a hierarchical order which gives the first term priority ...'[34] The signifier is in the dominant position; the signified subordinate. By insisting that the signified cannot be adequately represented by the signifier, and calling for the deconstruction of the signified – which is 'under erasure', thereby reversing the balance of superiority and inferiority as between the signifier and signified, Derrida provides a linguistic technique which has been adopted by feminists in the quest to understand language, society and law. The significance of this technique in feminist theory will be discussed below.

Jacques Derrida's focus lies in a rejection of modernist linguistic structures and a reformulation of the relationship between the 'producer', the artist or author, the painting or text, and the 'consumer' of that work. Aesthetic deconstruction is a technique for 'reading' texts. The writing or the reading of a text, and what is understood by the writer and reader, is not explained by the text itself, but rather by the influences and situation of the writer and the use made of the text – the interpretation of the text – by the reader who constructs her own 'text'. The critic of the text will produce yet another interrelated text. Cultural life, then, is represented not by a series of disconnected, isolated, 'texts', but rather by intersecting, interrelated texts. This is the problem of language: language cannot be isolated from the words expressed, or the reading of the words. The authority of the author of the text is diminished. The continuity of the discourse is broken, 'and leads necessarily to a double reading: that of the fragment perceived in relation to its text of origin; that of the fragment as incorporated into a new whole, a different totality'.[35] Thus linguistic and other representations have shifting meanings – there can be no unified monolithic representation of the world. The individual Subject moves through differing relations, and as the text, the 'reading' of the Subject may differ from the Subject's self-image, just as that self-image is localised, determined by time and place. Subjectivity therefore cannot be fixed any more than can the meaning of an author's words. It follows that unifying classifications – woman, white women, women of colour – are too simplistic formulations on which to fix identity. The question 'what is woman' thus presents a problem. Derrida states that '[I]t is impossible to dissociate the questions of art, style and truth from the question of the woman'. Further, '[O]ne can no longer seek her, no more than one could search for women's femininity or female sexuality and she is certainly not to be found in any of the familiar modes of concept or knowledge. Yet ... it is impossible to resist looking for her'.[36]

34 Derrida, J, *Dissemination,* 1972, Paris: Éditions du Seuil.

35 Derrida, J, cited in Foster, H (ed), *The Anti-Aesthetic: Essays on Postmodern Culture,* 1983, Washington: Port Townsend, p 142.

36 *Ibid*, Derrida, 1983, p 71.

Postmodern and poststructuralist thought and analysis contains its own contradictions. The master narrative must give way to the inclusion of and predominance of the individual, the subjective, the atomised, the contemporary (non-historical), the local. As Wayne Morrison writes:

> ... postmodernity is characterised by a feeling of extreme ambivalence to the hopes and social structures of the last 200 years; a mood of nostalgia; cultural relativism; moral conventionalism; scepticism and pragmatism; a dialectic of localism amidst globalism; ambivalence towards organised, principled political activity; and a distrust of all strong forms of ethical or anthropological foundations.[37]

Past modernist theory 'stands in the dock', under prosecution, found guilty and awaiting sentence, rejected and useful only for its role in rejection. However, it must be noted that to speak of postmodernism, with the implication that postmodernism is a coherent school of thought, is to mislead. Postmodernism comes in many forms – there exist postmodernisms rather than postmodernism. In Pauline Marie Rosenau's analysis, the two principal forms of postmodernism are sceptical postmodernism and affirmative postmodernism. Sceptical postmodernists, epitomised by Heidegger and Nietzsche, focus on the negative: the uncertainties and ambiguities of existence, the 'impossibilities of truth', 'characterised by all that is grim, cruel, alienating, hopeless, tired and ambiguous'.[38] Affirmative postmodernists, on the other hand, according to Rosenau, while agreeing with the critique of modernity, adopt less dogmatic, negative, ideological attitudes to the present and future. Not all socio-political action is decried, not all values are rejected. Neither sceptical nor affirmative postmodernist approaches are mutually exclusive – there are overlaps, intersections. In each there exists both the extreme and the moderate. While sceptical postmodernism offers little constructive potential for feminist (or indeed any) theorising, affirmative postmodernism offers avenues for development.

Sceptical postmodernism, in its denial of theory, paradoxically itself presents its own formulated theory: that of the impossibility of theory. Thus, in seeking to distance itself from all grand theory, postmodernism postulates a grand theory of non-theory: the postmodern conundrum.[39]

37 *Op cit*, Morrison, fn 9, p 513.

38 Rosenau, P, 'Affirmatives and skeptics', in Anderson, W (ed), *The Fontana Postmodernism Reader*, 1996, London: Fontana, p 103.

39 On the potentialities and problems posed by postmodernism for jurisprudence in general, see *op cit*, Morrison, fn 9, Chapter 16.

CRITICAL LEGAL STUDIES

Critical Legal Studies (CLS) is the term applied to those legal scholars who, from the late 1970s, reacted against the 'grand theorising' of 'traditional' jurisprudence. Critical Legal Studies began life with a conference in 1977, the agenda of which was undefined beyond an invitation to discuss critical approaches to law and society:[40] intellectual punk thus entered the legal academy with all the irreverence and innovative vitality of its artistic counterparts.

Consistent with poststructuralism and postmodernism, CLS abjures theory which is abstracted from society, which posits 'grand truths' about society and law. Scepticism and self-doubt about law and legal theory are the hallmarks of CLS:

> Traditional legal scholarship implicitly tells us that everything is as it should be and that our role as lawyers, or thinkers about law, is assured. The law is the tool of modernity and modernity is sane, rational, functional, efficient – CLS writings points out the underbelly of modernity's claims to universality, reason and coherence.[41]

The distrust of 'meta-narratives' about law has not escaped feminist jurisprudential attention. The assumption that law is centrestage in the recognition of the rectification of women's disabilities has been criticised, for example, by Carol Smart,[42] who argues that law, far from being rational, objective and coherent, often exhibits irrationality, subjectivity and incoherence.[43] Also characterising much CLS writing is the distrust on the traditional insistence on the value of legal rights. Debunking, or 'trashing' the myths of law comes to the fore. In place of law's centrality and certainty, so prevalent in positivist theory and the liberal rule of law, is exhibited distrust for law and a yearning for a society characterised not by atomised individuals each relying on legal rights, but based on co-operation and sharing within a spirit of community. Moreover, the 'science of law', characterised by positivism and its attempted rationality, so evident in the centrality of fixed rules and principles, masks the law's interaction with and dependence upon other disciplines, such as anthropology, politics, psychology and sociology. CLS thus seeks to open up the legal mind to fresh interpretations of law and the legal enterprise and to see law as a political enterprise within its social setting. This demands that law be looked at through fresh eyes: get away from the concentration on formality and rationality, understand the causes and

40 *Op cit,* Morrison, fn 9, p 454.

41 *Op cit*, Morrison, fn 9, p 458.

42 See Smart, C, *Feminism and the Power of Law,* 1989, London: Routledge and Kegan Paul.

43 See, also, Olsen, F, 'Feminism and critical legal theory: an American perspective' (1990) 18 Int J Soc L 199.

effects of legal change. Legal education came under early attack, especially from CLS scholars Robert Gordon[44] and Duncan Kennedy,[45] as artificial, sterile and not fitting law students for the 'real world' of legal practice. 'Grand theory', whether liberalist or Marxist also falls under attack. Wayne Morrison identifies four 'assumptions' of liberalism which attract CLS critique:

> (a) the assumption of law's neutrality ...;
>
> (b) the assumption that legal reasoning is somehow an unproblematic matter ...;
>
> (c) the assumption that laws are positive data of social life, ie, that they have fixed objective meanings which cannot really be challenged; that their validity and significance are settled by objective unchallengeable methods ...;
>
> (d) the radical contingency and openness of modernity and hence the meaning of social progress ...;[46]

Sweeping away the assumptions of modernity's grand theories; postulating the radical view of law's inherent indeterminacy, law's lack of formal rationality, CLS, typifying postmodernism's doubt and uncertainty about knowledge and reality, demands that law be seen as a 'cluster of beliefs'[47] held about law which mask the fact that law is a representation of power, and a mechanism for maintaining power in society. Law thus has an ideological function, which becomes hidden under liberalism.

The uncertainties and fragmentation which characterises postmodernism and CLS has both positive and negative implications for feminist jurisprudence. First, freeing the mind from the certainties about law and legal theory, has led to considerable feminist scholarship on law and women's subjectivities. Secondly, and related, 'grand theory', such as liberalism and also feminist 'grand theory', for example, that of legal scholar Catharine MacKinnon, has come under closer scrutiny. Thirdly, the CLS distrust of legal rights has come under criticism from feminist scholars for whom the concept of rights, and the struggle for the achievement of equal legal rights for women in society, has played a central role in the quest for gender equality.

FEMINISM, POSTMODERNISM AND CRITICAL LEGAL STUDIES

It is with the critique of essentialism, and the appeal for an all-embracing feminist jurisprudence, that the demands for diversity and inclusion arise.

44 Gordon, R, 'New developments in legal theory', in Kairys, D (ed), *The Politics of Law: A Progressive Critique,* 1982, New York: Pantheon.

45 Kennedy, D, 'Legal education as training for hierarchy', in Kairys, *ibid*, .

46 *Op cit*, Morrison, fn 9, p 460.

47 *Ibid*, Gordon.

Thus, any theory – whether it be liberal, cultural, Marxist-socialist or radical – which fails to attend to the diversity of women's reality falls under attack.

The history of jurisprudence as a mainstream discipline within the academy has advanced through the certainties of positivism which unsettled natural law thought and asserted rationality, objectivity and order into legal theory. In its turn, positivism was to be unsettled in the 1920s and 1930s, particularly in the United States of America, by the school of legal realism. Legal realists assert, in essence, that a closed system of legal theory, one which excludes the practice of law, the *reality* of law, cannot be sustained. Instead the focus of inquiry must shift to encompass the work of the courts; an analysis of legal judgments; the problems in the evaluation of both facts and the legal reasoning employed to reach decisions. Early perceptions concerning the cultural origins of law, and law's dependency on culture, expanded further the boundaries of understanding about the complex relationship between society and law.[48] The developing sociology of law and sociological jurisprudence, evolving out of this realist movement, further challenged positivist assumptions about law as a discrete, autonomous discipline. However, conventional legal theory has maintained a tenacious hold on presenting law as a discrete autonomous theoretical domain. Hart's *The Concept of Law*,[49] Rawls's *A Theory of Justice*,[50] and Ronald Dworkin's *Law's Empire*[51] reside firmly within modernist thought, as does liberal feminism, difference feminism, Marxist-socialist feminism and radical feminism.

The charge put forward by critics is that the predominant modernist feminist legal thought, particularly of the 1980s, and in the United States of America, was propounded by white, educated and privileged, academics whose backgrounds and experience were ethnically and culturally limited. This is the accusation of feminist 'essentialism' or 'reductionism'.

In *Inessential Woman: Problems of Exclusion in Feminist Thought*,[52] Elizabeth Spelman[53] subjects feminist writing to critical analysis, arguing that from the time of Plato and Aristotle through to contemporary feminist writers, too many assumptions have been made about the nature of women which have resulted in the virtual exclusion of women oppressed by other forces such as class and race. Spelman's thesis centres on women's diversity and the difficulties in extrapolating from one woman to all women in the creation of a

48 See, eg, Ehrlich, E, *The Fundamental Principles of the Sociology of Law (*1936), 1975: New York: Arno Press; Sumner, W, *Folkways* (1906), 1940, Boston, Mass: Ginn.

49 Hart, HLA, *The Concept of Law*, 1961, Oxford: OUP.

50 Rawls, J, *A Theory of Justice,* 1972, Oxford: OUP.

51 Dworkin, R, *Law's Empire,* 1986, London: Fontana.

52 Spelman, E, *Inessential Woman: Problems of Exclusion in Feminist Thought*, 1990, London: The Women's Press.

53 At the time of writing, Associate Professor of Philosophy, Smith College, Massachusetts.

satisfactorily coherent feminist theory. In an insightful, pithy passage, Spelman observes that:

> ... essentialism invites me to take what I understand to be true of me 'as a woman' for some golden nugget of womanness all women have as women; and it makes the participation of other women inessential to the production of the story. How lovely: the many turn out to be one, and the one that they are is me.[54]

The question which arises from this perspective, is whether there can be developed a feminist jurisprudence which is all-inclusive of all women, or whether – if gender is not the sole force of oppression in society, but rather one of many – gender can legitimately continue to be used as a foundation for feminist theory. Elizabeth Spelman, among others, argues not. For her, gender is but one basis for the oppression of women in society. For privileged, white, middle-class women, gender may be the only basis for oppression. For other women, however, the issue is less clear-cut. Can a white, middle-class professional woman, share the same concerns about her position in society, about the forces which dictate that position, as a middle-class woman of colour, or a poor, white or black woman, or a Muslim woman living in traditional society? For any woman to assume that merely because 'I am a woman I am entitled to speak for all women' suggests both arrogance and naiveté about the forces which determine most other women's lives. For a particular individual may not be oppressed by one particular factor such as gender, race, or by class, or by religion, or by male constructions of cultural norms which have a particular bearing on particular women. An individual may alternatively be oppressed by a combination of one or more factors.

Accordingly, from this perspective it is not possible for any individual to 'know', trapped in his or her own particular characteristics/psyche/consciousness, the discrimination or oppression from which another woman with differing characteristics suffers. However much this discrimination may be understood intellectually, however much reading and research is undertaken, a person cannot '*know*' precisely what another, different, woman experiences. Part of the postmodern agenda is to deconstruct the concept of 'woman' and 'gender' and to provide a theoretical perspective, reconstructed with a critical awareness of the danger of conceptual generalisation.

In Spelman's view, what is needed is not so much an abandonment of theorising about the position of women, all woman, vis à vis men, but rather an opening up of the debate in order that the many and different voices of women are all heard. From this perspective there is an overwhelming need to recognise the differences between women, and when theorising to make it clear from which standpoint the author is speaking, in order to avoid the problem of appearing to assume that 'I am all women'. Only by opening up

54 *Op cit*, Spelman, fn 52, p 159.

the debate further, and making feminist jurisprudence truly inclusive of all women's concerns, will the feminist endeavour develop in a manner which avoids Spelman's charge of 'feminist ethnocentrism'.

Angela Harris[55] shares the concerns about feminist jurisprudence being the preserve of the white, privileged woman, and excluding too many other women's concerns. In 'Race and essentialism in feminist legal theory',[56] Angela Harris argues that radical feminist scholars adopt a gender essentialism which not only excludes the voices of women of colour but also in so doing, privileges those women who fall within the characterisation of the 'essential woman'. Harris criticises Catharine MacKinnon's dominance theory for its claim to be a total theory capable of representing all women, irrespective of race, ethnicity, class or sexual orientation. Despite MacKinnon's frequent reference to the needs and interests of woman of colour, Harris accuses MacKinnon of justifying essentialism on the basis that irrespective of particular women's particular situation and characteristics, all women are dominated and subordinated by men, and this is the central organising fact for a total feminist theory. By way of example, Angela Harris cites the differing experiences of white and black women in relation to rape. MacKinnon defines the rape experience as being 'a strange man knowing a woman does not want sex and going ahead anyway'. For Harris, this is a white woman's account of rape which ignores the complexities of rape for women of colour. The historical experience of women of colour was rape by a white employer; during slavery, the rape of a black woman was not even considered a crime, and after the Civil War the law was rarely used to protect women of colour. Furthermore, the charge of rape against a black man was often used by whites as an excuse for a lynching.[57] Thus, rape for women of colour represents more than forced sex by a stranger; to understand rape from the perspective of women of colour is to understand also the oppression through colour expressed in slavery and the master/slave relationship. Angela Harris calls for a movement beyond essentialism, for the abandonment of 'grand theorising' about women's oppression as women, and women 'as victim', and argues for positive action to understand the differences between women, to root out and overcome discriminations and to build a confident future for all women.

Professor Patricia Williams[58] has also written of the need to recognise and accommodate the experiences of women of colour within feminist theory. In

55 Professor of Law, University of California at Berkeley.

56 Harris, A, 'Race and essentialism in feminist legal theory' (1990) 42 Stanford L Rev 581 (see *Sourcebook*, p 249).

57 See, also, Smith, V, 'Split affinities: the case of interracial rape', in Hirsch, M and Fox Keller, E (eds), *Conflicts in Feminism*, 1990, London: Routledge.

58 At the time of writing, Associate Professor of Law, University of Wisconsin.

'The pain of word bondage',[59] Williams describes the difficulties faced by black women in their relationships with white people, and writes of the stereotypical construction of black women as 'unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute'.[60] Because of this perceived reaction, Patricia Williams argues against both essentialism and against critical legal theorists, that legal rights are of particular significance to people of colour. Whereas for her white, male colleague renting an apartment, informality and trust regulated the transaction, for her there was a real need for a binding legal contract. For her white male colleague, any insistence of formality would damage the relationship between himself and the lessor by introducing distrust, but for Williams, lacking the commonality of a shared background with the lessor, formality represented the protection of legal rights without which she would have experienced insecurity. These two very differing examples – the black experience of rape and the entering into of contractual relations – show the extent to which white, middle-class essentialism inevitably fails to recognise the very differing histories, experiences and perceptions of women of colour.

In 'Race, reform and retrenchment: transformation and legitimation in anti-discrimination law',[61] Kimberlé Crenshaw identifies the binary opposites of language which have typically been employed to define black identity. First, white is privileged over black: black is the negative and subordinate image of white. Secondly, racist ideology employs traditional stereotypical images of people of colour. Accordingly, Crenshaw argues, white images are those of industriousness, intelligence, moral, knowledgeable, responsible, etc, whereas the opposite, negative and subordinate black images are lazy, unintelligent, immoral, ignorant, shiftless etc. Historically, American society regarded people of colour as 'the other', the 'subordinate' and reinforced this otherness – this exclusion – through both what Crenshaw labels 'symbolic' and 'material' forms. Symbolic subordination was effected through 'the formal denial of social and political equality to all people of colour, regardless of their accomplishments', while material subordination was reinforced by segregation and 'other forms of social exclusion'. American history is thus characterised as privileging white identity at the expense of people of colour. Formal equality for Afro-Americans was secured through the rhetoric of rights – rights consciousness and the language of rights was crucial in the struggles for formal equality. However, Crenshaw argues, formal equality is not enough, and itself masks the continuing subordination of people of colour. Where law can present itself as a rational and equal ordering of society, the real remaining inequalities are hidden. Legal reforms have provided 'an ideological framework that makes the present conditions facing underclass

59 From *The Alchemy of Race and Rights*, 1991, Cambridge, Mass: Harvard UP, p 146.

60 *Ibid*, Williams, p 147.

61 Crenshaw, K, 'Race, reform and retrenchment: transformation and legitimation in anti-discrimination law' (1988) 101 Harv L Rev 1331.

blacks appear fair and reasonable'. Paradoxically, the achievement of rights which has enabled some people of colour to secure real equality has also, Crenshaw writes, fragmented the solidarity among black people. What is called for is the development of an understanding of the oppositional black 'subordinate Other', and the struggle to defeat 'Otherness' in the quest for meaningful equality.

Both similar and different objections to modernist feminist theory come from lesbian scholars. Two charges are pertinent here. The first is essentialism as discussed above. The second charge is that radical dominance theory, fails to accommodate lesbian women who, whatever oppression they may experience, are not oppressed by men. Patricia Cain[62] has taken heterosexual feminism to task. In 'Feminist jurisprudence: grounding the theories',[63] Cain argues that a feminist theory cannot successfully be built unless and until feminism becomes inclusive of all women's voices. Cain argues that radical feminist theory, while insisting on the importance of feminist method (listening to the voices of real women) and whilst making passing reference to the differences among women, is a theory of heterosexual relations which relegates lesbian women to the margins by treating them as either irrelevant to the core of dominance theory, or alternatively suggesting that even though lesbian women do not directly experience male dominance in their relationships, they nevertheless remain in a world constructed on the basis of male dominance. This represents, according to Cain, a failure to listen to the voices of lesbian women, in the same way that radical (and other) feminism has allegedly failed to listen to the voices of those oppressed by race and class.

Given these debates within feminist theory, centred on sameness/difference or dominance, there remains the central question of the way forward for feminist jurisprudence. On the one hand, 'sameness' feminists would seek the assimilation of women within the male world: remove the remaining obstacles to full equality; allow women their rightful place alongside men. On the other hand, difference feminists seek women's distinctive 'voice'. Conversely, if social relations are – as MacKinnon argues – constructed on the basis of dominance (by men) and submission (of women), then the liberal assimilationist ideal is no more than an ideal: an unrealisable goal – only apparently realisable whilst in reality unattainable without a fundamental reordering of gender relations. Further, the charges of essentialism – quite aside from the debate about 'sameness' and 'difference' – appear to undermine the feminist quest. There is thus an apparently unfathomable conundrum which offers no clear future direction for a coherent feminist jurisprudence. This uncomfortable suspicion, however, is one entirely consistent with the postmodern condition.

62 Professor of Law, University of Texas.

63 Cain, P, 'Feminist jurisprudence: grounding the theories' (1989) Women's LJ 191. (See *Sourcebook*, pp 256–67.)

POSTMODERN FEMINIST JURISPRUDENCE

Postmodern legal thought emphasises critique and seeks to unravel the uncertainties, irrationalities and diversities of law. The values of the Enlightenment which inform modern(ist) thought – liberalism, rationality, equality and freedom – fall under scrutiny. Thus the very foundations of traditional, modern(ist) legal thought are challenged. Theories about law, whether they be conventional, male, jurisprudential theories, or more recent feminist theorising about law, are critiqued for portraying legal theory as 'closure'.[64] Postmodernist theorists seek to explode the previously foreclosed boundaries of law.

The feminist reaction to postmodernism and poststructuralism is both positive and negative, alternatively viewed as offering new techniques for analysis of concepts, law and legal systems or viewed as a danger to the potentiality of feminist theory as coherence. The concept of essentialism, discussed above, is a manifestation of postmodern feminist thought. Deconstruction, moreover, located originally primarily in the postmodern field of linguistics, becomes an accessible tool for the analysis of law and legal theory.

The construction of gender

As understood in modern(ist) thought, gender is a socially constructed identity. This identity fixes the subject of law. Gender constructs reside within the linguistic system of binary opposites: man/woman; Subject/Other. As Luce Irigaray's analysis has shown, psychoanalytic theory is premised on gender, and in its modernist theorising about the origins of gender, the focus is male. Using Lacanian theory, but moving beyond it, Irigaray argues that this traditional male psychoanalytical theorising, in privileging the male, constructs woman as Other. The boy's identity with his mother, his dependency on the mother, must be rejected if he is to assume his gender-assigned role as a male. This Irigaray terms 'matricide': the mother is destroyed in order to free the boy-child to develop 'as a man'. In order for the woman to become a Subject (as opposed to the Other, or object), to have a voice, she must learn to speak (as) woman; develop her own language which can then be admitted to, accommodated within, the male-dominant language. Only when women's different voices are heard, will women be recognised as having subjectivity, and thus become, as Irigaray puts it, 'the other of the other', rather than the 'Other of the same'.

64 See Norrie, A (ed), *Closure or Critique: New Directions in Legal Theory*, 1993, Edinburgh: Edinburgh UP.

As has been seen, postmodernism constitutes an unsettling of fixities, and a denial of the determinacy of concepts. Postmodernism challenges the traditional modes of thought which form the foundation of theory, whether philosophical, linguistic or legal. Postmodernism seeks explanation and critiques which are not dependent upon former theoretical foundations. Neither philosophy nor linguistics – as understood in modern(ist) terms – nor even theory itself, can avoid the postmodern deconstructive process. Thus, the very terms gender and woman come under scrutiny, as does theorising which focuses on any particular concept. The very existence of, or possibility of, a feminist jurisprudence appears threatened. The postmodern analysis seeks to collapse the meaning attributed to 'gender', 'woman', 'man' – to render gender a non-viable linguistic construct on which to found theories about society and law. For modernist feminism, gender has proved an invaluable construct in unravelling law's maleness and exclusion. In modernist thought, gender has been formulated as a culturally and socially induced construct into which to situate women and men. There is a coherence in the term 'woman', which is readily comprehensible, and which forms an organising focus for theorising about women and as a political tool with which to press for legal and social equality. If that coherence is lost – if 'woman', along with gender, is deconstructed – it becomes possible to argue, as does French psychoanalyst and poststructuralist theorist Julia Kristeva,[65] that woman cannot be said 'to exist'.[66]

The feminist reaction to postmodern thought has accordingly been ambivalent. Feminism, as a political enterprise, requires organising concepts. Woman and gender provided that focus which facilitates the campaign for equality, non-discrimination and a non-patriarchal society. Postmodernism in challenging the use of any meta-narrative organised around a single, unifying concept, and thus feminist modernist theory, unsettles former certainties. As women have started to find a voice, to analyse their subjectivities and demand equal incorporation into life, politics and law, postmodernism steps in the undermine the feminist quest. In Susan Bordo's view, postmodernism not only distracts feminists from pursuing 'crucial feminist concerns' but also denies the legitimacy of feminist theorising.[67]

While postmodernism and poststructuralism unsettle the certainties of modernity, and criticise theory based on essential organising foci, such as

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65 Kristeva, a contemporary of Luce Irigaray, also analyses the subject from a psychoanalytic and linguistic standpoint. Her deconstruction of language, however, leads to a very different conclusion from that of Irigaray. Rather than women needing a distinctive voice and subjectivity, Kristeva argues that there is no specifically feminine voice. See Moi, T (ed), *French Feminist Thought: A Reader,* 1987, Oxford: Blackwells, Chapter 5.

66 Kristeva, J, 'Woman can never be defined', in Marks, E and de Courtivron, I (eds), *New French Feminism,* 1984, New York: Schocken.

67 See Bordo, S, 'Feminism postmodernism and gender-scepticism', in Nicholson, L (ed), *Feminism/Postmodernism,* 1990, London: Routledge, p 136.

woman, or gender, or even feminism itself, the postmodern approach also offers new insights and suggests new directions for feminist jurisprudence. The challenge to some forms of modernist feminism, based on its essentialism – its assumptions about the nature of women – discussed above, compels feminist theorising to recognise its own self-imposed boundaries: its closure. 'Women' are not necessarily white, heterosexual, middle-class. While the essentialist 'woman' facilitates discourses about women's (inferior) status in relation to men's (superior) status, it also masks characteristics of disparate women's characteristics and lives. Women, vis à vis men, have traditionally been constructed as the inferior half of the binary opposition. Nevertheless, this perception, whilst credible at one level, ignores the impact of culture, race, class, age and sexual orientation. Status is culturally dependent: women's status cannot be universalised but must be set within its cultural and historical context – both time and place are essential features in the analysis of women's condition. Feminist theory which fails to identify the differences between women, and the impact which those differences have on women's lives, fails to be inclusive. Thus scepticism with gender may be helpful in so far as it obliges feminist scholarship to 'demote' gender as an organising concept, in so far as it has been the *dominant* concept in feminist modernist theory, and to set gender alongside crucial other factors such as race, class, age, sexual orientation, the local and specific (as opposed to universalising and general), and so forth.[68] Thus a postmodern feminism must focus on the specificities of women's lives, rather than assuming the commonality of all women's lives. Feminist pluralism must replace feminist modernism.

Nonetheless, such challenges entail their own difficulties. Whereas gender as a central, unifying construct, may fail to encompass alternative realities of women's lives, gender also remains the basis on which women can challenge the dominant male discourse. As has been said before, gender represents a simple (too simple?) categorisation for the political pursuit of women's equality. Some political issues *are* specifically issues of gender – abortion, childbirth for example – and whilst, as will be discussed in Chapter 10, issues of race and class do affect the manner in which abortion and childbirth are handled by law and medical practice, these issues are most appropriately dealt with as gender-issues; with gender as the principal organising construct, and race and class as subordinate organising constructs. Alternatively expressed, abortion rights and childbirth management are issues which potentially affect *all* women; additionally *some* women will be affected in particular ways because of their race or class. Thus there is a necessity to identify, and recognise, that there are two, probably more, levels at which women's issues may be conceptualised and organised.

68 See, in particular, Fraser, N and Nicholson, L, 'Social criticism without philosophy', in Nicholson, *op cit*, fn 67, Chapter 1.

Postmodernism is troubling to a feminist perspective in a different regard. Postmodernism smacks of intellectual and theoretical elitism. To those who struggle to achieve equality in the harsh reality of life and law, and those who seek to theorise the causes of the inequality handed down by male-constructed and male-dominated history, the intellectual postmodern theorising of white, privileged men in industrial societies which denies the disadvantaged a theoretical legitimacy – on theoretical grounds – is problematic. Feminist goals are both practical and political. To deny legitimacy to theoretical concerns located in gender on the basis that the theoretical premises are inadequate is to deny or delegitimate – in the interests of those who have – the aspirations of those who traditionally have not, and must fight to have. While society and law remain gendered, while women are classified as women with all the attendant inequalities, whatever merits the tools of analysis offered by postmodernism are for feminist analysis, feminists should resist the overarching prescription of postmodernism in so far as it proscribes the centrality of organising concepts. Sceptical postmodernism invites a loss of direction, of identity, with the potential for undermining feminist goals. Relativism and nihilism loom on the horizon.

On the other hand, feminist jurisprudence can develop in a more radically and constructively self-conscious manner by utilising the tools of postmodernism/poststructuralism. While postmodern scholarship invites/demands the collapsing of organising concepts, the rigorous logic of postmodern deconstruction must be utilised in a constructive manner by feminist scholars in the task of unearthing the wiring of patriarchy. At the same time, the merits of the postmodernist deconstructive exercise must be weighed in the balance against the social and political, legal, *practical*, goals of feminist jurisprudence. The scepticism of black feminist author and scholar bell hooks, which echoes that of Jane Flax[69, 70] must be borne in mind. As bell hooks asks:

> Should we not be suspicious of postmodern critiques of the 'subject' when they surface at a historical moment when many subjugated people feel themselves coming to voice for the first time?[71]

Bordo echoes this perception when she asks: 'Do we want to delegitimate *a priori* the exploration of experiential continuity and structural common ground among women?'[72]

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69 See Flax, J, 'Postmodernism and gender relations in feminist theory', in Nicholson, *op cit*, fn 67, p 39.

70 See, also, Hartsock, N, 'Rethinking modernism: minority vs majority theories' (1987) 7 Cultural Critique 187.

71 hooks, b, 'Postmodern blackness', in *Yearning: Race, Gender, and Cultural Politics*, 1991, Boston: South End, repr in Anderson, *op cit*, fn 38, p 117.

72 *Op cit*, Anderson, fn 38, p 142.

It has been seen that from a postmodernist/poststructuralist perspective, all forms of theorising which focus on a unifying, totalising concept, are anathema. Thus, as a project, feminist jurisprudence, focusing on women and women's inferiority under and before the law, as theory – on this logic – is problematic.[73] However, such a conclusion need not follow. Feminist jurisprudence over the past decade at least has absorbed some of the strictures of postmodernism and used them to its advantage. Recognising the limitations of 'grand theory' which makes essentialist assumptions about women without recognising the diversity among and between women, has given way to more specific analyses of women's conditions and situations. Generality has given way to specificity, the universal has given way to locality and individuality.

However, there are limits to the postmodern method which feminist jurisprudence should recognise if it is to retain its power to critique social and legal structures which inhibit the potential for women's real equality in society. While postmodernism may decry universalising theory which is monocausal, which demands that theory centred on single concepts should be abandoned, feminists should be wary of the siren call to abandon gender as an organising concept, a *foundational concept* upon which to theorise. Whatever the deconstructionist and philosophical logic of collapsing concepts into themselves, thereby revealing their meaninglessness in theory, gender is too important a conceptual tool for feminists to abandon. Abandoning gender as an organising concept, would lead to the nihilism implicit in much postmodern and Critical Legal Studies thought. Throwing the baby – woman – out with the bathwater – postmodernism and CLS – may be a strategy which would be welcome to anti-feminists, of whom there remain many, but not to the cause of women's equality: that is a political and legal objective, not a 'mere' matter of philosophical speculation on the limits of meta-narratives, and their destruction, from a postmodern/poststructuralist/deconstructive/CLS perspective. As Mary Joe Frug has written:

> Despite the healthy, self-serving respect I have for the influence of legal scholarship and for the role of law as a significant cultural factor (among many) that contributes to the production of femininity, I think 'women' cannot be eliminated from our lexicon very quickly.[74]

Thus, feminist jurisprudence must continue to use postmodernism's deconstructive techniques, while avoiding postmodernism's elitist,

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73 See Harding, S, *The Science Question in Feminism*, 1986, New York: Cornell UP; see, also, hooks, b, *Feminist Theory: From Margin to Center*, 1984, Boston: South End.

74 Frug, M, *Postmodern Legal Feminism*, 1992, London: Routledge, Chapman and Hall, p 131. Mary Joe Frug, formerly Professor of Law at the New England School of Law, was murdered in April 1991. *Postmodern Legal Feminism* was published posthumously.

exclusionary, male and obscurantist language,[75] to analyse and theorise inequalities based on gender, and the complexities within gender analysis. But arguments over *method* must not be destructive of arguments over *substance.* To remain overly concerned with essentialism is to court the danger of losing sight of the feminist quest for woman's equality. As Susan Bordo has written:

> The programmatic appropriation of poststructuralist insight ... in shifting the focus of crucial feminist concerns about the representation of cultural diversity from practical contexts to questions of adequate theory, is highly problematic for feminism.[76]

Postmodernism/poststructuralism and Critical Legal Studies: unravelling law's claim to rationality and objectivity

Consistent with the demands of postmodernism and CLS, feminist scholars have been focusing on the claims made by traditional legal theory to the supposed rationality, logic, objectivity and coherence of law and legal systems.[77] As seen above, positivism perpetuates the mystification of law and the idea that legal rules and principles can satisfactorily be explained in a structural/scientific manner. As emphasised by sociological jurisprudence and CLS, however, there is much evidence which suggests that law is not, either in terms of judicial decisions or in legislation, imbued with these characteristics.

To illustrate by way of concrete example, under the English Children Act 1989, in relation to the private law, section 1 provides that the welfare of the child shall be paramount in any consideration relating to the education and upbringing of the child. Section 1 also provides that where conflict exists between adults with parental responsibility for the child, or an adult with a substantial interest in any particular decision sufficient to entitle that person to *locus standi,* the court shall not make any order unless making an order is better than making no order at all. Thus, within one section of the Act, we find two potentially competing principles at work: the 'welfare of the child', and the 'no order' principle, thus allowing elements of flexibility and discretion into the decision making process.

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75 As Walter Truett Anderson has remarked, 'The postmodern era has given the world some really good ideas and some really bad writing'. See the entertaining and irreverent essay by Katz, S, 'How to speak and write postmodern', in Anderson, *op cit*, fn 38.

76 *Op cit*, Bordo, fn 67, Chapter 6, p 136.

77 See, eg, *op cit*, Smart, fn 42; *op cit*, Olsen, fn 43. (See *Sourcebook*, p 342.)

In Frances Olsen's analysis,[78] there exist three potential challenges which may be launched against law's rationality. The dualistic structure of thought, which identifies a linguistic system of binary opposites (male/female, culture/nature, rational/irrational, active/passive, power/sensitivity, objective/subjective, etc), identifies the hierarchically superior former half of the dualisms with maleness, the latter with femininity and women. Thus men are rational, active, powerful, objective, rational and so on. As is law, or so is law said to be. Women, on the other hand, are imbued, under this dualistic system, which is a sexualised system, with all the characteristics which fall on the hierarchically inferior side of the dualism: women are irrational, passive, emotional, sensitive, subjective. One approach is to argue that contrary to male ascriptions as to the characteristics of women, women have been wrongly labelled: women can be rational, objective, active, unemotional and so forth. An alternative strategy is to reject the hierarchical nature of the dualisms, and to assert equality for women. From this perspective, it can be argued that even if women are correctly identified with differing characteristics from men, women nevertheless are equal with men: there is no hierarchical ordering of the dualisms, they co-exist. Far from women being viewed as subordinate to men, on the basis of the dualisms, women's unique characteristics entitle them to equality with men. The third strategy involves a rejection of the 'sexualisation and hierarchisation of the dualisms'.[79]

Olsen argues that the sexualisation of law which results in women's categorisation, and relative inferiority, needs to be dismantled. So too must the ascription of particular kinds of law – such as *par excellence,* family law – as 'feminine', and hence irrational etc, whereas commercial law, is traditionally conceived as rational, 'male'. Such classification of legal subjects results in what Olsen terms 'law's irrational, subjective ghettos'. Law is not, Olsen argues, capable of being so rigidly classified: in every aspect of legal regulation, there exist examples of rationality and irrationality. One of the tasks of feminist critical theorists is to break down the traditional classifications which work against women's interests. To see law as inherently rational etc, and hence male, is an historical error. Law is neither male nor female, but since it has traditionally and almost exclusively been practised by men, the identification of law with male qualities is an understandable, but false and damaging, feature of legal analysis which must be eradicated.

As has been discussed, where feminism differs from other critical legal theorists is in the centrality of gender as an organising concept. Only through incorporating women's voices, and women's experience into legal theory and critical theorising about law will gender-based inequality and discrimination

78 See *op cit*, Olsen, fn 43.

79 *Op cit*, Olsen, fn 43.

be eradicated. This takes us back to the importance of feminist legal method.[80] Feminist legal methods, it will be recalled, include consciousness raising: the retelling of women's experience, a restatement of women's point of view, a demand that women's voices and experience be heard in and by the law.

Feminism differs also from other critical theory in its origins. While CLS, as a derivative of postmodern thought, grew out of a dissatisfaction with legal theory and legal education, critical feminist theory grew out of women's experience of inequality and lack of representation, and women's exclusion from the law. Feminism is thus a political enterprise, grounded in women's experience of gender inequality. With gender as a central organising focus comes the problem caused by the diversity of women, and charges of essentialism levelled at feminist theory. Without reworking the concept of essentialism, it is necessary at least to recall that feminist theory has been criticised on the basis that the concept of 'woman' suggests a homogeneity, a sameness, of all women which excludes women's diversity. Age, class, culture and race all contribute to *differing forms* and experience of discrimination and inequality. Only when these factors are also brought adequately into focus will feminism be able to claim to be representative of women and women's interests. However, while there is much merit in the demand that feminist scholarship be truly inclusive of all women's experience and interests, it should be remembered that the ascription 'woman' is a powerful organising concept: arguing that different women experience discrimination and inequality differently does not mean that all women, irrespective of their similarities or differences, do not suffer inequality and discrimination on the basis of gender alone.

FEMINISM AND THE CLS DISTRUST OF RIGHTS

For many CLS scholars, legal rights build defensive barriers around individuals which inhibit the building of a society constructed on co-operative communitarian foundations. Rights, from this perspective, emphasise individuality, defensiveness and lack of trust. From a feminist perspective, however, the gaining of legal rights has played a central role in the quest for the elimination of discrimination on the basis of gender. The struggle for the franchise, the struggle for equal rights between mothers and fathers over children, the struggle for the right to equal and further education, the struggle for entry on equal terms into the professions, the right to equal pay and equal conditions of work, the campaign for legal recognition and regulation of domestic violence, the removal of a husband's immunity from the law of rape,

80 Discussed in Chapter 1.

the establishment of the offence of sexual harassment, of stalking, all testify to the centrality of rights in the demand for equality for women.

Legal scholars who argue against rights, albeit on the altruistic and idealistic basis that rights undermine community, argue from a privileged male perspective. While it may be acknowledged that law alone cannot produce social change, and that the impact of law as a force for social change is difficult, if not impossible, to measure, rights have played and continue to play an essential role for women in the movement for equality. It may also be argued that the existence of *formal rights* alone does not guarantee that the *substantive equality* provided for will in practice be brought about. To provide legal guarantees against sexual discrimination in recruitment laws, does not secure a guarantee that in practice a prospective employer may reject a female applicant on other grounds: qualifications, unsuitability, etc. To prove in a court of law that a rejection was in fact based on grounds of gender would, for most, be both prohibitively expensive and uncertain in outcome. Moreover, legal systems characterised by white, middle-class, privileged judges does little to convince applicants from alternative backgrounds that their claim would be met with an impartial and fair interpretation, let alone a successful outcome.

Notwithstanding the indeterminacy of rights, legal rights provide an authoritative platform from which to press for greater equality and control. In the United States of America, rights discourse takes on a particular resonance. The written Constitution guaranteeing fundamental rights and freedoms, provides a sound foundation for the securing of equal rights. Thus, for example, the right to privacy has been employed to promote the right of women to control their reproductive lives.[81] The right to equality under the law provides a platform for the campaign against the sexual harassment of women.[82] The right to the equal protection of the law was also instrumental in removing the discriminatory barriers of racial segregation and discrimination.[83] Conversely, however, where rights claimed by women conflict with other rights secured under the Constitution, little progress may be made. An example of this alternative outcome lies in the campaign spearheaded by Catharine MacKinnon and Andrea Dworkin to provide civil remedies for the harm caused by pornographic representations of women. As will be seen in Chapter 12, while the Dworkin/MacKinnon Ordinances were adopted in Minneapolis and Indianapolis, they were ultimately to be struck down as infringing the constitutional guarantee of 'freedom of speech'. One set-back for constitutionally guaranteed rights, however, does not diminish the force of rights rhetoric, or the importance of the existence of a constitution

81 On which see Chapter 10.

82 On which see Chapter 11.

83 See *Brown v Education Board of Topeka* 349 US 294 (1954).

which provides a frame of reference against which claims of rights may be adjudicated.[84]

Critical legal scholars overemphasise the 'downside' of rights. Not only is the overemphasis wrong from a feminist perspective, but it is also misleading. Legal rights are not just individualistic: legal rights for women have been secured for all women – not just individual plaintiffs. Rights as class rights, as collective rights for subordinate groups in society, are more important even than individual rights. As Kimberlé Crenshaw has written, '[T]he Critics' product is of limited utility to blacks in its present form. The implications for blacks of trashing liberal legal ideology are troubling, even though it may be proper to assail belief structures that obscure liberating possibilities'.[85]

DECONSTRUCTING THE SUBJECT OF LAW[86]

> The question of 'the subject' is crucial for politics, and for feminist politics in particular, because juridical subjects are invariably produced through certain exclusionary practices that do not 'show' once the juridical structure of politics has been established.[87]
>
> The problem of the subject is that it has never been part of the story. Until now.[88]

The application of postmodern deconstructive techniques to the identity of law's subject has become a fruitful and vibrant site of feminist analysis. The formerly accepted constructions of sex and gender as the appropriate binary pairing in which the biological attributes of women have been downgraded in favour of the social construction of the human subject of law as the principal focus for analysis. This process has been prompted by several perceptions. First, while prioritising gender over sex avoided the tendency to perpetuate women's inequality through forms of biological essentialism, gender itself has been critiqued for its essentialist portrayal of women in legal theory as uniformly heterosexual, white and middle-class. Second, feminist theory which is cast in the mould of 'grand theory', whether it be labelled dominance theory or cultural feminism, when subjected to critique from alternative

84 The position under an unwritten constitution, such as that of the United Kingdom, deprives citizens of this point of reference. The constitutional differences between the USA and the United Kingdom, above all, explain the relatively muted feminist campaigns in the latter country.

85 *Op cit*, Crenshaw, fn 61.

86 For in-depth analyses, see Naffine, N and Owens, R (eds), *Sexing the Subject of Law,* 1997, London: LBS Information Services/Sweet & Maxwell.

87 Butler, J, *Gender Trouble: Feminism and the Subversion of Identity,* 1990,New York: Routledge, p 2.

88 Schlag, P, 'The problem of the subject' (1991) 69 Texas L Rev 1627.

perspectives, revealed its inherent weaknesses. Either grand theory 'said too much' about women's inequality by positing single causal explanations, or it 'said too little' by ignoring or denying alternative perspectives. The postmodern challenge to the meta-narrative has forced postmodern feminism to re-evaluate its methods and objectives in order to avoid the alleged implicit dangers of universalising theory. Furthermore, the conceptualisation of biological sex – male and female – and culturally-constructed gender – men and women – fails to mirror the diversity of human experience, and privileges the conventionally accepted pairings. Thus 'men' are heterosexual, 'masculine', 'virile', rational and objective; 'women' are heterosexual, feminine, frail, emotional and subjective. Law, based on this conventional stereotype, reflects all that is 'male', and little that is 'female', other than calculating, when relevant, the extent to which women do not reach the 'male' standards of law. Not only is this discrimination in law, but it also represents a false conceptualisation of both men and women. The conceptualisation of the subject of law in binary manner fails to recognise the diversity of the subject – irrespective of maleness or femaleness. Men are not all rational, unemotional, objective. Women are not all emotional, irrational and frail. By characterising law's subject as if it were an autonomous, disembodied individual – the conventional privileging of mind over body – law fails also to recognise the interconnectedness of human beings, their relatedness and the manner in which their embodiment interacts with the manner in which the subject is socially constructed. From a postmodern feminist perspective, law is thus premised on overly narrow perceptions of sex and gender which, through deconstruction, can – without positing a new essentialism in place of the old – reveal the multiplicity and diversity of the subject of law, and thus debunk law's claims to objectivity and rationality, and the notion of the universalised, masculine, subject of law.

The analysis of the legal subject has thus become a central focus of attention. From the time of Descartes, through to contemporary liberal theory, the subject of law is portrayed as the autonomous, rational, gender-neutral individual. In conventional (masculine) jurisprudence, law is theorised consistently as a rational gender-neutral ordering of human conduct. Accordingly, law and the subject of law, are presented in terms which mask the gendered reality of law and individual subjects. When the focus shifts from the analysis of law to the analysis of the subject and the concept of subjectivity, it becomes possible to broaden theory to expose the reality of individual lives, without forcing the subjects of law into the conceptual straightjacket represented by concepts of sex and gender. As many feminists have long argued neither sex nor gender are adequate constructions for reflecting the multiplicity of human realities. The concept of sex not only implies biological determinism, but also fails, in its compartmentalisation of man/woman, adequately to reflect the diversity of human sexual life. Gender fails also in this regard by implying universal heterosexuality, and in reifying

the conventional social attributes of maleness and femaleness. Highlighting subjectivity through deconstructing sex and gender, leads not to nihilism and emptiness, but to a rigorous analysis which opens up spaces in which all subjects of law can find accommodation – irrespective of their individual sex or gender orientation.

The ongoing analysis of the legal subject also entails the recognition and analysis of the manner in which the law fixes legal subjects with identities which are universalising and false. The 'reasonable man' of the common law is perhaps the most obvious of law's falsehoods. The reasonable man of law is characterised as being rational and objective, thus privileging the mind over emotion, and suggesting that reasonableness is a male, and not female, trait. With the masculine identified with the rational, the feminine is cast in the mould of rationality's subordinate, inferior binary opposite – irrationality and emotionality. For feminist analysis, both the law of provocation and rape, discussed in Chapter 11, have provided fertile areas for research in exposing law's gendered nature. As has been well documented, the law of provocation when applied to women who kill their violent partners, reveals itself to be steeped in masculinity: the law is premised on two individuals of roughly equivalent physical strength, one of whom provokes an immediate and sudden loss of control in the other, who responds instantly with a degree of force which is deemed reasonable to the provocation which prompted the reaction. Women, particularly women who have been victims of violence in domestic relationships, do not, as research into the psychological effects of domestic violence which leads to battered woman syndrome, testifies, respond in this fashion: rather they bide their time until it is safe to react. The law of provocation, constructed in its male-gendered fashion, thus cannot accommodate women's subjectivity. The English law of rape is equally problematic in its gendering. As will be seen, the law of rape centres not on the fact of unlawful, non-consensual sexual intercourse suffered by the victim, nor on the reasonableness of the man's belief as to whether or not the woman consented to sexual intercourse, but on whether the man – reasonably or not – actually believed that the woman was consenting. Thus, in both instances – provocation and rape – the law genders, or 'sexes', the subject of law as male to the exclusion of other identities and subjectivities. The 'abstract' subject of law is masculine, and masculine in the conventional sense: the 'reasonable man' of law is characterised as white, heterosexual and middle-class. Thus viewed, the law is gendered to construct the subject of law in a manner which is exclusionary not only of women but of men who do not share the paradigmatic characteristics of law's preferred subject. The potential for the deconstructive project is well summarised by Margaret Davies:

> When it is widely recognised that the law sexes its subjects, it will no longer be possible to present any subject as an abstract person before the law, meaning that if it is to retain its ideal of equality, the law will have to begin to deal with

its inbuilt prejudices in some way, or at least invent new ways of masking them.[89]

89 Davies, M, 'Taking the inside out', in Naffine and Owens, *op cit*, fn 86, pp 25–27.

PART IV

KEY ISSUES IN FEMINIST JURISPRUDENCE

CHAPTER 10

WOMEN AND MEDICINE

INTRODUCTION

In this chapter, feminist concerns over law, medicine and medical practice are considered. The hallmark of autonomy and integrity of the self is the right to make decisions concerning one's own body, including the right, among others, to regulate one's own fertility. A woman's right to autonomy over decisions relating to her body is circumscribed by culture, law and medical practice. The traditional role of women, defined and reinforced by traditional patriarchal society, lies at the heart of the debate concerning a woman's right to autonomy. As Frances Olsen has written:

> By refusing to grant women autonomy and by protecting them in ways that men are not protected, the State treats women's bodies – and therefore women themselves – as objects. Men are treated differently. Their bodies are regarded as part of them, subject to their free control.[1]

Women's traditional role in child-bearing and nurturing, her *private* role within the *private sphere* of life, continues to exert its historical influence over contemporary matters of medicine and medical practice. Furthermore, women's rights to control over their bodies, especially in relation to issues of fertility, are traditionally viewed as rights which are placed in competition with, if not opposition to, the claims of others: of husbands, partners, children and the yet unborn. The conventional family exerts its control – directly or obliquely – over a woman's right to determine her own destiny. Thus, operating within the context of medical decisions, there exists an interacting web of controls and influences: the family, the State and law; the medical profession; and the traditional conceptualisation of woman as mother and the primary carer in society.

Within this context, the principal issue for consideration is the extent to which law and medical practice respects, or does not respect, women's autonomy. Subsumed beneath this far-ranging enquiry lie a number of further and specific issues for consideration. The availability and safety of means of contraception, the availability of abortion, the management of pregnancy and childbirth, reproductive technology and surrogacy, sterilisation – voluntary and involuntary – and the use of mental health legislation in relation to this

1 Olsen, F, 'Statutory rape: a feminist critique of rights analysis', in Bartlett, KT and Kennedy, R (eds), *Feminist Legal Theory: Readings in Law and Gender*, 1991, Boulder: Westview, pp 306–08.

and other medical treatment, and the forcible treatment of victims of anorexia nervosa are discussed below.

In addition to issues relating to individual autonomy in medical matters, consideration needs to be given to State policies such as population control programmes. The means adopted in the pursuit of population control goals, which undermine the individual's claim to autonomy and respect, are several, although a common element – that of focusing on controlling women's rather than men's reproductive capacity – may be discerned.

Each of the issues considered involves questions of a woman's autonomy, competing individual interests, the interests of the State, the status and role of the medical profession, and most particularly in relation to abortion, a clash of ideologies concerning individual women's rights and the claimed 'rights' of the unborn. What also becomes apparent from a study of the differing aspects of 'women and medicine' is the extent to which different cultural, institutional, legal, political, religious and social factors coalesce to produce a position of inferiority for women as compared with men. This web of interacting factors represents subtle control by the State, judiciary and the medical profession, a further manifestation of the patriarchal ordering of, and hierarchical male power in society. A person's body and his or her sexuality is *par excellence* a site of autonomy and privacy. When autonomy and privacy are taken away or delimited, individuality itself is harmed. For women, sexuality, conception and contraception, pregnancy and childbirth are all central to female identity. As will be seen below, the rise in medical professionalism in the nineteenth century was accompanied by the increasing medicalisation of reproductive issues: that which was once natural and unregulated – reproductive capacity – became increasingly the subject of regulation by predominantly male doctors and surgeons, to the exclusion of women medical practitioners. Pathology entered the natural.[2] Devoid of experience of womanness, male theories about women and their 'conditions' – be it premenstrual tension, pregnancy or the demand for abortion – informed medical practice and law.

The traditional linguistic analysis of binary opposites hold clues to this phenomenon and has great explanatory power in relation to the construction of women by men, and, conversely, of men by men. Male/female; objective/subjective; rational/emotional; responsible/irresponsible; strong/weak: all these binary oppositions come into play in the construction of women. Thus, woman is emotional, irrational, irresponsible, subjective and weak (physically and psychologically). Conversely man, and in this instance the male-dominated medical profession, is rational, responsible, objective and authoritative.

2 Pathology: the branch of medicine dealing with the origins, cause and nature of disease.

Woman's unique reproductive capacity has accorded her 'special status' historically and universally. Woman is ostensibly cherished for her capacity to reproduce. On this male rationale, woman must be protected from the reality and ravages of the public sphere for which she – by virtue of her talent for nurturing and caring – is deemed to be unsuited. Woman must be confined, for her own good, and the good of future generations, in the private sphere, under the care, power and tutelage of, firstly her father, and then her husband. The idealisation of motherhood, the capacity (apparently unique to women) to nurture and care, represents a mask for male power and control; a justification for women's exclusion from the public sphere of government, the professions and other paid employment.

Without reworking the discussion on cultural feminism, the celebration of woman's uniqueness in terms of reproduction and nurture, or of her differing faculties of moral reasoning, tend to reinforce the constructions of women by the medical profession, to the detriment of women. This difficulty is exacerbated by the fact, dictated by the originally male exclusivity of the medical profession, that the profession itself is organised on the lines of differences between men and women and a hierarchical professional ordering which has evolved in a manner which reflects male dominance and female subordination; male rationality and authority with the correlative of women's 'capacity for caring' (nursing rather than doctoring; obstetrics and gynaecology and physiotherapy rather than orthopaedic surgery) resulting in inferior career status for women while upholding the traditional authority and power of men.

THE MEDICAL PROFESSION IN WESTERN SOCIETY

Whereas early medical and legal developments in Australia and the United States of America largely followed those of the United Kingdom, and continue to employ similar concepts in relation to fertility management, differing constitutional arrangements between the three countries have resulted in very differing juridical bases for the resolution of disputes over various issues. The medical profession has traditionally, as with every other profession, been dominated by men. The struggle for entry into the profession was considered in Chapter 2. Nowadays, while women enjoy equal rights of entry,[3] the profession is characterised by unequal sexual distribution and unequal rates of career advancement. General surgery remains a male province.[4] Women consultants are mainly located in field of gynaecology, obstetrics, paediatrics

3 In the 1950s, the University of Cambridge restricted entry of women to read medicine to 10% of students: see Savage, W, *A Savage Enquiry: Who Controls Childbirth?*, 1986, London: Virago. In 1997, the proportion of female medical students in the United Kingdom has risen to 51%, 48% of whom graduate.

4 Bock, G and James, S, *Beyond Equality and Difference*, 1992, London: Routledge.

and psychiatry. In general practice, which is less lucrative than surgery, whereas men used to outnumber women, fewer men than women now enter into general practice. In 1980, in England, there were 19,500 men and 4,000 women in general practice. By 1991, there had been an increase of 3,500 female GPs, but only 800 more male GPs.[5] It is no coincidence that in that decade general practice became less lucrative and attractive, compared with consultancy work. Within the National Health Service, in 1991, 15.5 per cent of consultants were women, and only 18 per cent of National Health Service General Managers were female.[6] At the other end of the spectrum, in nursing, women predominate. A third of all nurses work part time.[7] 'Bank' nurses, temporary staff employed to deal with shortages of full time staff, are increasingly employed by the United Kingdom's National Health Service. Ninety eight per cent of all bank nurses work part time; receive no sick or maternity pay, nor pension or annual leave.

The male control of the upper echelons of the medical profession provides a 'natural' site for the imposition of male perceptions of health and norms of practice which both reflect male perceptions about women's health and which simultaneously exclude women and their perceptions. The doctor/patient relationship is inherently a power relationship: with the power invested in the male profession, and exercised according to male constructions of women and women's health, reinforced by legal norms, women's role as object rather than equal subject is reinforced. The imbalance in power is supported and extended by the symbiotic relationship between the medical profession and the medico-scientific technology industry and pharmaceutical industry. Fuelled by medical and scientific advancement and the profit motive, the pharmaceutical and medico-scientific industries have posed a number of significant threats to women's health. In the 1960s, for example, the prescription of the drug Thalidomide, designed to suppress morning sickness in pregnancy, resulted in the birth of deformed children. In the 1960s and 1970s, the development of the contraceptive pill provided women with sexual liberation, with also with the threat of yet undiagnosed side-effects.[8] In the 1980s, the introduction of contraceptives by injection or implants, Depo Provera and Norplant, provided 'long term' protection from conception to women, but again at the cost of severe side-effects, including prolonged bleeding, weight gain or weight loss.[9] In 1979, 30.7 million benzodiazepine

5 See *Health and Personnel Social Services Statistics for England*, 1992, London: HMSO.

6 Department of Health, *Departmental Report*, 1994, London: HMSO.

7 See Seccombe, I and Ball, J, *Motivation, Morale and Mobility: A Profile of Qualified Nurses in the 1990s*, 1992, London: Institute of Manpower Studies, No 233, October.

8 See Mosse, J and Heaton, J, *The Fertility and Contraception Book*, 1990, London: Faber & Faber.

9 Bunkle, P, 'Calling the shots: the international politics of Depo-Provera', in Arditti, R, Klein, R and Minden, S (eds), *Test-tube Women*, 1984, London: Pandora.

prescriptions for Librium, Valium, Mogadon and Mandrax, were dispensed, decreasing by 1991, following increased concerns over their over use, to 19 million. In the late 1980s, 'there were over one million long-term users, two-thirds of whom were women'.[10] The use of the anti-depressant 'miracle' drug Prozac, prescribed predominantly to women, who, according to medically defined criteria, are most susceptible to depression, has created a climate in which the individual is able to cope with daily routine, but prevented from addressing the underlying socially induced circumstances of her depression.

Obstetrics[11] and gynaecology[12]

Gynaecology and obstetrics, as a male medical discipline dealing with women's bodies, developed in the nineteenth century. Matters relating to abortion, pregnancy and childbirth had, in pre-industrial society, been regarded as private matters dealt with by non-medically-trained female midwives, with knowledge being handed down from generation to generation.[13] Pregnancy and its management at that time was mainly an all-woman affair:[14] a service by women for women, unregulated by the State and not a concern of either surgeons or physicians.[15] Female midwives provided an abortion service as well as natal care. As English society became industrialised, much of the specialist female knowledge of midwifery skills was lost. At the same time, there was a rise in the availability of chemical substances to terminate pregnancies which could be purchased from apothecaries and self-administered. Significant also in this period was the invention of mechanical aids to childbirth: the introduction of extracting foetal slings and forceps. Designed by men, and used by men, the process of childbirth became associated with technology, a development which was to have profound and lasting effects on the question of the medicalisation of pregnancy and childbirth.[16]

10 Foster, P, *Women and the Health Care Industry: An Unhealthy Relationship?*, 1995, Buckingham: Open University, p 90, citing research findings: Gabe, J (ed), *Understanding Tranquiliser Use*, 1991, London: Routledge; *Mental Illness: The Fundamental Facts*, 1993, London: Mental Health Foundation.

11 The branch of the medical profession specialising in childbirth and related matters.

12 The branch of medical profession specialising in women's diseases, especially those of the genitourinary tract.

13 See, *inter alia*, Castiglioni, A, *A History of Medicine* (1941), 2nd edn, 1958, Alfred A Knopf; Oakley, A, 'Wisewoman and medicine man: changes in the management of childbirth', in Oakley, A and Mitchell, J (eds), *The Rights and Wrongs of Woman*, 1976, London: Penguin.

14 There were some male abortionists, but they were at that time in the minority: see *ibid*, Oakley, p 33.

15 The two principal divisions within the emergent medical profession.

16 See Martin, E, *The Woman in the Body: A Cultural Analysis of Reproduction*, 1987, Buckingham: Open University, Chapter 4.

THE MEDICALISATION OF REPRODUCTION

As seen above, in pre-industrial Western society, and still nowadays in existing small-scale societies, the management of conception control, abortion, pregnancy and childbirth was regarded as a non-medical matter within the informal jurisdiction of women themselves. Paralleling the developments noted above which resulted in women no longer controlling pregnancy and birth, was a relatively far more significant factor: the rise of the medical profession and usurping of traditional 'non-medical' skills relating to reproduction matters through a reconceptualisation of such issues as medical issues within the province, alone, of the medical profession. Ann Oakley writes that:

> The main change in the social and medical management of childbirth and reproductive care in industrialised cultures over the last century has been the transition from a structure of control located in a community of untrained women, to one based on a profession of formally trained men. Thus, a process of professionalisation has been accompanied by a transfer of control from women to men.[17]

Feminist theologian Mary Daly writes that the medical profession in the United States of America in the nineteenth century was regarded as: 'flamboyant, drastic, risky, and [with the] instant use of the knife.'[18]

However, even before the medicalisation of pregnancy and childbirth, female midwives had not been unchallenged in society. There was an early associative relationship between witches, midwives, and female healers. In Marianne Hester's analysis the persecution of female witches could be explained largely as an attempt by men to control women who were unmarried and therefore outside of normal patriarchal controls.[19] Further, as Ann Oakley documents, society was regulated by the Church, which in the sixteenth century had assumed control over midwives through the introduction of a licensing system designed in large measure to prevent witches becoming midwives.[20]

With women excluded from university education, and the right to practice medicine being confined to those with a university education and training, it was inevitable that the medical profession would become dominated by men. The Royal College of Physicians was founded in 1518 by Royal Charter.

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17 *Op cit*, Oakley, fn 13, p 18.

18 Barker-Benfield, GJ, *Horrors of the Half-Known Life: Male Attitudes Toward Women and Sexuality in Nineteenth Century America*, 1976, New York: Harper and Row, p 81, cited in Daly, M, *Gyn/Ecology: the Metaethics of Radical Feminism*, 1979, London: The Women's Press, p 226.

19 See Hester, M, *Lewd Women and Wicked Witches: A Study of the Dynamics of Male Domination*, 1992, London: Routledge and Kegan Paul. (See *Sourcebook*, p 35.)

20 See *op cit*, Oakley, fn 13, p 26.

Physicians were not permitted to perform surgery. That right was confined to surgeons, who had a lesser status than physicians, and were trained via apprenticeship rather than at university. The Royal College of Surgeons was established in 1745. Male midwives started to practice in the seventeenth century, and the invention of forceps in 1647, initially undisclosed, and when publicised, accompanied with a prohibition against their use by women, contributed to the rise in male control over obstetrics and the exclusion of women. The power and control of the medical profession, especially in industrialised Western society, manifests itself in numerous ways, most particularly in relation to that most intimate and private issue of reproductive rights, including the right not to reproduce, and reproductive technologies.

In relation to abortion, for example, under English and Australian law, it is one or two doctors who must certify that a woman meets the legal criterion for an abortion – not the woman who may seek an abortion as of right. In relation to the English Abortion Act 1967,[21] two doctors must certify that a woman seeking an abortion within 24 weeks of her pregnancy would be at risk of injury to her physical or mental health, a risk which must be deemed to be greater than if the pregnancy were terminated, or, alternatively, that the termination of the pregnancy is necessary 'to prevent grave permanent injury to the physical or mental health of the pregnant woman'; or that continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or that if the child were born it would suffer serious physical or mental abnormalities. The criteria are thus framed on medical grounds, with those medical grounds being determined by doctors. In no sense does the Act convey the concept of a 'right' to terminate the pregnancy – even within the first trimester – which may be exercised autonomously by the woman. That this is so should cause little surprise when the composition of the Parliament which introduced the Abortion Act 1967 is considered. Simply stated, Parliament being traditionally a male domain, the law was framed by men, and as has been well documented by research, the debates in Parliament portray women seeking abortions as variously, irresponsible, feckless, weak and irrational. Set in opposition is the medical profession categorised as authoritative, responsible and rational.[22]

Further, as the case law of the Supreme Court of the United States of America reveals, even though the Court continues to uphold the rhetoric of a 'woman's right to choose' in the first trimester,[23] the Court has subsequently so whittled away a woman's autonomy, by upholding restrictive procedural requirements of State law, that the woman's 'right' has become virtually

21 As amended by the Human Fertilisation and Embryology Act 1990, s 37.

22 See Sheldon, S, 'Who is the mother to make the judgment? Construction of woman in English abortion law' [1993] 1 Feminist Legal Studies 3. (See *Sourcebook*, pp 507–18.) See, also, Sheldon, S, *Beyond Control*, 1997, London: Pluto.

23 See *Roe v Wade* (1973) and subsequent interpretations of the law discussed below.

devoid of substance and conditional upon meeting the procedural and other requirements deemed constitutional by the Court.

Similar considerations apply to the contemporary medical control of pregnancy and childbirth throughout the West. The insistence on childbirth in hospital as opposed to birthing at home – on the basis of maternal and foetal welfare – is opposed to the long tradition of midwifery in the community. Before 1914, less than one per cent of births took place in hospital: in 1990, 99 per cent of births in England and Wales took place in hospital. The manifest readiness of doctors to insist on delivering babies by forceps delivery or Caesarean section is also testament to the medicalisation of childbirth. As Emily Martin has shown in her detailed research in the United States, a woman's desire to give birth at home is too often frustrated by doctors insistence on hospitalisation for the event, an insistence avoided only by the most obdurate women.[24] To quote Emily Martin, '[O]ne has to ask: whose baby, whose life, whose birth, whose timing, and who has the power to decide?'.[25]

Emily Martin's research also covers the question of race and class in the United States of America, with some disturbing findings. It is apparent from the research findings cited that a woman's social class background, and her colour, adversely affect both her health and medical treatment, and that of her baby. A study in New York City, in the early 1960s, for example, revealed that not only was there a '50 per cent difference in neonatal mortality between children of professional and managerial fathers at the top and service workers and labourers at the bottom, but also that the 'neonatal mortality rate among blacks in the highest socio-economic class is close to the rate in the labourer and service worker category among the whites'.[26] In terms of medical treatment, Martin finds that whereas – given the relative high cost of Caesarean section – it would be expected that these would be primarily made available to those in the highest socio-economic group, in fact, and notwithstanding the complexity of interpreting such data, in some areas the use of Caesarean sections on non-white women of low socio-economic class is disproportionately higher than those available to white, higher class women.[27]

24 See *op cit*, Martin, fn 16, especially Chapter 6.

25 *Op cit*, Martin, fn 16, p 148.

26 Shapiro, S, Schlesinger, E and Nesbitt, R, *Infant, Perinatal, Maternal and Childhood Mortality in the United States*, 1968, Cambridge, Mass: Harvard UP, pp 66–67, cited in Martin, *op cit*, fn 16, p 148.

27 See *op cit*, Martin, fn 16, pp 149–55.

STERILISATION

Sterilisation also raises questions concerning the appropriate balance to be struck between a woman's autonomous decision making, her health, and the interests of the State. In many parts of the world, the State interest is that of population control, where sterilisation programmes – usually focused on women – represent a form of contraception. The data on the use of forced or coerced sterilisation around the world reveals the extent to which law and medical practice combines to restrict women's reproductive autonomy. Even in industrialised societies there exists evidence of sterilisations being performed on minority groups and on mentally incompetent adults who are incapable of giving full and informed consent.[28] The whole issue of sterilisation and its uses becomes confused with a number of competing claims which need to be unravelled before any sound judgment may be reached as to the justification for its imposition on women without consent.

On the positive side, it is undeniable that for some women, who have either achieved the family size that they desire, or who have made the firm decision not to bear children, sterilisation, as the most permanent form of contraception, frees them from the need for constant vigilance over contraceptive devices or methods, and from concerns over the side-effects which such methods or devices may produce. However, data suggests that such women – exercising their free choice – are in a minority of those women who undergo sterilisation. A further preliminary point may be made: namely that the focus on female – as opposed to male – sterilisation, which is a statistical feature in most countries, places the full responsibility for the control of fertility and pregnancy on the shoulders of the woman, to the exclusion of men, thus reinforcing already unequal power relationships.

Sterilisation, whether by division of the fallopian tubes[29] or by hysterectomy is a generally non-reversible termination of a woman's right to reproduce, recognised in life and law as a fundamental human right. Where a woman voluntarily chooses sterilisation as a means of achieving freedom from reproductive risks, there is little controversy – other than in the eyes of the Roman Catholic Church or Islam – both of which oppose sterilisation, on the basis that it is contrary to God's will. However, in other situations, sterilisation is one of the most controversial issues in reproductive ethics.

Historically, there is much evidence that sterilisation was performed on men and women for eugenic reasons. Earlier in this century, in the United States, a number of States had legislative provisions for the sterilisation on

28 See, eg, the recent admission of the Japanese Department of Social Justice and Welfare that mentally incompetent women had been routinely sterilised until the programme ceased in 1995.

29 Laparotomy, laparoscopy and colpotomy.

mentally incompetent persons, those suffering from genetically transmissible diseases and criminal recidivists.[30] Nowadays, several States retain legislation permitting compulsory sterilisation, while under the common law the courts have the power to authorise the sterilisation of legally incompetent minors and adults.[31] It is from the dismal eugenic legacy that the law inherits its powers in relation to the authorisation of involuntary sterilisation.

Sterilisation may be sought for either therapeutic or non-therapeutic reasons, and this distinction has raised a number of basic issues which have been treated differently in different common law jurisdictions. Sterilisation as a form of therapeutic medical treatment is one accepted use. Sterilisation as a means of ending menstruation, or for contraceptive purposes,[32] or sterilisation of mentally incompetent minors and adults is more controversial.

The case law

In 1976, the case of *Re D*[33] was decided by the English Court of Appeal. An 11 year old girl, D, suffered from Sotos' syndrome, and had an IQ of approximately 80. On an application by a mother, supported by her doctor, to the courts to authorise the sterilisation of D, the judge, Heilbron J, ruled that given the girl's IQ and that her condition was improving rather than deteriorating, her 'basic human right to reproduce' should not be removed from her. While the girl was not capable of giving her own informed consent at this young age, she should not be forced to undergo an operation the consequences of which were so final and which she might, at a later age, come to understand and regret.[34]

A decade later the Supreme Court of Canada was to hand down a seminal and controversial judgment. In *Re Eve*,[35] while citing *Re D* with approval, the Court ruled that the determining issue was the best interests of the woman, a 24 year old suffering from 'extreme expressive aphasia'. Relying on the 'best interests' test, the Court ruled that a distinction should be drawn between therapeutic sterilisation and non-therapeutic sterilisation, and that the former was permissible, the latter unlawful. In La Forest J's opinion:

30 See Reilly, P, 'Eugenic sterilization in the United States', in Milunsky, A and Annas, G (eds), *Genetics and the Law – III*, 1985, Aldershot: Dartmouth, Chapter 17; Norrie, S, *Family Planning Practice and the Law*, 1991, Aldershot: Dartmouth.

31 See *Re Grady* 405 A 2d 851 (Md, 1979).

32 In Canada, sterilisation for contraceptive purposes is regarded as a major form of contraceptive: see *Sterilization Decisions: Minors and Mentally Incompetent Adults*, 1988, Institute of Law Research and Reform: Edmonton, Alberta.

33 *Re D (A Minor) (Wardship: Sterilisation*) [1976] Fam 185; [1976] 1 All ER 326.

34 See Bainham, A, 'Handicapped girls and judicial parents' (1987) 103 LQR 334.

35 (1986) 31 DLR (4th) 1.

> The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilisation without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorised for non-therapeutic purposes under the *parens patriae* jurisdiction.[36]

From the perspective of a woman's right to autonomy over her reproductive decisions, the Canadian Supreme Court's decision had the most far-reaching implications. To restrict authorisation for sterilisation only to cases where the operation is used for therapeutic reasons denies to mentally incompetent women access to sterilisation as the safest permanent form of contraception for other social, non-therapeutic, reasons and limits the right of all women to choose a permanent form of contraception in order to lead a secure child-free life.

Sterilisation was to return to the English courts in 1987 with the case of *Re B (A Minor) (Wardship: Sterilisation).*[37] The first case of its kind to reach the House of Lords, the court in *Re B* gave careful consideration to the judgment of the Canadian Supreme Court in *Re Eve.* The English decision has been much criticised – not least on the basis that the House of Lords felt compelled to reach a speedy decision[38] because the girl in question was aged 17 and about to pass out of the English wardship jurisdiction.[39] B, then aged 17, had a mental age of about five years and, unless institutionalised, was in danger of becoming pregnant. There was general consensus that any ensuing pregnancy would have to be terminated. Thus, what was being sought was authorisation for a sterilisation based not on therapeutic grounds, but rather on non-therapeutic, social, grounds. The House of Lords ruled that the welfare of the girl required that the sterilisation be authorised. Her welfare, and her welfare alone, dictated the result.[40] Lord Hailsham LC made particular reference to *Re Eve,* and declared that the Canadian court's decision that sterilisation should never be considered for non-therapeutic purposes was 'totally unconvincing' and 'in startling contradiction to the welfare principle'.[41] The House of Lords, and Lord Hailsham LC in particular, considered the nature of a woman's 'right to reproduce', which he linked clearly to a woman's capacity to reach an informed decision on whether or not to reproduce:

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36 (1986) 31 DLR (4th) 1, p 32.

37 [1988] AC 199; [1987] 2 All ER 206, HL.

38 See Kennedy, I and Lee, S, 'This rush to judgment' (1987) *The Times*, 1 April, p 12.

39 The position in Canada differs, with the wardship jurisdiction being retained by the courts in relation to such issues after the age of majority.

40 For a critical analysis, see Kennedy, I, *Treat Me Right: Essays in Medical Law and Ethics*, 1994, Oxford: OUP, Chapter 20.

41 [1988] AC 199, p 203; [1987] 2 All ER 206, p 213. In the Australian High Court case *of Re Jane* [1989] FLC 92, the court followed similar reasoning to that of the House of Lords in *Re B*. See Boldhar, J, 'The right to reproduce' (1989) 63 Law Inst J 708.

> To talk of the 'basic right' to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth ... [or who] is unable to form any maternal instincts or to care for a child, appears to me wholly to part company with reality.[42]

Re B was followed by *Re F (Mental Patient: Sterilisation).*[43] The patient, a 36 year old woman, was mentally handicapped,[44] having a mental age of about four or five years. The House of Lords accepted that it had no jurisdiction, either by statute or derived from the *parens patriae* jurisdiction, to either give or withhold consent to the medical treatment of an adult. In order to avoid the logical trap of being unable to reach a decision, the House of Lords held that a decision could be reached either on the basis of necessity,[45] or as being in the public interest,[46] and that these criteria necessitated a decision when that decision would be in the patient's best interests. In the instant case, the House of Lords granted a declaration that the treatment – sterilisation without consent – would not be unlawful.

In F's case, she had apparently formed a relationship with a male patient, and was thought to be engaging in sexual intercourse about twice a month. Concern arose over her ability to manage pregnancy and childbirth.[47] Griffiths LJ reviewed the position in Australia, Canada and the United States of America.[48] In his judgment, there was a need for a common law rule which required that before a sterilisation operation was performed on a mentally incompetent minor or adult, those proposing the operation must come to the High Court for a judicial inquiry and sanction.[49] That position was strongly supported by Lord Goff of Chieveley, who rejected the suggestion put to the court by counsel for the Mental Health Act Commission, that a court should never depart from the expert medical evidence put before it, and ruled that an independent judicial determination of the issue in each case must be made. On the basis that F had a 'right' to relationships, including sexual relations, it

42 [1988] AC 199 p 205; [1987] 2 All ER 206, p 213. See, also, *Re P (A Minor) (Wardship: Sterilisation*) [1989] 1 FLR 182; [1989] Fam Law 102.

43 [1989] 2 All ER 193.

44 But did not fall within the Mental Health Act 1983 criteria, on which see below.

45 See the judgments of Lords Brandon and Goff.

46 *Per* Lord Griffiths.

47 The Official Solicitor had argued before the House of Lords that sterilisation of an adult of unsound mind could never be authorised. His submission turned on a woman's right of reproductive autonomy and on the fact that sterilisation represents irreversible interference with the 'patient's most important organs' and that sterilisation is an issue over which there exist divided medical opinions.

48 In the United States, no sterilisation operation may be performed on an incompetent minor or adult without the consent of the court.

49 The *parens patriae* jurisdiction over minors was less appropriate in his Lordship's judgment, depending as it does on an interested party making an application to the court, and thus not guaranteeing that every such decision would be authorised by the High Court.

was in F's best interests for her to be forcibly sterilised. As Ian Kennedy pithily remarks:

> F is entitled to enjoy her rights to society including sexual intercourse (and, as a consequence, should be sterilised), but she is incapable of understanding sexual relationships and their consequences (hence she should be sterilised).[50]

The question which needs asking[51] is why it is that F, rather than her sexual partner, who was allegedly also having sexual relations with other patients, should be sterilised? The answer to that, presumably, is that sterilising her current partner did not guarantee that she would not form future relationships with other men, and that the risk of pregnancy would remain. That, however, remained a speculative judgment, for which no evidence could exist.

Circumstances do exist in the United Kingdom, however, in which sterilisation may be undertaken without the authorisation of the court, where sterilisation is the only available alternative and is being performed for therapeutic purposes.[52]

The Australian courts departed from both the English and Canadian approaches as expressed in *Re D* and *Re Eve,* in *Department of Health v JWB and SWB*.[53] In reaching its decision to authorise the sterilisation of a mentally incompetent 14 year old, the court ruled that there was a distinction between therapeutic and non-therapeutic sterilisation, but that non-therapeutic sterilisation could be authorised judicially on the basis of the best interests of the patient.

COURT ORDERED CAESAREAN SECTIONS

Between 1992 and May 1997, there were eight cases of legally enforced Caesareans in the United Kingdom.[54] In seven of these cases, the women concerned were not legally represented in court. Concern has been expressed at the use of mental health legislation in order to raise the jurisdiction of the courts for the issue to be decided.[55] It is accepted that the courts have no

50 *Op cit*, Kennedy, fn 40.

51 As Ian Kennedy asked.

52 See *Re E (A Minor) (Medical Treatment)* [1991] 2 FLR 585; *Re GF* [1992] 1 FLR 293; [1993] 4 Med LR 77.

53 (1992) 66 ALJR 300. See Cica, N, 'Sterilising the intellectually disabled' (1993) 1 Med L Rev 186.

54 An American survey in 1987 revealed that court orders had been obtained in 11 different States. A disproportionate number of forced Caesareans were authorised in relation to non-English speaking women and women from ethnic minorities. In 88% of cases, the orders were obtained within six hours. See Kolder, V, Gallagher, J and Parsons, M, 'Court-ordered obstetrical interventions' (1987) 316 New England Journal of Medicine 1192.

55 In particular by the Royal College of Midwives: see (1997) *The Times,* 16 May.

parens patriae jurisdiction over mentally incompetent adults which would confer power to give or withhold consent to medical treatment. Nevertheless, the courts have held that the court does have jurisdiction to grant a declaration that a given procedure is lawful and in the patient's best interests.[56] A mentally competent adult, on the other hand, has the absolute right to consent to or to refuse medical or surgical treatment:

> An adult patient who suffers from no mental incapacity has an absolute right to choose whether to consent to medical treatment, to refuse it or to choose one rather than another of the treatments being offered.[57]

Furthermore, the decision to refuse treatment by a mentally competent adult does not 'have to be sensible, rational or well considered'.[58] The fact that a woman is pregnant has no effect on her capacity to give or withhold informed consent.[59] However, when the court seizes jurisdiction over a situation in which a pregnant woman refuses consent to treatment, it is possible that the court, invoking the doctrine of the patient's best interests, may deem the patient's capacity to consent to be impaired and thus undermine the 'absolute right' of the otherwise mentally competent patient to decide.

This situation arose in *Re T (Refusal of Treatment)*.[60] The woman, a 20 year old who was 34 weeks pregnant, was involved in a motor accident. Following her admission to hospital her condition deteriorated and she gave birth to a stillborn child. A blood transfusion was necessary, but this she refused on the basis that she was a Jehovah's Witness. When her condition became critical, her father and boyfriend applied to the courts for a declaration that a blood transfusion would not be unlawful. The Court of Appeal, having reiterated the doctrine of a patient's right to refuse treatment, granted the declaration on the basis that the effect of her condition, together with misinformation, rendered her refusal of consent ineffective. Lord Donaldson noted a possible exception to the absolute right to refuse treatment in the case of a pregnant woman: namely that the court might intervene in a competent patient's refusal to consent to treatment where that refusal 'may lead to the death of a viable foetus'. That situation did not pertain in *Re T*.

Possibly the most bizarre case relating to forced Caesarean sections, and the capacity to consent, to reach the English courts is that of *Re MB*.[61] MB, an

56 See *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1; *Airdale NHS Trust v Bland* [1994] 1 FCR 485; *Re T (Adult: Refusal of Treatment)* [1992] 2 FCR 861; *Re C (Adult: Refusal of Treatment* [1994] 2 FCR 151; *Thameside and Glossop Acute Services Trust v CH* [1996] 1 FCR 753.

57 *Re T (Refusal of Treatment)* [1992] 3 WLR 783.

58 *Per* Butler Sloss LJ, *Re T (Refusal of Treatment)* [1992] 2 FCR 861.

59 On informed consent under English Law, see *Sidaway v Governors of the Bethlem Royal Hospital* [1985] AC 871; [1985] 2 WLR 480; [1985] 1 All ER 643; *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. See also the Law Commission's proposals on mental incapacity: Law Commission, *Mental Incapacity*, Law Com No 231, 1995, London: HMSO.

60 [1992] 3 WLR 783.

61 [1997] 2 FCR 541.

adult woman, suffered from a phobia to injections. Whilst in hospital and in labour, doctors considered that a Caesarean section was required. MB refused to consent, on the basis of her fear of the anaesthetic injection. A declaration that the administration of the requisite treatment was not unlawful was sought from the court. The Court of Appeal, whilst affirming the right of a mentally competent adult to consent to, or refuse to consent to treatment, and specifically stating that women in labour have that same right, overrode MB's refusal. That right to refuse was accepted to exist even though 'the consequences may be the death or serious handicap of the child she bears, or her own death'. However, in MB's case, her needle phobia rendered her less than mentally competent to make the correct decision.[62]

However, the Court of Appeal ruled, in 1998, that a woman whose mental faculties were not impaired, was entitled to refuse medical treatment even where that refusal would result in the death of her unborn child.[63] Ms S, when in her thirty sixth week of pregnancy, was advised that she needed urgent hospital treatment for pre-enclampsia. She refused.Two doctors signed the necessary forms for her compulsory admission to hospital under the Mental Health Act 1983. Doctors then sought the consent of a court to administer treatment and the court dispensed with Ms S's consent. While confined no treatment for any mental disorder was prescribed. Ms S gave birth to a daughter delivered by Caesarian section. The Court of Appeal ruled that Ms S had been unlawfully detained. The fact of pregnancy *per se* did not diminish her capacity to refuse treatment. Moreover, there was no conflict between her autonomy and her foetus, and her autonomy could not be lawfully overridden even though her thinking process was 'unusual, even apparently bizarre and irrational'.

Treatment under the Mental Health Act 1983

Under the Mental Health Act 1983, provision is made for the treatment of a medically incompetent person. That treatment is defined as being treatment which is given for the mental condition itself, subject to restrictions imposed against the use of certain irreversible procedures and hazardous procedures or treatment:[64] Section 63 provides:

62 The Court of Appeal laid down guidelines of the procedure to be followed when clinicians seek declarations from the courts. *Inter alia*, applications will only be entertained by the courts when the issue of mental competence is in doubt; rulings should be sought from the High Court; the mother should be legally represented and the hearing *inter partes*. The Official Solicitor should act as *amicus curiae*, in order to develop a body of expertise; there should be some evidence – preferably that of a psychiatrist – as to the competence of the patient. Decisions will be made by the court on the basis of the patient's best interests.

63 *St George's Healthcare National Health Service Trust v S*; *Regina v Collins and Others ex p S* (1998) *The Times*, 8 May.

64 Mental Health Act 1983, ss 57 and 58.

> The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering, not being treatment falling within section 57 or 58 above, if the treatment is given by or under the direction of the responsible medical officer.

The question which inevitably arises is the basis on which the court can authorise a forced Caesarean on a mentally incompetent adult. It was this question which was directly addressed in *Tameside and Glossop Acute Services Trust v CH.* The patient, a diagnosed schizophrenic aged 41, was admitted to hospital under section 3 of the Mental Health Act in 1995 and was subsequently found to be pregnant. When problems arose over the pregnancy in the thirty eighth week, doctors were concerned that, whilst the patient had indicated her consent to induction, and, if necessary, a Caesarean, she might change her mind. It was accepted by the doctors that if the patient were of sound mind, she would have the absolute right to refuse any particular course of treatment.[65] However, the medical opinion was that for the patient to give birth to a live child would maximise her chances of recovery from her mental condition, and that accordingly there was a direct link between the treatment for her mental condition and the treatment necessary to ensure a healthy live child.[66] The hospital trust applied to the court for a declaration that a Caesarean section, and any necessary restraint, would be lawful. The court granted the declaration as to the lawfulness of the Caesarean section, accepting that treatment not directly related to the mental disorder in question, but ancillary to it, was authorised under the Act.[67] In relation to the issue of the possible need for restraint to be applied, the court ruled that such restraint which was reasonably necessary as an incident of treatment was lawful, and did not require a declaration to that effect.[68]

65 [1996] 1 FCR 753. *Per* the Guidelines laid down by the Royal College of Obstetricians and Gynaecologists following *Re S (An Adult: Medical Treatment)* [1992] 2 FCR 893.

66 Compare the case of *Re C (An Adult: Refusal of Treatment)* [1994] 2 FCR 151, in which a male paranoid schizophrenic patient refused medical treatment (amputation of a gangrenous leg) which would have saved his life, and the court granted the patient's application for an injunction preventing amputation without his consent.

67 This reasoning has been judicially accepted in relation to the treatment of anorexic patients by forcible feeding: see further below.

68 See, also, *Norfolk and Norwich Healthcare (NHS) Trust v W* [1997] 1 FCR 269, in which the High Court granted a declaration authorising medical treatment to bring to an end a patient's labour, whether by forceps delivery or if necessary a Caesarean. The court ruled that, notwithstanding that the patient was not suffering from a mental disorder, she lacked the necessary competence to make a decision, and that terminating the pregnancy would be both in the interests of her health and that of the foetus.

INFERTILITY TREATMENT

Infertility treatment[69] raises several difficult issues from a feminist perspective. Whilst the relief of infertility, for those whose lives are blighted by infertility, is an unquestioned good, the conceptualisation of infertility as a disease for which treatment is increasingly available is more questionable. The issue also involves unstated assumptions about the appropriate role of women: that of child-bearing and nurturing and of being 'incomplete' unless able to bear children, which has not been welcomed by many feminist critics. The emphasis on woman's 'natural maternal' role aside, Renate Duelli Klein, for example, has argued that techniques designed to relieve female infertility 'deconstruct' women. Rather than the woman being seen as a whole, a unique identity, women are now fragmented – reduced to their bodily parts – to ovaries and uteruses.[70] Michelle Stanworth also argues that the new techniques mean that women are reduced to their parts – and fragmented in such a way that the idea of the 'mother' can no longer be conceived in the natural way, but must be seen as 'ovarian mothers', 'uterine mothers', and, in the case of surrogacy, 'social mothers'.[71]

Furthermore, in the United Kingdom, whilst the techniques continue to be developed, and the demand for the relief of infertility continues to grow, the potential success rate of treatment, which involves extensive, invasive and often painful techniques, is poor. Citing research, Peggy Foster states that, in the 1980s, the overall success rate in the United Kingdom was only 9.7 per cent of couples treated and that by the early 1990s, the success rate of 'larger, more established British clinics in a population of "carefully selected" couples were only approaching 50 per cent after three cycles of treatment'.[72]

The phenomenon of professional medical control, allied to male constructions of women, is also evident in the criteria to be established before a woman may qualify for treatment for infertility. No infertile woman has an entitlement to infertility treatment, and in the United Kingdom State funding is limited and strictly controlled.[73] In 1984, the influential Warnock Report

69 Artificial insemination by donor (AID); *in vitro* fertilisation (IVF); gamete intra fallopian tube transfer (GIFT).

70 Klein, R, 'What's new about the "new" reproductive technologies', in Corea, G *et al* (eds), *Man-made Women: How New Reproductive Technologies Affect Women*, 1985, London: Hutchinson, p 64.

71 Stanworth, M, 'The deconstruction of motherhood', in Stanworth, M (ed*), Reproductive Technologies: Gender, Motherhood and Medicine*, 1987, Cambridge: Polity, p 16.

72 *Op cit*, Foster, fn 10, p 51.

73 See Harman, H, *Trying for a Baby: A Report on the Inadequacy of NHS Infertility Services*, 1990, London: HMSO.

was published.[74] The report, which reviewed the ethical and legal implications of techniques to relieve infertility in the United Kingdom, formed the basis for the current statutory regime for regulating infertility techniques, and for research into causes of and treatment for infertility, now contained in the Human Fertilisation and Embryology Act 1990. The moral and ethical dilemmas which such techniques entail – especially the issue of experimentation on embryos – were given detailed analysis, although it may be argued that a consistent moral stance was not evident in the final report.[75] Certain preconceptions about the role of women, and the centrality of the conventional family, however, are clear from the Report.

The Committee expressed its preference for treatment to be given to women who were either married, or could demonstrate that they were in a stable, heterosexual two-parent family, thus placing the interests of the potential unborn child above that of the potential mother:

> To judge from the evidence, many believe that the interests of the child dictate that it should be born into a home where there is a loving, stable, heterosexual relationship and that, therefore, the deliberate creation of a child for a woman who is not a partner in such a relationship is morally wrong ... we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother, although we recognise that it is impossible to predict with any certainty how lasting such a relationship will be.[76]

This preference for a two-parent, heterosexual family has not only led to the exclusion of those women who cannot satisfy the immediate criteria, but to those who, having been an infertile partner in a marriage, find that posthumous use of a deceased husband's frozen sperm, taken without his consent at the time, but consistent with his desire for his wife to have his child/children, is prohibited. This precise issue came before the English courts in the case of Diane Blood,[77] whose husband contracted bacterial meningitis which led to his coma and death, and had been unable to sign the required consent form which would have enabled his wife to use his sperm for posthumous fertility treatment. Following a two year campaign against the ruling of the Human Fertilisation and Embryology Authority which led to the Court of Appeal, Diane Blood finally won the right to seek the necessary treatment in Belgium.[78]

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74 The Warnock Committee, *Report of the Committee of Inquiry into Fertilisation and Embryology*, Cmnd 9314, 1984, London: HMSO; and see Warnock, M, *A Question of Life*, 1985, Oxford: Basil Blackwell.

75 The issue of abortion was considered by the Committee to be outside its terms of reference.

76 *Ibid*, Warnock Report, para 2.11. See, also, paras 4.16 and 5.10.

77 *R v Human Fertilisation and Embryology Authority ex p Blood* (1997) *The Times*, 7 February, CA.

78 The Court of Appeal laid much emphasis on a citizen's right to receive medical treatment in another Member State of the EC, under the EC Treaty, Arts 59 and 60.

Issues of class also enter the picture. Given that the National Health Service allocation of funds for such infertility treatment is finite, an evaluation of the potential of the applicant woman/couple inevitably involves an evaluation of their social capacity to provide for the child. Further, the scarcity of resources also inevitably leads to the greater capacity of the relatively affluent and confidently articulate to seek treatment for infertility, even at the cost of mortgaging their home and future.

ABORTION RIGHTS

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to colour one's thinking and conclusions about abortion.
>
> In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not simplify the problem.[79]

> State parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.[80]

Introduction

The World Health Organisation estimates that 'globally 20 million unsafe abortions are performed each year, resulting in the death of 70,000 women'.[81] The incidence of unsafe abortions is highest in South America, but also very high in parts of Africa. In Asia, the rate of unsafe abortions is relatively low among developing regions, although in southern Asia the total number of deaths from abortion is high. Female infertility is also associated with unhygenic abortions and obstetric practices. The United Nations Report records that 'more than half a million women are estimated to die each year for want of adequate reproductive health care'. In Latin America, abortion is prohibited in most countries due to the pervading influence of the Roman Catholic Church, and it is estimated that between one-fifth and one-half of maternal deaths are due to illegal abortions. In Bolivia, some 60 per cent of

79 Blackmun J, *Roe v Wade* 410 US 113 (1973).

80 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), GA Res 34/180, UN GAOR, 34th Sess Supp No 46 at 193, UN Doc A/34/46 (1979).

81 United Nations Report, *The World's Women 1995: Trends and Statistics*, 1995, London: HMSO, p 79.

funds spent on obstetrical and gynaecological care are committed to treating complications from illegal abortions.[82] In Africa, the risk of a woman dying from pregnancy related causes is one in 12, whereas in North America the figure is one in 4,000.[83]

A woman's right to autonomy entails the right to control her fertility. The availability of contraception and abortion is thus critical for women who do not wish to spend their lives as reproductive instruments confined within the private world of the home and family. As Luce Irigaray has pointed out, contraception and abortion enable women to be conceptualised as *women* and not merely as *mothers*: 'contraception and abortion ... imply the possibility of *modifying women's social status,* and thus of modifying the modes of social relations between men and women.'[84]

The struggle for the right to abortion across the Western world has represented one of the sites of intractable difficulties and conflict. While in the West the battle for abortion rights has largely been won, the debate continues to arouse passionate debate, particularly in the United States of America, where it remains a live and contentious issue.

Blackmun J, in the extract from his judgment cited above, explains many of the influences and issues which confront the question of abortion law reform and practice. What is left out of his opinion above, is the question of a woman's right to choose, a right to control her own reproductive life.[85] Conflicting interests, personal and political, intrude on the abortion debate: the rights of natural fathers, the 'rights' of the unborn child oppose the woman's right to choose. The traditional Western liberal separation of the private and public spheres of life, and perceptions about woman's role within the family, the power and control of the (predominantly male) medical profession and the (predominantly male) legislature and judiciary also compound the issue. Abortion thus represents an amalgam of issues, of philosophies, of politics and morality.

The evolution of abortion law in England[86]

The debate about abortion law is of relatively recent origins. Under the common law of the United States of America and the United Kingdom,

82 Newland, K, *The Sisterhood of Man*, p 612, cited in Hartmann, B, *Reproductive Rights and Wrongs: The Global Politics of Population Control*, 1995, Boston, Mass: South End.

83 *Op cit*, United Nations Report, fn 81, p 77.

84 Irigaray, L, 'The power of discourse', in Whitford, M (ed), *The Irigaray Reader*, 1991, Oxford: Basil Blackwell, p 130.

85 *Roe v Wade* was decided on the basis of a woman's right to privacy as guaranteed by the Fourteenth Amendment to the United States' Constitution.

86 In 1996, 177,225 abortions were performed in England and Wales.

abortion was permissible before the 'quickening'[87] of the foetus, occurring at around the fifth month of pregnancy. In the nineteenth century, with the confinement of middle and upper class women to 'the home' and the production and care of children, and the development of the medical profession as a male-dominated domain, abortion became criminalised.[88]

The English Offences Against the Persons Act 1861 made abortion illegal. Notwithstanding that Act, abortions continued to be performed in England and Wales where a woman's life would otherwise be in danger. The legal position in Scotland was more relaxed: a doctor could lawfully perform an abortion provided that it was, in his clinical judgment, necessary. In England, the Abortion Law Reform Association was founded in 1936. The volume of illegal abortions performed in England and Wales was estimated, in 1939, to be in the order of 50,000 a year.[89] By 1949, the estimate rose to 250,000. In 1938, a doctor was prosecuted for performing an abortion on an 14 year old rape victim.[90] The doctor, Mr Bourne, performed the abortion and reported his 'offence' to the police whereupon he was duly prosecuted. The prosecution failed, the judge concluding that an abortion was lawful where the woman's physical or mental health was at risk through the continuation of the pregnancy. This seminal case expanded the law to include the effects on a woman's mental health, a ground which has since remained in the law.

It was to be 1967 before the English Parliament acted to regulate abortion. A Private Members' Bill introduced by David Steel MP,[91] opposed by both the Conservative right and Roman Catholic MPs, amidst much controversy, reached the statute book. The Act confirmed the legality of abortion under the conditions specified in *R v Bourne.* Abortion was also to be permitted where the mother risked giving birth to a seriously handicapped child. In addition to the health of the mother, the Act included a clause which would require doctors to consider whether an abortion should be performed where the pregnancy would seriously affect the existing children of the family, and where the woman's social environment dictated the need for abortion. Abortion was permissible up to the twenty seventh week of pregnancy. After sustained pressure for a tightening of the law, and especially the problem of terminations in late pregnancy, the time limit was reduced to 24 weeks, with exceptions being permitted on the basis of serious handicap of the foetus.

87 The time at which movement of the foetus is experienced by the carrying mother.

88 See Kaulfmann, K, 'Abortion, a woman's matter: an explanation of who controls abortion and how and why they do it', in Arditti, Klein and Minden, *op cit*, fn 9.

89 See Birkett Committee, *Report of the Committee of Inquiry into Abortion*, 1939, London: HMSO.

90 See *R v Bourne* [1939] 1 KB 687; [1938] 3 All ER 615. See, also, Bourne, A, 'Abortion and the Law' (1938) 2 BMJ 254.

91 As he then was.

Opposition to the Act came from the Society for the Protection of the Unborn Child (SPUC) and *Life.* Each received support from the Roman Catholic Church. The principal objection came in the form of the claim to legal protection for the foetus, more emotively labelled the 'unborn child'.

'Foetal rights'? and the law

Under English law, the foetus enjoys no legal protection until it is developed to the stage where it is 'capable of being born alive'.[92] However, an action in negligence may lie if damage is done to the foetus through carelessness.[93] Equally under United States' law, '[T]he unborn have never been recognised in the law as persons in the whole sense'.[94] Whilst this position ostensibly protects women's autonomy from being restricted by the foetus, at least in the early months of pregnancy, it is clear that in both the United Kingdom and the United States of America, the status of the foetus is by no means clear-cut, and that as a pregnancy progresses, the *prima facie* right of the foetus to the protection of its mother from harm, increases to the point of denying the carrying mother autonomy over her body.

Given that under English law the foetus has no rights to protection from its mother, other than the right conferred on the child born alive to sue, through its 'next friend', for compensation to injury suffered whilst in the womb, it is unsurprising that the issue of foetal welfare has not given way to judicial and medical perceptions about the 'best interest of the mother', rather than the foetus. Such perceptions have, however, been repeatedly enunciated by courts in the United States of America. By way of illustration, rather than full analysis, the courts have, in relation to the issue of forced Caesarean sections, as with the judicial control of the woman's 'right to choose' abortion, repeatedly placed in the balance the right of the mother to autonomy over her body, and the State's interest in the near viable or viable foetus. For example, in 1981, in *Jefferson v Giffin Spalding County Hospital*,[95] the Supreme Court of Georgia placed an unborn foetus in the custody of the Department of Family and Children Services, and conferred power on the Department to make all medical decisions in relation to the birth of the foetus, including that relating to a Caesarean section, if needed, on the basis that the woman would not consent to such treatment as a result of her religious beliefs. Although the court recognised that in general the powers of the court in respect of mentally competent adults was exceedingly limited, on the facts of the case, power would be exercised in order to protect the child's right to live. Such an

92 Infant Life Preservation Act 1929.

93 Congenital Disabilities (Civil Liability) Act 1976, s 1.

94 Blackmun J, *Roe v Wade* 410 US 113 (1973).

95 247 Ga 86, 274 SE 2d 457. Discussed in Kennedy, *op cit*, fn 40, Chapter 19.

approach reinforces the view that in relation to pregnancy, American courts will weigh in the balance the woman's rights over her body and the incipient rights of the unborn, despite ostensibly adhering to the view that the unborn foetus has no rights which can be protected by law.

The Warnock Committee Report

It was the question of the point at which an embryo should be accorded legal protection which dominated the Committee on Human Fertilisation and Embryology's (the Warnock Committee) considerations on the regulation of *in vitro* fertilisation and other techniques for the relief of infertility.[96] Whilst the Committee regarded the law relating to abortion as being outside its terms of reference, the Committee's Report represents a comprehensive review of the complex moral, legal, political and social issues relating to the foetus. The Committee, while endorsing the production of, and experimentation on, foetuses surplus to the requirements of the infertile woman receiving fertility treatment, nevertheless did not recommend that medical scientists should be granted a *carte blanche* in relation to medical experimentation. In a compromise decision, the Committee, whilst recognising the legal position concerning the absence of foetal rights up until the time at which the foetus could be born alive, refused to countenance experimentation on embryos beyond a period of 14 days from conception: thus implicitly recognising the uniqueness of human life whilst also recognising and respecting the value of medical experimentation in the search for solutions to infertility.

The legal position of the father of the child

Under English law, the natural father possesses no right to control his wife or partner in relation to the question of abortion. The issue has been raised in three cases. In *Re Paton v British Pregnancy Advisory Service Trustees,*[97] the husband sought an injunction restraining his wife from undergoing an abortion. The application was refused. This decision was followed in *C v S,*[98] in which a student father tried to seek legal support to stop the termination of his girlfriend's pregnancy. In *Re F (in utero),*[99] the Court of Appeal ruled unequivocally that a foetus could not be subject to the wardship jurisdiction – the protective jurisdiction of the High Court – thus implicitly respecting a mother's right to choose whether to carry a foetus to term.

96 *Op cit*, Warnock Report, fn 74.

97 [1979] QB 276; [1978] 2 All ER 987. See Kennedy, I, 'Husband denied a say in abortion decision' (1979) 42 MLR 324; Lowe, N, 'Wardship and abortion prevention' (1996) 96 LQR 29.

98 [1988] QB 135; [1987] 1 All ER 1230.

99 [1988] Fam 122; [1988] 2 All ER 193. See Fortin, J, 'Can you ward a foetus?' (1988) 51 MLR 768.

The interaction between abortion, contraception and sterilisation

Increasingly, with legal abortion becoming more widely available, the availability of abortion is linked to medical practices and procedures designed to control future fertility. The most extreme practice is that of sterilisation of the woman during the course of, and as a precondition to, abortion, although evidence suggests that sterilisation is often undertaken without the full informed consent of the woman. Less drastically, but with serious medical and psychological implications, in some Third World countries, Inter-Uterine Devices (IUDs) may be inserted into women who have undergone an illegal abortion and present themselves for treatment at a hospital. Alternatively, in India, for example, where abortion is lawful, sterilisation or the insertion of an IUD to prevent subsequent pregnancies, may be a precondition for the abortion.[100] In Indonesia, the woman must either agree to the insertion of a contraceptive implant (Norplant), or their husbands agree to undergo a vasectomy where there are already two or more children in the family. In attempts to regulate population control, women in the Third World are actively encouraged in the use of Depo-Prevura – a contraceptive injection which provides between three and six months protection from pregnancy. Depo-Prevura has had a controversial history in the West, carrying with it the risk of many short term, and some suspected long term, side-effects. Despite the risks, both the World Health Organisation and the Office of Planned Parenthood allegedly promotes its use as a means of population control, without adequate information being provided as to its risks, or safeguards undertaken to limit those risks.[101]

Abortion rights in the United States of America

With the medical profession seizing jurisdiction over pregnancy and childbirth from women who in previous centuries provided a self-regulating, self-administering, informal system of services, pregnancy – its continuation or discontinuance – became a public, rather than a private, matter. As the law intervened to provide a formal system of regulation, the termination of pregnancy became an overtly political issue. Nowhere is this more clearly seen than in the United States of America, with its high proportion of Roman Catholics and a written Constitution, interpreted and enforced by the Supreme Court. Whereas under the unwritten Constitution of the United Kingdom, abortion regulation falls under statutory provisions which may be

100 See Ravindran, 'Women and the politics of population', and Karkal, M, 'Abortion laws and the abortion situation in India' [1991] 4 Reproductive and Genetic Engineering 3 .

101 On population planning programmes see, further, below.

amended by Parliament with the minimum of procedural technicality, in the United States the issue is regulated by State law, subject only to the constitutionality of that law under the Constitution. The highwatermark in terms of judicial decision making lies in *Roe v Wade.*[102] The case was a class action suit, representing the interests of many women, not just the parties to the litigation. In *Roe v Wade*,[103] three different issues were involved: a pregnant woman wanting an abortion; a couple trying to avoid pregnancy but wanting abortion available as a 'last resort', and a doctor being sued for performing abortions.[104] The decision of the Supreme Court was reached by a majority of seven to two. The law under challenge was a statute of the State of Texas, passed in 1857, which made procuring an abortion, other than to save the life of the mother, a criminal offence. Jane Roe challenged the law, seeking a declaration that it was unconstitutional in so far as it denied her access to a lawful and safe abortion conducted by a competent physician. While the Supreme Court ruled in Jane Doe's favour, and granted the declaration, its judgment was not a licence for the absolute availability of abortion at any stage of a pregnancy. The Court ruled that the concepts of liberty and privacy enshrined in the Constitution entitled a woman, in the first trimester of pregnancy, to choose whether to continue with that pregnancy or not. After the first trimester, however, other competing interests were given recognition which effectively limited a woman's right to abortion. The woman's right diminished as the pregnancy progressed: by the second trimester of pregnancy State law could regulate abortion, and by the onset of the third trimester the State could absolutely prohibit abortion, other than where the abortion was necessary to save the life of the mother. Thus the 'right to choose' was confined to the first three months of pregnancy, after which the competing interests of the foetus, and of the State in relation to its respect for the life of the unborn, assumed greater significance, culminating in the last three months of pregnancy into overriding interests.

While at the time the decision was greeted by feminist groups as a legal triumph, especially in affirming that decision making at least in the first trimester of pregnancy was a matter for the woman alone as an aspect of her constitutional right to privacy, it did not go so far as to require doctors or hospitals to perform abortions, nor did it have any impact on additional funding being given for such services to be set up, nor for the provision of funds under Medicaid[105] to enable women to have financial access to abortions. Such battles lay ahead. For the anti-abortion, 'pro-life', lobby, the

102 410 US 113 (1973).

103 See, also, *Doe v Bolton* 410 US 179 (1973).

104 For a full analysis, see Rubin, E, *Abortion, Politics, and the Courts: Roe v Wade and its Aftermath*, 1987, New York: Greenwood.

105 State funding for meeting the medical costs of those meeting the need criteria: Title XIX Social Security Act 1965. The fund is administered by States but regulated by the Federal Government.