

LAW, STATE AND THE FAMILY:
THE POLITICS OF CHILD CUSTODY

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SUMMARY

Law, State and the Family: the Politics of Child Custody is an examination of the development of law and legal practices in relation to mothers and the legal custody of children. It maps the history of statute law and re-reads legal practice focusing upon the way in which these practices reproduce and sustain the conditions of motherhood.

The first section documents the construction of the infant as a legal subject and the emergence of mothers' legal rights in relation to children under the nineteenth century Guardianship Acts. The second section examines debates regarding the role of the state in the area of children and divorce following the Second World War. This section also examines the influence of ideologies of welfare upon the legal treatment of different categories of children during this period. In addition, this section also analyses the limited role which the law plays in the majority of decisions concerning custody of children following divorce. The third section documents and analyses women's experiences of contesting custody of their children through an empirical study of a sample of lesbian mothers. The focus is upon both the courts and legal processes involving lawyers and divorce court welfare officers. This section reveals the influences of notions of good mothering and perceptions of female sexuality upon those legal processes.

The final section is concerned with contemporary debates in the 1980s regarding the role of the state generally in the area of children and divorce and particularly discussions of the role of law in constructing children's relationships with fathers. This section addresses the issues of 'joint custody' of children and conciliation schemes through a discussion of the implications of these practices in America. This section concludes with a discussion of the general trend away from 'law' and legal rules in this area, towards 'private ordering' in conciliations. Finally, it sets out the implications of that trend for feminist discussions of future policy in the area of children and divorce in Britain.

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OVERVIEW :

This thesis is the result of research into the issue of child custody in Britain. It looks at campaigns to achieve legislation, legislation itself, court practices and legal procedure and finally, womens' experiences of law and legal procedure in Britain in the 1980s.

The first part of the thesis is concerned with the absolute powers of fathers in the nineteenth century patriarchal family, and legal intervention. My concern was to examine traditional explanations of the development of law in relation to the guardianship and custody of children. I argue that developments in this area of law cannot adequately be described simply in terms of the demise of 'father right' and the emergence of 'mother right'. Rather, I document the emergence of a third party - the State - in the management of the patriarchal family. I demonstrate how legal intervention was always tempered by a desire to preserve the family. Thus a concern for the custody and maintenance of children was mediated through a desire that any new law and legal practices should not appear to undermine the institution of the family, by making separation and divorce a viable alternative for mothers, except in the most extreme of circumstances.

I discuss the emergence of the infant as a legal subject and the shift in the ideology of the family which that focus brought about, particularly in relation to the reconstruction of the role of mothers. However, in examining the focus upon children,(and subsequently on mothers) over the turn of the century, I argue that, whilst 'motherhood' was indeed elevated in certain social practices, this did not necessarily lead to a simple re-evaluation of power within the patriarchal family (Donzelot 1980). Whilst nineteenth century campaigns demonstrated gross failures in the system of privilege and rights which the law attached to men, state intervention to
protect/

women and children focused upon sustaining the family rather than undermining it. Thus the new rights which mothers did acquire under the Guardianship Acts in relation to children, were only operable on the breakdown of marriage. It was at the point of breakdown that welfarist discourses provided the dual mechanism through which childhood and hence motherhood become constituted in family law.

In the second part of this thesis I focus on law and legal procedure in the post war years in relation to different categories of children - the orphan, the deserted and the illegitimate child. Here I examine the influence of ideologies of both welfare and motherhood particularly in relation to new procedures to deal with children and divorce. I analyse the tensions between two approaches to the role of the state in dealing with this issue. One approach, located in the Denning Report (1947) argued for increased power for the courts to investigate and report on the circumstances of all children whose parents divorce. The other approach, located in the Report of the Royal Commission (1956), argued that the aim of the state in the post war reconstruction must be to support and encourage the reformation of the pre war family form. The role of family law therefore must be in stemming the tide of divorce and adopting legal procedures which would induce, not replace, parental responsibility.

In addition during this period I argue that the courts' assessment of women's claims to children was mediated through a consideration of their behaviour as wives. In contrast to contemporary explanations of court practices in this area in the post war years (for example, Maidment 1984a; Graveson & Crane 1957) I argue that the courts continued to sanction the sexual misbehaviour of women through the loss of custody of children. Thus children continued to be awarded on the basis of guilt established in divorce proceedings.

Through an examination of court practices and research on child custody in the 1960s and 1970s, I take issue with

dominant explanations of developments in this field. Those explanations have focused on 'maternal preference' and notions of the privileged position of wives and mothers within family law. In this section I document the tensions in courts' approaches to who gets custody of children on divorce and the factors which influence fathers' chances of being awarded custody of children. I am concerned to demonstrate that new trends in legal practice and procedure are not necessarily the result of a response to radical transformation of responsibility for childcare within the family. Indeed I argue that the debates which emerged in the 1970s on this area of law, (through the fathers' rights movement, new developments in child psychology, and criticisms of the adversarial procedure) do not focus upon responsibility for children within marriage. Moreover, in the 1970s as in the 1950s, the 'law' played a very small part in deciding the custody of the majority of children of divorcing parents.

In Part III, I move between the political and the 'personal'. Parts I and II have been concerned to demonstrate the focus and priorities of law and legal practice as mechanisms in the reproduction of motherhood. Part III documents a further example of those processes but in addition, it moves down into the 'personal' to examine women's experiences of those practices and procedures. In this Part therefore I examine the operation of the 'law' in relation to the issue of lesbian custody. I look at the significance of children's residential status quo at the time of divorce or separation, and I examine the influence of notions of 'good' mothering and conceptions of female sexuality on court practices.

My argument is that it is only within a framework which locates the role of law in the reproduction of power relations between parents that we can begin to understand the legal treatment of lesbian mothers. Such treatment is most accurately placed within an analysis of the legal construction of motherhood. The legal experiences of lesbian mothers documented in the third part of this research reflect in an intensified and revealing form many

assumptions regarding the role of women as mothers in society and demonstrate one institution (law) through which those assumptions are reproduced and sustained.

Finally, I discuss developments in the area of child custody and divorce in the 1980s in Britain, and the implications for mothers. There are many modes of regulation and control over the conditions of reproduction in society, and I am concerned to demonstrate that although there has indeed been a shift away from formal 'law' in this area (and towards welfarist principles), this movement is not necessarily indicative of control 'moving back to the people' and least of all women. Indeed, I demonstrate that the trend towards various forms of conciliation in this field of family law can be highly problematic for mothers. I therefore conclude with a discussion on the politics which inform the contemporary debate on 'joint custody' in Britain, through an examination of such orders in one State in America. I argue that it is a crass assumption to assume that because parents in Britain are now formally (ie legally) equal guardians of their children within marriage, that such a formal situation equates with 'co-parenting' in Britain generally. Indeed existing research demonstrates that the notion of 'co-parenting' does not describe dominant patterns of childcare in Britain. Therefore, a presumption within legal practices and procedures on divorce to enforce/encourage 'co-parenting' may in reality be a presumption to continue a situation in which there are unequal inputs into childcare, and unequal distributions of power with regard to major decisions concerning children. In such circumstances therefore, I have attempted to demonstrate how certain contemporary legal practices and procedures can continue, albeit in more subtle but nevertheless effective ways, to sustain and reproduce both aspects of men's power over women and the control of reproduction in its broadest sense. It is because this process is mediated through a welfarist discourse, that the intervention of feminists in this field of social policy is both difficult and frequently misunderstood.

"if we conceive of feminism as more than a frivolous label, if we conceive of it as an ethics, a methodology, a more complex way of thinking about, thus more responsibly acting upon, the conditions of human life, we need a self-knowledge which can only develop through a steady, passionate attention to all female experience. I cannot imagine a feminist evolution leading to radical change in the private/political realm of gender that is not rooted in the conviction that all women's lives are important; that the lives of men cannot be understood by burying the lives of women; and that to make visible the full meaning of womens experience, to reinterpret knowledge in terms of that experience, is now the most important task of thinking."

[Adrienne Rich (1979) Lies, Secrets and
Silence]

The growth of feminist research as a field of study in the last decade has influenced the disciplines of sociology and, to a lesser extent, law. This development raises new questions for both disciplines and challenges conventional approaches in both fields. New questions are raised for research, but in addition, feminist analyses has required a re-examination and interpretation of both social and legal 'facts' whether historical or contemporary (O'Donnovan 1985; Oakley 1981; Smith 1973) This thesis is part of that development and part of that challenge to conventional thinking within the interdisciplinary study of the sociology of law.

This approach however poses several problems

because, despite respectable contributions to the development of an interdisciplinary approach (eg: Hunt (1976) *The Sociological Movement in Law*), the sociology of law is hardly a well established area, indeed it remains a relative newcomer to the academic curriculum. Even so, this thesis is part of a critique of basic conceptualisations of gender (or rather, the lack of that consideration), within the sociology of law, although it is in other ways, founded upon a critique of legal positivism, which is a major part of the sociology of law. Therefore, this thesis runs the risk of criticism, but more importantly misunderstanding from a range of orthodox positions. The legal positivist school may perceive it to be insufficiently 'legal'; equally, positivist or orthodox empiricists within sociology may find it insufficiently sociological. It is therefore necessary in this introduction to clearly outline my theoretical position and my methodological approach. In this way it is hoped that the following chapters will be judged on their own terms and for the contributions they make to a critique of the tenets of orthodox schools of thought in both these fields of study.

Women's Oppression

This research, like that of other feminists (eg Barratt 1980) starts from the premise that women's

oppression in society is a reality, and that such oppression is complex and takes many forms, both institutional and individual. I am concerned with the institution of law and two features, reproduction and sexuality, which contribute towards structuring women's position in society. In attempting to understand and analyse the position of women in society, writers have focused on four key structures in women's lives: production, reproduction, sexuality and the socialisation of children (Mitchell 1971:101) These separate structures form a very complex unity, and throughout history women's position in society has been a result of different combinations in the four elements. However, as Nava points out (1983:93) there is no necessary or automatic correspondence between these structures, each has an autonomy, each can effect women differently.

The Family

Marriage and the family have long been identified as the only legitimate sight for reproduction, the expression of female sexuality and the rearing of children. However, 'the family' is a problematic term for feminists, it is imbued with many emotional and psychological characteristics and is a slippery phenomenon to examine. Nevertheless, as Barrett and McIntosh (1982:7) identify, it can be

understood as a social and economic institution, which is organised on the basis of a specific sexual division of labour. In this sexual division of labour it is assumed there is a primary breadwinner who is male and whose main area of activity and self expression is in the world of work, and a primary childbearer and domestic worker who is female and whose main area of activity and self expression lies within the family. Although in part these are assumptions, research has demonstrated that they are also a feature of the way in which the family is organised in contemporary society, whereby women (regardless of employment outside the home) are primarily responsible for childcare and domestic work in the home (Oakely 1974; Edgel 1980; Lewis & O'Brien 1987).

Moreover, that sexual division of labour in the home has far reaching consequences particularly for women. To a large extent it also dictates the different kinds of work which men and women do in the labour market (see below - Motherhood). And job segregation between male and female workers in the labour market leads to considerable differentials in terms of wage levels, training and promotional prospects and job security. For example, with regard to different wage levels between men and women, despite the equal pay and sex discrimination legislation of the

1970s, there is evidence that the wage gap is in fact widening. Women's earning as a percentage of men's have fallen from the 1977 figure of 75.5% to 73.8% (Equal Opportunities Commission 1979) In addition, those assumptions regarding the different sites of primary commitment as between men and women which inform and underlie sexual divisions in the home and in the labour market, also underscore and direct principles determining state benefits and taxation - (Bennett 1983; Land 1978; Wilson 1977) And, as Bennett argues (1983:190) contrary to popular views that the welfare state has lead to a reduction in the traditional family, such services have in fact strengthened that division precisely because public law has, since its inception by Beveridge, in the 1940's, been equally based on the myth of the male breadwinner and the dependent wife and children.

The concept of the family is not therefore a neutral term, it entails relationships of dominance and dependency between men and women and indeed between adults and children. Neither is 'the family' a transhistorical or transcultural institution. Yet it is frequently presented in this way - as a powerful symbolic feature of a nation's security and stability which transgresses time, class and culture. For individuals, it is often posed as the only haven in an

otherwise heartless world (Lasch 1977); the one private place offering a range of emotional and experiential satisfactions unavailable from any other source in society. In contrast to this over idealised a-historical construction of the family however, feminists have begun to re-examine family life and have mounted a major deconstruction of those conventional definitions. Far from being a haven in an otherwise heartless world, feminists have demonstrated that for women 'the family' is in many ways anti-social (Barratt and McIntosh 1982) that it is both the site and the source of women's economic exploitation and emotional and psychological destruction (Delphy 1976; Bernard 1976; de Beauvoir 1974; Gavron 1968). Research has demonstrated that the traditional model of the family - the heterosexual couple, with husband as breadwinner and wife as full-time homemaker - does not correspond to the typical household unit in Britain (Segal 1983:11). Indeed if one considers womens' working lifespan as a whole and work which does not appear in official statistics (eg part time work, cleaning in private houses, unregistered childminding, hidden work in voluntary organisations, casual work in clothing manufacturing industries), it is doubtful if it was ever a completely accurate picture of 'family life' in Britain (Bristol Women's Study Group 1979:201) and it is certainly not an accurate picture of families in the

1980's.

In addition, both historical and contemporary feminist research has addressed and been critical of the way in which social formations are constructed through the dichotomy of public and private domains. Research has demonstrated that the home (the private domain) can frequently be a violent and dangerous place for women and children in which they can suffer sexual, physical and emotional abuse at the hands of men (Cobbe 1878; Binney et al 1981; Borkowski et al 1983; Dobash & Dobash 1979; Pahl 1985:23; McCann 1985; Nelson 1982; Weir 1977; Rush 1980; Herman 1980). As the National Women's Aid Federation point out, twenty five percent of all reported violent crime is wife assault. However, a considerable degree of wife abuse goes unreported. Women are reluctant to involve the police and, as the above research demonstrates, wife assault is the section of crime which the police are most reluctant to become involved in. That, reluctance as researchers have demonstrated (eg Faragher 1985; McCann 1985; Maynard 1985) reflects the view of many people in state agencies that a certain degree of wife abuse is acceptable within 'the family'. Thus, the notion of 'privacy', usually invoked in an effort to protect the family from what is generally seen as the encroachment of the modern state into its internal affairs, in

effect, frequently serves to protect the actions of violent men from outside interference at the expense of protecting women and children within (Fahl 1985). Moreover, that very notion of 'privacy' can frequently obscure the fact that within the 'private' sphere of the family, wives and mothers suffer widespread isolation, anxiety and depression (Chester 1972; Gavron 1968; Brown & Harris 1978; Dally 1982:249; Parkers & Mauger 1974). In examining the position of women in relation to depression, Brown and Harris demonstrate that lack of an outside job actually lowers women's resistance to depression. And it appears that even among women whose social and economic position places them in high risk groups, their social susceptibility to depression is practically halved where such women have a job outside the home. As Harris and Brown conclude, it may not be an interesting job as such which protects women against depression, but rather, that work outside the home provides more opportunities to make other social contacts and thereby breaks down the total isolation which wives and mothers frequently experience in the home.

The family has also been located as the site of economic exploitation and appropriation of women's unpaid labour by men (Delphy 1977). In the contemporary period, primary responsibility for rearing

children makes women more susceptible to economic exploitation because responsibility for young children locates many mothers more firmly in the home, albeit on a temporary full-time basis (see below motherhood). Moreover, feminists working in the field of psychology and psychological processes, have demonstrated that it is within the nexus of the family that key relationships of dominance and submission are learned. It has been argued that it is within the family that the acquisition of gender takes place, where children acquire feminine and masculine identities (Mitchell 1975; Chodorow 1978). As research demonstrates, it is initially within the family that girls are reared to 'womanhood' and boys to 'manhood' and where girls learn a treasury of platitudes, anxiety and expectations about their future role which are based upon a mixture of tradition, myth and reality about their roles as women in society (Chetwynd & Hartnett 1978; Roberts 1975: 14/15; Davidoff 1973;51). Thus, the structure and organisation of the family, in effect, reproduces many of the material characteristics and features central to its ideological construction.

Motherhood

Although of course women have always been biologically equipped to produce children, the social meaning of reproduction, of conceiving, bearing and

rearing children has varied enormously both historically and culturally (Mead 1955; Davin 1978; Badminter 1981). Nevertheless, motherhood does not lend itself to a simple or straightforward analysis, socially and experientially it is fraught with complexities ambiguities and contradictions. As Saunders argues (1983;95), it is hard for women to dismantle the positive qualities of motherhood from the web of social political and economic factors which surround and inform it. For many women motherhood can provide the sole meaning of their lives, it can be the one area in which they experience fulfilment and indeed some personal power and control not found elsewhere in their lives (de Beauvoir 1974;501). But equally that sense of personal power and control is, as Dally demonstrates (1982;143) somewhat falsified. It diminishes quickly, as infants grow and their demands increase in intensity and variety, and, as they 'separate' emotionally from their mothers. so the momentary 'power' of motherhood correspondingly decreases. Moreover, although motherhood is publicly revered on many fronts in society, it is in practice, low status work, and is not recognised as a formal job by either the left or right in British politics (Goodison 1980;39).

A major contribution of feminist writers particularly in the post war period therefore, has been to re-address the issue of motherhood on a number of different levels. Research has demonstrated that in fact there is an enormous gap between the dominant ideologies of motherhood in society and women's lived experiences of motherhood. In addition, writers have also focused on motherhood as an important feature in political and theoretical discussions concerning the relationship between sexual and class divisions in contemporary capitalist society. This is conceptualised in the controversial patriarchy debate and the patriarchy/capitalist debates (Barrett 1980; Beechey 1979; Rowbotham 1979; Cousins 1978; McDonough & Harrison 1978; Burton 1985). The central questions in that latter debate focus upon which particular structure is the dominant or determining structure so far as women's oppression is concerned. However, in seeking to answer some of those complex questions certain feminists are setting aside those major theoretical and sometimes insoluble questions, and are increasingly turning to the investigation of concrete issues in women's lives as a way of re-addressing those major theoretical and political questions (Graham 1982; Oakley 1974; Macintyre 1976). Thus, it is increasingly work which focuses on the specific ideological and material structures which sustain women's oppression in

particular social formations which is bridging the theoretical and analytical gap between different structures of oppression in society and women's lived experiences.

In that investigation into women's experiences in society, reproduction, as one of the four structures identified by Mitchell (1971), holds a central place. And a growing body of research has demonstrated how this capacity is socially defined, regulated and controlled (Macintyre 1976; Rose & Hamner 1975; Oakley 1975, 1876, 1979; Rich 1977; Graham 1982; Badminter 1981; Treblicot 1983). Research has been concerned to investigate and analyse how being a mother is patterned both historically and culturally (Davin 1978; Pheonix 1985). An important part of that analysis has been to demonstrate the role of ideology in the reproduction of the social conditions of reproduction in society. Indeed ideology plays a crucial role both in the theory and practice of women's oppression in society. It is therefore necessary in this introduction to say something briefly about the concept of ideology within sociological and philosophical traditions.

The Concept of Ideology

In Britain, sociologists investigating the concept of ideology have been greatly influenced by

theoretical developments from continental Europe which have focused on the relationship between social structures and social consciousness (1). Prior to that influence, in both the British and the American sociological tradition, ideology received little attention and was generally taken to mean little more than 'false consciousness' or 'mistaken ideas' or simply a body of ideas (Hall 1978:9). However, under the influence of European developments in this field, attempts have been made to understand and theorise the inter-relationship between the dominant ideas and the social structure of a specific society (Centre for Contemporary Cultural Studies 1978; Hall 1980; Sumner 1979).

This research project draws on that development. It starts from the premise that the dominant ideology of a society refers to the body of ideas which, in a complex way, underpin a particular social structure. Secondly, the dominant ideology of a society also relates to the models of normality and expectation by which people in that society live their daily lives. Moreover, those models frequently legitimate and justify the divisions and hierarchies within a given society. In addition, they are accepted by many who derive no material benefit from them and for whom, they are a source of continuous oppression and exploitation

(Eaton 1985:352). How that consent is achieved, has become a major concern for British sociologists exploring the role of ideologies in society. For example, Sumner (1979:20) exploring the concept of ideology clearly outlines the important differences between traditional views of ideology and the analysis developed in Europe. He argues that according to this latter approach, ideology is a sign of something other than itself, it is an 'outcome and element of social practice which reflects and designates the world of that practice within the social consciousness of human beings'. Thus, ideology is an element of social consciousness. But ideologies and their social formations do not simply exist in social consciousness, they are the material products of social practices. Moreover, as determining elements within social practices they help to shape those practices. Ideology is thus both mental and concrete; a creation and a creator of social practices. As Sumner argues (1979:22) within this perspective ideologies are inhabitants of the social world and not creations of the human mind, they play an active and reactive part in the formation and maintenance of social conditions in society.

In the context of this thesis therefore it is that definition of ideology which is adopted and I

attempt to illustrate how dominant ideologies of motherhood, of marriage and the family are reproduced through law and legal practices.

Ideologies of Motherhood and Women's Experiences

One of the central features of motherhood, both historically and in contemporary society, is that it does increase women's susceptibility to various forms of exploitation both in the home and in the labour market (see below). Yet images and representations of motherhood seldom signify that element. Rather, as Badminter demonstrates (1981:232) in her review of motherhood in Europe, as the maternal role gained in areas of responsibility throughout history so the notion of 'devotion' and the image of the 'devoted mother' increasingly dominated representations of women. Indeed being a mother was increasingly presented as an integral part of the female identity and posed as the surest source of female happiness. And as Badminter argues, if women themselves did not consider that motherhood was their calling, morality was increasingly called in to justify what was in reality a social demand which required the complete self sacrifice of women to the task of rearing children. By the beginning of the twentieth century motherhood was chiefly discussed in terms of 'suffering and sacrifice' (Badminter 1981; Davin 1978). Central

therefore to modern ideologies of motherhood is the notion that all women are innately capable of motherhood, and are born with the capacity for complete self sacrifice and the desire to give primary emotions and attention to the needs and demands of others but especially to children. But in addition motherhood is largely perceived as an a-sexual role. As Bland argues (1983:10) this perception is in part a legacy of the way in which female sexual activity in general has been perceived, as being intrinsically linked to a desire for reproduction and motherhood. Male sexuality however has usually been identified with notions of (frequently uncontrollable) lust and pleasure. For men therefore sexual activity has been perceived as a pleasurable biological urge and an end in itself. For women however, sex is often presented as simply a means to an end - pregnancy and motherhood. That different definition of the role of sex in the lives of men and women provides the rationale for the double standard of morality which exists in society, whereby substantial sexual experience is thought acceptable indeed desirable, for young men, but is viewed as problematic and generally promiscuous where it occurs in young women (McRobbie & Brooke 1977). Symbolic representations of women are frequently posed in two mutually exclusive categories: eg:wife/mistress, Madonna/whore. Images of motherhood, in women's

magazines and journals, newspapers, educational and self help literature etc all portray motherhood in an almost spiritual light, motherhood is valorised but represented quite separately from any sexual identity or discussion about sexuality in general (c/f Saunders 1983).

Against that ideological backcloth, feminists have begun to explore the question of motherhood in a variety of ways. The dominant method adopted has been to ask mothers about their experiences (Graham 1982; Oakley 1974). Such work has demonstrated the gap which exists between ideologies of motherhood and women's experiences of being mothers in society. Although images of motherhood are seldom placed within a legal and economic framework, research has nevertheless demonstrated the impact which that framework has for women's experiences as mothers. And of course work which focuses on women's experience has a long tradition within feminist writing and campaigning, for example writing in 1915, Margaret Llewellyn in *Maternity: Letters from Working Wives*, documents the burdens of motherhood reported by mothers themselves. Such mothers outline at some length the pain, suffering, poverty, hardship, malnutrition, lack of knowledge and control which mothers experienced. More recently, contemporary writers have again documented

the strain and hardship involved in a job which lasts seven days a week, twenty four hours a day and which is completely unpaid, unrewarded and undervalued generally by society (Maitland 1980; Goodison 1980). Maitland in particular points to some of the impossible demands which are made on mothers in contemporary society where, if mothers do not meet the demands of total devotion and sacrifice of their lives to the needs and demands of their children, they are perceived as failing, but equally, if they do, they are often seen as over protective and dominating. As Maitland concludes (1980:88) conflicting social demands which are made upon mothers means in effect that a mother can't win and whatever happens to her children it is her fault'. As Gilligan (1982:1601) and others (eg Davin 1978) have demonstrated, this conclusion of 'failure' on the part of mothers is largely due to the fact that women are judged by the particular standards of care they provide as measured against idealised standards incorporated in dominant ideologies of motherhood in society, quite regardless of the material conditions under which they carry out that task. But moreover, despite the fact that dominant ideologies of motherhood posit motherhood as a natural (unlearned) role for all women, nevertheless, research documents that many women are quite unprepared for the physical

emotional and social demands which motherhood brings (Oakley 1980; Rich 1977; Breen 1978).

Moreover, motherhood, by locating married women more firmly in the domestic economy, exposes women to further forms of economic exploitation. This is primarily because motherhood, (particularly in relation to the care of very young children) usually necessitates women giving up full-time paid employment altogether for the early years in a child's life. This in effect, frees more of women's time to be spent on domestic work which is not directly related to childcare but rather to traditional notion of wifely duties, for example, cooking, cleaning, shopping etc and general servicing of husbands. This work, while essential to the current structure of families, in effect, leaves husbands free to pursue jobs and careers on a full time bases unrestricted by the demands of children and domestic labour (Oakley 1974). In addition, of course motherhood, by reducing married women's participation in the labour market increases their financial dependency upon men, and thereby increases their economic vulnerability.

Furthermore, motherhood frequently has irreversible economic consequences for women's position in the labour market (Joshi 1984; Martin & Roberts

1984; Hunt 1973). There, women are already found in predominant proportions in low paid, unskilled and semi skilled work, where they are confined to jobs which are generally described as 'women's work' (Social Trends 1974:16; Hakim 1979; Hunt 1968). This type of work in the labour market largely reflects the work which women do in the home (ie cooking, cleaning and servicing jobs such as nursing secretarial, clerical, and unskilled and semi skilled work in the clothing food and drink industries) (Oakley 1981:152, quoting Department of Employment New Earnings Survey (1977)). Motherhood increases that job segregation, and this is primarily because responsibility for children forces women into part-time unskilled work in an attempt to combine paid employment with the demands of motherhood (Mackie & Patullo 1977:40 Martin & Roberts 1984:147). However, such work offers women little or no prospects, no further training, little job security, or rights to statutory employment related benefits. As both Hunt (1973:28) and Martin & Roberts (1984:147) have concluded motherhood provokes demotion for women when they return to the labour market, and thus increases their already over representation on low paid unskilled work.

Parenthood therefore, does 'cost' women more than men, in both the short term (through loss of an

independent income and increased dependency upon men) and in the longer term (through loss of immediate and long term opportunities in employment). Moreover, research demonstrates women suffer emotional and psychological stresses as a result of the imposition of the total responsibility for the well being of children. Alongside declining nurseries and creche facilities in Britain (Riley 1979), mothers turn to child minders, friends and relatives in their struggle to combine motherhood with paid employment. Such mothers frequently feel guilty and inadequate as a consequences of the attitudes and myths which exist in society regarding the effects upon children of working mothers. These ideas most prevalent in the 1960's are emerging again in right wing literature in the 1980's (eg: Ellis Jones - Bow Group 1986). Although research has long since disproved a causal relationship between such issues as juvenile delinquency and working mothers (Burchinal 1963; West 1969; Home Office Research Study 1985), such is the strength of dominant ideologies of motherhood which posit motherhood as a full time job which only women can and should do, that mothers continue to worry and are blamed over such issues (Oakley 1974:211; Maitland 1980:88). However, as Oakley also points out (op cit 208), nobody has yet sought to ask, let alone investigate the effects of working fathers upon children's development. Yet

mothers continue to deploy various coping mechanisms on a daily basis in order to continue to meet a range of impossible social and economic demands (Graham 1982:102/3). And, as writers have already argued, the heavy workload and stress which this process produces for women is likely to increase as the boundaries of the welfare state are withdrawn, since it is wives and mothers who are increasingly expected to replace and cover for missing school meal services and nursery facilities; it is women who ultimately have to cope with reduced incomes as child benefits shrink and it is women who are expected to care for elderly and physically and mentally sick relatives where social and hospital services are reduced (Finch & Groves 1983: 1/10).

In addition as Seiter argues (1986:22) the social organisation of the family in which women do take primary responsibility for childcare and the care of family members and, where women do sacrifice their own needs and desires and goals in an attempt to meet the physical, psychological and emotional needs of others, that organisation, will tend to produce girls who are indeed better carers, better at 'mothering', better at self sacrifice, than boys. It is then very clearly within the nexus of familial relations that children are first exposed to the realities of the sexual

division of labour (Dyhouse 1977; Sharpe 1976; Wolpe 1975).

Finally, research on motherhood has demonstrated how dominant ideologies of motherhood not only equate being a woman with being a mother (Gavron 1968) but in addition, equate motherhood with marriage and the family. Thus, sex, marriage and reproduction are frequently linked together in a way which implies that each explains and necessitates the other (Lasch 1977), and there are of course strong negative sanctions against both illegitimacy (ROW 1979) and voluntary childlessness within marriage (Miller 1978). As Busfield points out, (1974:14) 'on the one hand, it is accepted and regarded as desirable that those who marry will have children, and on the other hand, that those who want to have children will marry'. Thus reproduction is, in reality, only conceived as natural and as 'destiny' for women, so long as sex, procreation and childcare are equated with femininity and confined to marriage. Radical feminists have concentrated on illegitimacy in particular, amongst other issues, to demonstrate this point. For example both Dowrich (1980:67) and Rich (1979:196) argue women cannot be mothers alone, without a husband a woman's child is not legitimate. Thus motherhood is admirable, natural and celebrated only so long as mother and child are

attached to a legal father. And research has begun to demonstrate how these features, central to dominant ideologies of motherhood in society, are in fact reproduced and sustained within certain institutional practices. Sally Macintyre's research (1976) in medical sociology is a classic demonstration of this issue and it is worth some discussion.

Macintyre examined the routine responses of the medical and helping professions to pregnancy in a sample of married and single women. Against an ideological backcloth which proclaims motherhood as destiny and natural for all women, Macintyre identifies two distinct attitudes towards pregnancy and motherhood which depended upon the marital status of the woman involved. Macintyre concluded from her research that in fact for married women, pregnancy and childbearing are indeed considered normal and desirable; conversely, a desire not to have children was considered aberrant and in need of explanation. Moreover, for married women, to consider offering a legitimate child for adoption was considered aberrant, and if a married couple were childless it is considered clinically advisable that they receive diagnostic attention. Furthermore, the loss of a child by miscarriage still-birth or neonatal death should occasion instinctive grief and distress.

For the single mother however, Macintyre found almost the complete reverse of these approaches and attitudes. Thus, pregnancy and childbearing for the single mother are abnormal, undesirable and indeed the desire to have children is aberrant selfish and in need of explanation; pregnancy itself is treated as problematic; illegitimate children should be surrendered for adoption, and the mother who wants to keep her child is perceived as selfish and/or unrealistic in her aims. Moreover, diagnostic treatment for infertility is not advisable or relevant; it is not considered proper for an unmarried woman to adopt a child; the loss of a baby through miscarriage, stillbirth or neonatal death should not occasion too much grief or distress and may even produce relief. In summary, Macintyre argues that there is one solution for the problems of a single pregnant woman and that is to get married. If she is married she will want the child if not then she will not want it. 'Maternal instinct' therefore as a 'good' and 'natural' thing is here ascribed only to married women. Macintyre's work on the reproduction of motherhood is important because firstly, it demonstrates both how dominant ideologies of motherhood are reproduced through the routine and everyday activities of social agencies and institutions and secondly, because she also illustrates what some of the real consequences of those ideologies can be for

the women involved.

There are of course, as Ruddick points out (1980:22), other models of motherhood in society (eg: single mothers, lesbian mothers, co-parenting among women) which constantly serve to remind us that there are in fact many ways of rearing and caring for children which do not incorporate the inequalities of power, privilege and economic resources which currently identify marriage and the nuclear family. But as other writers have argued (Oakley 1974; Graham 1982; Rich 1979) the social regulation and control of reproduction, of women's capacity to reproduce and rear children lies at the heart of women's oppression in society. We must therefore understand how this capacity is regulated and defined, both through immediately visible and less obvious social and economic mechanisms, if we are to understand how women are regulated and ultimately 'kept in their place' (Graham 1982:101).

It is as part of that endeavour in feminist writing and research that this thesis seeks to make a contribution. It looks at one institution -law and legal practices -and at the impact of ideologies of motherhood, of marriage and the family, and of female sexuality, both historically and in contemporary

society. With regard to the issue of female sexuality in particular, through an analysis of the legal processing of lesbian mothers involved in child custody disputes, the role of dominant ideologies of motherhood in law and legal practices can be clearly identified. That processing demonstrates the consequences for mothers of the courts employment of particular stereotype models of the 'good' mother, and pejorative stereotypes of 'the lesbian'. In particular, it demonstrates some of the consequences for women who transgressed traditional notions of female sexual passivity and laid claims to both an assertive female sexuality and motherhood. Moreover, the content of those stereotypes are not arbitrary, and they are not interchangeable. As Perkins (1979) has demonstrated in relation to media stereotypes in films, stereotypes are selected features which have a particular ideological significance and a particular relationship to familial relations within social formations. It is the role of law in the reproduction of those relationships which forms the central questions addressed in this research. In the final part of this introduction therefore, I wish to address the issue of 'law', why it is important for women, what we mean by 'law' and finally my approach to 'reading law'.

Sociology and Law

Within the interdisciplinatory study of the sociology of law, there has been a strong tendency to theorise the form and content of law as a reflection of specific economic and social relationships within society, or, as an instrument utilised by the ruling class in a class struggle with subordinate classes. That analysis of law begins with the economic formation of society, and takes the nature of law for granted. However certain contemporary writers in this field have been critical of the way in which that relationship has been posed (eg: Cain & Hunt 1979; Sumner 1979). Equally writers in the field of family law have also criticised that conceptualisation of 'law' (eg Smart 1984) and have demonstrated that in fact 'law' is mediated through the arena of both politics and ideology (Eaton 1986). Law is not simply an instrument of class struggle, it is also an instrument of party politics, a protector of revered ideas and an agency for moral codes. It is in addition, a means of regulation, providing a normative framework for familial relations. And, it is these latter issues which have informed a substantial part of contemporary feminists concerns with family law (eg; Smart 1984; Atkins & Hoggett 1984; O'Donovan 1985) particularly in relation to discussions regarding the regulation of female sexuality. The role and function of law and legal practices in the sphere of sexuality is however

complex. It is not necessarily immediately apparent. While all societies control and regulate sexuality, a variety of positive and negative sanctions, formal and informal mechanisms are employed. Feminists within sociology have been concerned to locate and reveal how these sanctions are manifest in the practices of a variety of social agencies and institutions (eg: Stang Dahl 1978; Barrett & Roberts 1971; McIntosh 1978; Smart 1976).

Two points arise from the above work. Firstly of course, feminists working in this field are not necessarily always opposed to the regulation and/or control of sexuality -it is not in all cases a 'bad' thing, as the issues of rape and child sexual abuse demonstrate. But, in attempting to understand the concept of regulation in society and the different levels on which it operates, it is important to understand the different forms of sanctions which can be employed and to note that even where positive sanctions do not exist in relation to particular forms of behaviour, other (negative) sanctions may also exist. As McIntyre's work demonstrates, these negative sanctions can be equally effective in regulating certain forms of activity. And of course such sanctions can equally be experienced as punitive (see below).

Secondly, the practice of sociology in examining social institutions and locating different forms of regulation does not however equate with locating and revealing a form of conspiracy. Indeed, it is frequently in quite disparate social practices, with hidden levels of meaning which are legitimised through particular ideologies, that the ultimate regulation of sexual behaviour is revealed. That form of analysis can be demonstrated in the work of Macintyre discussed above, but also for example in the work of Lucy Bland (1985). Bland argues that in relation to rape, while law claims to protect women from rape, in practice however, it is frequently the rape victim who is put 'on trial', and it is her sexuality which is questioned, her behaviour and her morality which is subject to extensive cross examination, surveillance and judgement. This is not however the result of a conspiracy to stop women reporting rape and pushing for prosecution in the case of rape. Rather, it is a consequence of the application, by courts, of particular views regarding male and female sexuality, such that certain female behaviour (eg: styles of dressing, previous sexual activity, geographical location, (ie: walking alone late at night etc.,) can be seen as contributing towards the crime of rape. Thus, women are advised to dress and organise their

lives in a particular way in order to protect themselves. In this way, women's behaviour is ultimately regulated, and of course myths regarding female culpability in relation to rape are reproduced.

In assessing the role of law in the regulation of female sexuality, clearly it is necessary to go beyond an examination of formal statute law and the political struggles involved in passing legislation. It is not simply at this formal level that law sets the parameters of what is considered normative (eg: in terms of marriage, sexual relations, grounds for divorce and separation, familial conditions for rearing children). In addition, we need to examine the law in practice. And for a number of reasons this is particularly the case regarding family law. Firstly there is a considerable amount of judicial discretion within family law and this is especially the case when we consider law in relation to the custody, maintenance and access of children. But secondly, explanations of law cannot remain at the level of a simple reading of Acts, since this tells us nothing of the social meaning and practice of law. 'Law' is also a set of rules and principles taken and applied to a set of gendered legal subjects by particular sets of legal agents (judges, registrars, magistrates) and of course these are, in the majority, men. And it is the application of law

to gendered subjects which forms the focus of much feminist research surrounding law (eg: Edwards 1981; Eaton 1986; Smart 1984).

It is therefore, within the application of law, within that very process that law 'comes alive'. How it 'comes alive', is through the mundane everyday level of experience. Family law is therefore a social discourse. By this I mean that it is actualised through social and political practices and through the lived experiences of gendered legal subjects. Thus, it is women's experience of law which provides the starting point of analysis. This is not however to argue that experience 'is all', or that all women's experiences of law and legal practices are the same (I am not posing women as a unitary category (c/f Cousins 1980)). It is however an important starting point - though not an entirely new or novel approach to law as criminologists (eg Bottoms & Maclean 1976) have demonstrated. However, for feminists it is the issue of the impact of 'law' on gendered subjects (ie wives and mothers, husbands and fathers) which is an important starting point for both theoretical and political analysis. This is not to suggest that we should or indeed that we could ignore notions of formal 'justice' or 'equality'. Rather, that such concepts can only usefully be analysed in relation to their

relevance for women's structural position within society. Notions of formal equality and equal legal treatment are not a sufficient goal for women where structurally, women remain financially and economically so disadvantaged vis a vis men (Brophy & Smart 1985:3). Therefore if the analysis of family law and legal practices is to add anything to discussions on women's oppression in contemporary society, it must be firmly rooted the daily lives of women (and indeed men) and in the cumulative effects of law on gendered individuals. This level of analysis is lost if the focus of examination remains at the level of abstracted notions of 'justice' and/or 'equality'.

Guardianship Custody and Maintenance of children and
Orthodox Legal History

It will now I hope be clear that I am addressing law from a particular theoretical perspective. This perspective moves beyond both orthodox readings of law and the traditional sociology of law. It is, in effect, a critique of the limitations of both those approaches for understanding the role of family law in relation to women. Finally therefore, in this introductory chapter, I wish to outline the development of my research questions, and to demonstrate why it was necessary to move beyond both orthodox interpretations of legal history in this field and traditional methods of reading law.

My initial research questions arose from two concerns. On a broader theoretical and political level I was concerned to examine the role of contemporary family law and legal practices in relation to the reproduction of motherhood; how, for example, has law defined and redefined this role in the post war economy. As other feminists have already demonstrated, it is necessary to move beyond abstract theory and monolithic structures (Graham 1982; Oakley 1974). What is necessary in order to develop theoretical analysis, is research which attempts to

bridge the gap which exists between women's everyday experiences of motherhood, and abstract theoretical analysis, and which demonstrate the interconnections between the two issues. Secondly therefore, I was concerned about the problems which certain lesbian mothers were experiencing in gaining legal custody of their children, and how those experiences might throw some light on the theoretical and political issues posed above in relation to law.

The experiences of lesbian mothers involved in legal proceedings over the custody of their children raised a number of important issues, and refocused my attention on the position of mothers generally on divorce. Such a focus has not been a part of feminist concern with the law and legal issues for some considerable time. Indeed, the last major women's campaign on the law relating to custody, guardianship and maintenance of children was in the 1920s (see chapter three herein). General responses to the issue of lesbian mothers and legal issues among women in Britain in the mid 1970's were enormously varied and often confused. Much of this confusion however was related to misunderstandings regarding law and legal practices generally on issues of custody of children on divorce. Women tended to argue that if 'adulterous wives were now allowed to keep the custody of children,

why not lesbian mothers?' or, they argued 'surely mothers always get the custody of children on marriage breakdown, and wasn't that one of the few achievements of the early women's movement in Britain ?'

The issue of lesbian mothers and legal practices therefore, raised further general questions regarding current practices in the area of child custody and divorce in Britain in the latter part of the twentieth century; just how significant are issues of morality and sexual behaviour so far as courts are concerned, how often do fathers get custody of children, and, in what circumstances do they do this most successfully. It is interesting to note that at a time when certain lesbian mothers were attempting to mount a public campaign surrounding their loss of children in the mid 1970s, organisations such as Families Need Fathers (1975) were also forming and organising campaigns (in both Britain and Europe). A major theme in that latter development was the argument that in fact, since the last war, the 'law' had now swung too far in favour of mothers. Thus certain writers argued that mothers were now the privileged parent within legal practices (Richards 1982; F.N.F. 1981; Maidment 1981). That development was largely attributed to the influence of post war theories in the field of child developmental psychology (located in the work of John Bowlby (1953))

which stressed the importance of the mother-child relationship in the early years of a child's development (Freeman 1983).

However, I became increasingly dissatisfied with that level of explanation of law and legal practice in the post war period. For example it was apparent that courts continued to focus on women's errant sexual behaviour for a considerable period following the second world war - indeed it is identifiable in case law well into the 1960s (see chapter five herein). Moreover, I questioned whether in fact the notion of 'privilege' was an accurate or indeed useful description of the position of mothers on divorce. It was certainly not an accurate description of legal practices (see chapter five herein). Furthermore, where courts did award custody of children to mothers, confirming the existing sexual division of labour in relation to childcare is not, as my earlier discussion on the social and economic consequences of motherhood demonstrates, placing women in positions of economic or social privilege vis a vis men in society.

It was therefore a dissatisfaction with existing accounts of contemporary legal practices and the actual role of law in relation to custody on divorce generally which lead me to reconsider the development of policies

in this area of family law in the post war economy. I ultimately take issue with orthodox explanations of that development. I argue (chapter four) that in attempting to understand and explain the particular way in which policies on children and divorce have developed since the last war, analysis of those trends cannot be separated from an examination of other major concerns of the period, for example, falling levels of public morality, fears for the stability of family life etc., (McGregor 1957; Smart 1984)) which informed policy on divorce law generally after the war.

In addition, that disagreement with orthodox constructions of post war legal history stretched back further than the 1940s. It increased as I examine early twentieth century developments (see chapter three herein) and was amplified as I examined interpretations of nineteenth century developments in this field. I was again in disagreement with aspects of both social historians accounts of nineteenth century policy (eg: Maitland & Pollock 1968; Plunkett 1949), and with interpretations offered by certain family lawyers of that period (eg: Pettite 1957; Karminski 1959). This disagreement came partly from a frustration at the limitation of the terms in which they addressed developments in this field. But equally, that initial criticism also lead me to at times, radically disagree

regarding the ultimate role and function of family law in relation to mothers. So for example, with regard to the limitations of orthodox approaches, these did not address the question of mother's powerlessness within marriage and the role of legal developments in actually sustaining that position (see chapter one herein).

Moreover, traditional liberal interpretations of this field of family law tell us little about the role of the state in relation to the family. Yet as I argue here (chapter one), it is important to locate the precise form, content and legitimation of state intervention into the patriarchal family in order to fully understand the consequences which that form of intervention had for mothers and ultimately for power relationships within the family. Although a clear concern for the welfare of children certainly increased a focus on motherhood within marriage, nevertheless I argue here (chapter two) that contrary to orthodox interpretations (eg Donzelot 1980) that focus did not lead to any necessary increase in mothers powers as parents within families. Indeed that demand by women themselves was vehemently opposed and rejected by a range of governments in early twentieth century Britain (see chapter three herein).

This re-examination of both historical and

contemporary developments is therefore important for a number of reasons. Firstly, it throws new light on contemporary debates regarding the role of 'law' and legal policies regarding children and divorce, and the relative position of divorcing parents. I argue that mothers are not in fact the spoilt darlings of the 1980's anymore than wives were the spoilt darlings of the law in the 1950's. (Lord Justice Denning (as he was then) *The Times*, 13 May 1950). That position, though now part of conventional wisdom in this field of family law is nevertheless misguided and oversimplistic in its analysis of the role of 'law' in this area. But secondly, that position is part of conventional wisdom (particularly in the post war period), precisely because, of the limitations of the terms in which the history of this field in family law have been constructed. And this has primarily been in terms of notions of formal justice and increasing legal equality for women. I argue here however, for a re-evaluation of that history through a perspective which reveals and examines certain important 'silences' in orthodox accounts. Those silences are located in constructions of legal history which do not address, the role of the State, or, the role which law played in sustaining mothers continued oppression within the family, or indeed, women's experiences as gendered legal subjects.

Historically, where women were trapped in marriages which they dared not leave for the fear and sure knowledge that they had neither the means nor the right to take their children, where there were no or inadequate provisions to allow women to leave and not risk loss of children, this was policy. What I have attempted to demonstrate here, is how those policies were legitimised and justified through particular ideologies (of child welfare and motherhood and the family), ideologies which are frequently perceived as being constructed and engaged in women's favour and interests. Moreover, I argue that this was largely successful, not because of an enormous conscious conspiracy to contain women in marriages which they might otherwise leave, but precisely because the content, (the ideas and the moral standards expressed within these particular ideologies) were part of the taken for granted order of society. They were part of, and appealed to, the social consciousness of society. And, as Sumner argues, with regard to understanding the role and function of ideologies in society, these ideologies in turn, sustain and reinforce that social consciousness.

Thus, while I would agree with certain writers in this field (eg: Freeman 1983) when they identify the development of a concern for the welfare of children as

taking a formal priority in this field of family law, nevertheless, I argue here that that development cannot be 'read' as somehow existing outside of an understanding of law as a social and moral discourse. In other words, the exercise of the welfare principle in this area of family law does not have an autonomy, it must equally be read as part of that social and moral discourse.

Deconstruction of the welfare principle is not of course limited to the work of sociologists, lawyers are increasingly engaging in that exercise (eg: King 1981; Hoggett 1977). As Hoggett demonstrates in her analysis of law in relation to illegitimacy, historically law can be demonstrated to have been much more concerned with the orderly transmission of property than the actual welfare of children. Nevertheless, it is important in this introduction to briefly elaborate on what that exercise entailed in relation this research. Finally therefore I wish to address this issue through a discussion of what is commonly referred to as 'reading law'.

Reading 'Law'

Although feminists are increasingly looking at law and legal issues (Smart 1984; Eaton 1986; Kingdom 1985;) very little has been written about the actual

practice of reading 'law' (c/f Sumner 1979; Goodrich 1986). For lawyers that practice becomes an almost unconscious exercise. But learning to 'read' law within the discipline of legal training is regarded as a central feature in learning the practice of law. In relation to case law, this entails what might be termed doing 'justice' to law, getting 'inside' its internal logic, understanding legal principles and applying those particular principles to the factors which are deemed relevant in specific cases. With regard to child custody disputes therefore, this method entails applying the welfare principle (established in statute law) to the particular facts of each case as they are presented to courts. Locating its historical development, necessitates tracing its establishment in statute law and also locating the application of that principle through its development by courts. In practice, this means identifying precedents established by the Court of Appeal, locating where precedents are later approved, considered, distinguished, explained, doubted, extended, followed or overruled.

The above method is presented to the student lawyer as a method which is a purely technical practice. And, as one aspect of legal discourse, it is not only a discrete phenomenon, but in addition, as Sumner points out (1979), to the legally 'uninitiated'

it can be downright impenetrable. However, the process of coming to understand orthodox legal methods of reading 'law' demonstrated a number of important issues within the terms of this research. Firstly, as a method of reading case law on a 'purely technical level it is intensely 'habit forming'. In coming to understand and apply those particular skills therefore, and to some extent thereby breaking down some of the privacy of law, one can in effect simply reproduce it. Thus, initial drafts of the first part of thesis locating developments over the last century, read precisely as a lawyer might interpret legal history (eg: Wadsworth 1971), reproducing a particular methodology by mapping out a chronological history of statute law and case law developments, and locating precedents through annotated cases. Clearly at that stage it was necessary in terms of this research, to 'stand back' from these documents and return to initial research questions regarding the complex relationship between the role of law in the reproduction of aspects of women's oppression in society. That initial exercise in reading case law and orthodox legal interpretations of legal history, although frustrating, was not however wasteful. It raised two important and related issues for feminism and the interdisciplinary study of the sociology of law. The first issue relates to the exercise of 'reading' case law and the relevance

of orthodox legal methods, and the second concerns theoretical questions regarding the ultimate role of family law in relation to power relationships within the family.

Firstly, to date, very little has been written which has sought to question and analyse in any detail the prevalent and frequently unconscious methodology employed in orthodox reading of law (c/f Goodrich 1986). As a discourse, 'law' encompasses a number of 'levels'. For example as a system of regulation and control, family law can be traced through a focus on statute law examining the extension of certain rights to legal subjects (eg the gradual increase of wife's rights to divorce on equal terms with husbands). But that exercise in itself is of limited value. Simply reading legal Acts tells us nothing of law's effective social meaning and practice. To explore and understand the role and function which 'law' plays in society with regard to the deliniation and regulation of familial relationships in any specific period, we have, in addition, to move 'down' into the everyday practice of 'law'. For sociology, that exercise entails two important focuses. One focus (already referred to earlier in this introduction) begins at the level of the experiences of gendered legal subjects. It is at the mundane level of everyday experience that

'law' becomes alive. The other focus begins with actually 'reading law'. By this I mean the very process through which legal agents construct, test and develop law, the legal scenario through which particular features of a case become the significant legal 'facts', the filtering mechanisms of trial and pre-trial reviews, the court practices through which precedents are set, questioned and overruled. It is at that point that legal methods and sociological enquiry most clearly demonstrate different concerns.

For the lawyer, the establishment of the relevant legal 'facts' of a case and existing applicable precedents is usually presented as a purely objective and technical exercise. For sociology however, what is equally important is the social construction of those 'facts'; how for example, out of a range of events and circumstances in peoples lives, legal practices construct a preferred text, and, how legal methods actively selects and privileges certain meanings and accents. 'Facts' do not 'speak' for themselves. Indeed, a substantial part of legal discourse in this field of family law is not particularly 'legal'. Case law on child custody disputes for example consists largely of a description of the 'facts' to be dealt with by the court. However, which particular features of a case count for the

relevant 'facts' of the case, are, in effect, constructed by court procedures, they are a product of the filtering mechanisms of bi-lateral bargaining. Thus, law is, as Goodrich (a lawyer) has also recently argued (1986:V) 'inherently a social and political activity'. And it is that activity which forms the focus of investigation in this research. For example with reference to the significance of notions of morality and sexual behaviour, what concerned me as a feminist and a sociologist, was that although certain lawyers argue that wives adultery ceased to be relevant in determining the custody of children on divorce around 1910 (Maidment 1984a; Karminski 1959:) nevertheless, it can be demonstrated that courts continued to focus on adultery in custody cases not simply in the immediate post war period, but well into the 1960s (see chapter 5 herein). Indeed in the post war period wives adultery appears to have been almost the only issue from a range of behavioural 'faults' available, on which fathers contested custody of children through to the Court of Appeal. Was this the case because lawyers acting for fathers felt this was the only ground on which fathers stood a significant chance of usurping mothers claims, and if so, why was that the case? In formal terms under Guardianship provisions, adultery ceased to be a bar to mothers application to the courts for custody of children in

1873. Moreover, adultery was never a formal bar to petition under divorce proceedings. In practice however, courts continued to deny custody to adulterous wives in divorce proceedings after both formal law and precedents in the Court of Appeal attempted to eradicate that practice. For example, the two judges statements below, although separated by some one hundred years, are nevertheless remarkably similar in the moral message which they carry :

"it will probably have a salutary effect upon the interests of public morality that should be known that a woman, if found guilty of adultery, will forfeit, so far as this court is concerned, all rights to the custody of or access to, her children"

Sir Creswell Creswell in, Seddon,
Seddon & Doyle (1862) 2 Sw & Tr 640

"if the [adulterous] mother in this case were to be entitled to the children it would follow that every guilty mother who was otherwise a good mother would always be entitled to them"

Lord Denning in Re L (Infants)
[1962] 3 ALL ER 3

For the sociologist, this raises a number of issues regarding the role of law in the regulation of female sexuality. In developing a theory of family law in this field, it is not sufficient to argue that where case law does reveal the courts to be preoccupied with wives adultery, that such a focus is simply due to the idiosyncratic behaviour of certain members of the judiciary, or simply that it is examples of 'bad' case law, or that what lawyers construct is not what 'law' is. In theorising the role of law in society, explanations cannot ultimately be located in the behaviour of certain members of the judiciary (although aspects of the composition of the judiciary are not entirely irrelevant (Griffiths 1977) Nor can explanations lie in what lawyers deem to be examples of 'good' or 'bad' case law.

In the same way that explanations of law in society cannot be based in a simple reading of legal Acts, neither can explanations of case law remain within a purely technical representation of 'facts' or precedents as these arise from the Court of Appeal. The process of reading law is a social and political activity, 'law' is not therefore simply what the Court of Appeal struggles to establish as 'good' law, it is

equally what is happening in everyday courts (2), even though that exercise is frequently more difficult to establish (see chapter 5, page 115 herein). Thus, the selection of the particular facts of a case are important, as are the categories of cases which go to the Courts of Appeal. Indeed prior to 1977 it was largely only through information gained from the details of contested custody cases heard on Appeal that we could begin to construct a picture of what was happening in everyday divorce courts. This approach in addition forms a link with the second issue of concern for feminists looking at law - that of the experience of gendered legal subjects.

Following the last war, custody continued to be determined in an entirely 'fault' based divorce system. This had significant consequences for the adultery of mothers. Despite the rhetoric of the 1950s and 1960s regarding marriage as a new partnership of equals, on divorce and separation judicial attention remained focused on the behaviour of wives. As Carol Smart points out (1984:42) the divorced wife of the 1950s had to 'earn' her maintenance, it was not hers as of right. The adulterous wife was rarely awarded maintenance (Eekelaar 1978; McGregor 1970), even though the High Court was entitled to award her some kind of subsistence. The magistrates courts however never

awarded maintenance to an adulterous wife - even if she committed adultery years after her husband had deserted her - in fact such an action was sufficient grounds for a court to revoke an order. As Carol Smart argues, (1984;42) this practice was based upon common law, but the Matrimonial Proceedings (Magistrates Courts) Act 1968 actually introduced the principle into statute law. In this way, courts operated a sanction over the sexual behaviour of wives.

And it must be remembered that it was within that same moral climate that custody decisions were taken. The same courts which identified wives sexual behaviour as harmful to the family structure and therefore to the moral codes of society, also made decisions regarding the claims of such wives to the custody of children. Although formally different principles directed the courts attention, 'conduct' remained relevant in custody decisions, and it is impossible to argue that such decisions were not equally informed by those same moral considerations. Such considerations were embodied within the dominant ideologies of motherhood applied by courts. Indeed to argue otherwise, is to suggest that the social (that is, commonly accepted) definitions of what constitutes good motherhood have no effect upon legal processes. If that were the case it would be difficult to see how ideology or socialisation

works at all in society (Perkins 1979;140).

But moreover, to argue that decisions concerning custody can be abstracted from this moral discourse leaves unanswered the question of why in fact courts did remain at all preoccupied with wives sexual behaviour in assessing their claims as mothers? When wives lost custody of children because of adultery within a legal system where, as wives, they also lost rights to maintenance and, when both issues were played out with a legal code which 'spoke' in terms of 'obligation and duty' and 'guilt and innocence' it is important to ask how else could women experience that system, other than in the moral terms in which it was constituted. Being found guilty or innocent meant, in effect, being punished or rewarded, there were indeed clear winners and losers; how could a moral discourse talk otherwise and how indeed could women experience it otherwise.

For feminist research therefore, and for the sociology for law generally, it is not simply statute law and legal facts which constitute 'law' and are of interest. It is also the very processes by which 'facts' are established and come to claim dominance in relation to the range of issues at stake. The very process of establishing the 'core' and 'periphery' of

cases itself demands analysis. These issues are relevant in theorising law in society. And of course questions regarding how certain ideas might hold at particular periods in time are addressed in the field of the sociology of knowledge (eg in the work of Marx and Engels, and Durkheim (1953) and more recently, in the work of Karl Mannheim (1936; 1952)). In theorising law in society therefore, we must be concerned with legal discourse as a whole and its effects upon gendered legal subjects. That exercise includes not only struggles to achieve legislation, statute law itself, courts practices and trial and pre-trial reviews but equally the social construct and development of 'law' by courts. In order to begin constructing a theory of law which can make a contribution to discussions regarding law and women's oppression in society, the complexity and contradictions within law and legal practices must be addressed. In relation to this piece of research for example I have asked, how does 'law' delineate and reproduce power relationships with the family? It seems to me that in relation to the issue of child custody practices, it does this in terms of certain ideologies available in that social formation. This process is obscured and not immediately accessible precisely because the law 'speaks' in terms of genderless legal subjects (spouses and parents). It

is however experienced by women and men who are husbands and wives, and mothers and fathers, and who as inhabitants of those roles, already occupy different and unequal positions of power within familial relations.

Finally, although statute law does not designate power relations in terms of gendered subjects, this is not to say that such ideologies are in fact identifiable in legal practices but, absent from the legislative process. Rather, that law designates them in a general discourse abstracted from those gendered categories. In this way, the concerns and issues which do nevertheless inform legislative changes are concealed in a final discourse where it is stated in abstracted terms. Thus, law appears to take on a universal moral character separate from ideological and political forces. This can be demonstrated if we take a principle of law central to this research - the welfare principle; as an abstract principle it is commendable. It appeals to 'common sense' and lays claim to a series of accepted values which are assumed to be held in common and consequently, do not require justification or explanation. However, one cannot conceptualise the best interests of children without reference to real conditions and gendered parents. The welfare principle is not then an unambiguous

principle, it is not immediately 'transparent' within legal discourse, it has to be read 'through' certain dominant ideologies - of marriage and the family, and specifically what constitutes 'good' motherhood in society. This thesis is therefore a contribution towards revealing those practices which sustain and reinforce such ideologies. It takes issue with orthodox interpretations of legal history, not simply on the basis of historical accuracy (although that too is important). But in addition, I argue, that to engage in modern policy debates regarding children and divorce, we must work from a more accurate picture of the role of law and the effects of legal practices. I argue therefore from a broader theoretical framework which, among other things, requires recognition of the impact of law on gendered legal subjects. Moreover, I also argue that current policy debates must acknowledge that issues of regulation, (generally only accepted as part of legal tradition in this field of family law in the nineteenth and early twentieth century), can in fact continue to operate within contemporary legal practices - albeit in less immediately obvious, and more complex forms under the guise of protecting (unambiguously) the interests of children. It is the task of sociological enquiry to identify and reveal those forms. And, as this thesis demonstrates, ideology plays a crucial role in that process.

Footnotes - Introductory Essay

- 1 Initially from Marx, *The German Ideology*, where he states ".....it is not consciousness which determines life but life which determinates consciousness" (Marx & Engels 1976:37) And later under the aegis of modern Marxism in the work of Althouser, (1971) particularly in *Lenin & Other Essays*, in which Althouser outlines his influential work on "Ideology and Ideological State Apparatuses" (pp 121-173); and Gramsci (1971) and (1977); and Colletti (1972); and Poulantzas, (1968) (1974) and (1975).

- 2 So for example, contemporary writers (eg: Maidment 1981; F.N.F. (1981); Richards 1982) argue that the approach of the Court of Appeal has been to favour mothers. Research carried out in everyday divorce courts however (Eekelaar & Clive 1977) established that in practice, whatever the approach of the Court of Appeal, it was not the sex of the parent which determined court practices, but rather, the status quo principle. That principle overruled any notion of favouritism or privilege towards either parent, courts awarded custody of children to the parent who had the daily care of such children at the time of the hearing, thus confirming the children's residential status quo.

CHAPTER 1

PATRIARCHAL POWER AND LEGAL INTERVENTION

Over several centuries the lives of adults and children have been increasingly differentiated, most notably in the spheres of work, education and leisure. Indeed, for those who perceive the child and 'childhood' as natural, biologically determined necessities which entail dependency, protection, repression and exclusion from adult society, the work of social historians (Plumb 1950; Aries 1979; Pinchbeck & Hewitt 1973; Thane 1981) provide ample groundwork for locating the historical specificity of what we today generally refer to as 'childhood'. And while recent research does illustrate the complexity of locating the emergence of 'childhood' in one specific discourse (that is to say, it is in fact the point of many determinations (Fitz 1979)) nevertheless, there does seem to be a correspondence between the emergence of nineteenth century capitalism and the construction of modern age groups (Thane 1981).

Historically, the concern of the law with infancy emerged through its concern with inheritance. In feudal times, a principle characteristic of the family was its concern with inheritance; it represented both stability and continuity between generations (Plunckett 1949). So, to locate the production of the legal infant, one has initially to begin with the concern within feudal society for the protection and orderly transmission of land through land law. Indeed, 'infancy' was initially constituted as a legal category only in relation to discourses 'about' land law and marriage contracts (Pollock & Maitland 1968; Fitz 1979). The discharge of tenures¹ (1660) effectively removed certain infants from the wardship of feudal lords and transferred the rights over those infants to what

Blackstone referred to in 1765 as the "empire of the father". The patriarch in this period, in terms of control over certain children, thus changed in substance from feudal lord to father. An absence in those early legal texts of concern for the propertyless infant is illustrative in the way in which the child, as a legal subject, was constituted solely in cases concerning disputes over property. That separation of children in terms of heirs to property from wage labour was constituted by a legal system in which the propertyless infant would eventually confront the law through the courts of summary jurisdiction.

However, for the infant with property, it was initially a concern for that property which called the attention and protection of the law. Indeed, the medieval doctrine of *parens patriae* (the sovereign's concern and expression for the protection of subjects with legal disabilities) was a concern directed not at the person (although she/he may ultimately gain some protection) but rather, at the protection and control of their property until such time as the infant reached the legal age of majority.

Although it is not entirely clear how power under the doctrine of *parens patriae* devolved upon the courts of Equity² (Manchester 1980; Reiss 1934; Fitz 1979), by the early nineteenth century the jurisdiction of the Chancery Courts in this respect was well established. Lord Eldon, in 1825, stated:

"...the state must of necessity place somewhere a superintending power over those who cannot take care of themselves and the court represents the King as *parens patriae*..."

However, the power to act on behalf of infants was severely limited, as Eldon continued:

"...the court has not the means of acting,
except where it has property to act on..."

Lord Eldon, in Wellesley v Duke
of Beaufort (1827) 2 Russ. 1

Prior to the introduction of civil divorce then, matters concerning children were dealt with either in Chancery or the courts of Common Law under habeas corpus proceedings (which basically dealt with proceedings concerning unlawful restraint). If an infant had property, a case could be brought before the Courts of Chancery (proceedings being brought by making the infant a ward of court). Of the two categories of divorce available during this period³ neither were particularly concerned with the question of children. Over the question of guardianship of children, the courts of both Common Law and Equity concurred; all parental power and rights were vested solely and absolutely in the father. In cases where the child held real estate independent of fathers, such fathers could, in their capacity as guardians, have charge of that estate and could receive the rents and profits during the child's minority. Fathers also had rights to benefit from their children's labour; to correct children as they felt fit and proper; and in addition, a father's consent was necessary for children under the age of majority to marry. Indeed, just as marriage during this period was perceived as a sacrament, the courts also treated fathers' rights with a similar reverence, describing them as 'sacred' and as such beyond the jurisdiction of the courts⁴.

The strength of mens' position as fathers during the early nineteenth century was only equalled by their position of power as husbands. For example, if a husband chose to desert his wife and children, she could not compel him to return; her property remained in his possession and this included any monies she may have earned during this desertion. A husband could return at any time and insist upon the resumption of cohabitation, and his legal rights over both wife and children

remained undisputable. Wives held no statutory rights, either to the custody of their children or to maintenance for themselves or their children. Where a wife could not use the somewhat limited facility of pledging her husband's credit (Brophy & Smart 1981) she and her children had no alternative but the workhouse - that is, unless she could earn her own living - in which case her earnings would be paid to her husband if he chose to claim them (Reiss 1934).

If, instead of deserting his wife, a husband chose to ill-treat her or commit adultery, the only redress available to such a wife was to leave the marriage. However, as far as the court was concerned, the degree of cruelty it would accept as sufficient justification for her to leave had to be "nothing short of actual terror and violence"⁵. Moreover where a husband's cruelty was, according to the courts, of sufficient magnitude to justify her leaving, her property and children remained in his control.

Thus, fathers' absolute rights during this period made it virtually impossible for most wives to assert their extremely limited rights as wives, except at the expense of their children. Drunkenness, profligacy, cruelty and desertion were not viewed as sufficient grounds on which to deny fathers' rights to the custody and control of their children⁶. The child could be removed on the demand of the father even while the mother was breastfeeding⁷ and, in one instance, the court refused to interfere on behalf of a mother where a father was in jail and his six-year-old son was being brought to him daily by his mistress⁸. This is not, however, to say that the term child 'welfare', or 'interests' had not emerged as a concept in legal discourses during this period. Indeed, it was apparent as a concept in case law as early as the 1740s⁹. But what is significant about its employment in legal practice during the nineteenth century is that those early decisions carried

both implicit and explicit assumptions about fathers' rights, such that the preservation and perpetuation of those rights to the exclusion of all other considerations were viewed as synonymous with meeting the interests and welfare of children¹⁰.

Where the courts did interfere with the absolute rights of fathers over their children, these cases were generally those where either the father had administered such gross ill-treatment and cruelty as to lead to his prosecution and imprisonment¹¹, or where his gross immoral conduct was such that the court was of the opinion that the children were in danger of contamination and corruption if left in his care¹². Not surprisingly, over this period the Courts of Chancery continued to focus on its role of protecting the property of heirs, so that it would refuse to uphold a father's rights to the custody of an infant where it was likely that philandering fathers, though not in a position themselves to contribute to their children's upkeep (or even to their own upkeep), might nevertheless, as the children's rightful legal guardian, have access to the sometimes considerable fortune of their children's inheritance. As Lord Mansfield stated:

"...the natural right is with the father, but if the father is bankrupt, or if he contributed nothing for the child or the family unit...the court will not think it right that the child should be with him."

Blisset's Case (1774) Lofft 789;
see also: Gifford & Gifford,
quoted in Blisset.

Even so, towards the mid-nineteenth century the courts continued to express clear reluctance to interfere with the rights of fathers. In the 1840s, for example, the Lord Chancellor argued that the father must have so conducted himself:

"...as to render it not merely better for the children but essential for their safety or their welfare in some very serious and important respect that his rights should be lost or suspended... or interfered with. If the word 'essential' is too strong, it is not much too strong."

Re Fynn (1848) 2 De G. & Sm. 457

Moreover, not only did the courts relentlessly uphold the rights of some neglectful and cruel fathers during this period, but in addition they refused to recognise the validity of agreements in which fathers voluntarily gave up their rights to the custody of their children. In effect, this meant that where a husband and wife agreed in a separation deed that she should have the custody of their children and should bring them up, he could return at any time and either take the children or simply resume control over them and the organisation of their lives. Under those circumstances the children's mother had no recourse to the law to uphold their original agreement¹⁴. Lord Chelmsford restates this position in 1873 during attempts to change the situation:

"...the position of a wife separated from her husband was rendered even more distressing in consequence of the manner in which the Court dealt with separation deeds... This deed might contain a certain clause giving the children to the mother; but if so, the deed is not the slightest degree binding if the husband did not choose to be bound by it...if she appealed to the Courts of Chancery for its interpretation, the Court must refuse its aid on the grounds that it was contrary to public policy for the husband to relinquish his duty - the care and management of his children."

Hansard 3rd Series 1873, Vol. CCXV, Col. 14.

So that, not only were husbands able to dictate to a large extent the amount of contact between mothers and children through frequent disruption and change of mind, but in addition they could influence the quality of mother-child relationships by similar methods.

The absolute rights of fathers as legal guardians of their children also extended beyond the lifetime of fathers during this period, so that a father could, by a Will, appoint guardian(s) to act on his behalf, carrying out his wishes after his death¹⁵. Guardians appointed in this way held the same absolute powers (to carry out the wishes of the father) as the father had held himself. Under these circumstances, the Lord Chancellor in 1840 felt it necessary to set out the legal position of mothers:

"I thought it necessary to explain that, in point of law, she had no right to control the power of the testamentary guardian. It is proper that mothers of children thus circumstanced should know they have no right as such to interfere with testamentary guardians..."

Cottenham, in *Talbot v the Earl of Shrewsbury* (1840) 4 My & Gv, 672

Indeed, during this period - if the father did appoint the children's mother as one of a number of legal guardians - she had no more power or say in decisions concerning the children, such as where the children should live, their education and religious upbringing etc., than any of the other guardians appointed by the father¹⁶. If the father did not appoint a guardian and the court chose, in these circumstances, to appoint the mother as guardian to her children, this was not in respect of any rights held by her as their mother but rather as a consequence of the power of the court in such circumstances to appoint and control testamentary guardians¹⁷.

State Intervention into Fathers' Rights

State intervention into the absolute power and rights held by fathers was both slow and, initially, class specific. In the period prior to the introduction of civil divorce (1857), pressure for legal changes was mounted on two levels. Firstly, from the beginnings of campaigns for

the recognition of the status of women as mothers, and secondly from an increasing concern about the court's lack of power to enforce the duty to maintain upon neglectful husbands and fathers. Indeed, Blackstone (1765) had argued that:

"...the power of the father over the child is derived from...their duty...to enable the parent the more effectively to perform his duty."

Commentaries on the Laws of England

Yet, increasingly, the total absence of power within the law to enforce that duty upon cruel and neglectful fathers received comment within the court:

"The law makes the father the guardian of his children by nature and by nurture... you may go to the King's Bench for a habeas corpus to restore the child to its father but when you have restored the child to its father can you go to the King's Bench and compel that father to subscribe even to the amount of five shillings a year for maintenance of the child?...wherever the power of the law rests with respect to the protection of children it is clear that it ought to exist somewhere; if it be not in this court, where does it exist?... The courts of law can enforce the rights of the father but they are not equal to enforcing the duties of the father..."

The Lord Chancellor in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1

It has been argued that the fundamental reason why the courts were not in fact equal to the task of enforcing the duty to maintain upon fathers is to be found in the low social significance of children during this period (Pinchbeck & Hewitt 1973). It is argued that children had never been of much account in England during this period; too many died before reaching maturity, and those who survived were hurried into the ranks of adult society. While this explanation is clearly applicable in relation to the timing of state intervention and provision for

certain classes of children (i.e. those abandoned by their parents - the vagabond and delinquent child), but in relation to the lack of adequate provision for the child who suffered within the family, this explanation is insufficient. Moreover, if one examines the debates and legal provisions which followed nineteenth century campaigns to achieve a legal remedy for women and children in these circumstances, those debates and discussions reveal a rather different rationale, which operated both on the provision of custody legislation and maintenance provision. It is to those debates and the recurrent focus upon 'marriage' that I now turn.

Mothers' Rights?

Although earlier case law in the Chancery Courts had illustrated both reluctance and the inability of the court to interfere in the common law rights of fathers, public debate over the issue of mothers' total lack of rights was prompted by two somewhat famous custody disputes. In both cases, of course, prominence was undoubtedly due to the stigma attached to domestic disputes in aristocratic families, but in the second case particularly, the notoriety of the parents involved gave rise to much publicity.

In the first case (brought under habeas corpus proceedings) the court ordered a mother (Mrs Greenhill) to hand over three daughters, all under the age of six, to their father. The father, who had been living in adultery with his mistress, claimed custody of his children, arguing that his wife had no means of supporting the children and, as their legal guardian, he - as their father - had full rights to their custody. He proposed therefore to hand them over to his own mother to be brought up¹⁸. Mrs Greenhill had refused to hand over the children; however, the court argued:

"...she had by her conduct taken them out of his custody...that he had a right to claim that they all be restored...the fact of a father having formed an improper connection is not of itself sufficient reason for separating his children from him... The right is with the father and must take effect."

R v Greenhill (1836) 4 AD & E, 928

The second case which raised substantial public debate was that of Caroline Norton who left her husband taking their three children. Her husband later seized the children, took them to Scotland, and refused her access to them. Caroline Norton began a determined crusade for legal reform on the question of 'rights' over children. As a married woman during this period, she had no legal status independent of her husband; she had no rights to maintenance from him; she could not herself make contracts nor, following her separation, could she retain any earnings she made if her husband chose to claim them. Even so, she did have some major advantages over some of the mothers who had attempted to question the common law rights of fathers. She was a popular society hostess, and was well-known in her own right as a successful journalist and author. As a prominent member of the aristocracy, her pamphlets and letters which documented the powerlessness of mothers in the English courts¹⁹ did find some sympathy within Parliament, and a Private Member's Bill was introduced on her behalf. It is undoubtedly the case that Caroline Norton's friendship with Lord Melbourne (Ackland 1948) and her personal influence with other members of Parliament made the Bill possible. Norton's particular crusade was born of her anxiety and frustration at being deprived of any relationship or communication with her children. She did not mount an overtly feminist campaign attacking the patriarchal common law rights of fathers and husbands. Instead she relied upon her personal grief and anger expressed through her literary talents. Her crusade then was primarily a moral issue, resting upon her innocence of matrimonial offence and the symbolism of motherhood. Indeed, Norton was probably one of the first women to draw upon an emerging ideology of motherhood.

The Private Member's Bill introduced into the House of Commons by Sergeant Talfourd (who had represented Mr Greenhill²⁰) was the first of two attempts to introduce reforms to fathers' common law rights during the 1830s. The first Bill proposed that, in a case of separation, a wife - whether guilty or innocent of adultery - could demand access to, but not custody of, her children. The first Bill was eventually thrown out by the House of Lords. However, the general response to those initial proposals both inside and outside Parliament provided, perhaps for the first time, debate of deeply held beliefs about the nature of men's rights as husbands and fathers over wives and children as embodying the correct and essential structure of family relations during this period.

What is so striking about those early debates on the nature of the distribution of power in the family is not their historical specificity, but rather their contemporary familiarity. For example, a pamphlet written in response to both the campaigns of Caroline Norton and the proposals contained in the initial Bill, argued that the Bill would most inevitably undermine the institution of marriage itself, and that the children of a marriage were often the chief factor in maintaining it as an essential institution. The pamphlet continued:

"It is notorious that one of the strongest hindrances in all cases...to preserve wives from lightly separating from their husbands is the knowledge that they will thereby lose their maternal rights. This at all times has been a safeguard to preserve the institution of marriage."

Jahled Brenton (1838)²¹ - quoted
in Pinchbeck & Hewitt 1973, p. 374)

Opposition to the Bill then tended to argue that its proposal favoured separation between husband and wife. Much of the debate depended upon a consensus on the view that children should be used as a mechanism to control and keep women in marriages where husbands were frequently

violent and/or neglectful, and which they might otherwise have left. Indeed, in the debate following the initial Bill, no mention was made of the lack of any general legal remedy available to women and children who were suffering at the hands of vindictive and violent men, nor was attention focused on the lack of legal provision to enforce the duty to maintain children upon neglectful fathers (even though the Lord Chancellor had himself pointed out this anomaly some ten years previously)²². Rather, it appears that the whole question of the protection of children, and the duties of parents in these circumstances, received only subsidiary discussion within the context of wives and mothers who lived apart from their husbands, and who were therefore perceived as failing in their maternal duties towards their children:

"It is true that it is by no means certain that wives who live with their husbands do fulfil all their duties to their children; but it is quite certain that those who are living apart from them do not and cannot fulfil any of them."

Jahled Brenton (1838) op. cit.

The popular appeal and strength of arguments which linked the provision of legal remedies for mothers with accusations of state support for the breakdown of marriage (and therefore ultimately against the best interests of both mothers and children)²³ is clearly reflected in the modifications which appeared in the second Bill, introduced the following year. The proposals contained in this second Bill, when compared with the initial proposals, were clearly calculated to ensure no criticism on the basis of the Bill actually favouring separation of husband and wife. In essence, the second Bill did not provide certain mothers with any 'rights' as such (equivalent to those possessed by fathers as legal guardians). Instead, it provided the courts with certain powers which the court could use in relation to some categories of mothers if it so chose; a judge in Equity could, if he so wished, in a case of separation make an order allowing a mother who

was proved innocent of adultery, custody of her children until they reached the age of seven years. The judge could also, if he thought fit, allow her access to her older children. Those provisions were ultimately contained in the 1839 Custody of Infants Act²⁴.

As can be seen, that Act represented something of a compromise and was illustrative of a fundamental tension between, on the one hand, increasingly widespread recognition of the hardship, neglect and cruelty suffered by many women and children within families²⁵; and on the other, the impossibility of providing legal remedies to alleviate that hardship which did not appear to undermine the ideological and material structure of the nineteenth century family, the essence of which was seen to lie in the absolute power of husbands and fathers, and the powerlessness and dependency of wives and children.

The significance of that first piece of legislation, however, does go beyond its final content (as illustrative of the power and influence of some concerns over others). What is perhaps more important in terms of understanding the development of the law and legal practice in the field of child custody, was the mechanism through which those modifications were orchestrated. The law's focus upon children, as previously discussed, was initiated through a concern over property and the issue of rightful inheritance. 'Infancy', therefore, was constituted as a legal category only in relation to discourses about land and marriage contracts (Fitz 1979). That concern with land and property, and the corresponding protection of inheritance, in effect created a potential custodial 'space' - between the heir and her/his legal guardian. The doctrine of *parens patriae* provided justification for intervention and legitimated the removal of guardianship rights where the possibility of maltransaction might occur.

The devolution of this power upon the courts of Chancery provided the nineteenth century state with that

same lacuna - a theoretical space which it was increasingly to utilise to intervene and formally reduce the absolute powers of fathers as legal guardians of their children. So that, in response to pressures from campaigns about womens' powerlessness as mothers and increasing instances of cruelty and hardship on the part of fathers, the nineteenth century state's reply was not to routinely and unproblematically reduce that powerlessness by giving mothers equal or age-related guardianship 'rights' over children; instead, in those cases which actually reached the courts, a somewhat different and more far-reaching solution was provided. The power which men held as fathers was increasingly to be subjected to limitations - but not by introducing mothers' guardianship rights (thereby legally formalising her relationship with her children as their mother). Rather, some of the inherent power which was currently held by fathers was relocated to the court. As the Lord Chancellor stated shortly after the 1839 Custody of Infants Act: "I have now an absolute authority over children under seven years of age..." [Warde v Warde (1849) 2 Ph, 788].

It was then through this (initially limited) discretionary power allocated by the state to the courts, authorising the courts to determine who should fill that custodial 'space', that women became constituted as mothers. On the separation of husband and wife, mothers were given a limited right to ask the court to consider their request to be allowed to care for their children. The decision as to whether to grant that request lay entirely with the newly-acquired discretionary power of the Courts of Chancery.

Those beginnings, then, of a shift of power within certain privileged sections of the nineteenth century family are not therefore simply to be conceived in terms of a gradual 'swing of the pendulum' - from fathers to mothers. But rather, mark the beginnings of a specific form of state intervention into the family. This form of

intervention is complex, it was not simply informed by disputes between fathers and mothers and a growing concern with the lack of rights of mothers. Firstly, intervention was of course class specific. But secondly, the content of legal intervention (initially through the Guardianship Acts and later through divorce legislation) revealed a further concern. Clearly there was increased recognition of the need to provide protective legislation for certain women and children. However, that recognition existed alongside a further more clearly defined objective: that such protection as was conceded to women and children should not appear to undermine the institution of the family. Separation from husbands and fathers must not be a viable option for mothers except in the most extreme and severe circumstances. Thus, the development of policy in this field (both in terms of law and legal practices) is informed by this consideration and it is ultimately a central theme in understanding the legal construction of motherhood during the latter part of the nineteenth century. The final part of this chapter is therefore concerned with the emergence and development of that theme through both divorce law and Guardianship jurisdictions.

Divorce Law and Child Custody

The introduction of civil divorce in 1857 conferred further discretionary powers on the courts in relation to the children of divorcing parents. Under the Matrimonial Causes Act of that year, the courts were authorised to:

"...make such provision in the final decree as it may deem just and proper with respect to custody maintenance and education of the children...and may if it shall think fit direct proper proceedings to be taken for placing such children under the protection of the court of Chancery..."

s.35 Matrimonial Causes Act 1857
(emphasis added)

Formally, this section did give the courts extensive discretionary powers to intervene in the common law rights of all fathers involved in divorce proceedings, and indeed that section was interpreted by the courts as granting a wider jurisdiction over children than had previously been possible in either Equity or common law²⁶. Even so, this did not necessarily improve the position of many women and children, primarily because the exercise of that discretionary power was mediated through an assessment of the mother's matrimonial behaviour. A single act of adultery on the part of a mother not only afforded her husband the opportunity of divorcing her²⁷, but in addition it also effectively removed her right to apply to the court for exercise of its discretionary power over children:

"It will probably have a salutary effect on the interests of public policy if it should be known that a woman found guilty of adultery will forfeit so far as this court is concerned all rights to the custody of or access to her children."

Seddon v Seddon & Doyle (1862)
2 Sw & Tr. 642

Moreover, not only did a single act of adultery on the part of the wife mean the loss of her children and any right to even see them, it also meant the loss of any rights to maintenance. So that in practice, the court's application of this extended discretionary power had differing effects for the children of the upper classes depending upon the guilt or innocence of their mothers.

In the Chancery Courts applications under the Custody of Infants Act continued to bar petitions by wives found guilty of adultery until 1873²⁸. A Bill of that year had also sought to make binding those voluntary separation agreements in which husbands agreed to mothers' custody of their children. However, while provision was made in a Custody of Infants Act of that year which allowed for the legal recognition of such agreements, verification of those agreements was made subject to the discretionary

powers of the courts. So that, it was ultimately the court which decided whether or not husbands should be bound by their earlier undertaking²⁹.

In practice, the exercise of this further discretionary power showed the courts' willingness to return children to fathers who changed their minds, despite the existence of a legal deed of separation. For example, in the Besant case, Mrs Besant's daughter was returned to her husband on the grounds of Mrs Besant's views on religion and contraception (she was an atheist and promoted birth control for women³⁰). The court argued that the child was being returned to her father "otherwise the child might not be brought up in a father's [religious] belief which he had a right to demand"³¹. The court here maintained that it had a clear duty to the Ward to prevent her from exposure to the risk of being brought up: "in opposition to the views of mankind generally of what is morally decent, womanly, and proper" (in Besant (1879) 11 Ch D 508 C.A.).

Moreover, there continued to be resistance within the courts to afford some wives the protection they required as wives (that is, the right to live separately from husbands) without subjecting them to uncertainty as to the consequences for their role as mothers. For example, following the 1839 Custody of Infants Act, it was still argued:

"...it does not follow that because a husband's conduct is such as to make his wife unhappy that he is therefore to be deprived of the custody of his children. To justify such an interference with the father's rights, his conduct must appear to be of such a nature as to be likely to contaminate and corrupt the morals of his children."

In Re Spense (1847) 2 Ph. 247

The position of women-as-wives, and women-as-mothers then still presented the courts with what was

felt to be a dilemma. A central objective in the arguments and debates of the 1830s had been for provisions which would enable married women to assert their limited rights as wives to gain protection from husbands, without being restrained by fear of separation from their children. The courts, however, initially continued to adopt the criteria applied prior to the introduction of the 1839 Act. Indeed the criteria applied above in *Re Spense* was precisely that on which the court had already shown an albeit limited willingness to intervene in fathers' common law rights in the early part of the nineteenth century³². Even though the 'intention' underlying the provisions of the 1839 Act were later laid out more clearly, for example it was stated in 1849:

"...the object of the Act...was to protect mothers from the tyranny of husbands who ill-used them..she was [previously] precluded from seeking justice from her husband by the terror of that power which the law gave him of taking her children from her. That was felt to be so great a hardship and injustice that Parliament thought the mother ought to have the protection of the law with respect to her children...and that she should be at liberty to assert her rights as a wife without risk of any injury being done to her feelings as a mother."

The Lord Chancellor in *Warde v Warde*
(1849) 2 Ph. 788

Mothers, then, during this period continued to be excluded as custodial parents except in those situations where she was successful in establishing exceptional and grave misconduct on the part of her husband. This was because neither the 1839 Custody of Infants Act, nor the 1873 Custody of Infants Act gave mothers any general rights as legal guardians of their children. Indeed, as discussed earlier, even following the death of her husband, mothers did not necessarily gain any increased powers - this depended on whether her husband had chosen to appoint her as a testamentary guardian. And even in these circumstances she had no more power than any other guardian so appointed, and the task of all guardians appointed by the

father to act after his death was simply to carry out his wishes.

During the 1880s, attempts were made to limit the rights of fathers to appoint guardians with superior rights to those of widowed mothers. A Private Member's Bill proposed to overcome the problems of mothers excluded in this way by providing that, during marriage, both parents should be joint guardians of their children³³. On the death of either parent, the surviving parent would be the child's legal guardian. Where parents separated, it was proposed that questions of custody or religious education should be decided by the court in the exercise of its discretion. However, the proposal to introduce joint guardianship over children within marriage raised similar objections to those voiced during the debates over the initial Custody of Infants Bill introduced in 1838. Opposition, both inside and outside Parliament, focused upon the issue of the necessity of unequal power over children within the family, and the dangers envisaged by 'divided power'. In Parliament, for example, it was argued:

"Nothing could be more injurious than divided guardianship...[this] bill would introduce discord between husband and wife, it would place women in a position of equality with men which they did not by their nature possess."

Parliamentary Debate H.L. Ap 21
(1885) Vol. 297,p.298

Strong opposition finally resulted in the loss of that Bill. However, a further Bill did reach the Statute books the following year³⁴. That Act again clearly reflected an attempt to reconcile some of the major criticisms of the law as it stood in relation to the powerlessness of mothers but, at the same time, illustrated the ultimate strength of opposition to remedies which proposed to increase the legal power of wives within marriage. The notion that divided power within the family represented a threat to its stability and durability was successful in getting proposals for joint guardianship dropped from the final Bill.

Mothers were not to be legal guardians of their children while fathers survived. However, the Guardianship of Infants Act of 1886 did concede some limited rights to mothers which they had not previously held.

Firstly, the Act provided that a mother could only become the legal guardian of her children on the death of her husband³⁵. She was then to act alone, or if the father had appointed other guardians, then jointly with them. If the father had not appointed any guardians, then the court was here given jurisdiction to appoint a guardian to act with the mother³⁶. The 'gain' here, then, for mothers was that they no longer had to rely on husbands' favour or goodwill to make them guardians of their children after his death. However, having acquired guardianship rights on the death of a father, a mother still had no more power and authority over her children than other guardians appointed to act jointly with her. That position is made clear under Section 3(2) of the 1886 Act, which dealt with mothers' rights to appoint guardians to act after her death. That Section provided:

"The mother of any infant may by deed or will provisionally nominate some fit person or persons to act as guardians...after her death jointly with the father...and the court after her death if it can be shown to the satisfaction of the court that the father is for some reason unfit to be the sole guardian of his children, may confirm this appointment."

s.3(2) Guardianship of Infants Act 1886.

So mothers could in fact simply nominate a guardian(s) to act while fathers were still alive. The nomination was only to operate provisionally. Guardians appointed by the mother then under these provisions did not become guardians by the mere act of appointment (as in the case of guardians appointed by the father). Instead, the appointment must be confirmed by the court, and, until that time, it had no binding effect. Moreover, the court

would only confirm a mother's appointment if it was convinced that for some grave reason the father was unfitted to be the sole guardian of their children.

The fundamental question regarding womens' powerlessness as mothers, both in and outside of marriage and on the death of fathers, was again viewed as an extremist proposition. The preference was for a solution which was in accordance with the general direction in which the settlement of disputes between parents was now most clearly moving. The legal solution was to increase the court's jurisdiction to capacity in relation to those disputes over the custody of children which came before it. The 1886 Act formally gave the courts full jurisdiction to override completely the common law rights of fathers in relation to the custody of his children:

"The courts may, upon the application of the mother of any infant...make such order as it may think fit regarding the custody of such infant and the right of access...of either parent having regard to the welfare of the infant, and to the conduct of the parents and to the wishes as well of the mother as of the father..."

s.5 Guardianship of Infants Act 1886

This Act completed the formal development of the court's discretionary powers over those children who came before it under Guardianship proceedings. There are several important factors regarding the formulation of this Section in the Act and its subsequent application in the courts, and I will shortly turn to the significance of these for mothers generally. However, in terms of the general provisions of this Act, for those who had campaigned for a complete reversal of the common law rights of fathers, the provisions here were indeed disappointing. The Act left untouched the rights of fathers within marriage as sole legal guardians. Fathers therefore had absolute rights to determine where children lived, their education and religious upbringing; he retained the power to consent to travel, to medical attention, and to their marriage whilst they were minors. He continued in his

capacity as sole guardian to have charge of any real estate due to the infant and could continue to receive and dispose of rents and profits from those estates during the child's infancy. Even following the 1886 Act a widowed mother had not any more rights than before to have her children brought up in a religion different from that of her husband unless some very exceptional reason would persuade the court to grant her such a 'privilege' (Reiss 1934). Indeed, the position prior to the 1886 Act was stated by Lord Justice James in 1871:

"The rule of the court is, that the court or any persons who have the guardianship of a child after the father's death should have a sacred regard to the religion of the father in dealing with the child."

Hawkesworth v Hawkesworth (1871)
Law. Rep. 6 Ch. 539

And this rule applied even when the guardian appointed by the father was the children's mother. So that, a widowed mother's powers in these circumstances were exactly the same as any other guardian appointed by the father - simply to carry out his wishes. This rule was not, in fact, altered by the provisions of the 1886 Act on the appointment of testamentary guardians³⁷. Moreover, it was not necessary for the father to clearly express any wish on the subject of the religious education of his children. If he died intestate, his wishes were either inferred by the courts from his conduct or, in the absence of evidence to the contrary, it would be assumed that he would have wished the children to be brought up in his own religion³⁸. So that, despite limited rights to become her children's legal guardian on the death of her husband, a widow could still find herself compelled to bring up her children in a religion she abhorred. If, for example, during his lifetime he had contracted that some of the children be brought up in a different religion from his own (this arrangement was not infrequent in cases of marriages between a member of the Church of England and a member of the Church of Rome) that contract was non-

enforceable following his death³⁹. This position frequently led to cases where relatives of a dead father contested a mother's intention to continue to raise the children in a religion different from the dead father⁴⁰.

The law then, over this period, offered a very limited and controlled protection to aspects of mothers' relationships with their children. In relation to her ability to get a divorce, for example, the grounds remained unequal (a wife continued to have to prove her husband guilty of adultery coupled with incest, or bigamy or rape, or bestiality, or adultery plus cruelty). Even if this was the case, she had to have sufficient personal means to enable her to take her case before the divorce court which, during this period, only sat in London. So that, not only must she have had an extremely good chance of succeeding in her application, she also required a substantial amount of money. Although the court could in theory make an order for maintenance to the innocent wife who succeeded in her application, in practice clearly the court's powers were inadequate in cases where a husband had no property on which the payment of gross or annual sums could be secured.

A re-examination of law and legal practices in relation to the question of child custody and the demise of absolute father right in the nineteenth century reveals the complexity of the law in this field. But that examination also reveals that it would be inaccurate to portray that development simply in terms of changing 'rights'. Rather, we should view that period as one in which both the state and the courts can clearly be shown to have been equally, and indeed at times more concerned with preserving and sustaining a patriarchal family form than with the powerlessness of women (both as wives and mothers) within marriage. To describe that period in legal history as simply the "swing of the pendulum" (Graveson & Crane 1957⁴⁰) conceals more than it reveals. Indeed, neither the new Guardianship Acts nor the new

divorce laws, in practice, offered any protection to the vast majority of working class wives and mothers. There was also, throughout the latter part of the nineteenth century, increased comment on the high incidence of suffering of wives at the hands of cruel and neglectful husbands, for example, it was stated:

"No-one would read the public journals without being constanctly struck with horror and amazement at the numerous reports of cases of brutal and cruel assaults perpetrated upon the weaker sex by men who one blushed to think were Englishmen, and yet were capable of such atrocious acts."

(Under Secretary of the Home Office
142 Official Report, 3rd Series,
Col: 409-410)

And while it was popularly believed that such actions were primarily located in working class homes, nevertheless the 1878 Matrimonial Causes Bill already before the House of Commons contained no reference to wife abuse, and no provisions to deal with that situation. The choice, then, for working class wives beaten by their husbands was stark. Such a wife could take the risk of bringing a case in the Magistrates' Court (under criminal law⁴¹). If she was able to convince the magistrates of the danger and extent of her husband's violence, he might be sent to prison. In those circumstances, she and her children would probably be sent to the workhouse for want of support during his imprisonment. However, if a working class husband simply refused to support his wife and children, the law offered his dependents no direct protection, nor method of enforcing the 'duty' of husbands, to maintain. In these circumstances, her only recourse was again the workhouse.

Whilst she and her children resided in the workhouse, and thereby became chargeable on the parish (and only while they remained chargeable), was it possible to take legal action against her husband for their support. However, the right to take legal action against such a husband was not vested in his wife or children as legal dependents

but rather, in the workhouse authorities under poor law provision⁴². Here, the Poor Law authorities would take out a civil action against such a husband to enforce him to maintain his wife and children whilst they remained 'chargeable'. The statutory aim here, however, had been to protect the financial interests of ratepayers, rather than the physical well-being of the children and/or wife (Manchester 1980; Reiss 1934; Pinchbeck & Hewitt 1973).

A clause was finally included in the 1878 Matrimonial Causes Bill⁴³ (primarily as a result of the work of Frances Power Cobbe) which provided that, if a wife did succeed in getting her husband convicted of aggravated assault and, if she could satisfy the court that her future safety was at risk, then the court could order that she should no longer be legally bound to cohabit with him. In addition, the magistrates could also order such a husband to pay maintenance to his wife (though of course this in no way ensured her support), and the court could, in these circumstances, also make an order for the custody of their children.

During this period there were, however, several discrepancies between the courts in their treatment of mothers and children. For example, although this later Act did allow magistrates to make order for the custody of children of the marriage, such orders were only applicable to those children who were under ten years of age⁴⁴. This was despite the fact that, in the higher courts under divorce proceedings, the courts had now complete jurisdiction over all minor children of the marriage. And, under Guardianship Acts, the higher court held jurisdiction over all children under sixteen years⁴⁵.

In addition, the 1878 Act also introduced into the Magistrates Court a principle of moral evaluation of womens' sexual behaviour. A wife could not therefore, under this Act, ask the Magistrates Court to consider her application for either maintenance or custody of their children if she was found guilty of adultery - even though this bar to petition had been removed from applications to the higher courts (under Guardianship proceedings) in 1873⁴⁶. However, although this statutory bar to petition by adulterous wives in the Magistrates Courts formally separated mothers and children of different classes in terms of the legal consequences of notions of morality

and sexual behaviour, in practice such conceptions had similar consequences for mothers and children of all social classes well into the twentieth century.

Fathers, then, retained their position of ultimate power within marriage as their children's sole legal guardian. By extreme behaviour they could, towards the latter part of the nineteenth century, forfeit those rights. In such circumstances a mother might be allowed to approach the courts and ask for the custody of her children. Here a moral evaluation was made of her behaviour as a wife. If she was innocent of adultery, or sufficiently 'deserving', she may be awarded custody. If, however, she failed to convince the court of the extreme nature of her husband's behaviour (e.g. adultery was not of itself sufficient grounds to cease to cohabit) she not only was unable to leave but, in addition, she had no rights either to maintenance, nor to custody of any children of the marriage. The primary focus of the law over this period was on sustaining and perpetuating a specific family form in which power was vested in men as heads of households. Women's claims as mothers in all types of proceedings between husband and wife relied upon notions of 'forfeit and innocence'. Women therefore acquired no fundamental 'rights' over their children analogous for example to those possessed by fathers which were based upon kinship, sustained through legal 'rights' and protected by notions of bourgeois individualism during this period.

Later attempts to provide legislation for the magistrates court⁴⁷ again confronted the dichotomy between, on the one hand meeting a demand for the protection and maintenance of individual family members (i.e. women and children), and on the other taking punitive steps against husbands and fathers which it was felt would necessarily undermine the stability, and probably facilitate the break-up of the family. This is not, however, to say that notions of children's welfare or interests were absent from case law during the mid-nineteenth century, but

rather that the emergence of such notions did not coincide with any clear trend in the courts away from prioritising fathers' common law rights. Indeed, in instances where the possibility of a contradiction or conflict of interests might arise, the court's position was clear:

"It is not for the benefit of the infant as conceived by the court, but it must be the benefit of the infant having regard to the natural law which points out that the father knows better as a rule what is best for his children."

Bowan, L.J. in *Re Agar-Ellis*
(1883) 24 Ch D

"It is not in our power to go into the question as to what we think is best for the infant. [This] father has not forfeited his right to exercise his duties as a father and we ought not to interfere... this court holds this principle - that when by birth a child is subject to a father it is for the general interests of families and for the general interests of children, and really for the general interests of the particular infant that the court should not except in extreme cases interfere with the discretion of the father."

Cotton, L.J., *ibid.*

However, the introduction of 'infant welfare' into statute law in 1886 as a principle for the Court to consider in applications under the Guardianship Act⁴⁸ did mark the beginnings of a shift within legal discourse on the question of children involved in custody disputes between parents. For example, during the last decade of the nineteenth century in the Court of Appeal, it was argued:

"...the welfare of the child is not to be measured by money alone nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor will ties of affection be discharged."

Lindley L.J. in Re McGrath (Infants)
1892 1 Ch

Clearly, the courts' approach here has moved some considerable distance from its position at the beginning of the nineteenth century (when it was occupied with infancy as a category only as it was constituted through land law and inheritance rights) and, from its concern during the mid-nineteenth century, (with protecting and enforcing fathers' rights). There has not simply been a broadening out of the categories of children who became the focus of a legal consideration. There is, in addition, a fundamental change in relation to perceptions of what constitutes 'infancy' towards a consideration of what the important social components of that role might be. Infancy as a legal category was undergoing a qualitative change. Within law and legal practice this was articulated through a gradual transfer of the terms in which questions concerning custody were fought out - from an arena in which the court simply had to establish rightful possession of the "body of the infant" (rightful ownership) - to a quite different focus: a focus upon the child itself through a consideration of its 'welfare'. Welfarism ultimately provided the mechanism through which 'childhood' became constituted in legal discourses. And that focus upon children brought about a substantial shift in the dominant ideology of the family and a reconstruction of the role of mothers, and thus the emergence of an ideology of motherhood. It is to those two factors I will now turn.

NOTES AND REFERENCES

1. The Tenures Abolition Act 1660 discharged all "tenants by homage, escuage, voyages royal and wardships incident of knights service". The Act effectively ended all military tenure, removed infants from the wardship of feudal lords but at the same time extended the infant's dependency on fathers until twenty-one years. Unmarried infants were subject to the guardianship of fathers even after his death through the new provision of testamentary guardian. A testamentary guardian "shall and may take into his or their custody to the use of such child or children the profits of all land tenements and hereditaments of such child or children, and also the custody, tuition and management of the goods chattels and personal effects of such child until their respective age of one and twenty."
2. Or if in fact the power devolved from the courts of wards (Manchester 1980).
3. By this period the procedure for obtaining a full divorce was threefold: Firstly by obtaining a judgment in the common law courts against the adulterer (wives having to prove aggravated adultery, that is, adultery coupled with incest, cruelty, bigamy) and obtaining damages for 'criminal conversation'. Secondly, proceeding to the ecclesiastical courts for a divorce 'a mensa et thoro' (in effect a legal separation which allowed husband/wife to refuse to continue to cohabit but did not allow spouses to remarry). Thirdly, to remarry, a spouse had then to petition Parliament by a private member's bill for a divorce.
4. See, for example, the comments of Bacon, L.J. in *Re Plumley* (1882) 47 LT (N.S.) 232; Bowen, L.J. in *Agar Ellis* (1883) 24 Ch. D. page 337.
5. *Emery v Emery*, 1 Y & J. 501 (English Reports 148; 769). *Houlston v Smith*, 3 Bing, 127 (English Reports 130; 462). *Horwood v Heffer*, 3 Taunt, 421 (English Reports 128; 167).
6. *Re Pulbrooke* (1847) 11 Jur. 185.
7. *R v De Manneville* (1804) 5 East 22.
8. *Ex Parte Skinner* (1824) 9 Moore C.P. 278.
9. *Smith v Smith* (1745) 3 Atk 304; *Blissetts Case* (1774) Lofft 789.
10. *Re Pulbrooke* (1847) at 6; *R v De Manneville* (1804) at 7.

11. Whitfield v Hales (1806) 12 Ves 492 and, in ex parte Warner (1792) 4 Bro 101 where refusal to maintain was coupled with desertion; Ex parte Bailey (1828) 6 Dowl 311, where the father was a felon at the hulks under sentence of transportation.
12. Wellesley v Beaufort (1828) 2Russ 1; Lyons & Blenkin (1821) Jac 245.
13. For example, Cruetze & Hunter (1790) 2 Cox 242.
14. Lord St. John v Lady St. John (1803) 11 Ves, 526.
Westmeath v Westmeath (1821) Jac, 264.
Vansittart v Vansittart (1858) 2 De G & J, 249.
Hope v Hope (1857) 8 De GM & G, 731.
Jump v Jump (1883) 8 P.D.
15. Ex parte Edwards (1747) E ALK 519. Eyre v Countess of Shaftesbury (1725) 2 P. Wms 102.
16. Campbell v Mackay (1837) 2 My & Cr. 31.
17. See the comments of Cottenham (L.J.) in Talbot v Earl of Shrewsbury (1840) 4 My & GV 683.
18. R v Greenhill (1836) 4 AD & E 921.
19. Caroline Norton wrote and published (1837) two pamphlets:
 - i) "The Natural Claims of a Mother to the Custody of her Child as Affected by the Common Law Rights of the Father and Illustrated by Cases of Peculiar Hardship", and
 - ii) "The Separation of the Mother and Child by the law of Custody of Infants Considered."

Plus: "English Law for Women in the Nineteenth Century" (1854). She also wrote letters to the Queen and the Lord Chancellor, see Norton 1855.
20. Talfourd had been counsel for the husband in R v Greenhill (1836). It is argued (Pinchbeck & Hewitt 1973) that it was as a consequence of that case that Talfourd was determined to reform the law in relation to the position of mothers. Certainly the subsequent Act (1839 Custody of Infants Act) is frequently referred to as 'Talfourd's Act'.
21. Jahled Brenton (1838): "A Brief Exposure of the Most Immoral and Dangerous Tendency of a Bill affecting the Rights of Parents now under Considerations of Parliament, or, Summary of Reasons why this Bill entitled 'Custody of Infants Bill' should not be allowed to become the Law of the Land".quoted in Pinchbeck & Hewitt, 1973 (p. 374).
22. In Wellesley v Duke of Beaufort, (1827) 2 Russ 1.

23. For example, in response to the first Bill it was argued in Parliament that "the Bill if passed in its present form would reduce the obligations of marriage and would thereby prove detrimental to the best interests of married women and their offspring." Hansard 3rd Series 1839 Vol. XLVIII Col. 159.
24. The Custody of Infants Act 1839 [2 & 3 Vict. C. 54].
25. In debating Talfourds Bill in the House of Lords for example, Lord Durham, a High Court judge, stated: "I believe there was not one judge who did not feel ashamed of the state of the law and that it was such as to render it odious in the eyes of the country." (quoted in Pinchbeck & Hewitt, 1973, p.371 - where they give further evidence of judicial disquite on existing law.)
26. See for example the comments of Sir Creswell Creswell in *Marsh v Marsh* (1858) 1 Sw. & Tr 313 (Eng. Rep. 164; 144); *Symington v Symington* (1875) 2 Sc. & Dir. 415 (H.L.).
27. The Matrimonial Causes Act 1857 provided that a husband could divorce his wife simply on the single ground of her adultery. A wife, however, had to prove aggravated adultery [see Note 3 above].
28. Custody of Infants Act 1873. This Act also raised the age limit to which a mother might retain the care of her children from seven years to sixteen years. A father's formal jurisdiction over his children continued until they were twenty-one. In practice, however, under habeas corpus proceedings, when a minor was old enough to state its own wishes - 14 for boys, 16 for girls, the courts did sometimes refuse to do more than free the child from restraint. However, see *R v Howes* (1860) 3 El & El 332, where the demands of a father for the return of his daughter who was 15½ years and living with her mother, were met by the court, despite her opposition.
29. S.2 Custody of Infants Act 1873.
30. *In Re Besant* (1879) 11 Ch D 508 C.A. Here there was no doubt that Mrs Besant and her husband, the Rev. Frank Besant, had agreed in a deed of separation that she should have custody of their daughter. Subsequently, Mrs Besant wrote and published 'atheistic' texts. A judge found "Fruits of Philosophy" which she republished with Charles Bradlaw (c1877) in England.
31. *In Re Besant*, Ibid.
32. For example there were the grounds on which Lord Eldon had intervened in the father's common law rights in *Wellesley v Duke of Beaufort* (1827), op. cit.
33. Mr Bryce: Hansard 3rd Series, 1884, Vol: CCLXXXVI; Col. 1813.
34. The Guardianship of Infants Act 1886 (49 & 50 V. C.25).

35. s.2 provided "on the death of the father...the mother if surviving shall be the guardian of such infant either alone where no guardian has been appointed by the father or jointly with any guardian appointed by the father."
36. s.2 "...when no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is/are dead or refuse to act, the court may...appoint a guardian...to act jointly with the mother."
37. The position is spelled out by North L.J. in *Re McGrath* (1892) 2 Ch p.503.
38. *Talbot v Shrewsbury* (1890) 4 My & Cr 672;
Hawkesworth v Hawkesworth (1871) 6 Ch. App. 539.
39. For example, in *Re Agar-Ellis* (1878) 10 Ch. p.
40. Graveson & Crane (eds) (1957) A Century of Family Law, London, Sweet & Maxwell.
41. The Act for the Better Prevention and Punishment of Aggravated Assault upon Women and Children 1853.
42. Poor Law Amendment Act 1834 (4 & 5 Wm. IV. C. 76). The workhouse authorities could also prosecute a husband for failure and neglect to maintain his wife under the Vagrancy Act 1824. Neither Act, however, was aimed at protecting wives and children but rather at reclaiming public expenditure on a 'private' issue.
43. Largely through the campaigns of feminist Frances Power Cobbe - see for example "Wife Torture in England" in Contemporary Review (1873).
44. Whilst it is somewhat difficult to trace the precise reason for this age bar, it is quite likely to have been related to the fact that many working class children were working by ten years of age and fathers as sole legal guardians had rights to acquire the earnings of their children. Thus, to deprive a father of custody of an older child was also to deprive him of a potential income.
45. s.1 Custody of Infants Act 1873.
46. s.1 Custody of Infants Act 1873.
47. The Married Women (Maintenance in Case of Desertion) Act 1886, and the Summary Jurisdiction (Married Women) Act of 1895. This latter Act consolidated and extended the 1878 Matrimonial Causes Act and the 1886 Married Women (Maintenance in Case of Desertion) Act.
48. s.5 Guardianship of Infants Act 1886.

CHAPTER 2

THE SOCIAL CONSTRUCTION OF CHILDHOOD AND THE
PATRIARCHAL FAMILY

The abundance of controlling, regulating and protective legislation directed at different categories of children over the latter part of the nineteenth century¹ is clearly illustrative not simply of changing attitudes towards children in the courts (and a concern to reorganise many aspects of their lives) but also of enormous economic and political transformations within English society under competitive capitalism. There has been substantial work on this era in the development of the British economy and the reproduction of capital (Holloway & Picciotto 1978). In this chapter, however, I am primarily concerned with aspects of that reproduction of labour which had specific consequences for discourses concerning children, and the subsequent repercussions which that focus had for aspects of power and gender within the patriarchal family. Thus I will focus on the child rescue and infant protectionist movements which developed over the latter half of the nineteenth century. I will examine how those campaigns progressed from a fairly narrow concern with the (apparently) parentless infant to encapsulate all categories of children, that is to say, children both within and outside of the family.

The focus upon children, such as it was over the early part of the nineteenth century, was directed towards the poverty-stricken, the abandoned, the vagrant, the illegitimate and delinquent child - the (for all intents and purposes) parentless child. The problem of delinquency amongst children was viewed as inextricable from that of parental abandonment and thereby, destitution². (Pinchbeck & Hewitt 1973; Manchester 1980). Philanthropic and benevolent agencies existed alongside the controlling and regulating role of the nineteenth century state. The purpose here however, is not to attempt to separate out those different activities (although clearly there

were important and substantially different means and ends) but rather to locate some of the results of those activities upon the lives of children over this period. Central to those improvements, then, was the notion of the child 'at risk'. Initially it was the parentless working class child, who was the focus of attention. Philanthropists (e.g. Peter Bedford, the famous Spitalfields philanthropist, and the Quakers, Elizabeth Fry and James and Samuel Gurney, and Mary Carpenter) attempted to contain, train and educate such categories of children. One motive being to redirect such children away from becoming part of the criminal classes once they left the workhouse. Towards the end of the nineteenth century, rescue organisations such as Dr. Barnardo's Homes played a considerable role in gaining state support through legislation to protect the neglected and abandoned child who was, nevertheless, not necessarily parentless³. Such organisations were instrumental in gaining legislation which sought to limit the rights of parents to reclaim children previously abandoned to the care of these institutions. An Act of 1891 gave the courts jurisdiction to completely override 'parental' rights and refuse an application for the return of the child in these circumstances:

"...if the court is of the opinion that the parent has abandoned or neglected the child or that he has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the child..."

s.1 Custody of Children Act 1891

A further sphere where children were increasingly deemed to be 'at risk' was within the labour market, through economic exploitation. The exploitation of child labour during the nineteenth century is well documented (J.H. Plumb 1950; Pinchbeck & Hewitt 1973; Humphries 1982), as is the essential contribution this labour provided towards the income of the working class family (Pinchbeck 1930; Pinchbeck & Hewitt 1973). Various investigations and Commissions into the hours, conditions and health of child labour resulted in the gradual removal of children

from employment in fields, factories, mines, mills, workshops and cottage industries throughout the nineteenth century⁴. Thus, conceptions of the category of children 'at risk' was extended to include economic exploitation, both by employers and by parents themselves. In addition, legislation seeking to implement compulsory education of young children also attempted to restrict their employment in the labour market⁵. So that, the circumstances in which 'parental rights' could be set aside gradually increased as the category of children encompassed in the 'at risk' classification expanded.

The second set of circumstances which were central to the reconstruction of childhood over this period were those generated by fears over high infant mortality rates, and falling birth rates (Davin 1978). Fears of a general population decline found expression in a barrage of propaganda on the importance of child health⁶ (Davin 1978; Cowan 1982). Economic and political analyses of the falling birth rate focused on both home and foreign policy in terms of assessing the consequences of the fall for new developments in industrial capitalism in Britain. For example, in relation to foreign policy, notions of imperialist expansion focused on both the quality and the quantity of the British race as a resource from which to populate the white dominions⁷. Children, then, became a question of national importance; they were "the capital of a country, and upon them depended the future of the country and the empire"⁸. However, whatever the rhetoric, the reality of the conditions of health of the vast majority of working class children was a growing national problem. Not only were general standards of physique very poor (and a workforce with ill-health meant poor profits for industry) but in addition, problems over public health and hygiene had reached epidemic proportions (Cowan 1982; Davin 1978).

That concern over the quality and quantity of Britain's children, however, dramatically increased a focus

upon children within the family. But not only was the child the focus of attention (its poor physical condition and low rate of survival). In addition it was argued that, if children's chances of reaching adulthood were slim, then those responsible for child care must be to blame, that is to say, mothers were the root of the problem: "...in dealing with infant mortality, it is the mothers we must go for, not the babies..." (Kanthack, Preservation of Infant Life, p.28. Quoted in Davin 1978). What followed from this fear for the 'population' was a medicalization of childcare and childrearing practices (Davin 1978; Donzelot 1980). Fears for both the quality and quantity of the nation's children focused attention upon mothers, both to blame, but also as a mechanism through which to disseminate new scientific methods of childcare.

The Reconstruction of Motherhood

The subsequent reconstruction of women's role in the family over this period centred upon a new craft - that of 'motherhood' - with one primary task: childrearing. The subsequent strength of that ideology of motherhood transcended class division, but it also incorporated class specific features (Davin 1978; Donzelot 1980). For working class mothers, the location of blame (for the poor physical condition of children and their poor chances of survival) at the level of individual mothers' ignorance obscured the effects upon child health of poverty and a deprived environment. It proved, however, to be an acceptable explanation for a national economic and political problem (Cowan 1982; Davin 1978). In addition, it provided the rationale for intervention into the working class family by both state and voluntary agencies. Indeed, voluntary organisations promoting public health and domestic and moral hygiene mushroomed over this period⁹. Doctors, district nurses and health visitors all asserted their superior knowledge and authority over traditional

methods of childrearing. And mother's ignorance, rather than inadequacy of conditions and resources, formed the focus of both state and voluntary attention (Davin 1978).

In relation to the focus on children of the middle and upper classes, much of the concern was racist and related to notions of the importance of 'good stock and pure breeding'. For example, eugenics propaganda directed at the upper classes incorporating fears of the perceived consequences of limiting family size (a practice already beginning in the upper classes). It was argued that in these classes, the birth rate should increase, both to provide an administrative elite for the White dominions and to prevent the nation at home from being populated by the "freely-breeding alien immigrants" (Davin 1978). It was also felt that the increased educational and employment opportunities which were opening up to women of these classes was responsible both for decisions to abstain from marriage, and to restrict the number of children they had once married. Indeed, in an attempt to discourage these practices among middle and upper class women, it was argued that intellectual development itself might impair women's reproductive capacity:

"If child-bearing women must be intellectually handicapped, then the penalty to be paid for race predominance is the subjection of women."
Karl Pearson, 1885, lecture on
The Woman Question, quoted in
Davin 1978, p.20

Increasingly during this period, women in these classes were encouraged to stay 'at home'; to the extent that this was achieved, they became visible symbols of status for their husbands' social and financial success (Davin 1978; Oakley 1974).

Clearly the economic and political context in which that preoccupation with infant mortality emerged is important. However, my focus here is not to enter into debate over the reproduction of capitalism and the reproduction of

relations of reproduction; rather, the purpose here is to document some of the central changes which converged on the lives of children during the period in such a form as to relocate, control, regulate, and not unproblematically, protect increasing aspects of their lives within the family. That primary focus on children legitimated a specific form of state intervention into the patriarchal family - especially initially the working class family. At one and the same time, mothers were blamed, but 'motherhood' was revered; high infant mortality rates were a consequence of her ignorance and inability, but scientific motherhood was to give her a new social status. Women were to be 'mothers-of-the-race'; motherhood was glorified, and elevated to a new dignity (Davin 1978). For the middle and upper class mother also, blame was not without a focus. Here, self-interest and concern for her own educational enlightenment was viewed as detrimental to the national effort to increase the birth rate in the bourgeois family. During this period in civil society, mothers were the central focus and the main point of support for all actions which were directed towards a reformation of family life. They were both the focus of attention as mothers but, in addition, it was women who were chosen as auxiliaries by both voluntary and state agencies to disseminate the new scientific knowledge¹⁰ - the medical and welfare principles of childcare.

Ideology of Motherhood and the end of the Patriarchal Family?

It has been argued (Donzelet 1980) that this 'elevation of motherhood' by domestic medicine was responsible for a 're-evaluation of power' between men and women within the family. Indeed, Donzelet (1980) argues that this shift marks the end of the patriarchal family. Certainly it made women the focus of attention (for both criticism and instruction). Motherhood became women's

central task; it became a craft in which she must be educated and trained, observed, criticised and supervised. And this surveillance of mothers brought about by an initial focus upon children certainly did relocate aspects of women's lives in terms of public attention, and as points of intervention by both state and voluntary agencies. However, in relation to questions of a substantive, re-evaluation of power within the patriarchal family structure with material consequences for women in terms of power and control both over their own lives, and the lives of their children, the picture is less clear. For example, in locating the working class mother as responsible for the weak and sickly nature of her children, she became the focal point for education and instruction. In particular this led to substantial intrusion into her life and increased control over her time (Davin 1978). The new standards of childcare which were set were, for the vast majority (given their living conditions and resources) totally unrealistic. District nurses, doctors and health visitors all asserted their new science, denigrating care by anyone other than mothers (i.e., neighbours, older children, grandmothers, etc.)

Mothers' employment in the waged economy became the focus of much criticism (Hewitt 1958). Her employment outside the home was blamed for effects upon children's health (Davin 1978). Attempts to force married women out of the waged economy through legislative means had clearly failed, but limited opportunities, and the ideological pressures brought about by the notion of motherhood as a full-time job certainly operated as a brake on married women's employment, and helped to confirm women as casual workers (Hewitt 1958). Davin (1978) also identifies that pressure as helping to create an army of women outworkers, who tried to negotiate the need for money from paid employment with the ideological pressure to be full-time mothers. To the extent that this pressure was successful in reducing women's paid employment in the labour market and thereby increased her dependency on the male

breadwinner, her subordination within the family would seem to increase with her increased sole responsibility for childrearing. Thus, increased social 'status' and prominence of mothers does not have any necessary (or indeed unproblematic) relationship with a relocation of 'power and control' in the nineteenth century family.

The question of women's problematic and contradictory status as mothers towards the end of the nineteenth century, therefore, is even more clearly demonstrated when we return to the legal status of her relationship to her children.

As I documented in Chapter 1, the changing legal position of wives as mothers cannot be described in terms of a simple and gradual increase in her legal rights and a subsequent decrease in fathers' common law rights. Rather, I documented the emergence of the third party - the state - into the management of the family. A mother's position in relation to the custody of her children on separation or divorce continued to rely on fathers forfeiting their rights by gross misbehaviour. In these circumstances, mothers acquired limited rights to ask the court when considering the breakdown of the marriage, to also consider their own position as mothers. The decision to allocate children to the care and control of mothers lay with the court in the exercise of what was, by the end of the nineteenth century, a total discretion over all children who came before it. To earn the favour of this discretion, mothers had not simply to prove a father's unfitness; she had, in addition, to convince the courts of her own moral worth. That is to say, the position from which she was judged as a mother depended upon her matrimonial behaviour as a wife; thus, it was against notions of morality and sexual behaviour deemed appropriate for a wife that she was judged as a parent.

However, in civil society from a focus on infant welfare, it was increasingly argued that children belonged

"not merely to the parents but to the community as a whole", childrearing was now a "co-operative undertaking between father, mother and state" (see Davin 1982). It might appear that against this ideological shift, women's campaigns for legal rights as mothers might fall on fertile ground. However, the focus was upon co-operation within marriage, with regard to rights within marriage at the end of the nineteenth century women had neither effective rights to maintenance nor guardian^{ship} of her children. Outside of marriage on divorce or separation she had only limited and conditional rights, and the results of her application depended entirely upon the court's evaluation of her moral behaviour as a wife.

The emphasis upon 'childhood' and hence 'motherhood' over the turn of the century certainly created a focus upon women's caring role within the family. However, an emphasis upon marriage and the family as the only legitimate site for rearing children and the demand that motherhood be a full-time occupation, in effect increased women's subordination within the family. Women's position in the labour market was effectively subordinated to her position in the home. Yet there she was neither the focus of power nor control over children and her ability to meet their needs continued to rely upon husband's goodwill and benevolence. Her position as mother, with renewed duty and responsibility, did not lead to a redefinition of formal power within the patriarchal family, she was not made an equal legal guardian of her children, fathers remained sole legal guardians.

However the campaigns of the nineteenth century for women's rights as wives and mothers had made public the vulnerability of many wives and children at the hands of

vindictive and neglectful husbands and fathers of all social classes. The sanctity of the private domain of the family had, to some extent, been broken. Domestic relations became the focus of public debate. Campaigns demonstrated a gross failure in the system of patronage and protection, duty and responsibility, which it had been claimed, flowed from the privileges and rights which the law attached to men. Increasingly, 'scientific' welfarism located mothers as a mechanism of intervention in the family. However, such intervention was intended to secure and sustain the family, rather than replace or undermine it in any way. Giving women 'rights' per se within the family was viewed as necessarily undermining the structure and stability of the institution of marriage. The law, it was asserted, must not be seen as in any way supporting the breakdown of marriage. Therefore, those severely limited rights of application to the courts which women-as-mothers did acquire towards the end of the nineteenth century were, in fact, only operable on the breakdown of marriage and the separation of husband and wife. At that point of legal adjudication, welfarist discourses therefore provided the dual mechanism through which childhood and hence motherhood became constituted in family law.

Within the family, however, the rights of husbands and fathers - their ultimate material and ideological power and control - remained unimpaired. That shift of focus, then, through the social construction of 'childhood' and the subsequent reconstruction of 'motherhood' had no necessary or radical weakening, let alone break-up of the patriarchal relations within the family over this period. And on divorce or separation patriarchal relations were only marginally diluted by law and legal practice.

NOTES AND REFERENCES

1. The period is described as "The Queen's Reign for Children" by William Clarke Hall, London, Fisher Unwin 1897. He lists 34 Statutes enacted between 1837 and 1895 for the purpose of protecting children (quoted in T.E. James Child Law, London, Sweet & Maxwell 1962).
2. Pinchbeck & Hewitt (1973) "Vagrancy & Delinquency in an Urban Setting", in, Children In English Society, Vol. II, London, Routledge & Kegan Paul.
3. The Prevention of Cruelty Act 1889, and the Poor Law Adoption Act 1889 also illustrate an emerging focus upon children at risk from their own parents. Pinchbeck and Hewitt argue (1973;358) that these Acts served to deprive "irresponsible parents of their parental rights and transferred them to the overseers to protect the welfare of such children"; the Criminal Law (Amendment) Act 1885, sought to protect children from sexual exploitation through child prostitution.
4. For example, in relation to agriculture, Pinchbeck and Hewitt cite (p.394) the Gangs Act of 1867 as stating that no child under 8 years should be employed in them. This Act also empowered local authorities to regulate the distance older children should walk to and from work (1973;394). These historians also note (p.404) that the Factory Act 1819 restricted the employment of children under 9 years in cotton mills or factories, and subsequent Factory Acts imposed penalties upon employers for the infringement, and upon parent or guardian for misrepresentation of a child's age.

A discussion of the economic exploitation of children is outlined in Evidence to the 1843 Children's Employment Commission (see Pinchbeck & Hewitt 1973;397); Jane Humhries discusses the exploitation of children in coal mines and outlines the debates around the 1842 Mines Regulation Act in "Protective Legislation the Capitalist State and the Working Class", in, Feminist Review, 1982, No.7.

5. Education Act 1876, which Pinchbeck & Hewitt argue (p.394) was more effective than the Gangs Act in preventing the exploitation of children in agriculture by making it illegal to employ any child under 10 years. The 1886 Education Act raised the limit to 13 years. Further Acts of 1893 and 1899 and 1900 established a rising minimum age.
6. As both Cowan (1982) and Davin (1978) point out, these fears were largely confirmed and indeed intensified by the Boer War (1899), where almost one-third of recruits of that year were found to be physically unfit for duty.
7. The argument was that if the British population did not increase fast enough to fill up the empty spaces of the empire, others would - the threat being not so much from indigenous populations, as rival master-races (in Germany and North America) (Davin 1978).

8. Inaugural lecture address by Earl of Beauchamp to the International Congress for the Welfare and Protection of Children 1902, quoted in Davin 1978, p.10.
9. E.g. Institute of Hygiene 1903; Infants Health Society 1904; National League for Physical Education and Improvement 1905; The Food Education Society 1908; The National League for Health, Maternity and Child Welfare 1905; Womens' League of Service for Motherhood 1910.
10. Many local authorities appointed female health visitors (e.g. to the Ladies' Health Society of Manchester and Salford), and started instruction in domestic hygiene in the 1860s. Buckingham County Council, Brighton, Birmingham, and Worcestershire followed in the 1890s. And, at the beginning of the twentieth century, the movement extended considerably (Davin 1978, p.37).
11. E. Cadbury, M.C. Matheson & G. Shann, "Womens' Work and Wages", 1906; B.M.J. 30 July 1904. Reporting on A.G.M. of the British Medical Association (quoted in Davin, 1978).

CHAPTER 3

MOTHERS' RIGHTS OR CHILDREN'S WELFARE? THE 1925
GUARDIANSHIP OF INFANTS ACT

In this chapter, I want to examine the campaign of a group of twentieth century feminists who focused upon mothers' lack of legal rights in marriage. Our general understanding of feminist campaigns during the early part of the century is usually located around the suffragettes and campaigns for votes for women and the Sex Disqualification (Removal) Act. However the 1925 Guardianship of Infants Act was also a result of the campaign of feminists for changes in the law in relation to the guardianship, custody and maintenance of children.

In the period following the First World War, the question of the role of law in the oppression of women produced different responses amongst feminists. Although few believed that obtaining the vote would provide the solution to all the disadvantages experienced by women, there were nevertheless wide differences of opinion regarding which political goals should be pursued. In relation to motherhood that debate focused largely on the issue of whether women should campaign for equal rights with fathers over children, or whether in fact women should argue for special treatment in view of their larger responsibility for children. In this chapter I want to examine the work of a group of feminists whose work might initially be viewed as generally more identifiable with the former position. The National Union of Societies for Equal Citizenship (NUSEC) was concerned to establish mothers on an equal footing with fathers in relation to rights and responsibilities over children within marriage. However the Union's campaign was not limited to achieving formal equality, it was linked to a more sophisticated argument both about the unequal nature of marriage and the role of law in sustaining that inequality. Thus feminists in NUSEC were particularly

concerned about the way in which mothers' lack of legal rights over children was in effect utilised to restrain women in marriages which they might otherwise have left.

The campaign of feminists in NUSEC between 1919 and 1925 covered several governments and eventually resulted in the 1925 Act. That Act is important in understanding the development of family law in this area for two reasons. Firstly in legal discourses that Act is identified as forming the basis of the contemporary approach to child custody disputes. This is because the Act embodies the welfare principle - the best interests of the child - as the overriding principle for the court to consider in exercising its discretion in custody disputes. (Although of course the sentiments are already clearly visible in case law). And secondly the Act is important because it is also identified as establishing equality between mothers and fathers in relation to rights over children (e.g. Pettitt 1957). However I will argue through an examination of the campaign and political struggles which surrounded the passage of the various Bills, that in fact the final Act did not establish formal equality between mothers and fathers in relation to parenthood. Indeed, I will argue that the final provisions of the Act were in fact the outcome of a specific struggle in which the focus of concern of the state was neither women's rights or children's welfare, but rather the maintenance of the patriarchal structure of the family. Moreover, I will illustrate that the justification for preserving that patriarchal structure was grounded in a material and ideological rationale. This particular rationale reduced considerations of the welfare and rights of individual family members (e.g. women and children) to questions in which the major focus of concern was what the legal structure of the family should be as a unit of consumption and distribution.

In the first section therefore I will discuss the position of feminists within NUSEC in relation to law

and motherhood, and the way in which the language and sentiments of welfarism were ultimately successfully engaged to displace the initially radical demands of NUSEC for equal parental rights for mothers. The second part of this chapter will examine the crystallization of struggles between feminists and the state in 1924 and the rationale adopted in a final rejection of feminists' demands and the substitution of a government Bill. The third section will examine the proposals contained in the government Bill in relation to custody and maintenance of children on the breakdown of marriage.

The Equality Debate and Mothers' Position Within the Family

During 1919, the National Union of Societies for Equal Citizenship began a campaign on behalf of some twenty women's organisations to change the law in relation to the guardianship custody and maintenance of children. The Union's position was for equal parental rights for mothers but it also lodged an attack upon inequalities in marriage and the way in which the law supported those inequalities. A central focus in that latter criticism was the way in which the law in effect utilised children to restrain women in intolerable marriages. Thus they argued that regardless of the provisions of the Guardianship of Infants Act (1886) many women could still only exercise their limited rights as wives at the expense of their position as mothers. Because mothers held no general rights as parents, women who were living with violent, vindictive, cruel and/or habitually drunk husbands were forced to "run the gauntlet". They could leave such husbands (if they had the means to establish a separate residence) but they could not take their children. They must then attempt to prove to the court a sufficient degree of cruelty to entitle them to a separation order. If such mothers failed in that exercise, firstly

they could not realistically return to such a husband, and secondly, they could be sued by a husband for desertion. Thus such women who failed to prove their case as abused wives were effectively homeless with no means of support and with no rights to see, let alone care for their children. As the Union argued, many women lacked the means to establish a separate residence and those who wished to would not in any case leave their children in the care of such men. Thus it was not only women's financial dependency which trapped them in marriages they might otherwise have left but in addition, their lack of rights to take their children.

Moreover, the Union examined the law in relation to the maintenance of children and argued that in fact there was no clear enactment in law of the obligation on husbands to maintain children or indeed wives so long as they lived together¹. Wives had no means of knowing how much a husband earned or of establishing a minimum of support for herself or her children. Although in theory women of the wealthier classes could pledge their husbands' credit, in practice this was an unpopular form of credit with the local tradespeople, and was of minimal use. Working class women however were entirely powerless to enforce maintenance and in cases of neglect their only recourse, save family and friends, was usually the workhouse.

The case upon which feminists based their campaign was mothers' general lack of rights and power to act. Mothers, they argued had no general rights which would allow them to operate as legal parents independent of fathers. Thus they could not simply leave and take children, nor could they apply to the courts in matters concerning either the guardianship or maintenance of children within marriage. Women's only method of gaining recognition as a parent was to establish a matrimonial fault sufficient on the part of husbands to break up the family.

NUSEC therefore prepared a Bill - the Guardianship of Infants Bill - which was introduced into Parliament

on behalf of the women's societies in 1920. The central focus of the Bill was to give mothers general rights in relation to their children. The Bill proposed that instead of the father being the sole legal guardian of children of the marriage, both mother and father should be joint guardians, with equal rights and responsibilities with regard to the custody, maintenance and education of their children. Interestingly NUSEC here argued that in assessing women's liability, her domestic labour in relation to childcare held a value and should be deemed as a financial contribution², a position still argued (though largely unsuccessfully) by many feminists in the 1980s (Row 1983). That initial Bill also proposed to make better safeguards for the custody and maintenance of children by allowing the courts to make orders whilst parents lived together.

Feminists in NUSEC substantiated their demands by drawing on the two interdependent ideologies developed over the turn of the century: childhood and motherhood. But in addition they also drew upon the theme of formal equality between men and women and husbands and wives. Women had by this time achieved a measure of success in the campaigns carried out by suffragettes for legal status for women as citizens and workers in the Sex Disqualification (Removal) Act of 1919. The work of both suffragettes (militants) and suffragists (constitutionalists) had put the oppression of women on both the public and the parliamentary agenda, and the issue of women's campaigns for equality was rehearsed in both public and private. Feminists in NUSEC argued that along with amendment to property rights³ and civil rights, the concept of equality should logically be extended to parenthood within marriage. On introducing the Bill into Parliament on behalf of Women's Societies Viscountess Astor stated:

"May I respectfully point out that this is in no sense a political matter. We are bound by election pledges to carry out the programme... we are committed by the principle of equal citizenship as between men and women and it will be the duty of the new Government to remove all existing inequalities of law as between men and women...thus, inequality between men and women in regard to the guardianship, maintenance, and upbringing of their children is one of those inequalities."

(H.C. Debates (1921) 141:1400)

Indeed, obviously aware of a level of opposition within Parliament to the issue of 'women's rights' she continued:

"All parties are alike when it comes to women, you will find men in all these parties who only give [women] lip service. Some of the greatest anti-feminists are amongst my colleagues, the Coalition is notorious but all parties are alike."

(H.C. Debates (1921) 141:1407)

Nevertheless NUSEC's position was never simply located at the level of abstract rights for women (as comparable, for example to the position of fathers in the mid-nineteenth century). Nor indeed - given the position of mothers within the family - could it have done. The strength of the ideology of motherhood and the resultant sexual division of labour in relation to childrearing practices had firmly located mothers of all social classes with the major emotional and frequently physical responsibility for the rearing of children⁴ (Davin 1978; Cowan 1982; Dally 1982). The Union therefore also argued its case for rights for mothers through an analysis of the materiality of child-care responsibility within families. Thus Viscountess Astor in arguing for the Bill stated that existing law in relation to children in marriage bore no relationship to the reality of childrearing in families, since the mother was the parent with responsibility for the day to day care of the child, her opinion as to what was best for it should carry equal weight. Moreover she argued that fathers should not be able to remove children or utilise them to restrain women nor make decisions concerning their lives

without reference to mothers. Thus she concluded, it was in children's interests also that mothers, because they held responsibility for childcare and childrearing, be given equal rights over children within marriage through becoming equal legal guardians with fathers.

Opposition to NUSEC's Bill ran high both inside and outside of Parliament (Brophy 1982). Within Parliament, the question of whether it was an issue of 'rights' over children between husband and wife had two consequences. Firstly, those opposed to the Bill argued that giving mothers equal guardianship rights within marriage would deter men from marrying:

"if he feels he cannot bring his children up as he thinks fit he will be disinclined to marry...and this would lead to immoral consequences."

(H.C. Debates (1921) 141:1409).

and it would also lead to divorce:

"...if he can't have the management of his own children."

(H.C. Debates (1921) 57:802).

And some opponents to the general principle of the Bill nevertheless agreed that women did indeed carry the major responsibility for children within marriage but because it was felt that giving mothers rights within marriage would also necessarily give them a degree of power the Bill was bitterly opposed (Brophy 1982).

Promoters of the Bill in Parliament came under considerable attack on the issue of rights for mothers within marriage. This resulted in a shift in the debate on the need for the Bill. Certain promoters concentrated on the politically safer justification of protecting the interests of children. Indeed, it was quickly argued that the Bill was not merely concerned with ameliorating previous inequalities between men and women, it had a more 'sacred' endeavour:

"the question of guardianship of infants must not in any way be damaged by any suggestion that in this way we are deciding for women's rights as apart from the rights of the infant."

(H.C. Debate (1921) 141:1420)

Moreover it was then argued that the content of the Bill should be reworded leaving out completely the general principle of equality between mothers and fathers. The general argument about the way in which existing law had constructed wives and children as legal subjects such that wives could only exercise their (relatively) new rights as wives by deserting their children was dropped. Emphasis in the Parliamentary campaign quickly turned to a justification for the Bill which found public sympathy on a level which would have been impossible in relation to women's rights at that time. Speeches in the House of Commons turned to what one member referred to as the 'new spirit of the age'. The Bill was discussed in terms of the state's new approach to the nation's children, references were made to the amount of legislation passed to protect children over the latter part of the nineteenth century and how this new Bill was in fact a further contribution to that endeavour.

It is of course difficult to know in retrospect quite what the response of the Union was to the effective transformation of the political terrain in which this Bill was originally set. Certainly NUSEC's position had never been mother's rights as opposed to or in isolation from the welfare of children. Indeed their initial criticism of the law was in its treatment of women-as-wives and women-as-mothers. Yet clearly engaging the language and sentiments of welfarism in the name of children achieved two ends. It effectively silenced those who strongly opposed the Bill because it attacked the unequal power relationships within marriage. And also for a time it did appear that adopting such a defence would facilitate an easier passage of the Bill through Parliament. However, that shift of support for the Bill amongst some of its Parliament-
ary

promoters in effect was also to facilitate fundamental changes in the content of the Bill.

Mothers' Powerlessness: The State's Response

Feminists continued to struggle with several governments (Labour, Conservative and Coalition) over the content of the Bill; two Select Committees considered their demands but several private members' Bills were lost during the period 1921-23. However the crystallization of positions on the issue of mothers and the guardianship, custody and maintenance of children occurred in 1924, with the introduction of Mrs Wintringham's Bill. Still central to feminists' demands was an end to the ultimate legal power which a man held over his wife and children so long as they continued to live with him. However the principle objective for the state in those struggles appeared to be that of preserving the stability of a specific family structure in which women's subordination to men was to be sustained rather than undermined. The justification for that particular objective was constructed upon both ideological and material grounds. On an ideological level the position was justified in terms of a desire to preserve the stability of the family as a significant symbol of the nation's stability. On a material level, it was justified in terms of the legal liabilities which were currently attached to fathers as head of household. Initially the reaction of the Lord Chancellor's Office had been that, because the Union's Bill attempted to broaden enormously the field of disputes which might come before the court, and because it proposed to introduce "joint liability" for children, the Bill represented something of a threat to the purity of English Law. Thus it was argued by the Lord Chancellor's Office, that the courts must be protected from having their time occupied with such matters:

"The net result of the Bill, therefore, would be to substitute a legal for a domestic forum in every household; to multiply causes of strife, and to bring into the courts, to the encumbrance of their proper business, a multitude of trivial disputes."

(P.R.O. L.C.O. 2:757)

Feminists however rejected this attempt to contain domestic relations within the "private" sphere and argued that the modern approach to marriage was that it was now a partnership and therefore the objective of Parliament should be to set up the legal standard for all families. Equal responsibility would, they argued, promote a more responsible attitude on the part of erring husbands, especially if they knew that a wife's opinion would receive equal weight should their dispute go to court.

The general level of Parliamentary debate on the issue of legal intervention in domestic relations was of a somewhat individual and often flippant level, members arguing that differences between husband and wife were not settled by a "cataloguing of rights":

"Matrimony is not based on the assertion of rights...the whole happiness of marriage is based on understanding and mutual forbearance, one giving way to another, by reason of love and respect, you cannot possibly improve that contract by the enactment of the law".

(H.C. Debates (1924) 171:2708)

"from my experience as a married man there is only one master in the house and it is not the husband..."

(H.C. Debates (1924) 171:2609)

and

"I would like to see anyone bold enough to deny the fact that the hand that rocks the cradle rules the world".

(H.C. Debates (1924) 171:2707)

"it would be a brave man indeed who would not support this bill...and then go home and tell his wife he had not done so..."

(H.C. Debates (1924) 171:2671)

Indeed, there were many references to "petticoat government" in the home by Members of Parliament, and many were concerned to express the view that it was indeed impossible for the law to deal in areas of "affection".

However, the persistence of feminists in pressing their case, and the weight of evidence they produced on the inadequacies of the current laws on custody and maintenance eventually forced the 1924 Conservative Government to formally reassess the evidence produced for Select Committees over the previous four years and ultimately draft a Government Bill. Its response was decisive; there was to be no Government compromise to women on the issue of joint guardianship of children in marriage. Drawing on evidence submitted to the 1923 Joint Select Committee, the Under Secretary of State for the Home Office repeated the position of the Law Officers' Department on the Bill:

"to put mothers on an equal footing with fathers in all matters concerning their children would simply produce a deadlock".
(P.R.O. L.C.O. 2:757)

The Crown Office had been opposed to the principle from its inception in 1920:

"to make provisions for all such disputes to come before the courts would only congest the court and detract from the real concern of English law".
(P.R.O. L.C.O. 2:757; (see correspondence, Sir Claud Schuster, Permanent Secretary and Clerk to the Crown).)

However, the Government's major objection to the principle of joint guardianship was that to allow the courts to become the final adjudicator in all disputes concerning children could only be subversive of family life. Introducing the Government's own Bill in 1925, the Lord Chancellor (Viscount Haldane) stated:

"...the status of women has very much changed in the last twenty five years. [She] has almost the same status as man. She has not altogether the same status because it is necessary to preserve the family as a unit and if you have a unit you must have a head".

(H.L. Debates (1924) 57:791)

Thus the common law patriarchal power of fathers as sole legal guardians and thereby ultimate decision makers in all aspects of family life was not simply an historical 'fact' - it was viewed as a central and necessary feature in the stability and continuity of the family as a social institution. That particular view was prevalent in much of the evidence assessed by the Home Affairs Committees of the Cabinet during 1923 and 1924, although it was generally presented as the intuitive position rather than the result of lengthy debate or logical discussion - the family was a 'natural' hierarchy. From that intuitive position it was then argued, that any duality of control over children within the family would simply undermine the authority of the father and lead to further domestic strife. Moreover, not only would it add to friction in those already unhappy marriages, but, in addition, dual authority over children would actually undermine stability in happy marriages. Thus, the Government's argument against joint guardianship was that it would lead to the ultimate dissolution of the family.

The second major objection which the 1924 Administration tabled against joint guardianship was focused on the dangers which would result from a dilution of the father's responsibility as head of household. This case was argued on the evidence submitted by several state departments during the early years of the Bill. For example, it was argued on behalf of the Ministry of Health that the principle of joint guardianship would create serious problems firstly, in pressing criminal proceedings against negligent fathers, and secondly, in recouping any state expenditure administered to a man's wife and child under Poor Law Relief⁵. On the basis of such evidence, the Joint Select Committee

argued that, although it held no brief for the father,

"it was essential from an administrative point of view that a household should be treated as a single unit and that there should be some person within it who in the last resort should have the determining voice."

(P.R.O. L.C.O. 2:757: Draft Report, Joint Select Committee).

However, the Committee concluded:

"that they were unable to recommend that Parliament should adopt the principle of equal guardianship...what is at stake is the well-being of the child itself and any duality of control must militate against that."

Draft Report J.S.C., *ibid.*
(emphasis added)

It is indeed interesting to note how the language of welfarism is introduced here to substantiate an assumption that the hierarchy within patriarchal family relations protects and/or ensures children's welfare. Yet what is so striking from the entire evidence submitted to the various governments over the four years of consideration of this Bill is that firstly, no case was made to either of the Select Committees, which specifically argued for the retention of fathers' sole guardianship rights to children within marriage on the basis that such a situation was in children's interests. Indeed apart from the evidence which feminists submitted regarding the way in which the existing law effectively operated to force women and children to remain with men who were frequently violent, cruel, vindictive and habitually drunk, there was no direct discussion of children per se, let alone children living in these circumstances. Rather, various state departments focused upon rejecting feminists' proposals on the basis that they would alter the existing parameters of the law in terms of legal liability and thereby create problems for the State in the exercise of liabilities which were formerly attached to fathers as heads of household. Indeed much of the evidence submitted by state

departments relied upon a foregone consensus that preserving the patriarchal structure of the family (and thereby the power of husbands and fathers) necessarily coincided with protecting the interests of children.

Custody and Maintenance on Separation

The area in which feminists did manage to make some impact was that of custody. They had argued that an unscrupulous husband could gain compliance from his wife through the threat of removing her children. Indeed, he could take them away from her entirely and trust them to another person without consulting her or seeking her consent. And, except in proceedings for divorce or legal separation she had no right under the existing law even to apply to the Magistrates' Courts for the custody of her children. The Joint Select Committee had been convinced by the weight of evidence submitted by the Women's Societies that the custody law required change. Moreover, no case was made to the Committee which argued against the principle of equal rights to custody, and, perhaps somewhat ironically neither was it anticipated that the Court would experience any difficulty in determining which parent was better suited to undertake this responsibility. The Committee therefore gave support to the demand for a change in the current law in relation to custody. However, it was somewhat illusory to allow a mother to claim custody of her children, without giving her some means whereby she could support the children. While there did exist some limited provision to cope with the maintenance of divorced or legally separated women, the question of adequate maintenance within marriage presented the Government with something of a dilemma. On the one hand clearly there did exist loopholes in the current law whereby certain "neglectful and vindictive" husbands could escape their responsibility to maintain their families adequately (such families often becoming dependent on the state). But in addition, there was no legal way of

enforcing that obligation except through the disintegration of the family. Yet, to allow women to come before the Court and obtain an order to determine the proportion of her husband's wage to which she was entitled, and to make that order enforceable whilst they continued to live together, was thought to be tantamount to legislating for domestic strife. Thus, it was argued by Viscount Cave (Lord Chancellor in the previous Government) that such a provision would actually cause yet further domestic friction;

"by putting a weapon in the hands of a wife whilst she was still part of the household."
(H.L. Debates (1924) 58:355)
(emphasis added).

The dilemma for the Government was again how to ameliorate the disadvantages suffered by some women and children without threatening further the stability of the family unit by undermining the position and power of the father as head of the household.

The Government's attempt to resolve that dilemma became what was then referred to as the "Clause 3 Compromise". The central issue was whether to give a mother an order for custody and maintenance while she lived with her husband. The Government's position, outlined by the Solicitor General (Sir Henry Slessor) was that for the law to regulate relations between husband and wife in this way could, (yet once again) lead to a subversion of family life. He continued,

"similar objection was felt to a provision which would enable a wife to obtain an order for payment which could only be enforced in the last resort by seizure of the property or imprisonment of the husband, who would normally be a wage earner".
(P.R.O. L.C.O. 2:758; C.P. 287)

When the Lord Chancellor defended the Government's proposals to Parliament, he again stated that the

Government's criticism of the feminist's Bill. Firstly, it did not give sufficient priority to the child's interest, and secondly, it would increase the area of domestic friction. He began,

"The Bill of the Government does away with all those objectionable features of the original measure. It removes all those fertile opportunities for domestic differences with which the other Bill bristled."

(H.L. Debates (1924) 57:796)

What the Government proposed was, that a mother should be able to go to Court and obtain an order for the custody and maintenance of her children, but that the order was not to be enforceable as long as she continued to live with her husband. The Lord Chancellor further argued that, while a mother should be able to ask the Court to determine the proper sum to be allowed for her maintenance,

"it did not follow that if a wife chooses to stay with her husband that she ought to be able to enforce the law...if things get so bad that the wife is bound to leave the husband then she has an order ready."

(H.L. Debates(1924) 57:794)

Comparing that provision with the existing law, (whereby a wife had first to leave her children and her husband before she could apply for an order) he added,

"But the order is not to be enforceable so long as she stays under his roof. That is a compromise by which an endeavour is made to get rid of a dual authority which was considered to be one of the chief defects of previous Bills."

(H.L. Debates (1924) 57:799)
(emphasis added)

However, it could of course be argued that the Government's "compromise" had defeated its own stated objective, that of preserving the unity of the family. By attempting to side step the crucial question of inequalities of power between husband and wife the Government had in fact, put

something of a premium upon separation, since it proposed to make a mother's rights to custody and maintenance contingent upon her leaving her husband.

Feminists' response to this proposal was somewhat divided. NUSEC had, during this period, managed to secure provision in the Government's Bill to allow mothers equal rights with fathers to apply to the Court in any matter regarding the children. This was (given the loss of the joint guardianship provision), an important addition because it gave women a general right of application to the court separate from divorce or judicial separation proceedings. Even so, there was considerable opposition to the compromise from many of the Womens Societies. There was some support for an outright rejection of the Government's Bill on the grounds that it left untouched crucial demands in the original Bill to alter power relations within the family. NUSEC was faced with either supporting a Bill which went a very small way to meeting their original demands, or withdrawing their support, putting down wrecking amendments and losing the Bill altogether.

The Government's position remained unchanged. It claimed the "Clause 3 compromise" was the best that could be attained between, on the one hand, a desire to amend the existing law, and on the other, the more extreme proposals for enforceable custody and maintenance contained in the feminists' Bill. In recommending these provisions to the Cabinet, the Sub-Committee (appointed by the Home Secretary) stated that:

"the proposals represented the absolute minimum necessary to secure anything like agreement in the House of Commons, and, in view of the pledges [on equality of the sexes] given on behalf of the Labour Government during and before the last election...it seems highly desirable that early steps should be taken to give effect to that Compromise now arrived at and avert the danger which might result from a renewal of the agitation for a more radical amendment of the law."

(P.R.O. L.C.O. 2:758, C.P. 287 p.8)

NUSEC, faced with a very real possibility that the Bill would indeed be lost, finally agreed to support the Government's severely limited proposals.

In addition to that "compromise" over maintenance and custody, the promoters had also lost in their negotiations with the Government for an 'Attachment of Earnings' clause. This clause would have meant that payments for maintenance could (on the order of the Court) be deducted from a father's wage by his employer. This clause was seen as vital by feminists because it would have allowed payments to change hands without the parents having to meet. NUSEC had provided evidence of women suffering abuse and violence when they tried to collect the payments from fathers which they had been awarded by the court. But what is significant about the loss of that provision, is not so much that it was an essential feature of the original demands, but rather the Government's stated rationale for excluding the provision. The rationale had been that in the current economic climate the provision was "too controversial". The argument had been addressed on two levels, both with undesirable results in terms of the labour market. From the point of view of the employer it was thought that it might unnecessarily increase his workload, and thus possibly make certain employees less acceptable. From the point of view of labour itself, it was argued that such a provision could reduce work incentives and would in any case be resisted by the Trades Union Movement because it would contravene the Truck Laws⁶. Thus it was finally argued that an 'Attachment of Earnings' provision would be likely to cause further friction in the economy, at a time when the Government was already concerned about unemployment, such a situation was therefore to be avoided at all costs.⁷

The most striking feature about both the 'Clause 3 Compromise' and the exclusion of the 'Attachment of Earnings' clause is the total absence in these debates of questions which addressed the issue of how best to secure

adequate maintenance provisions for children whose father would not willingly or voluntarily support them. Indeed, the rationale applied throughout itself precluded any discussion of child welfare.

The effectiveness of the provisions under the "Clause 3 Compromise" were further reduced by the introduction of a time limit before the Bill finally reached the Statute books. The Government amended the clause so that if a mother was still living with the father three months after she had obtained an order for custody or maintenance then that order became void. The amendment was justified on the grounds that,

"it would be undesirable that an order of that kind should be hanging over the heads of parents for an indefinite period."

(Lord Chancellor, H.L. Debates
(1925) 61:522)

The Union protested at this short time limit. They argued that in a relationship where a wife suffered abuse and neglect, an order of the court empowering her to custody of children and a maintenance order could provide mothers with some limited bargaining powers. A wife might realise an order through separation, but equally she may be able to draw upon it in attempts to negotiate better behaviour on the part of a husband.. The Union therefore argued that if a clause stating a time limit was inescapable then six months should be the minimum period. This would at least provide mothers with a more realistic period in which to assess whether their husbands had reformed. It is interesting to quote the Lord Chancellor's response to that argument at length because it also illustrates how the original Bill had been diluted and transformed from its original objective - that of attacking precisely those expressions of patriarchal power and control which the Government's Bill sought to protect:

"...if these orders are going to be obtained simply by way of a threat to the father...a long period might be desirable. But I think the intention of the House was that these orders should only be applied for where there is a real desire to have custody - custody under a separate roof and maintenance connected with the custody - and they should not be applied for simply as a threat...I think 3 months is quite enough."

(H.L. Debates (1925) 61:661)

The small amount of bargaining power which women had been accorded under the "Compromise" had effectively been removed. The mother had, under this additional amendment to decide within three months whether to stay and rely upon her husband's goodwill or reformed character, or leave while she had an order allowing her to take her children with her. In either case of course she was still dependent upon her husband's ultimate goodwill and benevolence for maintenance payments for children.

The Government's Bill finally reached the Statute books in July 1925. The Government laid great claim by its preamble to the Act:

"Parliament by the Sex Disqualification (Removal) Act 1919 and various other enactments has sought to establish equality in law between the sexes and it is expedient that this principle should obtain with respect to the Guardianship of infants the rights and responsibilities conferred thereby".

However the rhetoric of the preamble did not in fact adequately describe the Act. Although it claimed to establish full equality between the sexes, it did not in fact achieve this. What it did was to establish formal equality of application to the Courts on issues relating to children where mothers and fathers could not agree. Either parent could apply to the court for a decision. In deciding the issue the Act laid down the principle on which questions regarding children's custody, upbringing etc. was to be decided:

"Where in any proceedings in any court... where the custody or upbringing of an infant...is in question, the court in deciding that question shall regard the welfare of the infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father...is superior to that of the mother, or the claim of the mother is superior to that of the father.

s.1. Guardianship of Infants Act 1925

Hence, in the absence of court proceedings the patriarchal structure of the family was to remain unchallenged so far as family law in this field was concerned. Mothers could not take any initiative or individual decisions concerning children except on the agreement of fathers.

Conclusion

The original demands of NUSEC had sought to attack the unequal distribution of power between men and women within the patriarchal family structure. The Government's major justification for its own Bill was that it was superior to feminists' proposals precisely because it did not interfere with the status quo of family life. That many both inside and outside of Parliament had felt that to provide legislation in an attempt to alter inequalities within marriage would be tantamount to legislating for the breakup of the family, is illustrative of the strength of patriarchal ideology in the period. But what is also significant about the campaign is the way in which the language and sentiments of welfarism - discourses which had initially been responsible for the creation of an ideology of motherhood - had, in effect, been successfully employed to fragment and displace womens' demands for equal legal rights for mothers. So far as legal discourses were concerned, of course the concept of children's welfare (as illustrated in Chapter 1) was already apparent in case law. However, as King (1981) argues in relation to nineteenth century

approaches to childcare, to a large extent, welfarism as a rationale for just cause and grounds for action gradually took over from that of Christian morality. That is not to say of course that in the case of this Bill, that in all instances of opposition to the feminists' proposals the concept of children's interests was simply engaged as a 'smoke screen'. But rather, I would argue that it was precisely because the issue of children's welfare was (and is) such an emotionally provocative but nevertheless nebulous concept⁸ that it was so successful in effectively silencing the concerns of those (women) most closely responsible for the care of children. Indeed it provided what on the surface appeared to be a neutral and 'scientific'⁹ solution to what was a political dilemma. It appealed to sentiments regarding 'protection of the innocent' against which no responsible person - especially mothers - could reasonably object. Indeed it appealed to some of the very sentiments which had motivated NUSEC to draft the first Bill in 1920.

NOTES AND REFERENCES

1. Under the law then extant, except under the operation of the Poor Law, there was no obligation to maintain on either parent, although the father might incur criminal liability if he wilfully neglected his children and they became chargeable to the parish. (See Chapter 1).
2. In relation to the joint obligation to maintain, the feminists' original Bill had proposed that in calculating a mother's liability, her domestic labour for the child in the home should be deemed as a contribution to the maintenance. However, that attempt to gain recognition of the economic value involved in rearing children was neatly side-stepped by the 1924 Conservative Government on the grounds that "it was not possible to calculate and reduce to economic terms the value of the affection and love of a mother for her children" [H.C. Debates (1924) 171:2690] and the provision was dropped from the Government's measures introduced in 1925.
3. E.g. Married Women's Property Committee formed in 1855 campaigned for the separation of property within marriage. This was achieved in 1882 under the Married Women's Property Act which enabled those women who owned property to retain it on marriage.
4. It has been argued, (Lowe (1982)) that in fact middle and upper class mothers did not in any case rear their own children. However this approach is severely limited in that it fails to address the power relationships involved in marriage and the way in which law sustains and reproduces those relationships in and through children.
5. Home Affairs Committee (Cabinet) P.R.O. C.P. 3719 1922 Memorandum for the Ministry of Health.
6. The Truck Laws provided safeguards to ensure against indiscriminate deductions being made against wages. Thus any deductions must be voluntary on the part of the worker.
7. Attachment of earnings provisions had been used during the First World War to deal with soldiers who had defaulted in respect of affiliation orders. In promoting the inclusion of such a provision in the Guardianship of Infants Bill it was argued that "if such orders were used to allow payments to be collected from a soldier's pay that we cannot discriminate between soldiers and other classes of society". However, in addition to the economic rationale used to dump the provision in 1923, it was also argued by the Lord

Chancellor that "it was most insulting that such an order should be forced upon (a husband) as if he had a bastard child".

8. In that children's needs are socially defined, redefined, adjusted and sustained as dominant expectations of children change.
9. That notion arose largely as a consequence of the medicalisation of childrearing practices over the turn of the century which had adopted a 'scientific' approach to the task. That approach consisted of some degree of new and thereby 'expert' knowledge (in terms of ideas on sanitation, sterilization and physiology) but combined with a high degree of moralistic, value-laden prescriptions.

CHAPTER 4

WELFARE, CHILDREN AND THE FAMILY: 1945 AND THE
POST-WAR RECONSTRUCTION

Introduction

After 1945, developments in legal discourse concerning custody of children have tended to be theorised by contemporary writers in terms of a recognition of the ideology of motherhood (Freeman 1983; Maidment 1984). In assessing developments in Court practices regarding womens' claims to custody of children writers have drawn upon two mutually dependent ideologies: welfare and motherhood. These ideologies have contributed to a 'received wisdom' regarding the legal status of mothers following the war and the existence of a maternal preference within the courts.

In turn, explanations of that situation are frequently located in emerging psychological and psychoanalytic discourses concerning the importance of maintaining the mother-child relationship for children's future psychological and emotional stability. Thus those who posited a judicial preference for mothers usually substantiated that post-war development through appeals to the new maternal deprivation theories, and specifically the work of John Bowlby in the 1950s¹. In this chapter therefore I will examine the development of law and legal practice primarily, but not exclusively in the post-war years. My argument is that although both children's welfare and ideologies of motherhood are indeed apparent in legal discourses it is a mistake to conclude that either individually or combined these notions overdetermined law and legal practices in all instances. Indeed I will illustrate that although

a concern for children is frequently apparent, nevertheless that focus was also undercut by notions of morality and sexual behaviour. This is not however to argue that the courts and policy makers during that period were not 'really' concerned about the welfare of children. Rather, it is to demonstrate that it was one issue within a number of concerns in that period. Firstly, therefore, I will discuss briefly why the post-war period has become an important period for feminist analyses of family law and specifically why it is especially important in relation to current debates surrounding custody and mothers. I will then examine three areas of family law, beginning with an examination of the welfare principle in relation to the concept of illegitimacy. I will then discuss the development of new policies on legal procedure in relation to children and divorce in the post-war period. Finally, I will examine the courts' treatment of mothers who have committed adultery.

Motherhood and the 1950s

The 1950s is frequently viewed as the heyday of the ideology of motherhood. In the post-war reconstruction mothers were viewed as having a particularly important role to fulfill, they were again 'mothers of the nation'. Like mothers over the turn of the century, mothers in the post-war years were the first point of intervention and education as the primary caretakers of the nation's future human capital. Women's magazines and journals flooded the market with information and advice on how to be a good mother. New techniques on childrearing and new technologies for housework all identified mothers as the focus of attention in the post-war reconstruction (Dally 1982).

Yet despite the idealisation of motherhood which clearly did occur during the 1950s, many contemporary feminists have viewed the period with considerable ambiguity and suspicion. This is largely because regardless of the

myth and rhetoric surrounding women's role within the family during those years, documentations of the period focused upon particular political forces which created a culture in which it was very difficult to articulate or gain access to information regarding women's experiences within the family. As Wilson (1980) has pointed out we know very little of married women's experience of that culture. We know little or nothing of the experiences of divorced women and single parents or of the position of battered women, or of the issue of rape during this period.

That gap in our understanding has led contemporary feminists to re-examine aspects of 'received wisdom' during this period (Riley 1981; Smart 1984). For example, Riley (1981) has re-examined the issue of women and employment at the end of the last war. It has been part of our 'received wisdom' in this field that there was a conscious decision on the part of the state to remove married women from paid employment. Thus, it has frequently been argued the state closed nurseries in an effort to retrieve jobs for men, and that the medium through which that exercise found legitimation was the *maternal deprivation theories* expounded by John Bowlby (Dally (1982)). Yet on re-examination of that period in women's employment, Riley argues that, far from there being a state/male conspiracy to retrieve jobs for men, in fact, labour shortages in 1947 resulted in a production drive to recruit women workers (including those with children) (Riley 1981 p. 10). In identifying both confusion and compromise on this issue, Riley also identifies wide acceptance of the language of pronatalism (generated by a low birth rate). A language which was not simply successful in finding expression in state policy but equally found acceptance within various women's organisations². Thus as Riley concludes, it is not sufficient simply to identify a discourse, in addition we must examine whether and how it enters or acts to form specific structures of opinion and ultimately state policy.

Equally, in relation to family law the task of unpacking received wisdoms regarding the position of wives and mothers in the post-war years has a particular importance. It is significant not simply as a general desire for historical accuracy; in addition, it is important to address that period because a major focus in debates surrounding family law in the 1980s is on 'redressing the balance' in an argument which perceives law as having gone too far in women's favour. Thus Campaigns such as Families Need Fathers (1981) and Campaign for Justice in Divorce (1980) argue that women have come to occupy positions of privilege within family law. In relation to mothers, that argument centres on the issue of child custody and the existence of a 'maternal preference' operated by the courts in deciding custody cases. Thus in the final section of this chapter I will examine that claim in the light of practices in the courts during the 1940s and 1950s.

Child Centredness and the Child Outside the Conventional Family

To understand the dimensions of state policy regarding the development of the welfare principle it is necessary to look briefly at policies directed towards different legal categories of children, specifically those policies directed at children for various reasons outside the conventional family. Policies towards that category of children changed radically after the First World War and there is little doubt that the general concern for such children was accelerated by the effects of war. Hence the introduction of both the 1926 Adoption Act and the Legitimacy Act of the same year sought to deal with some of the legal and social disabilities of children born to unwed mothers, and children who were abandoned or orphaned by the war.

Although aspects of nineteenth century Poor Law

provision had dealt with some aspects of illegitimacy, the focus of that legislation was primarily concerned to punish immoral mothers³ (ROW 1979; Pinchbeck & Hewitt 1973). However in relation to adoption there was no legal provision for the complete severance and transfer of parental rights over children (there was of course de facto adoption for example in the practice of baby farms⁴). Moreover, no legal standards existed over parents who left children to be reared by strangers or relatives. Children could be handed over from one person to another with or without payment, they could be sent out of the country without record. Those Homes and Institutions which did exist were not subject to any systematic inspection or control (Pinchbeck & Hewitt 1973; Cretney 1974). Indeed public pressure for some form of investigation and state control led to the appointment of the Hopkinson Committee (Report of the Committee on Child Adoption (1921) Cmd 1254 BPP ix, 161) which reported that urgent legal provision was necessary to deal with the circumstances of children.

The solution was to create formal legal adoption and instigate a procedure whereby in certain instances married couples could adopt orphaned, abandoned or illegitimate children. Indeed for these (apparently) parentless children adoption was perceived as the only viable alternative to a stable home with natural parents. To provide a legal procedure to allow children to become permanent members of otherwise frequently unrelated family units was not simply seen as a solution to the plight of the orphaned or abandoned child, it was also seen as the solution for couples unable to bear children. For women in these circumstances adopting children was equally perceived as providing a complete and stabilising influence upon an otherwise problematic and incomplete marriage (Hopkinson Report 1921 p.62).

The notion of providing a 'fresh start' for children in a new and 'proper' family also influenced debate surrounding the provisions of the 1926 Illegitimacy Act. However the latter Act was also guided by additional concerns which ultimately led to the retention of certain punitive

sanctions towards both child and mother which were evident in Poor Law provision. The creation of the legal category of illegitimacy (largely to protect inheritance rights) and its maintenance throughout the nineteenth century had served as a major bulwark of marriage and the family. It operated as a fundamental source of discouragement of extra-marital sex for women and a central source of support for the regulation of motherhood and sexual relations within marriage. Nevertheless increasing numbers of illegitimate births following the war led certain philanthropists and various voluntary and state agencies to publicise the plight of illegitimate children and to exert pressure upon the Government to consider their situation (Manchester 1980; Pinchbeck & Hewitt 1973). It was felt by many that such children should be allowed a fresh start in much the same way as the law had facilitated that for certain other problematic children through adoption. However it was argued that the solution chosen in this field of reform should not be seen to undermine the family, or indeed support motherhood outside the institution of marriage (Pinchbeck & Hewitt 1973). Thus the final provisions of the 1926 Legitimacy Act provided that certain children born illegitimate could subsequently be declared legitimate on the marriage of their parents, provided that neither parent was married to a third person when the child was born (s 1(2) 1926 Legitimacy Act⁵). Refusal to legitimate the 'adulterine' child was justified on the grounds that to do otherwise would result in a serious weakening of marriage, indeed it was argued it would mean dispensing with the most powerful deterrent to illicit sexual relations (Manchester 1980).

Following the Second World War, the Royal Commission on Marriage and Divorce (1951-6) considered the position of the illegitimate child unable to be legitimated by its parents' marriage. That Commission reported during a period of intense 'moral panic' regarding the stability of marriage immediately following the War (McGregor 1957; Smart 1984). It is not therefore surprising to find that the Commission rejected the suggestion that the 'adulterine'

child should be legitimated by the subsequent marriage of its parents. The Commission reported:

"It is unthinkable that the State should lend its sanction to such a step, for it could not fail to result in a blurring of moral values in the public mind. A powerful deterrent to illicit relationships would be removed with disastrous results for the status of marriage".

(Royal Commission, 1956, p.304-5)

While state policies did continue to broaden the focus upon different categories of children within family law jurisdiction, it is not ^{therefore} entirely accurate to argue that this trend was solely determined by a concern for the welfare of children. When that concern came into direct competition with notions of public morality or was viewed as in any way threatening to the stability of marriage, the welfare of children was clearly not the overriding consideration. The stigma attached to children born outside marriage was to remain as a salutary lesson to women of the consequences of motherhood outside marriage.

However, it was not simply a question of social stigma. Children born in these circumstances not only suffered statutory legal disabilities (e.g. inheritance) but were also in certain situations the focus of a particularly punitive approach within the courts. One example of this approach is found in the courts' treatment of the question of maintenance of 'adulterine' children. For example, for some thirty years following the 1926 Legitimacy Act it remained impossible for mothers to obtain an order for the custody and maintenance of 'adulterine' children in the event of subsequent separation or divorce. This was because under divorce jurisdiction the term 'children' was interpreted by the courts as meaning legitimate children (Harrison v Harrison [1951] 2A11 ER 346⁶). Thus in making awards for children on the breakdown of marriage the test applied by the Court to determine whether or not it could make an order against a parent was not the welfare of the

child of the parents, but whether or not the child was the legitimate child of the marriage.

This punitive approach by the courts in effect created a hierarchy of children in relation to the treatment of applications for financial relief, between different categories of illegitimate children generally, and for different categories of children within the same family. For example, in circumstances where a marriage was declared null and void or where a marriage was deemed bigamous, thus rendering any children illegitimate, the law made express provision to enable the courts to make orders for the custody and maintenance of such children (Langworthy v Langworthy (1886) 11 P.D. 85⁷). Yet in neither set of circumstances (i.e. 'adulterine' children or children of bigamous or void marriage) could one argue culpability on the part of children involved. In addition, the retention of a punitive approach to financial provision for illegitimate children in divorce or separation proceedings could also create a hierarchy of legal eligibility between children of the same family (between legitimate and adulterine children) (Colquitt v Colquitt [1948] P. 19⁸).

While the policy trend in relation to children 'outside' a family therefore was towards integration into new families, nevertheless the recurrent dilemma for state policy, was how to engage the sentiments of welfarism by doing what was best for children, without at the same time undermining the stability of the family by blurring moral standards and removing what was felt to be the major deterrent to illicit sexual activity. In the 1950s as in the 1930s and 1940s the latter consideration determined aspects of both law and legal practice. This is not to argue that a punitive approach completely overdetermined policy in relation to the illegitimate child as compared for example with adopted children. Indeed even though the approach of the courts in relation to maintenance provision of 'adulterine' children was in effect punitive, there is evidence that certain members of the judiciary were distinctly

unhappy with that approach. For example, Lord Denning argued in the 1940s, that the courts should adopt a permissive construction of the law, and that the test of the jurisdiction of the court to act in such cases should be 'parenthood' and not whether the child was the legitimate child of the couple, (M v M [1946] P.31⁹). Rather, the focus here has been to demonstrate that to understand the development of legal discourses surrounding children it is necessary to examine specific spheres for the interplay between crucial concerns, such instances reveal the way in which what appear to be dominant ideologies can nevertheless be undercut by other concerns¹⁰.

Divorce, Children, and Legal Procedures in the Post-War Economy

Concern about the substantial increase in divorce immediately following the Second World War (see Table 4.1) led to two Reports on aspects of family law, both of which contained extensive discussion and recommendations regarding the position of children in parents' divorce.

Table 4.1 Divorce Petitions filed: England & Wales 1937-60

Year	Filed by husband	Filed by wife	Total
1937	2,765	2,985	5,750
1942	6,303	5,310	11,613
1944	10,154	8,236	18,390
1946	26,429	15,275	41,704
1948	18,456	18,619	37,075
1950	13,207	15,889	29,096
1952	14,705	19,065	33,770
1954	12,708	15,639	28,347
1956	12,538	15,215	27,753
1958	11,540	14,044	25,584
1960	12,109	15,761	27,870

Source: Civil Judicial Statistics, HMSO

Immediately following the end of war the Denning Committee (Final Report of the Committee on Procedure in Matrimonial Causes (1947)) examined existing legal procedures. And in the 1950s a Royal Commission, chaired by Lord Morton of Henryton (Royal Commission on Marriage and Divorce 1951-1956) examined the law on grounds for divorce, administration in the Courts, property rights between husband and wife. The Denning Committee and the Royal Commission, though different in status and extent of enquiry were both informed by similar sentiments regarding the deplorable increase in the number of divorces. The focus of the Denning Committee was the existing system of divorce law administration. It was required to consider what procedural reforms should be introduced, and particularly whether any machinery should be made available for the purposes of attempting a reconciliation between parties (Final Report (1947) p.5 para 3). In its introduction to the Final Report the Committee stated:

"We have throughout our enquiry had in mind the principle that the preservation of the marriage tie is of the highest importance in the interests of society. The unity of the family is so important that when parties are estranged, reconciliation should be attempted in every case..."

Final Report 1947 p.5 para 4

Some ten years later, the Royal Commission was equally directed by that same philosophy in its approach to the question of whether the existing divorce law, based upon matrimonial fault, should be retained. It argued:

"It seems to us self evident that marriage cannot be the concern only of the partners to it. If there are children their interests must be considered. But whether there are children or not, the state must be concerned in the maintenance of marriage and its dissolution because the state has an overriding responsibility to ensure in the interests of the community that the institution of marriage is upheld".

Royal Commission 1956 p.15 (vii)

Both Committees saw the function of law as being to 'strengthen the good and control the bad'. For the Denning Committee, this led (after an extensive examination of the causes of marriage breakdown) to a recommendation for the twin systems of education for marriage¹¹ (for those about to marry) and reconciliation services for when marriage fell into difficulties (Final Report p.5 para 5). For the Royal Commission it also led to the endorsement of education¹² systems but it also led to the recommendation that matrimonial offence should remain the determining principle of divorce law because it argued that to do otherwise would necessarily weaken the institution of marriage (p.13 para 65).

However that general 'panic' and concern regarding the stability of marriage did not simply focus attention upon increasing numbers of divorcing couples. Both the above-mentioned Committees considered the role of law in relation to the increasing numbers of children involved in divorce. That consideration led to substantial shifts in state policy regarding what the role and focus of the courts should be in relation to such children. Both Reports viewed the decision of parents to divorce as essentially deviant and reprehensible. That decision itself therefore legitimated a recommendation for a far more extensive and interventionist role for the courts in decisions concerning children than had previously been considered either possible or indeed desirable. In this section therefore I am going to consider the context in which those recommendations arose and I will argue that in fact these changes in approach towards children cannot be isolated from the central concerns of the Reports and the general attempts of the period at marriage saving and reconciliation. The central focus of criticism of both the Denning Committee and the Royal Commission regarding divorce law procedure in relation to children was the courts general lack of jurisdiction regarding children whose parents divorce. The court could not consider the position of children involved unless called upon to do so by parents. But equally, the Denning Committee and the Royal Commission were also concerned about existing court practice

in those cases where its jurisdiction was invoked by parents. The focus of criticism rested upon the type of information currently available to the court when making a decision concerning a child's future custody and maintenance. Here both Committee and Commission argued that there was a lack of information for the court other than parents' affidavits. Thus both Committees stated that in the absence of independent information, the question of which parent should have custody frequently became a contest between parents in which the 'innocent' party (in terms of matrimonial offence) usually succeeded in obtaining custody. The Denning Report particularly argued for independent information for the courts through the form of a report on the children, but both Committee and Commission argued for an extension of the jurisdiction held by the divorce court to consider all children of divorcing parents, regardless of whether parents themselves desired it. However there the similarities of approach between the two end. While each was concerned to strengthen the role of the courts in relation to children the particular function which each Committee envisaged for the courts led to rather different recommendations.

The Denning Committee argued that many of the difficulties suffered by married couples in the 1940s were largely a consequence of war and would therefore be removed once war conditions were removed (p.7 para 8). Where it considered the position of married women, although it recognised the stress and strain caused to women by the 'double shift' (domestic work and waged labour) it viewed that position as simply an unavoidable consequence of war (p.7 para 7/8). Moreover, it argued that in relation to further 'causes' of divorce in post war Britain many of these could be removed, firstly, by education of young people for marriage and parenthood but secondly, by providing reconciliation services.

However, in arguing that machinery should be available for the purpose of effecting a reconciliation between estranged couples, the Denning Committee were not introducing

a completely new concept to the handling of marriage breakdown in society. The model for that machinery was already provided by the Welfare Services of the Armed Forces, specifically the Sailors' Soldiers' and Airmans' Family Association. Reconciliation services were also provided by voluntary organisations such as the Church Societies, the Marriage Guidance Council and the Family Welfare Association, and statutory services in the magistrates courts were provided by probation services. Indeed the Denning Report noted with approval the close liaison between the Probation Services and the Welfare Services of the Armed Forces. The Probation services had had jurisdiction since 1937¹³ to interview married women who sought matrimonial relief in the Magistrates Court¹⁴. During the war years, the Welfare Services of the Armed Forces would visit the estranged wives of servicemen in an attempt to forge a reconciliation. Indeed, it appears from the evidence presented by these Services to the Denning Committee (p. 7/8 para 17) that in the Armed Forces, before any estrangement could be formally recognised (family allowance stopped and divorce proceedings started with legal aid for husbands) the reconciliation machinery of the Forces Welfare Services had to be set in motion.

The Denning Committee therefore argued both for state financial support for the reconciliation services in the voluntary sector¹⁵, especially the Marriage Guidance Council¹⁶, and for an expansion of the system, currently operated by Probation Officers in the magistrates court. The divorce court should also appoint an officer to attempt reconciliation and these officers should preferably be:

"...persons holding a degree or diploma in social science. They should be trained in social services particularly in marriage guidance and the welfare of children".

Third Report p.13 para 29

Moreover the Committee argued that the prospects for reconciliation were much more favourable when the parties had children:

"In many cases the most powerful reason which urges parties to adjust to difficulties or which impels a wronged party to forgive and forget is the welfare of children".

Third Report *ibid.*

But endeavours to save failing marriages did not stop at extending available services for couples experiencing difficulties. The Committee recommended an element of compulsion in the decision as to whether couples should see a reconciliation officer. Not only were couples to be given the necessary address of the officer, in addition, 'the officer himself should have access to every divorce petition to enable him to decide whether to offer his services' (p.15 para 29 (viii)). In justifying those powers of intervention, the Committee argued that children were the innocent sufferers from any estrangement of parents and it was therefore in their interests that every possible attempt at reconciliation should be made (p.15 para.29 (viii)). It is not perhaps surprising to find therefore a considerable extension of the element of compulsion in the Committee's recommendations regarding children.

On the question of children and divorce procedure the Committee argued that existing procedure was poorly fitted to protecting their interests. The court held a limited jurisdiction over such children, it could not consider children's arrangements unless custody was in dispute. Moreover the Committee also argued that where custody was in dispute, the Court had no opinion other than that of parents as to children's circumstances:

"The judge is never in possession of the report of an independent person as to their welfare, the result is that the welfare of children is subordinated to the interests of their parents".

Final Report p.17 para 30

Moreover, the Committee felt that where custody of children was unopposed in divorce proceedings:

"The reason why the application is unopposed may be quite unconnected with the welfare of children¹⁷".

Final Report p. 18 para 31 (ii)

But where custody of children was opposed in divorce proceedings, the issue usually developed into a contest between parents:

"This leads to allegations by one parent against the other and an embittered contest as to whether allegations are well founded ...in the course of which the welfare of children fades almost out of sight".

Final Report p. 18 para 31 (iii)

The Committee concluded that in the welter of affidavits it was small wonder that it became difficult to ascertain what was best for children, thus:

"...judges are sometimes forced back to the test of who is the innocent party in the divorce suit".

ibid.

The solutions which the Committee proposed to these problems were in effect an extension of the proposals made in relation to reconciliation procedures for divorcing couples. Indeed they cannot be separated from them. The Denning Committee recommended that the same court welfare officer who attempted to reconcile husbands and wives should also 'be available to advise and guide parents as to the welfare of their children' (p 19 para 34). In addition the Committee argued that every petition for a divorce should contain a statement of arrangements as to the children (p.19 para 34¹⁸). But moreover, the Committee argued that the court welfare officer should, in having access to every divorce petition, be authorised to investigate every case concerning children regardless of the wishes of the parents. And in addition, 'he should also

be authorised to by-pass parents and make an application to the courts for directions' (p.19 para 34 (iii)).

Legitimation of those extensive powers of intervention and surveillance by a (relatively) new para legal personnel was located in the divorce decision itself. The Committee argued:

"it should be recognised that parents who have been or who are about to be divorced have no absolute right to determine the lives of their children. They have disabled themselves from that joint responsibility and have created a new situation in which the interests of children need consideration apart from those of parents"¹⁹.

Final Report p.19 para 33

It was not then a general failure in the role of parenting which was to justify state intervention, but rather failure at marriage. Divorce was to 'disinherit' parents of rights to determine absolutely their children's lives. This was because the decision to divorce was taken as evidence of a failure of duty towards children to maintain childrearing within marriage and the nuclear family: children's best interests were perceived in sustaining marriage, marriage was automatically in children's best interests. Indeed, it is interesting to note that the focus of the psychological evidence to the Denning Committee equally concentrated upon the importance of marriage. And in concentrating upon the effects of divorce upon children's psychological development, the primary concern appeared to be whether or not such children would later themselves become divorcees. Thus, psychological development and stability was here measured solely in terms of a capacity to endure and sustain marriage.

The intention of the Denning Committee was to import into legal procedure mechanisms to stem the tide of divorce following the Second World War. The twin tools were education and reconciliation services. The former, not surprisingly, was never developed. Some of the proposals in relation to

children drawn from the latter proposal were later put into (a somewhat shortlived) effect²⁰. But the coercive and interventionist role which the Denning Committee proposed for state para legal personnel ultimately did not become a reality in the 1940s and 1950s. However that position was not the result of apprehension or anxiety with regard to the wider political implications of allocating to the state apparatus such extensive powers of total intervention into family life in the 1940s. Rather, it was ultimately a consequence of, firstly, an inadequately developed super-structure of existing state agencies (to undertake the extensive new work load envisaged by the Committee). And secondly, severe financial restraints upon public sector spending in this sphere in the post-war economy²¹ (Royal Commission 1956 p.109 para 385). Nevertheless, the questions and options posed by the Denning Committee regarding the role of law and the powers of the court in relation to children of divorcing parents do represent an ongoing dilemma which continues to appear in both legal and psychological discourses in the late part of the twentieth century (Mostyn 1970; Davis, et al 1983; Maidment 1982, 1984; Freeman 1983; Freud Solnit & Goldstein 1973). The recommendations regarding complete jurisdiction for all such children and the expansion of the work of the Probation Service to provide independent information for the court was however to become a reality. But the latter provision was not to apply to all children of divorcing parents. This was because, when the Royal Commission (1956) considered children in its Report (p.103 para 365), while in agreement with the criticism of the Denning Committee on existing procedure, the Commission however envisaged a further function of divorce law procedure: that of inducing parental responsibility.

The Royal Commission, like the Denning Committee, envisaged a vital role for reconciliation services²² in an attempt to shore up marriage and stem the tide of divorce. Although by the mid 1950s the expansion of the principal statutory agencies was considerably slower than

that of the rapidly expanding voluntary sector²³, the Royal Commission nevertheless continued to support the development of both agencies²⁴. In relation to the statutory service it argued:

"Our evidence has shown that in England and Wales the existing organisations are as yet operating on a limited scale but the measure of success already attained supports the view that in many cases husband and wife have been able with the help of skilled Counsellors to overcome their difficulties and to achieve a reconciliation. We consider that further²⁵ expansion of those facilities is required".

However, in the event of the failure of reconciliation services to prevent divorce taking place, the Royal Commission's primary concern was that any procedural recommendations which it made in this sphere should emphasise and not reduce parental sense of responsibility (p 105 para 370). It was this concern which led the Royal Commission to reject the Denning Committee proposal that every divorce case involving children should be investigated by state agencies:

"It is this later consideration - the desirability of bringing home to parents their continuing responsibility that has primarily led us to reject the suggestion that investigation should be carried out ...in every case [parents'] sense of responsibility would be diminished not strengthened".

Royal Commission 1956 p.107 para 377.

Investigation by Court welfare officers in all cases involving children was viewed as counter productive in achieving a legal procedure which would bring home to parents the idea that divorce was detrimental to the interests of children. The Commission instead sought a procedure which would focus parents' attention on children and in so doing, might well forge a reconciliation 'for the sake of the children'. To achieve that end, the question of children (their custody, maintenance and education) had to be introduced directly into divorce procedure and not

be ancillary to it.

The solution proposed by the Royal Commission was that there should be statutory provision whereby the divorce itself could not be obtained until the children question was resolved. Thus it recommended that the custody question should be introduced into divorce procedure between decree nisi and decree absolute. In every case the petitioner should submit a written statement of arrangements for the children and until the court was satisfied regarding those arrangements, the parents should not get their full and final divorce (p.106 para 373). In this way the Royal Commission felt it had secured a solution to existing failures in legal procedure. It had met welfarist demands regarding the need to consider all children whose parents divorce. It had located that responsibility within the existing divorce jurisdiction of the court. The right of intervention of court welfare officers however was to be at the direction of the court and would largely be restricted to contested custody cases. Thus, the extensive powers of intervention of para legal personnel envisaged by the Denning Committee were rejected, not because such powers were thought unnecessary to protect children's interests, but rather because it was felt that in a period where there already existed a general failure on the part of parents in their sense of duty and responsibility towards children, such extensive powers of intervention and control would make a further contribution to that failure:

"Investigations by officials might only cause resentment and frustration and would be counter productive in what is most desirable namely that the parents themselves should be encouraged to fulfil their responsibilities".

Royal Commission 1956 p 107 para 377

It would indeed be counter productive in the overall venture which the Commission envisaged for family law during this period: that of inducing a sense of morality and responsibility.

Guilty Wives - Unfit Mothers ?

It is aspects of case law, more than any other feature of legal discourse in the post war years which have contributed to a 'received wisdom' regarding the 'privileged' position of mothers within family law²⁶. Indeed, it has been argued that concern for the welfare of children coupled with an ideology of motherhood completely overshadowed the court's prewar occupation with women's matrimonial fault. Such are perceptions of the influence of these ideologies upon court practices, that even in a period in which the availability of divorce itself remained entirely fault based, nevertheless, it is argued that the courts came to view the question of establishing women's matrimonial fault as a separate issue from that of ascertaining her qualities of parenting (Maidment 1984). Moreover, some writers have suggested that a concern to preserve the mother-child relationship (largely as a result of the influence of post war psychoanalytic theories of child development), resulted in a practice of 'maternal preference' by courts in deciding child custody disputes (Graveson & Crane 1957; Karminski 1959; Freeman 1984; Maidment 1984a).

In this final section therefore, I wish to address those arguments. I shall argue firstly, through a re-examination of case law during the post war period, that although features of both ideologies (welfare and motherhood) do indeed appear in court decisions, they did not however exclusively determine court practices. Court decisions equally demonstrate that they did not adopt a uniform approach to the issue. Nor was it that straight forward, particularly when addressing issues of 'morality' and women's errant sexual behaviour. Secondly, I shall argue that where mothers did retain the custody of children following divorce during this period, that result owed more to the materiality of childrearing practices within marriages in the post war period, than to the dictates of either 'law' or psychological theories of child development.

In relation to the latter issue (the impact of law and psychology), although the increase in divorce in the years following the Second World War necessarily focused

attention upon the position of children involved in parents' divorce, it would be a mistake to assume that in all cases involving children, their future custody became an issue for the courts to decide. As both the Denning Report and the Royal Commission point out, the courts in fact held no jurisdiction to consider the welfare of children on divorce unless requested to do so by parents. And very few custody cases came before the divorce courts for a decision. Indeed the figure for fully disputed custody cases in the 1950s was approximately the same as it is in the 1980s: some 5% of all divorce cases involving minor children²⁷. In the 1950s approximately 20,000 divorce suits per year involved children and some 1,000 cases involving a custody dispute came before the courts (Royal Commission 1956 p 105 para 370). However, in 95% of cases involving children their custody was not the subject of a court decision. Clearly then in discussing the post-war years an initial distinction needs to be made between contested and non-contested cases. And where women retained the care of children following divorce, this would largely seem to relate to the fact that that position generally went uncontested by the majority of fathers. Such results reflect a continuation of childcare responsibilities as they were carried out in the majority of marriages²⁸.

In relation to disputed cases, it should be noted that our general sources of information regarding legal practices in such cases is limited. It is largely taken from Court of Appeal decisions, and it is from those Reports that we can gain some information regarding practices in the everyday divorce courts. In the area of child custody, as with most areas of family law, the degree of judicial discretion was (and is) extensive, leading to what has been referred to as judge-made law (Smart 1984). The relationship between the divorce court and the Court of Appeal is not therefore always straightforward²⁹. One area which demonstrates that issue is the continuing significance of issues of morality and women's sexual behaviour when assessing women's claims to the custody of children.

Some writers have argued that the shift away from a punitive approach by courts in the treatment of mothers who had committed adultery occurred as early as 1910:

"Judges did finally recognise the social forces for the emancipation of women and were accepting the special claims of (even adulterous) mothers to their children by the first decade of this century".

Maidment (1984) p 152

The justification for that claim is evidenced by reference to a case in the Court of Appeal in 1910: *Mozley Stark v Mozley Stark & Hitchins*. This case is also cited in legal texts of the 1950s (e.g. Karminski 1959) as evidence of a fundamental change in the courts' treatment of the claims to custody of children by adulterous wives, and it is worth some detailed consideration. A divorce court had granted a father custody of a thirteen year old daughter on the grounds of his wife's adultery. The father had placed the daughter in a school. On attaining sixteen years, the daughter had left the school, ostensibly to go to her father, but had broken her journey and joined her mother and the man her mother had subsequently married. The father issued a writ of attachment against the mother for contempt of court and requested an order that the child be returned to him³⁰. The mother also applied to the court for an order transferring custody of the daughter to her. However, the court ordered the daughter to be returned to her father. The mother appealed to the Court of Appeal. This latter court deliberated whether it could, where a child had reached the age of discretion, order that child into the care of either parent against its stated wishes. The Appeal judges had interviewed the young woman concerned and she had stated her wish to live with her mother. The Court therefore decided it could not make such an order, it argued:

"In these circumstances we think the proper course for us to adopt is to discharge the order for custody and to leave the parties to their common law rights. If the girl is minded to leave her father's house it is plain that the father cannot reclaim her by habeas corpus or otherwise".

Cozens-Hardy M.R. p 193

Thus, the daughter was released to make her own choice as to where she would live. But the Court of Appeal did not award custody to the mother in this case. It simply discharged the previous court order giving her legal custody to her father. However, in its closing statement the Court of Appeal added:

"We only desire to add that the matrimonial offence which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to the custody of her daughter, assuming her to be under sixteen."

ibid, p.193/4

In this case, the Appeal Court judges concluded by stating that the first duty of the courts was towards the welfare of the infant involved, and not towards punishment of the guilty party (p 194). Yet cases which followed the Mozley Stark judgement indicate that the lower courts continued to punish mothers who had committed adultery by the removal of children. Indeed some courts even refused such a mother any access to her children. For example, in *B v B* (1924) (p 176), a mother appealed against a decision of the lower court refusing her any communication with her eleven year old daughter on the grounds of the mother's adultery³¹. In this case the Court of Appeal held that in relation to the treatment of the claims of adulterous wives, there was no established role or precedent. It argued that each case must be considered 'in all its circumstances' (p 190). In this particular case the Court of Appeal noted:

"..we are dealing with a delicate child of eleven years of age who is obviously very closely attached to the mother and who.... has necessarily been throughout the whole of her childhood under the substantial and sole charge and nurture of the mother".

it continued :

"under these circumstances it would be a very strange and unusual combination of circumstances that would make it to the interests of the child to be deprived at that age of all association with the mother. It means a cutting away from the child all the most tender associations that she has ever had in her life."

Atkins, L.J. B v B [1924] P. p.191

In this case, the Court of Appeal ultimately decided that, provided the child was 'not brought into contact with.... the corroding side of her mother's nature' (p.182), the mother should be allowed some limited access. This intervention by the Court of Appeal (which are not undertaken lightly) may suggest that the earlier decision (of the President (Sir Henry Duke) at the trial stage) to refuse the mother any communication with her child save in the event that the child's life was at risk (p.179), was formally out of line. However, we do have to question the effectivity of the Court of Appeal in this area because, the sentiments expressed by the President in this case (heard in 1924), would seem to be more in keeping with those expressed by Sir Creswell Creswell in Seddon Seddon & Doyle (1862) 2 Sw & Tr, 640 with regard to mothers who have committed adultery,³² than with those expressed in Mozley Stark in 1910. In the light of this series of decisions, we must ask why, some fourteen years after the Mozley Stark case, a judge would still consider adultery sufficient reason to deny a mother any further contact with her child except in the gravest of circumstances as the child's life being at risk? At this point, the question of the lower courts simply being 'out of line' becomes insufficient as an explanation. Rather, these lower court decisions demonstrate some important features of the real movement of judicial practice with regard to

this issue, features which are lost if we simply attempt to 'read off' legal practices during this period from a consideration of law at the level of formal statutes and certain Court of Appeal decisions - points outlined and argued in the Introductory chapter (pages xxxi/ii and xxxvii-iv herein).

It is also important to remember that in the post war years, the changing position of women in society did not lead to an immediately more liberal approach by courts when dealing with the property and maintenance claims of guilty wives (Smart 1984)³³. Indeed, the notion that married women had a special responsibility in the post war reconstruction effort, frequently resulted in women being viewed as more culpable for the breakdown of marriage (Royal Commission 1956, p.9).

And with regard to claims to children on divorce, the lower courts continued to attempt to practice a heavily punitive approach to the treatment of custody claims by adulterous wives, especially it appears, when dealing with what seems to have been fairly common circumstances immediately after the war, in which men serving in the Armed Forces returned from war service to find their wives had formed new relationships (Millard Millard & Addis [1945] 2.525 Div; Allen v Allen [1948] 2 All ER 413). But evidence of that post war phenomenon does not simply come from the few cases which reached the Court of Appeal. Much of the evidence comes from the work of the marriage saving organisations of that period, such as the Soldiers' Sailors' and Airmen's Association, The Marriage Guidance Council, The Family Welfare Association and the matrimonial work (limited though this was) of the Probation Officers,

(Report of the Committee on Procedure in Matrimonial Causes (1947); Royal Commission on Marriage and Divorce (1951-56)). That many of those cases involving custody issues were ultimately settled out of court is in no way surprising. In the immediate post-war economy characterised by severe housing shortages, few men, particularly working class men would have been in a position to establish a separate residence and contest custody of children while maintaining a job. Equally few women would be in a position to be able to leave a marriage unless they could establish grounds for divorce or separation.

welfare services were able to argue in their evidence to the Denning Committee in 1947 that they were successful in orchestrating a reconciliation in twenty five per cent of cases - not perhaps surprising - especially as both the Denning Committee and the Royal Commission illustrate, reconciliation 'for the sake of the children' became the catchphrase of the period. But for these cases where attempts to forge a reconciliation failed and divorce proceedings started, in the vast majority of cases, the custody of children was not contested in court. Thus the pervasiveness of the ideology of motherhood was not ultimately tested in family law courts.

For those cases which were contested, the position of mothers was far from secure. Those cases which went to the Court of Appeal in the 1940s and 1950s largely relate to circumstances in which ex-servicemen were able to establish an alternative home and a substitute mother. And in such circumstances the divorce courts showed no special concern to preserve mothers' nurturing role. For example in *Allen v Allen* ([1948] 2 All ER) a mother appealed against an order of the divorce court which granted custody of an eight year old daughter to a father on the grounds of the mother's adultery. The father had been abroad in the Armed Forces during the war. He had left when the child was twelve months old. On return four years later he discovered his wife had formed an adulterous relationship.

He obtained a divorce on that ground. On decree absolute both remarried, she the co-respondent, he, a widow. The following year the father applied to the court for the custody of the child, by then eight years of age. He succeeded in that application. This was despite the fact that the child had throughout her entire life known only the care of her mother, and the fact that in the intervening period (between divorce and the subsequent application for custody) the father had made no attempt to see the child. It was not disputed in court that the child was happy with her mother, nothing was said against the mother, except that, during her husband's four year absence she had committed adultery with the co-respondent, whom she later married. However, when the trial court heard the custody application, it awarded custody to the father, arguing that the child's moral welfare would be adversely influenced by living with her mother, a mother 'who had committed adultery and was [therefore] likely to do it again' (p.414). That court's attempt to sanction the sexual behaviour of married women was ultimately overturned by the Court of Appeal, to which the mother appealed. And indeed that court (again) repeated that the trial court had not applied the proper test (Wrottesley L. J.). This Appeal Court judge stated that the welfare of the child, both moral and physical was the paramount consideration, and moreover that it was impossible to say because a woman had committed adultery she was not a fit person.....to look after the child (p.414). In this particular case, the mother (albeit expensively) retained care of the child. However, for the vast majority of women in similar circumstances in the post war years (prior to the introduction of legal aid Schemes) that course of action may not have been an option. Moreover, that Court of Appeal decision did not put an end to the punitive approach to adulterous wives and mothers adopted by trial courts. In *Willoughby v Willoughby* [1951] P. 184³⁴) (the same trial court judge) awarded custody of a two year old child to a father on the basis of the mother's adultery. The mother appealed and the Appeal Court again argued;

"While it may be undesirable, and in some cases it is undesirable that the care and control of a child should be given to a mother if she has committed adultery but it is not a rule to be followed in all cases"

Singleton, L.J. op.cit.p.192

Thus, the Appeal Court again overturned a decision of a trial court judge. In this case, it concluded :

"it is better for this two year old girl to be in the care and control of her mother at least for the present"

ibid, p.184

It might be argued that the initial judgements discussed here are simply an example of the idiosyncratic behaviour of a particular judge. I would suggest however, that such reversals serve only to further confirm two major points which this research has been at pains to demonstrate. Firstly, the role of the Court of Appeal with regard to monitoring/setting precedents in this area, is not as clear cut as some writers on this subject have attempted to argue - a point recently endorsed by the Law Commission in its discussion of the need for guidelines for courts with regard to interpretations of the welfare principle (Working Paper No.96 Custody (1986) para. 6.26). And that same point was also made by Stamp, L.J. in 1977 in the case of *Re K* [1977] Fam 179, 183. Secondly, the need, in consequence, to examine judicial practices at all levels, including those formal (ie: reported) enunciations of the Court of Appeal.

In further evidence of the importance of this more concrete approach to law, we can cite the Denning Committee. Discussing existing practice in 1947, it argued that many women found guilty of adultery did not contest the custody of children because they understood that such conduct necessarily disinherited them in terms of their claims to custody (p.18, paragraph 31(ii)). Moreover nearly a decade later, the Royal Commission on Marriage and Divorce stated that the custody of children continued to be awarded on the basis of guilt and innocence established in divorce proceedings.

Indeed, the standard lawyer's text book on law and legal practice during that period stated, that establishing adultery was the lynchpin in decision making over children's future custody in divorce proceedings, (Raydon on Divorce, p.346, quoted in the Denning Committee Report 1947, p.18).

The issue of the custody of children on divorce, and the position of mothers in the post war period was clearly more complex than a sympathetic reading of certain popular aspects of case law might have initially suggested. In the case of a contested hearing, the question of which parent would obtain care of the children, and indeed why, cannot be 'read-off' from ideologies of childhood or motherhood as these existed in that period.

In those cases which were contested through the courts, clearly there were contradictions between the approaches taken by different courts with regard to the treatment of wives adultery. For those cases which did reach the Court of Appeal, the practice of that court was increasingly to overturn the punitive decisions taken in divorce courts in the treatment of wives errant sexual behaviour.

Equally however, it would be a mistake to assume this represented a unified stage in the development of the approach taken by the Court of Appeal to this issue. In the 1960s that court can be demonstrated to be also capable of attempting to sanction women's sexual behaviour through the removal of children (see chapter five herein, pages 107-113).

The balance between confirming the existing sexual

division of labour in society in relation to childcare and thereby being seen to serve the needs of children, and awarding custody of children on the basis of guilt and innocence in divorce proceedings, proved ^{to be} a fine and indeed moveable line. In the majority of cases it was a decision which the courts did not have to make. In those contested cases heard in courts, clearly they represented situations in which it was felt fathers were most likely to succeed, for example where fathers had established adultery on the part of the mother and where they themselves could offer a mother substitute through remarriage. It was not that they intended to care for children themselves. And while certain judges in the Court of Appeal argued that adultery on the part of mothers did not automatically bar them from claiming custody of children, in practice that was frequently the result.

Conclusion

The argument developed in this chapter has been, that neither ideologies of childhood nor ideologies of motherhood can adequately explain developments in law and legal practices concerning children in the post-war years. The increasing state concern for children in this period cannot be isolated from a focus upon preserving marriage and the family. The position of mothers following the breakdown of marriage was influenced by a number of factors. Foremost in these was whether or not a father chose to contest custody of children. In the post-war years when motherhood was over idealised but where, in addition, women's responsibilities for the entire exercise of childrearing was also increased and extended, it is not too surprising to find that in the vast majority of cases custody of children was not ultimately the subject of a court dispute. Where custody was disputed by a father, the central issue for mothers was their status in divorce proceedings. During a period when the avail-

ability of divorce remained entirely fault based, the exercise of the courts' discretion generally meant the innocent wife became the deserving wife, and she usually also became the deserving mother.

However, where mothers were also guilty wives, as the Denning Committee reported, many such wives did not in fact dispute fathers' claims to the custody of children. This was largely because it was believed that adultery would in practice, if not in theory, disqualify them as future custodial parents. For those mothers who contested fathers' claims to children, regardless of their guilt as wives, ideologies of motherhood did not exclusively determine court practices. In these circumstances that ideology was frequently undercut by notions of morality and acceptable sexual behaviour on the part of married women. This resulted in the courts' continued attempts to sanction women's errant sexual behaviour through the loss of custody.

With regard to assumptions concerning the influence on court practices of maternal deprivation theories in the 1950s, these theories may have provided ideological support for (already existing) ideas regarding the necessity of the sexual division of labour in relation to childrearing. However, I would argue from this evidence that it would in fact be inaccurate to attribute post-war shifts in legal policy and practices to those theories. Indeed I would argue that such theories are themselves the result and not the cause, of an ongoing development regarding the changing status and relevance of children in industrial Britain. As demonstrated in preceding chapters there is substantial evidence of the appearance of that discourse in law and legal practice a considerable time before the work of post-war psychoanalysts in the field of child development. I would suggest therefore, that research to locate a route of entry of such ideas into the divorce process is more accurately directed at the training and case work approach of Probation Officers. However, it should be remembered that the formal establishment of divorce court welfare officers did not

occur until 1958. Additionally, because of the shortage of trained personnel at that time, it is highly unlikely that a system of training of such officers (and their subsequent duties of investigation and report writing for the courts) would have been operating in a comprehensive form much before the early 1960s. Indeed the extension of their matrimonial duties to cover county courts with jurisdiction to try undefended divorce cases did not occur until 1968.

With regard to attempts to change divorce procedure after the war, concern for the position of children cannot be isolated from an endeavour to provide a new legal procedure designed to shore up and sustain failed or failing marriages. Indeed the two concerns are inextricably linked within policy considerations. Fears generated by a high divorce rate resulted in the engagement of child protection discourses to legitimate an absolute right (albeit ultimately largely bureaucratic) of courts to consider and oversee all decisions concerning the future of children whose parents divorce.

This is not to argue that there was not a genuine level of concern for such children. But rather that it only finds expression in discourses about marriage. And the procedures developed in relation to children and divorce cannot be isolated either analytically or procedurally from the overall aim of legal policy in this area, that of attempting to provide a procedure to orchestrate reconciliation. Even though those proposals were slightly modified in the 1950s, nevertheless 'reconciliation for the sake of the children' provided the primary justification for introducing questions of childrens' future arrangements directly into divorce proceedings making divorce itself dependent upon obtaining the court's approval of arrangements. In addition of course that discourse also legitimated the wider introduction of Probation Officers (otherwise concerned with crime) into matrimonial work.

It is however important to note that these new procedures would have been consistent with existing ideologies of marriage and the family identifiable in the post-war reconstruction (see Wilson 1977). Moreover, the new proposals for legal procedure were not a completely new and novel approach to

marriage breakdown. Rather they were largely an extension of the procedure and philosophy already adopted by the welfare services of the Armed Forces aided by voluntary marriage guidance agencies.

In retrospect it is of course difficult to judge the experience of estranged wives who were subject to visits from welfare officers attempting to forge a reconciliation. But while it is quite likely that justifications based upon the interests of 'state and community' would have been fairly unsuccessful, the same may not have been true where the justification was children's interests. Indeed in a culture in which mothers were posed as the key to children's physical and emotional survival, it is likely that such a provocative argument would have proved highly successful. It is perhaps not surprising that such welfare officers reported a reconciliation success rate of some twenty five per cent of all cases considered (Final Report Denning Committee 1947). Nevertheless, both the Denning Report in the '40s and the Royal Commission in the '50s were completely silent upon women's experiences of those visits. Although each dealt with issues central to the lives of women as wives and mothers in the post-war years, as part of an endeavour to achieve a post-war consensus, each, in its remit, effectively silenced the voices, concerns and experiences of those (women) most centrally affected.

NOTES AND REFERENCES

1. Bowlby (a psychoanalyst) argued that early childhood experiences were crucial for future adult mental health. He argued that children should experience a warm, intimate and continuous relationship with their mother (or mother substitute). Continuity of care was essential, all other relationships were subsidiary.. Deprivation of maternal care in children's formative years caused irreversible emotional damage. Later work in the field of child development has to a large extent discredited the major claims of Bowlby's thesis. (Schaffer 1971; Rutter 1981).
2. So for example, Riley argues that both during the war and most strikingly just after it, the reproductive woman at the heart of family policy is surrounded by the language of pronatalism. Pronatalist thought generated a great deal of language about 'the mother'. Much of this was thought to be progressive and for a brief time it sounded as if it spoke to the same needs for the protection of motherhood about which various women's organisations had been agitating for decades.
3. Indeed in some respects the position of the poor unmarried mother worsened during the nineteenth century because the Poor Law forced the main burden and support of the illegitimate child onto the mother. Fathers could be made to contribute financially to the upkeep of their illegitimate children but single mothers were forced to enter the workhouse or leave their children if they could not support them by themselves.
4. Cretney (1974) argued that de facto adoptions had been common in the industrial slums for many years. Charitably disposed neighbours would bring up an orphan who would otherwise have to go to an institution. But perhaps the practice which the Government sought to control was that of unmarried women arranging for their baby to be delivered in a private lying-in house. The owner of such a house would receive a lump sum in exchange for arranging the baby's 'adoption'. The child was then removed to a baby house. The owners of the house received a small lump sum and inadequate weekly allowances. According to the evidence of the Report of the Select Committee on the Protection of Infant Life B.P.P., (1871 vii 607) such children were so culpably neglected, so illtreated and badly nurtured that with rare exceptions they all died in a very short time.
5. Also, provided the father was domiciled in England at the date of the marriage, s.1(1) Legitimacy Act 1926.
6. It was argued in *Harrison v Harrison* that the term 'children' in s.26(1) of the Matrimonial Causes Act, 1950 does not include a child born out of wedlock in

circumstances which prevent the child being legitimated by the subsequent marriage of the parents. Accordingly on the dissolution of the parents' marriage, no order for the custody of the child can be made.

[This case was heard on Appeal from the magistrates courts in 1947. The mother had applied to that court for maintenance for herself and a child. The justices had refused her application for maintenance for the child. The mother appealed to the Courts of Appeal. In that Court Barnard J. decided that, under s.26(1) of the Matrimonial Causes Act 1950, children meant legitimate children. He therefore dismissed the mother's Appeal]. See also Packer v Packer [1954] p.15 and Galloway v Galloway [1954] p.312.

7. Here, the Court claimed it had jurisdiction to deal with claims in relation to the child of a marriage declared void under s.35 of the Matrimonial Causes Act 1857. (Bryant v Bryant [1955] 2 All ER 116).
8. Compare with Packer v Packer [1954] op cit, and Harrison v Harrison [1951] op cit.
9. This case was concerned with a custody dispute between parents over adulterine children. Here Lord Denning argued that the test for the courts' jurisdiction was parenthood and not legitimacy. That definition resulted in a successful application by a father for the custody of three children. Also, Singleton L.J. in Galloway v Galloway [1954] op cit argued that there should be a change in the law to enable the courts to deal with financial provision for such children.
10. The Legitimacy Act, 1959 amended the 1926 Act so that adulterine children could be legitimated on the subsequent marriage of parents.
11. Educational courses to instruct young couples in the duties and obligations of married life. For the Denning Committee this system was to involve the co-operation of parents, teachers and pastors in providing a general system of education for marriage, parenthood and family life. (Denning 1947 p.5 para. 5: p.12 para. 28).
12. For the Royal Commission, the objective of education in this field was to 'foster in the individual a duty to the community, inculcating a sense of responsibility towards children and strengthening his resolution to make marriage a union for life'. (Royal Commission 1956, p.47 para. 9).
13. As a result of recommendations of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction, 1936 Cmnd 5122, the Probation service were allocated a statutory duty to include reconciliation work and investigations for the court in relation to matrimonial jurisdiction of the magistrates' court, (by the Summary Procedure (Domestic Proceedings) Act 1937).

14. This would, of course have largely applied to working class women since the Summary Jurisdiction was largely a working class forum (Carlen 1976).
15. During the War, the War Office, faced with a decision of whether to set up Welfare Agencies staffed by its own paid officers or to make grants available to voluntary organisations (for example, the Solider's, Sailor's and Airman's Family Association) chose to make grants to the latter. The Denning Committee approved that decision: "in our opinion grants in aid of societies working in the field of marriage guidance are desirable in cases where a society has proved the value of its work". (1947 p.13 para.29(i))
16. The Marriage Guidance Council was a voluntary organisation formed in 1938 and reconstituted following the war in 1943. The Council operated a system of largely volunteer counsellors to assist people with marital problems. The Council took referrals from a number of sources (Social and Welfare agencies, hospitals and clinics, Citizens' Advice Bureaux) and sometimes it appears people were sent by the Probation Officers in the Magistrates Court or indeed by the magistrates themselves. In 1947, the Marriage Guidance Council in collaboration with the Family Welfare Association initiated six Marriage Guidance Centres in London. In addition, the Council gave specialist courses of instruction to staff Family Welfare Associations and lectures to the Probation Officers of the Magistrates' Courts in marriage guidance.
17. Interestingly the Committee here use the example of a wife who because she has committed adultery "may think that she has thereby forfeited the children and she may have reluctantly handed them over to her husband" (Denning Report, 1947 p.18 para.31(ii)). An interesting example because clearly in case law the two roles are frequently conflated (Chapter 5), a position adopted by Denning himself in the 1960s.
18. This was regardless of whether custody was contested, and the statement should give details such as children's ages, past present and future home maintenance and education (p.19 para.34(ii)).
19. Technically of course this is incorrect, it was not a joint responsibility or right since fathers were sole legal guardians. Mothers did not acquire joint guardianship rights with fathers until the 1973 Guardianship Act.
20. Effect was for a time given to the recommendation for 'Statement of Arrangements' for children in divorce petitions (under Matrimonial Causes Rules 1947). However, the details outlined by parents were often so sketchy and incomplete that the requirement was later dropped (Royal Commission 1956 p.378).
21. The Royal Commission 1956 outlined the practical

impossibility of Welfare Reports in every case concerning children:

"the benefits achieved would often be negligible and could not justify the expense...even if financial considerations were irrelevant it is almost certain that sufficient experienced social workers could not be made available to undertake this work" (p.109 para.385).

22. Interestingly the Royal Commission employ the terms 'conciliation' and 'reconciliation'. It is clear however that here the fundamental differences between these two terms and methods (developed in the late 1970s) were not applicable in the 1950s. In that period the terms were both used to apply to the same service and methods, that of saving failing marriages.
23. Voluntary Services (for example, the Marriage Guidance Council, the Family Welfare Association and the Catholic Marriage Advisory Council) had received funding following the recommendations of the Denning Committee and the Harris Committee (Report of the Departmental Committee on Grants for the Development of Marriage Guidance, Cmd 7566).
24. The Denning Committee had argued (p.94, p.335) that funding should be extended to cover the entire cost of selection and training of marriage guidance counsellors. Indeed a Marriage Training Board was set up in 1949 and the Royal Commission in 1956 recommended that Exchequer grants towards a central administration and selection and training of counsellors should continue.
25. The Royal Commission noted that by 1954, the probation service had dealt with 40,000 matrimonial cases in which both husband and wife were seen (p.94 para.334).
26. For example, Re S (an infant) [1958] 1 All ER is usually drawn upon as evidence of a judicial preference for mothers (Maidment 1984 p.156).
27. In the 1980s that figure is put at 6% by Eekelaar & Clive (1977) p.29.
28. This is not of course to say that the custody of children was never an issue between parents, but that then as now, the sexual division of labour within marriage in relation to childcare and domestic labour largely determined parents' decisions.
29. The role of the Appeal Court in areas of judicial discretion is such that an appeal will only succeed where it is possible for the Appeal Court to be satisfied that the trial judge came to the wrong conclusion. There are occasions when Appeal judges indicate that they might have exercised their discretion differently. But they are unable to say that the trial judge's exercise of discretion was actually wrong or unreasonable.

30. The daughter had written to her mother saying that she was leaving school to travel by train to meet her father and that she intended to break her journey and, requested that her mother be at an intermediary station to meet her. The mother acceded to her daughter's written request and met her at the station. In so doing, the mother's conduct was technically in contempt of court.
31. In this case, the father had initially given a voluntary agreement allowing the mother to continue to bring up their daughter, but with certain conditions (p.177). Some time later he physically removed the child from the school in which the mother had placed her, and placed her with relatives. The mother then applied to the court to be allowed access to her daughter. Initially the court granted the mother limited access over a three month period after which, the mother again applied for further access and it was at that stage that the President refused the mother any further communication with the child.
32. "It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, so far as this court is concerned, all right to the custody of, or access to, her children" - Sir Creswell Creswell, Seddon Seddon & Doyle (1862) 2 Sw & Tr, 640.
33. In the 1950s, although the courts spoke of a woman's right to be housed and maintained by her husband, it was a 'right' which was vested in a legally constructed moral evaluation of whether she was a 'deserving' or innocent (or deserted) wife. Unless therefore she had a strict legal claim to property, her rights on divorce were entirely contingent upon the court's evaluation of her moral behaviour.
34. Here, a husband on return from the army failed to find employment. The family fell into debt on the birth of a child and so the mother returned to her employment on London. The child was sent to paternal grandparents in Devon, the husband also went to Devon. In his absence, the mother formed an adulterous relationship and she subsequently went to live with the co-respondent in the case, who she immediately married following her divorce.

CHAPTER 5

CHILD CUSTODY IN THE 1960s AND 1970s: COURT PRACTICES AND
THE EMERGENCE OF THE STATUS QUO

Introduction

The 1960s and 1970s provide an important backcloth to current debates in the field of child custody and motherhood in Britain. The right of courts to consider the circumstances of all children whose parents seek matrimonial orders was extended to the Magistrates' courts in 1960 (Matrimonial Proceedings (Magistrates Courts) Act 1960) and mothers acquired equal guardianship rights with fathers within marriage in 1973¹ (1973 Guardianship Act). In relation to parenthood generally, the language of equality and partnership permeated discourses on children and childbirth (Holly 1984). Certain sociological texts on the family began what at the time appeared to be an analysis of the decline of role segregation between spouses and the growth of equality of responsibility for childcare and domestic labour generally, (e.g. Willmott and Young 1973). New approaches to child-rearing techniques in mother and baby journals at the end of the sixties acknowledged the (albeit) limited presence of fathers.

In her analysis of this literature throughout the sixties and seventies Holly (1984) identifies the emergence of a new image of fatherhood. It had moved from an authoritarian style concerned with rights, ownership and discipline, to a new perspective based upon notions of partnership with mothers in the care of children. Yet Holly, along with other feminists (e.g. Oakley 1974; Sutton & Pollock 1984; McKee & O'Brien 1982) have viewed this image with considerable suspicion. Oakley argued from her research findings:

"...only a minority of husbands give the kind of help that assertions of equality in modern marriage imply."

Oakley, 1974, p.138

Edgell (1980) argued from a study of middle class couples that in these homes material relationships remain highly segregated, unequal and husband dominated (p.104). In a review of studies which posit the greater preparedness of fathers to participate in certain childcare tasks, McKee and O'Brian (1982) argued that many studies suffered from grave methodological drawbacks particularly in relation to longitudinal information. Indeed there is considerable difference between the general image of the new fatherhood in literature of the 1970s and the position of fathers as outlined in research. Moreover, that some fathers claimed to carry out certain tasks within the childcare routine does not necessarily alter the fundamental division of labour in the home in which women continue to carry the major responsibility for children. Nor does it address or indeed alter the material consequences of that responsibility for women's position in the labour market.

It was partly against that albeit vague and untheorised image of the new fatherhood that the fathers rights movement emerged in Britain during the 1970s². In Britain, Families Need Fathers (FNF) has focused its campaign almost entirely on the issue of custody of children following divorce. It does not for example offer an analysis or critique of the sexual division of labour within marriage. Instead it simply argues that in an era of 'equality' current legal practices discriminate against fathers and favour mothers in relation to the custody of children on divorce.

The rise of the fathers' rights movement in the 1970s has coincided with a number of developments in this field of family law, for example the introduction of conciliation procedures and the emergence of psychological texts on children and divorce. All of these developments present women with a considerable number of dilemmas. Increasingly it seems they are faced with public challenges and personal dilemmas regarding their role and status as mothers. Yet formally, in the 1960s for example, women had demanded that men take an equal share of responsibility for childcare and domestic labour. In view of that history it is sometimes

not at all clear why feminists in the 1980s are so opposed to the demands of the fathers' rights movement. Equally, arguments rehearsed by the fathers' rights lobby, for example, the notion that mothers occupy a position of considerable privilege within family law and legal procedures, raises ambiguities regarding precisely where mothers stand in contemporary legal practices.

It has been part of our received wisdom but equally part of our lived experience that in the case of marriage breakdown, 'mothers usually get the kids'. But the reasons why this is the case and what role courts played in that process has largely been a superfluous question. For the most part where feminist campaigns focused upon law in the 1970s, they centred on issues such as equal pay and sex discrimination legislation, domestic violence legislation and improvements to the law in relation to married women's property rights³. Meanwhile, the figures for single parent households headed by women continued to rise so that by 1981, 78.5% of all such households were headed by women and 67.5% of those households were headed by divorced or separated mothers (National Council for One Parent Families, Annual Report, 1983-4, p.22).

In the face of accusations that the above figures are demonstrative of attitudes of privilege or favour on the part of the courts towards mothers, it is necessary to look in more detail at the approach of the courts during the 1960s and 1970s. In this chapter, therefore, I will begin by looking at case law from the Court of Appeal over that period. I will then examine the findings of relatively recent research in this field on the practices of ordinary divorce courts. Finally, I will consider some of the major debates in the 1970s regarding legal procedure in relation to the handling of custody questions on the divorce of parents.

Contested Cases in the 1960s. The Impact of 'law'

In the 1960s (as in the 1950s) judicial pronouncements in the Court of Appeal gave rise to the notion that mothers

occupied a position of privilege within Courts. However, prior to the work of Maidment (1976) and Eekelaar & Clive et al (1977) which I outline below, we had very little information regarding the processing of disputed custody cases in the everyday divorce courts. For the most part, cases were dealt with as uncontested and under these circumstances they simply came before the Court under what is now s.41 of the Matrimonial Causes Act 1973 (children's appointment). At these hearings, the judge has to certify that s/he is satisfied as to the arrangements made for the children. And indeed it is difficult to consider what alternatives are available other than, in the majority of cases, to issue a Certificate of Satisfaction. Not surprisingly that procedure is subject to a considerable amount of criticism, largely because it has resulted in what has been termed a rubber stamp approach to the treatment of uncontested custody cases (Davis 1983). In discussing the sixties and seventies therefore, a major distinction has again to be made between contested and uncontested custody cases. Also, it has to be noted that a tiny proportion of cases which are contested will ultimately go on the Appeal courts.

In many ways the approach of the courts in the 1960s to contested custody cases appears to have been more ambivalent than approaches during the 1950s. Although a focus upon children's need for nurturing resulted in such statements as

"the prima facie rule...is that other things being equal children of this tender age should be with their mother."

In Re S [1958] 1 W.L.R. 397

in the majority of cases which came before the Appeal Courts however all things were not equal. Nor indeed could they be since divorce itself during this period remained entirely fault based, and the courts continued to import responsibility for marriage breakdown into the decision making process in relation to the custody of children.

In the early 1960s, the case of Re B [1962] 1 All ER 875 demonstrates this point. In this case the mother left the father. The dispute over the future custody of their four year old son first came before the Magistrates' Court. That court took the view that the mother had broken up the matrimonial home; she had in other words, put her own interests before that of the child (Evershed, p.874). Moreover, the Magistrates' Court was also of the impression that she would always put her own interests first (Donovan, p.875). They also thought that the influence of the stability of the father would exert the more beneficial influence now that the child was past the baby stage (Donovan, p.874). There was no evidence of instability on the part of the mother, other than her decision to leave her husband (Donovan, p.875). The Magistrates however awarded custody of the child to the father. The mother appealed that decision.

The case came before the High Court, and that court, largely it appears in the belief that Re S [1958] 1 WLR p.397, had established a rule in this area, reversed the decision of the Magistrates. The father in turn appealed that decision. The Court of Appeal ultimately restored the magistrates decision - but on the basis that the appellate court should not have interfered with the discretion of the magistrates' court. However, Lord Evershed in the Court of Appeal also added that in fact, there was no established rule that children of tender years should be with their mother. He stated :

"every case must plainly be determined in the particular circumstances affecting that case; though it is of course true to say that as a matter of human sense a young child is better with its mother and needs a mother's care"

Re B [1962] (an infant) 1 All ER, 873

In 'uncontentious' cases, courts have tended to confirm the sexual division of labour in awarded custody of children. However, the Court of Appeal was anxious to establish that that was in no sense the 'law'. Mothers did not start 'one-up' in custody disputes because of their primary role in the sexual division of labour with regard to childcare within marriages. Each case it is argued, is unique, each parent faces the court with equal rights (Harman L.J. op.cit, p.874). Indeed therefore, far from simply reproducing an ideology of motherhood at this time, the Court of Appeal did on occasion, clearly struggle to resist some of its more obvious implications with regard to care of children on the breakdown of relationships.

Throughout the 1960s the Court of Appeal continued to grapple with the relationship between women's responsibility for marriage breakdown through adultery, and its significance for their claims to custody of children. In the early part of the decade, Court of Appeal decisions are exemplified by moral statements regarding the failure of adulterous wives to recognise their responsibilities and duties to marriage and the family :

"one must recognise that to be a good mother involves not only looking after the children but making a home and keeping a home for them with their father.....in so far as she herself by her conduct broke up that home she is not a good mother"

Lord Denning, in Re L (Infants) [1962]
3 ALL ER. 3.

In including a consideration of mothers' behaviour as wives in the custody decision making process, it was generally argued by the Court of Appeal that although the court was instructed to consider the welfare of the infant as the 'first and paramount consideration', that did not in fact mean that it was the 'sole' consideration,

spousal conduct was also relevant. For mothers, this meant in effect, that regardless of ideologies of motherhood, adultery and responsibility for ending a marriage was still relevant to the court's consideration of their future fitness as mothers.

This arose, not because of any physical neglect or cruelty towards children per se, but rather, because the court's conception of 'good mothering' during this period by definition, carried with it a duty to remain married to the children's father. The explicit aim of the law was indeed to safeguard the interests of children. However, the implicit injunction to women was to remain married. Lord Denning, in *Re L* cited above makes this point clear :

"If the mother in this case were to be entitled to the children it would follow that every guilty mother who was otherwise a good mother would always be entitled to them."

op. cit. p.4

Moreover, Lord Denning also demonstrated in *Re L*, that he was not beyond utilising children as a mechanism to induce an errant wife to return to her husband, by awarding custody of children to the father in the hope that the mother will not leave permanently without them. Although in *Re L* there was no evidence that such a move on the part of the court would be successful⁴. *Re L* demonstrates that in the so-called permissive sixties, the Court of Appeal was clearly reluctant to award custody of children to a mother, where the father

had not through his own matrimonial misconduct forfeited his rights. Again Lord Denning makes this point clear:

"It would be an exceedingly bad example if it were thought that a mother could go off with another man and then say of right...I am entitled to take [the children] with me."

ibid p.4

In view of the approach taken to the issue of women's errant sexual behaviour in the 1960s, it cannot be argued that it was simply a matter of time before the Court of Appeal 'stamped out' the punitive approach adopted by divorce and magistrates' courts. Clearly the Court of Appeal was equally willing to impose sanctions upon wives who transgressed perceptions of wifely behaviour and female sexual passivity. And this was particularly the case when faced with a wife determined to end her marriage against the wishes of a man who the court perceived to be an exemplary husband. The notion that the courts generally operated a policy of clear discrimination in favour of mothers in the 1960s is therefore inaccurate and oversimplified. Indeed, new conceptions of motherhood which set rigid standards and routines in relation to childcare could, in effect, work to the detriment of mothers who became involved in court proceedings over their children. And where certain mothers appeared to fall short of the new 'ideal', retribution could be particularly severe, for example, not simply denying a mother custody, but also attempting to deny her *all communication with her children*. Allegations of 'failure' as a mother could cover such issues as allowing children to remain in night clothes at 11.30 a.m. coupled with too much 'self interest' (evidenced by the fact that a mother left children in the care of their father)⁵..

Over the turn of the decade, attempts by courts to preserve the family by sanctioning the sexual behaviour of mothers began to give way to what appeared to be a more clearly defined 'continuity of care' approach. That development was facilitated by changes in divorce law generally in relation to the relevance of matrimonial fault (see below). However, wives' adultery continued to present the courts with a dilemma.

Guilty wives it seems could not be seen to walk away with 'all the cards'. Although the interests of children dictated a continuation of the sexual division of labour as it existed in the marriage in relation to childcare, the courts remained ambivalent when faced with arguments regarding the rights of 'innocent' fathers.

For a while, that ambiguity found expression in what were termed split orders. Here, the courts when faced with a guilty mother and an 'innocent' father would award care and control to the mother but legal custody to the father (Wakeham v Wakeham [1954] 1 All E.R. 434; Re W (JC) (an infant) [1963] 2 All E.R. 706). That development was problematic⁶, but in the 1960s it appeared to mean that all the legal rights attached to guardianship remained with the father. This included rights to determine religion, education, consent to medical attention and to a passport and consent to marry while the child was under the age of majority. Mothers in these circumstances continued with the daily tasks of childcare, but fathers were perceived to hold all the necessary status and power to make decisions and 'place' children in wider society.

The argument that the courts during this period were simply concerned with protecting and enhancing the rights of mothers conceals more than it reveals. Custody was granted only to those mothers who conformed to the acceptable model (i.e. one which involved not only daily childcare but also appropriate social and sexual behaviour). The importance of continuity of care of children, articulated on occasions by the Court of Appeal, should not be read as a blanket statement of positive discrimination in favour of mothers. It was a specific affirmation of the existing sexual division of labour and not an attempt to enhance the rights of women per se. For example, where the courts did transfer the custody of boys from mothers to fathers (W v W & C [1968] 3 All E.R. 408) it was not suggested that such mothers might nevertheless have legal custody or at least share legal custody with fathers, and thus retain a say in their children's futures⁷. Where mothers 'lost', they lost the daily tasks of physical

care (care and control) and thereby any chance of acquiring any of the rights attached to legal custody.

Case Law in the 1970s

Changes in the significance of 'fault' generally in divorce law in the 1970s led to a decline in the significance of adultery for mother's chances of being awarded custody of children. The idea that divorce should be available on grounds other than establishing matrimonial fault was rejected by the Royal Commission on Marriage and Divorce in the 1950s. However the suggestion that divorce should be allowed following a period of separation of spouses continued to receive attention in the 1960s. In 1966, the Law Commission on Reform of the Grounds of Divorce: The Field of Choice argued, that while good divorce law should seek to buttress the stability of the family, nevertheless, where marriages had irretrievably broken down, divorce law should enable the empty shell to be destroyed with the maximum of fairness and the minimum of bitterness and humiliation (para 15). The Law Commission concluded that divorce law should afford dead marriages a decent burial and operate to establish harmonious relationships between parties and their children. It therefore recommended that the basic principle for new divorce law (later contained in the 1969 Divorce Reform Act) should be irretrievable breakdown. This would be inferred from a number of facts some of which remained the same as those which established matrimonial offence⁹ but would also include new grounds of separation¹⁰. Detailed investigation by the courts into spousal behaviour was formally rejected as no longer 'good' divorce law. That approach was reiterated in 1973 in the Court of Appeal, where Lord Denning argued, that such inquests should not simply be transferred from decisions as to whether divorce was possible, to court decisions surrounding entitlement to property and maintenance on divorce (Wachtel v Wachtel [1973] a All E.R. 829). Conduct was only relevant in such decisions if it was 'both gross and obvious' (p.835)¹¹

A similar approach was therefore made possible in relation to custody decisions. Awarding custody of children according to the guilt or innocence of parents as established in divorce proceedings was also no longer regarded as good 'law':

"the interest and wishes of the parties whatever their role in the breakup of the marriage must yield to the child's best [interests]"

J v C [1969] 1 All E.R. 788 (H.L.)

"I do not myself think that whether this marriage broke up because of the husband or the wife or of both of them is of any consequence whatsoever."

HvH & C [1969] 1 All E.R. 263

However that approach by the Court of Appeal did not completely relieve an underlying ambivalence towards the issue of fault. Although adultery per se was no longer considered grounds on which to deny custody to an otherwise fit mother, nevertheless where it is utilised as evidence of a general promiscuity or (as increasingly became the case) emotional instability, the position is less clear. Moreover, that change in the formal significance of fault did nothing to solve the indecision of courts as to how to deal with the demands of 'innocent' fathers. So far as the Court of Appeal was concerned, once fathers were unable to engage adultery as sufficient grounds to prove a mother unfit, it was not at all clear on what grounds a father could challenge a mother's claim to children. Trial courts did on occasion continue to award custody of children to fathers on the grounds that they were the innocent party and therefore the deserving parent. The Court of Appeal in turn reversed many of those decisions (for example, S(BD) v S (DJ) [1977] 1 All E.R. 656). But the concept of the 'unimpeachable father', coupled with notions of the 'essential justice of the case', continued to appear in case law well into the 1970s. Indeed, they provided a major stimulus for appeals against lower court decisions in favour of adulterous wives.

In addition, mothers were still on occasion viewed as more culpable for the breakdown of marriage. Thus, where it was a mother's decision which had brought a marriage to

an end, such mothers continued to receive moral condemnation from the courts (*Dyter v Dyter* [1974] 4 Fam Law 52). The same was not however true of the court's consideration of similar decisions on the part of fathers (*M v M* [1977] 7 Fam Law 17)¹².

Divorce Court Practice

Despite the complexity of court decisions in relation to the custody of children, and what appears to be contradictions between the practices of the ordinary divorce courts, and the Court of Appeal, it remained conventional wisdom that courts operated with a clear maternal preference (Ross Martyne 1970; Berkovits 1980; Grossbard 1982; Poulter 1982). However, apart from case law reports from the Appeal Court, we have until recently lacked any systematic research on the disposition of custody disputes in divorce courts. There are no official statistics recorded regarding the number of contested cases and their dissolution¹³. Our only source of information came from reported cases, and it was only from an extensive 'reading backwards' from those cases that we have been able in any way to grasp the everyday practices of the divorce courts.

Two studies in the late 1970s attempted to change that situation. The first study was based on the records of a Midlands court in 1973 with a sample of 95 cases (Maidment 1976). This study examined one in five of divorce petitions with dependent children presented to the court in that year. The second study was much larger, with a sample of 652 divorce cases selected from the records of ten courts in England and Wales (representing regional variations and a cross section of the divorcing population). This being one in twenty of divorce petitions involving dependent children filed in 1974 (Eekelaar and Clive with Clarke and Raikes, 1977), (hereafter Eekelaar and Clive).

Both the above-mentioned studies confirm that only six per cent of all divorce cases involving dependent children are fully contested in court (Eekelaar & Clive 1977, p.29; Maidment 1976, p.236). That is not of course to say that other cases were not initially contested. Maidment for example, notes a 50% reduction in the number of cases which begin as contested (recorded as such in the petition and the respondent's acknowledgement of service) but become through certain precourt practices (sometimes referred to as bilateral bargain) orders by 'consent' or 'agreement'. Fully contested custody cases are then extremely rare. But while the percentage is small, the numbers of children involved is substantial and increasing. For example, in 1979 60% of divorce decrees involved one or more dependent children, some 137,985 decrees were made absolute, indicating approximately 82,791 divorce cases involving dependent children in that year. On an estimation that 6% of those cases resulted in a contested custody case, in 1979 that would have resulted in 4,967 fully disputed cases, each involving one or more children.

In addition, both studies confirm that in contested and uncontested cases alike, the most significant factor determining custody after divorce is the children's 'residential status quo'. That is in uncontested case, the residence of the child at the time of the petition, as indicated in the petitioner's 'statement of arrangements' for children. And in contested cases, the residence of the child at the time of the hearing. Issues such as the age of the children and their sex were not significant factors in either study. That finding does of course raise issues about the strength of the status quo in relation to other factors, particularly rights to remain in the matrimonial home. An order confirming the residential status quo frequently confirms the right of the custodial parent to remain in the home (Southall 1985, p.184). And that position has important implications for bi-lateral bargaining on divorce (Mnookin 1979).

In relation to Maidment's study (1976) there were thirteen cases classified as contested and she reports a 100% confirmation of the status quo. In Eekelaar & Clive's

study (1977) with a sample of thirty-nine contested cases it was found that the court's decision resulted in a change of status quo in only five cases. In only two of those five cases was a real change effected¹⁴. That those two changes resulted in a change of custody from a father to a mother provoked the authors to comment, that although the study provided evidence of a certain judicial caution in allowing husbands to look after children (para 6.5), nevertheless they concluded:

"our study confirms that the major factor taken into account by the courts in deciding where a child is to live is the avoidance of disruption of the child's residence. We could find no significant relationship between the outcome of the residence issue and factors such as the age of children, the sex of the custodian parent or the separation of siblings."

Ekelaar & Clive 1977, para 13.13

In relation to the two instances in which wives successfully challenged their husbands' status quo, the authors concluded that 'such instances are quite uncharacteristic of general practice' (para 13.14).

Both studies also confirmed that where children were in fathers' care, mothers were more likely to contest that arrangement, for example Ekelaar & Clive reported:

"...husbands expressed an initial intention to apply for custody of children currently in their wives' care in only 10.3% (49) of such cases, whereas, in 34.3% of cases (23) where children were living with a husband the wife expressed an intention to seek custody herself."

ibid para 13.7

Finally, both studies confirmed that in

uncontested cases, the vast majority of children were living with mothers (80% of the Keele sample and 76% of the Oxford sample).¹⁵

For those writers and campaigners who maintained the courts operated with a clear preference for mothers, these findings represented something of a problem. Claims of substantial bias in favour of mothers could not be sustained. However, Maidment argued that on appeal there was evidence of widespread bias in favour of mothers. In 'What Chance Fathers?' (Forward From Finer No 7 (1981)) Maidment attempted to investigate what was felt to be a discrepancy between factors influencing decisions in the Appeal Courts and those taken in ordinary divorce courts. That study examined cases reported in Family Law reports over a five year period during the 1970s. The major purpose of that survey was to explore the outcome of cases in terms of the strength of the status quo hypothesis. Two points emerge from that study. Firstly, Maidment concludes that in contested cases which go to the Court of Appeal, the residential status quo is not the most important factor influencing the Court's decision (p.15)¹⁶. Secondly, Maidment argues that in those cases which resulted in a transfer of a child from a father to a mother (14 out of 19 cases) those decisions could only be explained by the existence of judicial preference for the mother (p.18/19).

The purpose of that study was simply to test the strength of the residential status quo, it was not concerned with the reasoning whereby the welfare principle was applied to reach or justify a given outcome. However, Maidment's study reveals a further factor which has implications for both the Court's attitude to appropriate carers and for any notions of the changing role of fathers in the family.

Where fathers did have the major advantage over mothers by virtue of holding the children's residential status quo, two factors clearly influenced whether the court ratified that arrangement. Firstly, the existence of a substitute mother:

"other factors came into play such as the father's ability to provide suitable care. ...in particular a female influence in the form of a grandmother or other relative, or cohabitee..."

Maidment (1981) p.15/16

And secondly, some detrimental factor on the part of the contesting mother:

"It is quite clear that detrimental factors such as a wife's behaviour in breaking up the marriage on leaving home, her inability to provide suitable accommodation for the children, her mental instability, inadequate personality or, her choice of cohabitee play a much larger part where the father gets custody."

ibid p.16

In assessing the relative chances of fathers in contested cases in the Appeal Court, the author concludes:

"For the time being a father who seeks custody has a very good chance of getting it as long as he has the care of children at the point of separation...he has not as good a chance as the mother and he may have to rely on some defect on her part."

ibid p.20

It is clear that the question of which parent obtains custody of children on divorce or separation is far more complex than an analysis simply at the level of competing parental 'rights', or, a focus upon courts' 'apparent' maternal preference can accommodate. But, in addition, the above-mentioned research raised a whole set of further questions regarding pre-court practices in this area on the part of solicitors and divorce court welfare officers particularly in relation to issues of gender. Although the role of the divorce court welfare officer has been under scrutiny (see below) the focus does not include a discussion of the impact of gender (or indeed race) on practices and procedures.

The Divorce Court Welfare Officer and Welfare Reports

The debate surrounding the divorce court welfare officer's role in the 1960s and 1970s focused upon several issues, for example, the discrepancy in judicial approaches to referrals, the influence of welfare reports upon judicial decisions, the power to decide which cases to investigate and the categories of families most likely to be investigated.

In the 1960s, the Law Commission (Working Paper No.15: Family Arrangements for the Care and Upbringing of Children) reported a wide discrepancy in the use made by the courts of the services of divorce court welfare officers (p.6/7 para 8(a)). In relation to the question of how influential such reports are in disputed custody cases, Maidment (1981) comments that in relation to her sample, reports were ordered in some 50% of cases (19 out of 38 cases). However such reports were not significant in determining whether or not the courts confirmed the children's residential status quo (p.5). Eekelaar & Clive (1977) reported that welfare reports were available in 53% of contested custody cases in their research (20 out of 39 cases) (para 6.3). However, they concluded that because the numbers were small it was not easy to deduce any factors especially associated with the ordering of reports. They also noted that where cases were adjourned for a welfare report this could result in up to six months delay in obtaining a decision.

Equally, of course, judges are not in any way bound by recommendations made by welfare officers (J v J [1979] 9 Fam Law 91). And although it has been suggested that where the courts depart from the recommendations of a welfare report that departure should be reasoned (Re C [1973] 9 Fam Law 50), there continues to be a wide discrepancy in courts' handling of welfare reports.

It was partly that varied and unpredictable approach on the part of Courts to welfare reports, and the continued questioning of the precise function of welfare officers in the field of matrimonial work which prompted a demand to

return to the radical proposals voiced by the Denning Committee in the 1940s. The Denning Committee had argued for a statutory right of welfare officers to investigate and report on all children whose parents seek matrimonial orders. That proposal re-emerged as a recommendation from the (by then well-developed) Family Law Committee of the Chief Probation Officers' Conference in 1976, (Divorce Court Welfare). At that time some writers in this field were critical of such a recommendation, largely because it amounted to a transfer of power from the courts to the welfare agencies (e.g., Graham Hall 1977). But others (e.g. Freeman 1983; Maidment 1977) argued that in fact welfare agencies were probably better placed than judges to make the decision regarding which cases should be investigated. However, this latter approach is limited in that it fails to address crucial political questions regarding the practices of welfare officers in this field. There is, for example, some evidence that working class families may be more likely to be investigated than others (Murch 1980, p.197)¹⁷. Moreover, the services have also been criticised for submerging the functions of investigation and counselling (Davis 1983) and more recently for incorporating a therapeutic approach to marital breakdown (Bottomley 1985).

The demand for a transfer of power in relation to the decision making process regarding the ordering of welfare reports in fact represented one school of thought in a psychological-legal debate which emerged in Britain during the 1970s. A major feature in that development was the influence of American research (largely psychoanalytic) which examined the children of divorced parents. While I do not wish here to outline those materials in any detail, the contemporary debate emerged around the work of Goldstein, Freud, & Solnit (1973; 1979) regarding children in divorce proceedings, and more recently has focused on the work of Wallerstein & Kelly (1980). In Britain the debate has been taken up by members of the welfare profession (e.g. Lees 1972), by psychologists (e.g. Richards 1982) and by lawyers (e.g. Maidment 1984^b; Freeman 1983). And it is increasingly argued that

to protect the best interests of children on divorce we cannot continue to rely on what, at times, appears to be the idiosyncratic approaches of members of the judiciary as to what constitutes a child's best interests. Essentially this argument called for the integration into the decision making process of the new approaches to child development in this field developed in America. Initially it was a call to educate the judiciary in child psychology and the focus of the debate was on promoting 'joint custody' orders (Maidment 1982; 1984b).

To a large extent however that debate has been displaced in the 1980s by the introduction of conciliation schemes in Britain to handle custody disputes. However, important questions regarding the precise function and influence of divorce court welfare officers particularly in relation to issues concerning gender and indeed race remain unanswered. Indeed, in view of the trend towards conciliation schemes and the central role which welfare personnel now play as mediators in those schemes, I would argue that such questions are of primary importance. The formal control exerted by courts in this field is one aspect of the social control experienced by women. Divorce, however, is a process in which there are more subtle forms of social control. Therefore, it is equally important to question whether and how dominant ideologies of the family, structure the perceptions and work of the para-legal profession who are increasingly involved in divorce court welfare work. In relation to the criminal courts, Eaton (1985) demonstrates how gender divisions are reproduced by the routine practices of court personnel. But in relation to the civil courts many questions regarding approaches towards mothers and motherhood generally remain unanswered.

Moreover, it is indicative of the way in which the current debate has been constructed (preferential treatment of mothers and discrimination against fathers) that new research in this field focuses almost exclusively on the approach of probation officers towards fathers. For example, Eekelaar (1982) (Children and Divorce: Some Further Data) attempted to

provide some information on how far probation officers approach the issue of care and control by fathers in custody cases¹⁸. From a questionnaire survey he concluded that the probation officers in his sample saw no grounds for disapproving of fathers caring for children.

In this survey, Eekelaar notes that where there was a dispute at the time of contact by the welfare officer, it was less likely to be resolved by agreement where the children were living with fathers. However, in only two cases out of twenty nine cases were children transferred from a father to a mother to the satisfaction of the welfare officer. And in only one of fifty cases were children moved from a mother to a father, again to the satisfaction of the welfare officer. Eekelaar concludes:

"Although it is true that when the father's sole custody of the children was challenged by the mother [a father] was less likely to retain them than when he challenged the mother's sole custody, a father is nevertheless more likely to retain custody than lose it. If he loses custody this will usually have the approval of the welfare officer."

1982, p.78

Unfortunately, Eekelaar's data is insufficient to allow an analysis of the theories or principles adopted by welfare officers in this work, neither was it able to offer any discussion of the process by which agreement was reached. However, Eekelaar does note that in addition to providing information for the courts, welfare officer almost always (82%) saw a counselling role as part of their function. Moreover, two thirds of officers saw themselves as 'helping' in the parties' negotiations.

In view of that definition of the functions of divorce court welfare officers it would seem important that further research identifies the influence of dominant ideologies of the family in this era and their significance for the position of contemporary mothers involved in custody disputes. In his analysis of questionnaires, Eekelaar does identify

aspects of what he terms a 'pragmatic-predictive' approach, a 'psychological theory' approach and a 'social theory' approach within the recommendations made by officers in relation to considering custody by fathers¹⁹. We do not however have any systematic information regarding the approach taken by officers to the position of mothers, it is largely assumed that ideologies of motherhood determine this area of work but as Eekelaar's work demonstrates this is not necessarily the case.

In relation to the issue of remarriage, Eekelaar states that fathers living alone with children were more likely to be contemplating remarriage than wives similarly placed (28.5% of fathers against 24.1% of mothers). He concludes that it may well be that chances of remarriage make it more feasible for a father to contemplate custody and this Eekelaar argues, would support a 'social theory' that child care is more appropriately a female role, particularly of married women (p.79). Nevertheless, as Eekelaar points out, in relation to this study, this still leaves a majority of cases in which husbands were living alone and not contemplating remarriage.

The above-mentioned study is limited and most conclusions are tentative. However, in so far as it does identify the approaches adopted by divorce court welfare officers to the issue of care by fathers, these officers do not appear to raise any objections to fathers retaining the residential status quo of children, either alone, or, where such fathers contemplate the help of a female substitute.

Where fathers hold the residential status quo position therefore, it appears they stand a very good chance of gaining both the support of court welfare agencies in retaining that position and the agreement of the courts to ratify that arrangement. If such fathers can in addition utilise aspects of a mother's behaviour (e.g. responsibility for breaking up the marriage, or the more fashionable grounds of 'emotional instability') then, as Maidment (1981) identifies, such fathers face the courts as clear forerunners in the dispute for custody.

Moreover, that position of strength on the part of certain fathers arises regardless of the sexual division of labour within an individual marriage regarding responsibility for children and childcare. Indeed, both the courts and welfare agencies appear to proceed on the basis of what can be quite arbitrary and fortuitous arrangements regarding the care of children in the process of marriage breakdown. For example, parents may make what they perceive to be temporary arrangements regarding who should care for children during this period. But equally, one parent may refuse another care of children, or, may order a parent out of the matrimonial home without children. Equally, a parent may acquire the children's residential status quo simply by refusing to return them following an access period.

It should not then be assumed that in ratifying the children's residential status quo, that courts (or social welfare agencies) are necessarily adopting a 'continuity of care' approach (thus protecting children's relationship with their major or psychological parent (Goldstein, Freud & Solnit 1973)). This may or may not be the case. In certain circumstances it may equally be the case that the courts are simply ratifying the outcome of power relations as these are played out during the process of marital breakdown. And I outline situations in which that can occur in chapter 8 herein.

However, where mothers lose the custody of children as a consequence of losing the children's residential status quo, a pragmatic approach on the part of courts may indicate that in confirming the status quo, courts take the view that the least further disturbance to children the better. But it is also based upon a powerful underlying cultural belief that regardless of circumstances

others should not lose their status quo position, or, more precisely, a good mother never leaves or indeed loses her children. That philosophy is reiterated in the Court of Appeal in the late sixties :

"Many mothers who are good mothers have left their husbands; but as a rule they take the child with them"

Salmon L.J., H v H & C [1969] 1 ALL ER p.263

In this case, Salmon, L.J. did not dispense with the idea that there may have been a genuine explanation for the mother leaving the child with the father, but all the Court of Appeal (and indeed the lower court) had, were the affidavits. And it was indeed the case that factual information was generally lacking. However, the fact that Salmon cited it as a general rule that "good motherstake the child with them" suggests that the judge was more influenced, generally, by the dominant ideology of motherhood than the structural realities facing many mothers when leaving their husbands and the matrimonial home. The reality for such women usually centres on their ability to take children when they leave and also of course, their ability to provide alternative accommodation. In the absence of adequate alternative accommodation, or insufficient grounds to be awarded sole occupation of the matrimonial home by courts, then the implicit and indeed explicit injunction to women, is to remain within marriage 'for the sake of the children'. If such a mother leaves without the children in the hope of finding a solution to her own situation and of caring for them once that is sorted out, as research verifies, she places herself in an extremely vulnerable position, because she is viewed as having abandoned her children - a heinous crime indeed for a 'real' and 'proper' mother.

The research outlined above in relation to the significance of the status quo attempted to transfer the formal terrain of the debate on children and divorce. However, the popular debate in this field continues to be perceived in terms of 'favoured mothers and displaced fathers'. Moreover, further research in the 1980s (Maidment, 1981; Eekelaar, 1982) has focused on the position of fathers within legal practices. And public debate continues to focus very much on the position of fathers and what has been termed, the 'fatherhood crisis' with regard to children and divorce (Families Need Fathers 1983). But what of the crisis in motherhood? While the notion of 'privileged mothers' continues to provide the back-cloth to debate in this area, we have in fact very little information regarding the experiences of mothers facing a custody dispute.

In the following chapters therefore I wish to examine in more detail the significance of the status quo for certain categories of mothers, particularly the circumstances under which they might lose that position, and the inter-play between the significance of the status quo factor and notions of morality and sexual behaviour. I will do this through an examination of the position of lesbian mothers in Britain in relation to child custody on divorce. I will examine how dominant ideologies of motherhood and the family are influential in custody disputes, both at the level of court proceedings and pre-court practices. Therefore I will also examine the role of solicitors and divorce court welfare officers in these cases. My argument is, that aspects of the legal treatment of mothers who are lesbians reflects in an intensified and revealing form, central assumptions regarding women in society specifically in relation to their function and status as mothers.

NOTES AND REFERENCES

1. Although the significance of that right had necessarily declined considerably since the campaigns of NUSEC in the 1920s.
2. It is not of course limited to Britain, for example, Father Power in Auckland, New Zealand, Movement for the Paternal State (M.C.P.) in France. The International Working Party on Divorce & Separation held its European Conference in Brussels in April, 1984. The Conference was entitled 'DADDY: Parental Equality in the Interests of the Child' and focused on denial and enforcement of access, the situation of men and divorce in Europe, and the preparation of a Petition on Joint Custody to be presented to the European Parliament and Council of Europe.
3. And these resulted in the Equal Pay Act and the Sex Discrimination Act 1975, The Domestic Violence and Matrimonial Proceedings Act 1976, The Domestic Proceedings and Magistrates' Courts Act 1978, and The Married Women's Property Act 1964.
4. In the case of *Re L* [1962], ——— it is clear from the wife's statement that she had no intention whatever of returning to her husband. Moreover this wife had sufficient money to enable her to live apart from her husband in relative comfort.
5. In this case the lower court had denied the mother all access to her two daughters aged four and five years. It had argued such a refusal on the grounds that apart from a lax in childcare standards, the mother had a close friendship with a man before the correspondent, and in addition the mother had 'left her husband and children in the house with no-one to look after them'. On appeal (*S v S & P* [1962] 2 All ER 3), it was argued that 'all these matters are an indication that she had less interest in her children than she had in her own personal concerns'. However the Court of Appeal concluded they were insufficient grounds on which to refuse a mother all future communication with her daughters. Nevertheless it decided mother should not see them as often as she would like to see them (*Ormrod*, p.3).
6. There does not appear to be any clear foundation in statute law for this type of order. It appears to have been developed by the judiciary simply to deal with this situation. For example the notion of divided custody is unknown to common law, and 'care and control' is a relatively modern development. That judicial development has contributed to the growing confusion and complexity in this area of family law. I will take up this issue in Chapter 9 but it is important here to note that not all courts can make split orders, it depends upon the definition of custody (i.e. legal custody or actual custody as identified in legislation under which the

application is made.

7. Technically it is doubtful if that solution would have been possible prior to the 1973 Guardianship Act (c/f Re H (an infant) Ch D [1959] 3,746). This is because, fathers during this period remained sole legal guardians of children within marriage, mothers could only acquire those rights through the courts on marriage breakdown. Thus, a joint custody order in effect, would put a separated/divorced mother in a more powerful position than a married mother.

The point here is that mothers were not generally perceived as having anything to offer their children - save nurture and domestic labour in early years. The Courts did not utilise split orders to the benefit of mothers who lost the physical possession of children.

8. In 1963 Leo Abse presented a Bill which among other things would have allowed divorce after seven years' separation.
9. Adultery, cruelty and desertion.
10. Two years' separation by consent of both parties otherwise five years' separation.
11. In effect, however, this remained problematic for women, because conduct was a mechanism generally engaged in attempts to reduce men's financial commitment on divorce (Smart 1984).
12. In this case a father had deserted his wife and taken their three children to live with his lover. The focus of enquiry of the lower court however was whether the father's lover would provide a good mother substitute and whether their relationship was likely to be permanent. Although the Court of Appeal ultimately returned these children to their mother there were no statements of condemnation regarding his conduct as a father in 'breaking up the family' or 'his responsibility to the children to maintain a home with their mother' as in Re L [1962].
13. These figures are not recorded in either HMSO's Judicial Statistics or HMSO's Legal Aid statistics.
14. In one case the child had already been moved to the mother by agreement; in one case the mother obtained custody on a welfare report recommendation after having abducted the children so that they were already living with her at the time of the hearing.
15. In uncontested cases the studies reported 11% of the sample were living fathers in case of the Keele sample; 9.1% in the Oxford sample, ('other' arrangements were 9% and 14.9% respectively). The Oxford sample noted that if children were living with husband, they were more likely to be older children and less likely to be under four (especially if they were girls). However they comment that the differences were not striking (para 2.2).

16. There were 11 cases where the mother had the residential status quo and 27 cases where the father held it. In only 4 of 11 cases (36.4%) did the mother retain her residential status quo, and in only 8 of 27 cases (29.6%) did the father retain his residential status quo.
17. Murch argues that middle class families previously unknown to either Probation or Welfare Services largely avoid scrutiny. He also points out that the background to the Probation Officers' proposals in 1976 were investigations carried out in 1975 and 1976 into divorce petitions to see what proportion of families were already known to social services departments or local probation services. Three studies revealed 39%, 43% and 36% of families were already known.
18. This research was based upon a questionnaire survey of twenty-four separate probation areas during June and July 1978. 120 completed questionnaires were returned. In 100 cases information was also returned about the court hearing and its outcome.
19. Eekelaar acknowledges that that classification is tentative and somewhat problematic. For example an illustration of 'pragmatic predictive' is given as a rejection by an officer of the arrangements which a father proposed for children while he was working and where he was also known to be a heavy drinker and violent. It is difficult to know whether from this if the objection related to issues surrounding 'latchkey kids' or, fears regarding leaving children in the care of alcoholics, or both. Equally this could have been classified under social theory (as opposed to pragmatic).

Clearly analysis of decision making and recommendations made in this area require a somewhat more detailed analysis and classification system than the present study allows, since adherence to the dominant ideologies of the family might well account for all these classifications.

PART III :

INTRODUCTION

In 1977 a group called Action for Lesbian Parents (ALP) produced a pamphlet entitled A Guide to Gay Custody (AGGC). That pamphlet attempted to give some guidance to lesbian mothers who faced a custody dispute over their children. The booklet covered such issues as the selection of solicitors and barristers, and a discussion of the range of problems likely to face a lesbian mother plus information on courts, legal procedure etc. The pamphlet argued that for the most part, lesbian mothers had little chance of being awarded custody of their children by the courts in the face of opposition from a father.

Although the issue of lesbian mothers has received some attention in America (Basile 1975; Riley 1973; Armano 1974; Weston Evans 1982), the issue had not received any systematic attention in the U.K. This has been the case for a number of reasons. There has been little research on law and legal practices in relation to child custody and thus very little in the way of a framework against which one could begin to analyse and discuss the position of lesbian mothers in the U.K. And that lacuna is partly responsible for claims of bias and/or simple prejudice by the courts against lesbian mothers as compared with the treatment of (presumed) heterosexual mothers. It also contributed to attempts at explaining the approach of courts in relation to this issue in terms of 'homophobia' (Humphries 1978; Basile 1974).

In the U.K. we have lacked information beyond an anecdotal level on the legal experiences of lesbian mothers. And that position has been compounded by the selection of cases which are chosen for Report in the Law Reports¹ and by the need not only to protect the identity of those mothers who have contested custody from adverse

publicity but also the need to protect those women working in this area (as advisers and supporters of mothers). Women who agree to offer support and advice in this area are frequently women who have either lost custody of their own children or women who feel that if their identity became well known they would almost certainly lose custody of their children.

However, an increase in the number of cases in which women in these circumstances decided (at least initially) to contest custody and the organisation of national support groups, (for example, ALP, Bristol Lesbian Mothers Group, The Manchester Lesbian Mothers Group, (Our Lives; Lesbian Mothers Talk to Lesbian Mothers), and more recently support groups in Sheffield, Leeds and London) plus the actions of individual lesbian mothers in providing information about their cases has began to break down the almost enforced silence in this area of women's struggle.

In the following three chapters therefore I will set out and discuss the operation of law and legal practices in the U.K. in relation to a sample of thirty-six lesbian mothers. Firstly I will examine a number of cases which actually reached a a fully disputed court hearing. That position, like the situation of custody cases generally is extremely rare. In relation to lesbian mothers however there are additional reasons why it is so unlikely that a case will reach the courts. These reasons are partly based upon particular precourt practices in this field, but it is also the result of the experiences of those few lesbian mothers whose cases came before the courts during the mid 1970s (Humphries 1978; Hanscombe & Forster 1982). The general approach to the issue of 'lesbian mothers' by the legal profession (solicitors and barristers) and the courts (judges and magistrates) and by the para legal personnel (divorce court welfare officers) is to see such mothers as deviant, morally corrupting and socially threatening. This led many lesbian mothers facing a similar experience to seek other types of solution to their situation . For many, it has meant remaining in

marriages which they find intolerable and which, were it not for the fear of losing their children they would clearly leave. In addition many lesbian mothers faced with no alternative but a legal dispute ultimately decide not to contest the case in court. In the following chapters I will outline some of the practices engaged in these cases which are influential in that decision.

A central theme in my analysis of this issue is that it is inaccurate to talk of the 'lesbian custody case' or 'the lesbian mother' - just as one cannot talk of 'the heterosexual mother'. That label in fact gives us very little information. Moreover, we cannot understand the operation of the law and legal practices in this field simply by attempting to contrast the legal treatment and experiences of mothers on the basis of sexual preference. That is to misunderstand the role and development of law in this area. In addition, we cannot explain current legal practices in relation to lesbian mothers simply in terms of the homophobic nature of 'law'. It is inadequate to explain the operation of law and legal practices simply in terms of the class or gender or indeed the phobias of its personnel². Equally, the politics of this issue do not lie within the 'rights and civil liberties' debate or the gay rights debate³. Analysis of the legal treatment of 'lesbian mothers' is more accurately placed within an examination of the social construction of motherhood and the conditions and circumstances under which that role is socially acceptable and the institutions and mechanism through which it is sustained and reproduced. The legal experiences of lesbian mothers reflect many assumptions regarding the role of women as mothers in society and they demonstrate one institution through which those assumptions are sustained and reproduced.

In chapter six therefore I will begin with an examination of the outcome of a sample of lesbian custody cases in the light of the residential status quo hypothesis (Eekelaar & Clive 1977). In chapter seven I will examine in more detail

the recurrent justifications employed by courts in the removal of children from the care of lesbian mothers. In chapter eight I will present materials from a series of interviews carried out with a sample of lesbian mothers in the U.K.

CHAPTER 6

SEXUALITY AND SOCIAL CONTROL: LESBIAN MOTHERS, THE COURTS
AND CHILDREN'S RESIDENTIAL STATUS QUO

In this chapter I will present the findings of fourteen contested custody cases involving twenty-one children aged between 3½ and 15 years all of whom are the children of mothers who are also lesbians. The cases are divided according to which parent held the children's residential status quo at the time of the court hearing (i.e. mothers, fathers or joint status quo - see Table 6.1, p.136). It is however important to note that that position is not always a valuable indicator of who has had general responsibility for the care of children during a marriage.

Mothers' Status quo

Court decision transfers children to father's household

Mothers held children's residential status quo in eight out of a possible fourteen cases (see Table 6.1, p.136). In five of those eight cases a court decision resulted in the transfer of a child or children from a mother's care to the care of a father. Those cases are, H v C (1980) (unreported case - County Court); I v I (1978) (unreported case - High Court); L v L (1976)(unreported case - County Court); McT v McT (1977) (unreported case - Magistrates' Court); D v D (1974) (unreported case - County Court).

In H v C (1980) the court transferred the care of two daughters, aged five and six years from their lesbian mother to their father. The mother had cared for the children since birth. Following separation and divorce, the mother lived with her lover who herself had four children. The father had remarried a woman with one child. His new wife undertook to care for the daughters if they were granted

Table 6.1 : CHILDREN'S RESIDENTIAL STATUS QUO

CHILDRENS RESIDENTIAL STATUS QUO	TRIAL COURT DECISION		COURT OF APPEAL DECISION		WELFARE REPORT				EXPERT WITNESS			
	CONFIRMS	TRANSFERS	Application		AVAIL	Recomend/s			CALLED	Recomend/s		
			DISMISSED	SUCCESSFUL		M	F	OTHER		M	F	
<u>WITH MOTHER</u>												
H v C 1980		✓	N/A		YES		✓	S/O	NO			
In re B (TA) 1971	✓		✓		NO				NO			
I v I 1978		✓	N/A		YES	✓			NO			
L v L 1976		✓	N/A		YES	Unavailable			YES(3)	(1) ✓	(2) ✓	
A v A 1980	✓		N/A		YES	✓			NO			
Mct v Mct 1977		✓	N/A		YES	✓			NO			
D v D 1974		✓	N/A		YES	Unavailable			NO			
Re P 1982	✓		✓		NO				NO			
<u>WITH FATHER</u>												
H v C 1982		✓	✓		YES	✓						
J v J 1984		✓	N/A		YES	✓						
E v E 1980	✓		✓		YES(2)	✓		S/O	NO			
W v W 1980		✓		✓	YES	Unavailable			NO			
<u>JOINT</u>												
V v V 1977	{M} ✓				YES	-	-					
S v S 1980	{F} ✓				YES	✓		S/O	YES(2)		(1) ✓	

N/A : Not Appealed
 S/O : Supervision Order
 M : Mother
 F : Father

Figures in brackets refer to either the number of reports available/no. of expert witnesses.

to the father. A welfare report was available, it contrasted the two homes and stated that the father's home was more 'stable and natural' (p.1). Although the judge accepted that because the children had always been in the care of their mother that that was a strong reason for maintaining the status quo, nevertheless he agreed with the welfare officer and argued that the new wife's home offered a more stable and natural environment (p.1). The father in this case was therefore awarded sole custody and care and control of the children. The mother was awarded reasonable access. The judge also concluded that a supervision order should be made because of the 'tensions and emotions which exist between the mother and father' (p.6).

In I v I (1978) a boy aged five years was transferred from mother to father. The father proposed that his parents should care for the boy on a daily basis while he worked. The mother proposed to live with her lesbian partner who also had a daughter aged twelve years. The mother and father in this case were Australian and had been in England on an extended holiday⁴. The father intended to take the boy back to Australia. A welfare report was available in this case, in which the welfare officer stated he was satisfied with the welfare of the child in the care of the mother and her partner (p.5). The judge in this case assessed the father's mother as a potential mother substitute. She is described as a kindly, motherly and considerate mother. In comparing the alternative homes the judge concluded that if the child remained with his mother the very real advantage would be that he would be in the natural place for a young child. However that would mean that the father would have to stay in England, and that, the judge concluded, would be highly unsatisfactory from the father's point of view, 'enforced exile would probably arouse resentment in him' (p.11). Moreover, the judge viewed the mother's relationship as unstable (not likely to last) and that was therefore a risk for the child. In addition the judge felt the child might suffer because of his mother's relationship. In the care of his father and grandparents, however, he would be brought up in a normal family atmosphere (p.13). The

judge therefore awarded custody to the father. While she anticipated that a child of five would be upset and distressed at leaving his mother, nevertheless she argued that 'the sooner the change is made the better...he appears to be a resilient and adaptable child I do not see any risk of his failing to settle down in Australia' (p.14).

In L v L (1976) the mother lived with her partner and the father lived with his girlfriend. It was initially agreed between them that the child, a boy aged almost five years, should live in his father's household. However, the father decided that no harm would come to the boy in his mother's care and he therefore returned the child to her, his own relationship having broken down. In the following three months the child's home was changed several times. When the case finally came before the court, the judge argued that the case required 'expert' opinion. Three psychiatrists were engaged who gave evidence regarding the possible effects upon children of being raised by lesbians. Two of the psychiatrists argued adamantly that the child would be psychologically damaged if raised by lesbians, the third argued that that was not necessarily the case. In effect, the judge opted for the evidence which argued the child would be damaged and awarded custody of the child to the father and his new partner.

In McT v McT (1977) a magistrates' court awarded custody of a daughter aged 3½ years to her father. The father proposed to continue living with his parents. Initially both parents of this child had lived with paternal grandparents. The father had ordered the mother out of the home on the basis of a lesbian relationship. She had taken the child and gone to live with her own mother. Although the welfare officer in this case is reported by the mother to have been sympathetic towards her, the court made no reference to the report when custody of the child was decided. The magistrate is reported to have referred to the issue of the mother's sexuality as 'perverted and vile' and concluded that she was 'emotionally unstable'. Although

the welfare officer did not appear in court, the father's G.P. was called. He confirmed that 'if left in the care of the mother the child would suffer greatly because of gossip and taunts' ('OUT' No.4 p.3 1977). Custody of the child was granted to the father.

In D v D (1976) three daughters aged seven, nine and eleven years were transferred from mother to father and the daily care of paternal grandparents. In this case the father proposed to move the children from London to the West Country, where his sister-in-law would assist grandparents in the daily care; he proposed to continue working in London. A welfare report was available in this case but the judge stated that he felt unable to rely upon its content. For that reason he decided to interview the children himself. This he did on two separate occasions by visiting the children in their own home. This is a fairly unusual step to take, although judges have interviewed children in private (under both Wardship and divorce proceedings) (Re D W (A Minor) (Custody) (1983) 14 Fam Law 17) this is generally done in chambers. However, in this case the judge stated that he found the visits crucial to his decision (p.6). The husband here had argued that the mother had no respect for ordinary family life and that she had stated that a lesbian lifestyle was the only form of sexuality compatible with her political ideals. The judge hearing this case concluded that this mother had quite deliberately sought to free herself of the trammels and obligations of family life (p.12) and in her care the children would be brought up in 'singularly unbalanced feminine environment...where they would be exposed to particular intellectual opinions expressing themselves as an eagerness for total feminine freedom sexual and otherwise will have a marked effect' (p.22). The judge therefore concluded that the children 'are likely to have a more stable and balanced background in the family home that is proposed for them in the West Country than in the single parent family life that is proposed by their mother' (p.22).

Mother's Status Quo - Confirmed by the Court

Lesbian mother's continued care of children was confirmed by the court in only three cases: A v A (1980) (unreported case - Sherriff's Court); In Re B (TA) (1971) Ch, 270 and Re P (A Minor) (1982) (unreported case - Court of Appeal).

In A v A (1980) the court with clear reluctance, confirmed the mother's status quo position on the basis that a) the father did not himself want custody of the boy, b) the child was in fact fourteen years of age and had expressed a clear wish to be allowed to stay with his mother, c) the only alternative was to place the child in the care of the local authority, indeed that was the request of the father who argued that he had no room to take custody of the boy himself. A welfare report was available in this case and it recommended that the boy should remain in the care of his mother. However the father argued, the mother was homosexual, there was no father figure in the home and that the home was regularly used for meetings of people who shared the same sexual preference as the mother.

Presented with either continued care by the mother or local authority care, the court in this case finally opted for care by the mother but with a statement to the mother to the effect that she should endeavour to ensure the boy grew up to be heterosexual.

In Re B (TA) (An Infant) (1971) the magistrates' court initially awarded custody to a mother on the basis that her lesbian relationship was over, and it was felt because she offered the daughter, aged 3 years, a more stable environment than the father. In this case the mother had acquired the status quo by refusing to return the child following a period of access. The father appealed the magistrates' decision. On Appeal, the judge expressed dissatisfaction at the way in which the mother had acquired the status quo however 'dealing with matters as they now presented themselves to the court',

the judge argued, firstly that the mother had moved into her parents' household and therefore the daughter would not now be raised in a manless home (p.276). Secondly, the mother produced medical evidence to say that the lesbian episode was due to periperal depression (p.277). These developments persuaded the Appellate judge to dismiss the father's appeal and the mother therefore retained custody.

In the above- mentioned case there is no indication that a welfare report existed. However there did exist several circumstances which earlier research has indicated might well lead to the order of a welfare report (Eekelaar & Clive 1977) e.g. the father changed his housekeeper without notifying the mother (and on that basis) the mother retained custody of the child following an access visit; the mother moved her home; the father applied for what would amount to a further move of residence for the child.

In Re P (1982) the court again confirmed a mother's residential status quo when faced with an alternative of local authority care. In this case the mother had originally left home with a daughter aged six years (and a son aged fourteen years by a former marriage). She went to live with her lesbian partner. When the husband discovered the 'nature of the relationship' he took the daughter back. Five months later he obtained interim custody of the child. Six months later he returned the child to the mother because he could not cope. Two weeks later he took her back. The mother later obtained an order allowing her access to the child on condition that she did not allow the child to come into contact with her lover. During an access period the child made some very serious allegations against the father (p.36) and on that basis the mother did not return the child following access. The mother then applied to the court for care of the child. The father contested her application.

When the case came before the court the judge stated that the allegations made by the child against the father were of such a character as to disqualify the father from

having care of the child if they were true. However by the time the judge came to make a decision the father had withdrawn his application for custody and instead argued that the court should place the child in the care of the local authority. His objection to care by the mother was based on the fact that she was a lesbian. The trial judge however argued that before he could consider a care order under s.43 of the Matrimonial Causes Act it was necessary to show that 'it is impracticable or undesirable that the child should be placed in the care of an individual' (p.37). In assessing whether or not the proclivities of the mother and the lady with whom she lives are such as to make it undesirable for [the child] to be brought up in their home he stated;

"I have no evidence as to the effect upon children of being brought up with a parent living with a person of ...her own sex, and I have no experience of what impact that is likely to have upon a child. The official solicitor is unable to help me in that regard. In those circumstances the best I can do is to use such common sense as I possess".

(p.37)

The judge then argued that the mother was discreet regarding her sexual preference and faced with an alternative of local authority care he concluded that care by the mother would be preferable.

The father then appealed the decision on the basis that under no circumstances should a lesbian mother be allowed to rear children.

The Appeal Court however agreed with the trial judge, despite all the risks attendant with care by a lesbian mother this was in fact preferable to care by the local authority. However, in view of the risks, the Court of Appeal decided to place the child under a supervision order with the local authority social services department with reports 'as the department felt fit but at a minimum the department should submit a report to the official solicitor on a quarterly basis (p.40).

Father's Status Quo - Confirmed by the Courts

There were four cases in which fathers held the children's residential status quo at the point of the court hearing (see Table 6.1 p.136). And that position was ultimately confirmed by the court in two cases, E v E (1980) (unreported case - Court of Appeal) and W v W (1980) (unreported case - Court of Appeal).

In E v E (1980) a county court had awarded interim custody of a boy aged six years to a father. The court also ordered a supervision order and a further welfare report in six months time. The mother in this case had formed a lesbian relationship and on that basis the father ordered her out of the matrimonial home. The mother lived with her lover. Two welfare reports were available in this case, both recommended the mother should have custody. Both parents had always worked outside the home. The child had been catered for during the day by maternal grandparents. The welfare officer interestingly refers to the child as "granny reared" (p.49). The welfare officer recommended that the mother should have care of the son, on the basis of shortcomings of the father and the firmer discipline exercised by the mother (p.49).

The county court judge contrasted the relative 'safety' of the father's home with the risks involved in the child living with a mother who was a lesbian. The father was viewed as 'somewhat wanting in terms of strength of character necessary to guide a child'. But the recorder had argued that, however unsatisfactory the father is reported to be, giving him the child would not rule out other people taking an interest or the benefit of other people (p.50). Moreover, he concluded that a supervision officer could supply the lacking qualities in the father to ensure the child had a satisfactory upbringing. In relation to the mother's lesbian relationship this judge argued that the child would not understand the relationship and that it could not arguably be explained. In the mother's care the child would

soon suffer taunts and he would be aware that his background was different to others (p.51). In this case it appears the mother and her lover were going to be 'discreet'. They did not plan to explain the basis of their relationship to the child. However, in contrast to the judge in J v J (1984) (see page 149), this judge disliked that approach. He argued it was 'sly', 'they intend to employ a certain falsity' (p.51). In awarding the child to his father, the county court judge concluded that his decision must take a long term approach. He argued that attempts to hide the relationship would become increasingly difficult as the child grew older. Therefore, he concluded because 'the child was getting on well where it [was], it should remain there and not be exposed to the risks of custody with the mother' (p.51).

The mother in E v E appealed that decision and the case came before the Court of Appeal in 1980. Here, interestingly, it was argued that 'there was no rule or principle that a lesbian mother or homosexual father cannot be granted custody of a child'(p.49). Yet it was also stated that in this case there was nothing the matter with the mother's home except that, living there, the child would learn of the unusual and irregular sexual relationship of his mother. The judge argued that according to the second welfare report the child was already manifesting a curiosity about something he could not possibly understand (p.49). In view of that, the judge concluded that the lower court had indeed made the correct considerations and she dismissed the mother's appeal.

In considering why the trial judge in this case did not follow the recommendations in the welfare report, the President of the Family Division stated :

"It is of course proper that judges should consider welfare reports and the conclusions and recommendations in them. It may be that when it is demonstrated in a particular case that the judge has not considered those matters, an appellate court will look critically at the decision, and if it finds it unacceptable will regard lack of consideration of the welfare report as a valid ground for reversing the judgement.....but that is not this case"

The mother's appeal in this case was therefore dismissed. From the documentation it does not appear that an order for joint custody was made, it was commented that access was happening, although there were difficulties (p.50).

Two Appeal Court judges, Sir John Arnold in *Re P (a Minor)* (1980), and Lord Lane in *E v E* (1980), have stated that there have been cases in which the court has awarded custody to lesbian parents in the past. However, I would suggest that before we can comment on such remarks we do need to know the circumstances under which such awards were made so that these can be examined against the framework developed in this research. In the light of the statement by Watkins in *Re P (a minor)* (quoted on p.182) suggesting that almost any alternative is preferable to granting custody to a lesbian mother, the suspicion must remain that only in extreme circumstances (ie where there is little or no alternative) is such a course of action adopted.

As further support for this line of reasoning, Action for Lesbian Parents (a pressure group monitoring cases in the 1970s) approached the Lord Chancellor's Department to complain about the way in which courts were dealing with these cases in the mid 1970s. The Lord Chancellor's Department said it would investigate the issue, and responded referring to some eight cases arguing that mothers had succeeded in several of these. ALP's work involved most of these cases and revealed, in line with my argument above, that lesbian mothers succeeded in obtaining custody of children only in those cases where in effect, the courts had little alternative (in the majority of these cases fathers had withdrawn or had insufficient accommodation to offer the children).

In *W v W*, the father successfully appealed against an order made in the county court which gave custody of a boy aged 3½ years to the mother. The effect of this order would have been to transfer custody from the father to the mother. In this case, the mother had suffered a period of depression following the birth of the child and

had eventually left the matrimonial home living first with friends, then with her brother.

The father in this case then gave up his employment to care for the child. The Magistrates' Court made an order awarding custody of the boy to his father. The mother saw the child on access. Two years after separation the mother began living with another woman. In a divorce petition she applied for custody of the child. There was considerable delay (some six months elapsed) before a welfare report was available, and the case did not come before the court for a further six months. Thus, a further year had elapsed between the mother's application, and the court hearing.

The trial court judge appeared to ignore the mother's lesbian relationship - for reasons which we can only speculate. He contrasted the two alternative homes, referring to the fact that the mother's home had a garden whereas the father's home did not. The judge also referred to the fact that the father had at times developed an interest in homosexual relationships. There is no reference in the documentation as to the recommendation of the welfare report, nor does the county court judge appear to refer to the welfare report in his decision to transfer the boy from his father to his mother. However, the father applied for a stay of execution and appealed that decision. The case came before the Court of Appeal the following month. In that court it was decided that the lower court had not taken into account, a) the fact that the child had been adequately cared for by the father for three years, and, b) the fact that no clear case had been made to substantiate a change of the child's residential status quo. Indeed, it was argued that the lower court had ignored the most important aspect of the whole case (p.55). And on that basis, it was argued that the 'Court of Appeal was entitled to apply its own mind to the problem and make its own decision in the exercise of its own discretion' (p.55).

Thus the Appeal Court judges concluded that no case had been made out for the transfer of the boy, he was happy with his father, and the Court therefore allowed the father's appeal. The child thus remained with his father. The mother was allowed access to the child one weekend in three with visiting access on every other Sunday. There was no discussion of whether this mother might have joint custody.

In Cummins and Vassallo (1981) children were left in the care of their half sister who is a lesbian, rather than the father, confirming the children's residential status quo. This sister had cared for the children during the last year of their mother's life (living with the sick mother and the husband), she had then, with the permission of the father taken the children to live with her. When the father then contested that situation in court, it became apparent that he had no clear plans to care for the children, Ormrod, L.J stated the father 'has really very vague proposals in relation to the children.....it is right to say that the picture he presented [to the court] was a pretty colourless one' (p.2). In these circumstances, with the children's own mother having died I would argue the court was again left with little alternative.

Father's Status Quo, Transferred to Mother

There are two cases in which the court transferred children in a father's custody to the care of a mother: H v C (1982) (unreported case C.A.) and J v J (1984) (unreported case High Court).

H v C (1982) came back to court some two years following the original order transferring the children from the mother to the father. The intervening years had been fraught with access problems and the father now wished to stop the mother's access completely. A further welfare report was obtained in which the welfare officer stated that care and control of the two daughters should be transferred to the mother (p.2).

The basis of the recommendation in the welfare report was that the lesbian relationship between the children's mother and her lover, Ms D' appeared to be stable. But it was also stated in the Report that the children had made it clear that they wished to live with their mother.

The trial court judge stated that he found the welfare report helpful, and felt that the recommendations for a transfer of care and control of the daughters were worth trying (p.2). The focus of his judgement was upon relieving as quickly as possible the stress and pressure currently on the children as a result of the difficult (and sometimes violent) scenes which took place at access changeovers.

The father appealed against that order. The case then came before the Court of Appeal in February of 1983. The judge here began by stating that the dominant problem in this case was 'that the mother was a practising homosexual' (p.33). Drawing on statements in the welfare report in which the welfare officer indicated that the mother was unlikely to give up the fight against the father for the custody of the children, the judge stated :

"A mother who is determined to keep contact with her children particularly when they are young will often fight very hard for them, the result being that neither the children nor anybody else can establish a stable way of life".

ibid, p.34

In discussing the weight which the court should give to the views of the children (now aged nine and ten years old), the judge accepted that they had made their feelings known to the social worker; they did not want to live with their father and stepmother. However, the judge stated that he felt it was a mistake

to decide cases on the basis of what children say: 'one has to look at what is happening to the children and how they are reacting to the situation, not so much what they are saying' (p.34).

Nevertheless, this judge concluded that as children get older they make their views clearer, and can be very unco-operative and difficult. In this case he decided that the lower court had come to the right decision in transferring the care of the children from their father to their mother. However, in dismissing the father's appeal, he also stated :

"...a homosexual way of life on the part of the mother is not in itself a reason for refusing to give her control of the children, although of course it is a factor which one has to take into account and think about very hard. Experience shows.....that homosexual relationships do tend to be even more unstable than heterosexual relationships are....."

ibid, p.35

Interestingly, in this case, the court ordered joint custody with care and control to the mother - despite the fact that these parents clearly would not be able to co-operate over 'important decisions'. When the mother had originally lost care of the daughters three years previously, she had not been awarded joint custody, the father had been awarded sole custody.

In the case of J v J (1984), a county court judge transferred the residential status quo of three children, two boys aged fourteen and ten years, and a girl aged six years, from their father to their mother. The mother is a lesbian and proposed to move out of the city in which she and her husband lived and where the children attended their respective schools.

On leaving the marriage, the mother obtained an interim order (by consent) for custody of the children. Initially she planned to live with the children in the same area as the husband. However, housing problems resulted in her moving out of the city to her parents' (empty) house in Cornwall, some hours journey away. She had sought and arranged alternative schooling for the children.

Under protest from her husband she agreed, before a judge, to return the children to the matrimonial home (in London) temporarily, until such time as the final order regarding the children's future home was made. The matter took three months to return to the High Court. During this period the husband cared for the children with the assistance of a female neighbour. The mother had regular access.

Two welfare reports were prepared in this case. At the time of the first report, the mother did not disclose the lesbian relationship, nor was she questioned about it. A welfare officer visited her home which she shared with Ms "B". The first report described the mother as "a competent caring mother who has a good insight into the needs of each of the three children" (p.3). In the report, Ms "B" is simply described as a lodger and friend. The report concluded that since the mother was not working she would have more time to give to the children in their general day to day care. The judge stated that the report was limited in terms of its assessment of the parties (p.8). The second welfare report, prepared for the High Court hearing, contained the same recommendations for the mother's custody as the initial report. In the first report it was stated the boys had a preference to live with their father and the daughter wanted to live with her mother.

The father argued that he held the status quo and the court should endorse that position (p.13). Moreover, he

argued the children should be protected from the influence of their mother's lesbian relationship. He also argued he had played a significant role in childrearing responsibilities in the marriage. In relation to this latter issue the judge concluded the father's involvement was of a recent nature and not a feature of general practice throughout the duration of the marriage (p.15).

In relation to the mother's lesbian relationship the judge argued that it was right that the court as a general rule should be aware of children being led into deviant sexual ways and of the risk of social harm if the mother's relationship became known. However, in this particular case he stated that the mother was discreet about her relationship, she has not flaunted her relationship with Ms 'B'. He therefore concluded:

"I do not for one moment consider that there would be any corrupting influence by [the mother] if she were to have care and control of the children on a permanent basis. As to whether there would be social harm to the children if the knowledge of her association...was to become public knowledge in the Cornwall area I must confess I find that of a somewhat speculative nature".

(1984) (p.22)

In this case, the mother was finally awarded care and control of the three children. A joint order was made in relation to legal custody.

Parents Holding a Joint Status Quo

There were two cases in which by virtue of either a splitting of children and/or a sharing of the matrimonial home at the time of the court hearing parents shared the children's residential status quo: S v S (1980) FLR, 143; and V v V (1977) (unreported case - Court of Appeal). In the former case the father's position was confirmed by the court and in the latter case the mother's position was confirmed.

In V v V (1977) the Court of Appeal ultimately gave custody of twin girls aged eleven years to their lesbian mother. That decision overturned a previous decision in the High Court in which the father was awarded custody of the twins and their fifteen year old brother on the basis of the mother's allegiance to the Women's Liberation Movement and her lesbian relationship.

Mr and Mrs 'V' were divorced in 1973, but both continued to live in the matrimonial home. In 1975 Mr 'V' married his second wife who had three children, but two days later returned to the former matrimonial home. After two months he left to live with his new wife. He applied to the court and was successful in gaining the custody of the children of his former marriage. However, there was no available accommodation in the home of his new wife for three further children. Therefore the twin girls remained with their mother but the boy went with him and slept in a caravan in the garden. The mother appealed that decision. The father argued the mother should be ordered to leave the (four bedroomed) matrimonial home. He would then return with the three children and live there until he could buy a larger house to accommodate both his three children and the three children of his new wife.

In the Appeal Court, the judge began by stating that the case contained a great deal of emotion regarding the mother's attitude towards women's liberation and lesbian activities. However, he concluded that the case rested upon the narrow grounds of 'bricks and mortar' (p.15). He said it was clear that the father could not make adequate provision for housing the children and his plans were wholly unsatisfactory and unsuitable (p.14). He did however express misgivings about leaving the twins in the care of their mother:

"The evidence is...that the mother has become involved in an intense way with various movements of protest...She has reached the stage where no man could do anything right..."

ibid p.8

The second judge hearing this appeal said that while accepting that there was no viable alternative in this case nevertheless,

"I am much troubled lest it prove a disaster for these two eleven year old girls that they be brought up by their mother, having regard to what we have heard of her personality and her espousal of certain causes...I would not have hesitated to have taken the two girls away from her if any acceptable and practical alternative had been available".

ibid p.17

In this case although a welfare report was available, the welfare officer stated she felt unable to make any recommendations. The Court of Appeal called upon the Official Solicitor who equally felt unable to make a recommendation. The twin girls had expressed a desire to remain in the care of the mother. The older boy's preference is not stated. However the father argued that it was "all or nothing and that he was not prepared to continue with custody of their son if he lost the twins and the matrimonial home". The Court of Appeal reluctantly awarded care and control of the twins to the mother. It appears the father remained their legal guardian. It was not suggested that the mother and father should be joint legal guardians under a joint custody order.

In S v S (1980), the mother left the matrimonial home taking two children, a girl aged 7½ years and a boy aged six years. Initially the mother went to live with her lesbian lover but later she and the children returned to the matrimonial home because of accommodation problems. The mother then started custody proceedings. A welfare report was prepared which recommended she should have custody (p.143). Both children had expressed a wish to be in her care. There was also evidence from two psychiatrists reporting on the significance of lesbianism. Both doctors argued that there was no danger of children being led into deviant sexual ways. However one argued the children should be awarded to their father because there was less chance of social embarrassment

to the children.

The judge hearing the initial application accepted the argument of one doctor regarding the issue of "social danger". He also quoted from the judgement of Lord Wilberforce in *Re D (An Infant)* [1977] A.C. 602 referring to the 'dangers of children being exposed or introduced to ways of life...and the possibility that such exposure might scar them permanently'. In the circumstances he concluded that it was in the interests of the children that custody be granted to the father with reasonable access to the mother and subject to supervision order by the court Welfare Officer.

The mother appealed on the basis that firstly, it was wrong to ignore the recommendations of the Welfare Officer, and secondly, to prefer the evidence of one psychiatrist over the other. The Court of Appeal however dismissed the appeal, it argued that it was for the trial judge to decide whether or not having heard the evidence he agreed with the conclusion in the welfare report. That the judge also preferred the evidence of the second psychiatrist (even though this psychiatrist had not seen the parents) was also a matter essentially for the judge (p.146).

Conclusion

Although the numbers are necessarily small a number of issues arise. Firstly, ratification of children's residential status quo is not necessarily an indication that the courts are protecting and ensuring continuity of care of children on divorce. This may or may not be the case. It should be noted that parents can acquire that powerful bargaining factor through purely arbitrary or fortuitous arrangements. It can for example arise simply because the most powerful partner determines the position of children at the point of separation. For the mothers in this study, this can simply mean a husband asks or orders a wife to leave the matrimonial home, but refuses to allow her to take the children. Or, if she takes the children, he can use physical

(and/or emotional) force to retrieve them. Children can be returned to the matrimonial home because of insufficient accommodation (e.g. S v S 1980)). Thus, their home can change several times and it may be that the parent with whom the children finally reside at the time of the court hearing is not necessarily the parent who has provided continuity of care throughout a child's life. It may simply be the parent who remains in the matrimonial home.

Secondly it is clear that mothers who are also lesbians unlike their heterosexual counterparts do not benefit from holding children's residential status quo at the time of the court hearing. In this sample over half the lesbian mothers (eight out of fourteen) held the status quo. Fathers successfully challenged that position in five cases. In two of those cases fathers had formed new relationships and new female partners had agreed to take care of the children in the event of fathers gaining custody. In both cases judges viewed the women concerned as acceptable mother substitutes for very young children. In the remaining three cases fathers proposed that grandparents would provide the major caring role for children. In no case did a father contest a mother's custody on the basis that he himself proposed to provide the major caring and rearing role.

With regard to the three cases in which a lesbian mother's status quo was confirmed by the court (see Table 6.1 p.136), in two of these cases the only alternative open to the court was care by the state in the form of a local authority care order. This was the solution preferred by both contesting fathers (A v A (1980) and Re P (1982)). In the third case the mother had ended a lesbian relationship and was living with parents in a home 'well populated by males' (in Re B (TA) 1971). Indeed, it would appear that the only time the courts endorse a status quo held by a lesbian mother is when there is no viable alternative (therefore she wins by default) or where she has moved into living circumstances which appear to demonstrate a rejection or denial of her sexual identity.

In those cases where lesbian mothers successfully challenged the status quo of fathers - two of four cases - clearly the numbers are so small that little can be said at this stage other than to point out the particular features of each case. In *H v C* (1982) the issue turned largely upon a totally unworkable access arrangement (instances of violence on the changeover in which the father attacked the mother, children refusing to go back to the custodial father following staying access). Also, Social Services had voiced the possibility of care proceedings (see chapter 8 p.200). In *J v J* (1984) the judge was convinced of the absolute discretion of the mother in relation to her sexual identity, she was 'articulate and intelligent' and very much concerned about her child's educational future. She did not belong to any movements of political protest, she did not flaunt her sexuality. So far as this court was concerned she was clearly a very impressive witness.

The Significance of Welfare Reports

Welfare Reports did not appear to be in any way influential in terms of the outcomes in these cases. Reports were available in twelve cases (see Table 6.1 p.136).

In six of the eight cases in which mothers held status quo, welfare reports were available. However in two cases (*D v D* (1974); *L v L* (1976)) the comments and recommendations were not available from the judgements. It would appear that this was largely because in both cases the judge commented, that as a source of information for the courts the reports were somewhat limited. Both judges stated that they required additional information. In *D v D* the judge decided to interview the children himself and he concluded that exercise was indeed crucial to reaching his final decision. In *L v L* however, the judge felt the case demanded the attention and opinion of 'experts'. Three psychiatrists representing various schools of thought in relation to children's psychosexual development appeared. This effectively presented

the judge with a decision based upon preference for a particular theoretical position. In one case (H v C (1980)) the report recommended that the children be transferred to the father, and that was the resultant court decision.

Welfare officers were sympathetic to the continued care of children by lesbian mothers in two cases (I v I (1978) and MCT v MCT (1977)) and made a firm recommendation in favour of a mother in A v A (1980). In the former two cases, the mothers nevertheless lost custody of children, and in the latter case, against an alternative of care by the local authority, the mother retained custody. But this was undoubtedly due to the alternative choice available to the court and not to the recommendations of the court welfare officer.

In two cases in which mothers held the children's residential status quo (in Re B (TA) (1971) and Re P (1982)) it does not appear that welfare reports were available.

In all four cases where fathers held the status quo, welfare reports were available, (see Table 6.1 p.136). In three cases the welfare officer recommended a transfer of care to mother (H v C (1982); J v J (1984); E v E (1980)); and this actually occurred in two cases (H v C (1982) and J v J (1984)). In one case (W v W (1980) no recommendation appears.

Where parents shared the children's residential status quo - two cases - welfare reports were available in both cases. In V v V (1977) the officer felt unable to make a recommendation; the Official Solicitor who was also engaged equally felt unable to make any recommendation. In S v S (1980) the welfare officer recommended the mother should have custody, the court however awarded custody to the father.

Clearly welfare reports played no significant role in these decisions. Of the twelve cases in which welfare reports were available, in four cases recommendations were either not made or not considered worthy of discussion by

the court. In a further four cases, court decisions clearly went against recommendations made by welfare officers (all four having favoured custody by mothers). So that, in only four cases did the court's decision coincide with the recommendation of the welfare officer and in two of those cases local authority care was certainly the only alternative and in one case (H v C (1982)) it was a distinct possibility.

There were clearly a range of both overt and covert justifications engaged in the above-mentioned cases which resulted in the denial of custody of children to lesbian mothers. Courts focused upon issues of harm, damage and danger and these can be categorised into four basic areas of concern. It is to a more detailed analysis of those categories that I now turn.

NOTES AND REFERENCES

1. When this research began in 1979 there were only two reported cases *Re B (TA) (An Infant)* [1971] Ch 270 plus one case reported in Family Law (1976) Vol 6 p.230.
2. That is not of course to argue that certain people in society do not harbour a fear of homosexuality, but rather that we cannot explain the operation of law and legal practices simply in terms of the irrational fears or phobias of its agents.
3. This is for two reasons. Firstly to argue in terms of the denial of parental 'rights' is to ignore the whole development and focus of law and legal practice in this field. As demonstrated in this research the law has long since ceased to focus simply upon enforcing the 'rights' of parents. And secondly, to theorise this debate in terms of 'gay parents' is to ignore the way in which legal practices have differently constructed the categories of 'motherhood' and 'fatherhood'.
4. This couple had been in England on an extended working holiday, during which the father had secured a contract in the Far East. He had gone there to work leaving the mother and child in England. The mother's relationship began while he was away.
5. This mother stated that she had agreed to the child remaining with the father because she felt that as a lesbian she had no chance of obtaining custody through the courts, - see chapter 8.

CHAPTER 7

IN WHOSE BEST INTERESTS ?

CHILDREN, THE COURT AND LESBAN MOTHERS

In the U.K., as in America, the courts' general disregard of the children's residential status quo where the mother of the child is a lesbian is structured around four issues:

- (a) that a child raised by a lesbian will be homosexual;
- (b) the child will suffer confusion regarding appropriate gender role identification and behaviour;
- (c) the child will suffer embarrassment and teasing because of the social stigma attached to the sexual identity of its mother;
- (d) anxiety and myth regarding images of lesbianism in society.

Since decisions in these cases began to appear in the mid-1970s, there has been a slight shift in the courts' approach (see chapter 8). However the outcome for many lesbian mothers is frequently the same. During the 1970s in Britain the courts' general response to applications by mothers who were lesbians was largely one of complete moral outrage (e.g. *McT v McT* (1977)). The issue was referred to as 'a cancer in our society' and the practice 'as perverted and vile'. Mothers were seen as morally corrupting and physically dangerous. Underlying many decisions was a covert but equally sometimes an overt suggestion that children in these circumstances must be protected from the possibility of physical abuse - if not by mothers, then the homosexual women in whose company the mother spent her time. In custody decisions and access orders concepts such as 'risk' and 'danger' 'exposure to' and 'protection from' appear constantly. In relation to access to children for example, lesbian mothers have been instructed by courts that, for access to happen, the mother must not live with her lover.

If a child is allowed to visit a lesbian mother in the presence of a lesbian partner, they are instructed not to show any affection for each other in the child's presence. Indeed such are certain court's fears and anxiety in this area that in one court a mother was instructed that when the child in question goes to the lavatory, the mother's lover must go to the other end of the house (Guardian 16 January 1978).

Many women (not simply lesbians) were appalled by these decisions (Coote, Guardian 7 August 1975, Toynbee, Guardian 5 January 1978; Spare Rib 22 August 1976; Sunday Times 7 May 1978). Lesbian mothers who lost custody of their children in these circumstances argued that research on children raised by lesbian mothers was urgently needed to demonstrate that children are not 'damaged' and that lesbians do not abuse their children. Writers in this field in America (e.g. Weston Evans 1982) argued that expert testimony to the trial court is essential in order to establish that children do not suffer harm or damage. In Britain however the eventual production of research on the psycho-sexual development of children in this field (Golombok 1984) has had no appreciable effect upon the outcome of cases disputed in court¹. And while research continued to establish that most children of homosexual mothers are heterosexual in sexual object orientation (Pagelow 1980) and that there were no substantial differences in childrearing patterns between heterosexual and lesbian mothers (Rees 1979) nevertheless lesbian mothers in both Britain and the United States continue to lose custody of children through the courts (Basile 1974; Humphries 1978; ROW (Sheffield) 1979).

In the U.K. courts have tended to fuse two issues, that of children's future sexual orientation (choice of sexual object) and that of children's acquisition of gender identification and 'appropriate' gender role behaviour. In the 1970s the courts clearly felt that a child raised by a lesbian mother might well itself become homosexual, if it did not 'catch' homosexuality, it would be proselytised by its lesbian mother (it would be 'taught' about the 'gay life'). Over the turn of the decade that approach has

subsided at least on an overt level, and courts have come to focus much more heavily upon the issue of social stigma. However, issues surrounding gender role identification continue to appear, and of course this is an area in which the courts have little 'expertise'. But employing 'experts' frequently does little to resolve perceived problems. The fear and anxiety which the notion of lesbians raising children clearly does engender, frequently results in the engagement of a form of sexual 'McCarthyism' during the legal processing of these cases.

In this chapter therefore I will outline in more detail the disposition of lesbian custody cases by courts (both trial and Appeal courts) in the U.K. I will begin with a discussion of the case of L v L (1976), the perceptions of lesbianism engaged, the use of expert testimony and the justifications utilised to transfer a child from a lesbian mother to a father (and mother substitute). I will then examine the way in which the perceived 'risks' to children are dealt with. And I shall argue that the focus of the court is less concerned with the circumstances of the particular child than with the assumption that children per se can only acquire the necessary ingredients for adequate socialisation in a heterosexual family unit. Underlying a substantial amount of discussion in this field is a particular view of lesbians in society. Indeed cultural beliefs regarding the form and content of that identity do give some indications as to why courts and indeed society generally might consider a mother's sexual preference as in any way relevant to determining 'fitness' as a mother.

'Experts' and the case of L v L (1976)

The case of L v L (1976) concerned the care of a boy 'P' aged five years. When the mother in this case told her husband of her lesbian relationship he explained that he had been having a long term affair himself. He said that the

child should be allowed to live with him and his lover. The mother reluctantly agreed, she argued that 'I knew I had little chance as a lesbian of winning custody'. It was agreed therefore that the boy would live with the father and his lover.

Soon after that arrangement, the father's partner left him and the father returned the child to his mother on the basis that he could not cope with the child alone. Indeed the child was moved back and forth several times, at which stage the mother sought care and control; she argued:

"there was too much to-ing and fro-ing and I decided 'P' needed a settled home".

Initially it was agreed that 'P' should stay with his mother²; she commented:

"I made sure 'P' saw his father regularly. Then I got the impression that (the father) got worried and rushed around to find a new woman. He found someone very competent and impressive whom he married two days after our divorce. Once she appeared on the scene it was obvious they would fight to take 'P' away and everything became very strained and unpleasant".

The dispute over 'P's' custody came before the High Court in 1976. P's mother commented that although she felt her chances of keeping 'P' were limited because she was a lesbian, nevertheless she felt that her case was strengthened by the fact that she had cared for 'P' since his birth and she also held the residential status quo position.

Three central issues arose in this case. Firstly, the judge clearly felt that because the mother was a lesbian it presented a new dilemma for the English courts, "there is no guidance or precedent available". Secondly, he therefore felt he should rely upon 'experts'. Thirdly, both the evidence of certain 'experts' and the final judgement reveal a number of common myths and anxieties regarding lesbians and 'lesbian lifestyles'.

The use of 'experts' generally in lesbian custody cases can take a number of arbitrary forms. The focus can be solely on the mother. For example, the initial hearing can be adjourned for a psychiatric report on the mother. Generally speaking this is at the request of the father on the basis that lesbianism is a 'sickness' and is indicative of an emotional disturbance or mental illness. It is perceived as a personal pathological condition. In the case of the lesbian mother, since clearly she has lived for a period of her life as a heterosexual there is generally a search for 'events' within her recent life history to 'explain' her condition. Pregnancy, childbirth followed by postnatal depression are frequently cited as explanations of wives' 'condition'. And courts do seem generally more willing to accept an argument of 'precipitating circumstances', or that aspects of husbands' behaviour (e.g. laziness and disinterest in a wife and family, or overdemanding in sexual matters, or preference for certain 'unconventional' sexual practices) are responsible for a wife's lesbian behaviour. Those are events which provide an 'explanation'. However the courts are less sympathetic towards women who chose 'that' form of sexual expression. It is one thing to be 'born' that way, or 'driven' to it, it is quite another to consciously choose it.

However, a focus on the mother's mental stability is usually coupled with a focus upon children and their psycho-sexual development. This latter focus can take a number of forms. For example a psychiatrist may (with and sometimes without the consent of the court) interview the children concerned. The psychiatrist will then report on the children's psycho-sexual development. This will usually take the form of assessing current development, and giving an opinion as to the future consequence of being raised by a lesbian mother. Equally a psychiatrist may give verbal evidence in court - and indeed may simply argue from a particular theory regarding the significance of a lesbian mother for children's psycho-sexual development.

In L v L (1976), three psychiatrists were involved. The first psychiatrist interviewed the mother; he argued that although his interview was short (two hours), he doubted her homosexuality. He felt she was probably bi-sexual. Moreover, he suggested that she was in fact in court to further the cause of homosexuality (p.2). The report produced for the court concluded that the mother 'practices statistically abnormal sexual acts which can be looked upon either as deviations from the normal or frankly perverted'. A further psychiatrist reported that on examination of the child, he already demonstrated a level of anxiety about his masculinity (p.3). Both these doctors recommended that 'P' should be transferred to his father's custody immediately. The recommendation was based upon an orthodox Freudian approach; it was argued:

- (a) that fantasy and jealousy play a crucial role in children's psycho-sexual development. Jealousy of the same sex parent plays a central role in correct psycho-sexual development. In a lesbian environment 'P' could not be jealous of his mother's lover, he could not adopt the necessary sexual fantasies about her; he would not resolve the oedipus complex necessary to lead to appropriate sexual orientation;
- (b) 'P' is therefore bound to be confused about his mother sharing a bed with another woman.
- (c) It is impossible to enter adolescence happily if these childhood conflicts are not resolved (irresolution of the oedipus complex is the basis of neurosis).

The third psychiatrist in this case however argued that in fact at almost five years 'P's psycho-sexual development was already set. And any risk in his future development was very slight. He also said that 'P' would be more likely to suffer disturbance if he was removed from his mother and

the home and environment with which he was most familiar. Moreover he argued that the openness, warmth and frankness of the mother in relation to her sexual identity was a positive aspect for 'P'. However, the second psychiatrist argued that the mother and her lover should not be open, they should not sleep together.

In this case, 'experts' in effect presented the court with two radically different approaches to child development. Psychology like other fields of research and study in the social sciences exhibit competing paradigms. Orthodox Freudian theories (Freud, 1905, 1920, 1931) have tended to predominate both English and American training and clinical work in the field of child development for a considerable period in the early twentieth century (Brown 1974). However, it would be a mistake to conclude that those theories continue to hold a monopoly. The work of both Freud and the post-Freudians (e.g. Anna Freud and Melanie Klein 1932) has been subject to a considerable amount of debate and criticism (Brown 1973; Mitchell 1975; Cioffi 1975; Eysenck 1965; Oakley 1972).

Moreover, the development of social learning theories particularly in relation to the acquisition of gender role (e.g. Kohlberg 1966) illustrated that the acquisition of gender role identity and gender role development is far more complex than Freud's initial hypothesis and identification with the same sex parent allows. Gender role development is likely to be influenced by a number of factors quite apart from role models exhibited within an individual family setting. Children are influenced by siblings, and peers, and by knowledge, values and beliefs assimilated about the role of males and females within the wider social context.

In the case of L v L the judge argued that in fact few children were raised by lesbians, and without guidance or precedent he would have to rely upon expert opinions. The dilemma of course becomes which particular "experts" and additionally, what are the limitations on the knowledge

of experts in this category of court work (e.g. predictability as opposed to explanatory).

The judge in L v L accepted that the mother was clearly caring and devoted to 'P'. Nevertheless he concluded 'P's psycho-sexual development was not already set; "'P' is bound to be confused, he is bound to have fantasies, internally he is not accepting the lesbian relationship" (p.3). Thus he decided there were three objectives for the court: 'P' must develop along strong masculine lines, he must live where he will be happy and where he will obtain the best outlook on life (p.3), and finally, (somewhat incongruously) that 'P' should nevertheless accept his mother:

"the gravity of possible damage from the lesbian influence is inestimable, 'P' might grow up to be ashamed and embarrassed by his mother...the important object is that 'P' accepts his mother..." (p.3)

It was decided that 'P' was most likely to accept his mother's lesbianism if he was not exposed to it and grew up in a home which he can describe to his friends as normal. In awarding 'P' to his father the judge said 'no one need know of his mother's relationship', he concluded:

"it would be difficult to imagine this little boy going through his adolescent period of development without feeling ashamed or embarrassed of having a mother who engaged in sexual practices which are statistically abnormal". (p.3)

This judge adopted a 'sickness' model in relation to the mother's sexual preference. He stated that 'the couple frankly recognised their deviation, but they were free of lesbian's anti-male attitudes...their social life includes men (p.3). Nevertheless he argued that as a principle of public policy certain lines had to be drawn:

"I distinguish clearly between understanding and sympathy and acceptance and approval. It would mean the decay of society if people adopted the latter attitude. We definitely cannot have approval it would be detrimental, anyone might be influenced". (p.3)

In conclusion he stated

"these are difficult and uncharted waters, I grant care and control to 'P''s father". (p.3)

The mother in the above-mentioned case was advised not to appeal. In response to the judgement she said:

"do they think 'P' is going to grow up to be a statistician? We desperately need some research on all this. If we could have said in court 'look here is a study of fifty children who have grown up with lesbian mothers and they are no different from other kids - heterosexual - whatever, since we have to fight in their terms at present, - I believe this would have a tremendous effect, it would undermine some of the statements which are based upon nothing but prejudice and ridicule and myths about homosexuals".

In addition this judge also made 'P''s access to his mother conditional upon the mother and her partner sleeping apart; they must appear to be 'just good friends'. In relation to that condition the mother said:

"I really do not know how to find the words to express my reaction to this queer bashing. Anyone would think that the sexual aspect of our relationship is the be all and end all. I love 'P' and cannot envisage life without him but it seems that at the moment there is nothing we can do".

Lesbian Identities: Myths and Fears

Many mothers in this study (see chapter 8) expressed anger, disbelief and outrage at the focus and degree of attention given to their sexual preference:

"when they talk about my kids' best interests I thought they would ask how I looked after them not what I did in bed".

Another mother recounted her experience of going before a judge over custody of her daughter:

"I was completely flabbergasted, he asked incredibly insulting questions about our sex lives".

That focus upon where, when and sometimes indeed how, lesbian sex finds expression is not limited to court room experiences. It can also be located in the enquiries of solicitors, barristers and divorce court welfare officers. In many cases the nature of enquiry indicates not simply anxiety but in addition a high degree of voyeurism.

To a large extent cultural beliefs and attitudes towards lesbians are determined by elements of fantasy and anxiety. Once a mother is identified in terms of sexual preference, that label becomes the only noticeable quality and the central focus of the case. Gagnon & Simon (1976) make this point. They argue that generally speaking even where it can safely be assumed that an element of sexual activity takes place (e.g. relationship of husband and wife) the social constraint is usually to view the role in largely non-sexual terms (p.247). But where sexual activity is identified with a role our sense of the dimensions of the sexual component is often widely exaggerated:

"such persons are seen as having greater sexual appetites and less self-control over these capacities - homosexuals have a lower capability in controlling their impulses". (p.248)

For lesbian mothers that label and the consequential identity 'processing' has added dimensions. The suggestion, sometimes overt but frequently covert is that lesbian sexuality is predatory and moreover that it is indistinguishable from paedophilia. Thus it is feared that lesbians may

engage in sexual acts in front of children and that they may subject older children to situations in which sexual abuse is a possibility. Yet the presumption that lesbian mothers any more than heterosexual mothers would engage in sexual acts in front of children is not openly confronted. In addition the legal treatment of lesbian mothers both draws upon and necessarily contributes to general myths and confusion between homosexuality and paedophilia, yet as Richardson (1981, p.149) points out in her review of the (relevant) literature in this field, there are virtually no reported cases of female (homosexual) paedophilia.

It may be that a substantial amount of the fear and anxiety expressed in lesbian custody cases is drawn from assumptions regarding aspects of male homosexual behaviour and homosexual subcultures (e.g. preference for anonymous sex, cottaging, etc) (Humphries 1970). This is not to argue that male homosexuals can be adequately categorised in this fashion whilst lesbians cannot - male homosexuals are equally stereotyped by such images. Rather it is to argue that much of our imagery of lesbians and 'lesbianism' is drawn either from work on male homosexuals or clinical work on lesbians, or, from images of 'lesbianism' as it is portrayed in pornography intended for male viewers and audiences. It is only relatively recently that a growth in writing and research in the area of lesbian sexuality of a non clinical nature (e.g. Ponse 1978; Ettore 1980; Rich 1980) has begun to address and portray positive images of lesbians in society. Moreover, research (e.g. Kenyon 1970) has identified lesbians do not differ from heterosexual women in patterns of monogamy and non-monogamy or in valuation of emotional satisfaction in relationships. Indeed, it is being female which influences lesbian relationships and sexual behaviour (Freedman 1971; Schafer 1977). And more recently studies which focused upon patterns of mothering between heterosexual and lesbian mothers (e.g. Goodman 1978; Lewin 1979; Rees 1979) revealed that similarities between mothers (for example in meeting the challenge of single parenthood) far exceed differences in parenting patterns. But Lewin (1981) also found that lesbian mothers were in fact subject

to an increased degree of stress as parents through fear of loss of custody of their children. Nevertheless, for lesbian mothers involved in custody disputes with ex-husbands the language of 'risk and danger' continues to permeate legal practices in this field.

The Risks: Homosexuality and Gender Confusion

As can be seen from this study (see Table 6.1 p.136) very few cases which reached the courts involved the use of 'experts'. But 'experts' can be influential in reducing the number of cases which reach the courts and I will outline that process in the following chapter. For the most part however judges have ultimately relied upon their own common sense and experience (e.g. the trial judge in *Re P* (1982) p.37). Courts frequently reiterate the argument that there is no established rule or principle in this field (e.g. *E v E* (1980) p.49) while others (e.g. *H v C* (1982) p.1) argue that "the authorities think this (lesbian) relationship can lead to harm...". But the precise nature of the harm or danger is seldom clearly spelt out and courts frequently vacillate between concern for children's future sexual orientation and the circumstances and environment under which children acquire the 'appropriate' gender role behaviour patterns. For example in *I v I* (1978) in which the mother lost custody of a son aged five years, the judge argued:

"I am not going to argue that this boy would grow up to be a homosexual or adverse to women, he might or might not. It would be less harmful to him if he were to have a sound upbringing with his father". (p.3)

In the care of his mother the judge felt that the child would not have the opportunity to grow up understanding the normal relationships of men and women, and husband and wife (p.11/12). In *E v E* (1980), the trial court judge decided "not to expose the child to the risks of putting it with the mother" (p.15). And in *D v D* (1974) the judge

concluded that:

"there is a real risk that if the children were to be brought up in a single parent home with their mother as head of household, they would find themselves in a singularly feminine environment". (p.22)

In those cases in which courts do not overtly focus upon the possibility of corruption and/or proselytization of children, the issue of 'risk' or 'harm' is raised through an examination of attitudes toward men and the absence of male models in lesbian households. Indeed, in *Re B (TA)* (1971), the mother's case for keeping her child was finally agreed by the court because not only had this mother renounced her lesbian experience, she had also moved into a home 'well populated by men'. Commenting on the moving into her parents' home in which a twenty four year old brother also lived the judge stated:

"...in particular the daughter will not now be raised in a manless home". (p.276)

But the precise importance of not being raised in a manless home was not addressed. In those few cases which involved 'experts' (e.g. *L v L* (1976)) the focus of debate was psycho-sexual development (which includes choice of future sexual object). However in the absence of firstly expert evidence, and secondly, complete moral outrage at the very idea of a lesbian raising children (e.g. *McT v McT* (1977)), the focus of the court is not so much on sexual orientation as on the issue of adequate socialisation of children. So that even where the argument (either by fathers or courts) is not that a lesbian mother will necessarily 'corrupt' her children, underlying many decisions is a belief that for children to be adequately socialised they must be raised in a heterosexual environment preferably within marriage.

That anxiety that children should be exposed to the correct family images is expressed in almost all lesbian custody cases considered here. If it is not directly located

as an 'absence' in the mother's proposed arrangements for her children, it is identified as an added advantage on the part of father's proposals. So that, in cases where fathers have not remarried or are not cohabiting and therefore propose to rely on grandparents, the courts frequently view that situation as preferable to care by a lesbian mother:

"Above all (in his father's custody) he will see the normal relationships of his grandparents".

I v I (1974) p. 3

"I think it is likely to be a more healthy background for them if they rely upon (paternal) grandparents".

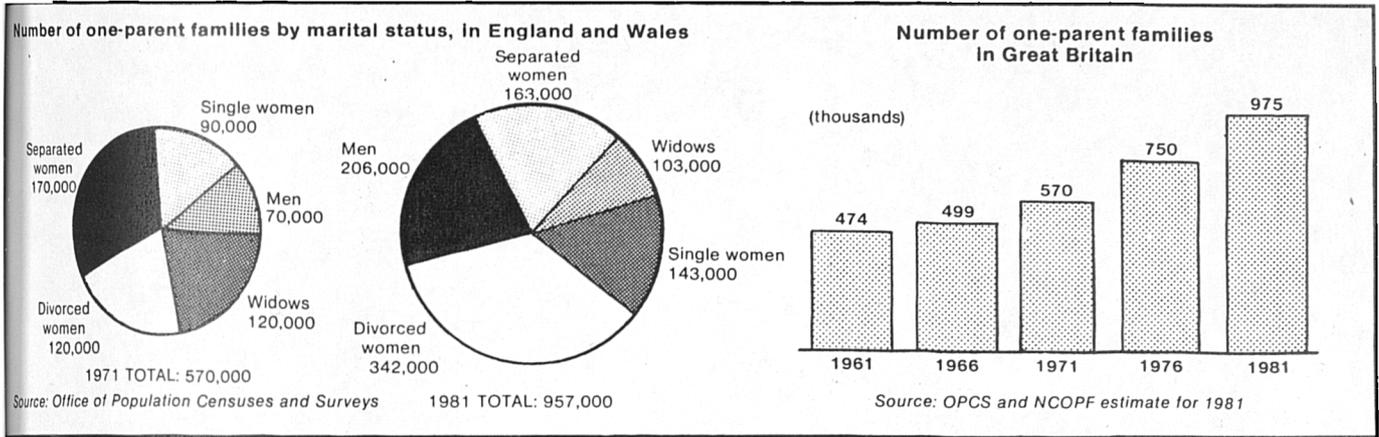
D v D (1974) p.23

Alternatives to continued care by lesbian mothers are frequently described as 'more healthy', 'more stable', 'more normal', 'less harmful', 'more sound', 'balanced'. But this is not simply because it is feared that lesbian mothers might 'corrupt' their children, it is also because alternatives are generally seen as providing models of marriage and the family and of appropriately structured gender role behaviour. Thus it is not simply a matter of not 'becoming' homosexual, it is equally important that children are exposed to appropriate role models. The judge in L v L (1976) makes this point clearly:

"...the second objective is to ensure that 'P' is most likely to develop along strong masculine lines". (p.3)

Although this point is not always so clearly expressed it usually underlies discussions of male presence/male absence. Yet this somewhat unsophisticated model of the acquisition of gender and gender role behaviour is seldom expressed in contested custody cases where the mother is presumed heterosexual. It may of course be argued that in those cases it is assumed that mothers will probably if not remarry then cohabit. However it should be noted that the largest

proportion of single parents are indeed divorced or separated women:



source: National Council for One Parent Families, Annual Report, 1983 p.22.

Psycho-sexual Development

Research on the psycho-sexual development of children raised by lesbian mothers has been available in America since the mid 1970s (e.g. Kirkpatrick et al 1976; Hoeffler 1981; Green 1978). However research in Britain is of recent origin (Golombok 1983).

The research projects carried out in America are small scale studies, for example Kirkpatrick et al (1976) interviewed and tested twenty children aged five to twelve years. In a majority of cases the mothers were living with a female partner. However the authors reported that children in this study were no more likely than other children to adopt atypical gender role behaviour or to become homosexual. In 1978 Green reported from a preliminary study of twenty one children living with a lesbian (or transsexual) mother. He came to similar conclusions. In this study the children ranged from five to fourteen years, the number of years in which they had lived in that environment ranged from two to six years. Green assessed gender identity, gender role orientation and, in the case of older children, choice of sexual partner. Measurements of assessment were based upon preference for types of toys and games, peer group compo-

sition, clothes, roles played in fantasy and vocational aspirations and actual sexual behaviour. Children in this study are reported as having a preference for toys, clothing, games, friends etc which are 'typical' for children of their age and sex. Those children old enough to report sexual feelings and desires were reported to be heterosexual in orientation. Green concludes that being brought up in an atypical household does not result in atypical psycho-sexual development either in terms of gender or sexual orientation.

In Britain in 1978 Susan Golombok at the Institute of Psychiatry, London, began a similar piece of research. This study examined and compared thirty-seven children from lesbian households with thirty-six children from single heterosexual households. She concluded:

"The findings of the study have been consistent in showing no difference between children raised in lesbian households and children brought up by a single heterosexual parent with respect to gender identity sex role behaviour or sexual orientation".

Golombok (1983) p.1 (abstract).

Not surprisingly these authors point out that children are exposed to many images in society, through schools, the mass media, peer groups, etc. etc. A child's immediate home environment is simply one factor in this equation and clearly as the above research points out it is not a major source of direct influence. Moreover it would be a mistake to assume the channels of 'influence' (however these are constructed) are in fact all one way. Children are not the passive recipients of 'culture'. As is frequently pointed out by mothers in this study, most homosexuals had and have heterosexual parents.

The above-mentioned research does however raise many questions, some of which cannot be adequately considered here. But it is important to point out that while some mothers in this study desperately wanted English research on

this issue to use as 'evidence' in their cases (e.g. mother in L v L p.166 herein), other mothers however were either ambivalent or fairly hostile towards such research. Some for example argued that they were not at all happy with the 'tools of measurement' employed in certain psychological tests (e.g. the use of standard stereotypical toys and clothes). Other mothers argued that to use such research confirmed (albeit in an unintentional way) cultural beliefs that to be gay is an unacceptable outcome to sexual identity. It is however true to say that the majority of women in this study who supported this latter argument were not at the time of the interview faced with the possibility of losing custody of their children. For the most part it seems that while mothers are not happy with this type of research, nevertheless when faced with a dispute in which they feel they are very likely to lose their children it can prove to be one of the few pieces of evidence they are likely to have in their 'favour'. Having said that it is equally important to note that the research has been wholly unsuccessful in influencing legal practices in this area³. This is partly because of course arguments which oppose custody by mothers who are lesbians are not simply based upon psycho-sexual development, indeed that argument has to some extent declined in these cases. Rather they are linked to issues of social stigma and this is a relatively new concept for the courts to consider in deciding child custody disputes.

The Risks: Social Stigma

The third theme which runs through the courts' consideration of lesbian custody cases is the question of social stigma. The courts conclude that if children are left in the care of a lesbian mother they will suffer teasing, embarrassment, shame, and possibly guilt:

"'S' might be mocked. The pain and harm this might cause him are incalculable".

I v I (1978) p.3

"It would not be long before this little boy found himself to be the subject of taunts and his anxieties would be roused by the difference between his background and others".

E v E (1980) p.51

"It cannot be disputed that observation by at any rate some sections of the community ...will lead to ridicule or scorn...however just or unjust such a condemnation may be if it involves a child living in such a household it must be likely to lead the child to be teased and embarrassed at the least".

Re P (1982) p.38

The issue of possible teasing and embarrassment when taken in isolation from issues of 'corruption' and gender role confusion in these cases is a fairly 'weak' and highly problematic justification on which to remove children from otherwise caring parents, it would certainly appear to be a unique instance (it is not for example employed in cases of unusual or minority religions although the two are not strictly comparable)⁴. Moreover, it is not established that teasing is an issue for all children raised by lesbian mothers. Clearly for some children it might be. But there is considerable variation and uncertainty in this area, and it is important to establish whether or indeed why it is considered an issue of sufficient magnitude to justify the removal of children and the disturbance of a mother's status quo.

Courts do not for example generally ascertain whether teasing actually happens in the case before them. Often the child is too young and, in those cases, the courts tend to speculate that it will happen. Yet they do not consider what kind of teasing might occur, how often it might occur and by whom; neither do they consider the child's own coping mechanisms nor the way in which mothers may help children negotiate teasing. Neither does the court ascertain whether

teasing does irreparable damage to self-esteem. Is it for example similar in importance to other types of teasing which children engage in and are subject to during their lives for example, being an early/late developer, being too small/tall, fat or thin; having the wrong/different accent; having parents who are unemployed/separated/divorced; coming from an ethnic minority; being middle/working class, or mentally or physically handicapped; being adopted or illegitimate, etc. Indeed the list of 'differences' is endless, but except in the situation of severe handicap the courts do not as a rule remove children on these grounds.

In relation to the question of whether teasing is an issue for children of lesbians, although there has not been any systematic study to date, nevertheless, there is increasing anecdotal evidence. For example, in 'Breaking Silence' (Channel 4 1985) a documentary about lesbian mothers, several adolescent children spoke about their experiences as children of lesbian mothers. The participants spoke with considerable clarity and confidence about their backgrounds, they said that they felt that their background had made them more tolerant of differences in their peers, more aware of the variety of cultures and lifestyles. The boys in the group also said that they were more self-sufficient than many of their peers, for example, they were able to cook and generally take care of themselves. From these interviews, it is clear that the children felt there were many positive aspects to living in "non-conventional" households. Teasing or memories of being teased did not appear as an issue for these particular children. Golumbok (1984) also identifies the positive aspects for children of living in unconventional households. Green (1978) included some qualitative information regarding the issue of teasing. He reported that from a sample of twenty-one children only three recalled being teased, and in each case these were isolated incidents.

The courts, however, take a 'prevention is better than cure' approach; in *I v I* (1978) for example, the mother's

partner also had a child called Mary. Mary's headmistress came to court as a witness on behalf of the mother. She reported that Mary was a 'perfectly happy and normal twelve year old'. In relation to the issue of teasing, she argued that the climate of opinion towards homosexuality had indeed changed and moreover by the time this mother's five year old son was a teenager public opinion may well be even more tolerant. In response the judge simply argued:

"there is no argument that there has been a liberation of views in the past period. As to the future I should not like to speculate, there have been earlier permissive ages and these have been replaced by much stricter views". (p.11)

Clearly the issue of teasing is highly speculative and generally speaking it is unusual for the courts to make an order in relation to children involved in custody dispute based solely upon speculation. Moreover, it could equally be argued (as it was by the third psychiatrist in the case of L v L (1976) p.164), that a child may be better equipped to deal with an incident of teasing if the child is living with the mother rather than the father who shares a negative and indeed hostile attitude towards the child's mother. Indeed more recently a judge at trial level took precisely that approach, he argued:

"as to whether there would be social harm to the children if the knowledge of (the mother's) association with Ms 'M' became public knowledge...I must confess I find that of a somewhat speculative nature".

J v J (1984) p.22

He concluded that if teasing became an issue, it could occur whether the children lived with their mother or simply saw her on access (p.22).

The above approach differs considerably from the general approach of other trial courts and indeed the Court of Appeal. And it is important to raise the question of what role the courts currently play in reproducing and

sustaining the image (if not the reality) of social stigma in this area by a general refusal to grant custody of children to lesbian mothers. Clearly the reproduction of social stigma may take many forms but the denial of the care of children to mothers is probably one of the most serious indictments against a woman which a society can administer.

However, as with issues of 'corruption' and gender identification, social stigma does not appear as an isolated issue in this case. Each of the above-mentioned three issues is underscored by a particular imagery of lesbians in society. That imagery (as purely sexual) is set in opposition and contrast to an equally imaginary construction of motherhood in which motherhood is perceived and reproduced as an asexual role. It is finally to those perceptions that I now turn.

Images of Lesbians -
Implications for Lesbian Mothers

Two common themes regarding lesbianism appear in these cases. The first is that lesbianism is a 'sickness', the second is that lesbians are unstable. Lesbians are portrayed as sick and unhappy women engaged through no fault of their own, in relationships which are doomed to failure. That model is partly drawn from clinical work (Storr 1964) which, while differing in the emphasis placed on certain etiological factors nevertheless assumes a naturalness about heterosexual relations and thereby posits and contrasts homosexuality as 'abnormal' 'deviant' 'atypical' forms of development.

Thus for example the judge in L v L (1976) argued:

"The root cause of this breakdown was the homosexual tendency of the mother. No blame was attributed to her, she has no control over it and the evidence has demonstrated she has learnt to live with it". (p.1)

In A v A (1980) it was argued,

"I am not criticising those who have found sexual satisfaction in this way. In fact one may feel sorry for them".

That particular perception of lesbians is not of course limited to lesbian mothers in courts. It is drawn from and in turn reinforces dominant themes within culture regarding lesbians. Such images are drawn from presentations of lesbian identities in the media, literary and psychological materials. And it is that negative model which is increasingly being challenged by lesbians who are openly gay (Ettorre 1980; Ponse 1978; Rich 1981; Richardson 1981). To a large extent that development owes much to the Women's Movement which has focused on sexuality as a major site of struggle (Millet 1971; de Beauvoir 1974).

For lesbian mothers however that denial of 'sickness' and the assertion of a lesbian partner as a positive choice can be particularly problematic, it can lead to allegations that she is less interested in the welfare of her children and simply in court to further the cause of homosexuals (L v L 1976). Moreover, where lesbian mothers challenge the notion of 'sickness' and the general negative response to lesbians (where they are open and frank and unashamed of their sexual preference) that approach is frequently viewed as a further indication of their perversity. Thus it is precisely those mothers who openly seek support for lesbian mothers within, for example, the Women's Movement and/or the Gay Movement in Britain, who can fare the worst in the event of a dispute over children. For example, in Re P (1982), the trial judge stated:

"The mother struck me as a sensitive articulate and understanding woman, she tells me she is not one of those homosexuals who, as many do nowadays, flaunt their homosexuality...I accept that she is discreet". (p.38)

In J v J (1984) the judge was equally impressed with the

mother; she too was discreet, articulate and sensible, and neither would she flaunt her relationship (p.21). However in D v D (1974) the mother's political affiliation was central to her loss of custody. It was not argued that this mother was engaged in a relationship at the time of the hearing, it was simply stated that she supported the right of women to define their own sexuality. Nevertheless the father produced materials in court (magazines such as Shrew, Monster, and Spare Rib) which he argued, demonstrated that the Women's Liberation Movement was very much tied up with lesbianism. It was also alleged that the mother had said that lesbianism was a form of sexuality compatible with her political ideals and that she intended to live a lesbian lifestyle. In this case the judge concluded that the importance of the mother's involvement in the W.L.M. was that:

"In her friends and associates she found an atmosphere sympathetic to her decision and purpose to free herself from the shackles of married life...She found a philosophy which justified the personal position she had decided to take up". (p.17)

He concluded that this mother had found support for her decision to free herself from the obligations of family life and throw upon her husband a degree of domestic duty which was onerous having regard to the amount of work he had to do as the one breadwinner and head of the household (p.19). In relation to the custody of the children (three daughters), the judge concluded:

"...being brought up with the mother...[the children] would find themselves in a singularly unbalanced feminine environment...there is a real risk which their father justly apprehends that they will be brought up in a rather exotic atmosphere in which particular intellectual opinions expressing themselves as an eagerness for the total feminine freedom sexual and otherwise which will have a marked influence". (p.22)

And in H v C (1982), V v V (1977) and A v A (1980), mothers in these cases were not simply described as lesbians, they were also censured because of activities in either the Gay or Women's Movement politics. The suggestion was that these mothers were not simply 'ordinary mothers' contesting - as any "proper" mother should - the custody of their children. They were political activists with a stake in the case which went beyond a concern for the individual child. Many individual husbands utilise that argument as evidence of a mother's 'unfitness'. But what is perhaps more interesting is the degree of attention and enquiry which courts give to that aspect of a mother's behaviour. The implication is twofold, firstly 'good' mothers do not participate in wider political activities, especially where they come into competition with notions of good motherhood. But secondly for lesbian mothers that activity is perceived as a further indication of psychopathology (Munro & McCulloch 1969; Romm 1965). So that while the mother in D v D (1974) was not an active lesbian, she was very clearly a feminist with particular views on marriage and the family and she lost custody.

In J v J (1984) however, the mother was a lesbian and was living with her lover. However she was an impressive witness, articulate, sensible, discreet, with a clear desire to promote the educational needs of her children, and a strong desire to bring them up in a good environment which would not preclude them from ordinary society (p.21). Clearly the comparison is problematic but where two parents contest the custody of children in courts the criterion applied by the court can equally be problematic and cases can, as Maidment (1981) demonstrates, rest upon proving a mother's 'unfitness' by reference to features of her behaviour which may have little to do with motherhood but more to do with marriage and 'wifely' behaviour. Moreover, it was not simply the disolution of cases in courts which carried those features. Identification of correct behaviour, attitudes, and activities appropriate for mothers is also a feature of pre-court practices and I will discuss these in the following chapter.

Throughout these cases, the courts express a recurrent theme, lesbian mothers should not generally be awarded custody of children if there is any viable alternative. Where a court does award custody to a lesbian mother, the court is usually careful to explain precisely why, for example in *V v V* (1977), the father could not accommodate the children, and in his summing up the judge made it clear,

"My decision is based on the narrow grounds of bricks and mortar else...there is no course other than to allow this Appeal and entrust custody of the two girls to the mother". (p.16)

and continued

"I would not have hesitated to have taken the two girls away from her if any acceptable and practical alternative had been available". (p.17)

Equally in *I v I* (1978), the judge argued that if there is an alternative the child should go there (p.12). Indeed although courts have increasingly begun to include in judgements statements to the effect that lesbianism per se is not an embargo on custody (*Re P* (1982) p.34; *E v E* (1980) p.48), in practice, that is usually the result:

"I accept that it is not right to say that a child should in no circumstances live with a mother [who is living in a lesbian household] but I venture to suggest that it can only be countenanced by the courts when it is driven to the conclusion that there is no other acceptable form of custody".

Watkins, L J Re P (A Minor)
(1982) C.A.

Indeed that statement is all the more incongruous because it appears in a case which the Court of Appeal took a previously unprecedented approach to the question of lesbian mothers and the corruption of children. In response to an application by a father that because the mother was a lesbian, (and would therefore corrupt the child), the child should be placed in the care of the local authority, the

judge in this Appeal case argued :

"as regard the corruption, there was no evidence either about the likelihood demonstrated by such statistical or other experience of casework as may exist, or from any assessment of the subjective probabilities arising in the present case from an examination (presumably a psychiatric examination) of the individuals concerned; nothing at all to give any clue as to the likelihood of corruption"

ibid,p.38

Yet while dismissing the argument that children will necessarily be corrupted, the issue of social stigma takes on increased significance. Indeed the judge here concludes (p.39) that it is a factor of such importance 'as to let in the power of the courts.....to make an order under s.42 (allowing committal of the child to the care of the local authority), although in this case, the court decided against such a course of action. Thus, speculation as to teasing and social stigma (referred to in this case as 'reputation') is viewed as of sufficient importance by the Court of Appeal as to warrant serious consideration as to whether to take a child into the care of the local authority. One could of course equally argue that children who live in local authority homes are also stigmatised and may be teased because of their a-typical background.

The above mentioned case appears to be the most recent case in the Court of Appeal involving a lesbian mother, and it does contain some highly problematic features. It does indicate that while to some extent (at the level of court practices) issues of psycho-sexual development and overt statements regarding corruption by lesbian mothers may be declining in importance, nevertheless, issues of teasing, mocking, embarrassment, previously issues of secondary importance in these cases, are now taking on a more central role. Certainly cases in the 1980s do not appear to carry statement of complete moral outrage reminiscent of cases of the early and mid 1970s. But this is not to argue that there has been any liberalisation of approach by certain courts. Indeed, if the possibility of future teasing because a child comes from an a-typical household is sufficient to disturb every residential status quo, it would appear that the courts are in fact exerting

more stringent criteria and are certainly moving some distance from dealing with each case individually and on the facts and evidence currently presented. Indeed it would appear that custody of children in these cases once again becomes a 'reward' but rather than an award for the innocent party they become a reward for the parent who provides the nearest approximation to a particular image of the family.

That focus upon providing a particular type of family environment in which to raise children has a number of consequences which go beyond specific court decisions. They have resulted in particular pre-court practices in this field and such practices are frequently of a sufficiently distressing nature as to dissuade many lesbian mothers from pursuing their cases through the courts. Indeed the issue of a mother's sexuality and therefore 'fitness' to continue being a mother frequently becomes a bargaining mechanism within divorce and custody proceedings. Although this term has become extremely unpopular in the field of matrimonial work in the 1980s and particularly in relation to divorce, nevertheless children (custody and access), housing, maintenance and property settlements are all factors which form part of the bargaining process. And the negotiating process itself provides opportunities for the linking of children and money (Mnookin 1979).

Moreover, where there is an 'issue' with regard to a mother's potential 'fitness' as a parent, this can have a number of effects upon bi-lateral bargaining. And it can equally be influential in the power relationships between couples before they seek legal advice regarding custody of children on separation and divorce. For lesbian mothers the period of pre-court practices can be crucial. During this period solicitors, court welfare officers, barristers and psychiatrists all become involved in negotiating the form and relevance of her sexual identity. It is usually the period in which she is persuaded to give up either her children or her sexual identity. These two aspects of her life in effect become bargaining chips and they are usually mutually exclusive. The following chapter is therefore concerned with pre-court practices in relation to a sample

of lesbian mothers and will focus on the kinds of advice these mothers received from solicitors, their experiences with divorce court welfare officers and their experiences of contesting custody in court.

NOTES AND REFERENCES

1. This is not of course to argue that there were no cases prior to that date. It is likely that women in this situation would not have risked a full hearing. The reasons why this has changed are of course many and varied, but certainly the beginnings of support groups, for example Lesbian Line and Sappho in the 1970s followed by Action for Lesbian Parents and a network of lesbian mother support groups clearly brought a political perspective to the issue which would have been impossible on an individual level.
2. When the case first came before a judge, the judge stated he did not like tug of love cases and sent parents and counsel outside the court to see if an agreement could be reached. To her surprise the barristers finally agreed the mother should continue caring for 'P'.
3. The majority of cases in which Dr Golombok has been consulted have been settled out of court. Indeed to date she has only appeared in court as an expert witness on one occasion, and the mother in that case lost. All other cases have been 'settled' out of court.
4. In relation to religion, courts prefer not to pass judgement on the beliefs of parents (Re T (Minors) (Custody: Religious Upbringing) (1975) 2 FLR, 239) where a parent belongs to a particular sect whose beliefs are problematic in terms of children (e.g. the approach of Jehovah's Witnesses to blood transfusions) the court will withdraw certain rights from that parent (e.g. right to consent to medical treatment) or will demand certain undertakings from a parent (In Re H (A Minor) (Custody: Religious Upbringing) (1980) 2 FLR 253). But that is not to say that the parent loses care and control, only certain features of the rights contained in custody. Moreover courts are not opposed to children being brought up in what may be viewed as narrower spheres of life, e.g. subject to stricter religious discipline than most people or where they may not have birthday or Christmas parties (Re T (Minors) (1975)). Indeed in a multicultural society it would be an extremely difficult decision to justify.

However, that situation is not analogous to the position of lesbian mothers. To describe a mother as a lesbian in fact tells the court very little, it is not a sect, it does not prescribe a particular lifestyle nor does it necessarily carry any particular beliefs or values any more than does the label 'heterosexual'.

CHAPTER 8

LESBIAN MOTHERS AND PRECOURT PRACTICES

Introduction

This chapter is concerned with pre-court practices in which the sexuality of the mother is either an overt or a covert issue. It is concerned with the legal processing of cases and the experiences of the mothers involved. The focus is on particular issues which are brought to bear on mothers during the preparation of contested custody cases and the way in which these issues are influential in discouraging mothers in their attempts to obtain legal custody of children. Thus I am concerned to outline not simply a further sample of mothers who came to lose custody of their children but rather to investigate some of the out-of-court processes which contribute to that situation.

The sample covers the experiences of twenty-two mothers and involves the custody of forty-six children, and the core interviews were carried out between 1979 and 1983. The sample was obtained through a variety of sources, through contact at conferences specifically on the law and lesbian mothers, workshops on the issue of mothers and child custody, through personal contacts and through lesbian mother support networks in the U.K. of which I was a member for four years. To some extent this does of course mean that the sample has an element of self-selection and may represent some of the most difficult and intransigent of cases. But the motivation for this study was not to produce a representative sample of lesbian mothers contesting custody of children. Rather it was to examine the processing of cases where the sexuality of the mother is perceived to be problematic and to begin to map out the way in which particular issues such as notions of 'good' motherhood on the one hand, and conceptions of female sexuality on the other are brought to bear on what is sometimes referred to as bi-lateral bargaining in contested custody cases.

It is important to remember, that just as one cannot talk of 'the' lesbian custody case, neither is it possible to talk about the lesbian mother's experience of the legal process. These experiences partly depend upon the circumstances of separation, the residence of the children and the position of the contesting father. It is therefore more appropriate to conceptualise the experiences outlined in this chapter in terms of a continuum. The extreme points of the continuum are represented by, on the one hand, the lesbian mother living with her lesbian partner and children, faced with a legal dispute with the father of the children who has a mother substitute (a new wife or cohabitee, or housekeeper or nanny or willing grandparents). At the other end of the continuum, a mother, identifying as lesbian but still living with husband and children, not involved in a lesbian relationship but wishing to leave her marriage though not her children. Between these two possible extremes there are a myriad of possible combinations of arrangements (just as there are for marriage breakdown as a whole) and some of these are outlined in the following section on separation and solicitors.

Although lesbian mothers are not an homogeneous group, just as the courts have focused upon specific issues (psycho-sexual development of children and expressions of lesbian sexuality) so this examination of mothers' experiences of pre-court practices reveals certain recurrent themes. Firstly, a sexual 'essentialism' regarding the structure of lesbian relationships and their perceived consequences determines aspects of both legal representation for lesbian mothers and the approach of divorce court welfare officers. Secondly that sexual essentialism is presented alongside constant 'appeals' to an ideology of motherhood. And a central feature in that imagery of motherhood is that it should only take place within marriage and that it should transcend desire.

The following chapter therefore will outline separation processes, responses of solicitors, experiences with divorce court welfare officers and the content of social enquiry reports and will discuss the way in which the above issues overlay and determine responses to the issue of lesbians and motherhood.

Separation and Solicitors

The processes involved in marriage breakdown and separation for mothers in this study are many and varied. And the 'presenting problem' to lawyers can be equally varied. For example not all the mothers in this study identified as lesbian at the point at which custody of children was determined; some mothers had been divorced or separated and had had custody (care and control) of children for some time prior to identifying as lesbians. Other mothers were clearly identified as lesbians at the time of legal proceedings although this does not necessarily mean they were involved in a lesbian relationship.

Whether the issue of the mother's lesbian identity arises at the time of custody proceedings or at some stage in the future the consequences can be equally problematic for the mothers concerned. For mothers who become involved in a lesbian relationship after custody of children has been determined, fear of exposure and a fresh challenge by ex-husbands to their position as mothers frequently means that women in this position live their lives under the sword of Damocles. This fear exists regardless of whether the father has regular access to children. Sally:

"my real fear is that he will discover that I am a lesbian and get custody of Joanne even though he has shown no interest in her for the last four or five years".

And sometimes where lesbian mothers felt marginally safer, for example where a husband had remarried, moved away and showed little or no interest in a child, that sense of comparative security could quite easily be shattered. For example one lesbian mother in this situation, Annie, commented quite early in the study that she felt relatively safe from a challenge from Marisa's father:

"oh he doesn't show much interest in Marisa, we've been divorced several years, he has remarried, got family of his own. She occasionally sees him, less so now, he's not really interested in her, she's seen him (shrugs) perhaps three times in the last year".

When asked what she thought his attitude might be if he discovered she is a lesbian she responded:

"Oh well, I have some indication because well, after our divorce we had a divorce party where two gay men came and sat in the kitchen and held hands...he (husband) threw everybody out and beat me up because I had a gay man in my flat, I mean, he went absolutely berserk so I mean, if he discovered I was a lesbian there was going to be hell, absolute hell".

Annie and her daughter had a very close relationship, they travelled a great deal together and had been almost around the world. However, they came back from one holiday to discover that Marisa's father had made an application for her custody. Annie had appeared on a television documentary programme about lesbian mothers, her ex-husband had seen this programme. Not surprisingly this threw the mother into a total panic, not only was she cited as a lesbian, a fact which she would not in any case wish to deny, but in addition she was (accurately) described as being actively involved in promoting the rights of lesbians. And Annie was well aware that this could make her case doubly difficult - she could hardly be described as 'discreet'.

For mothers who become involved in lesbian relationships some time after divorce and custody and where children do have regular contact with their father, the position is extremely fraught. Melanie:

"well I wasn't a lesbian or anything when we divorced, I mean it just wasn't an option that ever entered my head. He wanted 'out' and frankly I didn't care too much I was tired of the rows and things, he didn't want the kids he didn't want custody or anything, I mean I guess he felt guilty about leaving us for another woman...the kids went regularly it was difficult for them I know...I, well I did what most women on their own do in the end, I just got on with life and looking after the

kids and things you know, and then I met Sam our relationship developed (shrugs laughs) we all spend a lot of time together, Sam and me and the kids, we go places we have a nice time and the kids love her, it really didn't hit me for a while quite what a bomb we were all sitting on, I mean, if he knew, god, I guess he'd ...well, I don't know what he'd do. He'd explode I guess...and it's so difficult because of course the kids talk about Sam when they go to see him, she spends a lot of time with us. And we can't tell the kids not to mention her how could we shé's part of our life now and anyway we wouldn't put the kids in that position".

A number of women found themselves in a similar position to Melanie whereby their husbands did not contest children's custody at the time of the divorce and were it seems quite happy for wives to care for children as single parents. However knowledge of the development of a lesbian identity and a lesbian relationship usually instigated a custody challenge, or indeed the threat of one. One mother reported that her husband had recently found out she and the women she shared a house with were in fact having a relationship. She reported that initially he had created a scene and said he would take the children from her. She reported some weeks of threats of an impending court application and arguments in which he also said he would tell her employers. However she received nothing 'legal'. She recalled that over those weeks they lived in almost siege conditions expecting him to come with the police at any time and take the children. Eventually they realised that in fact it was unlikely that this father would take the issue any further, Karen:

"well he had nowhere to take them and nobody to look after them but at the time we were so frightened and so isolated we just didn't know where to go for advice. I didn't want to go to court unless we really had to so we waited, he created hell for a while, scared us to death, every day I went into work I thought it was probably the last...and then he just went... disappeared...I mean that's not unusual, he does go off...it's when he comes back we worry..."

For those lesbian mothers who went through divorce and/or custody proceedings as lesbians, these mothers fell

into two broad categories; those lesbian mothers who had children with them (i.e. they held the status quo - or shared it with the children's father); and those lesbian mothers who had lost the status quo. It was usually this latter category of mothers who felt they fared the worst so far as pre-court practices were concerned. Some mothers reported that they had been advised by solicitors that they basically did not stand much of a chance of getting custody of children and were advised to simply go for 'reasonable access'. Lesbian mothers in this category were subject to specific problems, some of which are shared by mothers as a whole where they lose the children's residential status quo. For example, they are subject to the general ethos that 'good' mothers under no circumstances leave (or lose) their children. Also, like mothers as a whole, this category of lesbian mothers frequently had housing problems (since local authorities bear no responsibility for 'single' homeless women - it is having the care of children which gives women access to public housing). But in addition, it is frequently the 'timing' element which finally militates against most mothers in these circumstances obtaining custody of children. This is because by the time the mother has obtained suitable housing, contacted a solicitor, welfare reports have been ordered and made, several months can elapse (one mother reported that it took eighteen months before her case was finally heard in court). During this time a father has usually established by whatever means¹, that he can in fact provide for the child or children on a daily basis. Under these circumstances it is unlikely that the court will overturn what, by that stage, is a well established status quo in favour of the father. Where the status of the contesting mother is also problematic (for example, where she is a lesbian) it is highly unlikely that she could succeed in having such a situation overturned in her favour². The additional issues regarding assumptions surrounding her sexuality and life-style and issues surrounding the psycho-sexual development of her children in effect make her case virtually impossible.

It is mothers in the above situation who frequently expressed the most dissatisfaction with their lawyers. Because in these circumstances lawyers/^{often} advised mothers to drop their application for custody and go for access, women felt their solicitors did not really fight for them. One solicitor at a conference for lesbian mothers held in Bristol in 1981 commented on that situation:

"It may well be that in such a situation a solicitor can see that the cards are so stacked against a mother that to put her through the ordeal of cross examination - an ordeal which, given the weight of evidence against her, will clearly destroy her and probably to no avail; in those circumstances, it could well be in her best interests to go for 'reasonable access' rather than risk destroying entirely her chances of any contact with her child".

Solicitors here are indeed acting as 'gatekeepers' to the law taking into account the degree of evidence for and against a mother, and her chances of succeeding and weighing that against what generally happens in circumstances where a mother does not hold children's status quo. In this situation specialist knowledge is very powerful, clients are at a disadvantage and have little alternative but to follow the advice of their lawyers. In retrospect however mothers sometimes felt that their solicitors (and sometimes they themselves) did not put up much of a fight. Moreover, mothers in these circumstances were critical of the way in which in the process of transforming their problem into 'legal' issues, factors which they as mothers thought important (for example their past record as good, caring parents, their proven ability in this area, evidence of fathers' minimal involvement in the daily care of children) these factors held little influence. Rather, the focus was on the immediate and future arrangements for children. And under those circumstances a mother who appears for all intents and purposes to have deserted her children and is a lesbian does not stand a very good chance of obtaining a transfer of custody in her favour.

Clearly the issue which frequently presents the most insurmountable problems for mothers in these circumstances is that of adequate housing. But so far as the courts are concerned that is a relatively 'weak' argument on which to justify not taking children - the fact that husbands frequently refuse to allow lesbian mothers to take children, (indeed some have demanded that mothers leave without children) does not hold much weight against a well established father's status quo. One mother from East Anglia makes this point about her case. She left home under considerable pressure from her husband and it became increasingly difficult for her to get access to the children during the interim period prior to the court case,

"It was awful really I was painted as the deserter - the mother who really didn't care about her children I can remember it now 'you don't really care much at all about your children do you Mrs Simons, how many times have you seen them since you left home'...it was impossible, I tried to explain why I had left and that I frequently travelled miles to try and see them only to be refused on arrival by my husband. I felt very let down, my case was mis-handled by my solicitor".

Another (cohabiting) mother of two young children described how difficult the separation process can be for women with children and nowhere suitable to take them, Ruth:-

Oh he started interrogating me and issuing ultimatums, he'd go out in the middle of the night and at dawn, he threatened to commit suicide, he was in a manic state I mean, I felt at that stage I really couldn't leave him in that state, he drank, he took tranquillisers, he wouldn't allow me to use the phone or leave the house, he intercepted my mail,...and then he suddenly changed, he started saying I was mad, that I was ambivalent and unfit to care for the children. He said if I left I could not take the children, he threatened to make them Wards of Court to prevent me taking them, which he ultimately did of course".

She continued:

"I was terrified but I mean, where can you go with two children and he knew, he knew I was living under intolerable conditions".

Eventually this mother did leave alone. Aware that the children's father would accuse her of desertion she left a note to the effect that she was not in fact deserting the children. However, the reality of the situation was that so far as this case was concerned, the father had ample opportunity to establish a status quo and a case for keeping the children.

With regard to the lesbian mothers who consulted solicitors while they still had custody of their children, the response of solicitors to the issue of 'lesbianism' fell into three broad categories. Firstly, that it didn't matter at all - it was irrelevant; secondly, well it was an issue but not terribly important; thirdly, it is important. Solicitors who realised the possible consequences tended to be either those who already had some knowledge of the issues involved, or who were 'fed' information from an informed lesbian mother.

Ellen, a mother of three boys under ten, married for several years and still living with her husband in the suburban area of a large town in the north east reported how she had gone to a solicitor in town. This solicitor she said was known to be a radical lawyer. She explained that she was a lesbian still living with her husband and that he had threatened to take the children from her because she was gay. She said this lawyer's response was 'why should that matter, it's your record as a mother that is important'. This mother wanted to leave the marriage and take the children and live with her lover.

Joanne, a mother with two children aged ten and eleven described a similar experience. She was also still living with her husband and he knew she was a lesbian. She said she went to see a solicitor primarily for some advice at first. Her husband was treating her; 'like a prisoner and I needed to know what I could and couldn't

do, could I take the children, how would being a lesbian affect things:

"well she didn't think it (being a lesbian) was a problem (raised eyebrows)...she didn't realise the implications, I found that difficult to understand, I mean I didn't think she was the one for me...I mean if you don't think there's a problem in the first place, how on earth are you going to handle it?... suddenly you realise 'oh god it's a problem and I know nothing' ".

Other mothers reported a distinct reluctance on the part of their lawyers to actually address the issue of their sexuality and its implications for their chances of keeping children. Marie, a mother of three children, described her feelings of exasperation when she attempted to talk to her solicitor about allegations raised in her husband's affidavit and the welfare report. This mother wanted to discuss the allegations in detail and decide how to handle them. However she felt her solicitor did not share the same sense of urgency:

"well he just kept saying 'we'll sort that out in court, we'll sort that out in court...well, I'm nearly going off my head. To my mind it was like going to war with empty guns, you don't do this, you answer it all, you work it out in front of (the hearing) so whatever you get thrown at you - you can answer it all".

Mothers criticised lawyers for a lack of preparation, a lack of attention to specific issues surrounding sexual identity and motherhood, and psycho-sexual development of children. Most mothers knew enough about lesbians and custody to know that they were in a difficult situation. However they did not know the precise nature of the objections likely to be engaged. Most left those issues to solicitors largely because 'it's their job to know these things isn't it'. Nevertheless those mothers who expressed anxiety about the lack of preparation, frequently had their anxieties borne out in their court-room experience. Here, they felt, their lawyers were frequently defensive, unprepared or unwilling to respond to some of the extreme allegations made

regarding the form and expression of lesbian sexuality. Margaret, a mother of two daughters aged six and seven makes this point. She had had custody of the girls for three years when her ex-husband decided, on the basis that she had formed a lesbian relationship, to contest custody. She went to see a solicitor and was honest about her relationship from the start:

"they knew I was a lesbian anyway because it was in my husband's affidavit but somehow we never got around to talking about exactly how it would affect my case...in court when things started to go wrong you know the sex side of things my barrister didn't put up any kind of fight, he simply relied on the fact that the welfare report said I was a good mother, he just didn't fight at all".

Some mothers however did report having sympathetic solicitors who they felt really did fight for them and who prepared their cases well. However even in cases where lawyers were prepared to address directly the relevance of sexual identity and discuss ways of handling it in court, the issues were not always straightforward either for mothers or indeed for the lawyers involved. Problems still arose and questions of strategy and compromise had to be discussed and these issues could also lead to frustration and anxiety for both mothers and lawyers. Mothers reported that some legal advice though likely to increase their chances of custody was nevertheless 'unpalatable'.

Advice on 'strategic moves' could cover a number of issues. For example, Joanne, like other mothers in this study, had been under considerable stress at home. She finally left but her husband would not allow her to take the children. She was a lesbian but not involved in a lesbian relationship, she went to stay with a (male) friend. Her husband demanded that she return home, when she refused he used physical force to drag her into his car:

"he came for me and dragged me back, we sat up all night arguing, I can't remember everything but I do remember how it ended, sex! something I didn't want and I don't know why he did...I was really angry, I were just angry I just felt like a piece of meat - a parcel to be passed around from one to the other, I felt I just can't go on like this I'm not going to be somebody's property for ever".

Joanne left the next day and after contact with a support group contacted a sympathetic solicitor. This solicitor advised Joanne that to stand any chance of being awarded custody of the children she had to get back into the matrimonial home. Because of the physical force her husband had used the previous day, Joanne dare not return to the house. Following discussion an ex-parte injunction against her husband was finally obtained and Joanne then returned home. Technically of course the advice of this solicitor was correct - for this mother to stand any chance of getting custody of her children she had to have at least a joint residential status quo - to get that she had to return to the home in which the children were resident.

In effect what it meant for the above mother was that she returned to a home where there was considerable hostility towards her. She reported that during the period prior to the custody hearing, nobody spoke to her (the children aged ten and eleven years were under pressure not to talk to her), she had to cook her meals separately from the rest of the family, she ate alone, spent most of her evenings sitting alone in the dining room and she slept on the settee at night. On one occasion she was visited by friends and her husband called the police and insisted they remove the lesbians from his house. The police duly arrived and suggested her friends 'should drink their tea and leave'. Joanne remarked that after that nobody came to see her. She recalled how lonely and isolated she felt during that period, nevertheless in relation to her new solicitor's 'return home regardless' policy she said:

"I felt she was on my side, I mean everybody kept trying to put her off, we had problems getting (emergency) legal aid and finding a judge who would see us at 3.30 on a Friday afternoon but she kept patiently pushing... then we had to find someone to serve it (injunction)...she was pretty impressive really...."

Returning to the matrimonial home in order to re-establish a residential contact with children was however only one of a number of compromises mothers have to face. But of particular concern to lesbian mothers is the issue of future living arrangements - whether or not they live with a female partner. Even when represented by lawyers who the mothers themselves thought were sympathetic and well prepared, the issue of whether to live with a lover could prove difficult. Margaret reported how she went back to court a second time having already lost custody of her children some three years previously. In both instances she was completely open regarding her lesbian relationship. In the first instance she lost, but the case came back to court because of enormous access problems where her ex-husband attacked her during the changeovers. When the time came for the second hearing Margaret remarked that she had learned a great many lessons from the previous case, she also had a new solicitor:

"my new solicitor was really marvelous she never asked the questions the sexual questions that the male solicitor had asked...I certainly think that a different solicitor and barrister made all the difference. I insisted that I met the barrister before and we had a long discussion about things..."

Yet once back in court Margaret came very near to losing again. She refused to sleep separately from her lover, she commented:

"it was ridiculous the children know we sleep together and I refused to make such a compromise".

Margaret Stock's case was in fact very complex, her lawyers had spent months fending off an attempt by her husband to

stop her access altogether. Initially the local social services department decided to take the case back to court (there was a supervision order) on the basis that access was unworkable. For some time it did seem that the children might well go into local authority care, indeed that was the expected order³. At that stage Margaret's decision not to be compromised in any way in her relationship with her lover caused some exasperation both on the part of her lawyer and the judge hearing the case. She took a principled gamble at this stage feeling that she had the backing of the welfare officer. In effect she gambled correctly because the welfare report did ultimately recommend the court should first try a change of custody and the children were transferred to her. However the case does not represent a resounding success for lesbian mothers, the alternatives before the court were limited; the children were three years older and still repeating a desire to be with their mother, the father was refusing to have custody if he had to allow access, and social services, who were constantly involved in the problems of access, made it clear that an application for a local authority care order was a very real possibility.

When other mothers were faced with similar decisions, responses varied. All mothers expressed anger and resentment at being forced to address the issue in this way. Some mothers refused to be compromised and lost custody, some mothers argued that by that stage it was doubtful if they would have succeeded in obtaining custody even if they agreed to live apart from their lover. Other mothers were prepared to make enormous compromises (for example, living alone, or agreeing that a lover would move out during access periods, or agreeing not to take the children to see particular friends) - indeed one is tempted to say such mothers reinforced the notion of 'motherhood' as a total identity transcending all other issues. But what is important about this issue and what these cases clearly demonstrate is the particular kinds of choices mothers are expected to make. This major choice about whether to live alone or with a lover increases in magnitude as the case against the mother mounts. It may well be for example that a court (usually under the request of a father's

counsel) orders psychiatric reports on both the mother and the children. If these reports are detrimental to the mother, for example arguing that children are already confused about their sexual identity or that they will suffer in some way in the future, although the mother has the residential status quo, her case for keeping the children may begin to look very difficult. And this is especially the case when faced with a father who can provide what the courts perceive to be an adequate mother substitute. In these circumstances certain mothers reported that even sympathetic solicitors, solicitors which some mothers described as 'feminists', advised mothers to consider seriously issues such as living with a lover and not living in an all female household. This was particularly the case where fathers objected to children living in an all female household and this objection was supported by psychiatric opinion.

In these circumstances, where lawyers perceive the cards to be heavily stacked against mothers, there is little belief in the power of research and rational argument to retrieve the mother's case. One mother commented on the choice she had to make, Jessica:

"it was dreadful I mean, there was I completely isolated with the children and there was room for us in Mary's house, I mean it was silly not to go, but my solicitor said that in view of the psychiatric stuff, living in an all female household at this stage was a risk which I shouldn't take, not right now anyway...we stood a chance if I lived alone, you know, the single parent bit...it's incredible isn't it, there it is, a lovely warm caring environment for the kids but no, to stand a chance of keeping them I have to be seen to live this lonely, isolated life...does it make sense to you I mean it's daft isn't it..."

Another mother however, Marie, refused to compromise, even though she had enormous confidence in her new lawyers:

"they (lawyers) were worried that if we mentioned that we slept together the registrar would say 'well this had better go back before the judge'⁵. They advised us not to admit to our relationship, but we couldn't agree. We've fought all along that we love each other; that we want to live together; that we will live together".

In this particular case the mother finally did succeed in getting custody of her children. It took four years, three social enquiry reports, three different solicitors and intensive interrogation regarding issues surrounding sexuality by both a welfare officer and a Judge (see below, p. 217).

The issues surrounding questions of 'compromise' for lesbian mothers are twofold. Firstly there is the way in which some lawyers search for ways of improving the application of lesbian mothers to retain custody of their children. Then there is the issue of the very nature of the factors to which they are forced to 'appeal'. The search for acceptable compromises usually means making two specific appeals, firstly to reduce the visibility of the sexual identity of women and secondly to increase the visible imagery of 'motherhood'. Both these 'appeals' are in fact to stereotypes; to limited and imaginary repertoires of female behaviour. Patriarchal relations demand that 'motherhood' should transcend desire, and what such 'appeals' therefore demonstrate is the difficulty of defending mothers within family law where allegations of 'unfitness' are substantiated by reference to a visible assertive sexuality. What such 'appeals' may achieve might be a better case (or stronger claim) for custody for the individual mother, but equally such appeals in practice reproduce and sustain those stereotypes. So that for example, in the face of stereotypical factors utilised by fathers to argue 'unfitness' (for example not only is the mother a lesbian, but she is not a full-time mother; is uncommitted to children; is promiscuous; mentally unstable, or too involved in politics) it is precisely to that same model of 'motherhood' that defending lawyers appeal in attempts to regain lost credibility. Preparedness to be a full-time mother is a

particularly popular example of this; Jessica makes this point:

"well there I was just beginning to get my life organised, my job and everything and then not only does he say I'm unfit because I'm a lesbian (which I am but that doesn't make me unfit) he also says 'look she's not even prepared to look after the children',...hell, what have I been doing all these years...but, in an attempt to regain some credibility, in desperation... I gave up my job."

Another lesbian doing a part-time plumbing course was also resentful at being advised by her solicitor to give up the course for the time being so that she could be seen to be prepared to be a full-time mother to very young children. This advice was given in the face of a highly critical welfare report and a husband's affidavit alleging the mother's increasing involvement in the women's liberation movement and her commitment to a lesbian identity. Equally mothers resented being advised not to spend nights with their lovers and not to go away for weekends with their lover (and take children). Other issues which were mentioned were women's and gay conferences, and in once case demonstrations (CND and anti-pornography march). When 'all the chips are down' so to speak, so far as lesbian mothers are concerned, it seems there are clearly certain things 'good' mothers do not get involved in. Action for Lesbian Parents (1977, p.5) begin to draw on this imagery when they advise lesbian mothers who have to go to court to remember that most judges prefer the 'Marks & Spencer' image of women.

What these issues demonstrate is not necessarily a failure of radicalism on the part of feminist lawyers, although clearly that is how some lesbian mothers experience it. But the issue is more complex than that argument allows. It is not simply that certain 'feminist' lawyers fail to step outside conceptual boundaries, it is also a question of the power relations which surround and underpin those boundaries. As Cain (1979, p.33) argues when discussing the role of lawyers, 'lawyers peddle the language of law

...they coerce the experiences of life situations of their clients...and individualise and de-politicise issues'. Cain argues that a process of reconstitution occurs in terms of a fundamentally bourgeois set of ideological categories. What the pre-court experiences of these lesbian mothers demonstrate is that for matrimonial lawyers these ideological reconstructions are patriarchal as well as bourgeois. The translation of the life situation of lesbian mothers into the language of law creates problems because of the limited repertoire of behaviour patterns available to mothers generally. Patriarchal relations do not generally allow for the sexual visibility of mothers particularly outside of marriage. The assertion of sexuality and sexual needs and desires is ^{more} generally the prerogative of men. That is partly why in pre-court practices lesbian mothers become stereotyped in the search for the dyke!⁶. It is largely because there is no perception of ^{female} sexual visibility and eroticism which is not linked to male sexuality. Thus, it is precisely when lesbian mothers claim a right to both a motherhood which does not transcend desire, and a sexual identity which is assertive and which refuses to be de-politicised, that the role of the lawyer becomes problematic. It is here that a choice frequently has to be made between two historically and socially constructed roles, the role of 'the lesbian' perceived as essentially erotic, and the role of 'the mother' essentially asexual.

Divorce Court Welfare Officers and Social Enquiry Reports

Discussions regarding the visit of divorce court welfare officers or social workers raised a great deal of anger and bitterness in several women in this study. Indeed some mothers felt that the welfare report had provided yet further unsubstantiated ammunition to support the accusations and prejudice of husbands. The major complaint voiced by mothers in this area rests upon the overriding focus upon mothers' sexual identity and stereotype notions of the lesbian identity. Indeed where mothers

made this complaint they argued that the focus on assumptions regarding sexual expression far outweighed the attention given to other factors in the report, for example that given to discussing children and their futures.

Several lesbian mothers said they had made conscious decisions to be frank, open and honest in their discussions with welfare officers regarding sexual identity. Indeed two mothers said that it had never occurred to them to try to hide anything. For example Marie and her partner Paula visited a divorce court welfare officer together at his request. He made attempts to make them feel comfortable and at ease and they felt this was a genuine attempt to be sympathetic and understanding. They were asked if they were prepared to be frank and honest with him and they replied that they were. The interview lasted three quarters of an hour. During this period the officer asked Paula if she looked at the children with the idea that she could be their father and if she was maintaining them (Marie, their mother, was at this time not receiving any maintenance from their father and was living on social security). He then proceeded to ask Marie if she was sexually satisfied by Paula - did she reach orgasm - did they both - did they enjoy it? He also said he knew women friends of theirs who wore a tie and waistcoat and dressed like men when they went out. Marie recalls that they denied the more preposterous insinuations and answered the sexual questions honestly. Neither home situation nor the children were mentioned. A week later Marie's solicitor sent her a copy of the report this officer had prepared. They were horrified,

"In the report he said we reached orgasm by mutual masturbation...we never used words like 'mutual masturbation'".

Another mother, Joanne, describes her visits from the divorce court welfare officer:

"oh she had the usual you know, the typical view of a lesbian - trench coat - it seemed a bit of an obsession with her, she wasn't unpleasant in fact she was very nice in a lot of ways except she said that the ten to sixteen years age group could be affected by me being a lesbian mother - she said Stephen (her eleven year old son) could grow up to hate women and Jan (her ten year old daughter) may grow up to be frigid'.

This mother also recalled that this welfare officer said her children would be called names at school and that because lesbians were anyway a minority group 'the children would be bound to suffer'. (These children lived in an industrial town in the Midlands and were of Afro-Caribbean origin). This mother argued with the welfare officer on the basis of research on the psycho-sexual development of children raised by lesbian mothers, she then rang her solicitor to explain what had happened. Her solicitor rang the welfare officer and raised the question of obtaining expert opinion regarding the psycho-sexual development of children. The welfare officer again visited this mother and suggested to her that her solicitor had a vested interest in gay rights.

Helen Longman, a mother who lost custody of her daughter in the mid 1970s said:

"the welfare report was so damning it's now a blur thank god but one thing I do remember it said I had the welfare of my children close to heart and then said two lines about my husband and two pages about my 'lesbianism'".

Welfare officers also cross examined lesbian mothers on role play in sexual relations, Jessica:

"he asked me whether I played the male or female role in bed - I ask you! what the hell? I mean, what an assumption I mean how dare he; I just looked at him and I knew he was finding the whole thing a big turn on, I could have hit him what a cheek! but I had to stay calm I kept thinking 'don't explode this is our future being decided here' I managed to stay calm, lots of deep breaths, 'no we didn't go in for that type of role playing, no the children didn't call Mary daddy'..but he'll never know how close he came..."

One mother also reported being asked if she 'used appliances'.

A further issue which some women reported welfare officers focused upon was their involvement in political activities. For example in one case, a mother left home and went to live with friends in a mixed household. She also worked in a resources centre in the local town run collectively by community groups and women's groups. This mother was very much aware that as a lesbian she was likely to lose custody of her two children. She developed a strategy for dealing with the questions of the welfare officer. Under interrogation regarding her sexuality this mother refused to be drawn and instead attempted to keep the focus of their discussion on the position and future of her two young children.

In his report this officer stated that his enquiries into the 'community resources centre' in which the mother worked 'suggest that the organisation was influenced by the women's feminist movement and allied political groups ... it would be true to say that individuals of a lesbian persuasion find acceptance in this group'. He also reported that when he questioned the mother about her affiliation with the Women's Liberation Movement and her lesbian tendencies 'I did not get clear answers, notions of identity were limited to that of "woman" and "mother", ... sexual preference was not admitted". He concluded that

"having seen the boys with Mrs Turner I have nothing but praise for the level of emotional warmth and caring that is extended towards them, Mrs Turner has sound parenting and maternal qualities, nevertheless there is another aspect of her life which may have greater prominence than she has led me to believe and with which I personally feel the children will inevitably be affected".

He concluded:

"My impression is that her interests and active participation in political issues and feminist matters will accelerate. She sees no conflict in her external pursuits and her role as a mother... equally she argues that research shows that children growing up in a homosexual atmosphere do not necessarily imitate their parents, my response is that the evidence is neither conclusive nor universal... I recommend that the father remains the custodial parent" [he was awarded interim custody]

The approach of the welfare officer in the above case clearly demonstrates the dilemmas and tensions, and the choices, which certain mothers are expected to make. Once mothers begin to step out of what here appear to be particularly rigid behaviour patterns, once they reject men and marriage their status as mothers become problematic and uncertain, they are on the borders of society. It is in these circumstances that defending solicitors and indeed some mothers themselves are forced into positions of compromise (in terms of relationships and living arrangements) in an attempt to retrieve some of the lost ground, the lost credibility associated with marriage and images of motherhood in society.

Ruth, a mother of three who attempted to incorporate childcare with research for a higher degree, describes how anxious she felt about the visit of the divorce court welfare officer and her possible appraisal of her as a mother. Her cohabitee had said she was promiscuous and mentally unstable and therefore not a 'fit' mother. She lived in a house with two other women and she recalled preparing for the visit

"yes I remember her visit, we cleaned and scrubbed like hell before she came (laughter) yes we vacuumed the surface off the carpet and I donned my only 'Laura Ashley' dress and arranged myself so that I was playing creative games with Harry when she arrived [we both laugh], anyway none of this cut a moment's ice with this woman".

Following visits to the homes of both parents the welfare

officer in this case insisted both parents attended her office together in order to attempt to sort out custody of the children. Ruth recalled how she tried to resist that demand :

"she said to me 'you must come' and I desperately didn't want to".

JB: "why was that?"

R: "because I hadn't seen him since he'd rushed off to London and made the children Wards of Court and I desperately did not want to be in the same room with him I felt horrified by what he'd done"

JB: "can you recall what happened at that appointment?"

R: "It was very grim I mean He sat there - serenely - puffing away on his pipe, I was more or less in tears at the shock of seeing him, and 'em, extraordinary lies were being told about me, really, I just could not believe it, I felt I was showing up rather badly, I was coming over the emotional hysterical woman and, you know, he was the 'calm composed man'...and she was really rather convinced by this...it ended up with both of them trying to persuade me that what he wanted (care and control of the children) was best, I remember she said 'but why Ruth, why won't you let Dr. S have care of the children?'"⁷ .

The above mother along with other mothers in this study suffered fundamental attacks upon their 'fitness' as mothers and their responses demonstrate the difficulty of defending that position once that status is under attack. A point which came over in all the interviews was that at some stage in the welfare report the mother is described as 'a good caring mother'. However, that in itself was not sufficient. Margaret Stocks, a mother who lost custody of her children in 1980 recalled the visits of her social worker. This social worker visited her home on several occasions and spent several hours with her and her children. The mother reported that the social worker would arrive at between two and three in the afternoon and would sometimes stay until early evening when the children were put to bed. Margaret:

"Yes she spent a long time with the girls, long enough to build up a relationship she sometimes came when they came home from school and stayed til their bedtime, she'd play games with them".

JB: "what kinds of games?"

M: "well she had these dolls and beds and furniture, tiny little things they were and she wanted to watch them play and who the children put the dolls with and that sort of thing".

JB: "Did she explain to you what she was doing?"

M: "not explain, she didn't exactly say why she was doing it but I knew, I mean it was obvious, she didn't attempt to hide anything I mean we both knew, we understood she was concerned to see how the children related to two females being together and a man and a woman and whether this was on their minds...she'd produce these dollies and say 'it's bedtime I want you to put the dollies to bed' she wanted to see who the children put the dolls with...she wanted to see if the children were being moulded into lesbianism - that sort of thing".

In the final welfare report the above social worker concluded that Margaret was a very good caring mother and in no way neglectful. Moreover she said the children had expressed a desire to stay with their mother (she had had custody for three years by this point) and that they had a strong sense of belonging with her. This social worker had also told Margaret that she felt her to be capable of the feminine touch. Margaret recalled how she felt about that remark:

"well (smiling) I thought it was nice because, because a lot of people get the impression that a lesbian is going to stick up feminist posters and become butch and incapable of putting up net curtains, they'd put a blanket up at the window! - but in lots of ways I am very feminine and of course this comes out in my home and the way I set up home".

Nevertheless, this social worker ultimately recommended a transfer of custody of two girls aged six and seven years to their father. He had recently remarried and the report concluded that he and his new wife would be able to

offer the children a more 'normal' home.

It tended to be the contents of welfare reports rather than the contents of husbands' affidavits which could have the most disturbing impact upon some mothers. They frequently expected moral outrage, prejudice (and hatred) from husbands, they were less prepared for the prejudice and criticisms they frequently received in welfare reports. Mothers who felt they had been co-operative and honest during investigations were frequently shocked when they saw welfare reports. They expressed anger at the apparent freedom which the welfare officer has to determine the focus and content of enquiry.

A major source of complaint was the overriding attention which 'lesbianism' received in the reports. Mothers complained that the focus frequently overshadowed other issues. Moreover mothers complained about the right of the welfare officer to question them for intimate details of their lives. They felt such questioning was completely irrelevant to the purpose of the visit. However few mothers felt able to refuse to answer such questions, they felt that a refusal would go against them in the final report.

In addition mothers clearly resented being asked questions about their political views and interests, the presence or absence of males in their lives or the views of the women's liberation movement on lesbians. These kinds of discussions frequently led to what one mother described as "one liners [in the report] to twelve years of dedicated childrearing and domestic services and two pages of accusation and assumptions regarding my sexual and political views".

Even those mothers who did manage to remain positive about their chances of being awarded custody of children in the initial stages of the legal process, became despondent on receipt of a 'damning' welfare report, especially when it followed what a mother felt had been a sympathetic meeting with the welfare officer. A great deal can depend on the

response of the solicitor at this stage. Some mothers felt solicitors tended to 'throw in the towel' and some mothers reported their self esteem took a tremendous knock at this stage. Mothers also expressed concern about the lack of weight which was given to the history of responsibility for childcare during the marriage and the way in which the issue of their sexuality and sometimes political interests override questions of proven ability and desire to care for children. Some mothers felt that solicitors should have challenged more of the content of the welfare report than they ultimately did.

One of the major problems was that some of the reports managed to 'damn by association', so that reports seldom actually said that mothers should not engage in women's groups, community organisations, political marches or demonstrations, but what they do clearly achieve is a process of comparison. They set in motion a process whereby those activities, presented alongside extensive discussion of the mother's sexuality, come to form the major piece of information on the mother in question. And these features are presented in opposition to an imagery of 'motherhood'. They 'draw' upon a received wisdom - a taken-for-granted model of 'good' motherhood. While the mother's sexuality and sometime political affiliations are spelt out, the imagery of motherhood to which reports appeal is not. As one mother put it, 'well, it feels as if my concern for my children should be limited to washing faces and collecting them from school, it should not extend to a concern about the arms race or pornography or male violence'. By contrast however the proposals of fathers to care of children are frequently described as 'normal' 'conventional' 'stable'. Substitute carers proposed by fathers (new wives, grandparents, sisters-in-law) were described as 'warm' 'motherly' 'sound' 'dependable'.

However not all lesbian mothers are involved in political organisations. Indeed most of the lesbians involved in this study were not. Many described their lives during marriage as simply consisting of home, work and the family in varying degrees of importance. Most felt

that they had been solely responsible for children particularly when the children were small. Many of these women did not know where to go to seek specific information regarding the significance which being a lesbian might have for their chances of getting custody of children. In these circumstances where a solicitor did not challenge the contents of welfare reports (where they referred to the consequences of a lesbian identity for children's future development, or issues surrounding a 'lesbian lifestyle'), mothers seldom felt able to. It tended to be lesbians who were aware of gay and women's organisations and increasingly those lesbians who were able to engage a feminist solicitor who felt able to challenge some of the contents of welfare reports.

During the mid 1970s some solicitors working on these cases requested a second or sometimes an independent social enquiry report. However following the Cadman ruling (Cadman v Cadman, The Times 13 October 1981) solicitors have expressed doubt about independent reports and some showed a clear reluctance to try that approach⁸.

Finding a psychiatrist where it proves necessary to get a psychiatric report on a mother and/or children can be equally problematic. It may be for example that certain psychiatrists while not necessarily holding a 'sickness' model of lesbians would nevertheless express doubt about lesbians bringing up children. One mother in this study for example agreed under considerable pressure to see a psychiatrist. He reported that although she was not 'sick' he did not feel able to support her claim to custody because 'the children would suffer teasing'.

However another mother did see a psychiatrist at the demand of her husband and in an attempt to convince the court that she was in no way unstable. Her solicitor went to considerable lengths to find a psychiatrist who they both felt would give the mother a fair hearing and did not subscribe to the view that lesbians are by definition 'sick'. The consultant psychiatrist reported to the court that there was 'nothing mentally wrong with this mother;

the issue is not a psychiatric problem'. While this report was clearly useful for the mother concerned, nevertheless the case does demonstrate that being a lesbian is still grounds for assuming mental disturbance and it seems few solicitors feel able to argue or refuse the suggestion of psychiatric opinion on the mother, on the basis that being a lesbian is not a psychiatric disorder.

Equally where a solicitor did confront a welfare officer regarding the contents of a report this raised enormous hostility on the part of the divorce court welfare officer and the solicitor in question also said she was aware that it would be a mistake to engender the hostility of the court by a too detailed and fundamental criticism of the report.

Although the numbers here are small, only six women had full copies of the report, nevertheless the other mothers recalled with great clarity the focus and content of the report. As one mother stated 'it's not something you forget easily'. However even with these small numbers one can begin to see where some of the pressures for mothers to 'compromise' comes from. Reports show a wide variation in length and number of visits and focus of attention. The focus on the mothers' lesbian identity was clearly voyeuristic in some cases, yet mothers felt too threatened and unsure to be able to refuse to answer certain questions. Comments regarding the significance or possible consequences on children of a lesbian mother were not substantiated by reference to either research or case work. In some instances children were interviewed and their views were stated but the recommendations of the officer did not necessarily follow the stated views of children. For example Margaret's children - two girls aged six and seven years - told their social worker that they wished to remain with their mother, the officer recommended transfer to father; Joanne Butler's children - a girl aged ten and a boy aged eleven years decided they wished to remain with their father (on that ground Joanne dropped her application for custody) but the welfare officer in this case had already told the mother

prior to that decision that she had decided to recommend the children should go to their father.

Mothers on Trial

One theme which runs through the experiences of all those lesbian mothers who finally went through a court hearing in relation to the custody of their children is one of profound shock. This is partly as a consequence of the overriding focus upon sexual identity - its form and content - and partly as a result of an attack on her 'fitness' to continue bringing up children. Identifying a mother as a source of moral and possibly physical danger to her children is experienced, not surprisingly, as a fundamental and irredeemable criticism. This is not to say that these lesbian mothers were ashamed or regretful of their sexual identity, quite the reverse. The initial shock and disbelief at the focus of enquiry was quickly replaced by anger. The anger was twofold. Firstly, mothers deeply resented the way in which 'those with power' (welfare officers, judges) denied them the opportunity of being both parents and lesbians. But secondly, mothers felt the whole process had very little to do with their perception of the welfare of their children. No mother felt for example that she actually could 'affect' the psycho-sexual development of her children. Some mothers discussed the complexities of children's development - the acquisition of gender and sex role behaviour - and how limited they felt their influence upon children was particularly when children reached school age. One mother recalled with some amusement how five years of an anti-sexist home environment was practically obliterated by the first year of school and traditional teaching materials. These mothers were therefore appalled at what they felt were the crude and simplistic models of 'influence' or 'causation' adopted by welfare officers and indeed courts.

Lesbian mothers' discussions of the contested hearing were often prefaced by statements such as "the worst day of

my life", "it's so painful to recall," "I was so exposed, so defenceless", "I was made to feel like an animal", "the questions were completely irrelevant", "what has all this got to do with my kids?". The focus upon lesbian sexuality was firstly upon its precise expression and secondly its consequences for children. Women reported being subject to cross examination regarding when, where and indeed how lesbian love found expression. Questions concerned such issues as whether children had seen the mother and her partner in bed together, whether the children knew they made love, where children were when they made love, what did children think about it. One mother recalls with bewilderment how during her case the court got completely 'bogged down' in trying to decide how long it would take to walk from her bedroom to that of her lover. The judge put this same question to her social worker. The mother reported that her social worker was equally perplexed and angry by the question. Margaret:

"I was then asked by the judge how I would feel if my children turned out to be lesbians, I said I would be sad because it's not easy to be a lesbian in this time and age in society but if they were heterosexual I would understand that too because my older daughters are heterosexual and I had a heterosexual relationship for a number of years".

This case had lasted all day but the judge did not make a decision; Margaret:

"he wanted time to seek advice so we went back to court a week later, he said he had found nothing to give him any sort of help, it was up to individual judges, so their father was awarded custody care and control".

This mother reported the total shock she felt at losing her children after having had them in her sole care for three years. She had felt the welfare report was good because it had said she was indeed a good mother. However it also recommended that the father should have custody because his household was a more normal family. Margaret recalled the days following the hearing:

"I just crumbled, I got back to my flat and spent days really trying to think about what to do we had twenty eight days to appeal but I felt my solicitor and barrister had let me down badly, I had nowhere to turn, so, 'em, I asked my social worker to hand the children over immediately I just crumbled..."

Shortly after that decision this mother and her ex-husband went back to court (in fact one of several further visits) to define the children's access. Her husband would not allow staying access. Margaret:

"It was decided I could have staying access on condition I didn't share a bed with Clare while the children were in the house...I refused. I wouldn't agree and the judge finally said 'look Mrs Stocks, if there was not enough room would you sleep on the settee' and I said yes and he said very quickly 'I make the order for staying access' ".

Marie another mother recalled how she attempted to remain calm and unashamed when some letters to her lesbian lover were produced and read out in court:

"it was pretty sickening really I had to stand up in court and there it was in black and white. She [judge] asked me 'was it a lesbian relationship?' do we make love? do we - whatever the word is they use - ? I said 'yes' I kept saying 'yes'. Then she asked 'do you sleep together?' I said 'yes' she said 'do you indulge in a lesbian liaison?' I said 'yes'..."

She continued:

"By this time I was feeling quite sick and hot under the collar I kept thinking 'I'm not to look ashamed' I had to sit down I felt quite faint...I'm there thinking 'no you're not to sort of sleep you've got to keep your head up... you've got to look them in the face' otherwise I thought I'd appear ashamed".

Another mother, Lisa, reported how, in an attempt to sidestep a direct attack on her sexuality she and her solicitor had decided to argue that her lesbian relationship had simply been a one-off affair:

"(I was) convinced that the only way I could get custody was to try and convince the court that my affair had been a one-off fling. That was my solicitor's angle anyway and since I was incapable of seeing beyond my nose and the immediate necessity of keeping my child, I went along with it".

However, for Lisa Maclean this line of defence was to no avail. Custody of her three and a half year old daughter was transferred to the child's father, Lisa:

"he (magistrate) lectured us about perversion and about wifely duties plus a reference to emotional instability...custody was awarded to him (father) not because I was a bad or neglectful mother or cruel or given to excessive drinking. Nor was the decision based upon a fair assessment as to which of us had the best to offer the child. It was ordered because I am gay, though this was not the word the magistrate chose. He chose words like perverted and vile and was so scathing in his comments..."

This mother concluded:

"I came from court emotionally shattered and physically near collapse. Of course I had known there would be little chance for custody to be given to me, lesbians seldom get custody of their children. But you don't stop hoping for a miracle of some sort... all of a sudden I was an unfit mother, branded morally dangerous for my child simply because I exhibited the ability to love another woman".

Even lesbians who do not ultimately contest the custody of their children through the courts do not necessarily escape the courts' condemnation. Stereotype notions of the lesbian as a sexual predator and a danger to children can still direct the courts' attention. For example, Joanne mother of two children (a boy and a girl) ultimately came to an out-of-court settlement with her husband. He was to have care and control of the two children, they were to share legal custody. Joanne and a locum solicitor⁹ and her husband and his solicitor turned up at court for what

everyone expected to be a simple administrative procedure (s.41 hearing) since both parents were now in agreement as to the children's future. Joanne:

"nobody mentioned lesbianism but then he (judge) started going on about why was there a divorce... he started flipping through the papers and things ...then he suddenly exploded, 'good heavens don't tell me this woman is a lesbian! and one of these children is a little girl!'"

Joanne continued:

"he sort of implied I would molest her, I mean this would not have helped my case at all but I was ready to go up there and give him a good hiding...I was fuming, it got so bad that even John's solicitor got up and started speaking for me...the solicitor with me hadn't a clue what was happening, John's solicitor said 'there's never been any suggestion that anything improper has gone on between Jan and Mrs Butler'. By this time I was really mad".

The judge continued this line of enquiry. Firstly he turned to this husband and said 'do you want this woman to have anything to do with your children?' But before he had time to answer the judge declared 'joint custody' to be a totally inappropriate order and sent everybody out of court to come up with a more suitable alternative. Joanne left the court room in tears. In the waiting room the parties stood in opposite corners and eventually her husband's solicitor approached her and said they were quite prepared to go back into court and say they did not wish to change the original application for joint custody. Joanne:

"we went back into court in the afternoon and the judge said 'are you of the same mind' and our solicitors said 'yes' and he said he was not happy about that...he then suggested that I might keep Jan against her will! I mean, the size of her! I mean, he was going on as if they were bits of kids instead of practically men and women, they've minds and opinions of their own and not slow in showing 'em".

Indeed it was ultimately the children's opinions as to their immediate future plans that had decided Joanne not to contest custody. However, after considerable argument Joanne said the judge 'rubber stamped the whole thing and trotted off in total disgust'. This mother was awarded generous access. In relation to whether the children ever stayed overnight she continued:

"if they stayed overnight Mrs 'D' (divorce court welfare officer) said I wasn't to have anyone here just them and me. I wasn't to have any friends in that's what she said, but there's no legal document nothing official, it's all very vague really".

As some of the comments of the mothers in this study demonstrate, even in the face of strong opposition and weak legal representation certain mothers were able to maintain a visible strength. It would however be wrong to assume these mothers came through unscathed. Indeed during the process of the interview some mothers said they felt they would never recover fully from the horrors of what they felt amounted to a 'public' cross examination in relation to very intimate aspects of their lives and the loss of their children. Equally the experience could also have a politicising effect, for example Margaret discussed how following the loss of her children she went 'public' as a lesbian mother:

"I knew it was time to fight publically after all I'd already lost the children what else could I lose".

That approach in itself can, as illustrated here, have additional problems for lesbian mothers. Several mothers in this study were not simply accused of being lesbians - an identity which they freely admitted, but in addition, husbands and welfare officers also focused on mothers' involvement in political movements - usually the women's liberation movement but sometimes the gay movement. For example one father produced feminist publications in court in an attempt to outline what he saw as his wife's extreme

political views. When asked what the importance of his wife's involvement with the women's liberation movement was this father responded:

"I do not myself expect or believe that what would happen is that my wife would successfully brainwash her daughters into militancy and an associated belief that in order to be truly militant they would need to adopt a lesbian way of life. What I fear is that she will move in company where the persuasion is of a sexual rather than an ideological kind as the girls grow up".

When asked specifically what it was about his wife's political views that disqualified her as a parent this father responded:

"my major fear is that my wife's own sexual problems are so profound that whatever guidance she gives will tend to be harmful".

The above mother was not involved in a lesbian relationship at the time of the court hearing nor was it ever suggested that she had been. However the judge did find her political views relevant - they provided a justification for her decision to 'break up the family' (see supra p.189) Sarah recalled that in deciding her children's custody a good deal of the hearing focused upon her duties as a wife and her responsibility for the marriage breakup, that angered her:

"I mean one of the points is that according to the letter of the law children are supposed to be paramount and my duties as a wife should have nothing to do with my duties as a mother I mean I have always thought they were completely separate".

Another mother from Sussex recalled how she was horrified when she received her husband's affidavit in support of his claim that she was an 'unfit' mother. She was particularly shocked because she along with other mothers in this study said she lived with a man who professed to share her radical sexual politics. Both parents had other relationships and that was an agreed part of their marriage, Nina:

"I just didn't think he would do such a thing I mean because he was a radical I mean, firstly I didn't actually think it was relevant and I thought it would offend even his own self-image. Certainly I thought it would offend his feelings of his position as a radical I didn't think he would do it for a minute".

This mother was already aware that lesbian mothers experienced problems over custody. However because of what she felt to be their shared political perspective in relation to issues of 'sexuality' she had never felt that she might be placing herself in any 'risk'. When she found herself labelled as both a lesbian and a political activist it came as a considerable shock.

In his affidavit the above father outlined in detail the mother's involvement in various women's campaigns and argued that her view of men, marriage and the family would have detrimental consequences for both his son and particularly his daughter. Moreover this husband linked her lesbianism to mental instability. That link is not at all unusual in these cases. For example, Ruth a mother of three children under five, recalled a similar experience. She was accused of being promiscuous and emotionally unstable. She was also involved in a relationship where both parties acknowledged other relationships. The children's father in this case was an academic in a university town who was seen as a 'feminist'. This mother described her horror at the change of behaviour in her cohabitee and the pressure she experienced when she expressed a desire to leave (she was not at this time engaged in a lesbian relationship, indeed she was initially involved with another man during this period:

"I was being watched, he said he knew my movements, I mean, my movements were very conventional I was going to the university library and taking the children back and forth from school and nursery, my letters and phone calls were being intercepted, I was very frightened I kept thinking 'I can't endure this regime I must be able to sleep at night I must be able to sleep in my own room'".

Ruth commented that she clung to the belief that if she waited long enough and kept calm they could keep things out of court and settle things amicably. She recalled her feelings over that period:

"I was very afraid I couldn't just seize the children, where would I take them? I talked to various friends but people just don't have two rooms free in their homes, I was terribly worried, I felt if anything will precipitate him carrying out his threats it's if I seize the children and go, but if I tell him in advance he'll just lock the doors how will I get out I don't want any violence".

Eventually this mother left alone. However well aware of the legal implications of leaving without the children she said:

"I left a note behind, I didn't dare take the children, I left a note saying, I mean, I tried to cover myself to say that I wasn't intending to desert the children, he knew I was living in an intolerable situation and I didn't have any intention of deserting the children it was a Catch-22 situation I mean he'd several times said if you leave this house I'll get you for desertion and I will get the children".

Ruth eventually found somewhere else to live with two other women, she commented that "although he didn't actually say you can't see them [children] he made it so difficult". One afternoon, Ruth received a telephone call saying he had been to London and made the children Wards of Court. He argued that she was unpredictable, ambivalent in her attitude towards her children, and that that stemmed from her own family background; that she had a history of promiscuity; that she might take the children abroad, and that she worked full time. He proposed that care and control of both children should be awarded to him and that staying access should be granted to Ruth when she was free and willing to care for the children herself.

Both these latter mothers had lived with men who the mothers felt shared a particular view regarding the role

of sexuality within a relationship. They claimed a commitment to 'radical sexual politics'. Other husbands in this study also claimed they supported women's liberation - they were not against equal pay for example. However much of that support appeared to be more apparent than real. As one mother concluded:

"his support of the idea of the liberation of men and women was superficial rather than real, in practice it meant when the children were little I played the traditional role but I can't use that against him I mean, courts don't expect him to play minder".

Moreover what that verbal commitment clearly does give some men is an access to a body of ideas regarding sexual politics which can then be utilised to usurp the validity of women's claims to the custody of their children. It indicates that whatever certain men's proclaimed commitment to radical sexual politics and the campaigns of the women's movement is, in reality they are quite prepared to become commercial bargainers over their children's custody in the full knowledge that drawing upon traditional notions of motherhood will place these mothers in almost indefensible positions so far as the courts are concerned. Indeed in many ways the political involvement of some mothers provided a more acceptable explanation for husbands, welfare officers and courts for the choice of a lesbian identity. It does seem that wherever possible there was a resistance to conceptualising 'lesbianism' on grounds other than 'feminism' and a tendency to conflate lesbian identity (as a sexual and erotic experience) with feminism (as a political philosophy).

Conclusion

In view of the legal experiences of the mothers outlined in this chapter it is not perhaps surprising that few lesbian mothers pursue their applications for custody of their children through the courts. In addition to the problems of maintaining children's residential status quo,

ascribed sexual essentialism in relation to lesbian relationships and ideologies of motherhood and the family operate to ensure that lesbian mothers seldom achieve custody of their children either as a consequence of out-of-court settlements or indeed at the order of the court.

Experiences of legal processes involved in a contested custody dispute illustrate the powerlessness these women experience both as lesbians and as mothers. The dynamics of maintaining identity as 'mother' demand a denial of an assertive sexual identity. A decision to maintain an identity as a lesbian will mean the withdrawal of the 'right' to remain a mother. What this process demonstrates is the precarious and uncertain nature of the status of motherhood once it is associated with an active assertive sexuality. As one mother's solicitor commented in relation to the position of men contesting custody of a lesbian mother, 'it's an absolute gift'. Certainly the husbands of women in this study utilised the issue of sexuality as the major way of discrediting mothers and usurping their claims to custody of children. Husbands went to great lengths to obtain evidence regarding their wives' sexual identity. They intercepted letters and phone calls, and letters were handed to welfare officers and solicitors and read out in court. Husbands also hired private detectives to follow wives, they also searched bedrooms and handbags, removed books, articles from magazines and diaries. And this is not especially unusual. For example in *D v D* (1974) the husband produced literature which he had taken from his wife's bedroom. He argued that the literature demonstrated that the women's liberation movement was very much tied up with lesbianism. In *re B (T.A.)* (1971) the husband hired a private detective to provide evidence of his wife's sexual preference. In *W v W* (1980) the father produced both letters and articles in court to prove his wife was a lesbian. In *S v S* (1980), the husband produced tape recordings of a telephone conversation, as also did the husband in *J v J* (1980). But not only is evidence of sexuality used to usurp mothers' claims to custody of children, it is also used on occasion to keep women in marriages they might

otherwise leave. Mothers in this study also for example reported that husbands had threatened to tell their employers, so that they lived not only in fear of losing their children, but also of losing their job.

Underevaluation of childcare was also an issue which constantly recurred in discussions with mothers regarding pre-court practices. Mothers felt that as the case became increasingly complex, as 'evidence' against the mother mounted, so the focus on the history of responsibility for childcare within the marriage declined. And that situation was repeated in court, Sarah:

"I mean there was no discussion of things when I got to court (and, so far as I know, when anybody else has been in court) of things like who meets a child from school who takes it to the doctor's and things like that, I mean, those are the things I would have thought would have been important, but the courts don't see it that way."

Margaret:

"I am the better parent, whether I am heterosexual or homosexual I have a relationship with my children and that has been taken away. He (husband) has not showed any interest in the girls, with the older girls he never showed any interest in them, he never spent any time with them, he never related to them, in fact, the children saw very little of him, but nobody discussed this it wasn't seen as important".

Indeed no father involved in the cases discussed here argued his application for custody simply on the basis of a history of shared childcare responsibility. One father did supplement his argument that the mother was 'unfit' (because she had had a lesbian relationship, was a member of the women's liberation movement and mentally unstable) with a statement that they had had an unconventional marriage in which they both had other relationships and he had shared childcare. The former element of unconventionality was confirmed by his wife, the latter she disputed. Only two husbands proposed to care for children alone (i.e. without

a resident mother-substitute). Both argued in affidavits that grandparents would provide a back up service. Neither had a history of joint or shared childcare responsibilities. The focus of husbands' arguments for being awarded custody of children in these cases rested not upon a past demonstration of 'fatherhood' but nor indeed does the law or legal practice demand that it should do. Rather, it rests upon discrediting the position of mothers and providing substitute care for the children's future in as near an approximation to the family as possible.

In the introduction to this section (Part III) I argued that it was in fact inadequate to explain the operation of law and legal practices in relation to 'lesbian mothers' in terms of the homophobic nature of 'law' (Humphries 1978; Basile 1974). My argument is that that explanation conceals far more than it actually reveals. This is not however to argue that certain legal and para legal personnel do not harbour a very real fear, dislike or indeed disgust for homosexuals, nor is it to deny the influence of individuals in certain instances¹⁰. Rather it is to argue that we cannot explain law and legal practices simply in terms of the personnel involved. Indeed to set up the question in terms of the rights of lesbian mothers as compared with the rights of (presumed) heterosexual mothers and then to explain the problems of the former simply in terms of the attitudes of the legal actors is to misunderstand the role and the development of law and legal practices in this field. It denies the political centrality of the concept of the family and the relationship of law to the family. Indeed such an approach is uncritical at the level of politics since it excludes an analysis of gender oppression. As the examination of pre-court practices reveals it is not simply issues surrounding sexual essentialism which are important in the lesbian mother's experience of contesting custody of children. But in addition a preference to preserve and sustain a particular form of motherhood and to award children to 'normal', 'stable', 'conventional' family forms. And, as Barratt and McIntosh (1982) argue, the family is

not a descriptive term for households. It is more ideologically constituted than that. The family is a collection of ideological cultural and economic factors imbued with certain power relationships. What feminists working in the field of law have been concerned to examine is the way in which law and legal practices reproduce and sustain aspects of those power relationships (Smart 1984; Eaton 1985; McCann 1985). The major problem therefore with utilising the concept of homophobia in this field of analysis is that it is unable to locate a theoretical or political referent. It says nothing about the role of law in relation to the family and the social construction of motherhood. In effect it de-politicises the practice of lesbian motherhood because it fails to recognise that the overt political challenge is represented by a shift from family to household.

NOTES AND REFERENCES

1. Usually a substitute carer - grandparents, a neighbour, sisters, a new wife, or paid help.
2. Indeed, that she left home without children in the first place is often used as evidence that she places her own sexual needs above her duty to her children.
3. This view was expressed by her solicitor.
4. Some fathers argued that they felt the mother's 'lesbianism' was due to depression. In two cases fathers argued that mothers had changed following the birth of a second child, and a subsequent period of depression. In one of these cases a psychiatrist refuted that claim.
5. This case was originally heard before a judge who thought the children should go into care. Two of Sue's three children were in voluntary care, she could not retrieve them because she was homeless and living in a hostel with one other child.
6. One mother for example recalled how the judge was visibly shocked when he discovered from the documentation that she was lesbian: - "she didn't look like a lesbian, indeed she was quite ordinary".
7. Both these parents in fact had a PhD.
8. In *Cadman v Cadman* (1981) on appeal it was held that it was "doubtful" if the court could appoint an independent social worker in a case concerning a custody dispute arising in matrimonial proceedings. A Practice Direction was issued on 24 March which clearly limited the access of an Independent Reporter to the child in question and to previously prepared reports. In effect this Direction directed Courts to continue to rely upon the Welfare Officer of the Court (see Legal Action Group Bulletin May 1983).

Following that Direction two solicitors acting for women in this study declared a reluctance either to request an independent report or a second welfare report on the basis of the "Cadman ruling".
9. Her solicitor had dealt with all the negotiations and felt she had the case well sewn up. She had another trial case that morning and sent along a locum to attend the s.41 hearing with the mother.
10. Although I would argue that the history of homophobia in religion and medicine for example (Basile 1974) is not at all helpful in understanding the history of lesbians in society.

CHAPTER 9

LAW, STATE AND THE FAMILY:

THE POLITICS OF CHILD CUSTODY IN THE 1980s

A major theme in this research project has been to argue that existing explanations regarding the development of law and legal practices in the field of child custody are inadequate. Through a re-reading of developments throughout the nineteenth century I have been concerned to demonstrate that we cannot understand those changes which have occurred, simply in terms of a gradual erosion of the patriarchal family through a decrease in the absolute rights of fathers, and a corresponding increase in the 'rights' of mothers. Rather I demonstrate a clear reluctance on the part of the state to interfere in the patriarchal structure of the nineteenth century family and reduce the powerlessness of mothers.

Moreover, I have argued that the emergence of the welfare principle and the subsequent appearance of an ideology of motherhood was undercut by ideologies of the family. So that, although motherhood was 'elevated' within certain social practices (for example medicine, psychology) it was generally argued that the family was the only legitimate site for motherhood and the rearing of children. In the post-war years in Britain neither legal practice nor procedure were exclusively determined by the welfare principle. Preservation of the family dominated legal discourse surrounding procedural changes in relation to children and divorce. And in the courts a concern to sanction women's errant sexual behaviour frequently meant loss of custody. Although the majority of divorced mothers retained custody of children during those years, this was not due to the 'privileged' position of 'motherhood' within family law. That outcome had very little to do with 'law'. Rather, it was a consequence of the sexual division of labour in the post-war family. Mothers succeeded in retaining the custody of children on divorce because for

the most part, fathers did not contest that arrangement.

Increased emphasis on the welfare principle in this area of law has not been a neutral or necessarily progressive move. It has signified a movement from a strictly legal criterion (based on 'rights!') to what some perceive to be a more benevolent 'caring' approach to the dissolution of custody disputes between parents. Nevertheless as Murch (1980 p.214) has pointed out 'the rationale of preventive child welfare has legitimated a powerful authoritarian paternalistic force which poses a real threat to the rights and liberties of the ordinary citizens'. For feminists the trend towards welfarism has a particular significance. This is because its referant is always 'the family'. While for mothers in certain instances that may result in a protection of aspects of the nurturing role it is usually only within the confines of the family. As Oakley (1981) has argued, 'how reproduction is managed and controlled is inseperable from how women are managed and controlled'. This statement does not simply apply to biological reproduction it also refers to social reproduction - to the conditions and circumstances under which motherhood is reproduced and sustained. It is important to remember that there are many modes of discipline and regulation. The general trend in Britain away from 'law' (the courts and judges) and towards conciliation to deal with custody disputes through both in, and out-of-court schemes¹ does not indicate a necessary decline in regulation. The rest of this final chapter therefore is concerned with major policy issues in the area of children and divorce in Britain in the 1980s. The major themes in current debate in this area relate to 'joint custody' and conciliation schemes. These issues do not however occur in a vacuum. Increased criticism of legal (adversarial) processes involved in child custody disputes, the emerging fathers' rights movement (and indeed the children's rights movement), plus aspects of psychological discourse all have a stake in 'joint custody'. Indeed the debate over joint custody has come to dominate policy discussions. In the following sections therefore I will present the general criticisms of

existing law and legal procedure in relation to child custody and the arguments regarding state intervention. I will then look at the claims made regarding the benefits of 'joint custody' through an examination of this type of order in the United States. Finally I will discuss the implications for feminist policy in this area.

The Law in relation to Custody

There is little doubt that a review of the law and legal practices in relation to children is long overdue. Indeed the Law Commission recently began a process of review starting with the issue of Guardianship (Law Commission Working Paper No. 91). Part of the demand for change in this area comes from a wish to clarify a very complex area of family law. But the demand also comes from writers who argue that family law must develop to meet the needs of changing family forms. These forms have been created by increased divorce and remarriage and thus the creation of step-families, but also increased co-habitation and illegitimacy. The demand is that the law must adapt to the fluidity and shifting composition of families in the latter part of the twentieth century (Glendon 1984). To date it has been the position of illegitimate children and step-children which has received attention (Law Commission No. 118, 1982; Burgoyne & Clark 1982). However the Law Commission did recognise in 1984 that reform of the law generally in relation to the position of children in society deserved priority. It stated that 'the law (now) consisted of a cascade of legislation employing different concepts and terminology and a multitude of judicial decisions given in different procedural contexts' (Law Commission No. 131, para 2.43).

In relation to the concept of 'custody' that 'the bundle of powers exercisable over children' (Hewer v Bryant (1970) IQB, 357, 373) it is no surprise that parents are frequently confused by the law. The concept of custody is subject to different interpretations depending upon the particular legal jurisdiction invoked by a parent's

application. Under the Guardianship Acts (Guardianship of Minors Act 1971 - 1973) (GMA) and under the Domestic Proceedings and Magistrates Courts Act 1978 (DPMCA), 'custody' is defined as legal custody and cannot be 'split' from actual custody. Under divorce jurisdiction however it is possible to award legal custody to more than one person and to split legal custody from actual custody. The major difference in the definitions of custody used in these Acts relates to 'legal' custody and 'actual' custody.

Under the GMA 1971 and under the DPMCA 1978 (as amended by the Children's Act 1975) legal custody means 'so much of the parental rights and duties as relates to the person of the child (including the place and manner in which his time is spent)' (Children's Act 1975, s.86). Under this jurisdiction the court cannot grant legal custody to more than one person. But what the court can do where it grants legal custody to one parent, is to order that the other parent retains certain specified rights sharing these with the custodial parent (DPMCA 1978, s.8 (4) and GMA 1971, s.11 (A)). So that for example an order could provide legal custody to the mother (giving her possession of the child) but also providing that she shares the right to determine educational issues with the child's father.

Under divorce jurisdiction however (under the Matrimonial Causes Act 1973) it is possible for the courts to make an order for joint legal custody, or a split order (custody to one parent, care and control to the other) or a sole order (custody care and control to one parent), or the court can simply make an order for care and control (leaving legal custody as it existed during the marriage). Nevertheless lawyers are increasingly reticent to give a precise meaning to 'custody' in the divorce jurisdiction (Cretney 1984 p.313).

Historically it was accepted that 'custody' related to the right to possession of a child and, as Cretney argues,

(ibid p.314) it has been accepted by the courts that the expression 'custody' was not confined to the actual physical possession of a child but also entails the right to determine the child's life. This means rights to determine education, to discipline, to choose religion, and rights to services and to administer property and to represent the child in legal proceedings. In addition, it includes the right to consent to medical treatment and to allow a child to marry under the age of consent. Hence the 'split' orders of the post war years appeared to make sense, one parent (almost exclusively the father) was awarded custody and that entitled him to make the decisions outlined above. And the other parent, (usually the mother) was awarded care and control - the daily task of childcare.

In practice, the divorce courts have tended to divide power and responsibility for children in whatever way they think fit, but generally they have utilised those combinations outlined above. However, a recent decision in the Court of Appeal has displaced much of the conventional views in this area. In *Dipper v Dipper* (1981) Fam 31, Cumming Bruce L.J. argued that it was a 'misunderstanding' to think that a parent having custody had a right to control the child's education. Moreover he argued that whatever the parent's custodial status, neither parent has any pre-emptive right over the other with respect to education or any other matter. He argued that both parents are 'entitled to know and be consulted' on these issues. It is difficult if not impossible to reconcile this new approach with previous decisions. Indeed it makes split orders in effect quite meaningless. However that decision does support the view that this area of law is long overdue for review. If the courts and lawyers are unclear about 'custody' it is hardly surprising that parents themselves have difficulty in understanding the reality of awards made by the courts. It is unlikely that the Law Commission's review of 'Custody' will begin until the spring of 1986, and that time will represent an opportunity to raise issues relating to feminist policy in this area.

The State, the Child and Divorce

The focus upon children and divorce in the 1980s has increased dramatically. And that focus is directed by a whole range of issues, for example the continual increase in the numbers of children whose parents divorce, further psychological research on the effects of divorce upon children, plus a growing general criticism of the adversarial system as an inadequate and inappropriate forum in which to resolve disputes over children (Parkinson 1983a, 1983b; Davis et al 1981). And of course the continuing argument that the 'law' discriminates against fathers and favours mothers. Underlying these issues is a general concern regarding a crisis in the family not simply represented by divorce itself, but by a breakdown of 'parenting'.

In Britain, the search for 'new solutions' has been greatly influenced by the work of Wallerstein and Kelly, Surviving the Breakup, (1980). Indeed arguments in favour of introducing mandatory 'joint custody' of all children following parents' divorce is frequently substantiated by reference to the work of these authors. In this section I want to look at the influences of that work in terms of current recommendations for change in both legal practice and procedure in Britain.

Despite the limitations of the work of Wallerstein and Kelly² the major contribution of their research has been a substantial shift in the focus of attention surrounding divorce. It has moved from a focus on divorce itself as the problem to a consideration of divorce as a process. Although Wallerstein and Kelly share the same psychodynamic framework as previous writers in this area (for example Goldstein Freud & Solnit 1973) the major recommendations of their work are substantially different. In the seventies in Beyond the Best Interests of the Child, Goldstein Freud and Solnit argued (p.38) that children have difficulty relating positively to, profiting from, and maintaining contact with, two psychological parents who are not in positive contact with each other. Wallerstein and Kelly however stressed the importance of both parents in children's

adjustment to parents' divorce (p.307). These latter authors argued that a major feature of importance in children's emotional adjustment to divorce was a lack of hostility in the post divorce environment. For many contributors to the debate on children and divorce in both Britain and the United States, a 'joint custody' order was perceived as the legal framework to facilitate better contact with a non-custodial parent.

In Britain, the debate on children and divorce has polarised around the question of how much or how little state intervention is necessary to achieve better contact with non-custodial parents. What is interesting about this debate is the distinct similarities which it bears to the debates of the post war years. Despite claims of the new 'egalitarian' family, the equal division of labour in relation to childcare and the new 'liberated father' (c/f Holly 1985) the current debate still focuses on issues of how to utilise 'law' to induce parental responsibility particularly in relation to fathers. Indeed the 'child savers' of the 1980s are rehearsing very similar arguments to those identified with the post war years. The Denning Committee (1947) argued for absolute powers of state intervention in all cases concerning children, but the Royal Commission (1956) argued that absolute state intervention would simply reduce parental responsibility. In the 1980s, a desire to increase the protection afforded to children whose parents' divorce leads Freeman (1983 p.199) to argue for firmer state control. He is sceptical of the ability of conciliation to represent the interests of children and facilitate agreement between the parties. Indeed he says that 'private ordering' may well be a mirage. Freeman argues for firmer control through the introduction of separate legal representation of children involved in custody disputes. He argues the case, first articulated in 1975 by Justice, for a children's Ombudsman. This person would have both legal and social science training and would act as overseer of children's interests. The Ombudsman would be able to instruct solicitors and counsel to represent children's interests in parents' divorce. Within this new procedure Freeman argues that

joint (legal) custody should represent the ideal outcome.

An argument ostensibly in favour of less state control and increased 'private ordering' of custody is put by Maidment (1984b). She argues that existing research in the area of children and divorce verifies that divorce itself is not the problem: "after control for social and economic disadvantage there is little evidence that family breakdown is linked to any long term consequences and certainly none that cannot be reversed by change in environment" (p.173). Therefore, she argues, divorce itself is no justification for state intervention. Rather the justification for intervention lies in identifying the child 'at risk'. Like the Royal Commission of 1956 Maidment argues that family law must encourage responsibility in parents. The concept of parental responsibility demands that parents should not be allowed to abandon a parenting role simply because a marriage has ended (1984a p.279). She argues that current divorce practice of making sole custody orders in relation to children and in allowing access orders to go unchecked is by implication encouraging parental irresponsibility.

Maidment argues (p.271) that family law should enforce parental responsibility in two ways. Firstly, access or parental contact should be mandatory and secondly, procedure should involve 'screening' couples. Although the logical extension of this would be mandatory joint custody orders, Maidment concludes that this would in fact add nothing. Rather she argues the court should refrain from making any order at all in relation to custody. This would preserve the legal position of parents as it existed in the marriage. The court should simply make orders for physical care (which could be sole or shared). The value of this approach, argues Maidment, is that it carries a symbolic message regarding the continuity of parent-child relationships and their immunity to the breakdown of marriage. Equally Maidment argues that law has an educative function, joint custody orders 'would have a powerful influence over parental behaviour by enforcing and facilitating co-operation (p.279/80).

In relation to procedure Maidment argues that s.41 hearings (children's appointments) should be used as the screening process to detect those families where there is the potential of 'damage'. This presumably relates to those parents who do not agree to joint legal custody and mandatory access. Maidment argues that the criteria for intervention should be the welfare of 'the family'. She says, in the interests of children it is necessary to reach a 'family solution'. Maidment concludes this procedure would demand not simply conciliation, but for those parents who reject joint custody and mandatory access, a therapeutic input through family therapy and a family systems approach³.

Freeman reifies 'the child' and does not consider any of the political, theoretical or indeed practical problems of prioritising children's wishes - for example it would seem that some children would prefer that their parents simply did not divorce. And equally, some children may prefer to live with the wealthier parent, (predominantly the father). Maidment however reifies 'the law' and adopts an uncritical acceptance of the dominant model of the family. She argues ostensibly for less state intervention and an increase in 'private ordering'. But in effect by reducing the parameters within which parents can negotiate 'private ordering' she ultimately adopts a more authoritarian and interventionist role for the state.

Maidment and Freeman are not of course alone in the search for legal solutions to the problem of 'divorce and children'. But they, like most other writers in this field perceive the problem in extremely narrow terms. For them, it is primarily a problem of divorce and essentially a problem about forging and maintaining men's post-divorce relationship to children. 'Joint Custody' is therefore represented as the panacea to a whole range of issues. For Freeman and Maidment it holds symbolic power. Although they both argue that it signifies the continuity of 'parenthood', neither of these writers address the materiality of 'parenthood', it is a given. Yet in marriage just as in divorce 'motherhood' and 'fatherhood' are differently

constituted with substantially differing social and economic consequences. But neither writer considers the way in which law reproduces and sustains those 'givens'. Both writers are prepared to support considerable state intervention in divorce, clearly a political move, yet neither writer addresses the politics of marriage and the way in which state policies 'induce' women's parental responsibility but reduce that of men.

Other writers place hopes on 'joint custody' orders as bearing the powers of persuasion where all other endeavours have failed. For example it is seen as an answer to the current non payment of child maintenance by fathers (Walczak & Burns 1984 p.139). The fathers' rights movement see it as an essential redistribution of lost power and a chance to halt regression in the family structure. (Lettington 1983). And it is seen as an answer to two warring parents because there are no 'winners' and no 'losers'. (Maidment 1984a; Richards 1982).

In Britain the State came to the brink of a presumption of 'joint custody' in 1983. In a major review of procedure, the Matrimonial Causes Procedure Committee (Booth Committee) examined existing procedures and made recommendations for reforms which 'might mitigate the intensity of disputes, encourage settlement and provide for the welfare of children (p.1). That Committee also thought that joint custody had much to recommend it. Like Freeman and Maidment the Committee felt joint custody held a symbolic value, it also had important psychological consequences for fathers who do not have the daily care of children. Moreover the Committee also thought that it would have a therapeutic effect on disputes, 'it would encourage the parties to settle their differences,' 'it would focus attention on children and would assist on such questions as access'. Indeed the hopes attached to 'joint custody' with regard to its influence upon parental behaviour were very similar to those attached to s.41 hearings when they were introduced by the Royal Commission in 1956.

However, when the Booth Committee reported in 1985, it ultimately rejected the idea that 'joint custody' should be a mandatory starting point in every case (p.64). The Committee rejected that approach primarily because it was felt it would fetter the absolute discretion of the court to determine the welfare of children. But the Final Report did say that the Committee hoped that joint custody would be the agreed outcome in the majority of cases, a comment which has served to support the philosophy of conciliation - that 'joint custody' is the preferred order (Parkinson 1981). Moreover, that comment does illustrate a change of direction from that of the courts during the 1970s. Generally speaking, it was held by courts that joint custody would be an appropriate order only in those cases where parents were likely to co-operate (Jane v Jane 1983 13 Fam Law, 209).

While the hopes for joint custody are fairly clear, the reality of such orders is far from clear. Indeed the terrain on which the current debate is taking place has made it very difficult to raise certain questions, the parameters of welfarism delineate not simply the preferred solutions but also the range of questions. Yet clearly legal decisions about the custody, care and control of children have far reaching effects. Decisions not only affect the lives of children they play a crucial role in structuring the social and economic wellbeing of mothers, as indeed does the division of labour and responsibility for childcare within marriage. Yet reification of 'the child' and different feminist positions on 'motherhood' frequently makes intervention at the level of policy appear difficult. I believe however this difficulty is more apparent than real.

Historically feminist campaigns and debates surrounding motherhood have been about improving the conditions of motherhood, and a focus upon law has been one aspect of that campaign (Brophy 1982). But feminist discussions in the area of motherhood have frequently been vexed by the question of how to achieve improvements without increasing

either women's sole responsibility for children or women's economic dependence upon men. Indeed contemporary feminists have reacted very strongly against the notion that only women should care for children and that motherhood is destiny for all women (Comer 1977 and de Beauvoir 1974). And those issues have sometimes led feminists to adopt quite different approaches to the use of 'law' in this field (Smart & Brophy 1985). The case in favour of 'joint custody' has been put by feminists (for example Bruch 1978) who argues that it is one way of forcing men to take more responsibility for children. I would argue that both in theory and in practice that approach is flawed. Bruch, like Maidment reifies 'the law'. In this area I think it is important for feminists to consider in much more detail the realities of 'joint custody'. There are a number of questions which require discussion before we can begin to develop a feminist response to this issue in Britain. It is not sufficient to argue that since we have formal equality in relation to parental rights in marriage, these should continue on divorce. Experience has illustrated that complete equal treatment is not a sufficient goal for feminists where structurally women are at a substantial disadvantage vis-a-vis men. To begin to discuss in more detail some of the claims made for 'joint custody' it is important to look briefly at women's experiences of this type of order in the United States.

Joint Custody - California style

In the United States, the trend towards 'joint custody' appears like a social revolution in post divorce arrangements for children. In California, statute law has moved from 'father right' to the 'tender years' doctrine and on to a sex neutral code with increased formal emphasis upon shared parenting. By 1985 thirty States in America had adopted some form of joint custody legislation in an endeavour to encourage fathers to share post divorce parenting. However one of the striking things about the adoption of joint custody legislation between different States is the degree of compulsion involved. For example some States have legislation which provides joint custody as an option to the court, and here the court is empowered

to impose an order for joint custody on parents who do not want it. Also, some States' legislation allows for joint custody orders where parents agree, and this is based on a recognition that a degree of parental compliance is necessary if the order is going to be workable. Other States have legislation which allows for joint custody at one party's request, this legislation allows judges to force a joint custody order on two hostile parents. This is the form of order which has been promoted by the fathers' rights movement both in America and in Britain (Brophy 1985). Finally, some States have legislated for joint custody as a preference or presumption, to overcome this presumption, a parent opposed to the order must prove that it would be detrimental to the children concerned. It is this type of order which most closely approximates to that provisionally recommended by the Matrimonial Causes Procedure Committee in Britain during 1983. Although joint custody where both parents agree is generally the most judicious and widely approved statute (Weitzman 1985) it does allow for the possibility of coercion in obtaining agreement. For example, a mother who is afraid of losing custody altogether if the judge learns that she is unco-operative, or where she is afraid of losing custody because her husband threatens to raise issues of 'unfitness', such a mother may agree to joint custody through fear of losing altogether.

The rapid adoption of some form of joint custody legislation in two thirds of the United States and acceptance of joint custody preference in six States did signal a rapid break with legal tradition. The policy objectives engaged were not dissimilar to those currently voiced in Britain - an attempt to assure a child frequent and continuing contact with the non-custodial parent (in the majority of cases of course the father); encouraging parents to share the rights and responsibilities of childrearing. The legacy of Wallerstein and Kelly legitimated pressure put upon parents to work out a joint custody order for the 'sake of the children'. In the United States the mechanism through which that was achieved was conciliation. Indeed, the movement from the legal arena (from courts, lawyers and

the judiciary) to 'private ordering' in conciliation became not simply the preferred mode of dispute settlement, it became compulsory in some States (for example, California in 1981).

The State of California was the first to adopt a joint custody statute and it has the strongest pro joint custody law in the United States. The joint custody preference allows the judge to impose joint custody upon parents where conciliation has failed to get them to agree. Equally it allows a judge to impose such an order where one parent opposes it or indeed, where both parents oppose it. It is important to note that California law defines and distinguishes joint legal custody from joint physical custody. Joint physical custody means that both parents legally share the day-to-day care of children (in Britain joint care and control); joint legal custody (the focus of decision making) can be awarded to both parents with physical custody to one parent.

In relation to the effects of these new joint custody laws Weitzman argued (1985 p.250) that while legal labels are now different, the reality is not so different. In America, like Britain the vast majority of cases concerning the custody of children are not disputed in court and most children are in the care of mothers (Weitzman & Dixon 1979; Eekelaar & Clive 1977). Weitzman argues (1985 p.250) that the change of terminology simply means that orders which were (prior to the introduction of joint custody statutes in 1980) called liberal visitation orders, are now called joint custody orders. So that, while the shift may have important psychological consequences for fathers who now define themselves as joint parents after divorce, nevertheless, it has not changed the reality of the daily care of most children. Indeed provisional results from studies suggest that less than one in five couples elected or felt pressed to try joint physical custody (Maccoby & Mnookin 1983; Wallerstein & Huntington 1985). As Weitzman remarks, within a legal system which positively promotes joint physical custody of children on divorce such a response

underscores the pervasive social attitude - most men and most women prefer not to share post divorce parenting.

In the light of suggestions that joint physical custody of children on divorce represents the ideal situation - (both by lawyers and psychologists in the United States and in Britain and indeed, by implication, the ideal for feminists) it is important to consider why parents might not opt for shared physical custody of children. Steinman (1981) studied twenty-four couples who chose these arrangements. She states that such arrangements demand unusual commitments of time and energy and in addition, financial resources which most couples cannot afford. Those couples who chose joint physical custody were well educated with at least average income and a strong commitment to parental responsibilities. Arrangements were very expensive, for example children had to have two sets of everything. But in addition, the arrangements were not without anxiety for children. They expressed confusion about where they were supposed to be and when. And this occurred even when the geographical location of parents was not a problem (i.e. when they lived very close). In a follow-up study (Steinman 1985 p.411) this author reported that the complex logistic arrangements involved in joint physical custody broke down when one parent moved and/or remarried.

In the Bodenheimer Address in 1983, Steinman reflected on joint custody and argued 'joint custody is an ideal, a policy and a set of expectations...there is no consensus on what it means and a great need for further data' (p.741). Her sample in 1981 arranged for joint custody extra judicially. They were parents who were personally committed. But their childrens' experiences were mixed, Switching homes every third or fourth day created confusion and anxiety. Steinman stated that joint physical custody offers benefits, but it is not for everyone, the capacities and vulnerability of individual children must be a primary consideration. It may be that co-operative smooth running co-parenting relationship is a precondition for children to do well but it is not sufficient. Steinman concludes that firstly

we need to consider not only parents but equally which children make good candidates for joint custody. And secondly that the evidence we currently have does not support a legal presumption in favour of joint custody. A legal.. presumption would, she argues, be based upon hope: that hostility and conflict between parents will die:

"Joint custody is a philosophy not a legal formula, at its worst it technically divides a child's life between two parents without consideration of the child's specific needs or capacities and that tries to end a war between parents who do not or cannot agree".

Steinman, 1983, p.761

It appears that the most common award which the California courts currently make is for joint legal custody with maternal care to mothers (Weitzman 1985). And results from preliminary studies indicate that there has been the largest change in this type of award (Maccoby & Mnookin 1983; Wallerstein & Huntingdon 1985). The rationale for introducing that type of order in the United States was similar to that currently being voiced in Britain. It is primarily a legacy of the work of Wallerstein and Kelly. After the five year follow up study of the impact of divorce on children the authors argued:

"while no single factor was associated with good outcome...the continuity of relationship with both parents and the extent to which the conflict between divorcing partners had subsided all contributed to the wellbeing of the child".

Clearly the important caveat to continued contact is the absence of hostility. Where hostility and conflict continue children are typically caught in the middle. Moreover, it is important to note that the Wallerstein and Kelly research findings were based on a sample of families who were self selected and (by definition) committed to co-operation. This is not then a recommendation for a court order to co-operate where couples register hostility to that type of order.

Two other major justifications are voiced in support of mandatory/preferential joint custody. Firstly that it improves chances of child maintenance being paid (Kelly 1983 p.765; Walczak & Burns 1984, p.139), and secondly that it will eventually reduce parental conflict (Maidment 1984a p.280). With regard to the argument that fathers are more likely to pay child support where they are awarded joint legal custody the evidence suggests that this is not necessarily the case.

In the United States as in Britain levels of maintenance payments for the vast majority of women and children remain wholly inadequate and are only attempting to make a contribution to the cost of raising children. Too little is ordered, even less is paid, enforcement is inadequate and awards do not keep up with either inflation or rises in male earnings (Maclean & Eekelaar 1983; Smart 1984; Gibson 1982; Pearson & Thoennes 1985; Chambers 1979). Indeed in the United States, Pearson and Thoennes reported that in 1983 forty per cent of the 2.6 million women and children living below the poverty level were owed child support from fathers (1985 p.1)

However, research into child custody awards and payment performances in the United States reveal that maintenance payments cannot be linked to the type of custody order made by the courts. The issue is more complex, other variables are more important - primarily employment and remarriage. *For example, a father's employment stability has a clear relationship with both regularity of payment and amount* (Pearson & Thoennes 1985 p.12). These authors reported that parents who were receiving regular support payment were also those who reported their ex-spouses had had no recent employment problems. Equally husbands who remarried and more importantly, those with children by new spouses, were less likely to pay child maintenance regularly. These authors conclude that knowledge of legal custody is of limited value in predicting maintenance payments after controlling for the effects of other independent variables.

With regard to the argument that a joint legal custody order will eventually reduce hostility between conflicting parents, the evidence is equally unconvincing. The argument is that once the father is assured of a clear legal right to be involved in decision making this will lead to a reduction of tension. However preliminary research findings in the States do not confirm this. Pearson and Thoennes (1984) found that many of the couples who settled for joint legal custody with physical care to mothers had originally disagreed about custodial arrangement of children on divorce. Typically the preference was for sole custody. Joint custody represented a compromise. These authors reported that mothers who were dissatisfied with the arrangement (three years hence) felt that they had been talked into it. Equally these mothers also reported a poor relationship with their ex-spouses and that their children were aware of the conflict and anger between parents (1984, p.14). Further research (Patrick et al 1986) also concluded that post divorce litigation was more likely in cases of joint legal custody than sole maternal custody. The high rate of post divorce litigation in relation to joint legal custody orders in these American studies is significant because the original custody awards were the result of 'voluntary' agreements. If these couples end up with more conflict and litigation in relation to children, the forecast certainly does not hold good for parents who are pressured into that type of order by conciliation, or by courts.

But not only does joint legal custody of itself do little to improve payment of child maintenance by fathers, it can also be used as a device to lower child maintenance awards. For example fathers may argue that because they spend more time with children they should not pay full (or sometimes even any) child maintenance. Indeed in some cases fathers have argued that they are entitled to part of the child benefit and single parent allowance⁴.

Major legal changes over the past fifteen years

in California have not dramatically altered the distribution of child custody awards. Neither it seems have they affected the materiality of childcare following divorce. Yet in America, as in Britain, general perceptions (for example media representations) are, that a growing number of men are seeking and obtaining custody of children. This may of course be partly due to the fact that while the percentage of fathers who get custody has remained fairly constant, the number of such fathers increased dramatically because of the steady rise in divorce. Weitzman also argues (1985 p.261) that the particular characteristics of the fathers who ask for and are awarded custody are relevant. She identifies them as well educated and of high occupational status, thus they are more visible and likely to be seen as trend setters. Equally I would argue that they are precisely those men most able to afford to employ substitute carers. This enables such men to continue to gain all the benefits of full-time employment alongside 'parenthood' - a privilege frequently denied many mothers.

The implications of the American research are primarily these; firstly, 'law' alone cannot determine behaviour in the way in which such writers as Maidment (1984a) and Bruch (1978) envisage. It makes little sense to argue as Bruch in particular does, that access should be legally enforceable and where fathers fail to turn up the courts should administer a financial penalty. Given the levels of child maintenance awards and records of payment by fathers in both Britain and the United States, that form of enforcement is almost certain to fail to say nothing of the issue of who pays for the mother to take legal proceedings against the father for non-payment of the financial penalty? It might make more sense to argue that such fathers should not be 'allowed' to remarry and incur further expenses.

Secondly, it is impossible to ignore social and economic factors in this area of policy. Indeed the most 'acceptable' all round solution - joint physical custody - demonstrates this point most clearly. Major problems

with this type of order related to financial resources. Equally children experienced anxiety, and remarriage increased the problems. Those experiences demonstrate that we cannot ignore the social and economic factors surrounding children and divorce as some writers suggest. It is not possible to isolate 'psychological' factors on the basis that they are somehow more 'universal' while social and economic factors, although difficult, are nevertheless susceptible to change given political will. It is not possible either in theory or in practice to isolate custody decisions from the social structure which they inhabit. Clearly if joint physical custody of children following divorce was a problem for the affluent parents and children of California, one can suspect that such orders might be at least equally problematic for the parents and children of Toxteth or Brixton, and for those parents generally who move to seek employment.

Thirdly, court orders do not in themselves ensure the greater participation of men in the lives of children. It must be remembered that in the research outlined above less than one in five couples opted for joint physical custody in jurisdictions where such orders were positively encouraged. The picture begins to look particularly bleak. But this is partly due to the narrow parameters in which the debate is currently placed. Co-parenting does not begin *with* divorce, it is a concept equally applicable to marriage. Yet while the arguments in favour of joint custody and conciliation are ^{often} heavily critical of mothers who reject both these 'facilities' (for example Kelly 1983, p.769) there is no corresponding critique of either parenthood in marriage, or of fathers. Indeed that status remains largely undefined. It is argued that extensive state intervention through parental education, mediation and counselling will be necessary to persuade mothers that joint custody is what they should agree to on divorce (Kelly 1983; Maidment 1984a). But there is no discussion of education/rehabilitational programmes for fathers.

Moreover the degree of coercion necessary to gain

mothers' compliance is likely to take considerable time. Nestor for example (1983 p.772) argues that a proper evaluation usually required at least ten hours with parents and children. This time has to be spread over periods of up to eight weeks to allow for parents to react, absorb and think about what is going on. This is clearly not the cost saving in-court mediation programme envisaged for divorce Courts in Britain by the Booth Committee (1985 p.86/87). Thus to think about utilising conciliation as an agency to change and override parents' decisions demands, as a pre-requisite, a commitment to fund out-of-court schemes. A decision which has for the moment already been rejected in Britain (Inter-Departmental Report on Conciliation 1983). Equally such a task also makes problematic the philosophy that conciliation is about 'party control' and parents making their own decisions.

But in addition, the focus upon divorce and the rejection of issues surrounding parenthood in marriage has further implications for the practice of conciliation. Utilising conciliation to obtain joint custody orders to instill into divorcing parents the necessity of co-parenting (Parkinson 1983, p.34; Maidment:1985, p.279) not only envisages substantially more state control over childrearing on divorce than exists in marriage, it is in effect, attempting to impose a particular model of parenting on divorced couples which may bear little relation to the reality of decision making within their marriage. It is important to locate the model of co-parenting which is being applied in conciliation. These questions are not simply pedantic. Instigating new patterns of behaviour is not the same task as enabling existing patterns to continue. The task of the conciliator will not be the same. Piper (1984) has addressed this question in her research on conciliation in Britain. Her research reveals cases where marriage ended because of one partner's inability to cope with the control exercised by the other. This control includes the imposition of all child care duties on the other parent and/or the retention of all major decision making concerning the children.

There is then a fundamental problem with the movement towards joint legal custody as a mechanism to achieve co-parenting on divorce. It assumes and thereby imposes a model of parenting upon parents whose marriage itself lacked mutually negotiated joint parenting. As Piper argues (1984, p.6) 'co-parenting' may well be a completely novel concept to the clients of conciliators. Therefore a presumption in favour of continued co-operation may be a presumption in favour of containing a situation in which there is inequitable inputs into childcare duties and decision making. In effect a practice which reproduces and sustains existing power structures and relationships.

Patriarchal Relations and Child Custody

I began this chapter by arguing along with Oakley (1981) that the way reproduction is handled in society is inseparable from the way in which women are managed and controlled. Throughout the research, the analysis presupposed the existence of institutionalised, material and ideological forms of oppression. Concrete analysis of practices was necessary to investigate the relationship between formal parental equality and notions of children's welfare, and women's oppression within the family. In the 1980s moves towards 'joint custody' whether through the 'back door' of conciliation or by legal presumption (unlikely following the Booth Report) demonstrate, that where legal policies fail to address the materiality of parenthood for both mothers and fathers, changes may well endorse and reproduce those existing inequalities.

But in addition, the desire to preserve and reify 'the family' at whatever cost to women and children perpetuates the belief, and hence the economic reality that children's interests are generally only ever properly served within 'the family' (Finer 1974; Marsden 1973). That the family can be a dangerous place for women and children (Binney et al 1979) is never addressed. And that many children grow up in households which cannot be described as traditional nuclear families is still viewed as essentially a social

problem and a deviation from the 'norm'.

Moreover that focus upon preserving the family has particular political appeal in Britain in the 1980s where there are attempts to valorise the family in Conservative social and economic policy and a call for the return of Victorian morality and values. As Hall argues (1979) 'we are in the middle of a deep and decisive movement towards a more disciplinary and authoritarian kind of society' (p.3). A focus upon preserving the family structure after divorce facilitates appeals to the 'law and order' debate and claims regarding the breakdown of the family as instrumental in current 'inner city unrest'. This is partly why there is media appeal in organisations such as Families Need Fathers. It is because they focus not upon marriage and the power structures within marriage, but rather on the erosion of the authority of fathers by divorce and the 'deviancy' of the mother-headed household:

"At a time of concern about urban violence, largely attributed to juvenile delinquency, and appeals from Government spokesmen for more parental accountability, it may seem strange that among the myriad explanations for the causes of such disturbances, discussions of the effect of the loss of parental influence has been notable by its absence. Fathers who had traditionally been responsible for discipline in the family, particularly regarding their sons have had that authority eroded in recent times by...theories which over emphasised the mother-child relationship...these theories have reinforced discrimination [against fathers] in the divorce courts".

Benians et al 1983, p.4

There is, in conclusion, a profoundly reactionary philosophy underlying the current debate over children and divorce in both Britain and the United States. Because the focus is limited to 'fatherhood' on divorce and does not consider parenthood within marriage it takes-for-granted the work which women do in relation to childcare and domestic labour. It equally takes-for-granted men's continued non-participation in childrearing in marriage. Psychological discourses make a major contribution to

that position. By arguing that a father's psychological importance to his children is not a function of the parenting role he played in marriage (Wallerstein & Kelly 1980), this lends legitimation to a political decision to ignore the structure of parenthood within marriage. Yet even within the authors' own terms this statement is problematic. They do for example acknowledge that children do have a perception of their parents' roles within marriage. For example children are reported as perceiving their parents as 'at fault', 'cruel' and 'vindictive' and as 'aggrieved', 'mistreated' or even 'martyred' (p.88). This is not to say that such children would not want a relationship with the offending parent, they might, but equally they might not. So that, one cannot deny the significance of the history of the marriage - a history which children (though clearly powerless in the situation) nevertheless share. If a part of a child's experience of fatherhood for example included physical and/or sexual abuse, is that to be ignored in striving to construct a post divorce father-child relationship?

Moreover, ignoring the history of the marriage when making joint custody orders has meant that men who have battered their wives have, in effect, been guaranteed continued access to and control over their wives through the children. It seems that neither courts in Britain⁵ nor the United States consider wife beating as an indication of bad parenting (Schulman 1980). Yet there is considerable evidence the children witness their mothers' physical abuse, and may well become involved in an attempt to protect her (Binney et al 1979). An expectation of 'mutuality' and 'co-parenting' under these conditions is fundamentally misconceived. A mother who lives with the fear and reality of abuse and who in addition, is usually economically less powerful than a father is not in a position to effect co-parenting since she has no control over the conditions of her mothering.

Feminist Policies

Clearly any discussion of feminist policies in this area is immensely difficult partly of course because of the limited parameters of the current debate. But there are a number of issues which I think are central. I think it is important firstly to consider the contribution which feminists have already made to this issue.

A major contribution of feminist analysis has been not simply a political analysis of the sphere of 'domestic' relations (Delphy 1977; Mackintosh 1979; Bland et al 1978), but in addition, a rejection of the traditional split (practiced by both the left and the right in British politics) between the private and the public spheres. Thus feminists analyses have moved between these spheres of work and home neglecting traditional boundaries to consider how those divisions impinge upon and construct the experiences of women (for example, Pahl 1985; Smart 1984) Research has been concerned to show that 'the family' is not the gender neutral alliance of sociological textbooks, but rather reflects power structures in the outside world.

Within that exercise the issue of motherhood, its terms and conditions, has been a recurrent focus in feminist politics. The focus has not simply been on the conditions of motherhood within the family, but has equally sought to demonstrate the consequences of those conditions for women's position in the labour movement. Thus feminist campaigns have been concerned with the extension of maternity leave, equal pay, free creches, accessible public transport, improving the conditions of part-time employment, play centres for schoolchildren, workplace nursery schemes etc. And those issues have existed alongside a critique of unpaid domestic labour, and a movement to separate out motherhood from the package of marriage and heterosexuality. The demand that motherhood and paid employment should not be an either/or decision for women, carries with it a critique of the organisation of the domestic

economy and the artificial split between the public (work) and the private (home). Thus feminist critiques of the 'public' - of the world of work - is not simply about women's exclusion and segregation within employment. It is also a critique about the nature and organisation of employment itself and the way in which that organisation reflects on the conditions of mothering in society. At the centre of feminist analysis is a rejection of the public/private distortion. The demands of the women's movement in the 1970s that men take equal responsibility for childcare and the domestic duties which accompany it, was not only a demand that individual men do their fair share. It was also a demand that men problematise and politicise that distinction and the way in which the 'public' takes priority. It was a demand to consider 'fatherhood' and the conditions of the domestic economy which make 'fatherhood' and full-time employment possible.

It is that failure to politicise marriage and parenthood which identifies the fathers' rights movement. That movement does not address the oppressive structures of marriage. Nor does it consider the way in which the sphere of the private and the public serve to the advantage of one parent. In Britain for example the voice of such groups as Families Need Fathers and Campaign for Justice on Divorce has been silent in relation to the recent campaign against the Conservative Party decision to tax workplace nursery facilities as a fringe benefit. There was no trade union outcry that such facilities are a necessity to working parents. Equally, such organisations have been silent on the Government's rejection of the EEC Directive on parental and family leave. It should be remembered that the 1980 Women and Employment Survey (Martin and Roberts) revealed that 45% of women who had returned to work part-time after having a child, return to a job in a lower occupational status (p.147). Data from the same survey shows that family formation has a lasting effect upon women's lifetime earnings - (an effect of 25% to 50%) (Joshi 1984 p.45). Moreover women spend a

disproportionate amount of time off work for family reasons such as caring for elderly and disabled relatives. And, given demographic changes and current community care policies, it is likely that this burden will increasingly fall on women. It is the silence of the fathers' rights movement on these issues, and their ferocious public front in relation to rights over children on divorce which reveal the reactionary nature of these groups. They do not have a critique of marriage nor an acknowledgement of the conditions of parenthood. Indeed their demand is ultimately for a continuation of the conditions of motherhood which in turn facilitate 'fatherhood'.

There is not a social revolution in childcare underlying the debate on joint legal custody in Britain. There are not vast quantities of men rejecting the benefits of full-time employment for part-time jobs and the pleasures of childcare. Nor are men's rights groups advocating men should relinquish some power in the workplace to women workers or positive discrimination in favour of single parents. On the contrary, mothers as part-time workers remain the least secure and the lowest paid workers (Martin & Roberts 1984).

It is partly then against that background that feminists enter the discussion on law. Clearly at this level of analysis divorce law has a limited role to play. As demonstrated here, 'law' and legal practices do not instigate women's oppression. However they can and do reproduce that situation. And power and control over conditions of reproduction determines power and control over women. Clearly it is then important that feminists engage in the current debate on children and divorce, but the issues need to be clear. The current debate is not concerned with equality of responsibility. How/^{ever,} there are areas where women could benefit from change. On a procedural level, a reduction of the length of time it takes to get a case to court is to be welcomed (proposed for the Initial Hearing-Booth Final Report 1985) because this reduces the uncertainty

for both women and children. But the question of the purpose and usefulness of welfare reports remains problematic, certainly the welfare officer who does the welfare report should not also attempt conciliation (Bottomley 1985). But equally it does seem that we should consider substantive law because it clearly creates uncertainty and ambiguity for mothers. When we address this area we meet certain 'old' problems for feminist theory and policy - how do we improve the conditions of mothering without further institutionalising women's sole responsibility for childrearing and increasing their economic dependency on men. Also we need to be aware of playing into the hands of the 'right' in the creation of a 'new' ideology of motherhood. Experience has shown that formal parental equality at the point of legal dispute is not necessarily progressive. A sex neutral code has distinct advantages for men since it means that the sexual division of labour in relation to childcare within the marriage accounts for very little. A father can continue with full-time employment and 'fatherhood' in the knowledge that the fact that he has taken little or no responsibility for children will not matter if the case gets to court. Equally, there is no acknowledgement of women's childcare responsibilities by such^a code. The labour and lost economic opportunities for economic self-sufficiency of^{women do} not feature in divorce^{settlements} yet they are an expected part of women's contribution to marriage.

One basis for opening discussion on substantive law could be the American 'tender years' doctrine (Klaff 1982). Klaff argues that the policy objective in this field of law should carry a presumption in favour of the primary care giver. In relation to the existing division of labour that would generally be a presumption in favour of the mother. To some extent this would remove some of the ambiguity and uncertainty engendered by the 'best interests' principle since it would be an evidentiary presumption. However the issue is complex, particularly while courts employ differing criteria to the value of parents' employment.

While fathers' employment is taken for granted and not considered a handicap, mothers' employment however may militate against her record as a good mother, particularly if her status is already under attack. It is frequently assumed that if both parents work outside the home, they are equal in the amount of time and energy they commit to children and childcare. In reality, employed mothers continue to provide primary care and responsibility for children (Polikoff 1983). Clearly a 'tender years' doctrine has its limits and is not entirely satisfactory. But in principle it need not be displaced by issues of age of children nor employment. While it would obviously allow for flexibility it would be a presumption applied if the case went to court but it would not inhibit different out of court settlements if the primary parent agreed. And it would perhaps remove some of the ambiguity and uncertainty mothers experience at present. It should be remembered of course that it is unlikely that enormous numbers of fathers will actually contest custody of children in Court. But what is important is, that beneath the surface is a bargaining climate. Within that climate women are scared or threatened and they feel compelled to give up or compromise their financial interests in order to retain custody (Mnookin 1979).

The removal of child custody from the public area of the courts to the welfare agencies and 'private ordering' and the focus upon joint legal custody is highly problematic. And it may be that the fragile ground women have gained in this field will be withdrawn by the oppressive and regulatory hand of welfare. While it is indeed difficult to develop a feminist response to this movement, to begin that process it is necessary to understand the underlying philosophy and its implications for conditions of mothering in society. This final chapter has been a contribution to that endeavour.

NOTES AND REFERENCES

1. There are many definitions of conciliation, but the general aim is to bring couples together to reach an amicable agreement over children.
2. The sample was self selected, and the researchers also acted as clinicians counselling families. Also the researchers were psychoanalysts working within a particular framework regarding children's development and the influence of early life experiences to future mental health.
3. The systems theory was evolved by natural scientists. When applied to the family the theory is an approach which sees the family as more than the sum of its members. It stresses the interdependence and inter-relationships within the family structure. Any change affecting an individual, affects the whole family, functioning depends upon facilitating communication.
4. Two fathers in the study outlined in chapter 8 used this argument.
5. In a recent BBC 'Open Space' programme on 'domestic' violence, mothers from refuges for battered wives complained that they kept having to move refuges because violent husbands had joint custody orders which gave them access to both children and wives. In effect a joint custody order removes their right to keep their address secret.

APPENDIX I

Doing Research

The focus of interest in this piece of research has been the role of law and legal practices in the social construction of motherhood and the consequences which that construction has had for the position of women within the family. Initially I was solely concerned with contemporary legal practices in contested cases where the sexuality of the mother is a major issue. However, it proved impossible to analyse the position of such mothers within existing explanations of the role of family law in child custody disputes.

A subsequent re-reading of both the post-war period and of nineteenth century developments in this field ultimately lead me to reject both the 'pendulum' theory of developments (a 'parental rights' approach which argues that 'the law' has moved from nineteenth century 'father right' to a version of twentieth century 'mother right'), and the welfarist approach (that all developments in this field can best be understood and explained as the state's ever increasing concern for the welfare of children). I have argued in this research that neither of those approaches fully explain the development of law and legal practices with regard to the guardianship and custody of children.

The first two parts of this thesis therefore have been concerned to map out and re-read legal history in the area of children and parental rights and responsibilities both within and outside of marriage. Parts I and II focus on various documentary evidence (eg: the political debates surrounding the introduction of legislation, the legislation itself, Government Reports and Enquiries, Evidence presented to such Enquiries and case law). For the most part (excluding the materials presented in chapter three) the case law examined and discussed in these sections have been previously discussed by lawyers (Pettit 1957; Karminski 1959; Maidment 1984; Freeman 1983;) and by legal historians (Pollock & Maitland: 1968; Plucknett 1949; Manchester 1980). However, I have argued that traditional methods of reading law have operated within a highly structured framework. 'Law' in effect has defined its own boundaries and traditional legal methods of reading law have not afforded an opportunity for a fundamental questioning of the very process of defining what counts as legal issues (ie the selection of relevant 'facts' the disregard of irrelevant 'facts' the application, extension and rejection of precedents) by courts. The impact of feminism on legal enquiry therefore is partly demonstrated in the category of questions addressed to these materials. So for example, in addition to questions regarding the process of constructing law, I also raised questions regarding the role of the state at various times. Moreover, I was also

concerned to examine the role of law' in sustaining women's powerlessness within the family during periods more frequently identified as significant for the increased rights allocated to women. In terms of 'doing' this part of the research therefore, that approach raises two issues in particular.

Firstly, it demonstrates a link between the theoretical perspective outlined in the introduction to this research and research 'questions & methods'. This point will become clearer when I discuss the sample of mothers analysed in the third part of this thesis. But it is also relevant in discussing 'non-reactive' data such as that contained in chapters 1, 2, 3, 4, and 5. In those chapters particularly, I look at 'public' documents some of which have been previously examined and discussed within the academic discipline of law and legal history. However, I re-address that legal data from a rather different framework, and with a new set of questions. Such an approach, concerned with power relationships, brings a critical perspective to women's position within the family and to the role of law and legal practices in attempting to change or sustain that position. So for example, where lawyers and legal historians point to the way in which nineteenth century statute law gradually increased mothers formal rights to the custody of children on marital breakdown, I have, in addition, focused the role of

law in relation to the rights of mothers within families and the consequences which that role had for married women's power and ability to leave unsatisfactory marriages. That focus has revealed a more complex and frequently more oppressive role of law in this field than was previously thought to be the case.

Secondly, with regard to the connection between theoretical perspectives and research methods, it may be argued that the above approach simply leads to a form of relativism (ie: 'findings' are largely determined by the framework within which issues are addressed). However, I would argue that the criterion by which such an approach should be measured and assessed, is, whether it can throw new light firstly, on the social effectivity of law, that is, the on the way in which 'law' and legal practices can effect peoples' lives; and secondly, on the contributions which such an approach can make to theoretical understandings of the role of family law in particular periods, and thereby finally, to contemporary policy debates. As Rich (1979) and others (eg Smith 1978) have argued with regard to the role of feminism generally and its relationship to theory and to methods in social research, the task of feminism is not simply to add another dimension - simply tacked on to existing theories and methods - but rather to demonstrate how a focus on gender and women's experiences changes the very basis of

existing theory and methods, and reinterprets what we call knowledge. And while the impact of that approach by feminists is increasingly identifiable in subjects such as history, literature, politics and sociology, it is hardly touched upon in the analysis of law (c/f O'Donovan 1985:59).

With regard to chapter three of this thesis, the materials presented here have not been brought together and analysed previously. They are new and original materials drawn from archives. For this part of the research I spent several months working in the Public Records Office and the Fawcett Library (1). In chapter 3 I document the development of a campaign by a group of feminists (The National Union of Societies for Equal Citizenship -NUSEC- an umbrella organisation representing some twenty five women's groups and organisations). This Union began campaigning in 1919 for rights for mothers within and after marriage in relation to children and fought several Governments over the lack of general rights for mothers. This chapter documents the development of that campaign, and the responses of various governments between 1919 and 1925 which finally culminated in the 1925 Guardianship of Infants Act.

The materials analysed form the records of the NUSEC (held at the Fawcett library) and these consist of

correspondence, minutes of meetings, draft Bills and Amendments and notes, personal letters and resolutions of meetings with various women's groups and with members of Governments and the Lord Chancellor and his officers. The Government records (held at the Public Records Office) consist of minutes of meetings of various state departments, minutes of the Home Affairs Committee of the Cabinet and records of the Lord Chancellor's Department and the Law Officers Department, Evidence and Report between the Home Office, the Lord Chancellor's office and the Law Officers Department, plus correspondence, draft Bills and minutes of meetings between the Lord Chancellor's Department and NUSEC. (Brophy 1982). Tracing this campaign through original sources was important. It demonstrated very clearly both the limitations of the 'welfarist' approach as a complete explanation for the provisions which were ultimately contained in the 1925 Guardianship of Infants Act, and indeed the preamble of that Act as an complete indication of legislator's concerns and intentions.

Parts I and II of this thesis have been concerned with reading re-reading and documenting 'non-reactive' data. The concern has been to approach that data with new questions regarding the position of mothers and the role of law. The importance of Parts I and II, is that they do provide a new and more critical framework from which to begin to re-address

questions concerning law and legal practices in the 1980s.

In Part III of this thesis, the focus of the research moves away from the construction and interpretation of law by the courts, and examines the social effectivity of law through an examination of 'women's lived experiences of those practices. That approach forms part of a growing endeavour by feminists within sociology of focusing on women's experiences (eg: Graham 1982; Oakley 1981) as a method of locating what Matza (1969:67) refers to, as the relationship between personal troubles and the social structure. In this section therefore I present and discuss law and legal practices in relation to a group of lesbian mothers concerned with the custody of their children on the breakdown of marriage.

In chapters 6 and 7 I outline and examine the disposition of fourteen lesbian custody cases by courts. I analysed court transcripts (some of which are available on Lexis (2)) , plus barrister's and solicitor's notes and documentary evidence provided by the mothers themselves. I examine the strength of the children's residential status quo hypothesis on court decisions and I also discuss the influence of social enquiry reports. In those chapters I develop a framework for the analysis of cases, utilising the notion of a continuum upon which I 'plot' the relative

familial positions of the contesting mothers and fathers. I outline and discuss the influence of notions of gender identification, acquisition of sexual orientation in children, and female sexuality in general, on the court's approach.

My findings partly concur with those of certain American lawyers' examination of courts' approaches to this issue (ie: courts are concerned about the 'effects' of lesbian mothers on the psycho-sexual development of children (eg: Basile 1974)). However, my analysis of this issue and the theoretical framework developed in this research extends existing American writing in this field in two ways. Firstly, it provides a way out of the problematic focus on denial of 'rights' or civil liberties of lesbian mothers (3) frequently prominent in the American materials (eg: Armanno 1974). This is especially important because, so far as law and legal practices in Britain are concerned, neither of those approaches is especially helpful, either in terms of political practice or future legal policy changes. In Britain we have been moving away from a focus on unambiguously enforcing parental 'rights' in this field of law for the best part of a century (some would argue longer). The enforcement of parental 'rights' as justification for decisions by courts has therefore taken something of a back seat at least in terms of stated formal policy for some

considerable time. A focus on the denial of formal 'rights' or civil liberties of mothers in this field therefore - appealing though such a focus may be from a campaigning point of view - is unlikely to meet any serious consideration at the level of formal policy changes. In addition of course, for some feminists (eg: Marxist feminists) demands for changes based on a notion of the inherent and absolute 'rights' of the individual is problematic. This is because such demands invoke a libertarian philosophy, and that perspective presents particular problems with regard to wider social and economic concerns (Kingdom 1985:Anderson & Dawson 1986:15).

Secondly, this research on lesbian mothers and 'law' demonstrates that this issue is not simply one of 'homophobia' 'at large' in the courts. In addition, it tells us something about how law and legal practices operate in relation to the issue of female sexuality and motherhood in general. In other words, we cannot fully understand law and legal practices in relation to lesbian mothers unless we contemplate the social construction of female sexuality in general and its particular focus on reproduction and motherhood only within marriage and the family. Hence, this section of the research locates the issue of lesbian motherhood and the role of law, within the wider social and political structures of society.

By moving down into the realms of pre-court practices in this field, this section of the research demonstrates some of the social effects of notions of the 'good' mother and 'the lesbian'. A small number of American writers have examined court practices regarding lesbian mothers, but we have no information about pre-court practices. Indeed there are enormous gaps in our knowledge generally about this area of legal practice. By focusing on the experiences of lesbian mothers at that point in the legal process, the final part of this section attempts to increase our knowledge and understanding of this part of the legal process. It demonstrates that pre-court practices play a crucial part in these cases, by providing information, not simply on why lesbian motherhood presents courts with such enormous dilemmas, but in addition, demonstrates why so few lesbian mothers ultimately contest custody of their children through the courts.

Interviewing Mothers: (1) Issues of Confidentiality and the Presentation of 'results'.

The highly sensitive nature of the issues dealt with in chapter eight of this research raised a number of problems. In terms of providing the results of interviews with mothers, not surprisingly, there were major problems surrounding the issue of 'confidentiality' and protection of the identities

of the women involved. Some of these problems have been partially overcome through the adoption of a particular method of presenting what are usually referred to as the 'findings' or 'results' of interviews. I have deliberately not followed a 'case work' approach in the presentation of materials. I do not therefore give biographical details on each case, with dates, courts, ages of children, mother's position with regard to sexual relationships, geographical location, occupational group etc., etc., Rather, I develop a framework for the analysis of each case which focuses on those details only in so far as courts and legal practices deem them to be significant. In terms of the experiences of the mothers presented in chapter eight therefore, it is these particular features which form the legal construction of the case which form the focus of attention. That choice of method of presentation of 'findings' was also important because, it must be remembered that some of the mothers who took part in this research project took enormous risks in being involved & their identities must be protected. Indeed, many of the mothers with whom I came into contact over the period of this research could not be involved or associated with it. For example, some mothers have been successful in obtaining the custody of their children through the courts through the denial of sexual identity. In certain cases mothers were indeed telling the 'truth', at the time of the hearing they were not involved in a lesbian relationship. But fear of losing their children meant in effect a

commitment not simply to immediate celibacy, but in addition to future isolation and loneliness for some time in the future-usually until their children were in their mid teens, - and for some women, this meant ten years or more. Moreover, that initial decision could also mean that mothers were under the constant surveillance of ex-husbands searching for 'proof' of a mother's sexual identity. Lesbian mothers in such circumstances frequently live their lives in almost total isolation of both friends and potential and past lovers through fear of being brought back to court, both for contempt and the possibility of losing the custody of children. Clearly for women in these circumstances 'speaking out', however careful that exercise is, it nevertheless can carry enormous risks both for the women and the children involved. The position of such mothers cannot be jeopardised, either for the sake of political campaigns or academic research. Having witnessed husbands attempts to listen to telephone calls, intercept mail, and follow women's movements in an attempt to document her involvement in lesbian and gay issues, caution in presenting materials is essential even some considerable time after the 'formal' resolution of all the cases outlined in this research.

It is therefore the task of feminists researching and writing in this field, to address conventional methods - of both 'doing research' (see below Interviewing women (2)),

and presenting 'findings' - and to develop methods which allow women to "speak-out" but equally do not, in doing so, jeopardising their own position or that of their children. In other words, where orthodox methods of presenting materials are problematic, this should not indicate that only those issues and experiences which are easily accommodated and 'reproduced' should be investigated and reported. Rather, it is the political task of feminists within social research to develop techniques and methods which reflect the complexity of women's position, but which do not thereby increase the vulnerability of women who are already demonstrated to be politically 'at risk' in certain areas of their lives.

It is also important to point out that the degree of information gained through interviewing these mothers could not have been obtained by any other 'method'. It is doubtful for example whether solicitors would have been able, or indeed willing, to provide the same degree and depth of information about their own handling of lesbian custody cases. Equally divorce court welfare officers and/or social workers would not have been formally able to supply information regarding their approach to lesbian motherhood, or indeed supply copies of the social enquiry reports they prepared. Indeed, strictly speaking, those documents should not be shown to any person other than parties to the

proceedings and their respective lawyers. However many mothers did have copies of the report on themselves and their children, and they allowed me access to these documents as did certain sympathetic solicitors. Clearly those cases should not be easily identifiable.

Interviewing Women: (2) The Social Practice.

When I began this research I did not envisage, given the complex and sensitive nature of the issue, to be able to produce a 'representative sample' of lesbian mothers. I simply hoped that I could provide sufficient materials to demonstrate that there are problems regarding the way in which courts approach the issue of lesbian mothers and child custody. I certainly did not envisage being able to devote an entire chapter to pre-court practices and bi-lateral bargaining. The development of a focus on the importance of pre-court practices in this area came from early discussions with various lesbian mothers regarding their experiences at that level and their reasons for what they termed 'giving up' in their struggle for custody of their children.

I talked with mothers who had already lost custody of their children, and mothers who were trying to avoid going to court through various forms of compromise and evasion with

their ex-husbands. In addition, I also talked to mothers who were 'closeted', their sexual identity unknown to all but their lover and perhaps one or two close female friends, and to mothers who had flatly denied being lesbian in order to keep their children, and to mothers who returned to live with husbands (some agreeing to abide by very strict and harsh rules laid down by such men regarding their freedom of movement and friends) in order to avoid going to court, facing cross examination on their sexuality and the ultimate risk of losing custody and possibly even access to their children.

Given the nature of the problems encountered by lesbian mothers, it was not of course always possible or practical to interview all the mothers discussed here at precisely the same stage of their case. I therefore talked to some mothers some time after their case was 'resolved' (that is, a court case, or a dispute settled out of court). Other mothers I talked to immediately after the resolution of their case by courts. And in some cases, I witnessed the case from start to finish, discussing the issues with the mother when it first became apparent that there was going to be a dispute over the custody of their children, visiting solicitors, discussing affidavits and welfare reports and the use of 'expert' witnesses, and contacting 'expert' witness (usually psychiatrists and psychologists). In these cases I

met lovers and children and friends - and occasionally in a court waiting room - an ex-husband.

The focus of the interview schedule therefore had to reflect the processes involved in contesting the custody of children as a lesbian mother. Thus, I explored experiences with solicitors and barristers and divorce court welfare officers, and in some instances, experiences with social workers. The practice of exploring those experiences through 'interviewing' does however raise a number of issues about interviewing women.

Firstly, in addressing this section of the research I did not approach the issues armed with a standard methodological textbook on interviewing techniques (eg: Selltitz 1965; Moser 1958). On the contrary, in the beginning I simply talked with and listened to lesbian mothers and to other women concerned about the problems lesbian mothers appeared to face - a form of participant observation. For those women who were concerned about this issue in the mid 1970s, this was a process, a gathering and exchanging of information among a small group of women some of whom had faced a dispute because they were lesbians and who had lost custody of children, some of whom were trying to avoid going to court. It was that process of talking and gathering information which gradually structured my thoughts

on the importance of pre-court practices and ^{the} necessity of revealing some of those practices. However, the practice of 'doing' the interviews was in effect also a process. It was not and indeed could not be a one way dialogue, too few women had any knowledge of the issues involved and within the small circle of women concerned about this area in the 1970s one could not discuss experiences and not exchange information. In certain cases it was necessary to talk about issues of possible tactics and strategy. But that discussion was only possible if the mothers concerned had some information on which to base those extremely important decisions. For example, there is little point in denying sexual identity in cases where husbands have clear evidence of a relationship (or where he had, in the past, encouraged it). Moreover, in making those kinds of decision it is important that mothers are aware of the consequences for their future lifestyle and that of their children.

That approach to the issues however, can raise certain questions regarding the meaning and value of the information which is ultimately obtained. And some of the points which I raise out of my experience of 'doing' this part of the research, and my subsequent criticisms of orthodox textbook approaches to interviewing, have been raised and discussed by other researchers in relation to interviewing women (Stanley & Wise 1983; Oakley 1981), and with certain

qualifications (c/f Smart 1984: 157/8) (4) my work in this area adds validity to some of the points raised.

In her review of sociological textbook approaches to interviewing Oakley (1981:36) locates certain contradictions both between the prescriptions given to the prospective interviewer (on how to adopt the role of 'an interviewer') and her own experiences of interviewing women. With regard to the instructions outlined for the interviewer, Oakley identifies that on the one hand, the interviewer is instructed to create the right atmosphere of empathy-to establish a rapport with the interviewee - in order to enable the researcher to elicit information, but, at the same time, the interviewer is also instructed to retain a sense of detachment, and indeed, is encourage to simply consider h/herself as a research tool. Thus, the interviewer is instructed to elicit, but not to give out any information, to receive but not express an opinion, and, if asked to do so by an interviewee, is instructed to employ various verbal deflection strategies such as "oh I don't know, that's a difficult question I'll have to think about that one' etc., etc., (Goode and Hatt 1952; 198; Selltiz et al 1965: 576) As Denzin rightly points out (1970:186) in effect the interviewer walks a tightrope between generating sufficient rapport and maintaining the stated necessary detachment. But as Oakley identifies from her own research in which she

interviews large numbers of women, there is a paradigm set up by orthodox approaches in certain situations and especially in situations in which the primary orientation of the work is towards the validation of women's subjective experiences. In these circumstances the orthodox model of 'doing' interviews which incorporates notions of complete detachment and invoke a hierarchical relationship between the interviewer and the interviewee is not in effect adequate to gaining an understanding of social events and experiences. Finding out about people is frequently best achieved where there is a non-hierarchical relationship (Oakley 1981:41).

With regard to this research, an orthodox approach to interviewing these mothers would simply have failed to get off the ground. It would have been impossible and indeed indefensible in terms of the political objectives set out in the introduction to this thesis. Moreover the most important and penetrating questions raised within this section of the research were only possible from a continual dialogue with mothers. Yet as Oakley identifies (1983:46) very little has been written about that process and it is almost certainly under-reported. Throughout this research, women explained their life histories and legal experiences to me in great detail and asked a whole range of questions. Foremost in these were questions about legal procedure and what they would be asked in court in cross examination. But mothers

also asked me about the availability of 'evidence' regarding the influence of lesbianism on children's psycho-sexual development. Moreover, mothers also asked about the use of 'experts' in court - was that a good idea - would it make any difference to their chances of succeeding? Equally, as mothers became more aware of the issues involved they often became increasingly dissatisfied with their lawyers and asked if and how they could change and to whom they might change. My response to all these questions was to answer honestly based on my own experiences of cases and those of the support group, and I frequently put mothers in contact with each other both for advice and support. Where possible therefore information and ideas were exchanged. So for example where a mother asked if 'expert' witnesses (such as psychologists) had been influential in past cases, I explained that generally speaking, they had been more influential in supporting father's claims against the mother than in supporting the mother's case. When asked about the kinds of cross examination they could expect in court, I went over previous court transcripts, and as Chapter eight verifies, a focus on popular images of lesbianism does tend to produce particular categories of questions regarding the way in which that sexual identity is thought to find expression. My experience of doing this part of the research in effect increased my motivation for producing a section which concentrated on women's experiences of pre court practices. In presenting that work however it is

important to demonstrate that the process was not as orderly and 'hygienic' as many existing textbook approaches to interviewing generally indicate.

Almost certainly under-reported, is the researcher's own emotional experiences of carrying out the research. In this research there were cases where I got to know the mother, and very detailed and intimate aspects of her life over the period of her case. I also got to know her lover and in some cases I also knew the children quite well. I was contacted by mothers in the heat of a custody struggle, and looked at some affidavits and welfare reports in the almost certain knowledge that the mother would lose the children. I sat with mothers who wept at what husbands said about them and at what divorce court welfare officers reported with regard to the perceived consequences of lesbianism. I sat and listened to mothers who wanted to talk about the consequences of staying with husbands they clearly found intolerable or of leaving and the risks that involved. I sat in court waiting rooms with mothers who wept with anger and despair - and rejoiced with mothers who 'won'. I waited in coffee bars with mothers while injunctions were served on violent husbands so that mothers could get back into the matrimonial home to be with their children. I listened to mothers who had been threatened with local authority care orders on the basis that they were

lesbian, and to mothers whose anger at courts, psychiatrists and solicitors was interpreted as a sign of possible mental disturbance, and to mothers outraged by the decision of court to award custody of children to men who had been violent, who had drunk throughout the duration of the marriage and who had spent very little of their time or energy or emotion on their children. And indeed questions from mothers surrounding the justification for such decisions were the most difficult to answer. Moreover, I sat well into the night with mothers who had lost custody or given up in the face of what they felt was impossible opposition. I would argue that it is not possible to begin and sustain research which focuses on such oppression and emotional turmoil in the lives of a relatively small number of women, and to work to develop research methods which allow for the reflect of those issues, and at the same time not be a part of and influenced by that process, which is, in effect, a political struggle. And indeed I would add that there were instances where the support and enthusiasm expressed by mothers for this section of the research far outweighed the support for the research within certain sections of the legal academic community.

The point which the above experience of doing research demonstrates is not that orthodox methods should in all circumstances be dispensed with. But rather, that in

certain instances the social and political practice of 'doing' research (as with theoretical and political debates) must be developed to reflect the impact of feminism, because, in so far as it does not, it actively prevents the acquisition of knowledge and understanding. A commitment to the issues under investigation does not necessarily equal 'bias'. It does not necessarily jeopardise the hard won status of sociology. Indeed, there are situations in which it can produce new information and knowledge where traditional methods would fail.

One final point needs to be made regarding this part of the research and that relates to my experiences of going with mothers to see their solicitors. In this situation I was able to observe first hand how solicitors responded to the issue of lesbian motherhood. Generally speaking I did not introduce myself and was taken for a social worker or a supportive friend (although in some cases solicitors were aware of my involvement in the lesbian mothers support group and in some cases of my research). It was sometimes the case that the mother involved knew more about the issues likely to be raised in her cases than the solicitor representing her. When the case became clearly contentious - usually that was on the receipt of a husband's affidavit or a damning welfare report - it was often a question of 'tactics' as to how to introduce possible options and ways of

responding to the issues raised which did not at the same time alienate or antagonise the solicitor. However, for the most part at that stage, solicitors were only too grateful for information and ideas. And this was especially the case if psychiatric reports were requested. For most solicitors an 'expert' was an 'expert', and therefore it was often necessary to spell out why many experts would take a negative approach to lesbian motherhood (based upon certain theoretical ^{of psychiatry and psychoanalysis} tenets) and why it was therefore necessary to find a psychiatrist/psychologist who did not start from that premise.

In addition, I was also able to observe first-hand how reticent some solicitors were to discuss the relevance of sexuality to the mother's case. This may of course be the case for a number of reasons, including a wish not to appear voyeuristic about lesbian relationships, or indeed a genuine but frequently misguided belief that it was irrelevant, or, it could be due to the belief that 'all that can be sorted out in court'. But while the ability to 'think' on one's feet may be an important and developed skill generally for lawyers, in these circumstances, it appears few in practice could 'think' a tenable and unrehearsed defence for a lesbian mother once under attack in court.

Further Research Questions

With regard to the question of further research, it may be that the networking approach (where women are put in touch with each other by word of mouth) and that working in a lesbian mother's support group has produced a study of some of the most intractable of cases. However, the focus of this research has not been simply to 'prove' or disprove 'discrimination'. The focus has also been on developing a framework to allow discussion of the legal experiences of lesbian mothers. From the materials presented in the latter part of this thesis, I have argued that there are certain events and circumstances which can turn any case from one in which a lesbian might succeed in being awarded custody to one in which it would be highly unlikely. Thus, I developed the notion of a conceptual 'continuum' on which to 'plot' the circumstances of the mother and the familial situation of the contesting father. The importance focus of that section was to develop a framework which would allow both for the discussion of individual cases, but in addition, would also demonstrate the link between individual cases and certain social structures and ideologies in society. In other words, a framework which places both lesbian motherhood and law and legal practices within and not outside of social and political structures. With regard to further research therefore, it is that framework, based on the notion of a continuum, which requires further testing and development.

But in addition, further research should attempt to isolate and study more clearly issues of both class and race, and indeed linked to both those issues is that of housing. With regard to the mothers in this research, alternative accommodation was a major problem. And this appeared to be the case regardless of class or more specifically occupational status. Even those mothers who, in formal terms (of education and qualifications) might be described as professional or middle class, they nevertheless, lacked sufficient financial resources to enable them to establish a separate residence for themselves and their children. Some mothers (eg: the mother in J v J (1984)) did manage to obtain accommodation, but on the whole, that situation is unusual and most mothers in this study could not. Many mothers reported having left their husbands prior to the final separation which resulted in the custody dispute (some had left more than once the most being three times). However, the primary reason for returning was lack of secure alternative accommodation for themselves and their children.

The influence of class or occupational status in relation to married women is clearly complex. Often married women's status is determined by that of their husbands. So for example if a mother is married to professional man (eg:

a doctor or a teacher or a solicitor etc. etc.), she is frequently presumed to be 'middle class'. However, separation and divorce can frequently reveal the way in which marriage conceals women's economic and occupational status, so that it is only after the marriage breaks down that women's financial vulnerability and dependency upon men within marriage is clearly evident. Few women in this study had any form of independent means (only two worked full time at the time of the interview) and this was regardless of previous occupational status.

All the mothers discussed in chapter eight had worked both prior to and during their marriage. By occupational group, the mothers included a computer programmer, who was not employed in the labour market at the time of the interview, two mothers who had completed a university course (one had acquired a doctorate) both were in part-time insecure lecturing posts. A further mother worked as a spinner in a mill in a northern provincial town. She had, where work had been available, worked throughout her married life, having returned to work soon after her two children were born. Her husband worked shift hours and to some extent they managed the childcare between them. This mother had however suffered periods of unemployment with the decline of the wool and cotton industry and had on occasion done private domestic cleaning to bring sufficient income into the home. A further

mother had moved from a skilled manual post to be a manager in a confectionery/newsagency. Married to a man who was frequently unemployed and then bankrupt, this mother had worked through the majority of her married life and had frequently been the only wage earner. She had paid off debts incurred by her husband through several failed business ventures of which she in practice had no knowledge or authority. Three mothers were not employed at the time of the interview, one had been a school teacher prior to having two children, the other two had had jobs in the services industries. It should also be remembered that in certain cases mothers were advised to give up their employment at the time of the custody cases in order to increase their chances of being awarded custody of children. Including the additional sample, mothers occupations included a teacher, a small holdings farmer, a homeopathic doctor, a nurse, a receptionist and a women's refuge worker. Most mothers complained that the break in employment to have and rear children made it difficult to return to the labour market and that they felt out of touch and underskilled. And, where they had children with them they complained that those difficulties were compounded by lack of adequate childcare facilities.

With regard to the occupational status of husbands, taking the sample combined, these included men of both

professional and semi and unskilled occupational groups. Occupations included an academic in the prestigious university, a senior administrator in local government, a teacher, an education officer with a large urban educational authority, a doctor, a lorry driver, a brick layer, an unskilled factory worker, plus some men were unemployed.

With regard to race, the majority of the women in this study are white and the arguments presented may therefore be limited largely to the experiences of white lesbian mothers. In the core sample, one woman is black and she is Afro Caribbean. Although this mother initially wished to contest custody of her children and went some considerable way to doing that she ultimately withdraw her application on the basis that the children expressed a wish to be allowed to live with their father. Nevertheless this mother did not escape condemnation by the judge when the case came before the court (as a consent order) the basis of that condemnation was focused on her 'lesbianism' and the fact that she had a daughter (implying there was a possibility of sexual abuse). A further mother was of mixed race and fought her case on grounds which do not allow discussion here. In both cases therefore it is difficult to determine the interconnection of race and gender. This is clearly not to say that race is not an issue in custody proceedings but rather that my sample does not allow for informed discussion. Indeed we have no

general information on issues of race and divorce or custody disputes, and in a society with significant multi racial communities in urban areas, that under-representation is a cause for concern especially with regard to future policy changes in this field.

So far as this sample was concerned, there was enormous diversity in terms of geographical location. Mothers were drawn from both rural and urban communities, from as far north as Tyneside and from the West country, from East Anglia, from industrial northern towns and from the London metropolitan areas. This may of course be an indication that the framework developed here is not limited to a particular court or jurisdiction. However if further research with a larger core sample were possible, it would clearly be important to examine issues of jurisdiction in more detail. This may be an issue which could be discussed in relation to the Family Courts Debates, since clearly there is a need for more uniformity and certainty in this field of family law.

Two final but related points should be made with regard to future research. Firstly, as outline in this research there are aspects of pre-court practices in relation to lesbian mothers which have implications for all mothers likely to contest the custody of their children, (eg: they

are all likely to be measured and assessed by a particular model of 'good' motherhood). This part of the legal process therefore does require further research because, if fathers who contest custody continue to have to rely on some notion of 'fault' or 'failure' on the part of mothers in order to be successful in their own application, (Maidment 1981:16), then clearly that practice will have repercussions for mothers on on the way in which contested custody cases are constructed and fought out in pre-court practices (and this includes conciliation). And a central question would seem to be whether there is a level of continuity in the particular categories of mothers who 'fail' in the face of criticism in the legal process - are the adulterous mothers or the mothers who are responsible for breaking up the matrimonial home or the mentally unstable or the 'inadequate' personality - or the lesbian mother -potentially the same women?

Secondly, as children's interests are increasingly identified with conflict free marital breakdown, it does seem that 'conflict' itself is perceived as a symptom of 'risk' in divorce and thereby a justification for increased state intervention. Historically it has been the case that where divorcing parents are not in open conflict over children, the law in reality seldom interferes. But given current trends towards eradicating 'conflict' (by conciliation and adaptation to s.41 hearings (Booth Committee 1984), and by attempts to introduce joint legal custody) in those cases

where parents do not agree about the future custody of their children, it may well be that it is the mother who refuses to conciliate, the mother who does not fit what seems to be an emerging model of a post divorce 'co-parent' who will, in effect, be stigmatised as a 'bad' mother because she is seen as exacerbating conflict. In other words, it does seem that in terms of ideologies of motherhood and the law, an additional feature of that legal ideology in relation to divorce in the in the 1980s is a willingness to co-operate, to take on the notion of co-parenting on divorce, if only for the sake of 'law'. If this is indeed the case, then we must ask on both a theoretical and a political level what such a situation tell us of the nature of law and legal practices in the contemporary period.

In examining contemporary 'law' therefore it is imperative that we do not simply focus on what statute law actually is, or, on what courts, lawyers and conciliators say and/or believe they do in terms of practice. Further research must focus on what is happening in that virtually 'invisible' arena of pre-court practices, because it is there as well as in courts that ideologies of motherhood are reconstructed and have an impact upon women's lives.

Footnotes

- 1 The Public Records Office is situated in Kew Gardens, Richmond, Surrey. The Fawcett Library (which holds the archive materials of some of the major feminist organisations of nineteenth and early twentieth century Britain) is situated in the City of London Polytechnic, Old Castle Street, London E1.
- 2 Lexis is a computerised system of case law reports. It holds additional transcripts of Court of Appeal cases to those reported in the law reports.
- 3 This is of course a different argument to that posed in relation to the rights of the child. But in either case (ie whether the argument is put in terms of a denial of rights of lesbian mothers, or, in terms of a denial of the rights of children) where that argument is based upon articles under the European Convention of Human Rights (articles, 9, 10, 11 and 14), because of the non compliance clause where such issues touch on notions of morality or public health, in those circumstances, an argument which hopes to benefit the case of a lesbian mother may incur problems. Indeed, Article 8 of that Convention which deals with everyone's right to respect in private family life could in fact be utilised to deny lesbian mothers custody of children. This would of course depend upon the precise definition of 'family life' adopted.

To date however, the Articles contained in the Convention have had little or no impact upon the disposition of child custody decisions by courts in the U.K. where the disputes over custody is between parents in the throes of divorce. But it is likely that this may change given the publicity given to the father of an illegitimate child currently pursuing his case in Strasbourg (see John v U.K. The Independent 17 October 1986).

- 4 Smart argues that much of what Stanley & Wise say should be restricted to certain specific situations. So for example, with regard to the issue of power imbalances and the idea that feminists engaging in interviewing should devise strategies to reverse that imbalance, Smart rightly points out (1984:157/8) that such an approach does not fit all situations. As she demonstrates in her own research when interviewing the 'locally powerful' (solicitors and magistrates) there is clearly not the power imbalance (between woman interviewer and interviewee) which Stanley and Wise suggest.

4/Contd.

Therefore, as Carol Smart concludes, there is not an inevitable power relationship involved when women as researchers are interviewing, that approach is only tenable if we ignore all social class and race divisions in society and the structure of dominance which exist outside the academic world of research.

APPENDIX II

NAME:

Research identification:

DATE OF INTERVIEW:

CHILDREN:

PROCEEDINGS:

COURT

DATE:

MOTHER'S APPLICATION:

FATHER'S APPLICATION:

AWARD:

Current living arrangements:

(M)

(F)

(C)

A Pre Separation Details

- 1. Mother's age :
- 2. Date of marriage :
- 3. No. of children :

	Names	Age
1)		
2)		
3)		
4)		

4. Are they all the children of your exhusband

If not, is the father likely to apply for custody
 Does he have access - regularly
 Does he pay maintenance

5. Where does your current income come from :

- (1) full-time employment
- (2) part-time employment
- (3) social security
- (4) maintenance payments
- (5) other

If (1) or (2) nature of employment

6. Did you do any paid work during the period in which you were living with husband - if so, at what, and for how long ?

7. What type of accommodation did you share with your husband:

where:

(1) owner occupier : mortgage : joint names ?

(2) privately rented type

(3) council housing type

(4) other specify

8. What happened to that home following court proceedings

9. Prior to the custody dispute had you ever left home before

If yes, why

Did you take the children

Where do you go

How long did you stay away

Why did you return

10. Has he ever been violent towards you prior to this dispute - what happened?

11. Has he ever been violent towards the children prior to this dispute - what happened ?

12. Did you report that incident to a solicitor

(1) at that time

(2) in current dispute

3. CHILDCARE ARRANGEMENTS

13. How would you describe his relationship with the children during the period you lived together.
14. Did you at any time discuss how the childcare arrangements should be organised ?
15. Were you employed outside the home at any time after you had the children ?
16. What aspects of their day-to-day care was their father either wholly or partly responsible for?

For example: who got them up, prepared breakfast and fed them
who took them to nursery and/or school
who collected them
who took them to the doctors/clinic/dentist
who went to school meetings
who bought their clothes
who took time off work when they were ill - how was that decided (i.e. through discussion, on financial grounds, tacit assumption, etc.)
who prepared supper and washed them and put them to bed

What happened at weekends

Did their father ever read or play with the children on a regular basis

Did he ever taken them to the park or/and on trips

Help with their homework

If, when you both went out, who organised a baby sitter

17. Did any of these arrangements change during those periods in which you were employed outside the home, if so, how

18. Were you happy with these arrangements. If not, what would you have preferred ?
19. Has your exhusband always been in full time employment ?
20. Did you have any specific problems over money. What were these ?
21. Do you feel that during the period you lived together he was as far as possible a responsible financial provider for the children ?

MOTHERHOOD

22. Had you planned to have children ?
 23. What was your experience of being a mother ?
 24. Did you have any leisure time away from your home and family?
If so, what did you do, For how long. E.g. 1 afternoon,
1 evening a week, etc.
- Did you have any transport of your own ?
- Did you live on a good bus route ?
25. Did your exhusband ever go out alone, how often ?
 26. Did you go out together regularly ? If yes, how often ?
 27. How would you describe your marriage ?

D. DETAILS OF EVENTS LEADING UP TO SEPARATION

E. CONTACTING A SOLICITOR

31. Did you have a solicitor at the time you separated ?

32. How did you go about finding one ?

33. Did you contact any of the following :

- | | |
|----------------------------|-----------------|
| Citizens Advice Bureau | Lesbian Unit |
| Law Centre | Lesbian Link |
| Women's Aid Federation | rights of Women |
| Community Law Centre | Women's Centre |
| C.H.E. | Other |
| G.L.A.D. | |
| Action for Lesbian Parents | |

34. Had you heard of any of these groups ?

35. Do you think you might have contacted one if you had known they might have been able to advise you ?

36. What did you want when you first went to see a solicitor ?

37. Was lesbianism an issue then (even if your husband didn't know)?

38. If yes, did you tell the solicitor ?
Why ?

39. Can you describe your first visit, how you felt, what did you tell h/her ?

40. What was the response ?

41. Did you contact more than one solicitor ?

Did you ever consider doing so ?

42. Did you ask if they had any special expertise that would be helpful in handling your particular case?

43. Did you ask if they had any doubts about lesbian mothers raising children ?
44. Were you aware that lesbianism would be an important issue for the courts in deciding custody ?
45. How did you find out ?
46. Were you aware at that stage of whether any special strategy problems would be involved. For example, whether to deny or admit that accusation ?
47. Did you have any support during your visits to the solicitor, if so, who ?
48. If no, would you have liked someone to have gone with you. Why ?
49. Did you always understand what your solicitor was doing ?
50. Did h/she explain things to you ?
51. Did you ask, when in doubt ?
52. Did he/she keep you well informed of progress ?
53. Did he/she consult you before making any decisions ?
54. How would you describe your visits to the solicitor's office ?
55. If lesbianism was an issue, what was the solicitor's initial advice or opinion of your chances of getting what you wanted ?

56. Did that opinion change during the course of your case ?

57. When and how did that change occur ?

58. Did he/she ever suggest you change your application ?
If so, at what stage

and what was your response

59. Did you ever consider changing your solicitor ?
Why ?
What happened ?

60. Did you receive legal aid ?
Did you make a contribution ?

61. Did your solicitor discuss h/her choice of barrister with you ?

62. Did you meet the barrister prior to the hearing ?

63. How did that meeting go ?

64. Did you ask the barrister whether h/she had any experience of
lesiban custody cases ?

65. Would you have liked to ?

66. Did you have any affidavits supporting your case ?

67. Did you think of having any ? Who ?

68. Did your solicitor suggest it ? Did you ?

69. Did your husband have any ?

Who ?

70. During the period leading up to the hearing was there any noticeable change in your husband's relationship with the children ?
If yes, what form did that take ?

e.g. quality of care/practical care/ more/less contact.

71. Do you know what the children's responses were ?

72. Did your relationship with the children change in any way ?

How ?

Why do you think that was ?

F. WELFARE REPORTS

73. Had the social services ever been involved with the family ?
If yes, can you tell me about the circumstances ?
74. Was there a Welfare Report on the children for the custody dispute ?
75. Did the Court Welfare Officer visit you ?
For how long did you talk ?
76. Did h/she know or ask if you were a lesbian ?
77. Did the Court Welfare Officer ask to see your sleeping arrangements ?
If yes, did you agree ? Why ?
If no, did you offer ? Why ?
78. Did the officer see or speak to anyone else with whom you were living ?
79. Did h/she interview the children ?
If yes, alone ?
How long roughly did the interview last ?
80. did h/she interview your husband ?
81. Did h/she interview anyone in his household who would be partly or wholly responsible for the children ~~and~~ he gain custody ?
82. Did you see the Report which was produced ?
83. What was your response ?

84. Did you have any expert witnesses to speak on your behalf ?
If yes, who and how was that received in court ?

If not, was it ever suggested, would you have wished to use one
had you known it was possible ?

85. Would you have wanted someone to testify that your sexual choice
would not necessarily affect the psycho sexual development of your child ?

G. THE HEARING

86. Date:

Court:

87. Before?

(Judge Registratar?)

88. What were your living arrangements at that time ?

89. Had they changed since the separation ?

90. Had they changed since the visit of the Court Welfare Officer ?

91. Had your husband's circumstances changed in any way ?

92. Can you describe what happened :

Were you cross-examined on the content of the social enquiry report ?

Were you given any opportunity to answer any allegations in it ?

Was the Welfare Officer present in court ?

How were witnesses (if any) treated ?

Expert witnesses ?

Did the judge make any comment ?

If applicable :

Was your lover in court ?

If yes, at whose suggestion was she cross-examined ?

If yes, how did that go ?

If no, do you think on reflection she should have been ?

Why ?

93. What aspects of your husband's role came under scrutiny ?

94. Was his past record as financial provider examined ?
95. Did you give any thought to what you were going to say, or how you should 'appear' ?
96. How long did the hearing last ?
97. When you went into court, what did you feel your chances were about getting custody ?
98. Did they change during the hearing ?
99. What was the decision ?
100. Did the judge make any comment ?
101. Did h/s. issue his summ~~s~~ing up - do you have a copy ?
102. What was your solicitor/barrister's response ?
103. Did you want to appeal ?

H . AWARD/ACCESS ARRANGEMENTS

104. What are your living arrangements now ?

105. What are your husband's living arrangements ?

106. Is he employed ?

Fulltime, part time - what is his job ?

107. ACCESS

Terms:

Conditions:

Supervision Order:

Staying access :

Arrangements for pick up

108. ACCESS: Working ?

Have you been back to Court ? Why ?

Outcome

109. Financial arrangements

Family home ?

Maintenance: (1) children

(2) self

110. How has this affected your relationship with the children ?

111. If applicable: how much have you and/or your husband told them ?

I. MOTHERS' OPINIONS

112. Why do you think you lost your children ?

113. Do you think it is possible to talk of a lesbian lifestyle ?

1. How would you depict such a lifestyle ?

2. How is that different from the way in which you previously lived ?

To what do you attribute this change ?

3. Do you think the judge had a perception of a lesbian lifestyle ? Why ?

4. Did your solicitor ask you questions about your lifestyle ?

114. Do you think your children's development would or could be affected ?

1. Their psycho-sexual development

2. Their emotional development

115. In what way could your choice of partner affect your children ?

1. Negatively

2. Positively

116. Has this case changed in any way how you see your role as a mother ?

117. Do you think the issue of your sexuality is relevant to determining your role as a mother ?

Are they completely separate, partly linked and if so, how ?

Why do you think it is seen as important ?

Does one in any way affect the other ?

APPENDIX III

LESBIAN MOTHERS AND THEIR CHILDREN

CORE SAMPLE - INTERVIEW SCHEDULE, APPENDIX II

The first ten mothers listed overleaf (page 311) provide the core sample of the research documented in Part III. The mothers were interviewed using the schedule attached under appendix II. In addition to the information given in the (taped) interviews many of these mothers had entire files containing the documents relating to their custody case. These included affidavits, welfare reports and psychiatric reports plus where appropriate, judges summings-up.

The other twelve mothers listed on page 285 provided information over a period of time relating to their position. This information was provided through letters, telephone conversations and discussions (not, for various reasons, taped) and also self written articles.

Core Sample - Lesbian Mothers and their Children
(A)

	<u>Children :</u>	
NINA ROBERTS	3	1 girl, 2 boys
RUTH DAVIS	3	1 boy, 2 girls
JOANNE BUTLER	2	1 boy, 1 girl
MARGARET STOCKS	2	2 girls
HELEN TURNER	2	2 boys
SARAH NORTON	3	3 girls
ANNIE FLETCHER	1	1 girl
LISA MACLEAN	1	1 girl
MARIE LOCKWOOD	3	1 girl, 2 boys
JESSICA SALMON	3	2 girls, 1 boy

(B) Lesbian mothers and their children

	<u>Children :</u>	
LAURA KELLY	3	3 boys
MARY JAMES	1	1 boy
GILLIAN TAYLOR	2	1 boy, 1 girl
JOANNE LAWLOR	1	1 boy
HELEN LONGMAN	1	1 girl
ELLEN BAILEY	3	3 boys
SALLY B HARRIS	1	1 boy girl
HELEN SHERWOOD	2	2 girls
CELIA WEBSTER	2	1 girl, 1 boy
BARBARA BENNETT	1	1 boy
MELANIE DALLY	4	3 boys, 1 girl
KAREN JAMESON	2	1 boy, 1 girl

CASES

"A v A" 1980, Guardian 22 Nov, 1980
Re Agar-Ellis (1883) 24 Ch D 23
Allen v Allen [1948] 2 All ER 413

B v B [1924] P.176
Re B [1962] 1 All ER 872
In Re B (TA) (an infant) 8/9 June 1971 Ch 270
Re B (TA) 1971 Ch 270
Ex parte Bailey (1828)
In Besant (1879) 11 Ch D 508
Blisset's Case (1774) Lofft
Bryant v Bryant [1955] 2 All ER 116

Re C (1973) 9 Fam Law 50
Cadman v Cadman, The Times, 13 Oct 1981
Colquitt v Colquitt [1948] P.19
Cruze & Hunter (1790) 2 Cox 242
Cummins v Vassallo (1981) LEXIS Court of Appeal

Re D (an infant) [1977] A C 602
Re D W (a minor) (custody) 1983 14 Fam Law 17
R v De Manneville (1824) 5 East 22
"D v D" 1974 - see note page 288
Dipper v Dipper (1981) Fam 31
Dyter v Dyter (1974) 4 Fam Law 52

E v E unreported case, Court of Appeal, 27 Nov 1980
Ex parte Edwards (1747) E ALK 519
Emery v Emery, I Y & J 501
Eyre v Countess of Shaftesbury (1725) 2 P. Wms. 102

Re Fynne (1848) 2 De G. & Sm. 457

Galloway v Galloway [1954] P.312

R v Greenhill (1836) 4 AD & E 928

Re H (an infant) Ch D [1959] 3 746

In Re H (a minor) (Custody: Religious Upbringing) (1980)
2 FLR 253

H v C 1980)

H v C 1982) see note page 288

H v H & C [1969] 1 All ER 262

Harrison v Harrison [1951] 2 All ER 346

Hawksworth v Hawksworth (1871) Law Rep 6 Ch 539

Hewer v Bryant (1970) 1 QB 357

Houliston v Smith 3 Bing 127

Hope v Hope (1857) 8 De GM & G 731

Horwood v Heffer 3 Taunt 421

R v Howes 1860 3 EI & EI 332

I v I 1978 see note page 288

J v C [1969] 1 All ER 788

J v J (1979) 9 Fam Law 91

J v J 1984 see note page 288

Jane v Jane (1983) 13 Fam Law

Jump v Jump (1883) 8 P.D.

Re L (infants) [1962] 3 All ER 3

L v L 1976 see note page 288

Langworthy v Langworthy (1886) 11 P.D. 85

Lord St. John v Lady St. John (1803) 11 Ves 526

Lyons v Blenkin 1821 Jac 245

Re McGrath (infants) 1892 1 Ch
McT v McT 1977 see note page 288
M v M (1945) T.L.R. 16
M v M (1977) 7 Fam Law 17
Marsh v Marsh (1858) 1 Sw & Tr 313
Millard v Millard & Addis [1945] 2 525 DIV
Mozley Stark v Mozley Stark & Hitchins [1910] P.190

Re P (a minor) unreported case, Court of Appeal 21 July 1982
Packer v Packer [1954] P.15
Re Plumley (1882) 47 LT (H.S.) 232
Re Pulbrooke (1847) 11 Jur 185

In Re S [1958] 7 W.L.R. 397
Re S (An infant) [1958] 1 All ER 783
S v S 1 F.L.R. 143 (C.A. 21 June 1978)
S v S & P [1962] 2 All ER 3
S (BD) v S(DJ) [1977] 1 All ER 656
Seddon v Seddon & Doyle (1862) 2 Sw & Tr 642
Ex parte Skinner (1824) and Moore C.P. 278
Smith v Smith (1745) 3 Atk
Re Spense (1847) 2 Ph 247
Symington v Symington (1875) 2 Sc & Dir 415 (H.L.)

Re T (minors) (Custody: Religious Upbringing) (1975)
2 F.L.R. 239
Talbot v the Earl of Shrewsbury (1840) 4 MY & GV 672

Vansittart v Vansittart (1858) 2 De G & J 249

Re W (JC) (an infant) [1963] 2 All ER 706
W v W unreported case, Court of Appeal June 1980
W v W & C [1968] 3 All ER 408
Wachtel v Wachtel [1973] 1 All ER 829
Wakeham v Wakeham [1954] 1 All ER 434

Warde v Warde (1849) 2 Phi 788
Ex parte Warner (1792) 4 Bro 101
Wellesley v Beaufort 1828 2 Russ 7
Wellesley v Duke of Beaufort (1827) 2 Russ 1
Westmeath v Westmeath (1821) Jac 264
Whitfield v Hales (1806) 12 Ves 492
Willoughby v Willoughby [1951] P.184

V v V 1977 see note below

NOTE

The following carry a fictitious case name to protect the identities of those concerned:

"H v C" 1980
"I v I" 1978: unreported case, High Court (Wardship)
"L v L" 1976: " " " "
"McT v McT" 1977: " " Magistrates Court
"D v D" 1974 " " High Court
"H v C" 1982 " " Court of Appeal
"J v J" 1984 " " County Court
"V v V" 1977 " " Court of Appeal

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