably of little import. On the contrary, the state is 'over-protective':[154] 'In the past the shortfall in the concern about domestic violence put people at risk. There is now a risk of damage to adults and children because of an overshoot.'[155]

Another approach is to maintain that much of men's violence is apparent rather than real; women make false allegations. Mothers engaged in residence or contact disputes are particularly prone to lie. According to Men's Aid:

> In assisting victims of domestic violence and their families we have become aware that false allegations of domestic violence and child abuse are common practices by the abusers in order to gain a better standing, greater support and sympathy and

147 *Ibid* and Fontes (1998).
148 Gordon (2003), p 8.
149 Fathers4Justice (2003), p 11.
150 Families Need Fathers (undated), p 2.
151 *Ibid*, p 3. See also p 5.
152 *Ibid*, p 6.
153 *Ibid*, p 6.
154 *Ibid*, p 8.
155 *Ibid*, p 5.

> inevitably residence of any children – a position from which they can continue to abuse and control the victim.[156]

Families Need Fathers, in a similar vein,[157] observes:

> Allegations of domestic violence towards the mother are frequently made in response to a father's application for a Contact Order. Many children lose contact with their father as a result, irrespective of the truth, for such criminal allegations are rarely examined properly in family cases[158] . . . An unsubstantiated allegation of domestic violence is therefore a key weapon for those wishing to obstruct contact.[159]

It is suggested by Families Need Fathers that women are fuelled by bitterness and motivated to lie by the benefits to be gained by denying contact to a 'hated ex', by gaining control of housing and by the prospect of 'improved incomes'.[160] What is more, it is these women who are portrayed as dangerous, not the accused men. Along with the denial of violence comes an attempt to shift the focus of blame and to establish a new form of victimisation: 'There are also victims, adults and children, of false allegations.'[161]

Yet another strategy is to deny any risk to children, even when there is evidence of violence against women. Men's groups seek to draw a clear distinction between woman abuse and child abuse, indicating that the former is irrelevant to the latter. It is irrelevant because it is in the past[162] or because it does not affect the children. Men's Aid, for example, recommends that 'perpetrators found guilty of domestic violence [be] permitted child contact',[163] although they might have to be kept from direct contact with the victim.[164] They also suggest that children should not necessarily be placed with the victim of domestic violence rather than the perpetrator: 'Being a victim of domestic violence does not assume that person to be a better parent, as being a perpetrator does not automatically assume that individual would do anything to harm the children.'[165] Families Need Fathers is adamant in its defence of contact between fathers and children: '[W]e believe that the removal or restriction of a parent's contact with his/her child is a draconian measure which should only be taken when there is a *demonstrable* risk of *direct* harm to the child.'[166]

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156 The Men's Aid Philosophy, at www.crisisline.co.uk/mensaid/philosophy.htm (accessed 5 November 2004). Although this does not refer to the gender of the parties, it is clear that it is the resident parent, normally the mother, who is alleged to have lied.

157 See also Gordon (2003), p 27.

158 It is suggested that allegations of violence be removed altogether from the family courts and be confined to criminal courts with the criminal standard of proof (Families Need Fathers (1999), p 2).

159 Families Need Fathers (2001). See also Families Need Fathers (1999), p 2.

160 Families Need Fathers (undated), p 8.

161 *Ibid*, p 11. See also Mankind Initiative, 'Family Policy Document' at www.mankind. org.uk/fampol.htm (accessed 1 June 2004); Men's Aid 'Domestic Violence' at www.crisisline.co.uk/mensaid/dv.htm (accessed 5 November 2004).

162 Families Need Fathers (undated), p 9.

163 Gordon (2003), p 27.

164 *Ibid*, p 50.

165 See at www.crisisline.co.uk/mensaid/philosophy.htm (accessed 5 November 2004).

166 Families Need Fathers (2001) (emphasis added). See also Families Need Fathers (1999), p 3; Gordon (2003), p 30.

It seems that, with assertions like this, Families Need Fathers is attempting to counter the thinking that has since led to the amendment of the definition of 'harm' in the Children Act 1989 to include the harm caused by witnessing domestic violence. It is also seeking to break the links forged by feminist research between woman abuse and child abuse. Indeed, Families Need Fathers manages both to break this link and to impugn women's credibility at the same time:

> The claim is often made that there is 'an association' between violence inflicted on partners and violence and other ill-treatment inflicted on children . . . But how strong is the association is highly problematic. It is based primarily on reports of residents of women's refuges, highly likely to hate their ex's.[167]

And even if children are harmed by witnessing violence, women's bad behaviour also exposes children to risk. While Families Need Fathers concedes that equivalence in terms of severity of violence cannot be asserted, there is equivalence in relation to harm to children, irrespective of whether there is actual violence or there is family conflict:

> [T]here is no reason to think the all harm (*sic*) to children is when there is violence and none occurs when there is hostile and aggressive behaviour of other sorts. The pattern asserted below – that extreme behaviour is often more male on female than the other way around, but affects a small minority of families, but that other undesirable behaviours are more common but more equally balanced by gender, applies here too.[168]

Having downplayed the risks posed to children by violent men, Families Need Fathers goes on to stress the importance of fathers to their children's well-being. The harm that we should be concerned about is the harm to children and to society should children's links with fathers become attenuated:

> There would be nothing less than tragedies in individual cases if a child were effectively orphaned from a loved and loving father on false on insufficient (*sic*) grounds. It would cause general social damage if this happens on any significant scale, granted the impact on children and society.[169]

Rendering women abusive and dangerous

Men's groups have deployed the equivalence argument to render men, and fathers in particular, safe or no more dangerous than women. But they also seek to show the converse: that women are as dangerous, or can be more dangerous, than men. Men's Aid stresses the need 'to appreciate that being female does not lessen the seriousness of their domestic abuse perpetration, and being male does not reduce the seriousness of the abuse that is suffered'.[170] And it is not only men who are victimised, it is children too. Men's Aid, for example, states that it is seeking to

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167 Families Need Fathers (undated), p 5. Walby and Allen (2004, p ix) report that in 2 per cent of cases of post-separation contact involving violent men there had been threats to the children and in 1 per cent of cases, the perpetrator hurt the children.

168 Families Need Fathers (undated), p 5.

169 *Ibid*, p 5.

170 Gordon (2003), p 8.

alleviate the plight of 'men, who have so far been left, with their children ... to suffer often chronic domestic violence at the hands of their partners and ex-partners'.[171]

The aim of Men's Aid and similar organisations appears to be to show that mothers cannot always be trusted to protect their children or to safeguard their best interests. More specifically, their aim is to discredit mothers who oppose contact. In order to achieve this, men's groups have sought to construct new categories of harm. Denial of contact is in itself classified as harmful; mothers who resist contact are defined as perpetrators of 'child abuse' and of 'domestic violence', terms which condemn them out of hand. Fathers and children are portrayed as victims, their suffering at the hands of the same oppressor uniting them on the same side in the contact battle.

Families Need Fathers, for example, maintain that the 'most common form of domestic violence amongst separating couples may be the deliberate thwarting of contact by the controlling parent'[172] and say that mothers who engage in such behaviour are emotionally abusive.[173] Men's Aid too refers to abuse and domestic violence: 'One in six men are victims of domestic violence and many more men are abused through being unreasonably refused child contact, itself an act of domestic violence.'[174]

This use of language seeks to expand the definition of domestic violence beyond its currently accepted usage.[175] However, Men's Aid has attempted to bring it within the parameters of established usage. The somewhat disingenuous explanation entails subverting the notion of the 'constellation of abuse', which includes social isolation as an element of abusive behaviour, in order to support the contact argument:

> We ... accept the national definition of domestic violence which states that being prevented access to 'your family and friends' is an act of domestic violence and, therefore, being refused reasonable contact with your child after separation and divorce is an act of domestic violence.[176]

Denial of contact is also designated as child abuse. According to Justice for Fathers UK, for instance, women emotionally abuse their children 'by using them as pawns'.[177] In addition, mothers are dangerous because they physically abuse their children or expose them to abuse from their new sexual partners.

Women in general are considered to be irresponsible and out of control.

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171 *Ibid*, p 5.

172 Families Need Fathers (1999), p 11.

173 *Ibid*, p 2. See also p 10.

174 Men's Aid at www.mensaid.org/general-info.htm (accessed 25 May 2004).

175 Of course, women's groups have also used and expanded the definition of domestic violence in strategic ways.

176 www.mensaid.org/about-us.htm (accessed 6 May 2004).

177 www.justiceinfamilylaw.co.uk (accessed 9 February 2004). See also the Mankind Charter at www.mankind.org.uk/charter.html (accessed 1 June 2004). The courts too, in a limited range of cases, have held children to have been emotionally abused by mothers who have made unfounded allegations of sexual abuse. See *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024 (Fam), [2003] 2 FLR 636; *V v V (Contact: Implacable Hostility)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851.

The Mankind Initiative, for example, complains that: 'Women are searching for the perfect man who does not exist – a man who will permit them to indulge in excessive behaviour or enable them to change the rules as and when it suits.'[178] This irresponsibility, combined with uncontrolled sexuality, presents a major risk to children, a risk that can only be countered by the presence of the father:

> The children's likelihood of being abused by their 'single' mothers, already the most likely person to abuse the children, is increased, and the woman's probability of meeting strangers is increased which in turn further increases the woman's and child's likelihood of being abused, particularly true as the main protector of the family is absent.[179]

Indeed, many allegations of domestic violence are falsely made, it is said, in order to eject the 'true victim' from the home and to allow the 'true perpetrator' to move in with a new partner, so perpetuating the cycle of abuse.[180] And the greatest danger to children is presented by the mothers' new partners.[181] Some men, it seems, are violent but these are sexual men, not family men and 'natural' fathers.

Even in the absence of a new partner, women cannot be trusted. Families Need Fathers points out that 'NSPCC[182] research . . . showed that the people most likely to be violent to children are their mothers'.[183] This can be explained, they say, by the fact that mothers 'have most involvement with children and therefore more stress'.[184] Lone mothers may be unable to cope and so abuse their children:

> A lot of . . . abuse is when the children and the abusing parent are on their own and without support. There is no-one to stop them hurting their children and help them control themselves . . . Shared parenting can reduce this stress by sharing the work and the tensions.[185]

The involvement of 'natural parents', namely fathers, prevents ill treatment of children.[186]

Fathers, then, are cast as the protectors of children against the violence of mothers. In this way, men are rendered safe. They are also the victims, along with their children, of dangerous women. Men, and fathers in particular, are distanced from violence in the vast majority of cases. Moreover, where they are violent, this is often understandable and the fault of the women concerned and of an unfair legal system.

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178 The Mankind Initiative 'Denigration' at www.mankind.org.uk/denigrat.html (accessed 9 February 2004).
179 Gordon (2003), p 16.
180 *Ibid*, p 55.
181 See Families Need Fathers (undated), p 3. See also Families Need Fathers (1999).
182 National Society for the Prevention of Cruelty to Children.
183 Families Need Fathers (undated), p 3. See also Sacks (undated); Fathers4Justice (2003), p 8.
184 Families Need Fathers (undated), p 3. See also Families Need Fathers (1999).
185 Families Need Fathers (undated), p 7.
186 *Ibid*, p 7.

Excusing and explaining men's violence

If men are violent, this is because they are hard done by; they are provoked:[187]

> The immediate aftermath of parental separation seems to be a flash point for violence. A possible factor in this is that the mother so often seizes the children and the father risks, or feels he risks, loss not only of the central adult relationship of his life but the children and much else.[188]

The solution, therefore, is to ensure that there is a 'clear understanding' that the relationships between both parents and their children will be preserved.[189] Even when domestic violence occurs during contact, this is the result of provocation. Men who were not previously abusive 'suddenly find that their children's mothers can continue to control them through dictating child contact'. There should therefore be 'equal contact, except in cases where criminal evidence shows that a parent is violent and a clear and present danger of causing harm to the children'.[190] Otherwise women will continue to 'control and abuse' men.

The notion of provocation and the shifting of blame are discernible also in the assertion that perpetrator programmes should be 'less focused on blame and undermining the position of the perpetrators . . . but focus more on appreciated, appropriate behaviour and how to respond appropriately to inappropriate behaviour'.[191] 'Therefore it should be emphasised that using violence as a reaction to domestic violence is not appropriate and constitutes a criminal offence . . . This would require that the police actually do their job properly and arrest perpetrators of domestic violence, even if they are women.'[192]

The law is unfair and biased against men

The call to punish men less and to punish women more recurs frequently throughout these websites and is tied up with allegations of discrimination against men. Men are unfairly stereotyped and unjustly accused of violence, while women can behave badly with impunity. To remedy this injustice, women's transgressions should be dealt with severely. False allegations of domestic violence 'should be properly punished to the full extent of the law'.[193] Women should also be punished if they do not allow child contact.[194] More generally, the law should 'recognise the cruelty of persistent or unrelenting verbal and emotional abuse which women can use . . . against men, and which may provoke a violent reaction.'[195]

Families Need Fathers reports that female-on-male violence is not taken

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187 According to Fontes, 'emotional abuse', in the form of 'yelling', constitutes provocation that can lead to physical violence by the man (Fontes (1998: 2003), p 31).
188 Families Need Fathers (undated), p 10.
189 *Ibid*, p 10.
190 Gordon (2003), p 16.
191 *Ibid*, p 24.
192 *Ibid*, p 25.
193 *Ibid*, p 26. See also *ibid* p 27.
194 *Ibid*, p 38.
195 The Mankind Initiative (2004), para 3.1.

seriously and that male victims are treated as perpetrators:[196] '[W]hatever the exchanges and events that might have preceded allegations of violence, it is the male of the couple that takes the rap.'[197] Gordon[198] takes a similar view:

> Men feel that the criminal justice system is heavily stacked against them. If they hit their partner they are punished, if their partner hits them, then little or nothing is done. All too often this means that the man has to defend himself, if that defence involves any level of violence, then he is the perpetrator.[199]

The Domestic Violence, Crime and Victims Bill (now Act) was seen as further evidence of unfair discrimination: '[T]hey [the government] are now forcing the criminal courts to become as corrupt as the family courts.'[200] Certainly, there is a perception that men are being disadvantaged. A 'Comment' from the *Daily Mail* linked to the Fathers4Justice website and reproduced on the Justice in Family Law site says of the Bill:

> From a government that has shown its contempt for marriage comes another assault on men, whose rights under the law are being systematically dismantled . . . [T]he British political establishment, including the judiciary, are declaring war on half the human race, creating a new official received wisdom that men are programmed to be violent towards women and children while women are blameless. In fact all the evidence suggests that women are as violent towards men as men are towards women.[201]

The impact of feminism

Not only are men discriminated against, according to these groups; they are demonised as a consequence of feminist influence: 'Violent women are treated more leniently than violent men . . . This is a result of the demonisation of men by radical feminists.'[202] Men and their interests are also marginalised: 'Giving women

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196 See also Families Need Fathers (1999), p 1.

197 Families Need Fathers (undated), p 4.

198 See also Gordon (2003), p 10.

199 *Ibid*, p 26.

200 www.justiceinfamilylaw.co.uk (accessed 26 November 2004). The family law system has come under sustained attack from men's groups. Bob Geldof, for example, in the context of contact with children, has posted a message on the Families Need Fathers website alleging that 'family law remains flagrantly biased, prejudicial and discriminatory', and that 'men and our children are forced through this disgusting and baleful construct, cruelly and surely ironically called "Family" law' (Geldof, undated). Fathers4Justice say in their manifesto: 'We *challenge the bias inherent in the family law system*' and 'advocate the dismantling of every element of the existing grotesque, cruel, unjust and unaccountable Family Law Industry and the *removal of all existing family court judges*' and seek to '*expose miscarriages of justice*' (emphasis in original), at http://homepage.ntlworld.com/f4jswansea/manifesto.htm (accessed 9 February 2004). The UK Men's Movement (UKMM) alleges that 'feminists have almost entirely succeeded in destroying men's rights in marriage and the family'. And the law, it says, gives rise to 'persecution of honest and decent men, and massive privileges for women' (UKMM, undated a). Fathers4Justice claims there is a 'war on Fatherhood' with 'mass fatherlessness' leading to social decay (Fathers4Justice (2003), p 12). For an exceptionally intemperate attack, see at www.justiceinfamilylaw.co.uk (accessed 26 November 2004).

201 *Daily Mail* (2003) at www.justiceinfamilyaw.co.uk (accessed 26 November 2004).

202 The Mankind Initiative (2004), para 3.8. See also UKMM (undated b); www.mankind.org.uk/denigrat.html (accessed 9 February 2004).

equal value to their voice is one thing, making their voice *more* valuable than the wisdom and voice of men is quite another. Today a growing number of feminists have devalued the voice of men.'[203] Moreover, '[g]ender feminists have become a formable (*sic*) obstacle in raising the real needs of the male victim'.[204]

Feminists are said to have a disproportionate and dangerous level of influence over academics, policy makers and law makers. The Mankind Initiative deplores what it regards as the 'corruption' of research by radical feminists and by feminist ideology.[205] It argues that the Law Commission is unduly influenced by 'feminist ideology that has no regard for the rights of men'[206] and it rails against discrimination:

> After decades of feminist ascendancy in society, men in generally (*sic*) experience sex discrimination in many ways . . . In the recent past, the Law Commission itself has been highly responsive to the radical feminist activists, who have begun to secure privileges for women (in respect of sexual and domestic violence, and family law) at the expense of men's basic human rights.[207]

'The problem with the "domestic violence movement" ', says Fontes,[208] 'is that it has become a feminist political movement'. 'Gender politics' ensures that all the available funding goes to women victims[209] at the expense of men. UKMM,[210] in turn, proclaims that:

> There can be no greater folly or degeneracy than to provide further support, via Ministers for Women etc. to the most privileged group in our society – women – while denying the disadvantaged, suppressed and persecuted group – men – any representation at all . . . The question of whether 'feminism has gone too far' is perhaps less important than 'why feminism was established at all'. Feminism is an aberration, like Nazism and communism – a blight on our society.[211]

The zero sum game in which many of these campaigners and groups see themselves as involved extends to embrace money, power and the fate of the traditional family.[212] As one piece appearing on the website of the Equal Justice Foundation, an American website, states:

> [T]he feminist matriarchy has had considerable negative influence on domestic tranquillity in the form of Draconian Big Sister laws that . . . are destroying families . . . Are we the only ones who regard the present unsubstantiated, radical social engineering based on the destruction of the patriarchy as extremely dangerous?[213]

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203 Fontes (1998: 2003), p 42 (emphasis in original).
204 *Ibid*, p 46.
205 The Mankind Initiative (2004), paras 5.1–2.
206 *Ibid*, para 6.10.
207 *Ibid*, p 1.
208 Fontes (1998: 2003), p 49.
209 *Ibid*, p 47. See also Gordon (2003), p 9.
210 UK Men's Movement.
211 UKMM (2001), Conclusions (accessed 1 June 2004).
212 See also Collier (1999), p 127.
213 Corry (2002).

Conclusion

In the context of domestic violence, the search for equivalence is intended to divert attention from male power and to seek acceptance for a construction of women as aggressive, controlling and out of control. It casts doubt on the veracity of women's allegations and seeks to shift concern from men's violence to women's mendacity; it is the latter, rather than the former, that warrants the attention of the law. It minimises the extent and severity of men's abuse of women, suggesting that it is something that has been exaggerated or that men are unfairly blamed for violence they do not commit. In addition, and most importantly, it is an attempt to make men appear safe; they are no more dangerous than women and perhaps less so. To deny men contact with their children is therefore an irrational over-reaction and unjustified.

The main concern of most men's groups is not to gain victim status for abused men in an effort to secure help and resources for them. What seems central to their campaign is the drive to establish perpetrator status for women, so that they cannot be believed or trusted to make decisions regarding their children or to keep them safe. Within this account, fathers are central to their children's well-being; it is only they who can provide some protection from mothers' cruelty or at least fecklessness and the consequences of their undiscriminating sexual appetites. With this strategy, men's groups seek to re-assert the place of the father in the nuclear or bi-nuclear family, as well as to counter the 'rampant' feminism that is undermining men's rights and that must be brought under control.

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Chapter 9
Feminist Perspectives on Youth Justice

Christine Piper

Introduction

Gender issues are not high on the youth justice policy agenda in the UK. 'Boys' and 'girls' or 'young men' and 'young women' rarely appear in practice and policy documents, and yet the Home Office is concerned about gender differences in the causes of offending.[1] This paradox runs throughout responses to children who offend. On the one hand, the increasing use of 'youth' as a descriptor and policy focus renders girls and young women invisible in a criminal justice system in which, it is true, the vast majority of those processed and punished are male. On the other hand, there is an increased visibility of what has been referred to in a Canadian article as 'female youth',[2] notably in media and policy concern at the perceived proliferation of 'girl gangs' and the rise in convictions of girls.

The existence of such apparent inconsistencies has often been the spur to feminist analyses and this chapter is no exception. It will, consequently, examine the ways in which minors who offend are described in policy documents, the media and practice guidance, and will also assess what we know about the offending of girls and young women in comparison with their male counterparts. In addition, it will seek to establish whether feminist analyses of gender issues in the sentencing and punishment of adult women apply also to girls and young women.

However, this book is bringing together feminist perspectives on family law and its effects, not just on family life but also on social and legal meanings ascribed to 'good' families and 'good' mothers. Law's construction or endorsement of values has given it a crucial role in the 'remoralisation' agenda which underpinned social, criminal justice and family policy in the 1990s and continues as a theme of New Labour policy.[3] The desire to support and also discipline the family as a means of strengthening the moral basis for an ordered society has encouraged an approach to offending children and their families which draws on older ideas about the child's need for discipline.[4] So, current policy holds families responsible for preventing their children offending or re-offending, at the same time as it deems children to be responsible from an early age for their own wrongdoing.

One implication of this development is that there is a potential gender issue in the extent to which mothers and fathers are held 'culpable' for their child's behaviour or pressured to be involved in informal justice, treatment or punishment. Policy and practice in relation to parenting orders, parental fines and parental involvement in restorative conferences (when their child receives a warning from

1 See Farrington and Painter (2004).
2 Boyle *et al* (2002).
3 See Day Sclater and Piper (2000).
4 See Fortin (2003), p 556.

the police),[5] and referral order meetings with the youth justice panel,[6] are of particular concern.

Gender implications for parents?

Research on the effects of policies directed at parents in the educational and child protection systems suggests mothers are disproportionately burdened and blamed by the encouragement of 'parental' involvement and responsibility in these systems.[7] The policy focus on parental responsibility and the involvement of parents in the youth justice system has the same potential to discriminate against female carers.

Parenting orders, introduced by ss 8–11 of the Crime and Disorder Act 1998, are triggered if the child or young person is subject to a child safety order, an anti-social behaviour order or a sex offender order, is convicted of a criminal offence or fails to comply with a school attendance order.[8] Parenting orders can last up to 12 months and can specify particular requirements, if that would be desirable to prevent further anti-social behaviour or offending. Parents must also attend parenting classes or counselling for a concurrent period not exceeding three months and not more than once a week. The Anti-Social Behaviour Act 2003 widened the scope and use of parenting orders, giving the court the power to impose a residential requirement in the order. Section 25 of the Act also puts parenting contracts on a statutory footing so that failure to enter into or comply with the terms of a voluntary 'contract' made between a parent and a youth offending team can be taken into account when the court decides whether or not to make a parenting order.

These are potentially very controlling orders, notwithstanding their aim of helping parents to acquire more effective parenting skills. The government's guidance on reparation orders gives a similarly ambivalent message to parents:

> The Government believes that parents have an important role to play in supporting their children when they are involved in any court proceedings. Magistrates' courts, including youth courts, have powers to enforce parental attendance at court where appropriate. Section 34A of the Children and Young Persons Act 1933 provides that where a child or young person is charged with an offence or is for any other reason brought before a court, the court may in any case – and *shall* in the case of a child or young person who is under the age of 16 – require a person who is a parent or guardian to attend at the court during all stages of the proceedings, unless the court is satisfied that it would be unreasonable to do so.[9]

A survey by Campbell (see below) would suggest that, in these new processes, mothers are again bearing the brunt of involvement and, in this case, potentially

5 For reprimands and warnings, see the Crime and Disorder Act 1998, ss 65–6.

6 For referral orders see Powers of Criminal Courts (Sentencing) Act 2000, ss 16–27.

7 See Piper (1994), and the references therein.

8 Under the Education Act 1996, ss 443–4; Crime and Disorder Act 1998, s 8(1)(d). For guidance on parenting contracts and orders see Home Office *et al* (2004).

9 Home Office (2000), para 3.17

being stigmatised. For example, the pilots for parenting orders revealed that 80 per cent of the children and young people involved were males, but over 80 per cent of the parents involved were females.[10] Despite the relative invisibility in the youth justice system of the problematic situation of young offenders' mothers, the government's proposal in *Youth Justice – The Next Steps* to encourage youth justice agencies to make more use of parenting orders and contracts 'more actively *engaging fathers*, making sure *both parents* generally come to court and ensuring courts consider a Parenting Order when they fail to attend court [emphasis in the original]'[11] is of concern. Arguably, 'the Government, the Home Office and the Youth Justice Board are reluctant to confront the stark correlation between gender, violence and anti-social behaviour'.[12]

Further, given the currently significant 'cross-overs' of law and resources between youth justice and child protection/children's services, the impact on families of the above policy developments is greater than might be anticipated. Children who are not offenders – and their parents – are being dealt with by youth justice teams, whilst relevant civil law measures are increasingly being backed up with criminal sanctions. The disciplinary net, justified by a focus on actual or potential juvenile offending or misbehaviour, is being cast over a much larger number of boys and girls and mothers and fathers.

The widening remit of youth offending teams

The youth justice system is part of the criminal justice system, operating with the offences, procedures and evidential rules established by the criminal law, but, in recent developments, the remit of the system covers young males and females who are not eligible to be in the youth justice system. There are two developments, focusing on the control of 'sub-criminal' behaviour, especially 'anti-social' behaviour and truanting,[13] or on pre-criminal behaviour, notably preventative schemes. The Crime and Disorder Act 1998 introduced civil orders to deal with sub-criminal behaviour, the relevant order for those aged ten and over being the anti-social behaviour order. The criterion for making an anti-social behaviour order (in s 1 of the Act) is one of the criteria in s 11(3) for imposing a child safety order on a child aged under ten: '. . . that the person (child) has acted . . . in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself.'[14]

That these provisions fudge the line between criminal and civil can be seen, for example, in the 'Executive Summary' in *Every Child Matters*. Under the bullet point 'reforms to the youth justice system', a brief paragraph begins: 'The Government intends to revise the Child Safety Order to make it more effective and

10 Campbell (2003).
11 Home Office (2003b), para 9, p 5.
12 Campbell (2003), p 3.
13 See, for example, DfES (2004b), a recent research report on risk of becoming involved in criminal or anti-social behaviour.
14 See Piper (1999).

build on the success of the Intensive Supervision and Surveillance Programme by using it more widely as an alternative to custody.'[15] This statement evidences child safety orders as part of a discourse of 'youth justice', despite the fact that only Family Proceedings Courts can make such an order, and elides in one sentence provisions for under-ten year olds being mentioned in the same sentence as a community programme for offenders over ten years old. This elision reflects the trend of government policy. After the consultation exercise following the publication of *Youth Justice – The Next Steps*,[16] the government proposed to include preventing anti-social behaviour in the duties of the Youth Justice Board and youth offending teams. Before the general election in May 2005, the government stated that this duty would be included in a subsequent Youth Justice Bill.[17]

Another example of this policy trend is the development of Youth Inclusion Support Panels through the Children's Fund. This fund is used for projects which target 5- to 13-year-old disadvantaged children and is administered by the Children, Young People and Families Directorate at the DfES. Of this budget, 25 per cent is allocated to preventative projects for children aged 8 to 13 who are seen as most heavily at risk of offending. The government's aim is that there should be a youth support panel in each youth offending team area.[18] Funding for preventative projects managed by youth offending teams is increasingly provided by crime and disorder reduction partnerships and the government intends to expand by 50 per cent youth inclusion and early intervention projects across England and Wales.[19]

This conflation of risk of offending by boys and girls and risk of harm to them, particularly in the context of the social inclusion–exclusion policy agenda, raises the possibility of early 'stigmatisation' of children and their parents and allows for potentially 'unnecessary' intervention in families.[20] This may seem far removed from this chapter's focus on offending girls and their mothers, but what these developments signify is that more girls, as well as boys, are being drawn into an increasingly important system in which the risk of offending normally takes priority over the risk of harm, or the latter risk is subsumed in the former. Further, there is evidence that the risks of engaging in offending are different for boys and girls in a way that might mean that those parents, particularly lone-mother parents, living in poverty may be more at risk of having their children's behaviour scrutinised.

The current focus in policy and research is on isolating factors correlated with risk of offending and desistance from offending. Farrington and Painter have recently conducted research on gender differences in this respect, using brothers and sisters.[21] This research found that the most important factors for offending

15 DfES (2003); see also DfES (2004a).

16 Home Office (2003b).

17 See: www.commonsleader.gov.uk/output/page798.asp. However, whilst a Youth Justice Bill was announced in the Queen's Speech in 2004 and drafted in the 2004–5 session, such Bill is not in the list of Bills for 2005–6; see the Queen's Speech, May 2005, at www.number–10.gov.uk/output/Page7489.asp.

18 Youth Justice Board (2004), para 6.3.

19 *Ibid*, para 6.6.

20 See Piper (2005); for the use of 'criminalisation' as a state response to poverty and educational disadvantage, see Drakeford and Vanstone (2000).

21 Farrington and Painter (2004).

and frequent offending were similar for brothers and sisters, but that 'risk factors predicted offending by sisters more strongly than offending by brothers'.[22] The example they give is of the influence of the factor of low family income on early-onset offending, where the proportion of sisters who were convicted increased from 1 per cent to 11 per cent according to the absence or presence of this factor, whereas for their brothers the increase was from 14 per cent to 33 per cent. After controlling for other risk factors, 'the partial odds ratios were 15.5 for sisters and 2.1 for brothers'.[23] They also found that socio-economic and child-rearing factors were more important in predicting offending of sisters, whilst parenting-related factors were more important for brothers. Farrington and Painter use their conclusions to note the cost-effectiveness implications of focusing preventative interventions on those risk factors which are most – and also differentially – influential on girls and boys respectively.[24]

This focus on risk assessment may, therefore, impact differentially on girls and boys and also on mothers and fathers, whilst the colonisation by crime prevention agencies of work and funding for children's services aimed at prevention of offending might mean that other aspects of the child's life and welfare are obscured, including those where gender issues are potentially significant.[25] Further, it means girls – whether or not they have offended – are being drawn into a system in which the 'child as youth' is the dominant concept.

'Youth'

Until legislation in the 1990s, in England and Wales, children and young people under 17 were the 'juveniles' who were processed in a juvenile justice system and prosecuted in the juvenile court set up by the Children Act 1908. Since the implementation of the Criminal Justice Act 1991, the criminal court for minors has been the youth court, with the upper age raised from 17 to 18[26] and, since implementation of the Crime and Disorder Act 1998, minors who have offended are now dealt with in a youth justice system. There are youth offending teams and youth offending panels providing youth justice services and operating with a published youth justice plan, within a system overseen by a national Youth Justice Board.[27]

In England and Wales, the word 'youth' has also gradually emerged through successive versions of the Code for Crown Prosecutors to refer to the child or young person; before that, the reference was to the juvenile, or a young person, or, in its penultimate version, a youth offender.[28] Similarly, in Northern Ireland, where

22 *Ibid*, p 56.

23 *Ibid*. In this sample, 12 per cent of sisters and 44 per cent of brothers were convicted.

24 *Ibid*, pp 57–8.

25 See the discussion below concerning the ASSET assessment tool.

26 At the same time, non-criminal cases were moved to the newly created Family Proceedings Court: Criminal Justice Act 1991, s 68 and Schedule 8; Children (Allocation of Proceedings) Order 1991, SI 1991/1677.

27 See Crime and Disorder Act 1998, ss 37–41.

28 See Piper (2001).

different legislation and terminology apply to many aspects of the treatment of minors, the same trend is to be found. In 1999, Northern Ireland re-named its juvenile court as the youth court (Criminal Justice (Children) Order 1998, article 27) and s 63 of the Justice (Northern Ireland) Act 2002 raised the upper limit from 17 to 18 years.

'Juveniles' have not disappeared from policy and administration: the Juvenile Offenders Unit at the Home Office sponsors the Youth Justice Board and 'is responsible for youth justice policy, law, processes and organisation covering 10 to 17 year olds in England and Wales'.[29] There is also still a Juvenile Operations Management Group in the Prison Service and juvenile secure accommodation. Further, in *Youth Justice – The Next Steps*,[30] the companion document to the Green Paper *Every Child Matters*,[31] the juvenile reappears in references to juvenile sentences, juvenile court orders and juvenile custody.[32]

Neither juvenile nor youth are morally or culturally neutral terms. 'Juvenile' has pejorative connotations: it suggests, perhaps, the offender as 'young and silly'. Arguably, however, 'youth' not only has more negative associations but is inherently gendered. If our associations with the word youth are pleasant ones of youth clubs, youth and community projects, or youth orchestras and choirs, where the two genders mixed on equal terms and the age range was not confined to older teenagers, there is no problem with the word 'youth'. However, Burney suggests that 'youths hanging about' have become 'the universal symbol of disorder and, increasingly, menace',[33] so that the meanings constructed around 'youth' are negative.

The significance of this change in terminology is increased by the abolition, in the Crime and Disorder Act 1988, of the presumption that children aged 10–13 years old are *doli incapax*: that is, incapable of being held criminally responsible.[34] From the tenth birthday, a child can legally be prosecuted and punished, so that a 'youth' in the criminal justice system now refers in law and practice to a girl or boy aged 10–17 inclusive. This has been widely criticised, not least by those concerned with the rights of children.[35] *Children in Trouble*, a report by the children's charity Barnardo's, criticised this 'tendency to criminalise children unnecessarily and at younger ages, and a corresponding tendency to treat them as adults too soon'.[36] Such a trend is encouraged by the use of the word 'youth', with its connotations of the older male person. Further, if policy and practice is – consciously or otherwise – geared to older male youths, then there is a risk that female youths – as well as younger youths of both sexes – will receive inappropriate responses to their offending.

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29 www.homeoffice.gov.uk/inside/org/dob/direct/jou.html.
30 Home Office (2003b).
31 DfES (2003).
32 Home Office (2003b). See, for example pp 4–6 and 8.
33 Burney (2002), p 473.
34 Crime and Disorder Act 1998, s 34.
35 Fortin (2004), especially pp 256–7.
36 Hibbert *et al* (2003), p 6.

Offending by girls

Whilst girls who offend or behave anti-socially are increasingly and routinely subsumed into 'youths', there is, at the same time, a selective but increasing visibility of some children and young people as offenders because they are girls and young women. Girl gangs have been a recurrent focus of media attention. They are the new lads or 'ladettes' at the level of minor offending and, most recently, in relation to drunkenness. In media reports, the implicit message is that girls are doubly culpable – of offending and also of not conforming to popular notions of femininity, of how girls and women should behave. For example, one of the online responses to a BBC *Inside Out* feature on 'binge drinking' and the new licensing laws ended, without explanation as to why one gender is being singled out, with the question: 'Lastly, why do girls behave so badly?'[37] Two national daily newspapers have run similar stories. An article in the *Telegraph* on the latest complex report of the 'European School Survey Project on Alcohol and Other Drugs' was simply entitled 'Girls overtake boys in binge-drinking study'.[38] The *Daily Mirror* began an article entitled 'Bottle of the Sexes' with: 'In bingeing Britain the boys still outdrink the girls . . . but the gap is getting dangerously smaller.'[39] The 'problem' is not presented as the long-term trend of boys' alcohol abuse, but the fact that girls are catching up with them.

More significantly perhaps, fears have been expressed that there has been a rapid increase in the number of violent girls. In the 1990s, these fears gave rise to headlines of the 'Sugar 'n' spice . . . not at all nice' variety.[40] More recently, a former US police chief is reported as saying of violence among American girls: 'This is vicious, I-want-to-hurt-you fighting. It is a nationwide phenomenon and is catching us all off guard.'[41] This statement, and its reporting in the British press, indicates a significant level of social anxiety about the behaviour of girls.

That there has been a rise in reported offending by girls is not in question. In England and Wales, the number of girls convicted of indictable offences rose, with a corresponding increase from 11.1 per cent to 13.2 per cent in the proportion of girls in the sentenced population between 1992 and 1999.[42] Increases can also be found elsewhere. In Scotland, the number of 17–19-year-old females who had a charge proved increased between 1987 and 1997, as did the number of referrals to a Reporter (children's hearings) on an offence ground.[43] However, statistics would suggest that this does not represent a significant surge in offending by young females. The National Association for the Care and Resettlement of Offenders (NACRO) points out that, in the 1990s, the *total* number of girls who were

37 www.bbc.co.uk/insideout/southwest/series5/drinking_binge_pubs.shtml
38 See article by C Hall on 15 December 2004.
39 *Daily Mirror*, 4 February 2005. See, for a balanced analysis, the article on motivations and outcomes of a study on underage drinking in *Childright*, April 2005.
40 *Sunday Times*, 27 November 1994.
41 Jansen Robinson, quoted in *The Times*, 28 April 2002, p 2.
42 National Association for the Care and Resettlement of Offenders (NACRO) (2001), p 2.
43 Glasgow: Girls and Violence Project. See www.gla.ac.uk/girlsandviolence/facts.htm

cautioned or convicted for indictable offences fell by almost a third, from 33,600 to 24,800, and that the number of girls sentenced for *violent* offences *fell* in the period 1992–9.[44] Further, the Edinburgh University Study of Youth Transitions and Crime found that, at age 15, boys are three times more likely than girls to carry a weapon and twice as likely to be involved in fighting, and that specific forms of the more serious offending – carrying a weapon, housebreaking, robbery, theft from cars, and cruelty to animals – are still much more common among boys than girls.[45]

The overwhelming majority of offenders in this age group are, however, still males: the Youth Justice Board estimated in 2001 that girls made up about 18 per cent of the offending youth population.[46] Further, the latest Criminal Statistics would suggest that the number of the more serious young offenders – of both genders – has now peaked in England and Wales. In 2002, a total of 3,713 ten to under-18 year olds, including 453 girls, were found guilty at the Crown Court for indictable offences.[47] In 2003, the total was 2,790, including 340 females.[48] For both years, the proportion of girls in these totals was 12 per cent. NACRO concludes that the rise in convictions of girls is, then, a function of reduced measures to divert them from court.[49] In Canada, too, an analysis of official statistics would suggest that female young offenders accounted for only 7.3 per cent of all cases brought before the youth court at the end of the 1990s.[50]

However, a major problem is that – until recently – there has been relatively little research in the UK since the 1980s on the experience and treatment of young female offenders, except in relation to ethnic minority girls and to gangs. Whilst the *Research on Girls and Violence* project based at Glasgow University has been important in the process of addressing that deficit, particularly as it is using research methods developed by feminists,[51] research on the treatment of women in the criminal justice system is still a necessary source of insights into the treatment of girls.

Invisible?

A standard feminist analysis of adult offenders is that women become 'invisible' in policy and practice because of the preponderance of men, and that this invisibility works to their disadvantage. So, whilst policy documents talk in apparently gender-neutral terms about offenders, the generic term used may actually be applicable only to men. The resulting issue is whether the different structural and personal factors relevant to women should lead to differential – rather than equal – treatment if substantive justice is to be achieved.

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44 NACRO (2001).

45 See www.regard.ac.uk/research_findings/R000239150/report.pdf. See also www.ed.ac.uk/news/truancy.html.

46 NACRO (2001), p 2.

47 Home Office (2003c), Table S2.1E.

48 Home Office (2004b), Table S2.1E.

49 NACRO (2001).

50 Boyle *et al* (2002), p 393.

51 Burman *et al* (2001); see also Batchelor and Burman (2004).

What is not yet so clear is whether girls and young women are also invisible, treated inappropriately equally or discriminated against in the youth justice system. It is certainly possible in youth justice texts to find instances where it appears unlikely that the commentator is thinking about girls when he or she is referring to youths. For example, when referring to Operation Spotlight, Muncie explains that 'after-hours revellers, groups of youths on the streets and truants' were targeted in Glasgow in 1996.[52] No gender is specified. Muncie goes on: 'As a result, charges for drinking alcohol in public places increased by 2,240 per cent, dropping litter by 320 per cent and urinating on the street by 140 per cent.'[53] Whilst it is not unknown for the last activity to be engaged in by girls and women, our dominant image is of males. Further, the latest Audit Commission report on youth justice mentions differences in terms of race but not in terms of gender.[54] 'Males' are only referred to, therefore, in the context of 'black',[55] and gender is not an issue anywhere in the report. Likewise, the recent *Youth Matters* consultation paper on wider youth policy has only one brief reference to gender.[56] This may be significant, given the conclusions of criminologists in relation to the treatment of adult women offenders.

Feminist criminologists have focused on differential gender treatment in the contexts of both sentencing and punishment. In relation to the latter, research has documented forms of disadvantage to female offenders in custodial regimes[57] and in the provision of community punishments. As regards sentencing, research suggests that constructions of femininity and the 'normal' woman could lead to either more lenient or less lenient sentencing treatment. Two types of response can 'save' a woman from imprisonment: the medicalisation of women – the 'not bad but mad' approach; or the paternalistic approach – the chivalrous protection of the 'weaker' sex or the 'social casualty'.[58] Feminist researchers in the 1980s drew attention to the fact that women were two or three times more likely than men to receive an absolute or conditional discharge on conviction for an indictable offence, and three times less likely to receive a custodial sentence.[59] More recent research has found similar discrepancies in relation to specific offences. For example, women are less likely than a comparable man to receive a custodial sentence for shoplifting and drug offences.[60]

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52 Muncie (2003), p 54.

53 *Ibid*.

54 Since the implementation of s 95 of the Criminal Justice Act 1991, the agencies of the criminal justice system must provide statistics broken down into different race and sex categories and so sentencing statistics are available by age, sex and race.

55 Audit Commission, *Youth Justice* (Home Office (2004a), p 81).

56 DfES (2005), para 169 in reference to the need for careers advisers to challenge gender stereotypes. The words 'girl', 'boy', 'young women' and 'young men' do not feature in the report.

57 See Carlen (1983), for an early detailed study of women in Corton Vale Prison in Scotland; see Easton and Piper (2005), ch 12, for a recent review of research about women and custody.

58 See, for example, Edwards (1984); Gelsthorpe (1986); Morris (1988); and Pearson (1976) for early, seminal work on these issues.

59 See, for example, Morris (1988), p 163.

60 Hedderman and Gelsthorpe (1997), pp vii–viii, and also Part 1.

On the other hand, the 'double deviancy' of offending and acting in an unwomanly fashion could lead to more intensive punishment than a man would receive for a similar instance of offending, particularly if the generally less serious criminal histories of women offenders are taken into account. Carlen, for example, found in her sample of judges in Scotland that the women they sentenced to custody were those who, in their eyes, had failed as mothers: 'Thus Sheriffs not only wanted to know whether a woman was a mother, but whether she was a *good* mother.'[61]

Hedderman and Gelsthorpe more recently found that some magistrates still treated female, but not male, defendants as 'troubled' offenders to whom they ascribed different motives, even if, for example, men were stealing bacon and coffee rather than alcohol or items to sell.[62] Consequently, they chose sentences to 'help' rather than punish them. However, their comparatively low use of fines for women (because they had no independent means) could mean that women were given a community sentence, a higher tariff sentence reserved for offences 'serious enough' to justify it.[63] There was also some suggestion that the conclusions of earlier research are still valid: that magistrates do take into account the demeanour of women in court when making sentencing decisions.[64]

Sentencing girls

First, a caveat: strictly speaking, we should not refer to 'sentencing' girls. Juveniles are not 'sentenced' after 'conviction'; instead, since the implementation of the Children and Young Persons Act 1933, the youth court 'makes an order upon a finding of guilt' (s 59) in relation to those minors who have been successfully prosecuted.

Second, we simply do not know enough about this decision-making process with minors. In 1986, Heidensohn reviewed research about girls and young women as well as adult women. That research – stemming mainly from the 1970s and early 1980s when a more welfare-focused juvenile justice system operated – concluded that 'delinquent girls', like adult women, were 'subject to a particular regulatory censure' stemming from ideas about what was normally expected of adolescent girls.[65] In particular, the response to male offending signified by 'boys will be boys' contrasts with the response to the 'waywardness' of delinquent girls.[66] So, for Heidensohn, research evidence that females of all ages risk the penalties of double jeopardy emphasises the fact that, 'while this is a man's world it will be his conception of justice which will prevail',[67] in relation to minors as well as adults.

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61 Carlen (1983), discussed in Morris (1988), pp 166–7.
62 Hedderman and Gelsthorpe (1997), p viii.
63 *Ibid*. The sentencing criterion is now to be found in the Criminal Justice Act 2003 at s 148(1).
64 Hedderman and Gelsthorpe (1997), p viii and ch 2.
65 See Harris and Webb (1987), p 134; see also Webb's 1978 research on the supervision order (Webb, 1984).
66 Harris and Webb (1987), p 134.
67 Heidensohn (1986), p 297.

It is tempting to use twenty-year-old research to prove discrimination in the present. For example, Annie Hudson, in her chapter on 'Troublesome girls' in a compendium on youth justice issues published in 2002, perhaps does rely too much on conclusions drawn in the 1980s.[68] A NACRO briefing in 2001 noted that data was not available 'at a sufficient level of detail' to know whether the factors identified in the 1980s currently influence sentencing outcomes for offending girls. Further, even in 1987, Harris and Webb had concluded: 'With the sole (and major) exception of the control of girls' sexual behaviour, the differences between the treatment of boys and girls are of degree and not kind.'[69]

The reliance on possibly out-of-date research on the experiences of girl offenders is also problematic because of changes in penal policy and theory since the 1980s, which may be influencing the treatment of women offenders and reducing the likelihood that girls are still facing the discriminatory treatment that research in the 1980s suggested.[70] First, the 'just deserts' sentencing framework set up by the Criminal Justice Act 1991 mandated an approach primarily in terms of proportionality to offence seriousness and, whilst the Criminal Justice Act 2003 has amended this framework in relation to persistence of offending, this retributivist starting point is still important.[71] The current focus on the young person's responsibility and accountability also increases the focus on the offence. In theory at least, these developments should have reduced the sentencing discretion that permitted different outcomes for girls and women.

However, in 1994, Hudson argued that the focus on proportionate punishment could work against the interests of female offenders: 'Young women's needs are marginalised as the criminal justice system becomes ever more offence-focused, and the sort of justice they are offered is of equal access to male provision, rather than gender-appropriate provision.'[72] A potentially gender-levelling focus on proportionality may also have been outweighed by the focus on risk. At the sentencing stage, minors and adults who have committed sexual and violent offences and are deemed to be dangerous must be dealt with 'disproportionately'.[73] New provisions in the Criminal Justice Act 2003 relating to persistence (previous convictions) may also undermine proportionality. The punishment stage is also infused with risk management and the use of ever more intensive community programmes – for adults and minors.

According to Hudson,[74] 'the factors which had been seen as bringing about harsher and more interventive sentencing of socially disadvantaged offenders . . . have reappeared as "risk of offending" factors'. The focus on risk factors can mean

68 Hudson, A (2002).
69 Harris and Webb (1987), p 135.
70 See Hudson, B (2002), p 21.
71 See Easton and Piper (2005), ch 3.
72 Hudson, B (1994), p 10.
73 Criminal Justice Act 2003, chapter 12; see Easton and Piper (2005), ch 5, particularly pp 145–6. There is also a focus on persistence in relation to drug offences and burglary through the 'three strikes' legislation; see Powers of Criminal Courts (Sentencing) Act 2000, ss 110–11.
74 Hudson, B (2002), p 25.

that life history factors increase an offender's risk score whilst the choice of preventative programmes or sentencing outcome ignores that context. For girls and women, then, the assessment of risk may itself be discriminatory.

Let us focus on a girl or boy from an abusive home who has committed a criminal offence. ASSET is the young offender assessment profiling tool used by youth offending teams to assess children and young people in relation to various interventions. There is some evidence from a national evaluation of Final Warning Projects that ASSET is not always properly used and needs are consequently not addressed.[75] One component of the form (section 2) on 'family and personal relationships' includes not only factors about the criminality or the health problems of the young offender's family but also has tick boxes for 'experience of abuse' and 'witnessing other violence' in the family context. At the bottom of the page, the professional conducting the assessment has to rate on a scale of one to four the extent to which the family relationships 'are associated with the likelihood of further offending'. This is one of 12 ratings which have to be totalled at the end with a maximum high-risk score of 48. A high score may lead to intensive supervision, which ignores the factors which led to the risk score. For a girl, this might mean a mixed-sex community project or pressure to stay with her family, when in neither context does she feel safe and may not be safe.

As noted above, Home Office research on siblings also points to gender implications of the prediction of risk of offending.[76] The finding that 'socio-economic factors such as low social class, low family income, poor housing and large family size predicted offending more strongly for sisters than brothers' might also confirm that girls and young women in custody are more likely to have experienced 'structural' disadvantage in their lives, which needs more targeted programmes as part of punishment. There is also an increasing awareness that not only are the young disproportionately at risk of violence, but that females experience different forms of violence, notably violence within the home.[77]

A telephone survey of criminal justice practitioners by Beatrix Campbell suggested that professionals in the front line are aware of gender issues.[78] The cases summarised by practitioner respondents reveal boys 'watching their mothers beaten to hell by their fathers' and mothers who felt disempowered and defeated. Campbell noted that government guidelines on the use of parenting orders 'refer only to "inadequate" or "harsh and erratic" parenting as risk factors, and cite no references to the significant volume of research on domestic violence and its impact on children'.[79]

Campbell's comments were based on draft guidance, the final version being issued in March 2004. This states that both parents should be seen if they both participate in the child's upbringing, 'unless a parent is estranged, for instance

75 See Holdaway and Desborough (2004).
76 Farrington and Painter (2004).
77 Burman *et al* (2001), p 446.
78 Campbell (2003).
79 *Ibid*, pp 4–5.

because of domestic violence'.[80] It further states that 'information that emerges during the intervention and assessment process about domestic violence or abuse will need to be passed on to police and social services for action' and practitioners should establish with other agencies whether they have such information.[81] However, as research on practitioners in the family justice system has shown[82] and as one of Campbell's respondents phrased it, domestic violence 'won't come out unless you create a climate'.[83]

The violence and harm that may be done to girls and young women – as offenders, as the mothers of offenders or as young offenders who are themselves mothers – does not get highlighted. Instead, as the Howard League pointed out, the focus is on the violence done *by* girls, and that results in an increasing tendency to give more severe sentences to girls than boys where violence is involved.[84]

Punishing girls

Ofsted has recently completed a report, *Girls in Prison*, which is a survey of female juveniles completing detention and training orders, conducted between October 2002 and April 2003 at three secure establishments.[85] Because the second half of a detention and training order is spent on supervision in the community, the findings cover the experiences of girls in detention and on licence. The main findings of this report are:

- the majority of young women interviewed had poor educational histories with low levels of attainment;
- all but a small minority of the surveyed group had exceptionally low levels of self-esteem (around half had experienced severe depression during sentence, of whom a significant number had a history of self-harm);
- attendance at education during custody was highly valued by the majority of those interviewed;
- the community aspect of the detention and training order did not provide sufficient structure or support to cope with personal problems or help them to progress to further education, training or employment;
- the quality of careers information, advice and guidance was extremely variable and too often inadequate; and
- the availability of suitable programmes and support structures for young women on licence was inconsistent from one youth offending team area to another.

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80 Home Office (2004a), para 2.17.

81 *Ibid*, paras 2.20 and 2.21 respectively. A note by Judy Renshaw to the Youth Justice Board, *Advice on Accommodation* (YJB(00)72), noted at paras 44 and 51 that 16–17 year olds who are 'fleeing domestic violence' are now treated as 'vulnerable' under housing legislation and the Safer Communities Housing Fund; see www.youth-justice-board.gov.uk/Publications/Downloads/AccomVulnerYP.pdf.

82 Piper and Kaganas (1997).

83 Campbell (2003), p 5.

84 Howard League (1997).

85 Office for Standards in Education (2004).

This summary is taken from the website of HM Prison Service and reveals an acknowledgment that girls may not be well served by the Prison Service, the Probation Services or youth offending teams.

In the community

The latest Criminal Statistics would suggest that there may still be differential sentencing in relation to community penalties whereby girls receive more regulatory, and fewer practical, penalties. The overall figures for under-18 year olds in 2003 reveal that 12 per cent of total convictions at the Crown Court are in relation to girls and young women, but the proportion given supervisory sentences is higher than this, whilst the proportion is lower for other community sentences. For example, only 18 community punishment (previously community service) orders (10 per cent of the total imposed on girls and boys) and no reparation orders were imposed on girls or young women in 2003, but they received 78 supervision orders (18 per cent of the total) and 17 community rehabilitation (previously probation) orders (17 per cent of the total).

The Ofsted report noted above included a variety of negative comments on the community part of a sentence of detention and training made by the girls surveyed. For example, they said that some community projects were too 'risky' for them and they criticised the standard of resettlement support.[86] As Carlen has pointed out, it is difficult to establish and maintain community projects designed for girls and women, ostensibly because of funding problems that mask other shortcomings such as non-use by the courts.[87] This results in pressure to extend the projects to men to avoid closure, so that survival requires ring-fenced funding and excellent public relations.

There is also potential gender discrimination arising from the increasing importance given to restorative justice in community programmes in the youth justice system. Below is an extract from government guidance on examples of suitable content for reparation orders.

- A 15 year old boy is found guilty of daubing graffiti on the walls of a newsagent's shop. He is sentenced to a reparation order which, with the agreement of the newsagent, requires the offender to clean the graffiti from the walls, and to spend one hour under supervision every Saturday morning for two months helping the newsagent to sort out his stock.
- A 12 year old girl is found guilty of vandalising an elderly lady's garden and shouting abusive language at her. She is sentenced to a reparation order which requires her, with the victim's agreement, to meet the victim in order to hear her describe the effect that this behaviour has had on her, and to allow the offender to explain why she has behaved in this way, and to apologise. This meeting might be arranged and supervised by a local voluntary organisation working with victims and offenders, in support of the youth offending team.
- A 16 year old boy has caused damage to a local children's playground. The court

86 Ofsted (2004).

87 Carlen (2001–2), p 44. For a discussion of one particular community-based project see Roberts (2002).

sentences him to a reparation order. As there is no obvious, specific victim in this case, the reparation is designed to benefit the community at large, many of whom use the playground; the offender is required to spend one hour every weekend under supervision helping to repair the damage that he has caused.

- A 14 year old boy is found guilty of damaging the greenhouse of an elderly man. The victim wants no further contact with the offender, but the court feels that some form of reparation activity would be appropriate. The offender is therefore required to spend two hours per week under supervision assisting the gardener at the local old people's home.[88]

In these examples, the three boys were given practical reparation, the girl met her victim to apologise and, it was hoped, to feel remorse at the effects of her offending. The crucial variable here could have been age, with 14 being seen as a minimum age for gardening. Nevertheless, the choice of examples is intriguing, as are the summaries below of two of the case studies included in the government's *Restorative Justice* Consultation Paper.[89]

> **Case study 02** 'A 28 year old man was assaulted by a group of 11 youths, four of whom were girls aged 14–16 . . . The four girls were all given referral orders.' A video was made of the first Panel meeting with the victim and this was shown to the others: 'both the victim and the attacker were visibly moved'. One of the girls went on to do a peer mentoring course and became a peer mentor for the youth offending team.

> **Case study 05** The 'offender' was serving a four and a half-year custodial sentence. 'During the restorative conference one of the offender's supporters was her grandmother', who was 'appalled' at what she heard. The offender was 'overwhelmed with remorse' at this. 'By the end the victim said her view of the offender had changed from a monster to a broken little girl.'

This is not to make the point that boys in the case studies were never remorseful; simply to draw attention to the choice of examples and the tone of the narratives. They serve to emphasise how little is known about the gender implications of these new processes, and how gender could be operating differentially without proper monitoring. Alder has pointed out that what we know about the greater intolerance by the public of offending and anti-social behaviour by girls, and different social expectations of girls, must be taken into account when developing programmes for girls.[90] Girls may be more likely to feel shame and guilt, and restorative programmes should not endorse the continuance of shame as a tool to control women. They should also be aware of the 'delicate balance between exhibiting contrition and remorse, and feelings of guilt and self-blame and self-harm.'[91]

In prison

Again, this title is technically incorrect: minors are not imprisoned or given custodial sentences, but are 'detained'. They currently receive orders for detention

88 Home Office (2000), para 6.3.
89 Home Office (2003a).
90 Alder (2003), p 119.
91 *Ibid*, p 120.

and training, detention for a specified period, or detention at Her Majesty's pleasure.[92] Section 226 of the Criminal Justice Act 2003 adds detention for life or detention for public protection to this custodial repertoire for the under-18s. The period of detention for all these orders may take place in a prison service establishment (generally a young offender institution), a secure training centre[93] or a local authority (social services) secure children's home. In practice, many girls and boys are in prison. The DfES website in mid-2005 gave a figure of 2,700 juveniles (15–17 year olds) in custody, either sentenced or on remand, of whom approximately 80 were females. Male juveniles are normally held in young offender institutions, but provisions for female juveniles have been unsatisfactory.

A recent report of the Howard League for Penal Reform gives a figure of 90 girls aged under 18 in prison on any one day and points out that, unlike for boys, there are no prisons which are solely for girls. Sentenced girls are therefore held in four designated prisons, where they may be placed on a separate wing for juveniles or on wings which also hold women aged over 18. The report provides evidence of what amounts to discriminatory treatment of girls in custodial establishments, stemming from the much smaller numbers of young female detainees and from their different needs.[94] Her Majesty's Chief Inspector of Prisons, Anne Owers, has implicitly accepted that justice for girls requires that they have facilities specifically geared towards their needs. She has argued that no girl aged under 17 should be held in prison, given the lack of separate facilities for girls, and has drawn attention to examples of girls inappropriately placed in custody, such as a pregnant 16-year-old girl and a 17-year-old girl with serious mental health problems.[95] She points out that this is sometimes because the appropriate facilities are not available. Five new 16-bed units for juveniles in female prisons were opened by Autumn 2006 to provide specialist provision for this age group; this will improve matters.

It is also encouraging that Owers is aware that 'many of the children coming into prisons have been abused, and that the issue of strip-searching is, consequently, a very sensitive one'.[96] For girls in particular, such intimate searches are problematic because there is evidence to suggest that girls are more likely than boys to be victims of sexual abuse. For example, the NSPCC's[97] international survey of studies of the prevalence and incidence of child sexual abuse reveals higher figures for women and girls in all the jurisdictions included in the survey.[98] Likewise, a study of children on child protection registers in England and Wales on 31 March 2003 found there were more girls than boys on the registers for sexual abuse, although the situation was reversed in relation to physical abuse.[99] A review of North

92 Under the Powers of Criminal Courts (Sentencing) Act 2000, ss 100, 91 and 90 respectively.
93 Four privately run institutions with health and educational services, inspected by the CSCI (Commission for Social Care Inspection).
94 Howard League for Penal Reform (2004).
95 Owers in conversation with Wadsworth (2005), pp 10–11.
96 *Ibid*, pp 9–10.
97 National Society for the Prevention of Cruelty to Children.
98 Creighton (2004), Table 1.
99 DfES (2004c), paras 6.8 and 6.9.

American research reaches similar conclusions.[100] This should also be noted in relation to the fact that prison staff may not have been properly vetted. Owers's recent inspection of Holloway Prison revealed that no adult working with children and young people had been subject to the required checks from the Criminal Records Bureau.[101]

Juveniles in Custody,[102] a report by the Prison Inspectorate, also found gender differences in regard to feelings of insecurity: over one-third of the cohort of 15–18 year olds surveyed had felt unsafe at some time whilst in custody, but this included *all* the 15-year-old girls. These and other findings emphasise what is already known: that girls and young women in prison are very vulnerable and often psychologically damaged and that they frequently self-harm. In 2003, for example, women constituted 6 per cent of the prison population but were responsible for 46 per cent of recorded incidents of self-harm.[103]

A research study undertaken in 2002–3 aimed to shed light on this, using a sample of 15 women aged 19–50 years. Whilst this research did not include minors, its results reveal in its sample of women histories of self-harm and suicide attempts going back to early adolescence, and also a disproportionate incidence of chronic mental illness, sexual abuse, assault and rape.[104] All but one of the women interviewed said they had wanted to die, and all were in custodial situations where their trauma and medical problems were intensified. There is no evidence to suggest that the situation is considerably better for girls aged under 19 who are in detention.

As has happened in adult prisons, one problem is that there may not be sufficient staff trained to deal with the specific problems of vulnerable (young) females: the title of the Howard League 2004 Report, *Advice, Understanding and Underwear*, gives an indication of what these might be. Another problem is that – with only four institutions – there is a greater likelihood of being placed far from home. The Response from the Gender and Justice Policy Network to the Halliday Report made the point that, with the serious shortage of places for girls and young women in young offender institutions in the south of England, many girls are transferred to places of detention in the north of the country, 'increasing the distance from home and community and making the maintenance of family ties more difficult'.[105]

The search for equivalence

A development which has, perhaps, hidden the particular safety as well as physical and emotional needs of girls is what has been called the search for equivalence. This refers to the aim of some campaigning groups to gain equivalent public interest in the problems or misdeeds of the other gender where, historically, the

100 Chesney-Lind and Pasko (2004), pp 25–7.
101 HM Inspectorate of Prisons (2005).
102 HM Inspectorate of Prisons (2004).
103 See Borrill *et al* (2005), p 57.
104 *Ibid*, pp 6–61.
105 Gender and Justice Policy Network (2001), para 2.3.2.

focus has been on only one gender. The clearest examples are to be found in family law practice. There we find, for example, the construction of women (rather than just men) as perpetrators of domestic violence and child abuse,[106] and also pressure, from men's groups, for men (rather than just women) to be constructed as victims of parental separation.[107] What such 'evening up' may do is to hide the different extents and natures of those phenomena that are united by a common name. This can lead to the assumption that there is no need for gender-specific approaches to dealing with the problems. Specifically, it hides any need to treat girls and boys who offend differently if their needs and family backgrounds are different.[108] It also legitimates the use of gender-neutral risk assessment tools such as those already mentioned.

Arguably, the assessment, supervision and detention of young male and female offenders are not given adequate analysis in theory or in policy. This may well stem from the fact that youth victimology, as Muncie points out, is non-existent and it is still not fully appreciated that young people are often both victims and offenders.[109] The findings of the *Girls in Prison* report, summarised above, support the finding of many research studies, which reveal that the proportion of offenders with abusive backgrounds is far higher than that of the general population.[110] A recent survey found that, prior to custody, 83 per cent of the boys and 65 per cent of the girls had been excluded from school, whilst 37 per cent of boys and 43 per cent of girls had been accommodated by the local authority.[111] Further, in 2000, of 15–20 year olds in prison service establishments, 90 per cent had a diagnosable mental health problem.[112] Offending not only re-categorises the child from victim to offender, but also removes him or her – temporarily or permanently – from the family justice system or the mainstream health service. Almost half of all girls in custody have been the subject of that move.[113]

Conclusions

Developments in policy relating to children who offend have significant implications for family life. What we know about the background and treatment of girls who engage in anti-social or offending behaviour suggests the potential for parental behaviour to have differential impacts in relation to their male and female children, and that parents face different outcomes for their male and female children who end up in the youth justice system. Further, the ability of the family justice system and family law to protect such girls must be assessed in the light of the increasing

106 See, for example, Kaganas, Chapter 8 in this volume.
107 See, for example, Smart, Chapter 7, and Collier, Chapter 12, both in this volume.
108 Worrall (2002).
109 Muncie (2003).
110 See, for example, Crowley (1998), for research evidence of the abusive backgrounds of 12–14 year olds eligible for what are now detention and training orders.
111 HM Inspectorate of Prisons (2004).
112 Lyon *et al* (2000).
113 Walklate has also argued that there is a gendered victimology with an unhelpful 'deeply embedded male view of the problem of victimisation' (2003, pp 32–3).

scope, powers and resources of the youth justice agencies. Indeed, Danner[114] has pointed out that the mothers of such girls may be disadvantaged by the movement of resources from social welfare to criminal justice policies, not simply in reduced benefits but also in reduced opportunities for traditional 'female' work in social services. Women generally are also being disadvantaged by the extra caring responsibilities resulting from the rising imprisonment rate: they may be left caring single-handedly for (the father's) children, or they may find themselves looking after the children of imprisoned daughters. Consequently: 'It is often the women and children who are left out, sometimes unintentionally . . . by the cumulative impact of crime control policies which adversely harm women.'[115]

Yet, despite the media and research focus on the offending of girls, girls and their mothers are virtually invisible in the processes of responding to their offending or their anti-social behaviour, particularly in analyses of 'youth' sentencing and punishment. There is now a growing focus on girls in prison but still very little attention to girls punished in the community or diverted to preventative projects in the community. Whilst there is, as now, inequality of opportunity, of societal expectations and of life experiences for girls and young women who offend, differential treatment is potentially necessary and should be considered in all individual assessments and in devising general programmes and institutional regimes. As a first step, there should be proper monitoring of gender in the ever-widening youth justice system. The difficulty is currently in finding out what is happening to young female offenders – and those girls being brought within the system because of their risk of offending – and this chapter has, consequently, prompted far more questions than it has answered.

There are, however, signs of change. Anne Owers, as HM Chief Inspector of Prisons, has given valuable publicity to the shortcomings of prisons for women and girls. Campaigning groups such as the Howard League and NACRO are again focusing on the experiences of girls in the youth justice system and in detention, as references to important research reports have evidenced. Further, the concern about the perceived increasing 'danger' from girl criminals is itself forcing policy development of responses. The urgent need, then, is for more empirical research – on boys and girls – and for that research to be brought to the attention of policy makers. Currently, the standard of the conditions in which children are held in penal detention is far below that envisaged by rights conventions. When addressing these shortcomings, there needs to be explicit attention to girls and boys. What is also required is an assessment of the role of, and burdens on, mothers, at least to counterbalance the assumptions about the importance of fathers.

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114 Danner (1998).
115 Miller (1998), p xviii.

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Chapter 10
Working towards Credit for Parenting: A Consideration of Tax Credits as a Feminist Enterprise

Ann Mumford[1]

Introduction

As Sainsbury has compellingly argued, 'the tax system is a crucial nexus of the state, the family, and the market'.[2] The intent of this chapter is to consider the current tax credit system for families, at the intersection of all of these factors. The impact of such initiatives on family decision making, in particular, will be addressed. Through incentives provided via the tax system, different types of families may be 'privileged', some members encouraged to enter the labour market or to leave it,[3] and this chapter will investigate the extent to which gendered tax incentives influence those choices and thus have an impact upon the division of family labour and gender relations within the home.[4] This chapter will confront the fact that tax incentives historically have encouraged fathers to work outside of the home and mothers to work inside of it, and, now, may be seeking to redress this balance. Put simply, this chapter will seek to demonstrate that tax plays a significant role in fashioning the subject of family law.

It is almost a truism that '[t]he tension between official legal forms and functional families has created issues for centuries'.[5] Through the study of tax credits, this chapter will reveal the government's latest vision for the ideal family. Tax, in particular, plays a crucial role in the government's vision.

On the question of this issue's importance, the Women's Budget Group have suggested that

> [t]he government is already encouraging the development of family friendly employment practices. Employer contributions to their employees' childcare costs should be on both trade union and employers' bargaining agendas. A more supportive tax regime would encourage both parties to take the issue more seriously.[6]

Perhaps the association of child care and family budget issues with tax, as opposed to benefits, takes the issue into the mainstream of cultural debate. This question will be considered, as will the thorny question of whether tax credits are

1 The author would like to express warmest thanks to Prof Lisa Philipps of Osgoode Hall Law School for her invaluable assistance in the writing of this chapter; and, also, to acknowledge the contribution of the Issues in Taxation class (2005–6) at the LSE, whose feedback on earlier drafts is very much appreciated.

2 Sainsbury (1999), p 185.

3 *Ibid*.

4 *Ibid*.

5 Minow (1991), p 270, cited at Kornhauser (1993), p 64.

6 Women's Budget Group (2003).

truly 'credits' at all. Further, in addition to family decision making, tax credits have an impact upon the range of choice that is available to women. They are presented as feminist initiatives. The extent to which tax credits live up to their promise will be considered. This 'promise' will be considered along the lines as suggested by Bennett, in that

> [a] key question to be asked of any policy proposal from a gender perspective . . . is not only whether it will make men's and women's 'choices' in the present easier, but also whether it will help to transform the existing gender roles and relationships that currently structure, and constrain, those choices, to allow both sexes to fulfil their capabilities to the full.[7]

Towards this end, whether tax credits assist mothers to 'fulfil their capabilities to the full' will be a recurrent, investigatory theme of this chapter. Most of all, this chapter will investigate the place of tax credits within a feminist vision of family law.

Child tax credits: Introduction to the legislation

The family tax credits upon which this chapter will focus are relatively recent initiatives: Child Tax Credit and Working Tax Credit have been payable from April 2003.[8] Couples are required to apply for tax credits jointly, and members of couples are precluded from applying for tax credits separately.[9] The Child Tax Credit, which is the primary focus of this chapter, is payable to people caring for at least one child, and is paid directly to the carer. According to Her Majesty's Revenue & Customs, nine out of ten families with young children qualify for tax credits, so the reach is very wide.[10] Families with income of up to the income threshold[11] per year are able to claim, and the claim lasts until 1 September following the child's 16th birthday.[12]

Child Tax Credit came into effect with the Tax Credits Act,[13] which abolished the Working Families' Tax Credit and Disabled Person's Tax Credit. The credits include a 'child care element', which 'is an element in respect of a prescribed proportion of so much of any relevant child care charges as does not exceed a prescribed amount'.[14] Child Tax Credit is, in design, an earned income tax credit, which may be defined as a benefit linked to paid employment. Confusion, which will be discussed below, exists as to whether the modern Child Tax Credit is a benefit, and thus a form of welfare payment; or a credit which may be deducted

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7 Bennett (2002), p 579.

8 *Per* Tax Credits Act 2002, Ch 21.

9 *Ibid*, at s 3(a). Section 5A, as amended by the Civil Partnership Act 2004, defines 'couple' as those who are either married or civilly registered and not living separate, or those who are living as husband and wife or as civil partners.

10 www.taxcredits.inlandrevenue.gov.uk/HomeIR.aspx.

11 Tax Credits Act 2002, s 7(1)(a). For 2005–6, see http://www.hmrc.gov.uk/pbr2004/pn02.htm.

12 Tax Credits Act 2002, s 8(4)(a).

13 Tax Credits Act, *ibid*.

14 *Ibid*, s 12.

against ultimate tax owed. The fact of the matter is that the Child Tax Credit carries features of both. Its ultimate purpose is to guarantee families who work in the marketplace a minimum amount of income through the allocation of a benefit. As this payment is linked to money earned, it shares features, in spirit at least, with a tax credit, for the benefit increases and decreases proportionately (much like a tax credit).[15]

Tax credits were particularly 1990s, New Labour – and in the US, Clintonian – initiatives. The development of the UK's tax credits (earlier known as the Working Families' Tax Credit, or WFTC) and the US's earned income tax credits (or EITC) followed strikingly parallel lines, although, as Gerfin and Leu explain,

> [t]he main difference between the Earned Income Tax Credits and the Working Families Tax Credit is that the Earned Income Tax Credit has a wage subsidy component at low incomes (in the so called phase-in region), whereas the Working Families Tax Credit replaces the phase-in region by a minimum working hours requirement of 16 hours per week.[16]

The Working Families Tax Credit, now Child Tax Credit, chose to focus on working hours, as opposed to income, perhaps as part of an effort to render the initiative potentially relevant to the middle classes. This relevance is strikingly absent in the US, where Staudt has described the Earned Income Tax Credit as part of a 'push' to force 'poor' mothers into work.[17]

In the UK, the tax credits were part of a package of initiatives targeted at families living in poverty. The Working Families Tax Credit and New Deal (the latter aimed at 18–24 year olds with a history of at least six months of unemployment) were directed specifically at families with low income and low levels of 'skill', and low-income workers more generally.[18] The focus of the Working Families Tax Credit, however, was the provision of an encouragement to enter the marketplace, viewed in the context of what the government perceived as the very powerful deterrent of a generous benefits provision for families.[19]

Studies conducted by Blundell *et al* have concluded that the effects of these initiatives have been 'significant but relatively small'; that whilst some families have received 'unambiguous' enticement to enter the marketplace, the number of families who have received this is relatively small.[20] Additionally, the Women's Budget Group has warned that 'the tax credit scheme is only reaching a minority of families who would like to make use of formal childcare to take employment'.[21] Given such studies, it is likely that the tax credits will be extended to reach a wider range of families.

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15 See Mumford (2001).
16 Gerfin and Leu (2003), p 13.
17 Staudt (1997), p 542.
18 Blundell (2004), p 234.
19 *Ibid*.
20 *Ibid*, p 235.
21 Women's Budget Group (2003).

Historical background

It is important to view tax credits within the context of tax legislation in its entirety, and not as a separate, independent, perhaps feminist initiative. As Blumberg famously argued in 1972, the forces which conspire to prevent women from having the access to work that men enjoy are to be found in a variety of tax provisions.[22] Additionally, the progress towards tax credits over the second half of the last century reveals much about the position of women in this nexus between 'state, family and the market'.[23]

The 1950s, with its norm of 'male-breadwinner families', produced a tax system in which joint taxation of husbands and wives was the rule, supported by deductions for men for their wives, and forms of relief for men and their children.[24] Amongst the changes the tax system has seen since the 1950s are the introduction of individual taxation and child allowances paid to the mother.[25]

The history of earned income tax credits reveals that they are very much conservative initiatives. Tax credits were first proposed by Edward Heath's government in 1972, although the proposal was dropped when Harold Wilson came into power in 1974.[26] Tax credits were part of a movement towards tax reform under Heath's government, which also included, in 1971, the introduction of the Family Income Supplement.[27] In the US, earned income tax credits were introduced during Gerald Ford's administration in 1975.[28] Adler stresses that what distinguishes the early-style tax credits from their modern counterparts is the design of a system which seeks to ensure that a recipient receives more money by working within the marketplace than if s/he were to stay at home.[29] He explains that, '[c]onsidered alongside the continued decline of national (social) insurance, it represents an alternative social security approach to those that have hitherto been associated with any of the familiar welfare state regimes'.[30]

The modern tax credit saw its genesis perhaps in 1988, when Harold Wilson's Family Income Supplement was replaced by the Family Credit – which, in 1999, was replaced by the Working Families' Tax Credit.[31] It is, in fact, the Family Credit which is the true ancestor of the current Child and Working Tax Credits, as the Family Credit targeted low-wage families, specifically.[32] The year 1999 also saw a

22 Blumberg (1972), cited at Staudt (1997), p 535.
23 Sainsbury (1999), p 185.
24 *Ibid*, pp 186–7.
25 *Ibid*, p 187.
26 Adler (2004), p 87, citing HM Treasury (1972) *Proposals for a Tax Credit System*, Green Paper, London: HMSO (Cmnd 5116).
27 Ochel (2001), p 6.
28 Adler (2004), p 88, citing Brewer, M (2000) *Comparing In-Work Benefits and Financial Incentives for Low-Income Families in the US and the UK*, Working Paper WP 00/16, London: Institute of Fiscal Studies.
29 *Ibid*.
30 *Ibid*.
31 Ochel (2001), p 6.
32 Blundell and Meghir (2002), p 10.

significant increase in the amount of the credit, and, importantly, the introduction of a minimum wage.[33]

Tax credits within a system defining women's financial independence

Part of the philosophy behind the Child Tax Credit is an assumption or hope that the tax system may provide a means by which women can choose to define a degree of financial independence. The idea of financial independence for women achieved much prominence in the 1990s, which, in addition to giving rise to the growth of the tax credit initiatives, also witnessed the end of the joint taxation of a married couple's income. Joint taxation ended on 6 April 1990, after which date husbands and wives have had the option to be taxed separately.[34] This was a striking moment in feminist history, and in many ways all tax measures which follow in its still-early wake must be considered in this context. It was also a moment to challenge assumptions at the basis of tax policy more widely.

Traditionally, questions of attribution of income in tax systems are answered by determining who has ultimate control or authority.[35] This has particular resonance in the context of the wife whose income, until so recently, was compelled to be merged with that of her husband. Contributing to the delay in the adoption of individual filing is thought to be a 1980 study by Feenberg and Rosen arguing that, in a family, not only is a great deal of property jointly owned, but, even if not, then a system which remained focused on individual ownership would entice spouses to transfer ownership of property from one spouse to another in order to achieve the lowest possible tax burden.[36] These were dangers which were assumed as written in 1990, when the decision to allow independent taxation of couples nonetheless went ahead.

Independent taxation did not end the gendered biases in income taxation. Indeed, a criticism of independent taxation is that it reinforces marriage as a societal ideal. The reason for this is found in the basis of the tax system itself. The tax system in the UK is based upon income; a choice which may be justified, among other policy grounds, on the argument that taxing income is based in fairness. Put simply, if one is fortunate enough to have both ability and motivation, the extent of both may be taxed in a system based on income (which may be described as taxing the 'sweat off one's brow').[37] Income taxation also incorporates progressivity more easily than consumption taxes, which have the potential to fall more harshly on lower earners.[38] So an income tax system is based on initiative, ability, and the individual. Joint income taxation moves away from

33 Leigh (2004), p 16.

34 See generally Andrews (1991).

35 As Kornhauser explains, '[t]raditionally, the power to manage and control determines whether income should be attributed to a taxpayer': (1993), p 74.

36 Feenberg and Rosen (1980).

37 Oberst (1988), p 671–2.

38 Kornhauser (1997).

that paradigm and into something else. This is potentially difficult, because it means that the taxation of families may not fit easily into the rest of the tax system, which remains based on the individual.

So where do tax credits fit within this redesign? Blundell has asked whether it is 'possible to design an effective training incentive within an individually based tax credit system'.[39] More broadly, the construction of that individual, in taxation and in the marketplace, will not escape the patriarchy underlying society (and the tax system that supports it), especially within the context of liberal feminism.

Perhaps an answer lies in (traditionally defined) 'liberal feminism', submitting that people are both individuals and self-governing, and that the choices they make are self-directed.[40] In this design, the more options from which individuals may choose, the happier they will be.[41] 'Sexism', Becker argues, 'operates by pressuring or requiring, sometimes by law, individuals to fulfil male and female roles regardless of their individual preferences'.[42] The female role is not subsumed within a system of joint taxation of income; rather, it is reinforced. Choices are denied in a system of jointly taxed income because the system itself is based on the model of the family, which itself is drawn along gendered lines. Jointly taxed income is derived from a family model which has been reinforced, even designed, by the tax system along lines of gender. What is being taxed are the gendered roles of male and female, joined together in the legal forms that define the family.[43]

Bennett proposes that the ideal of independent taxation should be taken a step further, such that 'a fundamental step towards achieving [financial autonomy for women] could be to base benefit entitlements and obligations on the individual rather than the family or household'.[44] He explains this point cogently, suggesting that 'the government often has a tendency to see couples as "one flesh", rather than as individual men and women'.[45] This has the consequence of increasing the importance placed on the stresses faced by, for example, one-earner as opposed to two-earner families, and 'working families' as opposed to 'out of work' families.[46] This point also has been seized upon by fathers' rights activists, who have enjoyed some success in litigation arguing that equal entitlement to tax credit is not superseded by any legitimate policy aim.[47]

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39 Blundell (2004), p 245.

40 Becker (1999), p 32.

41 *Ibid*.

42 *Ibid*.

43 The Civil Partnership Act 2004, Pt 14, s 3(c), ensures that 'two people of the same sex who are civil partners of each other' will be entitled to claim tax credits. This need not impact, however, on the gendered roles that continue to define the family, as explained in Eskridge (1995), pp 62–3.

44 Bennett (2002), p 564.

45 *Ibid*, p 579.

46 *Ibid*.

47 See *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] Fam Law 464.

Mothers, citizens and the economy

This section will consider, to some extent, why both men and women are taxed in the first place. Discussion will largely relate to concepts of societal obligation and citizenship. The very concept of citizenship, however, may 'negat[e] consideration of gender-based inequalities'.[48] When 'the paid worker in the public sphere is the model, and the appropriate citizenship rights are those associated with paid employment', women, inevitably, are marginalised.[49] Women often have a greater role in the private sphere (for example, as carers and homemakers) than men, and thus are excluded from models of citizenship which depend upon public roles.[50] Further, these responsibilities in the private sphere can act to preclude women's entrance into the public sphere, for example, of the marketplace.[51]

Fredman describes this move away from welfare and into paid employment as part of a 'push/pull' strategy by Labour: 'On the "push" side have been the welfare to work programmes centred on the New Deal; while on the "pull side" have been the minimum wage, working families tax credit (now child tax credit and working tax credit) and the national childcare strategy.'[52] Into what, exactly, are mothers being pushed?

Tax credits are designed to increase employment and net income in 'low-wage areas' without burdening the government's budget.[53] A contradiction of such initiatives is that whilst the problem of 'low wages' is their target, in some ways, tax credits may act to ensure that areas which suffer low wages continue to do so. As Adler has explained, a key aspect of the new earned income tax credits proposals is that they, by design, in effect force people to accept poorly paid employment.[54] Tax credits ameliorate the effects of low wages, but do not act to raise the wages themselves. Further, employers are given an opportunity by these initiatives to lower wages.[55]

Additionally, studies have suggested that '[e]mployment-conditional tax credits and benefits do not only affect the decision whether or not to participate in the labour market; they also affect the volume of labour services which those who are already in employment are prepared to supply'.[56] The reason for this, Ochel suggests, is a reaction against a structure through which, as a worker's income increases, so the level of credit decreases; and simultaneously, as a worker progresses up the rate brackets, so the rate of income taxation increases.[57] Put simply, although earned income tax credits are designed to ensure that working parents who may be classified as low wage can afford to work (ie, they are no longer

48 Kilkey and Bradshaw (1999), p 148.
49 *Ibid*.
50 *Ibid*, p 149.
51 *Ibid*.
52 Fredman (2004), p 299.
53 Ochel (2001), p 3.
54 Adler (2004).
55 Ochel (2001), p 18.
56 *Ibid*, p 5.
57 *Ibid*.

effectively prohibited from working because of taxation and the costs of child care), nonetheless, the fact that the more one works, the less one retains, may act as a disincentive to increase volume of work.[58]

It is worth stressing the argument that much of the work concerning the increase in the volume of labour supply emanates from studies of the US's earned income tax credits.[59] Leigh's study of the UK revealed similar results, focused on the specifics of the UK system, yet with some surprising caveats. His study considered specifically the increases that both welfare and the tax credits received in 1999, and '[w]hile theory suggests that the difference between welfare and in-work benefits will be a key factor determining the employment effect, the stigma associated with welfare may be such that a comparable increase in both welfare and the tax credit will nonetheless induce a rise in labour supply'.[60]

On the other hand, stark analysis of tax credits reveals that the economy may be injured by tax credit programmes.[61] Their attractiveness lies not in the amount of beneficial economic activity that is increased, it is suggested, but in the extent to which they increase the attractiveness of marriage for men (if not for women).

> First, poor families will get extra income that should allow them to invest more time and resources in their children. Second, it should make marriage a more attractive option for males, since single males are taxed without receiving any subsidy. On the downside, the attractiveness of marriage for females, however, might decline. Second, the beneficial aspects of this policy for children may be dissipated by larger family size. The long-run health of the economy is not helped by this policy.[62]

This research needs to be considered against a background of high rates of unemployment, which provided the background for the redevelopment of earned income tax credits in 2001 not only in the UK, but in Australia, Canada, Ireland, New Zealand, Finland, France and the United States as well.[63] Initiatives like tax credits are particularly effective techniques in such economic climates because, as explained above, of the opportunity they provide for employers to lower wages.[64] This can reduce the cost of labour, and hence stimulate the demand for more workers.[65]

High levels of unemployment, generally, may have provided a backdrop to the refashioning of the tax credits in 2001, but it was the under-employment of single mothers, specifically, as Blundell and Meghir explain, which truly commanded the government's attention in the structuring of these initiatives.[66] This was a particular concern, because single mothers remained a persistently 'under-employed'

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58 *Ibid*.
59 Leigh (2004), p 2.
60 *Ibid*, p 18.
61 Or, in their analysis, 'subsidies' for children.
62 Greenwood *et al* (2000), p 35.
63 Ochel (2001), generally.
64 *Ibid*, p 18.
65 *Ibid*.
66 Blundell and Meghir (2002), p 6.

group throughout growths in employment for other types of women.[67] The Women's Budget Group has defined the issue plainly: 'The government has accepted that we should collectively share with parents the maintenance costs of children by introducing the new child tax credit alongside universal child benefit (formerly family allowance). . .'[68]

On this question of sharing maintenance costs, Alstott has constructed a more radical platform. She suggests that society should contribute money, directly, to parents.[69] She points out that 'in the not-so-distant past' raising children made economic sense in terms of their expected contribution to the family business (even during childhood), and support during old age.[70] Now, parents are expected to provide emotional and financial support for almost twenty years, without immediate financial reward.[71] Given this shift, Alstott submits, it is not only unsurprising that parents need help from society, but proper that they should receive it.[72]

Alstott explicitly rejects the 'libertarian' response, which would suggest that, even if parenting makes less financial sense than it did not so long ago, nonetheless this is an activity which participants choose.[73] The skills valued under the tax credits legislation would include recognition of the fact that one should choose only to have children which one can afford, *without* state assistance. The end-game of the Child Tax Credit is a 'working parent', working in the marketplace.

In this context, it is worth remembering that fourteen years ago, Fineman suggested that the symbolism evoked by such initiatives may be that the state will move to the side, and then the father will step in to assume his rightful place.[74] This symbolism is particularly redolent when class enters the analysis, and the discussion of the extent of society's obligation to parents may disintegrate to: 'I don't mind paying to help people in need, but I don't want my tax (dollars) to pay for the sexual pleasure of adolescents who won't use birth control.'[75] The legislation enacting the Child Tax Credit is not, however, necessarily focused on the father. Its goal is a working parent, whether the mother or the father, to some extent liberated from the otherwise financially prohibitive demands of child care.

The libertarian objection, however, is not dependent on stereotypes of gender and class in the formulation of its argument that society owes no obligation to those who chose an activity of which the benefits, pleasures, struggles and demands are publicised and celebrated in equal measure. The flaw in this argument, Alstott suggests, is child care. She argues that 'continuity of care' is crucial to a child's development, and, if a child grows into a troubled teenager, or student, and eventually troubled adult, then society will suffer in a number of ways.[76]

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67 *Ibid*.
68 Women's Budget Group (2003).
69 Alstott (2004). This might be described as a radical version of the UK's Child Benefit.
70 *Ibid*.
71 *Ibid*.
72 *Ibid*.
73 *Ibid*.
74 Fineman (1991).
75 *Ibid*, p 282.
76 Alstott (2004).

Given the incentive society has in minimising the products of poor parenting, Alstott argues, it makes sense to make the job of parenting easier through financial assistance, even if parents probably would try their hardest to care for their children with whatever resources they had.[77] Alstott's proposal is to keep mothers out of the marketplace.

The lynchpin for Alstott's analyses are studies in child psychology. She writes that, '[s]tudies document the serious and lasting emotional harm suffered by children denied continuity of care for long periods or during formative stages'.[78] Social science also is relied upon to establish the impact suffered by parents by their choice to have children, and, in particular, the effect wrought on women's position in the marketplace. Alstott writes that '[s]ocial science research is often equivocal, but on the cost of parenthood to mothers in particular a truckload of research exists to establish how it limits economic options in every class'.[79] Her characterisation of the demands made of the twenty-first-century parent is stark: 'No exit.'[80] At the core of Alstott's philosophy is the argument that one affirmative choice (ie, to become a parent) should not provide the excuse for 'unlimited regulation' of the remainder (or, at the least, a very significant portion) of a parent's life ... without more.[81] Direct financial assistance to parents is that 'something more', and, at the least, it provides the possibility of remedying the enormous limitations that parenthood places on women in particular.[82]

In some ways, the value of Alstott's suggestions is what Livingston has described as 'the narrative or consciousness-raising side of feminist scholarship, the ability of an author to make us think about gender in a different way than we did before, even if her proposals are politically unrealistic or inconsistent with some versions of feminist theory'.[83] Alstott's direct subsidy proposals offer an alternative for those uncomfortable with the proposal of the marketplace, with all of its gendered assumptions, as the locus for women's liberation. Typical ripostes to feminist suggestions about tax include, as Livingston explains, 'political unrealism', 'flawed technical analysis' and 'failure to take adequate notice of the differences among various strains of feminist theory'.[84] Taking what could be posed as Livingston's challenge to view Alstott's proposal in terms of consciousness raising, then what do we learn about motherhood, tax and the marketplace from these suggestions?

First, we learn that the perceived impact upon children of care which is not provided by parents is increasing the attention placed upon (primarily) women's work within the home. We learn also, as Minow describes it, that '[t]he dominant discourse of economic necessity and market choice risks squeezing out the equally

77 *Ibid*.
78 *Ibid*.
79 *Ibid*.
80 *Ibid*.
81 *Ibid*.
82 *Ibid*.
83 Livingston (1998), p 1801.
84 *Ibid*, p 1802.

important language of responsibility, care, equality, fairness, and compassion'.[85] This is a contribution, as well, to a model – the family – which imposes limitations on women. It may be that 'family is one of the most important contexts for the structuring of women's lives . . . [and] feminists identify the family as a key site of male power over women'.[86] The family is *also* the basis for welfare distribution.[87] Kilkey and Bradshaw explain that '[l]argely as a result of gendered-power relations, familial welfare in all countries remains overwhelmingly the responsibility of women'.[88]

All of this suggests that society has a stake in parenting, and that we all take some benefit from a child that is well 'supported'. From a strictly economist's (ie, not feminist) perspective, it is all actually a rather more complicated series of sacrifices:

> Women in the lower strata of the economy are better off with a child tax credit. The rest are slightly worse off. The poorest women have the largest number of children so a tax credit helps them the most. Since women value children more than men (single men don't value them at all), the overall effect of the tax credit on women's expected utility is less detrimental than it is for men.[89]

Indeed, studies have explored whether child tax credits may be detrimental to society, in that they either encourage families to have greater numbers of children, or at least make it more possible for them to do so.[90] The (albeit limited) value of such research to a feminist analysis might focus on the inevitably broad question of whether or not 'women' actually 'want' tax credits. There is some empirical evidence indicating that they do.

A study by Alvarez and McCaffery revealed that, in the US, women were more likely to prefer initiatives such as earned income tax credits to, for example, reducing the national debt (which was favoured by men).[91] When informed that tax laws were biased against families with two workers, the study found that men adjusted their preferences to support initiatives such as earned income tax credits, although men objected to tax relief for child care.[92] Women were more predisposed towards child-care tax relief, but less inclined towards tax relief for the 'working poor' than men.[93]

The authors of this study explained that

> [t]he decline in support for general rate reduction and the increase in support for working poor tax credits, but not child-care relief, suggests that the prime had the effect of making respondents think more of general redistribution to the poor: that

85 Minow (1998), p 342.
86 Kilkey and Bradshaw (1999), p 149.
87 *Ibid*.
88 *Ibid*.
89 *Ibid*, p 36.
90 Greenwood *et al* (2000), p 7.
91 Alvarez and McCaffery (2000).
92 *Ibid*.
93 *Ibid*, p 19. Interestingly, however, women also were significantly more likely to express 'no opinion' than men, and to emphasise their 'ignorance' about tax law and policy (*Ibid*).

> the 'problem' of working mothers triggers an economic, not a familial demographic, response.[94]

What this reveals is that, with the focus taken away from the parent, or at least from the parent's gender, and redirected towards the economy, it is actually the child that is at centre stage. Or, perhaps, the transferring of income from families without children, to families with them, is at centre stage.[95] It is perhaps for this reason that the child-care element of the tax credit system can have important feminist consequences. For, as Orloff explains, 'the impact upon women of inadequate resources and support for childcare is well documented'.[96] Where lack of support impedes women's abilities to participate in the economy, there is an impression that they are prevented from participating in a fuller sense of citizenship as well. On the question of citizenship, Lardy has investigated whether the participatory benefits (civic and personal, even emotional) of voting ought to be made compulsory.[97] Then, in effect, everyone would be able to feel good for 'doing the right thing', even if forced to do so. This has intriguing resonance for tax credits, which seek to encourage (perhaps, financially, push?) women into the marketplace. Work traditionally has been viewed as a key aspect of citizenship theory, to the point that feminists have suggested that the denial of access to work directly impedes women's equality.[98] Focusing solely on work, of any kind, as the desired goal ignores the restrictions imposed by lack of education and other restrictions of opportunity.[99] The assumptions underlying such discourse reveal much about the value placed on the act of parenting.

Tax or benefit? The changing face of tax administration

As far back as 1972, the government realised that the amalgamation of taxes and benefits presented daunting administrative challenges.[100] A key facet of the (later) Working Families Tax Credit was that it was to be paid to the earning family member through his or her employer. Thus, the credit would usually be paid to men, not women. The government hoped through this approach that the 'stigma' associated with receiving what might be viewed as a 'handout' would be lessened, because the credit would be associated with the income tax system (as opposed to benefits).[101] This policy was never popular with child advocacy groups, however, who, along with influential research conducted by Goode *et al*[102] managed to convince the government of the old adage that money would be more

94 *Ibid*, p 12.
95 Greenwood *et al* (2000), p 34.
96 Orloff (2002), p 113.
97 Lardy (2004), p 303.
98 Staudt (1997), pp 542–3.
99 *Ibid*, p 543.
100 Adler (2004), p 91.
101 Bennett (2002), p 566.
102 Goode, J, Callender, C and Lister, R (1998) *Purse or Wallet? Gender Inequalities and Income Distribution within Families on Benefits*, London: Policy Studies Institute, cited at Bennett (2002), p 566.

likely to reach children 'going into the women's "purse" rather than the man's "wallet" '.[103]

The perception of whether or not 'assistance' through the tax system is a credit or a benefit may be linked to the class and gender of the recipient. What may be perceived as 'welfare' when received by taxpayers struggling with poverty may be viewed as 'a way of helping hard-working "independent" taxpayers' when directed towards the middle class.[104] The Child Tax Credit legislation is part of a process which began when the Inland Revenue[105] commenced administration of some benefits. Undertaken for reasons of efficiency, this was a startling development in the modern history of this agency. In 1999, the Benefits Agency units charged with administering the old-style Family Credit and Disability Working Allowance were moved from the Department of Social Security to the Inland Revenue.[106] The transfer was attributed to plans for establishing the infrastructure that would be needed for the then-upcoming Working Families Tax Credit and Disabled Person's Tax Credit, and to a hope that this merger would save employers some of the costs associated with administering the new legislation.[107]

Tax credits are distinguishable from benefits in that benefits typically are dependent upon a specified period of unemployment, and are limited in duration.[108] Tax credits need not be limited in duration.[109] Tax credits are meant to provide long-term assistance to families, to encourage them to alter their behaviour and to attain new skills, so the lack of time limits is logical from that perspective. That a tax collection authority should hand some of the money collected *back* was, simply, startling, but it seemed to make sense. Given the administrative infrastructure of the Inland Revenue, it was perhaps logical to attempt to employ these resources more efficiently.

Is the Child Tax Credit, in truth, anything to do with tax? Is it not simply a benefit? If so, may the title simply be dismissed as a cynical attempt at re-branding? Perhaps, but the importance of language in these initiatives, and its relevance to a feminist analysis of them are not to be underestimated. Brewer explains that although the tax credits originally were introduced as part of a government package to reduce child poverty, their administrative structure indicated a growing dissatisfaction with PAYE[110] as a means of identifying household need and targeting benefits.[111] Passing the burden to both the taxpayer and the employer, he suggests, may contain significant portent for the future.[112] If it worked

103 *Ibid*.
104 Orloff (2002), p 112.
105 As then was.
106 Inland Revenue Annual Report (1998). The Inland Revenue has now been merged with HM Customs and Excise to form one, combined 'new' organisation. See the O'Donnell Report (2004).
107 *Ibid*.
108 Blundell (2004), p 234.
109 *Ibid*.
110 Pay As You Earn.
111 Brewer (2002), p 245.
112 *Ibid*.

well, perhaps the introduction of self-assessment for self-employed taxpayers might be extended to non-self-assessing taxpayers, in a 'self-assessed benefit' of a sort. As of the end of 2004, however, it could not easily be suggested that it *had* worked well. Andrews, for example, warned in 2001 that the complexity of the credits' structure actually was not worth it when compared to the amount of money that families would be receiving.[113] Their early structure also led to initial misunderstandings about 'credit' and 'relief'. Andrews explained that the early Child Tax Credit was, in fact, a true credit of £520, which could be deducted from a taxpayer's ultimate liability to tax.[114] The Working Family Tax Credit, however, was 'welfare payment redesignated as a tax credit', or, simply, a benefit with the name 'credit' tagged on.[115] This, however, in these still early days, has proved to be the least of the problems faced by these initiatives.

Perhaps most unfortunate has been the problem of overpayment. Approximately 80,000 families were placed in the position of having to ask the Revenue if they could keep excess payments with which they mistakenly had been issued.[116] Worse, Ann Redston, chair of the personal taxation committee at the Chartered Institution of Taxation, warned that 80,000 was 'the tip of the iceberg' in terms of the poor administration of the credits.[117] Given that the Revenue has announced that it in fact intends to recover much of this overpayment,[118] these fears would appear to be well placed. The attempt to recover these funds has been criticised as 'over-zealous', especially when viewed in light of the aims of the legislation. In perhaps the worst case scenario, one mother announced that she now would need to work additional hours to be in a position to refund the overpayment – hardly the balance indicated as an objective by the legislation. Families have the right to challenge requests to refund overpayment if the blame may be ascribed to the Revenue, but fears were expressed that this right is not widely known (nor publicised).[119]

There are other levels of confusion. Wikeley has suggested that: 'While Child Tax Credit might just as well have been named Child Benefit Plus, there are features of Working Tax Credit that are genuinely new and would not fit comfortably in a social security scheme.'[120] This lack of clarity also has implications for the place that the credits should assume within the structure of the taxation of the family, generally – in other words, should the tax credits be 'taken at their word' and considered as part of a system of joint taxation (ie, taxation of the family), or are the credits really about the 'mother', and hence part of individual taxation? As the Women's Budget Group has explained, '. . . either tax credits are in effect means-tested benefits, and should be treated as public expenditure rather than

113 Andrews (2001), p 306.
114 *Ibid*, p 307.
115 *Ibid*.
116 BBC, 10 November 2004.
117 *Ibid*.
118 *Ibid*.
119 *Ibid*.
120 Wikeley (2004), p 22.

revenue foregone as other benefits are, or that they are part of the income tax system and the principle of independent taxation has been breached'.[121] Intriguingly, the Women's Budget Group believes that

> the government has now agreed to implement the OECD[122] conventions on accounting procedures for purposes of international comparison – ie that the refundable part of tax credits should count as public expenditure and the remainder as revenue foregone; but we are not aware of any commitment to change HM Treasury documents to reflect this agreement.[123]

Generally, the credits are part of a system which is supported by a fundamental adherence to joint taxation. As the credits address basic concerns founded along lines of gender, the gender implications of joint assessment might have been considered by the government prior to their introduction, and the Women's Budget Group consider it 'unfortunate' that this did not occur.[124]

It is particularly unfortunate, perhaps, when considered in the context of what Bennett believes to be Labour's track record on gender awareness. Included among Labour's accomplishments in this area are 'some progress on producing better statistics using a gender perspective'; the development (soon after assuming office) of a 'policy appraisal for equal treatment'; and research into social security initiatives.[125] Research and policies aside, Bennett suggests that the gendered perspective has been neglected as Labour's tenure has progressed, to the point that intentions seldom have produced results for women. Bennett explains that '[t]his lack of gender awareness is clearly not a product of ignorance amongst Treasury civil servants. Instead, it must reflect a particular conceptualisation of the major issues facing the UK and the government's resulting policy priorities'.

What is the problem, though, with programmes that may be described as, perhaps, mildly successful? Other than the fact that the problems which the tax credits are addressing are urgent, and more needs to be done, is there not an argument for applauding steps in the right direction? If such programmes are indeed steps in the right direction, then perhaps, but Staudt described the danger of tax laws which seriously impede women's efforts towards financial independence whilst giving the illusion of equality.[126] This is a debate which can also become subsumed in concerns over the societal 'devaluing' of work performed within the home.[127]

The tax credits are tools with intriguing feminist potential because they are designed to encourage women to work outside of the home. A traditional feminist critique of tax legislation is that it encourages women to stay at home, and thereby increases women's financial dependence on men.[128] Yet, as has been suggested at

121 Women's Budget Group (2001).
122 Organization for Economic Cooperation and Development.
123 Women's Budget Group (2001).
124 *Ibid*.
125 Bennett (2002), pp 561–2.
126 Staudt (1997), p 533.
127 See Graglia (1995).
128 *Ibid*.

earlier points in this chapter, the economic literature addressing whether or not tax credits actually 'work', from the perspective of the government's objectives, is not at all clear. In fact, Gerfin and Leu suggest that

> . . . changing the wife's labour supply would affect disposable income which can be increased above the poverty line. This is the reason why in the public discussion it is argued that this kind of tax credit makes work pay. Theoretically, however, it is well known that the labour supply effects of the tax credit are unambiguously negative.[129]

This has particular relevance when placed in the context of Alstott's response to proposals, first, to reduce the marginal rate of tax for working mothers; and second, to repeal legislation which ensures equal pay for men and women (in favour of women) with what she describes as 'feminist' objections.[130] For example, 'feminists who see the devaluation of women's family labour as the central obstacle to women's autonomy, power, or happiness could oppose market work tax incentives'.[131]

The undoubted political attractiveness of these initiatives aside, 'if', as Orloff has argued, 'strategies based on employment are the only politically viable option, one must still confront the fact that the workplace and the labor market remain deeply structured by gender, race and residence, and care giving responsibilities create a number of problems for many mothers and other caregivers who are or would like to be employed, particularly when they are poor and unpartnered'.[132] The marketplace is a curious destination for mothers, for women, if this is a feminist journey. Of course, marketplace work leads to increased financial independence, but the marketplace is largely drawn along lines of 'neoclassical economic assumptions [which] do not adequately serve the interests of the vast majority of people, especially those who are less powerful'.[133]

The target of the Child Tax Credit is constructed by the media and by government along hazy lines of deliberate confusion. The former Leader of the Conservative Party, Michael Howard, seized on this confusion, and gave it the 'spin' of 'Labour tends to believe it's all or nothing. You're either a stay at home mum or a career woman. You're either Kate Reddy or Gywneth Paltrow'.[134] Howard proposed to reform child-care tax credits by expanding them, such that they may be spent on child-care options beyond the 'formal', 'registered' carer.[135] He also promised that the Conservatives are 'looking at ways' to reduce

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129 Gerfin and Leu (2003), p 15.

130 Alstott (1996), p 2033, citing McCaffery, E (1993) 'Taxation and the family: A fresh look at behavioral gender biases in the code' 40 UCLA L Rev 983, and McCaffery, E (1993) 'Slouching towards equality: Gender discrimination, market efficiency, and social change' 103 *Yale LJ* 595.

131 *Ibid*, p 2035.

132 Orloff (2002), p 114.

133 Dennis (1993), p 34. As Bennett observed, '[w]hen the government *has* applied a gender lens to its tax and benefit policies, it has typically tended to focus on mothers'. Bennett (2002), p 563.

134 Howard, speech, 11 November 2004.

135 *Ibid*.

administrative burdens which are 'unfair' on the employer, such that, for example, credits might be paid directly to parents.[136] Additionally, he proposed reforms which would protect parents from the needlessly 'bureaucratic' requirement of having to inform the Revenue every time their circumstances change.[137] The latter proposal was potentially, particularly significant, as it indicates that the Tories considered removing the 'tax credit' element (confused though it may be) of the Child Tax Credit and rendering it a pure benefit (which, presumably, would be less dependent on information concerning a parent's changing circumstances, particularly if constructed along the lines of Child Benefit). Howard proposed also to consider including a deduction for child care as part of his platform.[138]

As a final question for this chapter, then, what is, potentially, the relationship of the tax–benefit conundrum to the debate surrounding the possible impact of the market on motherhood, or the debate surrounding the commodification of gendered labour?[139] Because the social constructs of class, gender and race are interconnected, the way in which one of these factors affects an individual is related to one's experience of the other two.[140] A woman's experience of the gendered construct of motherhood is inevitably affected by her relationship to class. It should be stressed, however, that de-commodification, with its focus on 'social rights free individuals from reliance on the market',[141] is equally problematic. Kilkey and Bradshaw argue that this concept is related to the male-breadwinner model of dependence on the market, and is thus of 'only limited relevance to women'.[142] What, then, constitutes 'independence' for women? Freedom, not from the marketplace, but from male dominance over their lives.[143] This may be achieved through a variety of means, including access to independent income, giving 'women "voice" to negotiate power relations within families, and "exit" to opt out of an unsatisfactory relationship'.[144] The ability of tax credits to provide this exit, however, is less than certain.

Conclusion

The family tax credits upon which this chapter has focused are relatively recent initiatives, born of the political sphere surrounding definitions of the family. Child Tax Credit, in design, is an earned income tax credit, which may be defined as a benefit linked to paid employment. The end-game of earned income tax credits is a 'working parent', working in the marketplace. This chapter has drawn attention to research demonstrating that some women in the lower strata of the economy

136 *Ibid.*
137 *Ibid.*
138 *Ibid.*
139 Cahn (2001).
140 Matthaei and Brandt (2001).
141 Kilkey and Bradshaw (1999), p 149.
142 *Ibid.*
143 *Ibid.*
144 *Ibid.*

are better off with a child tax credit. But tax credits are presented as being about children: all of society's children. Child tax credits are designed to elevate the welfare of all children in the economy. This focus on how a mother raises her children can have important feminist consequences.

These consequences include the place of tax credits within a structure which, over the past decade and a half, has acknowledged women's financial independence as an underlying value of the tax system. Although the place of women's financial independence on the value hierarchy (potentially) presently may be at risk, tax credits have been presented as a further (not necessarily connected) initiative towards this end. Interestingly, though, this independence is being achieved through her status, not independently, but *within* a family. It is the marketplace, with all of its gendered constructs, which is the locus for women's liberation. Davis explained that '[t]o the extent that the tax system is a source or a subsidizer of patriarchy, the tax system is in fact responsible for the continued oppression of women in this society'.[145] By encouraging women's participation, tax credits support, even reinforce, the patriarchy of the marketplace.

What will the feminist consequences of these initiatives be? The answer may lie in the fact that this chapter has considered tax credits as part of the changing face of tax administration. Tax credits may simply be refashioned benefits, part of a new administrative order, but this chapter submits that, even if that is their political reality, they may continue to suggest something more. With this push away from the home and into the marketplace, tax credits do not increase the value which society places on the act of parenting, and given that women continue to bear the bulk of parenting obligations, women's 'work' itself will continue to be devalued. Indeed, tax credits only compensate parenting when it is performed by someone *other* than the mother. Tax credits will be judged on the extent to which they assist families living in poverty, but they also will be considered for the success (or not) of the hype within which they are packaged. The significant role that tax plays in fashioning the subject of family law may not be, thus, and in this context particularly, a positive one, until the gendered assumptions underlying tax, family and the state[146] are addressed.

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145 Davis (1988), p 233.
146 *Per* Sainsbury (1999), n 1.

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Chapter 11
'The Branch on Which We Sit': Multiculturalism, Minority Women and Family Law

Maleiha Malik

Feminism's outstanding contribution as an ideology and a political movement has been its insistence that theory and practice are intimately connected. Theory matters: not only because it can influence the way women are treated but also – and crucially – because it can influence women's self-understanding. Yet, at the same time, thoughtful feminist scholars have recognised that when faced with stubborn empirical facts – the sincere claims of individual women – theory must align itself to practice.

Multiculturalism and the politics of difference

One aspect of our contemporary reality to which feminists must now respond is multiculturalism. Increasingly, our societies are comprised of a great diversity of races, cultures and religions. This 'factual multiculturalism' is undisputed. What is more controversial is the normative claim that such diversity is a good thing and, more significantly, the demand that these groups must be accommodated within our public sphere. Multiculturalism has put a considerable strain on feminism. Increasingly, groups claim that the liberal democratic state should grant them autonomy in decision making that affects their individual members; they claim distinct rights even where these are, in many cases, inimical to the interests of women. These issues require feminism to go back to basics: what happens to categories such as 'women', 'women's interests', and 'feminist critique' when they are restructured in conjunction with pressing categories such as race, culture and religion. This is an important question for politics because the most urgent demands for social and political equality are no longer exclusively or predominantly the preserve of feminism. It is also an important question for law because the legal regulation of equality has now moved beyond the traditional categories of race and sex and now extends to religion and some of its cultural manifestations.[1]

Multiculturalism gives minorities in liberal democracies an unprecedented opportunity to live as equal citizens without suffering the worst excesses of forced assimilation. It is not, however, a panacea. It carries within it risks: the prospect of fragmentation of our political communities; and the risk of harm to vulnerable individuals within minority communities.

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1 See, for example, The Employment Equality Directive 2000/78/EC, implemented in Britain via the Employment Equality (Religion or Belief) Regulations SI 1660/2003 (introduced/presented 26 June 2003; in force 2 December 2003).

Multiculturalism is a wide term that requires some explanation.[2] At a normative level, it includes the claim that different groups – defined along categories such as race, religion, gender and sexual orientation – can make legitimate claims for public accommodation of some of their practices. In this way, it challenges the classic liberal settlement of keeping the public sphere as a neutral space where citizens come together as equal citizens with recognized political rights. Of course, this classic liberal approach allowed minorities to flourish through guaranteeing individual civil and political rights, such as free speech, free association and free exercise of religion, but also provided an overarching framework that allowed minorities to pursue their way of life in the private sphere.

It is worth reiterating that multiculturalism is not only a normative claim but it is also a social and political fact. There has been a significant change in the form and content of the political claims made by minority groups in recent times. Many no longer ask for the 'same' rights as the majority. Some of the most compelling demands of minorities now take the form of calls for the accommodation of 'difference' in the public sphere. This social change is especially problematic for liberal multiculturalism. Claims for accommodation vary greatly: the categories range from race, culture and religion through to gender and sexual orientation and disability. Legal regulation – at the domestic, EU and constitutional level – covers all of these various grounds. I want to narrow the discussion by limiting my analysis to claims made by traditional groups whose claims may be framed in terms of racial, cultural or religious criteria. As I argue below, public accommodation of traditional groups raises a distinct set of problems for feminists and family law. Moreover, claims by traditional religious groups – for the public accommodation of their private religious identity – cause special difficulties. They challenge the most fundamental beliefs of secular liberals, for whom the public–private dichotomy is almost an article of faith: these traditional liberals will vigorously defend an individual right to religion in the private sphere whilst at the same time vigilantly guarding the public sphere as a neutral religion-free zone.

Minorities are no longer willing for their differences to be a matter of 'tolerance' in the private realm: they now demand political rights and accommodation in the public sphere. Feminists recognise this move immediately. Yet, at the same time, they also immediately recognise the way in which this challenge to the private–public dichotomy, especially by traditional cultures, is a threat to women, because processes of multicultural accommodation are likely to create specific risks to vulnerable group members. This is especially true where there is accommodation of traditional racial, cultural or religious practices which often and predominantly harm women.[3] This is partly why the confrontation between feminism and multiculturalism is so painful.[4] Feminism reflecting on multiculturalism often sees its own mirror image. Feminists are acutely aware that they have laid

2 See Malik (2000a).

3 Okin (1998).

4 See, for example, Baroness Hale's opinion in the case of *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

the foundations for a wider identity politics. However – as the 'Is multiculturalism bad for women?' debate confirms – despite this intimate connection, at the level of theory, the two movements are also often incompatible. In their most pessimistic moments, as they notice multiculturalism mutating into a threat, feminists have good reason to wonder if they have in fact created a monster.

'Is multiculturalism bad for women?' The challenge for feminism and family law

This chapter does not try to answer the question 'Is multiculturalism bad for women?' Instead, it explores the implications of this debate for feminist theory and family law. Recent developments confirm that feminists working in the area of family law need to take this issue seriously. Legal problems arise in areas such as divorce and the protection of children which force us to ask questions about how law should respond to claims of cultures and religions. The 'Sexual and Cultural' Research Project at the London School of Economics sets out the considerable number of British cases where there is a conflict between sexual and cultural, racial or religious equality.[5] A review of this database of cases confirms that this issue has considerable implications for family law. For example, a number of the cases and policy initiatives relate to forced marriage. The cases on forced marriages arise not only in criminal law proceedings but also in wardship proceedings in the family courts and petitions for the annulment of marriages. Other cases relate to divorce or the dissolution of marriages. Problems about the status and suitability of traditional norms have arisen in cases where the parties (often members of religious minorities) have chosen to submit to foreign jurisdictions in preference to English law in the regulation of divorce. These conflicts can also arise in those cases where there are two types of marriage: first, an English civil marriage and a second, cultural or religious ceremony. Subsequently, some minority women have resorted to forum shopping, challenging inequitable foreign divorce rules in favour of English law relating to divorce.

Difficult questions also arise in cases involving the upbringing of children where the child or the parents are from a traditional culture or religion. The possibility that traditional practices may cause harm to young girls makes this a particularly important issue for law and policy relating to children. Young girls are vulnerable to harmful traditional practices within their cultures for two reasons: because of their sex and because of their age.[6] Of course, parents are rightly concerned about the environment in which their children are raised, but can they impose practices on their young female family members that may cause these children harm? John Eekelaar has recently discussed this issue and concluded:

> Perhaps we should acknowledge that, at least normally, (that is outside cases of persecution), communities may have no specific interests *as communities*. Their

5 See 'Women and Cultural Diversity: A Digest of Cases' at http://webdb.lse.uk/gender (accessed on 20 May 2005).

6 Susan Moller Okin (2002; 1998) makes the point that leaving young girls to be raised in a culture which does not respect their autonomy can cause them harm even – and especially – where these young girls internalise the values of the culture.

> individual members most certainly do, and this includes the interest in passing on their culture to their children. But that interest is limited, and it is limited first and foremost by the interests of the communities' own children.[7]

As well as resorting to family courts within the mainstream legal system, minorities are also making claims for separate family law tribunals that can govern civil law disputes for minorities. The recent experience of Canada is a good example of the way in which claims of traditional minorities have moved beyond abstract political demands to become a legal reality. Ontario's Arbitration Act 1991 allows the use of alternative dispute resolution procedures to resolve personal disputes in areas as diverse as wills, inheritance, marriage, remarriage, and spousal support.[8] This legislation allows individuals to resolve civil disputes within their own faith community, providing all affected parties give their consent to the process and the outcomes respect Canadian law and human rights codes. The use of separate tribunals is a real rather than a theoretical possibility in Ontario, where groups from religious minorities such as Jews and Muslims have indicated their preference for resort to traditional religious justice to resolve family law disputes.[9]

It is understandable why traditional minorities will choose to focus on family law when they make claims for accommodation. Family law governs some of the most private and intimate aspects of who we are, and it relates to our personal identity in the most profound way. It therefore seems appropriate to allow citizens in a liberal democracy to reach an agreement about the rules that will govern these aspects of their life. The problem for feminists becomes most acute when there are claims by not only men but also women from traditional cultures that they prefer traditional legal rules to govern their private disputes. If all persons, and women, freely choose to be governed by a traditional justice system – the argument goes – then there seem to be no conclusive reasons why the state should not respect these choices. This is – at first sight – an attractive argument. However, feminist theory has taught us to be vigilant about the automatic acceptance of claims of the 'free choice of women' without asking further questions about context: 'which women'; 'when'; 'how'; 'under what personal, social, economic or political conditions?' Once we undertake this more detailed analysis it becomes clear that the argument moves too swiftly from 'free choice of minority women' to a separate system of family law. Most significantly, such a quick analysis pays insufficient attention to the myriad ways in which granting control over family law to a

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7 See Eekelaar (2004), p 191.

8 For a summary of relevant primary and secondary sources, see the bibliography at www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/bibliography.pdf.

9 See report in *The Forward*, 14 January 2004: 'In a move that is angering Jewish feminists, B'nai Brith Canada is supporting the demands of conservative Muslims in the province of Ontario who wish to have the right to use private arbitration based on Islamic law for the resolution of their marital, custody and inheritance disputes. A report prepared for the Ontario Ministry of the Attorney General recommended last month that family arbitration based on Islamic law be permitted, but regulated, under the province's Arbitration Act. But both Muslim women's groups and Jewish feminists are opposed, fearing that vulnerable female immigrants will be coerced into submitting to Islamic arbitration.' Cited in The Pluralism Project. See www.pluralism.org/news/.

traditional culture or religion has the potential for causing harm to vulnerable group members such as women.

Feminist theory also encourages us to undertake a deeper analysis of social practices to reveal the distinct impact that they have on women. This should immediately alert us to the more subtle reasons why family law and women have become a focus – sometimes an obsession – for traditional groups concerned with the preservation and transmission of their culture or religion. Women are always at the forefront of attempts to re-create collective identity because they reproduce and socialise future members of the group. Therefore, controlling with whom and on what terms they should undertake their child-bearing and child-rearing functions becomes an issue not only for individual women, their partners and families but also for the wider community. From this perspective, it becomes a critical matter that women should enter into their most intimate relationships and functions in a way that preserves the membership boundaries and identity of the whole community. For all these reasons, the control of women – especially in areas such as sexuality, marriage, divorce and in relation to their children – is a recurring feature of traditional cultural and religious communities. Women are also often given the status of passing on the particular collective history of the tradition and its social, cultural and religious norms to the next generation. Women become a public symbol of the group as a whole. This explains why traditional communities focus on family law when they demand accommodation. These groups draw on multiculturalism in support of their political claims: they insist that they, rather than the liberal state, should have exclusive jurisdiction in these key areas.

Simply citing multiculturalism in defence of these claims by traditional groups cannot be the end of the matter. One of the most powerful arguments for multiculturalism is that there are power hierarchies between minority groups, majorities and the state that should be re-negotiated. However, this recognition of external hierarchies should not blind us to the fact that there are also power hierarchies within groups. These internal inequalities of power may cause vulnerable individuals, such as women and children, to bear a disproportionate burden of any policy of accommodation of cultural or religious practices.[10] The resulting costs can include entering into a marriage without the right to divorce; inadequate financial compensation in the case of divorce; giving up the right to custody over children; restriction on the right to education, employment or participation in the public sphere; giving up the right to control over their bodies and reproduction.

It is often argued that many women choose to remain members of a group despite the fact that traditional rules and practices undermine their interests. 'They have a right to exit but they freely choose to remain' is the response to any challenge.[11] But this 'right to exit' argument is not a realistic solution to the problem of oppression within groups. It offers an *ad hoc* and extreme option to what is often a systematic and structural problem within traditional cultures and

10 Baroness Hale discusses this issue in the *Begum* case, n 4 above.

11 The right to exit argument is defended by Kukathas (1995). For the opposite view, see Green (1995). See also an application of this argument in Shachar (2001).

religions. It puts the burden of resolving these conflicts on individual women and relieves the state (which has conceded jurisdiction in this area to the group) of responsibility for the protection of the fundamental rights of its citizens. Most significantly, the right to exit argument suggests that an individual woman at risk from a harmful practice should be the one to abandon her group membership, her family and community.[12] The complexity of the choices that women face in these circumstances makes it more likely that they will continue to consent to practices despite the fact that they experience harm. This internalisation of harmful practices is exactly what exacerbates women's vulnerability in these contexts, and we owe feminist theory a great debt for revealing that women can develop a false understanding of their own best interests, and that consciousness raising is an important task for those concerned with the defence of the rights of women.[13] In the 'multiculturalism and minority women' debate, the stark fact is that emotional attachment, economic circumstances and sometimes religious commitment makes the 'right to exit' not only an unrealistic but also a tragic choice for many women from minority communities.[14]

There will be significant diversity in the responses of minority women who are faced with harmful practices within their own communities. In this context, it is worth remembering that not only are 'minority women' not a monolithic group, but also that there is variety *within* the category 'women'. This insight is more likely to ensure that our analysis does not distort the choices of minority women. Theory must also be alert to the fact that although women's membership of a cultural or religious group may provide a useful marker of their preferences, it cannot be allowed to pre-determine the complex possibilities for belief and action available to them. In the face of oppressive practices within their group some women will choose to leave altogether. Of course, they should be assisted if they make this decision and exercise their 'right to exit'. These are not, however, the hard cases. It is much more difficult to know how to respond to those women (probably the majority) who choose to remain 'insiders' within cultures and religions which do not always give them power, safeguard their interests or allow them full participation as equals. This is perhaps one of the most perplexing aspects of the behaviour of minority women that confuses contemporary feminists.

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12 Shachar (2001), ch 3. For a critique of the right to exit argument in the specific context of minority women see Okin (2002).

13 For a discussion of the case for, and some scepticism about, consciousness raising in feminist theory see Smart (1989), p 80. A classic exposition of consciousness raising is to be found in the work of the late Andrea Dworkin: see, for example, *Pornography: Men Possessing Women* (1983). Feminist theory that draws on methods from psychoanalysis understandably gives great status to consciousness raising as a useful method for theory and practice. Luce Irigaray and Julia Kristeva's work are examples of this; see Duchen (1986).

14 The LSE Gender Institute's Project Grant Report on the Nuffield *Sexual and Cultural Equality: Conflicts and Tensions* states in the context of forced marriage: 'The UK initiatives have focused very heavily on exit, and more specifically, on assisting individuals forced into marriage with an overseas partner . . . our research suggests that exit only works up to a point. It leaves to many individuals with what they perceive as no choice, for when the choice is between rejecting an unwanted marriage partner or being rejected by one's family (and as many experience it, then having to abandon one's cultural identity), the costs are set impossibly high.'

There is rarely one right answer to such complicated personal choices. Some women may choose to remain silent despite the injustice in their communities. Others may seek to challenge the dominance of certain 'interpretations' of their traditions that are a source of their oppression. For example, certain traditions within Islamic and Jewish family law give men the right to unilateral divorce but make the right to a divorce for a woman conditional on the consent of her husband. One consequence of this is that, where the husband refuses to grant a divorce, Muslim and Jewish women have to obtain an annulment from traditional religious authorities: called *khula* (in Arabic) for Muslim women; *get* (in Hebrew) for Jewish women. Rather than bypassing the traditional religious rules altogether and seeking dissolution of the marriage via secular legal authorities, some Muslim and Jewish women may choose to continue to seek redress using traditional forms of justice whilst at the same time pressing for a change in the way in which their religion interprets the rights to divorce. As Shachar argues, the state can assist these women in this struggle by providing incentives and safeguards for individual rights.[15]

Of course, all women will immediately recognise that collective units such as the family can often oppress women. Feminists are familiar with the argument that vesting rights in the family does not safeguard the interests of women and that the grant of individual civil and political rights to women has been an invaluable strategy in challenging the oppression of women.[16] Yet, at the same time, there is considerable agreement that the understandable status of individual rights needs to be offset against the importance of group membership (in a family and wider community) for minority women, which is a critical aspect of their self-definition.[17] However, this analysis need not collapse into a zero-sum game between individual and group rights. One of the great errors of some forms of multiculturalism, just like familism, is the assumption of essentialism of groups: the claim that it is possible to identify one fixed definition of a tradition or culture, or religion or family. Any complex group contains not just one but a plurality of ideas and arguments. Some of these voices are backed by existing power structures whilst others are relatively silent and do not have access to public space.[18] It should not surprise us to learn that very often those who purport to speak on behalf of traditional cultures or families do not represent the interests of women.

This conflict is not just a quarrel between minority women and their communities. It is also of vital concern for the state and for outsiders who are not members of these communities. Most pointedly, feminists must give this issue priority. Questions about how minority women should respond to harmful

15 Shachar (2001), pp 132–45. In England and Wales, see s 10A Matrimonial Causes Act 1973.

16 See, for example, Susan Moller Okin's comment (1979), p 282 that: 'In spite of the supposedly individual premises of the liberal tradition, JS Mill was the first of its members to assert that the interests of women were by no means automatically upheld by the male heads of the families to which they belonged, and that therefore women, as individuals, should have independent political and legal rights.'

17 See Kymlicka (1995), p 7. See also Malik (2000b).

18 For a discussion of some of these issues, see Nussbaum (1999), especially pp 8–10.

practices within their own groups, and how other women can support them in this struggle, should be of critical concern to feminism. If complex traditional groups contain within them a plurality of ideas and arguments, then women who are insiders within these groups have some space for resistance against the dominant interpretations of the groups' practices. This struggle bypasses the tragic choices involved in 'exit' from the group. It is also exactly the sphere in which minority women can and should expect support – intellectual, political and practical – from other women. A sensitive understanding of the concerns of minority women can assist in this delicate task of political advocacy. Once we move beyond the assumption that 'exit' is the only legitimate response of minority women who face injustice within their communities, then it becomes clear that the challenge is to strike a balance between showing solidarity for minority women whilst at the same time maintaining a critical perspective. This less extreme response would accept that partial recognition of a traditional group does not require the wholesale uncritical acceptance of all its practices.

In the concluding comments in this chapter, I will suggest that we need to reach some consensus on the foundations for feminist theory. At this point, I want to stress that clarity and articulacy about these foundations are invaluable assets for minority women themselves. In fact, one of the most significant contributions that outsiders can make is to 'hold the line' by using key principles such as autonomy as the basis for a detailed and constructive critique of traditional communities and their family practices. Insiders, minority women, can turn to this critique as a precious source of information and ideas to inform their tradition, which often contains within it the resources to allow them to challenge injustice and oppression within their own communities and families. Similarly, insiders will also be able to appropriate legitimate arguments from outside their own tradition and use the experience and ideas of Western feminism and other political movements to make demands for dignity and justice. Western feminism has made an outstanding contribution towards securing dignity for women. It also has an understandable and healthy scepticism about traditional group practices, particularly in the family context. It is therefore lamentable when this constructive analysis collapses into the view that minority women must shed all their group affiliations before they can be considered legitimate partners in feminist, or indeed any, intellectual and political movements. This is a significant barrier to minority women establishing alliances – feminist alliances – that would assist them in the Herculean task of challenging the power of men within their own communities.

There are other arguments against an 'all or nothing' approach. Insisting that all traditional groups are misogynistic and patriarchal – whether or not this is true – will cause us to miss those areas in which there is internal resistance to the oppression of women. This is likely to put minority women on the defensive by reintroducing the stark dilemma of 'your rights or your culture'. Multiculturalism draws its strength from the idea that membership and public recognition of a cultural or religious group can be a source of individual well-being.[19] In addition

19 Taylor (1992).

to this point of principle, there is also a strategic argument against such a wholesale rejection of traditional practices. Vehement and indiscriminate attacks on traditional practices may make a community group defensive, thereby weakening the position of minority women in their attempts to launch an internal challenge to harmful practices. It is essential that minority women are given an opportunity to formulate a criticism of their practices from within their own tradition. Minority women have the potential to be the most effective and devastating social critics of the traditional practices that harm them. Their knowledge and experience – and ability to speak the language of the group – give them an authority that cannot be replicated by outsiders. Taken together with the previous argument that 'outsiders' can offer an invaluable critique of social practices, this analysis supports the view that there is a need for alliances – feminist alliances – between all women. It also reinforces the point that feminist theory and practice must give priority to understanding and accommodating minority women. The real challenge is to be able to find a place for the experience of minority women within 'traditional' feminist theory: 'Experience is, in this approach, not the origin of our explanation, but that which we want to explain.'[20]

Feminist theory and minority women

How should feminism respond to those women within a particular group – the *insiders* – who freely choose to be governed by traditional systems of justice that contain rules that are likely to harm them? My main argument is that it is possible for feminism to respond to this challenge at the levels of theory and practice. However, this requires us to revise the usual methods that we employ in understanding the lives and choices of women.[21]

'How can we start to understand the beliefs and conduct of minority women who are insiders within groups?' is obviously not a question that is unique for us. There is a vast array of theoretical writing about methodology in the human and social sciences. Feminism is sometimes suspicious of grand theories that may, by making universal claims, crowd out the reality of differences between men and women. Theory, it is argued, needs to give greater priority to individual experience and practice. At one level, this position displays an understandable scepticism about the very status of 'grand theory' as a useful tool for analysis.[22] Feminist critique of traditional methods of analysis in the human and social sciences takes a variety of forms, but one recurring theme is the call for a focus on practice as a way of revealing the reality of women's oppression. This connection between

20 Scott (1992), p 40.

21 For a discussion of the importance of theory see Crosby (1992).

22 Smart writes (in the context of feminist jurisprudence, but the arguments have a more general relevance to feminist theory): 'It sets up a specific feminist theory as superior to other versions, not on the basis of a set of political values, but on the basis that radical feminism is the Truth and its truth is established through the validity of method and epistemology. This is scientific feminism; it attempts to proclaim its unique truth above all other feminisms and other systems of thought. It turns experience into objective truth because it has taken on the mantle of a positivism which assumes that there must be an ultimate standard of objectivity.' (1989, p 68.)

theory and practice in feminist theory is widely acknowledged. MacKinnon, for example, recognises the importance of individual experience to theory. In her early work, feminism – 'Unmodified' – is presented as a method that uses practical experience as the point of entry into a more universal theoretical project.[23] Carol Smart has noticed the way in which this method takes on the mantle of empiricism and a 'scientific feminism'.[24] More recently, Drucilla Cornell has made a similar criticism of this feminist method. She writes:

> Of course, there are examples of moralising which purportedly divide the righteous feminists from those women who have fallen prey to false consciousness and who disagree on a given position enunciated by a self-defined feminist. One glaring example is Catharine MacKinnon's accusation that feminists who disagree with her position on pornography are collaborators.[25]

Smart points out that theorising within law seems to be especially vulnerable to encouraging this tendency: 'It is unfortunate that working within the discourse of law seems to produce such tendencies – it is as if law's claim to truth is so legitimate that feminists can only challenge it and maintain credibility within law by positing an equally positive alternative.'[26] Smart does not argue against theory altogether but rather seeks to challenge a particular method that 'wants to claim that its truth is better than other truths. I would prefer that it sought to deconstruct truth and the need for such truths and dogmatic certainties, rather than adding to the existing hierarchies of knowledge'.[27] She concludes that: 'This is not an argument against theorizing, however, but a specific critique of grand theorizing.'[28]

Smart and Cornell's critique of MacKinnon also provides us with a prescient insight into the perils of automatically applying these traditional feminist methods to minority women. Extrapolating from personal experience to grand theory, and then presenting this as the 'scientific' or 'positive' truth about women as a group, is a risky strategy when we move beyond a heterogeneous group of women and start to accommodate differences based on factors such as race, culture or religion. What seems to be the neutral truth will often ignore or marginalise the experiences of minority women. In these circumstances, collapsing back into a position that gives overwhelming authority to the personal experience of these 'different women' will not provide a solution either. As Segal notes,

> if we rely on personal experience alone we cannot explore how that experience is itself shaped by the frameworks of thought of those immediately around us. These frameworks are not static or inflexible; there is conflict and disagreement within

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23 MacKinnon (1987). See also a passage from MacKinnon's earlier work on feminist method by Smart (1989, p 70): 'Radical feminism is feminism . . . Because its method emerges from the concrete conditions of all women as a sex, it dissolves the individualist, naturalist, idealist, moralist structures of liberalism, the politics of which science is the epistemology. Quoted from MacKinnon (1983).'

24 See Smart (1989), p 71.

25 Cornell (1995).

26 Smart (1989), p 71.

27 *Ibid*.

28 *Ibid*.

> the groups we are born into over ways of living and relating to others, ways of interpreting and experiencing the world. We cannot, however, easily step outside our own specific culture.[29]

So how should feminism – more specifically, feminist method – respond to difference in the category 'women'? There is a fine balance to be struck between the recognition of difference in our definition of 'women' and exaggeration of its relevance and importance. The move in feminist theory in the 1980s against essentialism ensured that 'difference between women' became almost as important an issue as the 'difference between men and women'.[30] An important contribution in this field is the work of Elizabeth Spelman.[31] She argues that: 'There are startling parallels between what feminists find disappointing and insulting in Western philosophical thought and what many women have found troubling in much of Western feminism.'[32] This is especially damning for feminists because it turns their critique of the exclusionary tendencies of mainstream political thought – that it marginalises and excludes women – on themselves. The accusation is that traditional feminism marginalises women who are differentiated along categories of race, culture, religion or class. This critique is now well established. Mainstream feminist thought is comfortable with the idea that theory and practice can sometimes exclude or marginalise women who do not fit comfortably into the majority category because of their race, culture, religion or class.

Being vigilant about differences between women on grounds such as race, culture or religion does not, however, necessarily mean that gender must be wholly determined by these other categories for analysis. It is possible to argue that there is something specific about oppression where it is based on gender without necessarily collapsing into the position that oppression based on other grounds is irrelevant. What we need is a more sophisticated analysis: one in which gender is restructured along with these other pressing categories such as race, culture, religion and class. This does not mean that gender is no longer a distinct category or that it should be subsumed within these other grounds. Instead, this increasing complexity in the subject matter means that we need more sophisticated methods that are sensitive to differences between women in those cases where difference is both present and relevant to analysis. We have to be aware of the danger of abstracting from personal experience (which is given such high status in feminist theory) to universal claims and then to conclusions that these are the truth about all women. It also means that, in some cases, we may want to insist that there are similarities that allow us to talk meaningfully about 'women' as a coherent category. This approach is more likely to achieve a workable balance between the need to make some generalisations about the form of oppression experienced by all women without marginalising important differences.[33]

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29 See Segal quoted in Smart (1989), p 79.
30 See, for example, Hooks (1984).
31 Spelman (1988).
32 *Ibid*, p 6.
33 For a general discussion of these issues and a critique of Spelman, see Okin (1979).

One consequence of this delicate balance between essentialism and the recognition of valid difference is uncertainty about how we define fundamental categories and objectives within feminist theory. Recent feminist theory influenced by postmodernism confirms some of these insights. Feminists who draw on these ideas usefully reveal the way in which power is not a concept that can reveal male oppression; it also infuses the way in which we undertake theoretical analysis. For Judith Butler, key questions for feminism include the following: 'Through what exclusions has the feminist subject been constructed, and how do these excluded domains return to haunt the "integrity" and "unity" of the feminist "we"?'[34] Smart, Spelman and Segal's insights are also illuminating because they point us towards some tentative conclusions about how to capture and understand the experience of minority women. Smart and Segal affirm the importance of theory but eschew the traditional positive feminist claims that there is one grand theory – to use Smart's terms, a 'scientific truth' – for analysing all women. We must also be alert to difference within the category 'minority women'. Just as there is a risk of distortion if we treat the category 'women' as a monolithic concept, so there are also dangers in a method that uses 'minority women' as an undifferentiated term. Such a crude approach cannot hope to capture the subtle variety and important nuances in the responses, beliefs and actions of these women. Of course, this concern with capturing difference renders the subject matter 'women' or 'minority women' complicated and unstable. One consequence may be that our choice of method does not yield the usual degree of certainty and predictability with which we are familiar. Feminist theory and practice, as I argue below, may need to accept this as an inevitable by-product of deepening its analysis of women's oppression. It will have to open itself up to a degree of uncertainty in the realms of concepts and ideas; objectives and policies.

Smart and Segal both acknowledge this risk and they are critical of a method that is in constant search for certainty.[35] Segal concludes her analysis of the challenge posed to feminist theory with a salutary reminder of the challenge facing any feminist theorist seeking to accommodate minority women: 'We cannot, however, easily step outside our own specific culture.'[36] It is difficult enough to develop a method that can do justice to differences between women that arise from categories such as class or sexuality. A method that seeks to capture difference among women will always give rise to problems of uncertainty and mutability. Race, and especially culture and religion, provide us with yet more intractable problems. As Clifford Gertz has noted, the study of cultures and religions is difficult because analysis must constantly balance grasp of detail, the perspective of insiders and objective analysis. There is a danger of reification on the one hand and reductionism on the other.[37] Yet, at the same time, these criteria – race, culture

34 See Nicholson (1995), p 5.

35 Smart writes, 'I hope to show below why we need to theorize women's oppression and why we cannot simply rely on experience as if it were a concrete reality which merely needs to be exposed thereby circumventing the problems and difficulties of intellectual work.' (1989, p 72.)

36 See Segal quoted in Smart (1989), p 79.

37 Gertz (1993).

and religion – are some of the most crucial determinants of personal identity and well-being. Membership of a racial, cultural or religious group is a secure form of personal identity: it is a based on belonging rather than accomplishment.[38] Hence, the conundrum for feminism: we are being asked to accommodate theory to a subject matter that is intrinsically – and notoriously – difficult to theorise. Moreover, to add to the dilemma, there is no realistic prospect that analysis can bypass the cultural and religious affiliations for minority women. Participation in a group provides women with meaningful choices about how to live their lives; it affects how others in society perceive and respond to them and therefore goes to the heart of a concern with 'self-identity' and 'self-respect'. It is this tension – between the fact that race, culture and religion are so resistant to our analysis whilst simultaneously being critical aspects of the personal identity of women – that raises a significant challenge for feminist theory. So we return to the question at the start of this analysis: 'How can we understand the beliefs and conduct of minority women who are insiders within groups?'

Theorising difference: '*From their own perspective . . .* '

One alternative to traditional approaches in feminist theory is what we can loosely label post-modern feminist theory.[39] Post-modern feminism is especially useful in any attempts to accommodate the claims of minority women because it challenges assumptions about the definition and status of the subject 'woman', therefore providing room for alternative definitions and analysis. It also makes clear that definitions of identity – such as women, race or religion – are never merely descriptive; they are also normative categories that need to be challenged and reconstructed ('resignified' in Butler's terms). In the present discussion about feminist theory, post-modern feminism's insights into the way in which power (and politics) influences our choice of theory are particularly pertinent.[40] The methods and conclusion of post-modern feminism confirm the earlier criticism of 'scientific feminism' by acknowledging the uncertainty in basic categories such as 'women' and 'their interests' and 'tradition' and 'culture'. In all these ways, post-modern feminism is invaluable to any attempt to analyse and accommodate the claims of minority women.

In the discussion that follows, many of the insights about theory are influenced by post-modern feminism. However, rather than explicitly making a choice between alternative ways of 'doing' feminist theory, I want to take a different approach. I do not want to set myself the impossible challenge of providing a conclusive answer on how we should theorise difference. Instead, I want to make a tentative gesture towards examining whether there are methods that can assist us in capturing the beliefs and experiences of minority women without distortion and misrepresentation. One way of making this issue more manageable is to

38 See Kymlicka (1995). See also Malik (2000b).

39 See discussion in Collier, Chapter 12 in this volume. For a challenge to the definition and use of the term post-modernism see Butler (1995a; 1995b).

40 Butler (1995a; 1995b).

reduce the methodological choices that we face to two contrasting models. Of course, such a reductive choice is vulnerable to the criticism that it is a caricature. At the same time, presenting the arguments in this way has a number of advantages. I hope that this contrast will make clear not only what, but more importantly just how much, is at stake in the initial choice of method. In addition, the reduction of complex positions to their simple end results will allow us to see that each of the models reflects ideas, presuppositions and debates which will be immediately familiar. The aim of this analysis, therefore, is neither to resolve the issue between post-modern feminism and its critics nor to provide one overarching theoretical approach. Rather, it is a more modest task of retrieval: what modifications do we need to make to the usual methods of feminist analysis so that we can better understand – and accommodate – minority women?

The first cluster of ideas, which I have loosely called 'scientism',[41] is similar in some respects to the 'scientific feminism' of approaches that have been criticised by Smart and Cornell. It has as its central presupposition the belief that the study of human practices can model themselves on the natural and physical sciences. It is partly summarised in the approach of certain writers such as AJ Ayer: 'Just as I must define material things . . . in terms of their empirical manifestations, so I must define other people in terms of their empirical manifestations – that is, in terms of the behaviour of their bodies.'[42] There are a number of aspects of this approach which are important for an analysis of gender and minority women. The first is the belief that there must be a strict separation between fact and value: description of a social practice is one thing; its evaluation is something quite different. The second is the *priority of the right over the good*: the belief that human agency is about the capacity to create an identity through the exercise of radical choice, rather than about participating in any prior conception of the individual or common good.[43] Third, the subject is abstracted from the context of decision making such as language, community and culture; identity tends to be interpreted as a 'monological' process. Thus, there is an atomistic treatment of human conduct: complex human actions are analysed in terms of their simple components. This ahistorical analysis emphasises the basic action as the proper temporal unit for the study.[44] The importance of the intentions, motivation and inner states of consciousness of the human agent is ignored, or at the very least marginalised.[45]

The techniques for analysis which this model advocates are description and observation. The theorist is encouraged to neutralise her own perspective and evaluative criteria before studying the subject matter. In this way, the subject

41 For an example of the use of this term see the work of Schumacher: eg, Schumacher (1973).

42 1971, p 171.

43 Examples include leading works such as John Rawls (1971), *A Theory of Justice* and, more recently, his *Political Liberalism* (1993); also Ronald Dworkin (1986), *Law's Empire*.

44 See, for example, Oakeshott (1975).

45 This idea is captured by AJ Ayer's famous statement that: 'Just as I must define material things . . . in terms of their empirical manifestations, so I must define other people in terms of their manifestations – that is, in terms of the behaviour of their bodies, and ultimately in terms of sense-contents.' (1971, p 171.)

matter is made more manageable: the focus is on qualities which are absolute and can be stated with precision; the theorist is necessarily forced to concentrate on the outward rather than inner dimensions of human conduct. A particular practice is described using accurate, certain and definite concepts, and in an all-or-nothing way. Finally, this positivist model is consistent with an understanding of language as an instrument for 'designating' existing subject matter and reality which exists 'out there'.

I think it will be clear from the way in which I have presented the model that I do not consider it an attractive way to proceed, and nor do I find its assumptions concerning human agency convincing. Moreover, this method is inappropriate to address the central challenge of understanding minority women because it does not have the appropriate resources to allow description of, and qualitative distinctions relating to, inner states. These inner states – motivations, feelings and desires – cannot be stated with scientific accuracy or tested by the empirical tools of scientism.

Most importantly, this approach ignores the need for feminist theory to move beyond claims that it has access to one absolute truth and to accommodate the complexity of difference in the lives of women. Recognition of difference means that the focus of our enquiry – the lives and practices of women – is no longer homogenous or stable. Both Smart and Segal argue for a method that is willing to sacrifice some certainty and objectivity in favour of greater responsiveness to difference. Their approach comes closer to what I term a 'human sciences' approach that lies in contrast to the scientific feminism I described above. I do not want to undertake a point-by-point comparison of 'scientific feminism' and a 'human sciences' approach to feminism, but some contrast between the two is illuminating because it reveals the specific ways in which we need to modify feminist analysis to accommodate minority women in a way that takes experience and difference seriously.

The key distinction between the two models is that the human sciences approach takes as an essential principle the fact that human agency raises unique issues for method and analysis. This has a number of consequences for theory. First, this alternative approach challenges not only the validity but also the possibility of describing human conduct without first undertaking the difficult task of evaluation: that is, we cannot understand human action without first understanding the purpose pursuant to which that action was undertaken. Therefore, understanding the point, value and significance of conduct as conceived by the people who performed those actions – and which are reflected in their discourse, actions, and institutions – is a key task for the theorist.[46] Second, any study of individual human conduct must also attend to the communal context of actions: for instance, language, community and culture, which mediates and is mediated by family, including affective ties and emotional, physical and economic hierarchies and dependencies. This means that individuals cannot be understood in an atomistic, all-or-nothing way; the exercise of freedom and choice by an individual must be

46 Weber (1978).

understood in this wider context. Third, this different approach is less resistant to shifting the focus of analysis from the outward manifestation of human conduct towards inner states of consciousness. It is consistent with the view that an essential rather than contingent feature of human agency is that agents not only make choices about what they want, but also undertake a process of reflection about these choices, by ranking them against evaluative criteria. They undertake a process of self-interpretation to judge certain inner states as belonging to an integrated, and therefore more valuable, mode of life; and others as unworthy.[47] Purpose, intent, motivations and inner states necessarily require us to place these features within the context of the agent's history, and social practices become intelligible only when understood as part of an ongoing tradition. The basic action gives way to a different temporal unit for analysing human conduct. Human action therefore needs to be analysed not as a static one-off event, but as part of a dynamic process. To paraphrase Alisdair Macintyre's observations: human agency is 'a quest – a narrative – a progression towards purpose and unity'.[48] Like post-modern feminism, this approach takes seriously the need to 'situate' women in a wider context for analysis.

These modifications will allow a greater focus on the purposes, intentions, motives of subjects. They will also take seriously the way in which historical and social contexts are important to the self-definition of women, their feelings and their choices. In this way, it is more likely that the experiences of minority women can be better articulated, understood and accommodated.

This alternative approach has important implications for our choice of method, concepts and language. Observation and description remain important devices, but the theorist has to start by undertaking the difficult task of identifying the good, point, value and significance which the subjects feel they are pursuing. Rather than mere description of outer action, this method gives a better understanding of the subject *from her own perspective*. In this sense, it is an inter-subjective understanding rather than an objective description that is being forced from the outside.[49] However, this move from neutral universal description to inter-subjective understanding raises some intractable problems. How can an outsider to the tradition (race, culture or religion) accurately understand purpose and inner motivations? Are there any evaluative criteria by which we can judge these purposes and inner motivations as being better or worse; beneficial or harmful to women? There will be a wide variety of purposes and inner states of consciousness which will vary between minority women and within the individual lives of minority women. How can a method capture such unstable subject matter?

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47 This is the idea of 'strong evaluations' that we find in the work of Charles Taylor and the idea of second-order desires and reflexivity in Harry Frankfurt discussions of the mind–body problem. The idea is that motivations, intention and inner states of consciousness should be a central focus for the study of human conduct. See, for example, Taylor (1985a); Frankfurt (1971).

48 Macintyre (1985), ch 15.

49 For a full discussion of inter-subjective interpretations, see Taylor (1985b). See also Malik (2000b).

A non-distorted understanding of a tradition might come from women who are themselves able to recognise, appreciate and accurately describe the inner motivations of subjects, but at all times, analysis must align itself with the lived experiences of minority women, as they understand them. In a less formal sense, this idea is reflected in Iris Murdoch's philosophical and fiction writing, which is a passionate call for our theorising to connect with essential features of our human experiences.[50] In the present context, paying attention to texts that have authority in the lives of minority women, and their own writing and literature, will be an essential task for any theorist who sets herself the task of making minority women's inner lives more intelligible.

There remain more fundamental problems of 'uncertainty' which arise because attention to point, motivation and inner states of consciousness complicates the subject matter. These features vary between different persons and contexts; they can also vary considerably within the life of the same person over a period of time. Taking them into account makes the lives of women less amenable to study using descriptive and 'all or nothing' concepts. Conceptual devices such as the identification of the focal meaning or the ideal type of a traditional practice, which are then used as the basis for evaluation and analysing how and in what ways the current practice has become corrupted, become more useful.[51]

Other acute problems of uncertainty will arise in evaluating the lives of minority women. Recent post-modern scholarship tells us that this problem of 'ethnocentrism' arises whenever we seek to understand a tradition as outsiders by applying evaluative criteria which are external to that tradition. Feminist theory has taken both sets of issues seriously. Critics have argued that these approaches risk eliminating 'normative philosophy' from feminist theory. Benhabib, for example, argues that to move away from universal claims about the importance of equality as a universal value underpinning feminism is to throw away crucial foundations that are 'the branch on which we sit'.[52] Butler replies that there is a need to challenge these foundations because power precedes theory, but argues that the resulting uncertainty need not collapse into nihilism.[53]

Their disagreement reflects the longstanding debate between post-modern feminism and its critics. Post-modern theory provides two interrelated ways of treating the problem of applying evaluative criteria by 'outsiders' to the practices of 'different insiders'. First, there are those – often relying on the work of Nietzsche and Foucault – who suggest that all criteria are ultimately a matter of

50 See Murdoch (1997).

51 Max Weber states, in relation to ideal types: 'The sociologist seeks also to comprehend such irrational phenomena as mysticism, prophecy, inspiration and emotional states by theoretical concepts which are adequate on the level of meaning. In all cases, rational and irrational alike, he abstracts himself from reality and advances our knowledge of it by elucidating the degree of approximation to which a particular historical phenomenon can be classified in terms of one or more of these concepts . . . In order that these terms should have clear meaning, the sociologist must for his part formulate "pure" or "ideal" types of systems of the relevant kind which exhibit the internal coherence and unity which belongs to the most complete possible adequacy at the level of meaning.' (1978, p 23).

52 Benhabib (1995).

53 Butler (1995a).

'power' and therefore refuse to use any standards for evaluation. Second, there are others who emphasise 'diversity' and suggest that the application of judgments is to do 'violence' – a term which Jacques Derrida uses – to the other, and shows a failure to respect the 'difference' of the other. In the present context of understanding minority women, it is unlikely that refusal to apply evaluative criteria, for whatever reason, will be helpful. For minority women, especially for those who rely on traditional cultural and religious norms, it is of critical importance that they believe these norms to be objectively true criteria for making value judgments. Therefore, a proper understanding of these norms and their status in the life of minority women must take this fact seriously. In these circumstances, it is tempting to fall back on a descriptive method that is 'neutral' between truth claims. At least observation – and adopting a neutral 'point from nowhere' – has advantages because it allows us to bypass difficult questions of the choice of evaluative criteria. However, this model – as suggested above – is not ideal. The evaluation becomes obscure, but that does not mean that it is not operating.[54] In particular, this method will miss altogether purpose, motive, intention and sentiment, which are essential features for a non-distorted understanding of the other tradition. Therefore, a seemingly innocuous description results in distortion and misunderstanding.

This dilemma may be resolved – in part – by remaining committed to, rather than abandoning, the central requirements of the human sciences model. Hans Gadamer's work reminds us that, in these contexts, we come to understand through an act of comparison which allows us to 'place' the different practice against a similar or analogous home practice. Attention to the purpose, intention and motivation which is necessary for us to make sense of our own practice also provides the basic modular frame within which the different practice is accommodated and made more intelligible. Gadamer states: 'Only the support of the familiar and common understanding makes possible the venture into the alien, the lifting out something out of the alien, and thus the broadening and enrichment of our own experience of the world.'[55]

The introduction of a method that makes comparison between the familiar 'home' understanding of a practice and the new 'alien' practice has a number of significant consequences for those involved in theorising difference. For observers, this requires moving beyond the dominant idea that 'understanding' is about reaching agreement on foundational arguments, which is an epistemology which is particularly attractive for scientific modes of thought. Once we start to move away from the assumptions of that model, we can start to see the way in which the idea of 'understanding' needs to be recast as a hermeneutic and relational process. On this analysis, the act of comparison of the practices and experiences of minority women with our home understanding carries within it the seeds of its own success.

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54 Iris Murdoch (1992), p 204 states: 'Theories which endeavour to show that all evaluation (ascription of value) is subjective, relative, historically determined, psychologically determined, often do so in aid of other differently described or covert value systems, whether political or aesthetic.'

55 Gadamer (1986).

Whereas previously the other practice may have been viewed as merely different, undertaking comparison in a self-conscious and formal context can be illuminating; placing the different practice against an analogous 'home' practice which has point, value and significance within the life of the observer may allow a shift – albeit modest – in understanding.

The use of hermeneutic methods, in a comparative context of a theorist seeking to make the practice of minority women more intelligible, may also have some transformative potential in two important respects. First, most obviously, it can allow the 'outsider' theorist to gain a more accurate appreciation of the value of the practice and beliefs of minority women as they themselves experience them. Second, more subtly, it presents a formidable and intimate challenge to the theorist's own perspective. This alternative approach uses a 'home' understanding rather than a neutral point from nowhere as the essential starting point for understanding. It follows that success in this method will require the theorist to have a more accurate understanding of her own 'home' perspective: that is, she will need to review and re-examine her own commitments as a (possibly minority) feminist. Self-understanding and the ability to analyse these pre-existing commitments will be as important as objective observation and description. The theorist will need to remain open to the possibility of transformation: the study of minority women may lead to a change and shift in the fundamental criteria which are the starting point of her analysis.

There will also be important limits to this method. Most importantly, it could lead to the problem of the 'hermeneutical circle' into which all women cannot enter, because they are not able to share the 'home' understanding of the particular theorist, and which cannot be broken because we have jettisoned the appeal to objective and neutral criteria. The method will work well in those cases where, despite difference, there remains a sufficient basis for some shared goals, attributes and experiences. It will not work as well where these criteria start to diverge significantly and it may fail altogether where there is a substantial chasm or binary opposition between the two world views: that of the theorist and that of the 'different' subject. Therefore, in some cases, the tradition or practice of minority women may be so alien and irrational that there is no possibility of any advance in understanding. One example of this may be the clash between a commitment to autonomy in the home understanding of the theorist and a minority woman's insistence on adhering to a practice that causes her substantial harm. There are many practical examples of exactly these types of conflict: ranging from the extreme case of consent to female circumcision through to other examples such as voluntary veiling or gender segregation. In the family context, the Islamic and Jewish law practice of making a right to divorce conditional on the consent of the husband is an obvious example. When faced with these fact situations, the immediate response of the outside observer may be: 'Why did she consent?' In these cases, comparison between the theorist's pre-existing commitments and values and the claims of minority women may not be illuminating. The 'home' understanding in these cases may be an absolute barrier to understanding. These practices will remain irrational and inexplicable to the theorist, as well as being accompanied by a judgment (using the home understanding as evaluative criteria)

that they are wrong. Therefore, it could be argued that this approach will fail in exactly those situations where there is the most need to make the practices of minority women more intelligible.

This last problem sheds light on the limits inherent in attempts to move away from neutral objectivity as the preferred method for analysis. My argument suggests that the term 'woman' needs to be subjected to analysis to allow greater accommodation for minority women. The methods I advocate do not resolve all the issues, but they do provide one way of gaining a more accurate understanding of the claims of minority women from their own perspective. Further work needs to be done that allows us to delineate the issues with greater precision. Is difference always relevant? If not, what are the circumstances in which we need to be specially vigilant about differences caused by race, culture and religion? We also need to ask ourselves about the status of traditional values in the lives of women and the limits of consent.[56] Is there a floor of individual rights which minority women cannot negotiate away?[57] Out of these enquiries we can start to develop a better theoretical understanding of the priorities – emotions, desires and choices – of minority women and whether, and if so how, feminist theory and family law can accommodate these aspects.

Feminism already contains considerable resources that allow us to develop an intelligent and sensitive response to many of these questions. For example, sophisticated concepts such as 'autonomy', 'power', 'hierarchy' and 'false consciousness' can be used, carefully, to analyse the position of minority women within their own communities. The starting point must be a better understanding of the choices, experiences and feelings of these women from their own perspective. With this knowledge in place, it becomes easier to imagine the way in which sustained and rigorous analysis can inform discussions about why minority women may consent to harmful practices. Feminism and multiculturalism both also require a more nuanced and sophisticated definition of social and political equality: one in which gender is aligned with categories of identity such as race, culture and religion. Clearly, we must reconsider dominant constructions of 'woman' to take into account these criteria and accept multiculturalism's charge that the misrecognition of private identity is a serious injury. Yet, at the same time, we should also acknowledge that misrecognition and the forced assimilation of a minority are not the only harms that should preoccupy feminists. Analysis needs to move on

56 Many of the cases that arise where there is a conflict between women's rights and traditional cultural and religious practices raise issues of consent. More specifically, many of these cases relate to the apparent consent of young women to marriage which they later repudiate. See, for example, *Sohrab v Khan* [2002] SCLR 663, Outer House (Scotland), and *P v R* [2003] Fam Law 162, Family Div. See also Baroness Hale's comments in the *Begum* case above, n 4.

57 One possible source for establishing limits on consent to harmful practices is international human rights law: see McGoldrick (2005). An example of existing limits on consent to harmful practices is female circumcision. The Female Genital Mutilation Act 2003 repealed and re-enacted the Prohibition of Female Circumcision Act 1985. It makes it an offence for UK nationals or permanent UK residents to carry out female genital mutilation abroad, or to aid, abet, counsel or procure the carrying out of female genital mutilation abroad, even in countries where the practice is legal. The 2003 Act also increases the maximum penalty from five to 14 years' imprisonment.

to delineate the nature and limits of valid consent. There are other injustices – violence, poverty and social exclusion – that remain urgent issues for feminists. Can we find a common basis for a 'home' understanding of feminist theory around these wider sets of concerns? Is it possible to challenge dominant constructions of 'woman' without collapsing into nihilism?[58] Is it unrealistic to hope that autonomy remains a fundamental and transformative organising principle for feminism? What is the 'branch' upon which feminists sit? Before we can understand and accommodate the needs of minority women, we will need to achieve some consensus – or, at the very least, reach a *modus vivendi* – on these essential questions. Until then, multiculturalism will continue to trouble feminism and family law.

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58 One response to this challenge is Drucilla Cornell's call that definitions of the concept 'woman' require feminism to take seriously issues of 'ethics' and define what we mean by the 'feminine'. In the context of the discussion on minority women this raises particular problems: how do we define the 'ethical' and 'feminine' in the face of deep differences between women? Cornell (1995).

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Chapter 12
Feminist Legal Studies and the Subject(s) of Men: Questions of Text, Terrain and Context in the Politics of Family Law and Gender

Richard Collier

Introduction

Within feminist legal scholarship in the field of family law, a critical engagement with the gender of men approached via recourse to the concept of masculinity/ies is a now well-established theme.[1] In recent years, in particular, it has become commonplace within literary and hermeneutic projects informed by the 'post-modern frame'[2] to find discussion of how law has been involved in the constructing, embodying or reproduction of various ideas about men, women and (hetero-normative) 'family life' approached via reference to the concept of masculinity. This work has sought to unpack, reveal or, more precisely, deconstruct the presence of the 'hegemonic masculine' in law (see below) as part of developing an understanding of the hidden gender[3] of (family) law. A recurring assumption in this work has been that there is a political, analytic and policy gain to be made for feminism by 'taking masculinity seriously'.[4] It is an assumption certain aspects of which I wish to question. What follows presents, in short, a re-reading of the male subject of feminist scholarship within the field of family law.[5] I wish to explore the limitations, ambiguities and confusions which, I will suggest, have come to surround the concept in this area of legal study. I will argue that there are pressing reasons to reconsider what an engagement with masculinity – in particular one approached via the analysis of legal texts – can bring to feminist legal scholarship at the present political moment.

Family law, as a sub-field of legal studies, has in many respects been at the forefront of the study of masculinity within legal scholarship; it is family law, I will argue, which has come to exemplify and illustrate some of the conceptual and political limitations of masculinity for feminism more generally, resulting from a number of political and theoretical developments over the past decade. A rethinking of the male (gendered) subject in family law is a project linked to – indeed, I want to suggest, it is inseparable from – a growing debate taking place

1 On the analytic shift towards an engagement with the plural term masculinities see further Morgan (1992). The broader interrogation of the relationship between masculinities and law has been, regardless of the political orientation, methodology or underlying epistemological presuppositions of the work in question, a longstanding and significant presence within feminist legal studies.

2 Thornton (2004), p 10.

3 Graycar and Morgan (1990).

4 Compare in the field of criminology the argument of Newburn and Stanko (1994).

5 Family law is, of course, a conceptually unclear, ambiguous and profoundly contested sub-field of legal study: see further, and generally, Diduck (2003; 2001); O'Donovan (1993; 1986).

about the future direction and politics of feminist scholarship within legal studies. It has been suggested that 'feminist legal theorists are in disarray';[6] a situation engendered significantly (although by no means exclusively) by the twin impacts of neo-liberal market imperatives on the academy and the impact of post-modernism on feminist legal theory. This debate is embracing concerns about the relation between 'high theory' and (feminist) practice, questions of audience and accessibility; of the relationship of men to legal feminism;[7] and, my concern here, about what it means to speak at the present moment, in the context of a growing debate centred around what has been termed the new 'male victimhood' in the field of family justice, of there being an interconnection between men, masculinity and family law.

Family, law and feminism: Putting masculinity on the agenda

The study of men and masculinities in the field of family law has occurred at a nexus of developments which, although linked, draw on distinct political and intellectual trajectories in terms of how the central relationship between law and the power of men has been conceptualised. A number of authors associated with the critical study or new sociology of men and masculinities have figured, with varying degrees of prominence, in this work. The most significant influence on the analysis of masculinity within family law has, however, undoubtedly been that of feminism.[8] The very project of feminist legal studies is, of course, contentious, not least in terms of an epistemological foundation around the unified subject 'Woman'.[9] It is nonetheless, for heuristic purposes, possible to identify a number of distinctive 'phases' or approaches within feminist scholarship in family law, each of which have conceptualised men and masculinity in some very different ways.[10]

Institutions, practices and the (hidden) gender of family law

Within what has been termed 'first phase' liberal-progressivist feminist scholarship,[11] through to the work of those writers who later sought to engage with what

6 Thornton (2004).

7 See, for example, the debates between: Bottomley (2004); Naffine (2004; 2002); and Barron (2000); Goodrich (2001). Note, generally, the arguments of Drakopoulou (2000); Conaghan (2000); Sandland (1998a; 1998b; 1995). An excellent account of the relationship between men and legal feminism can be found in Halewood (1995).

8 The broader sociological study of masculinities within the academy has itself largely, although by no means exclusively, emerged as part of an attempt to develop a self-identified 'pro-feminist' politics.

9 See, for example, in addition to the works cited above, n 7, Smart (1989); Lacey (1998).

10 This approach is, I recognise, problematic, not least in the way in which it tends to categorise together a vast body of work and assume a linear narrative underscoring what is, in fact, a far more complex history. Equally, it is important not to assume a conceptual 'clean break' with earlier (pre-feminist) sociogenic sex role accounts of masculinity: see further Carrigan *et al* (1985). Contrast, generally, the approach of Naffine (1990), ch 1.

11 Naffine (1990), pp 3–6.

was seen as the inherent 'maleness' of patriarchal legal systems, methods and reasoning (below), the concept of masculinity has been linked in diverse ways to ideas about law and the power of men. Masculinity has been deployed extensively in studies of institutions and practices relating to aspects of law and legal regulation concerning families; in accounts, for example, of the work of solicitors, barristers and judges; the administration of criminal and civil justice; and in studies of legal education, the law school and the legal curricula. Within earlier feminist work, the presence of the distinctive masculine culture (or cultures) of law was singled out as particularly problematic for women, a hetero-normative definition of family life historically enmeshed with a range of gendered, sexualised, sexist beliefs. This 'masculinism'[12] of legal institutions and practices was identified in such phenomena as the sexualisation (the rendered 'Other') of women's bodies; in the denial of women's corporeality;[13] in the prevalence of homosocial and homophobic behaviour;[14] and, encapsulating each of the above, in what has been seen as a persistent benchmarking and assessment of women against a normative, ideal 'benchmark' figure[15] – an individual understood (somewhat paradoxically) to be both gendered (male/masculine: authoritative, rational, competent, unemotional and so on);[16] and, equally, gender neutral, in particular with regard to those commitments and 'inevitable dependencies' seen as relating to the private familial domain.[17]

Within much of this work, and perhaps in particular in studies framed by what Harding[18] has termed a form of feminist empiricism, the maleness, masculinity or masculinism of law was seen as in some way distorting the gaze of an otherwise neutral observer. Thus, in accounts of family law and practice during the 1970s and 1980s, we find an identification of the 'sexism' of family law enmeshed with the critique of the benchmark 'man of law': a gendered subject(ivity) who embodied, it was suggested, a particular *kind* of masculinity. Discussions of equality of opportunity, motherhood, marriage, violence and 'breadwinners and homemakers' in Atkins and Hoggett's influential 1984 text *Women and the Law* perhaps illustrate this kind of approach.[19] If such work tended to engage with studies of case law, statute and the gendered cultures of legal practice, however, a body of feminist jurisprudential thought was seeking to develop a rather different critique of the masculine nature of law: one based, in contrast, on a critique of the masculine nature of legal methods and legal reasoning itself.

Within later standpoint (or 'second phase') feminist scholarship, there occurred

12 Brittan (1989), p 4.

13 An excellent account of which can be found in Thornton (1996).

14 See, for example, Bell (1995).

15 This idea has itself been a recurring issue within legal feminism and links to a theme within the critical study of masculinity concerning the tendency for men to claim reason as taken-for-granted, a positionality regarded as final authority and arbiter of social Truth: see, for example, Seidler (1989).

16 See Thornton (1998).

17 Fineman (1995).

18 Harding (1987; 1986).

19 Atkins and Hoggett (1984). Note also Sachs and Wilson (1978).

a shift in how men, masculinity and the power of law are conceptualised. Drawing on a forceful critique of the earlier liberal-progressivist position, classic tenets of liberal legalism (for example, individualism, autonomy and so forth) were refigured as quintessentially 'masculine' values.[20] Family law, not least in relation to a construction/reproduction of a public–private dualism,[21] was seen as profoundly implicated in a historical effacing of the distinctive social experiences of women. In one strand of this work, in particular, a direct link is made between law's status as an androcentric, positivist discipline and the masculine nature of law's governance, institutions and jurisprudence. Here, law, implicated with other phallocentric, totalising and oppressive knowledge formations, did not just equate with the power of men; law could be seen, in some accounts at least, to constitute, in its purest form, that power. Oft quoted, but summarising neatly: 'The state is male in the feminist sense. The law sees and treats women the way men see and treat women.'[22] Family law's purported neutrality would thus itself appear to be simply a mask for the '*masculinity of its judgements*'.[23]

Towards the 'post-modern frame': Discourse, text and the 'man of (family) law'

By the mid/late 1980s, in work which, by 1990, Naffine felt able to describe as itself constituting a 'third phase' of feminist scholarship,[24] a far-reaching critique had taken place of the limits of each of the above two approaches. Yet, once again, a conceptualisation of masculinity appeared central to how the relationship between law, the family and the power of men was understood within feminist legal scholarship. A key criticism of the second phase work, as above, had been that it ascribed to the category 'woman' an essentialist ontological status; in so doing, it negated the discursive construction of the (feminist) subject 'Woman', the diverse positionality within/between women's lives. It was also recognised, however, that much of the earlier feminist work had itself often tended to conceive of men as, in some way, a homogenous group, and law then as the (unproblematic) embodiment of the social power *of* men. Seen by those writers increasingly informed by post-modernism and post-structuralism as an approach which was, ultimately, as androcentric as the theories it purportedly sought to supersede, singled out for particular criticism was an underlying essentialism (something which resulted in 'a paradoxical mix of debilitating pessimism and unfathomable optimism');[25] and, related to this, an embrace of an apparently all-encompassing notion of the 'masculinity of law' (and, with it, of male (hetero)sexuality),[26] which

20 See, for example, West (1988).
21 Itself a central theme in feminist scholarship: note, for example, although from a different perspective, the argument of O'Donovan, (1985); *cf* Rose (1987).
22 MacKinnon (1983), p 644; also MacKinnon (1987).
23 MacKinnon (1983), p 658.
24 Naffine (1990).
25 Jackson (1993), p 211.
26 On which see, more generally, Segal (1994), p 46.

served, it was suggested, to efface the complexity and diversity in the lives both of men *and* women.

It is not difficult to see, in retrospect, why a transition should have taken place within feminist work at this time, and, in turn, why feminists and pro-feminist scholars should have sought to turn 'their attention to men and masculinity in a discursive attempt to stop the depiction of women as "the problem", as well as to resist the on-going objectification of women'.[27] The shift is perhaps encapsulated in the work of the British scholar Carol Smart, whose 1989 book *Feminism and the Power of Law*[28] illustrates themes subsequently taken up in the study of masculinity and family law during the 1990s. Within her earlier work in family law, such as *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (1984),[29] Smart had sought to question whether there might be a distinction between what she termed 'legal regulation' and 'male control'; whether the fact particular legal agents may be understood as 'subscribing to sexist attitudes to protect their material interests' necessarily rendered law itself, as a whole, 'sexist *or somehow masculine in nature*'.[30] Such questions had similarly informed the 1985 text *Women in Law: Explorations in Law, Family and Sexuality*, co-edited by Julia Brophy and Carol Smart,[31] in which it was argued that law

> is not in fact a unity, organised with the specific purpose of oppressing women, although clearly this is how it may be experienced . . . the law [is not] . . . a homogenous unit with a unitary purpose. It is possible to find contractions both in law and legal practice, and between legal agents, *which cast doubt upon the existence of a male, legal conspiracy*.[32]

Building on a growing concern in feminist work to address the nature of the gendered subject in family law, and drawing on the broadly Foucauldian understanding of the relation between law and power which was developing within (as well as, of course, beyond) feminist scholarship at the time, Smart's analysis in 1989 begins, in contrast, with a belief that although law may be '*constituted as masculine* on both empirical and cultural grounds' (that, at the very least, 'doing law' and being identified as 'masculine' can be congruous), this is not because of any straightforward biological imperative. Rather, what is at issue are the 'significant overlaps' or 'mutual resonances' between how 'both law and masculinity are constituted *in discourse*'.[33] Thus:

> Law is not rational because men are rational . . . law is constituted as rational as are men, *and men as the subjects of a discourse of masculinity* come to experience themselves as rational – hence suited to a career in law. In attempting to transform

27 Thornton (2004), p 12.
28 Smart (1989). Contrast Sandland (1995), p 3.
29 Smart (1984); also O'Donovan (1985).
30 Smart (1984), p 17, my emphasis.
31 Brophy and Smart (1985).
32 Smart and Brophy (1985), p 17, my emphasis.
33 Smart (1989), p 86, my emphasis.

> law, feminists are not simply challenging legal discourse *but also naturalistic assumptions about masculinity*.[34]

This argument continues to fuse a challenge to dominant notions of masculinity with a feminist critique of law. It is, after all, 'assumptions' about masculinity which are to be challenged and questioned as part of developing a feminist politics of law.[35] Yet what is significant here is the notion of men 'as the subjects of a discourse of masculinity': a theme which opens out to analysis of the plurality and contingency of those discourses which speak not only of 'Woman'/'women', but also of 'men and masculinity' across diverse institutional and cultural contexts. There is (albeit implicitly) an acceptance that all men do not have equal access to cultural, symbolic or economic capital; that there might, at the very least, be a need to engage with the plural (discursively encoded *as*) 'familial' masculinit*ies*. In turning critical attention to the construction of the Woman of legal (and, indeed, of feminist) discourse,[36] what was (inescapably) brought into the critical frame is the nature of the 'Man' of law – and, one might add, the 'man' of legal feminism itself.

'Deflecting the gaze?' Textual analysis and the critical study of the 'family man' in law

> Deflection of the objectifying gaze from women and Indigenous people to benchmark masculinity and heterosexuality, as well as 'whiteness', represents an attempt to disrupt the conventional orderings of modernity within legal texts.[37]

It was in an attempt to explore the above concerns that a range of studies developed in family law during the 1990s concerned explicitly with addressing issues around men and masculinities. In turning attention to men, and 'in a discursive attempt to stop the depiction of women as "the problem" ',[38] this work sought to engage, in particular, with the 'social construction' of the 'man', 'men' or 'masculinities' within, or of, legal discourse. My own book, *Masculinity, Law and the Family*,[39] published in 1995, illustrates aspects of this approach in its attempt to unearth or reveal the 'hidden' masculinities of law, the assumptions about men contained within a range of family law texts and practices. At the same time, and across diverse areas of legal study,[40] a growing feminist and pro-feminist

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34 Smart (1989), pp 86–7, my emphasis.

35 Note, for example, the depiction of the 'phallogocentrism' of legal discourse as the fusing of a *masculine*, heterosexual imperative and the fixing of sign/signifier within a patriarchal structure of power/knowledge relation (Smart (1989), p 86); also 'the needs of the masculine imperative which receive a cultural response' (O'Donovan (1993), p 5).

36 Contrast Smart (1992).

37 Thornton (2004), p 15. See further Middleton (1992), p 159.

38 Thornton (2004), p 12; see also Thornton (1989).

39 Collier (1995).

40 As simply an illustration of this body of work note, for example, Bibbings (2000); Berger *et al* (1995); Carver (1996); Collier (2000); Liddle (1996); Naffine (1994); Thomas (1995); Heins (1995); Williams (1995). On law, crime and criminal justice see Newburn and Stanko (1994); Goodey (1997); Jefferson and Carlen (1996); Collier (1998); Groombridge (1998).

literature has sought to unpack the diverse ways in which ideas about men as gendered subjects have been constructed or depicted at particular historical moments in laws relating to the family.[41] This work has involved the analysis of cases, statutes, legal utterances and cultural representations of law; what has emerged is what has since become a complex, rich picture of what might be termed 'the (family) man of law'.

This masculine subject in family law has been seen, in a number of respects, as a distinctively 'embodied' being.[42] Thus, in relation to laws around marriage and divorce, for example, it has been argued that whilst the penis frequently appears within law as somehow subject to a man's rational thought and control, the vagina, in contrast, has been presented as a space, as an always-searchable absence.[43] Related assumptions have been noted around the idea of there being a natural (hetero)sexual 'fit' between the bodies of women and men, with notions of male (hetero)sexual activity and female passivity informing the legal determination, historically, of what does, and does not, constitute a valid marriage[44] (as well as, indeed, a legally valid exit from any such marriage). In accounts of how paid employment can inform ideas of men as 'respectable' (and socially safe) familial subjects, meanwhile, an ideal of the liberal rational individual had been deployed in such a way as to depict a sexed, autonomous masculine subject as, in marked contrast to women, a peculiarly *dis*embodied being; a figure bounded, constituted as *male*, in ways ever dependent on a separation from other men and, crucially, on a hierarchical difference from women.[45] Such dissociation appears particularly marked, it is argued, in relation to ideas of care, caring and vulnerability commonly associated with the private sphere and 'family life'.

In keeping with the broader corporeal turn in legal scholarship during the 1990s, later work on masculinities has noted the way in which, whilst women's bodies in law often appeared as incomprehensible, fluid, *un*bounded, defined by 'openings and absences', the bodies of men, Sheldon suggests, all too often appear to be marked by ideas of bodily absence and physical disengagement rather than any sense of presence.[46] For Sheldon, men's 'safe', stable and bounded bodies signify a somewhat tangential and contingent relation to gestation, fertility and reproduction in families; one which, certainly, stands in marked contrast to women. In the work of Bibbings, similarly, although working more in the field of criminal law, the bodies of men are positioned in particular ways in relation to ideas about masculinity, not least a cultural condoning of intra-male violence.[47] In my own work,[48] men's subjectivity has appeared, across a number of contexts, as related to historically specific ideas about heterosexuality, parenthood and 'family

41 As earlier examples of this kind of study note, for example, O'Donovan (1993), ch 5; Moran (1990); Collier (1992).
42 See Hyde (1997). Contrast Bridgeman and Millns (1995).
43 Hyde (1997), p 172.
44 In addition to work cited above, see also Waldby (1995).
45 Naffine (1994).
46 Sheldon (1999); also (2001).
47 Bibbings (2000).
48 Collier (2002b; 2001; 2000; 1999a; 1999b). See also Coltrane (1996).

practices';[49] and, once again, on some (in fact questionable) assumptions about the nature of men's physical and emotional relationship to children, child care and ideas of dependency.

The engagement with masculinity in feminist and pro-feminist scholarship in family law cannot be confined to such analyses of legal texts. There has also occurred a broader political and cultural debate focused around the notion of 'masculine crisis' or 'crisis of masculinity',[50] which has itself informed a range of issues concerning policy and practice relating to law and the family. Across diverse cultural artefacts, recurring concerns and anxieties around the meaning of social, economic, cultural and political change have served to redraw the parameters of what is deemed to constitute a normal/normative (hetero)sexual family; in so doing, struggles around what has (or has not) been happening *to* men and 'their' masculinity/ies is an issue which has assumed an emblematic status, a powerful, symbolic significance – a cipher for broader transitions and tensions around shifting relations between men and women (as well as, importantly, children).[51]

This latter development has a number of dimensions. In some contexts, for example at the interface of family and employment law, there has emerged an agenda concerned with promoting (gender) equity by, explicitly, challenging ideas of masculinity which, it is argued, have become increasingly anachronistic. The aim here has been to engage with law reform in such a way as to encourage and/or reinforce certain kinds of behaviour on the part of men.[52] Thus, whether it be in relation to securing a satisfactory balance between the commitments of 'work and home', in the promotion of 'good enough' post-divorce/separation parenting on the part of men[53] or in securing the provision of child support,[54] we find a concern with changing men's practices and attitudes bound up within this debate about what is happening to contemporary masculinity. In other contexts, however, such questions of gender equity, law and law reform have been placed centre stage in some rather different – and far more contentious – ways. Nowhere, perhaps, have these issues and concerns been clearer – or more publicly and politically visible – than in relation to what has become, internationally, an increasingly high-profile debate about the gender politics of family law reform; a debate in which, it has been suggested – significantly for feminist legal studies – it is, in relation to the area of contract law in particular, *men*, and not women, who have now become the 'new victims' of family law.[55]

Where does my argument thus far leave us? Masculinity, I have suggested, has been deployed in a number of different ways within feminist legal scholarship at

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49 Morgan (1999), p 13. Also Morgan (1996).

50 See further Brittan (1989), pp 25–36; Hearn (1987), pp 16–31; Connell (1987), pp 183–6; Carrigan *et al* (1985), p 598. Compare Clare (2000); Faludi (1999).

51 See further Beck and Beck-Gernsheim (1995); Giddens (1992).

52 Collier (1999a).

53 See further Smart (1999); Smart and Neale (1999a; 1999b).

54 Diduck (1995); Wallbank (1997).

55 See Smart, Chapter 7, and Kaganas, Chapter 8, both in this volume. On the 'zero-sum' conception of power implicit in such a view see Collier (1999b).

different historical moments. If there has been no one model of masculinity in this work, however, it is possible to identify the contours of a distinctive masculine subject of family law which has emerged within feminist and pro-feminist legal studies: a man or male figure who has embodied a certain *kind* of masculinity. At the same time, we have seen, masculinity has been politicised more generally, an issue which has had far-reaching implications for questions of policy and reform across diverse areas of law relating to the family.

In the remainder of this chapter, I do not wish, in any way, to downplay the insights and value of the work undertaken to date in family law on the subject of men and masculinity. In suggesting that this work can itself be seen as the product of a particular cultural and political moment – a distinctive 'episteme' of feminist legal theory – I do, however, wish to unpack a number of unanswered questions in this area; questions which, in a context of formal equality and the rise of the 'male victimhood' referred to above, lead one to believe that masculinity may well have become an increasingly double-edged concept for feminist legal studies developing a critique of the gendered politics of family law. Why is this so?

(Re)conceptualising the male subject in family law

Recent empirical and theoretical scholarship concerned with exploring the gendered discourses of family law has sought, in a number of ways, to explore the masculine subjects of family law. Whether it be in relation to studies of divorce law and practice, contact law reform, marriage, parenthood or men's relation to employment, for example, it is possible to see in family law the concept of masculinity being deployed in a number of ways.[56] There has occurred a questioning of the way in which ideas about masculinity have mediated men's and women's experiences of the family justice process, with research speaking of the emergence of a distinctive 'masculinised discourse' of divorce; of men adopting 'masculine' subject positions within the processes of separation;[57] of ideas of a normative masculinity correlating, broadly, with the tendency of men to relate to, and appeal in their engagement with the legal process in terms of, a rights-based framework.[58] Elsewhere, a sense of challenged masculinity has been evoked in such a way as to link aspects of male identity either to an embrace of or (more frequently) resistance *to* changes seen as taking place in the (nuclear) family unit.[59] The latter theme has been particularly evident in recent studies of fathers' rights groups and, more generally, in work focused on the interventions of the men's movement in the field

56 See, for example, Brown and Day Sclater (1999); Day Sclater (1999a; 1999b); Day Sclater and Yates (1999).

57 Day Sclater (1999a); Arendell (1995).

58 Compare Dewar (1998), who suggests that the concerns about justice expressed by fathers' rights groups appear to be shared by many who have expressed a growing dissatisfaction with the perceived limits of a broad discretionary system in the family law field.

59 An appeal to a normative familial masculinity has been directly linked to a defence of a 'traditional' (heterosexual) family; a family premised on broadly clear-cut sexual divisions of labour and male economic authority: see below.

of family law.[60] Far from seeing women as the real or potential victims of family law reform and/or practice – a position which has, arguably, informed debates about family law at various points in the past – a powerful discourse has emerged which suggests that a range of ostensibly liberalising reforms may have, in fact, rendered men the real 'losers' in the field of family justice. It is against this background that feminist scholars have suggested that what is in fact taking place in this area is, internationally, something akin to, if not a 'backlash project', then a resistance *to* 'feminist inspired' legal and social changes; a development which reflects the disproportionate influence of fathers' rights groups in managing to set reform agendas in the field of family law.[61]

In much of the textual-based study of law discussed above, however, it is possible to identify a rather different object of analysis; it is in relation to these kinds of study that, I would suggest, the problems with masculinity can appear particularly marked. It has been a recurring theme within the study of masculinity in legal studies that law has been involved in the reproduction and/or embodiment of a form of 'hegemonic masculinity'. This is an idea closely associated with the structured model of gender power[62] developed in the work of RW Connell.[63] Repeatedly, this hegemonic masculinity has appeared as something which is to be unpacked, deconstructed or uncovered in law. Certainly, such work engages with the contested nature of law, the ever-present possibility of resistance, in ways that are in keeping with themes developed in feminist legal scholarship during the 1980s around the 'open-ended' nature of law. However, it does leave certain questions unanswered. It is unclear, in particular, how the model of hegemonic masculinity seen to be embodied in law relates to the actual lives and gendered practices of men and women. Thus, whilst textual readings can provide a wealth of information about how law constructs, sees or produces particular *ideas* about men and gender in the context of family law (although see further below), what we do not find is any account of how this relates to what individuals *do*. Why, for example, should it be the case that, whilst some men might 'turn to' or invest in particular (hegemonic) masculine subject positions (let us say, within a post-divorce separation context), others do not? Men encounter a diverse range of circumstances which frame their individual experiences of 'family life'. If it is to be argued that a distinctive kind of familial masculinity is 'offered up' for all men within a particular socio-cultural, structural location, why do individual men choose one, and not another, masculine identity? (And who, in any case, is doing this 'offering up'?)[64] There is clear evidence that men might identify with a diverse range of resources to 'accomplish' their masculinity in this sense. This does not, in itself, argue against the proposition that men are 'doing' hegemonic masculinity in the process of 'doing' family practices. However, it remains unclear how

60 Kaye and Tolmie (1998a; 1998b); Collier (1996); Arditti and Allen (1993); Berotia and Drakich (1993); Berotia (1998); Smart, Chapter 7, and Kaganas, Chapter 8, both in this volume.

61 Boyd (2003); Boyd and Young (2002); Graycar (2000).

62 See further Whitehead (2002), pp 84–99, 103.

63 Connell (1987; 1995; 2000). See further Whitehead (1999); Hall (2002).

64 Walklate (1995), p 180.

questions of individual life-history and biography impact on any such choice. How adequate, in short, is this kind of theorisation in seeking to account for the subjectivity of individual men? And what is the process by which these distinctive 'masculinities' are then constituted?

In this kind of deployment of a normative hegemonic masculine subject within critical scholarship, there does appear to be a certain rigidity in terms of how men are understood to be accomplishing or aspiring to the attributes of a dominant form of masculinity. Indeed, a model of gendered power would appear to hold in place a normative masculine gender as the object of (feminist) critique; one to which is then assigned a range of (broadly undesirable/negative) characteristics. Yet, at the same time, it appears to impose 'an a priori theoretical/conceptual frame on the psychological complexity of men's behaviour'.[65] What this means is that masculinity can all too easily appear, at once, as both a primary and underlying cause (or source) of a range of social effects (of what men do); and, simultaneously, as something which results from certain social actions. This is, at the very least, a tautologous proposition.[66] There is a sense in which social structure would appear to constrain men's practice. Yet a vast body of empirical, historical and autobiographical research on men suggests that there can be a richness, texture and subtlety to the 'gendered lives' of men, which this kind of deployment of hegemonic masculinity – and the associated (selective) focus on what are seen to be the negative connotations of the hegemonic masculine – cannot by itself account for.[67]

Underscoring these problems is another issue: how the masculine social subject has itself been theorised. There has emerged in recent years, within the sociology of masculinity, an attempt to build on the above critique of the structured action model and to seek, in contrast, to take the psychic dimensions of (masculine) subjectivity seriously. This is a perspective which has begun to inform studies of family law and practice in a number of ways.[68] It is not possible to do justice here to the complexity of the substantive analyses which have been produced in this area; nor the complex groundings of strands of this work within contemporary psychoanalysis.[69] It is, however, possible to trace elements of this development in terms of what it might have to say about developing understandings of the male subject in family law.

This psycho-social perspective, as it has been termed, tends to draw on the concept of discourse[70] rather than that of social structure. It has evolved, as it were, from the 'third stage' thinking as outlined above. In one strand of this work, what is placed centre stage is an attempt to engage with the presentational forms of masculine performances, identities, corporeal enactments and so forth.[71] In

65 Collier (1995).
66 Walklate (1995), p 181.
67 See Wetherell and Edley (1999).
68 As above, for example, in relation to accounts of post-divorce family life; also, on interventions aimed at addressing men's violence in families, see Gadd (2000; 2002).
69 Adams (1996).
70 Compare Pease (2000); Jefferson (1994).
71 Contrast Butler (1993; 1990).

rejecting, in suitably post-modern fashion, the idea of a unitary rational male subject, the aim has been, rather, to develop a social understanding of the masculine psyche; one which might, it is argued, shed light on men's behaviour across diverse areas of law and legal practice. Allied to the insights of queer theory (a body of work, arguably, strangely absent within the field of family law), the masculine subject has appeared as a 'performative construction' naturalised through repetition; contingent, unstable, nothing more (or less) than (at most) a temporary association with a particular desire and/or social identity; a manifestation of a gendered self conceptualised in terms of a series of constantly shifting practices and techniques.

This approach does offer up a way of prising open the possibility of making sense of the contradictions and difficulties that particular men may experience in becoming masculine. For example, by seeking to integrate questions of individual biography and life history, it is argued that a handle is given on the important question, noted above, of why some men do, and others do not, invest or engage in certain kinds of behaviour or subject positions. Importantly for feminist legal studies, questions of social power do remain. However, the focus of analysis shifts to how a (non-unitary) 'inherently contradictory' social subject comes to invest, whether consciously or unconsciously, in what are then seen at particular historical moments as socially empowering discourses around masculinity.

This approach has a rich potential for feminist scholarship in the field of family law, as has been evident in relation to studies of the fluid, evolutionary nature of post-divorce family life. It offers a great advance politically on the (always, already) empowered subject implicit within both the structured model of gender power, as above, as well as strands of feminist and pro-feminist thought. It would also appear to reject any 'reductive view of men as oppressors . . . [one] that [has] not endeared feminism to those men who might otherwise have been sympathetic'.[72] However, criticisms can also be made of this approach. Leaving aside the issue of whether the more explicitly psychoanalytically informed strand of this recent work on masculinity might itself be premised on an unduly mechanistic model of personality formation, an argument remains: although what we have here can offer a rich story for describing the effects of discourses of masculinity within particular contexts relating to families, they remain, at the end of the day, just that – stories. It is difficult to see how readings produced about the 'taking up' of a masculine subjectivity can ever be tested or proven in any meaningful way.[73] It is also unclear whether we are reduced, ultimately, to an 'all is discourse' position, an issue which links to the broader critique of post-modernism within and beyond feminist scholarship. In disavowing any outer reality, is one left with a wholly semiotic account in which, as Connell himself observes, 'with so much emphasis on the signifier, the signified tends to vanish?'[74] As John Hood-Williams has noted,[75] is it not difficult to maintain that there are many 'discourses of

72 Thornton (2004), p 10.
73 See Frosh (1997; 1994).
74 Connell (1995), pp 50–1.
75 Hood-Williams (2001), p 37.

subjectivication' whereby masculine identities become attached to individuals and, at the same time, maintain (as some do) that the claims this approach is making are grounded in real, historically specific and irreducible psychological processes?

What, ultimately, is meant by the term masculinity in this context? 'Is it a discourse, a power structure, a psychic economy, a history, an ideology, an identity, a behaviour, a value system, an aesthetic even?' Or is it 'all these and also their mutual separation, the magnetic force of repulsion which keeps them apart . . . a centrifugal dispersal of what are maintained as discrete fields of psychic and social structure'?[76] Masculinity has encompassed within feminist legal studies such diverse attributes as the psychological characteristics of men, a range of gendered (as masculine) experiences and identities, psychoanalytic readings of social practices (as above), as well as analyses of men's gendered behaviour within specific institutional settings.[77] To speak legitimately in this work of a 'discourse of masculinity', however, entails showing that 'a particular set of usages was located structurally within a clearly defined institution with its own methods, objects and practices'.[78] It is possible one could argue this in relation to law, although the heterogeneity and diversity of the issues discussed above would suggest otherwise. Yet if that is the case, references to 'discourses of masculinity' are themselves simply references to 'repeated patterns of linguistic usage'.[79] Whilst masculinity may be produced within some discourses, most examples 'of "masculine" utterances' are not necessarily discourses. At the very least, I have argued elsewhere,[80] masculinity is not a fixed, homogenous or unchanging concept; it encompasses a complex range of ideas and debates about the connections between a multiplicity of parallel worlds: of, for example, workplace, family, friendships, body regimes, sexual practices and relationships.[81]

Practice, politics and the limits of masculinity

The above concerns point to the conceptual limits of masculinity in relation to family law. I wish to draw this discussion to a close by considering an issue central to feminist legal scholarship – the way in which such analytical imprecision[82] renders the concept potentially fraught with *political* dangers for feminism at the present moment.

The project of 'revealing' the presence of the hegemonic masculine in law – the common tactic, I have suggested, within much critical work in the field of family

76 Middleton (1992), p 152.
77 Note the argument of Hearn (1996), p 203.
78 Middleton (1992), p 142.
79 *Ibid*.
80 Collier (1998).
81 Hearn (1996), p 202; contrast Connell (2002).
82 It is possible, Hearn suggests, that masculinity might in many respects be 'an ethnocentric or even a Eurocentric notion', a product of a particular historical moment which is, in some cultural contexts at least, at best 'irrelevant or misleading' (1996, p 209).

law to date – rests on a number of assumptions. There is a tendency here for social theory and the practices, texts and institutions of law to appear linked in what is, in effect, a systematic unity of shared assumptions, each embodiments of 'the masculinity of law'. Depicting law as contingently, essentially or otherwise irredeemably masculine in nature, however, fails to address 'the theories or institutions [of law] as such . . . the significance of . . . statements within their specific discursive contexts'.[83] The depiction of law as masculine or masculinist can conflate, by reference to preconstituted definitions of ideological or cultural meanings of masculinity, certain culturally specific beliefs about practices, identities, value systems and so forth.[84] And such a model of analysis – ironically, given its progressive political intent – can also be seen to result in a systematic *de*politicisation of issues of power and material interest.

Why is this so? We return to a familiar question – what is left *after* the 'deconstructive moment'?[85] There is a level of abstraction involved in the above kind of engagements with masculinity which can easily slide into something else – an effacing of broader questions about the development of a political, economic and materialist analysis of gendered labour.[86] Far from focusing attention on men's practices – what men do – the focus of analysis has all too often been the gender category masculinity. What is left open to question in such a line of thinking is the extent to which men's gender then itself appears as 'a reification . . . of men's practices (and, of course, the practices of women that support them) . . . [a] reification [which] is then employed to explain these same practices'.[87] What fades from view, that is, are questions about social power – the very issues raised by the feminist scholarship during the 1970s and 1980s in the first place. It is this issue which, at the present moment, would then appear to have far-reaching implications for feminist legal scholarship in the context of a politico-economic episteme framed, not just by neo-liberalism and post-modernism, as Margaret Thornton has recently indicated,[88] but also by a general acceptance and embrace of formal gender neutrality across many areas of law. It is this latter point which, I would suggest, further calls into question the use of masculinity within feminist legal studies in family law at the present moment.

The political limitations of masculinity for feminism are not simply a matter of the way in which the open-ended nature of the term means it can be (and has been) deployed as much by explicitly anti-feminist social movements[89] (notably when allied to the idea of masculine crisis, as above) as it has by feminists and pro-feminist men. It relates, rather, to the way in which a public debate on masculinities has, across a diverse range of cultural artefacts, rested upon what is in effect an

83 Brown (1990), p 48. It is important to consider in this regard the diversity and conceptual ambiguity of 'family law' as a field of study.

84 *Ibid*.

85 Does an account such as this suggest, for example, a return to the (inevitability) of establishing some kind of normative foundation of the human subject?

86 See McMahon (1999).

87 McMahon (1993), p 689.

88 Thornton (2004).

89 See Messner (1997).

individualising of a politics of gender. Instead of questioning whether men should change their behaviour, or else looking to broader questions about materialist analyses of labour and political economy, a debate has effectively been constructed around ideas of men 'wrestling with the meaning of masculinity'. Such a political and cultural project itself in many respects appears disconnected from any appreciation of the many insights of feminist scholarship around the gendered nature and material realities of issues around care and caring.

Concluding remarks

Writing in the *Australian Feminist Law Journal*, Margaret Thornton has recently spoken of her wish to begin 'a conversation which I hope others will join so that we might discursively constitute a new *episteme* of feminist legal theory that is linked to the political'.[90] In exploring whether 'the conjunction of postmodernism and neoliberalism' might add up 'to post-feminism',[91] Thornton questions whether the 'institutional base' of feminist legal scholarship may well be 'disappearing beneath our feet' in the context of the rapidly changing political economy[92] in which feminist research into law is now undertaken within and beyond universities.[93] What is necessary, she suggests, is a return to 'political engagement, rather than introspection', a discouraging of 'an exclusive focus upon the individual and micropolitical sites . . . disconnected from *the broader political picture*'.[94]

This chapter has sought to contribute to this new episteme of feminist legal theory by re-examining how the male subject has been conceptualised in critical family law scholarship to date. Thornton has suggested that 'clinging to the universals of the past [cannot] save legal academic feminism'.[95] Rather, she argues, what is necessary is to locate *both* feminist legal studies and post-modernism in the context of 'a particular politico-historical moment'.[96] This is a moment which is, I have suggested, marked by an embrace of formal gender neutrality and the twin pincers of neo-liberalism and post-modernism. In such a context, it has become a paradox of gender and law scholarship that the development of the academic study of masculinity has itself, in so many ways, concentrated on the individual and micropolitical sites, on issues of text and discourse, rather than these wider questions about terrain, political engagement and social power referred to by Thornton. Indeed, there is a sense in which the very model(s) of masculinity central to much feminist legal scholarship must themselves now be

90 Thornton (2004), p 22, my emphasis, following Drakopoulou (2000).

91 Thornton (2004), p 21.

92 Contrast Hillyard and Sim (1997).

93 The wider literature on this subject is itself now voluminous. See, for example, Brooks and Mackinnon (2001); Currie and Newson (1998); Slaughter and Leslie (1997); Currie *et al* (2002); Thornton (2001). See also Collier (2002a).

94 Thornton (2004), p 9.

95 *Ibid*.

96 *Ibid*.

seen as, in fact, the product of a particular 'episteme' – one whose time is, if not past, then at least now open to question in some far-reaching ways.

It is in such a context that these questions about masculinity take on a particular significance. There is growing reason to believe that, in many respects, the study of masculinity and law is at an important juncture. Increasingly, the concept central to so many feminist engagements with law and gender – the gender of men, termed, variously, masculinities, masculinism, masculinity – has been subjected to critique. This chapter has questioned the implications for family law of the growing call for researchers in this area to rethink actively both their *categories of analysis* and *focus of enquiries* in relation to the study of men and masculinity;[97] to question, for example, the overarching epistemic frame of sex/gender which has informed so much of the studies to date;[98] to rethink the dualism between hetero-homosexuality;[99] and, in particular, to re-appraise the place of materialist analyses of labour in developing an understanding of the politics of law. The latter issue assumes a particular significance in the light of the potentially 'corrosive impact' of neo-liberalism and marketisation on feminist legal scholarship within the academy more generally.[100] As Whitehead argues, it is only through a much more egalitarian material sexual division of labour that it will be possible to explore the 'freeing up' of gender identities advocated within so much of the work on masculinities and law; or, at the very least, to do so without the suspicion and recrimination about motive which appears to mark so many interventions in this area.[101] Tackling material inequalities in the relative position of women and men is more likely to bring about change than attempts pitched solely at the level of textual/deconstructive reforming men's 'selves', personalities or identities, or else aimed at 'subverting' dominant discourses around masculinity.[102]

Ultimately, it is important to remember, as Connell himself has long argued, that as a material practice, gender cannot be detached from what are increasingly *global(ised)* struggles around power and material interest.[103] 'Changing men', as a political end, cannot be reduced to questions of individual or collective projects of self-actualisation. The approach outlined in this chapter has sought to appreciate the undoubted strengths and insights of those analyses which have sought to develop understandings of masculinity in the field of family law. Yet it is through a recognition of the limitations of these approaches that it becomes possible to see what the ultimate problem in this area of scholarship may be: not one of the limits of deconstructive analysis *per se* but the analytic and political limitations of a model of structured action which has rested on outmoded and essentialist notions of masculine identity. At the same time, and in recognising the force of perspectives originating from within a broadly post-modern frame, it is equally imperative

97 Whitehead (2002).
98 See, for example, Daly (1997).
99 Edwards (1994).
100 Thornton (2004), p 1.
101 Whitehead (2002).
102 MacInnes (1998).
103 Connell (1998).

that questions of power, interest and political economy are not overlooked. What is as intriguing as it is worrying about recent developments is the way in which, whilst a range of cultural discourses have certainly problematised the relationship between men and family law in far-reaching ways, they are doing so in such a way that, behind a purportedly progressive rhetoric of gender equity, questions of power and material interest continue to be systematically marginalised and depoliticised. The current debate about contact law reform in the UK can itself be seen to serve as a case in point in this regard.

Family law has a particular significance in these debates. Indeed, it can be seen to exemplify the effects of a depoliticising of gender, an issue which has a worrying significance for feminism. Across a number of areas of family law and policy, gender-neutral norms and assumptions about gender neutrality are being applied to what remain, in many cases, profoundly gender*ed* areas of social life.[104] What is so revealing about present struggles in this area is how, alongside a downplaying of questions of the wider political economy in which knowledge of 'masculinity' is produced, much of the rhetoric in conversations about men and the changing family then takes the form of attempts to bolster and re-affirm traditional social relations in the face of the challenges posed by economic and cultural change. If that is where the study of masculinity and law has led us then there is, perhaps, good reason to take up the call by Thornton to seek to 'discursively constitute a new *episteme* of feminist legal theory'.[105] For all the seeming heterogeneity of the 'new ways of being a man' foregounded in so much of the literature on masculinities, what tend to be side-stepped are questions of the material basis of what research suggests are still-entrenched sexual divisions of labour;[106] still-pertinent questions about the autonomy of men to 'opt out' of caring relations; and, importantly, still-unanswered questions about what all of this might tell us about the way contemporary advanced capitalist neo-liberal societies value social care and intimacy.

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104 Note, for example, the arguments of Boyd (2003; 2001; 1991); Rhoades and Boyd (2004); Kaganas (1999); Kaganas and Day Sclater (2004); Fineman (1995; 1991).

105 Thornton (2004), p 22, original emphasis.

106 McMahon (1993), p 689; see also Duncombe and Marsden (1999).

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