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**Vanessa E. Munro**

**“The Ideal and The Real – At The  
Boundaries of the Possibility of Female  
Consent”**

**PhD Submission  
Supervisor – Dr. Jane Mair**

**University of Glasgow  
School of Law**

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## PREFACE

### THE IDEAL AND THE REAL

“The feminist interrogation of autonomy is at the theoretical edge of a movement that is literally remaking the social identities and historical self-interpretations of large numbers of women and some men.”<sup>1</sup>

“In rethinking the idea of autonomy...we are led to a rethinking of consent itself in both broader terms and ones which assume a mutuality of relationship and responsibility.”<sup>2</sup>

Commentators in legal, political and moral theory have long since established the significance of consent as the primary medium for the articulation of self-determination. Consent, and the capacity to give consent, have heralded such attention because of their centrality in the accrediting of the human being with the status of serious and rational agent. The capacity to give meaningful consent, or to have one's refusals of consent seriously accredited, establishes a benchmark in terms of the satisfaction of requisite standards of rational competence and self-awareness. What's more, it holds symbolic relevance in terms of establishing those wielding consent to be 'fully' human and therefore deserving of the attendant levels of respect and integrity.<sup>3</sup>

Since the heyday of the social contract tradition, the legal and ideological reverence afforded to the notion of consent has become even more pronounced. With thinkers as diverse as Hobbes, Locke and Rousseau heralding the concept of consent to be the only mechanism of self-determination sufficiently strong to support the establishment of the state and social institutions which we continue to know today, the occupancy of consent within the heart of traditional political and legal theory has been well-cemented.<sup>4</sup>

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<sup>1</sup> Fraser, N., “Michel Foucault – A Young Conservative?” (1985) *96 Ethics*, p.182

<sup>2</sup> Lacey, N., *Unspeakable Subjects- Feminist Essays in Legal and Social Theory* (1998) Hart Publishing, p.121

<sup>3</sup> Fletcher, G., *Basic Concepts of Legal Thought* (1996) Oxford University Press, p.109-117

<sup>4</sup> Hobbes, T. *Leviathan* (ed. MacPherson, G.B.) (1968) Penguin

Locke, J. *Two Treatises of Government* (ed. Laslett, P.) (1963) Mentor

Rousseau, J. J. *The Social Contract and Discourses* (ed. Cole, G.) (1968) Dent

Although today debate over the legitimacy of the social contract tradition continues to rage,<sup>5</sup> and although thinkers within the tradition have suffered from internal disagreement,<sup>6</sup> what has been questioned far less often is the legitimacy of the notion of consent itself. A formulation of consent heavily influenced by the pre-occupations of the day, namely individual personhood and the establishment of regimes for the protection of private property, has informed the writing within this tradition. In their clamour to challenge the historical viability and philosophical legitimacy of the social contract itself, commentators in political and legal theory have all too often left untouched the dangerous assumptions inherent in the very notion of consent that operates as the foundation of the contract. Preoccupation with critique of the notion of the social contract has allowed the individualistic and rationalistic model of consent implicit within it to become cemented within the dominant liberal ideology.

The ethos of liberalism within which legal discourse has established its foundations reifies both rationalism and individualism as inherent prerequisites of human subjectivity. The primary means of expression of subjectivity is through the exercise of agency, and consent is the mode of communication of that exercise. In accrediting the articulation or refusal of consent with this ideological significance, the liberal legal model assumes that agency is exercised in an abstract, rational and self-serving framework. At the level of experience, however, this is counter-intuitive. This thesis claims that the rhetoric of liberalism acts to disguise the realities of the operation of consent and to obscure the extent to which the agency of the human subject is curtailed to comply with this artificial framework.

This thesis proposes to examine the mechanisms employed to encourage this process of construction and curtailment of agency, at both the practical and

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<sup>5</sup> See Pateman, C : *The Sexual Contract* (1988) Polity Press and Pateman, C. & Brennan, T., "Mere Auxiliaries to the Commonwealth – Women and the Origins of Liberalism" (1979) *Political Studies* 27

<sup>6</sup> As between Hobbes and Rousseau, for example, in regard to the question of to whom the consent in question is given – for Hobbes, the recipient of popular submission is the sovereign Leviathan; for Rousseau, people submit their individual consent only to each other through submission to the provisions of the rule of the general will.

theoretical level. Within its confines, it would, however, be impossible to embark upon a catalogue of the obstacles to the establishment of unfettered agency facing human agents who seek to rely upon the vehicle of consent in the myriad contexts in which it now plays a central role. Although a general trend of curtailment and construction may be isolated, in each context a variety of social imperatives and normative expectations may be relied upon to render a specific form of constructionism. That said, however, an examination of the nature of the constructive imperatives that operate to structure choice in some of these specific contexts is a necessary prerequisite to the development of a more substantial critique of the disparity between the legal ideal of unfettered and individualist consent and the experiential reality of its operation.

Over the ensuing chapters, therefore, the thesis will focus primarily upon a critique of some of the most observable methods of curtailing the autonomy of the female agent through a specific examination of the contexts of rape and maternal-foetal conflict. The feminist critique of the notions of autonomy and rationality considered inherent in many aspects of liberal legal ideology represents a promising starting point from which to commence this project. However, there are many significantly more acute, intricate and puzzling aspects involved in the operation and conceptualisation of consent than can be brought to light through an exclusive focus on the allegedly inherent 'maleness' of its demands. Hence, although the primary concern of this thesis is to establish a critique of the operation of consent in regard to the female legal agent that attends to the pragmatic aims of the feminist agenda, it is hoped that the thesis also offers a far wider spectrum of interest and a broader range of applicability.

It is perhaps worth stating at the outset the nature of that feminist agenda referred to above. It would be misleading to suggest that a single, unified feminist agenda can be identified within the diverse frameworks of feminist thought. However, certain common concerns do unite feminist theory and to that extent a skeletal agenda can be asserted. Within the confines of this thesis,

the accepted definition of that agenda is one framed by Alison Jaggar. Jaggar has alleged that the self-professed aims that unite disparate feminist theories are, "first, to articulate moral critiques of action and practices that perpetuate women's subordination; second, to prescribe morally justifiable ways of revisiting such actions and practices; and third, to envision morally desirable alternatives that will promote women's emancipation."<sup>7</sup>

This offers a fair articulation of the feminist agenda that is to be served by a more meaningful conception of subjectivity, agency and consent. In the discussion over the following chapters, when reference is made to the compatibility of theory with the feminist agenda, it is to these self-professed aims of the feminist movement that attention is being directed.

The critique of consent to be developed within the confines of this thesis deals specifically with an examination of two particularly problematic aspects of the concept. This by no means presents an exhaustive account of the issues in regard to consent that should demand our attention as critical theorists. However, it is submitted that the areas dealt with bring to light many of the most significant downfalls of the prevailing concept of consent and make good ground for a more detailed examination of other inadequacies in line with the concerns of other projects.

The first problematic aspect of the prevailing concept of consent to be dealt with within the confines of this thesis relates to the actual operations of consent in the legal arena. Detailed analysis will be afforded to the role played by stereotype and cultural expectation in constructing an ideal image of the female agent. This abstract ideal presents a standard against which the conduct of particular women is judged in the legal arena. As will become evident through ensuing examination of this comparative process, its outcome has a profound effect upon the credibility that is afforded to the agency of the participants involved.

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<sup>7</sup> Jaggar, A. "Feminist Ethics" in Becker, L. & Becker, C. (ed.) *Encyclopedia of Ethics* (1992) Garland, p.361

By adopting the theoretical position of Michel Foucault in regard to the nature of power in modern society,<sup>8</sup> the thesis alleges that modernity is characterised by an increasingly insidious operation of normalisation techniques upon the individual. These techniques of normalisation constitute a peculiarly modern form of power that acts to construct the human subject into a pre-selected and artificial identity. The proliferation of such 'disciplinary techniques' and their increasing incorporation within the forms of law represent a significant obstacle to the realisation of the free and unfettered form of self-determination conceived of in the model of consent assumed by prevailing ideology. The liberal assumption remains one involving a perception of consent as a medium of communication and desire expression that takes place between equally free and self-determining individuals. However, the Foucaultian thesis of modern power establishes the artificiality of this perception and provides the theoretical grounding for a more detailed examination of the nature of the constraints and constructions under which real people struggle to make themselves heard.

Building upon the Foucaultian assertion that one of the prime sites of the operation of these modern, disciplinary power constructions has been upon the female body and her sexuality, the thesis will examine the constructions and stereotypes that have been imposed upon the female agent by the forms of modern power. In particular, we will examine the operation of that process in the specific contexts of the legal treatment of consent in rape and maternal-foetal conflict cases.

Catharine MacKinnon among others has argued that the idea of consent assumed in the treatment of rape trials is inadequate because of its assumption that the agents involved in the pre-consensual negotiations commence from an equal footing.<sup>9</sup> According to her radical thesis, this is fundamentally unrealistic because women exist as oppressed victims of a male power that expresses clear dictates upon the importance of sexuality and translates the exercise of female sexuality as a mechanism for survival rather than an issue of legitimate choice.

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<sup>8</sup> Foucault, M. *Power / Knowledge – Selected Interviews and Other Writings 1972-77* (Ed C. Gordon) (1980) Pantheon

In many respects this is a powerful critique. However, it is also a difficult critique to maintain alongside a contemporary feminist project of transcending the determinism inherent in much radical feminist thought.<sup>10</sup> Without going to the radical extremes of MacKinnon's thesis, therefore, the notion implicit in Estrich's distinction between 'ideal' and 'real' rape<sup>11</sup>, will be developed to support the argument that social imperatives (or disciplinary techniques to use the Foucaultian terminology) operate in the legal sphere to construct an ideal of female behaviour as weak and passive. What's more it will become apparent from examination of the treatment of specific claims about consent within our legal institutions that those women who fail to comply with these demands find themselves without the protection of law, and without the ability to refuse their consent to sexual intercourse.<sup>12</sup>

The existence of similar inconsistencies in terms of the operation of consent in the context of maternal-foetal conflict can also be established. Analysing the discourses that are prevalent within this complex arena of medical and legal life establishes the existence of a regime of compulsory motherhood that shares many of the characteristics of the regime of compulsory heterosexuality established by Adrienne Rich<sup>13</sup>. Essentially the demands of this regime have dictated that women are not only required to fulfil 'natural' maternal instincts as part of their development of true femininity, but also that in the realisation of that maternity, woman should occupy the role of altruistic and selfless mother assumed by social ideals. Through a brief examination of the stereotypes involved in the social imperatives of good mothering, it will become clear that demands of altruism are highest on the agenda.<sup>14</sup> Circumstances involving maternal-foetal conflict are often seen to represent a quite serious departure from this ideal. Once again, in examining the manner in which courts have

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<sup>9</sup> MacKinnon, C. *Feminism Unmodified* (1987) Harvard University Press

<sup>10</sup> Finley, L. "The Nature of Domination and The Nature of Women : Reflections on Feminism Unmodified" (1988) 82 *Northwestern University Law Review* 352

<sup>11</sup> Estrich, S. *Real Rape* (1987) Harvard University Press

<sup>12</sup> Brown, B, Burman, M. and Jamieson, L (ed.) *Sex Crimes on Trial* (1993) Edinburgh University Press

Temkin, J. *Rape and the Legal Process* (1987) Sweet & Maxwell

<sup>13</sup> Rich, A. "Compulsory Heterosexuality and Lesbian Existence" (1980) *Signs*, in Evans, M. *The Woman Question*, (1994) SAGE, p59

<sup>14</sup> Diduck, A. "Legislating Ideologies of Motherhood" (1993) 2 *Social and Legal Studies* 461

tended to interpret and deal with the situation where women refuse their consent to medical treatment indicated for the foetus, it will become apparent that these women have had their claims to self-determination consistently over-ruled when the decision matters.<sup>15</sup>

This presents an anomaly to a legal culture within which every other competent, adult human subject is permitted to consent to, or refuse, any medical treatment upon any grounds.<sup>16</sup> However, when we recognise the existence and significance of the social power forces operating upon the pregnant woman in this context, the anomaly is no longer a puzzling one. The interpretation of consent in both the rape and maternal-foetal conflict context is 'rigged' towards the realisation of one idealised identity and one prioritised choice. Having uncovered the reality that the interpretation of consent employed in the legal arena operates under the burden of powerful and effective normative stereotypes, the thesis questions the feasibility of continued liberal claims regarding the assumption of consent as the neutral vehicle for the articulation of free and self-determined human choice.

Recognition of this disparity between the ideal conception of consent as a liberal medium for the expression of self-determination and the reality of its operation as heavily curtailed by the imposition of cultural expectations of what constitutes 'proper' conduct paves the way for analysis of the second problematic aspect of the notion of consent. The target of this second level of critique pertains less to the manner in which consent is interpreted in its operation in particular contexts, and more to what have previously been referred to as the 'dangerous assumptions' that lie behind the prevailing conception of legal consent. More specifically, the critique of the latter stages of the thesis will be concerned with an examination of the relationship between consent as a

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<sup>15</sup> Legal authority suggests that these decisions are often overruled upon appeal. Nonetheless, trends suggest that courts of 1<sup>st</sup> instance tend to consistently demand surgery against the mother's wishes. Changing the decision after the event may help eradicate the inconsistency between the law in the statute book and the ideas of dignity and integrity central to our legal system, however, it does nothing to alleviate the violation already experienced by the pregnant woman and appears to do little to affect the law at the level of 1<sup>st</sup> instance practise.

<sup>16</sup> *Re T* (1992) 4 All ER 649

medium of self-determination and the assumption of the characteristics of the self who lies behind that determination.

One of the most damaging aspects of the prevailing conception of consent lies in the uncritical acceptance it adopts in favour of the perception of human subjectivity as inherently individualistic. Taking its point of origin from the social contract tradition, the conception of consent prioritised today continues to be one which assumes consent to be a medium for the communication of agreement between mutually distinct and disinterested human agents. The ongoing gravitation of legal theory towards this conception of consent can in many respects be explained by the continued reverence afforded to the work of Immanuel Kant within contemporary analysis.<sup>17</sup> A strong proponent of the quest for Enlightenment rationalism, Immanuel Kant has developed his own peculiar species of humanist and Enlightenment theory that takes its inspiration from the contractarian work of Rousseau.<sup>18</sup> Adopting a paradigm of human subjectivity as inherently individualistic and rationalistic, Kant develops a theory of the self and of self-determination that has become the focus of substantial critique. Within the confines of this thesis, we will examine the legitimacy of such critique of Kantian subjectivity and will propose alternatives to this model that offer an improved medium for self-determination no longer constrained by the abstract individualism inherent in the Kantian conception.

Taking on board well-established feminist critique of the abstraction and radical individualism inherent in Kantian subjectivity and prevailing notions of consent, we will develop potential alternatives to this ethical model of agency that accommodate the concerns and requirements of feminist theory and practice advocated above. In so doing, however, we will examine not only pre-existing feminist critiques of liberal individualism and agency, but also like-minded critiques developed by critical theorists unconnected to the feminist school. All too often, purely feminist critiques have implied a syllogism between the

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<sup>17</sup> Friedrich, W. *The Philosophy of Kant – Immanuel Kant's Moral and Political Writings* (1949) Modern Library

<sup>18</sup> Friedrich, *The Philosophy of Kant – Immanuel Kant's Moral and Political Writings*, Supra. Note 17.. For a further discussion of the relationship between Kant and Rousseau, See Chapter Four.



individualism implicit in legal standards and an alleged male experiential position of separation to suggest that the deficiency of liberal legal standards lies in their embodiment of male standards that prioritise separation over connection.<sup>19</sup> This correlation between men and separation and women and connection is too simplistic, however, and tends to uncritically accept the dominant perceptions of gendered identities. Recognising the shortcomings of such critique, particularly in terms of the achievement of a satisfactory feminist politics, this thesis will disassociate itself to a large degree from such overarching and totalitarian assertions and instead focus more critical attention on the creature of liberalism itself.

To illustrate the potentially liberating effect that this shift in emphasis may produce, the thesis will examine the successes heralded by previous feminist attempts to transcend this radical dichotomy.<sup>20</sup> These attempts have sought to build upon the insights of more 'mainstream' critiques of liberalism to produce a feminist critique of individualism that, although still gender-sensitive, is no longer fundamentally gender-specific. Within the confines of the thesis, particular attention will be paid to an examination of the successes and failures that can be claimed by feminist attempts to incorporate the critiques of liberalism developed by poststructuralist and communitarian commentators.

In charting the path of a feminist theory that builds upon the poststructuralist critique of the Kantian subject, particular attention will be paid to the work of Judith Butler. Butler's work has been hugely influential in establishing the possibility of cooperation between feminism and poststructuralism in their mutual desire to reconceptualise subjectivity and agency.<sup>21</sup> However, as we shall see, problems of radical fragmentalism inherent in Butler's prescriptive thesis render the possibility of consolidating women in furtherance of group aims remote. This has significant ramifications upon feminist politics and the

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<sup>19</sup> West, R. "Jurisprudence and Gender" (1988) 55 *University of Chicago Law Review* 1

<sup>20</sup> For Example, Butler, J. *Gender Trouble – Feminism and the Subversion of Identity* (1990) Routledge

<sup>21</sup> Butler, J. *Gender Trouble*, Supra. Note 20 & *Bodies That Matter – On the Discursive Limits of Sex* (1993) Routledge

notion of group self-determination (in the sense of groups through affinity rather than essentialist unity of nature) that is imperative to that political project.

Turning attention to the communitarian critique of the Kantian individualist subject, we will examine the celebrated attempt made by Martha Nussbaum to develop a feminist ethics on the back of the Aristotelian framework that forms the foundation of premodern communitarianism.<sup>22</sup> Again, however, a wholesale feminist embrace of communitarian theory will also be established to be problematic. The difficulty here lies less in the theory's being over-critical to the point of political self-extinction but rather in the theory's serious failure to challenge the notions of community which form its foundation. Particularly in light of the Foucaultian critique of power formations, this uncritical adoption of the notion of community presents conceptual difficulties and political dangers for the feminist position.

While an exclusive reliance upon neither poststructuralism, nor communitarianism proves adequate to the task of establishing a theory of the subject and of consent which meets the demands of the feminist agenda, the potential benefits offered by a selective appropriation of such theory should not be underestimated. This thesis will, therefore, present the possibility of developing a hybrid theory of subjectivity and agency that selectively incorporates the most promising aspects of poststructuralist and communitarian theory alongside those feminist theories of selfhood that have historically proven most fruitful to the feminist academy. Fusing a combination of poststructuralist and communitarian insight alongside a considerable reliance upon the less problematic aspects of the Gilligan-inspired model of an ethics of care,<sup>23</sup> promotes a 'contextual' conception of selfhood.<sup>24</sup> The contextual self who emerges from this process is neither entirely socially constructed nor entirely self-determining. It develops its identity within an affective and

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<sup>22</sup> Nussbaum, M. *The Fragility of Goodness* (1987) Cambridge University Press

Nussbaum, M & Sen, A. *The Quality of Life* (1993) Clarendon Press

<sup>23</sup> Gilligan, C. *In a Different Voice – Psychological Theory and Women's Development* (1982) Harvard University Press

<sup>24</sup> The kind of collaborative process behind this contextual selfhood has been advocated by Hekman, S. *Moral Voices, Moral Selves – Carol Gilligan and Feminist Moral Theory* (1995) Polity Press

emotional framework of relationship and responsibility, but with a capacity for critical reflection upon social imperatives that renders it more credible than the 'social dupe' of rival theories.

Providing an agenda for the realisation of a more experientially appropriate account of the nature of the self who occupies the space behind the medium of self-determination through which its intent is articulated permits a remit for re-evaluation of the prevailing notion of consent. Requiring a fluid form of self-determination that seeks serious recognition of the situated, embedded and embodied nature of human reality, the emerging contextual self offers an agentic framework, application of which will meet the requirements of the feminist project. In demanding proper concern for the life circumstances and peculiar struggles under which the agents involved have issued their decisions, it promotes the kind of extension of our concern to the concrete reality rather than the general abstract of human life that feminist criticism has repeatedly found to be lamentably lacking in the prevailing operation of consent standards.

The emerging disparities between the ideal conception of consent and the realities of its operation, that it is the project of this thesis to uncover, can in large part be attributed to the characteristically modernist attempt to achieve generalised and abstract philosophical and legal positions. Seeking theoretical claims of such broad applicability actively misrepresents the realities of our existence and of the categories through which that existence makes sense. While resisting, therefore, this modernist temptation to make grand statements either about the exact nature, or effects, of contextual agency, we will return in the final chapter to the specific arenas of rape and maternal-foetal conflict to offer a particularised analysis of the operation of contextual agency in these specific legal arenas. This localised form of analysis permits an illustrative argument for the potential advantages of the contextual model without any pretence towards grand theory. In so doing, the benefits to be gained in these arenas both in terms of the operation and interpretation of consent will be established, and the 'dangerous assumptions' that lie behind the concept itself will successfully be drawn from outwith the shadow of prevailing rhetoric.

The critique of the concept of consent lodged within the confines of this thesis seeks to highlight two related yet distinct inadequacies inherent in its current form. Firstly, it highlights those inadequacies invoked by the incorporation of discursive normativity into the actual operation and interpretation of standards of consent. Secondly, it challenges the assumptions of individualism that lie behind the conception of consent privileged by our legal tradition. Both levels of critique are, however, united through their implicit and explicit demands upon the law's honesty. In both contexts, the concern lies in the tendency of the law and of legal standards to legitimate the incorporation of erroneous stereotypes and abstract individualism under myths and false pretensions.

The primary call of this thesis asks the law to be more honest in its application of the concept of consent. It asks judicial officials and law-makers to recognise that people live under the dominance of forms of social imperatives which seek to construct and categorise behaviour and identities. What's more, perhaps as an extension of that request, it asks those same judicial officials to recognise that people do not live in a realm of abstract individualism, framed by dictates of rational self-interest. These assertions are in themselves far from controversial. However, in the legal arena, these assertions are frustrated and marginalised. This thesis asks that the law revise its stance on these realities of social life and develop a legal system that reflects the realities of social living, rather than the idealised mythology of individual indifference and rational self-determinism.

If law is to perform its function as a means of social control, it must do so legitimately. The society which legal consent standards currently presuppose is not the society within which we live. Legal standards must accept that reality and its implications. The law can no longer seek refuge behind false assertions of individualistic and unconstrained self-determinism.

## CHAPTER ONE

### CONSENT, LAW AND DISCOURSE

“The notion of consent ... is a chameleon, fluid and changing as between offences and in this capacity, it creates the possibilities of differential disciplining as between genders, sexualization, and sexual orientations.”<sup>1</sup>

One of the most striking aspects about the social contract tradition, and the conception of consent writers within that tradition espouse, lies in the relationship that is established between law and consent. If, as contractarian theorists have argued, it is the case that our collective consent has established the social and institutional framework from which all modern law emanates, then logically it must be the case that consent is the master of law. In making the assumption that consent is the master of law, however, the significance of mechanisms through which law operates to construct consent have often been neglected. Writers from within the contractarian tradition up till contemporary times have often assumed a one-dimensional vision of law, as something which is issued by an identifiable sovereign, through a vehicle of command or prohibition, to a collective who have accepted their position under legitimate authority. It is not surprising, therefore, that alongside this juridical conception of law has been a conception of consent as a medium which structures law, because of its original role in the establishment of legitimate authority. In conceiving the operation of power (and legal power in particular) as manifest singularly in the dictates of sovereign command, the dominant contractarian model has lent to liberalism the presupposition that areas of social living unregulated by prohibitive power are areas of social living within which the human agent has a free and unfettered remit for self-determination.

However, more contemporary analyses of the dynamics of power and law have begun to challenge the dominance of this contractarian perception by suggesting that law's power is more omnipotent than one-dimensional, that it infiltrates at deeper levels, and operates through construction more than prohibition. This

alternative vision of law offers a very different conception of consent – a conception that rests upon a more dialectical interchange with the dictates of law. It is a conception within which the constructive (‘disciplinary’) power of law is used to differentially structure the operation and interpretation of consent in ways that have been disguised by the unilateral version of law assumed by traditional theory. Where traditional theory perpetuates the myth of libertarian free space within which the agent is free to determine their choices from an unconstructed and unconstrained remit of options, this emerging conception of legal power emphasises the artificiality of this notion of free space within a society in which power increasingly pervades the most intimate aspects of social living through constructive and disciplinary mechanisms. In turn, this emerging conception demands a re-evaluation of the prevailing notion of consent to highlight the artificiality of this image of unfettered self-determinism and to replace it with a more realistic account of the highly constructed operations of choice within specific human contexts.

In this chapter, we will examine in some detail the nature of this alternative conceptualisation of law’s power and its implications in terms of our analysis of the legal model of consent. Most specifically, we will draw attention to the extent to which the traditional juridical conception of sovereign legal power has failed to attend to the more subtle and manipulative operations of power (both legal and otherwise) that have increasingly become incorporated into the networks of modern life. Illustrating the proliferation of normative discourses that characterise modernity, our examination of the power manifest by such discourses will highlight the pervasiveness of power within the frameworks of individual choice. Building upon that premise, we will illustrate the extent to which the imperatives of these normative discourses have been incorporated within legal frameworks to ensure the increasing operation of legal power through mediums of construction rather than prohibition. Introducing a central claim of this thesis, it will be argued that removing the unilateral juridical

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<sup>1</sup> Duncan, S. “Law’s Sexual Discipline : Visibility, Violence and Consent” (1995) 22 *Journal of Law and Society* 326-45, p.344

façade of law's power that has dominated analysis to date is a necessary prerequisite to the realisation of this more complex and experiential articulation of legal power. Such realisation in its turn is crucial to determining the extent to which consent, rather than being the unfettered medium of self-determination assumed by prevailing theory, is in actuality differentially construed in its various contexts and between its gendered agents.

Over the following chapters this analysis will be employed to highlight the extent to which the incorporation of discursive expectations into legal frameworks, that is characteristic of the emerging operation of power, has curtailed the legal agent's ability to issue or refuse consent in specific contexts. Recognition of the role played by modern power in the curtailment of the capacity for agency in this regard requires recognition of the artificiality of the concept of consent that prevails within dominant legal discourse. In later stages of this work, that realisation will provide the impetus for a detailed examination of alternative methodologies for the self-determination of concrete and situated human agents that recognise the constructive and disciplinary role undertaken by legal power.

### *The Emerging Conception of Disciplinary Power*

"The exercise of power is not simply a relationship between partners, individuals, or a collective; it is a way in which certain actions modify others. Which is to say, of course, that something called Power, with or without a capital letter, does not exist. Power exists only when it is put into action, even if, of course, it is integrated into a disparate field of possibilities brought to bear upon permanent structures."<sup>2</sup>

This quote from Michel Foucault illustrates the central contention involved in this emerging conceptualisation of legal power. Taking his lead from the thought of other critical theorists (most notably Nietzsche), Foucault has been the most vociferous in his elucidation of the terms of this peculiarly modern

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<sup>2</sup> Dreyfus, H. & Rabinow, P., *Michel Foucault – Beyond Structuralism and Hermeneutics* (1982) Harvester Wheatsheaf, p.219

form of power. On that basis, our excursion into the *modus operandi* of this 'disciplinary' power will be one largely charted by Foucault himself in his works *The Archaeology of Knowledge*, *Lectures in Power/Knowledge* and *The History of Sexuality*, vol.I.<sup>3</sup>

Throughout his discussion of power dynamics within these works, Foucault does not use the term 'power' to refer to a group of mechanisms that coerce the citizen into subservience as contractarian theorists have done. Nor does he use it in the more traditional sense to refer to a model of subjugation that has the form of a rule or a general system of domination extended by one group over another.<sup>4</sup> On the contrary, Foucault has proposed that these traditional perceptions of the nature of power and the dynamics of power relationships are somewhat outdated within modern society. Rather than seeking to maintain his model of power within the juridical realms of state institution and state-approved legal regulation, Foucault draws our attention to the complex and interconnected network of 'disciplinary techniques' through which power operates in what he calls 'modern, disciplinary society'.

While he is willing to accept that many more traditional forms of sovereign power have remained intact in modern society, he suggests that a considerable amount have gradually been taken over and are now ultimately sustained on the basis of power relations that operate on an entirely different scale and in an entirely different manner. In other words, the operation of sovereign power has become gradually dependent on a more regulatory, disciplinary and societal power. In an interview with J.L. Brochier, Foucault describes this modern focus,

"When I think of the mechanisms of power, I think of its capillary form of existence, of the extent to which power seeps into the very grain of

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<sup>3</sup> Foucault, M. *The Archaeology of Knowledge* (Trans. A. Sheridan) (1972) Harper Colophon  
 Foucault, M. *Power / Knowledge – Selected Interviews and Other Writings 1972-77* (Ed C. Gordon),  
 Supra. Preface, Note 8

Foucault, M. *The History of Sexuality, Volume I* (1976) Penguin

<sup>4</sup> Foucault, M. *The History of Sexuality*, Supra. Chapter One, Note 3, p. 92



individuals, reaches right into their bodies, permeates their gestures, their postures, what they say, how they learn to live and work with other people.”<sup>5</sup>

The fundamental assertion that Foucault seeks to make in relation to power is that, contrary to prevailing perceptions, power is not simply an oppressive force imposed systematically and uni-directionally from ‘above’. Rather, power is a social presence that exerts itself in all aspects of life and in all directions. The traditional analyses are over-simplistic and fail to recognise the important interplay of the micro-politics of power that operate at a more personal level. In *The History of Sexuality*, Foucault puts the point most plainly when he states that,

“Power comes from below; that is, there is no binary and all-encompassing opposition between rulers and ruled at the root of power relations...Power relations are both intentional and nonsubjective.”<sup>6</sup>

This conception of power stands in stark contrast to the traditionally advocated proposition. While most social analysts have tended to regard power in an essentially negative manner, as a regulatory force operated by the elite with the ultimate purpose of maintaining current social hierarchies, Foucault replaces this one-directional construct with a conception of power as a constructive force that permeates at all levels of society. Power in this more positive form infiltrates and creates a variety of different relationships, other than those within the domination-subordination dynamic of traditional conceptions.<sup>7</sup> Where the traditional approach speaks solely in terms of regulation by the state of the other, by means of overt prohibition and regulation through the medium of sovereign-issued commands, this alternative approach perceives of power as all-pervasive within social life.

This is not, however, to imply that the Foucaultian approach seeks to deny the existence of this more traditional form of power. It does not seek to deny the phenomenon of repression altogether. It does, however, refuse to continue to

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<sup>5</sup>Sheridan, A. *Michel Foucault – The Will to Truth* (1980) Tavistock, p.217

<sup>6</sup> Foucault, M. *The History of Sexuality, Vol. I*, Supra. Chapter One, Note 3, p.94

<sup>7</sup> McNay, L. *Foucault – A Critical Introduction* (1994) Polity Press, p.90

adopt the model of repression as being paradigmatic of power relations. The repressive model is recognised as being only one form among many in the effects generated by the interplay of power relations in society. This peculiarly modern conception of power is seen to penetrate all social relations. Hence, no stark distinction can be drawn between those wielding power and those subject to it, because once the veil of the idealised traditional construction of power relations has been lifted, we see more clearly the reality that we are all of us subject to the operation of power regimes.

This changing perception of power has implications both for law in general, and for our legal conception of consent in particular. Not only does it challenge the dominant perception of legal power as operating exclusively through the medium of prohibition and sovereign regulation, it also challenges the dominant perception that various areas of social life exist that are not the concern of legal power. In positing modern power as a pervasive force that infiltrates in all aspects of social living through the invocation of normative expectations and discursive discipline, Foucault contradicts the liberal contention and highlights the artificiality of the notion of unregulated social space. In so doing, he also challenges the legitimacy of the attendant liberal contention that individuals have a free and unfettered remit for self-determination within these confines. In the following sections, we will go on to examine the nature of Foucault's claims in this regard in more detail and we will devote specific attention to the discursive formations that he suggests have played a crucial role in proliferating these modern forms of power.

Before we go on to examine the implications of this critique in terms of our uncritical acceptance of the traditional conception of consent, however, it ought to be noted that the application of Foucaultian perceptions of power to the phenomenon of legal power advocated within this thesis is far from uncontroversial. Many commentators have questioned the legitimacy of applying Foucault within the field of legal criticism. In the following section,

we will examine the nature of the concerns voiced by such commentators and will illustrate the potential retorts available to those who wish to defend the possibility of a Foucaultian approach to legal power in the face of such concerns.

### *Legal Power as Disciplinary Power*

Although Michel Foucault himself was never specifically concerned with the place of law within his overall theory, the implications, and indeed the possibility, of a Foucaultian approach to legal theory have been hotly disputed with the dominant body of legal commentary on the subject adopting a generally sceptical approach. Confusion over the exact nature of the Foucaultian stance on law has further complicated the situation. It has been generally accepted that Foucault's approach, both to his theory and to his writings, is consciously cautious of attempts to devise holistic and cohesive frameworks. The implications of this for subsequent development of and commentary upon his theory are severe, and have led many to dismiss the possibility of a Foucaultian legal analysis too lightly, on the basis of what may superficially appear as oversimplifications and internal inconsistencies within his work.

The most common summation of Foucault's approach to law has been encapsulated in the claim that he regards law as a medium of power relations that has become out-dated within the modern disciplinary network. Many have interpreted his thesis that we should abandon the traditional juridical conception of power wielded by the state through the governing mechanism of legal sanction as intimating that we must also abandon our interest in the role of law in society. There have indeed been several indications in Foucault's writings that have seemed to support the adoption of such an interpretation. Certainly, the traditional dynamic of institution-state-law does pre-date the era of modernity in which truth (as grounded in discourse) has become the dominant mode of knowledge, and this latter period has been the main focus of Foucault's concern. Many have alleged, therefore, that Foucault is reluctant to bring his

analysis of power into the legal realm because he sees the legal realm as being obsessed with, and centred around, a different notion of power - one which is more in line with the traditional one-dimensional construction of authority.<sup>8</sup>

Foucault's demand that we 'cut off the head of the king' has been interpreted as a demand that we break away from this Austinian-esque conception of power as a commodity held by the oppressors, allowing them to rule by command and authoritarian decree. Only by doing so, it is alleged can we begin to appreciate the power dynamics that operate at all levels, behind the state and its apparatus. This is an interpretation of Foucault that there is no need to challenge. Certainly, Foucault has demanded that, "we must construct an analysis of power that no longer takes law as model and code."<sup>9</sup> This shift in analysis of power dynamics is of central importance to his thesis and underlies his ideological claims introduced in the preceding section. However, it is only a very superficial reading of such statements that permits the claim that Foucault has dismissed the mechanism of law from playing an integral part in the power regimes of modernity.

As intimated above, Foucault himself was never particularly interested in the question of law and its role in modern, or indeed classical, society. Perhaps, then, the first question to be addressed is whether it is even appropriate that we apply Foucaultian ideology within the field of legal theory. One of the most clear-sighted arguments in favour of the utilisation of Foucault in legal analysis has been provided by Carol Smart in *Feminism and the Power of Law*<sup>10</sup>. In this book, Smart harks back to a basic Foucaultian assertion that when something makes a claim to be a science (and therefore to be an authoritative statement within a discursive field), it elevates itself to a superior level of knowledge and thereby makes a claim to power. Accepting this premise, Smart applies a similar analogy to the functioning of law and to the claims made by legal

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<sup>8</sup> Foucault, M. *The History of Sexuality, Vol. I*, Supra. Chapter One, Note 3, p.88-9

<sup>9</sup> Foucault, M. *The History of Sexuality, Vol. I*, Supra. Chapter One, Note 3, p.90

<sup>10</sup> Smart, C *Feminism and the Power of Law*, (1993) Routledge

doctrine. Despite aforementioned problems of periodicity (which are of more concern to Foucault as an historian and a genealogist, than they are to Smart as a legal theorist), a similar process can be seen in operation within the legal field. Armed with its own specialised language and methodology, the law is able to set itself apart from other discourses and other fields of knowledge in a similar fashion to science. Although Foucault's analysis confines itself to power which is realised through a particular 'truth' making a claim to scientificity, Smart proposes a broader spectrum of possibilities through which a 'truth' can make its claim upon the conscience of the individual.<sup>11</sup> Law sees itself, and is seen by others, as having the means to establish the 'truth' of events based on legal methods that have been taught to its agents through a specific legal education<sup>12</sup>. Given Foucault's averred interest in the mechanisms through which 'truth' is constructed, and through which in turn the individual conscience is directed, it seems only logical, according to Smart, that the Foucaultian approach be applied also to legal analysis.

Whether or not we stand convinced by the argument from Smart that legal procedure operates via a self-defined power of legal imperialism, there remain other justifications for the need to examine the Foucaultian position on law more closely than perhaps Foucault himself takes the time to do. The essence of Foucault's overall thesis makes fundamental claims about the status of indisputable 'truths', about the interplay between networks of power and the individual, and about the construction of the individual in the face of all-encompassing power relations. Such concerns centrally involve the need to examine the role of law within society. As we have seen, and will continue to see elsewhere, the fact that Foucault does not devote specific attention to a particular implication of his thesis, does not imply that there are no implications to be laid bare, nor that he considers the implications negligible. Foucault

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<sup>11</sup> Smart, C. "Law's Power, the Sexed Body and Feminist Discourse" (1990) 17 *Journal of Law and Society* 194-210, p.197

<sup>12</sup> A detailed examination of the operation of these legal methodologies and the support which they lend to the legal claim to 'truth' is provided by Mossman, M. in "Feminism and Legal Method - the Difference it Makes" (1986) *Australian Journal of Law and Society* 103-21

continually asserted his reluctance to attempt any over-arching and all-encompassing theory. The fact, therefore, that Foucault appears to deal lightly with the question of law does not preclude the need for a subsequent detailed consideration of the issue.

Until fairly recently, the most common approach to a Foucaultian analysis of law has been framed negatively. In one of the most influential books examining the possibility of a Foucaultian legal theory, Hunt and Wickham<sup>13</sup> conclude that Foucault's assimilation of law with the notion of commands backed by threat provides an overly-simplistic analysis which had long since been dismantled by H.L.A. Hart in his critique of Austin.<sup>14</sup> They note that the most prominent theme in Foucault's writings on law involves the constant juxtaposition of law and discipline and suggest particularly that Foucault displays a marked trend of linking law with the negative conception of power that he seeks to renounce. In *Two Lectures*, for example, Foucault states that

"In short, it is a question of orienting ourselves to a conception of power that replaces the principle of the law with the viewpoint of the objective, the principle of prohibition with the viewpoint of tactical efficiency, the principle of sovereignty with the analysis of a multiple and mobile field of force relations, wherein far-reaching but never completely stable effects of domination are produced. The strategic model, rather than the model based on law."<sup>15</sup>

Through their examination of statements such as this one, Hunt and Wickham argue that Foucault equates law only with the traditionally Austinian notion of law as rules commanding behaviour by the threat of coercive sanction. Hunt and Wickham recognise that this definition of law has indeed played a central part in the history of positivist legal thought. However, in a contemporary echo of the assertion made by Hart, they argue that this represents only one aspect of law in its actual operations. Alleging that Foucault has restricted his attack on law only to this narrow definition of the concept, Hunt and Wickham are critical

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<sup>13</sup> Hunt, A. & Wickham, G. *Foucault and Law - Towards a Sociology of Law as Governance* (1994) Pluto

<sup>14</sup> Hart, H.L.A. *The Concept of Law* (1961) Oxford University Press

<sup>15</sup> Foucault, M. "Two Lectures", in Gordon, C. (ed.) *Power/Knowledge*, Supra. Preface, Note 8, p.102

of the viability of a Foucaultian theory of law. They are sceptical of the possibility of his analysis yielding any more than a highly over-simplistic syllogism between law and sovereignty. In positing this command based definition of law as being fundamental to Foucault's theory, Hunt and Wickham go on to illustrate the extent to which Foucault continually sets up law and disciplinary techniques as mutually opposing, and yet dual processes. They draw attention to Foucault's proposal that disciplinary technologies are to be found in operation on the underside of law and they propose that Foucault's ultimate project of redirecting the study of power and of exposing the part played by the disciplines in modern government has, as one of its distinctive effects, the displacement of law. In Foucault's own words,

"the analysis .. should not concern itself with the regulated and legitimate forms of power in their central locations...On the contrary, it should be concerned with power at its extremities...with those points where it becomes capillary...one should try to locate power at the extreme points of its exercise, where it is always less legal in character."<sup>16</sup>

Asserting that "the primary theme that emerges from Foucault's treatment of the origins of the modern state and disciplinary society is one which casts law in the role of a pre-modern harbinger of absolutism",<sup>17</sup> Hunt and Wickham devote a significant part of their book to criticism of this approach. They note with disapproval that this approach stands in fundamental opposition to the major drift of twentieth century legal thought that has tended to invest law with an increasingly central role in modern society. Foucault's general equation of law with pre-modern forms of power is heralded as the root cause of the debilitation of his overall theory.

More recently, however, a defence has been lodged in the name of Foucault which seeks to argue that commentators such as Hunt and Wickham are mistaken in their belief that Foucault seeks to make any such over-simplific equation between law and command. The trend of this counter-movement was

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<sup>16</sup> Foucault, M. *The History of Sexuality, Vol I*, Supra. Chapter One, Note 3, p.96-7

<sup>17</sup> Hunt, A. & Wickham, G. *Foucault and the Law*, Supra. Chapter One, Note 13, p.59

vociferously cast by Francois Ewald in 1990.<sup>18</sup> The essence of this counter-claim seeks to draw a distinction between the terms 'law' and 'juridical' in Foucault's analysis to establish that discipline is not in fact counterposed to 'law', but only to the 'juridical'. Hunt and Wickham have dismissed such arguments on the grounds that both ancient and modern law exhibit such 'juridical' characteristics, and while the form of legal discourse is of undoubted significance, it does not serve any useful role in distinguishing traditional and modern forms of law. Given the importance that Foucault himself has grounded in the signification of meaning through discourse, we must question, however, whether the answer proffered by Hunt and Wickham is sufficient to render the counter-claim inadequate. Through a closer examination of the details of this pro-Foucaultian claim, this chapter will seek to establish both the inadequacy of Hunt and Wickham's somewhat dismissive response, and the possibility of a re-examination of the relevance of law to Foucault's overall thesis.

One of the most contemporary statements in this on-going academic dialogue over the role of law in Foucault's ideology has been proffered to advance the counter-claim premised by Ewald. In "Between Governance and Discipline", Victor Tadros has lodged a significant criticism of the traditional interpretations of Foucault figure-headed by Hunt and Wickham.<sup>19</sup> Motivated by a concern to re-establish the importance of Foucault's work for an overall understanding of the way in which modern law operates within society, Tadros suggests that essentially there have been two interpretative claims made by those who challenge Foucault's understanding of the law. The first claim, exhibited strongly in the work of Hunt and Wickham, implies that Foucault's contrast between 'juridical power' and 'disciplinary power' reduces the law to the simple formulae of a command theory. This is the case despite a well-established contemporary consensus that such a command theory represents an inadequate description of the nature and operation of law in the modern world. The second

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<sup>18</sup> Ewald, F. *Norms, Discipline and the Law* (1990) 30 *Representations*, in Post (ed.) *Law and the Order of Culture* (1991) Univ. of California Press

<sup>19</sup> Tadros, V. "Between Governance and Discipline - The Law and Michel Foucault" (1998) 18 *Oxford Journal of Legal Studies*, 75-103



claim, which Tadros attributes specifically to Boaventura de Sousa Santos,<sup>20</sup> proposes that although Foucault does well to highlight the role which disciplinary power has played in modern society, he underestimates the closeness of the relationship between disciplinary and juridical power. For our present purposes, the important point to note is that a common factor unites both fields of criticism- namely, both claims equate Foucault's use of the term 'juridical power' with that of 'legal power'. This is an equation that Tadros, and Ewald before him, seek to resist. Both Hunt and Wickham, and Santos, propose that the term 'juridical' refers directly to law. Despite internal differences in other aspects of their approaches, therefore, what unites them is their belief that by analysis of the term 'juridical' and by examination of the uses to which that term is attributed, they will develop a full understanding of the Foucaultian stance on law.

Tadros suggests, however, that a careful reading of Foucault will show that it is not his intention to equate these terms. Such a careful reading will establish that the term 'juridical' is intended to refer to the *conception of power relations* that one may call Austinian. This is not, however, to imply that all law is necessarily 'juridical' in the Foucaultian sense of that word, nor that the only way in which juridical power can manifest itself is within the legal arena.<sup>21</sup> Foucault insists that the juridical conception of power relations fails to accord with the realities of power in modern society. The juridical notion of power as possession in the hands of the sovereign may well still be in place, however, it is no longer adequate of itself to describe the multiple ways in which power is made manifest in modernity. When we recognise the distinction that Foucault seeks to establish between the two notions of the juridical and the disciplinary, it becomes increasingly difficult to accuse him of reducing law to the Austinian conception of rules and sanctions. Indeed, it becomes apparent that this command model exemplifies the very mode of operation of power that Foucault proposes has been superseded. As Tadros notes, "this suppression has resulted

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<sup>20</sup> Santos, B. *Towards a New Common Sense - Law, Science and Politics in Paradigmatic Transition* (1995) Routledge

not only in the proliferation of disciplinary power, but also in the transformation of law”<sup>22</sup>. Hence, the critique that Hunt and Wickham establish in regard to Foucault’s ‘expulsion of law’ becomes questionable.

If we accept the potential, then, of an inherent distinction between ‘juridical power’ and ‘legal power’, we can begin to appreciate the implications of Tadros’ claims. Most particularly, for our purposes, it allows us to recognise that the arguments which Hunt and Wickham lodge against Foucault’s treatment of law are derived, in large part, from statements which Foucault has made about the ‘juridical’. In order to clarify the interpretation of Foucault that emerges from the realisation of this distinction, we must be able to identify the nature of the divide between the juridical and the legal more clearly. Unfortunately, however, the meaning of the term ‘juridical’ in Foucault’s work is often illusive and complex. He seems to use the term to refer both to a discursive understanding of power that could be either modern or more traditional, and also to a particular network of power relations connected together in a particular form. Ewald has tended to suggest that Foucault uses the term to refer simply to the discourse through which power articulates itself. This, according to Tadros, is a little misleading<sup>23</sup> and what’s more it allows Hunt and Wickham to make a simplistic and dismissive response to what may be a highly problematic consideration. In *The History of Sexuality*, Foucault talks of the juridical system of law as being in some sense armed and therefore not simply a discursive vehicle of articulation. The exact relationship between these two definitions of the ‘juridical’ is clarified a little by Tadros’ examination of Foucault’s statement in *Two Lectures*<sup>24</sup> where he talks of the disjunction between the operation of disciplinary powers and the juridical code that masks them. Foucault calls the code by which power is described juridical, whereas the actual mechanisms of power are referred to as disciplinary.

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<sup>21</sup> Tadros, V. “Between Governance and Discipline”, Supra. Chapter One, Note 19, p. 76

<sup>22</sup> Tadros, V. “Between Governance and Discipline” Supra. Chapter One, Note 19, p.77

<sup>23</sup> Tadros, V. “Between Governance and Discipline” Supra. Chapter One, Note 19, p.81

<sup>24</sup> Foucault, M. “Two Lectures” in Gordon, C. (ed.) *Power / Knowledge*, Supra. Preface, Note 8.

Referred to in Tadros, V. “Between Governance and Discipline” Supra. Chapter One, Note 19, p.82

The juridical network appears to leave libertarian space within which personal freedom can be employed. Foucault has suggested, however, that in reality disciplinary power operates to fill the apparent gaps of indifference that the juridical network does not account for. During the classical era, Foucault suggests that the disciplinary network operated alongside the juridical network enforcing what he terms a 'discipline-blockade'. Towards the end of the classical period, however, the mechanisms of state and law themselves began to evolve. Although many of the legal forms that are characteristic of the juridical model remained intact, the law began to operate primarily through mechanisms more compatible with the emerging *modus operandi* of discipline. This new model has become encapsulated in Foucault's notion of 'governmentality'.

Governmentality, as the new means of state operation, concerned itself fundamentally with issues of population and economy control. It became concerned with the disposal of people and things towards the achievement of particular goals, rather than with the delineation of lines of transgression. The law did not become redundant as a result of the emerging political technology, however, the juridical model no longer provided an accurate description of its operation. Recognition of this evolution in political technique allows appreciation of the differences between modern law and the juridical conception of power. Power, in the guise of the juridical understanding, is predominantly exercised as a means of punishing those acts that have transgressed previously delineated standards of conduct. Conversely, modern law, facilitated by the introduction of governmental technology, has been concerned primarily with the adjustment of the relationships between individuals *qua* individuals.

According to Tadros, then, once we recognise that Foucault never intended his readers to conflate the terms 'juridical' and 'legal' within his analysis, we are able to re-establish the place of law within Foucault's overall theory. Tadros suggests that the law itself has undergone considerable evolution in the primary methods of its operations. However, these changes have not been translated into

the juridical form of discourse that tends to mask the underlying legal methodology. Although the origins of the law in the classical era may well have been accurately described by the vocabulary of juridical discourse, changes in legal methodology have been brought about by a gradual increase in the role of disciplinary techniques. This renders the juridical conception of power an increasingly inaccurate depiction of the reality of the operation of modern law.

If we are to accept this claim, there remains one final question that must be addressed - if the position of law in modern society is one prioritising individual discipline over juridical coercion and punishment why is it that the juridical conception of power continues to inform prevalent legal discourse? The answer to this question, it seems, lies in application of Foucault's overall thesis on the strategies of power at work in society, i.e. that "power is tolerable only on condition that it masks a substantial part of itself."<sup>25</sup> By continuing to assert political criticism in juridical terms, the actual points at which power is exercised remain invisible. According to Tadros,

"This is why, whilst both sides of the juridical machine have become infested with more productive operations of power, the juridical code has flourished, and nowhere has it flourished more than in legal discourse."<sup>26</sup>

The crux of the debate regarding the place of law within Foucault's works centres upon the construction that we afford to the terms 'juridical' and 'legal'. At first glance, it certainly appears to be the case that Foucault is guilty of having simplistically adopted the command definition as being paradigmatic of the operation of law. If we accept this position, and thereby accept that Foucault uses the terms legal and juridical synonymously, the possibility of an effective theory of law being developed from within Foucaultian theory seems highly remote. In essence, Foucault's theory would remain premised upon a distinction between legal and disciplinary technologies that is arbitrary and artificial, leaving us little option but to dismiss wholesale the role of law in modern society. However, thanks to the inspiration of Ewald and the

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<sup>25</sup> Foucault, M. *The History of Sexuality, Vol I* Supra. Chapter One, Note 3, p. 86

subsequent development by Tadros, legal scholarship is increasingly coming to see that this is not the only possibility. By recognising that the term juridical refers to the discursive formation behind which is hidden the operation of various mechanisms of power (legal and otherwise), and that the term legal refers to mechanisms that could be characterised equally as non-juridical than as juridical, we are able to examine anew the role of law in modern society. Certainly, adoption of this approach seems to lend coherence to the discussions entered upon by Foucault in other areas of his work in relation to governmentality. Inherent in the acceptance of the juridical as a discursive formation that is placed superficially over the actual operations of power is the possibility of a continued place for law within the conceptions of power and discipline that we have addressed previously.

Distinguishing the legal from the juridical, we can now appreciate the continued role of the legal. We can appreciate that Foucault has not asked us to abandon our concern with the operation of law in society. He has asked only that we try to shake off the juridical discourse that tends to frame such operations in order to allow us to better understand the reality of the dynamics that bear upon the individual. The juridical discourse of which Foucault speaks is indeed paradigmatic of the command-theory conception of law. Foucault does not seek to propose that law itself is a power dynamic of the past, only that the juridical conception of it is no longer appropriate. His demand that we abandon the juridical conception of power relations requires nothing more than that we free ourselves from the shackles of the highly artificial discursive formation that is superimposed upon the real dynamics of legal operation. Given the condemnation which Hunt and Wickham voice towards theory which associates law exclusively with command, it seems that in this light Hunt and Wickham are not so different from Foucault after all.

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<sup>26</sup> Tadros, V. "Between Governance and Discipline" *Supra*. Chapter One, Note 19, p.101

Armed with this distinction between the legal and the juridical, it becomes apparent that Foucault has not demanded an expulsion of law from modern social analysis. Rather, he has demanded that the veil of the juridical be lifted from that analysis to allow a truer apprehension of the operation of legal power. The implications of this realisation in terms of the project of this thesis are significant. What the preceding discussion has established is not only that Foucault has not abandoned the concept of law, but also, and more importantly, that a substantial amount of the power that law wields operates in the mode of disciplinary technique rather than juridical prohibition. It is Foucault's argument that law (in terms of the legal text and the legal system) has been increasingly incorporated into a network of regulatory apparatuses which themselves exercise power quite differently from the centralising notions of the juridical medium. These regulatory apparatuses exercise power through what Foucault calls the 'devious and subtle mechanisms' of disciplinary techniques, relating to the "growing importance assumed by the action of the norm, at the expense of the juridical system of law."<sup>27</sup> Through operation of disciplinary power, the law is enabled to undertake a normalising function through which it defines, constructs and imposes what is considered 'normal' and 'acceptable'.

In real terms, then, recognition of the disciplinary power of law necessarily paves the way for a more critical examination of the role of law in constructing individual desires and identities. The normalising power now infused into our legal analysis dictates that law operates in infinitely more complex ways than has hitherto been anticipated. In terms of the project of this thesis, this implies that law plays an operative role in constructing and constraining the choices of the individual. This in turn presents significant ramifications for the boundless and unfettered conception of consent that has been privileged in western tradition since long before the articulation of the notion of social contract.

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<sup>27</sup> Foucault, M. *The History of Sexuality Vol. I*, Supra. Chapter One, Note 3, p.86

Given the centrality of the disciplinary mechanism within the functioning of modern law, it becomes crucially important that legal analysis seek to develop its terms in a manner capable of articulation outwith the shadow of the juridical. Within the confines of this thesis, we will attempt to draw out the conception of consent from within that shadow. Before we can hope to do so with any success, however, we must examine in some more detail the manner in which these disciplinary mechanisms operate their power upon the legal subject to construct identity development towards the realisation of privileged norms. The constraining implications of these mechanisms in terms of the realisation of self-determination will become a crucial concern of this thesis.

### *Discourse and Embodiment in Law*

“In a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated, nor implemented without the production, accumulation, circulation and functioning of a discourse. There can be no possible exercise of power without a certain economy of discourses of truth which operate through and on the basis of this assumption.”<sup>28</sup>

The shift in the *modus operandi* of modern power discussed above has been facilitated by a change in the manner in which modern society as a whole operates. Modernity is characterised primarily by its employment of extensive strategies of normalisation. As Foucault has suggested,

“In modern society, the behaviour of the individual is regulated not through overt repression, but through a set of standards and values associated with normality which are set into play by a network of ostensibly beneficent and scientific forms of knowledge.”<sup>29</sup>

This idea of the disciplinary power of modern society as a normalising, rather than repressive force, lies at the heart of Foucault’s assertion that power is a positive phenomenon. Control of the individual in modern society is ensured, not through the direct repression of the individual by the state, but through the more invisible strategies of normalisation. These strategies of normalisation

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<sup>28</sup> Foucault M., quoted in Kelly, T. (ed.) *Critique and Power – Recasting the Foucault / Habermas Debate* (1994) MIT Press, p.31

encourage individual self-regulation through a constant striving to meet prioritised social norms.

Discourse is the medium within which, according to Foucault, these constructs of power and normativity interconnect. Foucault defines discourse as a form of power that circulates in the social field. It is free to attach both to strategies of domination, as well as of resistance, but most importantly for our purposes, it is primarily through the medium of discourse that disciplinary techniques find their normative power. The proliferation of discourses (most notably scientific and quasi-scientific discourses) characteristic of modern society has facilitated the shift in the *modus operandi* of power illustrated above. Foucault identifies those fields of discourse most closely associated with the body and with the psyche as being a source of particularly powerful mechanisms for tying the demands of power inextricably to personal desire and attachment. These particular genres of discourse have increased the power of the individual while simultaneously rendering the individual more docile. In so doing, they have established what is recognised to be a peculiarly powerful mechanism of control, which Foucault refers to as 'bio-power'.

Through disciplinary mechanisms in general, the effects of power in modern society "circulate through progressively finer channels, gaining access to individuals themselves, to their bodies and their gestures, and all their daily actions."<sup>29</sup> The mechanism of bio-power is the paradigm manifestation of this. Bio-power does not simply take the acts of transgression of the population as a group as its object. Rather, and more specifically, it asserts itself against the life (and the body) of each individual. Bio-power is thus peculiarly effective in the extent to which it focuses upon the human body as the centrepiece of important struggles between various different power formations. The body subject to bio-power becomes both shaped and re-shaped by the different power forces acting

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<sup>29</sup> MacNay, L. *Foucault – A Critical Introduction*, Supra. Chapter One, Note 7, p.95

<sup>30</sup> Diamond, I. & Quinby, L. *Feminism and Foucault* (1988) Northeastern University Press, p.79



upon it. In terms of our analysis, this means that in order to best study the mechanics of power in modern society, we must

“rather than ask ourselves how the sovereign appears to us in his lofty isolation,...try to disclose how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces and energies.”<sup>31</sup>

What would be brought to light by such a study would be the realisation that all people, in all social classes, and of all sexual orientations, are constructed by prevailing discourses and are striving for ultimate conformity with the norms which society has heralded as appropriate. This is not to dismiss the possibility of resistance, for as Foucault notes whenever there is a power relation, there is a possibility of resistance. The importance of this analysis stems, however, from its revelation that the power of modern society lies in the ability to create and promote propositions to the status of indisputable truth and pervasive norm. This realisation has tangible implications for our analysis of consent by illustrating from the outset the limited credibility that can be afforded to the notion of unfettered individual self-determination that forms a pillar of the juridical conception of agency and consensual capacity.

In analysing the law's disciplinary power, it is necessary to employ an appropriate methodology that will operate effectively outwith the shadow of the juridical. In real terms, that demands that we focus our concern upon the mechanisms of disciplinary techniques, upon the discursive mediums through which they generate support within the social field, and upon the resultant effects upon the embodied subject of modern power. We have noted above that Foucault has defined the body as a political field and has expressed his concern that we analyse the material and discursive effects on embodied subjectivity perpetuated by disciplinary techniques. One of the prime arenas within which the mechanisms of bio-power have proven most fruitful has been identified by Foucault as pertaining to the ‘hysterization of the female’. Certainly, this is not the only arena highlighted by Foucault (for example, he is also keen to examine

the role of bio-power in terms of childhood sexualisation, etc.). However, the insinuation by Foucault that the female body has been a source of particular mechanisms of bio-power has given pause for fruitful thought to many feminist commentators.

Within the confines of this work, it would be impossible to give serious treatment to the myriad manifestations of constructionism brought to bear at the hands of networks of bio-power upon differentially situated and embodied agents. In what follows, therefore, our analysis will be restricted to consideration of the effects of bio-power in particular, and law's disciplinary power more generally, upon the female body. It is more than interesting to note the trend in our cultural history towards an assimilation of the female with the confines of her embodiment. It can barely be disputed that this is a phenomenon that has been significantly less observable in the context of male embodiment (although this is not to say that similar assimilation has not occurred in particular contexts). For this reason, Foucault's proposals in regard to bio-power have particularly observable implications for what is not necessarily a feminist analysis, but certainly an analysis of the disciplinary role played by law (through its use of consent) upon the construction of the female agent and her relationship to the parameters of her corporeal manifestation.

### *Feminism and Law's Disciplinary Power*

The notion of power as grass-roots and all-encompassing established above stands in stark contrast to the perception of power dynamics which has traditionally been advocated by radical feminist analysis. Prominent commentators within this species of legal criticism, most notable perhaps Catharine MacKinnon, have asserted that power is a commodity held firmly in the hands of patriarchy and systematically denied from the ownership of women. Hence, where MacKinnon and her followers herald patriarchy as the

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<sup>31</sup> Foucault, M. quoted in Gordon, C. (ed.) *Power / Knowledge*, Supra. Preface, Note 8, p.97

most pervasive system of power ever to take hold of society, Foucault's more fluid thesis concerns itself with the proposal that –

“power must be analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power. They are not only its inert or consenting target, they are also always the elements of its articulation.”<sup>32</sup>

MacKinnon and her radical feminist contemporaries have devoted considerable amounts of academic energy to constructing exactly the sort of sharp them/us dichotomy in terms of control of power that Foucault's analysis seeks to undermine as outmoded and inappropriate to the workings of modern society<sup>33</sup>. In *Towards Feminist Jurisprudence*<sup>34</sup> MacKinnon explains her position most lucidly when she suggests that,

“male dominance is perhaps the most pervasive and tenacious system of power in history...its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.”<sup>35</sup>

MacKinnon develops this deterministic thesis to argue that the law sees and treats women as a group the way that men, as a group, see and treat women.

“The liberal state coercively and authoritatively constitutes the social order in the interests of men as a gender, through its legitimizing norms, relation to society, and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level, occasionally cushioning, qualifying or *de jure* prohibiting its excesses when necessary to its normalization.”<sup>36</sup>

This provides a very totalitarian critique. While Foucault is also critical of the methodology of the liberal state, his suggestion remains in far more fluid terms.

<sup>32</sup> Gordon, C. (ed.) *Power / Knowledge*, Supra. Preface, Note 8, p.98

<sup>33</sup> MacKinnon, C. *Feminism Unmodified*, Supra. Preface, Note 9

MacKinnon, C. *Towards a Feminist Theory of State*, (1989) Harvard Uni. Press

<sup>34</sup> MacKinnon, C. “Towards Feminist Jurisprudence” (1986) *Signs* 635

<sup>35</sup> MacKinnon, C. “Towards Feminist Jurisprudence” Supra. Chapter One, Note 34, p.636-7

Foucault too has recognised that the allegedly 'libertarian free space' left unregulated by the liberal state is a myth of juridical political theory, because in reality these arenas are simply demarcated as arenas within which the exercise of power is communicated through the medium of disciplinary techniques. However, where Foucault diverges from MacKinnon is in the assertion that MacKinnon makes that the directors of these techniques are necessarily male, and they are necessarily exercising the power they 'possess' to further the perceived interests of their gender. We have seen that Foucault is highly critical of the suggestion that is inherent in the MacKinnon model of power as a commodity held in the hands of one group who act to oppress all others by virtue of that ownership of power. MacKinnon seeks to maintain a strictly dichotomous perception of power relations which proposes that even at points where it may superficially appear that power is being exercised to further the interests of women (for example through the provision of better contraception), this only serves to mask the true motivation behind the action which always remains to serve male interests (in this case by ensuring increased freedom of sexual access to women). In contrast, Foucault seeks to avoid the assertion of any such over-arching framework within the field of power dynamics. He seeks a fluid notion of power as a force that bears out its effects on every social agent rather than as a commodity to be wielded in the interests of the socially privileged to maintain the on-going derision of the socially subordinate.

The benefits which feminism can derive from such Foucaultian analyses are striking. Most striking of all perhaps is the centrality afforded within the framework of disciplinary power to the role of discourse as a medium for normalisation, both within and outwith law. Incorporation of the significance of discourse into an analysis of power in the manner that has been proposed above rests well alongside a feminist political and epistemological project that has long since developed mechanisms such as consciousness-raising and practical reasoning to enable the critical questioning of the assumptions of discourse. As Diamond and Quinby have noted, both the Foucaultian and the feminist school

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<sup>36</sup> MacKinnon, C. "Towards Feminist Jurisprudence", *Supra*. Chapter One, Note 34, p.644

of theory have identified the "crucial role of discourse in its capacity to produce and sustain hegemonic power and (both have) emphasised the challenges contained within marginalised and / or unrecognised discourses."<sup>37</sup> Adopting an analysis of power along more fluid lines than that hitherto presented to the feminist academy by commentators such as MacKinnon would permit of a more serious analysis of the role of discourse in the perpetuation of power relations. This holds particular relevance for feminist analysis, not only because feminist theory itself represents a marginalised form of discourse, but also, as we shall see, because the female subject has often been peculiarly tied to the dictates of discourse (particularly those circulating in the medical field over the terrain of sexuality).

Of course, many feminist analyses of the radical genre have always taken the role played by discourse in the construction and perpetuation of power relationships seriously. However, despite the importance of their recognition of the significance of this aspect of phenomenological experience, some of the more radical feminist positions on the issue of discourse have stood in contradiction to the essence of the analysis provided by Foucault. Such a radical feminist proposal has been codified in the works of Luce Irigaray who, in *Ce Sexe qui n'est pas Un*,<sup>38</sup> proposed that western cultural discourses are univocally masculinist. Irigaray alleges that there is no place for women to speak within these discourses, except insofar as they speak in terms and on terms which patriarchy has pre-ordained. While Foucault does not wish to deny that there are still large-scale structures of power in operation in society, unlike this radical feminist approach, he refuses to conceive of the relationships formed within them as being hierarchically imposed upon a dynamic of oppressor - oppressed. In further contradiction to the thought of Irigaray which has been hugely influential on much traditionally radical feminist thought, he rejects the insinuation that the power of patriarchal discourse is totalitarian and absolute

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<sup>37</sup> Diamond, I. & Quinby, L. *Feminism and Foucault*, Supra. Chapter One, Note 30, Intro. x

<sup>38</sup> Irigaray, L. *Ce Sexe qui n'est pas Un* (1977) Minuit Press

because for him, discourse must of necessity be plurivocal and ambiguous.<sup>39</sup> The relationships resulting from these power dynamics are explained not as the outcome of overarching systems of complete domination, but rather as the outcome of the ways in which

“infinitesimal mechanisms of power... have been - and continue to be - invested, colonized, utilised, involuted, transformed, displaced, extended, etc. by ever more general mechanisms and by forms of global domination.”<sup>40</sup>

Hence although Irigaray adopts a reminiscent concern for the role of discourse in the construction of power dynamics, her essentialist thesis that depicts the female subject as eternal other in all discourse contradicts the essence of the Foucaultian claim that the power inherent in discourse is fluid and complex.

We have noted at length above Foucault's refusal to adopt the traditional view of power as operating in a unidirectional manner. In opting for a perception that posits power as an ongoing struggle between mutually engaged individuals, Foucault uncovers the reality of the operation of systems of social regulation less as one-dimensional constructs and more as 'an endless play of domination'.<sup>41</sup> By de-emphasising our focus upon hierarchy and absolute domination in power relations, it may appear that Foucault has done little to help the feminist project. In fact, it may appear more appropriate to argue that he has frustrated their cause by eliminating the very platform from which feminist analysis seeks to speak. Certainly, this may be the case should feminist commentators seek to nestle within the confines of the radical feminist critique of the past. However, a more complex feminist analysis is possible outwith the essentialist dichotomies that have often plagued the radical critique. When this more complex analysis is elucidated and coupled with the Foucaultian recognition of the importance of power relationships outwith the shadow of the juridical, the possibility of future alliance seems more promising.

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<sup>39</sup> Sawacki, J. *Disciplining Foucault – Feminism, Power and the Body* (1991) Routledge, p.1

<sup>40</sup> Foucault, M. *Introduction to Herculin Barbin : Being the Recently Discovered Memoirs of a 19th Century French Hermaphrodite* (1980) Partheon , p.122

<sup>41</sup> MacNay, L. *Foucault - A Critical Introduction*, Supra. Chapter One, Note 7, p.85

Once we have divested ourselves of the notions of power as dichotomous commodity inherent in the radical critique, it becomes apparent that there is much in Foucault's analysis of power relations that remains in other respects in line with the modern face of feminism. Despite the high rhetorical value that can be attached to the more radical analysis of MacKinnon and her ideological comrades, many contemporary feminists have become increasingly uncomfortable with this determinist vision. At the level of experience, many feminists have alleged that this dichotomous model of oppressor-oppressed is counter-intuitive and alienating for women. What's more, it provides ideological grounding for perpetuation of the traditional conception of woman as the essential victim.<sup>42</sup> In recognition of this, many feminists have begun to seek a more fluid theory of power relations that can take account of the microcosmic operations of power forces that operate to structure the intimate levels of individual experience. This has led an increasing number of feminists to align themselves with a Foucaultian approach to gender-power relations, recognising in this model the remit to examine more subtle dynamics of power and to establish the extent to which we are all structured by power forces.

Such an alliance between feminism and Foucault has been advocated by Jana Sawacki,<sup>43</sup> who notes that Foucault's analysis of the dimensions of disciplinary power, which operate outwith the confines of the political realm of the modern, liberal state, can provide helpful analytical tools for those feminists already engaged in uncovering the 'micropolitics' of 'private' life. Foucault's analysis of the capillary nature of modern disciplinary power could be, and indeed subsequently has been, executed very effectively by feminists to help them explore the dynamics of power at the most intimate levels of family life. Sawacki herself, for example, has employed a considerable amount of

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<sup>42</sup> Finley, L. "The Nature of Domination and The Nature of Women: Reflections on Feminism Unmodified", *Supra*. Preface, Note 10

<sup>43</sup> Sawacki, J. "Feminism, Foucault and 'Subjects' of Power and Freedom" in Hekman, S. (ed.) *Feminist Interpretations of Michel Foucault* (1996) University of Pennsylvania Press, p.160

Foucaultian ideology in her discussion of the disciplinary techniques employed in the normalising forces imposed upon the female body.<sup>44</sup>

The link between disciplinary technology and the construction of female embodiment becomes still more pertinent when we examine the nature of the scientific and quasi-scientific discourses developed within the nineteenth century – the discourses to which Foucault attributes the means and origins of much of the disciplinary power in existence today. The majority of the discourse identified by Foucault in this respect pertains to issues within the field of medicine. This begs the question, however of whether it is legitimate for our current project to seek to attribute the assumptions of medical discourse also to legal discourse. It has been a central tenet of Foucault's thesis that ideology framed within the confines of one discursive field remains fluid and perfectly capable of being transferred, either in its totality or selectively as appropriate, to furnish also the discourse of another genre. Commentators have long-since traced the existence of exactly such interplay of meaning between medical and legal discourse. Carol Smart, for example, in linking medical and legal discourse, has claimed that both have been mutually supportive in legitimating the control which society exercises over the female body. Indeed, Smart dedicates her article entitled "Penetrating Women's Bodies – the Problem of Law and Medical Technology" to an examination of the means through which women's bodies have become signifiers of negative attributes in the field of law. In making this analysis, she notes that

"it is of course essential to recognise the extent to which law and medicine interweave in this project, law often becoming extremely dependent upon medical discourse to fashion its own mode of regulation and imagery."<sup>45</sup>

In fact, therefore, it seems to be of considerable importance that if we are to look at the law's treatment of the female agent, we should develop a clearer idea of how this regulation and imagery are constituted in the realm of medical

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<sup>44</sup> Sawacki, J *Disciplining Foucault - Feminism, Power and the Body*, Supra. Chapter One, Note 39

<sup>45</sup> Smart, C. "Penetrating Women's Bodies" in Abbott & Wallace (ed.) *Gender, Power and Sexuality* (1991) MacMillan Press, p.157



discourse. Excursion into the realms of medical discourse is especially pertinent given Foucault's assertion that it has been peculiarly through the proliferation of such discourse that disciplinary techniques have become operative upon the female body. As we have seen, these disciplinary techniques are operative through a variety of mediums, including the legal mechanisms that interpret issues of consent.

### *Discourses of Female Embodiment*

"Since neither the theory nor the practice of law, nor the theory or the practice of medicine, are truly impartial processes, an examination of the diverse sexual ideologies interposing in and thereby influencing the deployment of discretion in the decision-making process becomes a central concern."<sup>46</sup>

Since the time of Freud, it has been asserted that 'biology is destiny'.<sup>47</sup> The unshakeable conviction articulated by Freud that the physical differences between men and women are only the corporeal manifestations of more significant differences in terms of emotion and intellect has perpetuated a long-standing belief that the body is the determining factor upon human behaviour. This has led to a climate within which increasing deference is being afforded to the claims of medicine and human science, particularly as their discourses become increasingly immersed in scientificity.

Nonetheless, Foucault has remained highly sceptical of the legitimacy of these claims. It has been one of his central contentions that medical discourse has produced a wealth of misunderstandings about the human body and human sexuality.<sup>48</sup> Throughout the nineteenth century, legal practice became increasingly influenced by medicine, especially gynaecological precepts of sexuality. It comes as no surprise, then that the most powerful discourses around which the demands of bio-power have been erected have involved elaboration of medical interpretations of the issue of sexuality. In identifying

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<sup>46</sup> Edwards, S. *Female Sexuality and the Law* (1981) Martin Robertson & Co., p.1

<sup>47</sup> Mitchell, J. *Psychoanalysis and Feminism* (1975) Vintage Press

<sup>48</sup> Edwards, S. *Female Sexuality and the Law*, Supra. Chapter One, Note 46, p.13

this preoccupation within medical discourse, Foucault has noted that this 'hysterization of women's bodies' has been the lynch pin of the unity of power and knowledge through which women and their sexuality are, and historically have been, controlled. In *the History of Sexuality*, he notes that around the time of the rise of medical discourse

"the feminine body was analysed – qualified and disqualified – as being thoroughly saturated with sexuality; whereby it was integrated into the sphere of medical practice, by reason of a pathology intrinsic to it."<sup>49</sup>

Medical discourse, as it concerned itself with gynaecological concerns and their psychoanalytical underpinnings, provided an extremely powerful and effective legitimization for the prohibition of various social and sexual activities from the female agent. As the dominant ideology, it made claims to truth that entrenched the subordination of women, legitimating this by recourse to their physical limitations and psychological instability. Such was the strength of this medical legitimization that during the century, any possible deviation from the appropriate social or sexual role of the feminine, for example, smoking, laughing aloud, sexual relations for pleasure (within or outwith marriage), were frequently considered the result of some gynaecological disorder.

Discourse pertaining to the subject of sexuality abounded during the era of medical scientificity highlighted by Foucault and even today normative ideology encapsulated in discourse about sexuality remains a central element in the cultural identification of the feminine role. Throughout history, discursive strategies over sexuality have played a central role in the construction of power relationships between male and female agents. For that reason, it is necessary to examine the dictates of that discourse in some detail in order to allow us to formulate some general understanding of the implications of discourse upon personal desire and identity. Of course, any external force that impinges upon personal desire and identity formation has significant implications upon the credibility that can be attached to our so-called unconstrained exercise of self-

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<sup>49</sup> Foucault, M. *The History of Sexuality, Vol. I*, Supra. Chapter One, Note 3, p.104

determination through the medium of consent. Lorraine Code has put the point most lucidly –

“Women often have difficulty claiming the authority they require to take responsibility for their lives, in the face of the intransigence of institutionalised structures of power-knowledge, which define their subjectivity for them, and are stubbornly deaf to criticism. Enmeshed in such structures in innumerable aspects of their lives, women are commonly thwarted in their efforts to achieve the cognitive and moral autonomy that is crucial to the development of effective agency. In consequence, women too often live as self-fulfilling prophecies, adhering to the restricted options constructed for them by experts who claim to know them better than they could hope to know themselves.”<sup>50</sup>

Concern regarding the role of discourses about sexuality unites both Foucault and all genres of feminism, although as we shall see the treatment of issues brought to light by examination of such discourse may vary. At the most radical end of the spectrum of feminist analysis, it has been suggested that sexuality is especially important because “it is specifically through sexuality that the fundamental oppression, that of men over women, is maintained.”<sup>51</sup> Fighting against the biological determinism prevalent since the popular rise of Freudianism has become the primary preoccupation of many feminist commentators, radical and otherwise. Amongst the most celebrated attempts is that initiated by Betty Friedan in her work, *The Feminine Mystique*.<sup>52</sup> Within this work Friedan adopts the infamous proposal of Simone de Beauvoir that one is not born a woman, but rather becomes a woman through subscription to normative gender categories.<sup>53</sup> This notion has been adopted by Friedan in her discussion of the inability of women to fit comfortably into their predetermined, and gendered, social roles. Although the insight contained within this argument may well be legitimate, much subsequent discomfort has been aroused amongst more contemporary feminists by Friedan’s subsequent arguments that have implied the necessity of a crusade for androgyny.<sup>54</sup>

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<sup>50</sup> Code, L. “The Unicorn in the Garden”, in Harvey, E. & Ohrolik, K. (Ed.) *Women and Reason* (1992) University of Michigan Press, p.265.

<sup>51</sup> Leeds Revolutionary Feminist Group, *Political Lesbianism* (1981) Only Women Press, p.60

<sup>52</sup> Friedan, B. *The Feminine Mystique* (1963) Penguin

<sup>53</sup> De Beauvoir, S. *The Second Sex* (trans. Parshley, H.) (1997) Vintage

<sup>54</sup> In her latter work, *The Second Stage* (1983) Abacus Press, Friedan disassociates herself from many of the more extreme aspects of her earlier argument.

Along similar lines, an argument developed which concerned itself more with the cultural imposition of sexuality than with the cultural imposition of gendered roles. In her article in *Signs*, Adrienne Rich made the controversial suggestion that heterosexuality is enforced on women as a means of ensuring the continuation of male rights of physical, economic and emotional access to the female body. She postulated the existence of a regime of 'compulsory heterosexuality' that operated in a manner akin to the political system of capitalism. This sexual regime was likewise designed to produce a class of inferior status that could be exploited for the benefit of the ruling class and can be maintained by the operation of forces ranging from physical violence to false consciousness<sup>55</sup>. This proposal also provoked its share of opposition and even anger within the feminist camp because it was interpreted as a political call to turn all feminists into lesbians. This, however, would surely only have subverted the dynamic without reaching at the more fundamental problem at issue, namely the intrinsic relation which was being uncovered between prevailing social power and the deployment of sexuality and gender roles.

An alternative way of fashioning ideas of gender and sexuality has been posited by the 'new French feminist' school, their most prominent advocate being Luce Irigaray. In *Ce Sexe qui n'est pas un*,<sup>56</sup> she proposed that women are not merely female embodiments of human sexuality, as has traditionally been supposed, but rather, they comprise a completely different sex. What Irigaray seeks to illustrate by this is the falseness of the same / other binary which dominates discussions of sexuality. In her view, both the 'same' and the 'other' are masculine because the 'other' is but the negative elaboration of the masculine subject. This has resulted in the complete non-representation of the female sex. This has been a difficult proposition for many women to accept, although many of the ideas inherent in Irigaray's proposal have proven more palpable. As Whitford noted in her work *Luce Irigaray : Philosophy in the Feminine*,

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<sup>55</sup> Rich, A. "Compulsory Heterosexuality and Lesbian Existence" (1980) *Signs*, in Evans, M. *The Woman Question*, Supra. Preface, Note 13, p.59

<sup>56</sup> Irigaray, L. *Ce Sexe qui n'est pas Un*, Supra. Chapter One, Note 38

“for Irigaray, sexuality is not a raw, primitive and untouched territory which is somehow private, ‘outside’ conceptualisation uncontaminated by patriarchy and unstructured by the paternal genealogy. On the contrary, the links between sexuality, conceptualisation, ‘knowledge’ and social organisation are intrinsic.”<sup>57</sup>

Michel Foucault has displayed a similar position in his suggestion that sexuality is an entirely socially constructed concept. In positing the artificial nature of current categories of sexuality, however, Foucault does well to point out that part of the very construction of sexuality employs the notion that sexuality consists of overwhelming urges and uncontrollable needs. Hence its social construction cleverly becomes that it is uncontrollably natural. Foucault conceives of ‘sexuality’ as an historically imbued system of discourse and power which has produced the notion of ‘sex’ as part of its strategy to conceal, and hence to perpetuate power relations.<sup>58</sup> In *The History of Sexuality*, he notes that,

“Sexuality must not be thought of as a kind of natural given which power tries to hold in check, or as an obscure domain which knowledge tries gradually to uncover. It is the name which can be given to a historical construct ; not a furtive reality that is difficult to grasp, but a great surface network in which the stimulation of bodies, the intensification of pleasures, the incitement to discourse, the formation of special knowledges, the strengthening of controls and resistance, are linked to one another in accordance with a few major strategies of knowledge and power.”<sup>59</sup>

This idea of sexuality as being socially constructed has been well received by feminist academia. Catharine MacKinnon, for example, has been keen to concur with this insight. In *Feminism Unmodified*,<sup>60</sup> she states that sexuality is a social construct of whatever the given society eroticises at the time. MacKinnon considers sexuality to be ‘the ‘lynch pin’ of gender inequality’. She holds it up as a fundamentally social and relational construction that has men as its principal authors, constructing its normative fashionings under prevailing conditions of male dominance. Hence, for MacKinnon,

<sup>57</sup> Whitford, M. *Luce Irigaray - Philosophy in the Feminine* (1991) Routledge, p.150

<sup>58</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.95

<sup>59</sup> Foucault, M. *The History of Sexuality*, Vol. 1, Supra. Chapter One, Note 3, p.105-6

<sup>60</sup> MacKinnon, C. *Feminism Unmodified*, Supra. Preface, Note 9

"Feminism is a theory of how the erotization of dominance and submission creates gender, creates woman and man in the social form in which we know them."<sup>61</sup>

Foucault has placed great emphasis on the need for a detailed study of the relationship between power and sexuality. In *The History of Sexuality*, he suggests that in studying the effects of power, we ought to devote particular attention to the myriad of bodies that have been constituted as peripheral subjects because of the operations of disciplinary power upon their sexuality.<sup>62</sup> He contends that it is through a specific location of prohibition and regulation of sexuality within the discursive practices of law and medicine, for example, that control over female behaviour is secured. In his work, he encourages us to think of our bodies as elements in the articulation of power. His theory perceives of sexuality not only as a group of statements, prohibitions and regulations, but also as a power-index illustrative of the underlying structures of ideology. This linkage between perceptions of gender and sexuality with the pervasive social power structures has been re-iterated in the words of MacKinnon,

"Sexual objectification is the primary process of the subjection of women. It unites act with word, construction with expression, perception with enforcement, myth with reality."<sup>63</sup>

Hence, although their conceptions of the nature and operation of power may differ markedly, both Foucault and MacKinnon have sought to illustrate the fundamental connection between social power dynamics and the operation of sexuality within society. The problem that Foucault identifies in relation to this feminist conception of the 'deployment of sexuality', however, stems from the fact that feminist analysis tends to take the category of sex (and therefore, according to him, the binary restriction on gender) as its point of departure. In contrast, Foucault understands his own project to be one of inquiring into *how* that category of 'sex' is constructed within prevailing discourse as an integral

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<sup>61</sup> MacKinnon, C. *Feminism Unmodified*, Supra. Preface, Note 9, p. 50

<sup>62</sup> Foucault, M. *The History of Sexuality*, Vol. 1, Supra. Chapter One, Note 3, p. 106

<sup>63</sup> MacKinnon, C. "Feminism, Marxism, Method and the State" (1982) *Signs* 528, p. 541

aspect of bodily identity.<sup>64</sup> This more essentialist Foucaultian approach has been celebrated by some feminists, for example Winifrid Woodhull has proposed that

“Foucault’s analysis of power as a process that produces particular forms of sexuality and implants them in the body confirms and throws new light on the feminist contention that sexuality and sexual relations are social constructs.”<sup>65</sup>

Foucault suggests that the deployment of sexuality originated not so much from the enslavement of one class (as MacKinnon would suggest) as from the self-affirmation of another class. The process originated via a strengthening and exaltation of one class that eventually became extended to others, thence becoming a means of social control and political subjugation.<sup>66</sup> What this would seem to suggest then is that the deployment of sexuality is linked less to a patriarchal desire for domination and more with a celebration of phallocentrism. Society has become structured to meet the demands of the male imperative, rather than primarily to ensure the subjugation of women. The ultimate end may be the same, but the mechanisms and motivations employed to reach that end are not those that the traditional feminist camp tends to presuppose.

Throughout history, our male-based culture has encountered considerable difficulty in dealing with the issue of female sexuality. As we have seen, in the nineteenth century, women engaging in extra-marital sex were often considered to be mentally abnormal, and many were incarcerated in mental institutions. During the Victorian period, a definite division was constructed between good (i.e. asexual) women and bad (i.e. sexual) women. Underlying this dichotomy is the structural concern to protect the virginity of women. This is a concern that informs the very core of the control exercised over female sexuality, and it is a concern that Edwards<sup>67</sup> has suggested is a feature of the sexual mores of

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<sup>64</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.96

<sup>65</sup> Woodhull, W. “Sexuality, Power and The Question of Rape”, in Diamond, I. & Quinby, L. *Feminism and Foucault*, Supra. Chapter One, Note 30, p.168

<sup>66</sup> “What was formed was a political ordering of life, not through an enslavement of others, but through an affirmation of self” : Foucault, M. *The History of Sexuality, Vol.1*, Supra. Chapter One, Note 3, p.123

<sup>67</sup> Edwards, S. *Female Sexuality and the Law*, Supra. Chapter One, Note 46

most societies. Medical writings of the Victorian era illustrated this by their suggestion that as a general rule, a woman seldom desires any sexual gratification for herself. Any women who failed to conform to this restriction were considered 'nymphomaniacs' and were cured by excision of part of their genitals.<sup>68</sup> This general unease with the notion of an operative female sexuality has been traced through our social and legal structure, and continues to dominate present times, manifested in notions suggesting that women somehow desire to be raped, etc. This notion has been met with scathing and indignant denial from many women, but the doctrinal authority given to the thoughts of psychoanalytical 'experts' who have proposed that the essence of femininity is masochism has made it exceptionally difficult to shift this presumption.<sup>69</sup>

The relational character of power that Foucault posits allows a shift in emphasis away from the traditional concern of MacKinnon *et al* with power's repressive function, towards a larger concern with the productive function of power which allows it to create and perpetuate new forms of 'truth'. We have seen how Foucault has sought to illustrate the relationship between constructions of sexuality and prevailing dynamics of power. Foucault builds upon this premise to make the even more fundamental assertion that there is an intimate link between that deployment of sexuality and the very identity that we adopt and experience as our own. Furthermore, he proposes that this relationship does not exist outside of, or prior to language and culture, but rather, it is actually brought into play by invocation of discursive strategies and ideology. In "Feminism, Criticism and Foucault", Biddy Martin surmises from this assertion that

"Sexuality and identity can only be understood, then, in terms of the complicated and often paradoxical ways in which pleasures, knowledges, and power are produced and disciplined in language and institutionalised across multiple social fields."<sup>70</sup>

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<sup>68</sup> Edwards, S. *Female Sexuality and the Law*, Supra. Chapter One, Note 46, p.81

<sup>69</sup> The implications of this notion in the determination of the issue of consent in the rape trial will be examined in more detail in Chapter Two



Hence Foucault suggests that to fix upon attempts to give voice to our supposed sexuality and identity as 'gendered beings' (as has been the overpowering concern of traditional feminist crusades) as presenting a path to liberation is inappropriate. It is inappropriate primarily because it fails to recognise our own history as arbitrarily gendered beings, subject to the prevailing power's deployment of sexuality. He proposes, then, that the feminist enterprise, like all others, must refrain from the temptation of attributing some pre-existing doctrinal authority to the prevailing binary dichotomy that operates to control and confine sexuality.

"Foucault denies that his own discourse is free of power relations without despairing about the possibility that it can have a liberatory effect. This is not liberation as transcendence of power or as global transformation, but rather freeing ourselves from the assumption that prevailing ways of understanding ourselves and others, and of theorising the conditions for liberation, are necessary, self-evident and without the effects of power."<sup>71</sup>

At a more fundamental level, he sees a problem with the traditional feminist methodology of anchoring feminist discourse within a demand for 'control over one's own body' because he is wary of such attempts to unify feminists through the rallying cry of sexuality and its control. MacKinnon has proposed that sexuality is the lynch pin of male power. Foucault also appreciates the centrality of sexuality, or more specifically the deployment of sexuality, to the maintenance of current patterns of power. However, his reluctance to fix too much attention on the body in an attempt to liberate it suggests that he would be cynical of the wholesale embrace of sexual identity that MacKinnon advocates. Doubtless, Foucault would express concern that MacKinnon's proposal to produce a feminist political theory purely through an analysis of sexuality may in actuality render women more vulnerable to the ill effects of the deployment of sexuality by their implicit acceptance of the prevailing belief of the broader culture that sex is the sole measure of identity and the sole instrument of truth.<sup>72</sup>

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<sup>70</sup> Martin, B. "Feminism, Criticism and Foucault" in Diamond, I. & Quinby, L. *Feminism and Foucault*, Supra. Chapter One, Note 30, p. 9

<sup>71</sup> Sawacki, J. *Disciplining Foucault*, Supra. Chapter One, Note 39, p.56

<sup>72</sup> Diamond, I & Quinby, L. "American Feminism and the Language of Control", in Diamond, I & Quinby, L. *Feminism and Foucault*, Supra. Chapter One, Note 30, p.193

This suggestion is implied in Foucault's statement in "What is Enlightenment?" that

"I prefer the very specific transformations that have proved to be possible in the last twenty years in a certain number of areas that concern our ways of being and thinking, relations to authority, relations between the sexes, the way in which we perceive insanity or illness."<sup>73</sup>

Foucault has been heavily preoccupied, then, less with the ill-effects of sexuality as it is currently construed and more with the discursive and strategic mechanisms which operate to deploy these constructions and tie them so closely to the individual's conception of self. He has in this way been far less concerned with theories that presuppose current definitions of sexuality as intrinsic. Instead, he has sought to analyse the deployment of sexuality at a more fundamental level. In doing so, he has done more than any other contemporary social theorist to direct attention towards the body, and towards how it is that the individual body is constructed in line with dictates of power. In his attack on liberalism, for example, he replaces the traditional preoccupation with self-conscious subjectivity with a concern for how it is that one's embodied identity has been constructed to legitimate various regimes of domination throughout history.<sup>74</sup> According to Foucault, the body has become the prime site for the operation of modern forms of power. Once we recognise that modern power is characteristically elusive and productive, we can begin to appreciate the modern dynamics of 'bio-power' that operate to make the body the primary object of processes of discipline and normalisation.

Foucault's concern to theorise about the body has been a welcome development in social theory. Some have criticised him, however, for his failure to note the specific differences that characterise the embodied experiences of male and female. Bartky, for example, in "Foucault, Feminism and the Modernisation of Patriarchal Power"<sup>75</sup>, has argued that although Foucault does well to call

<sup>73</sup> Foucault, M. "What is Enlightenment?" in Rabinow, P. *The Foucault Reader* (1986) Penguin, p.46-7

<sup>74</sup> Davis, K. *Embodied Practices – Feminist Perspectives on the Body* (1997) SAGE, p. 3

<sup>75</sup> Bartky, S. "Foucault, Feminism and the Modernization of Patriarchal Power" in Diamond, I & Quinby, L. *Feminism and Foucault*, Supra. Chapter One, Note 30, p. 63

attention to the disciplinary practices that operate to produce the 'docile bodies' of modernity, his arguments cannot be adopted wholesale by the feminist school, because he tends to assume that the bodily experiences of men and women are the same. This makes him blind to those disciplines which operate exclusively on the female body, and

"to overlook the forms of subjection that engender the female body is to perpetuate the silence and powerlessness of those upon whom these disciplines have been imposed."<sup>76</sup>

Perhaps this criticism has over-exaggerated the extent of Foucault's oversight. Certainly, he does not pay specific attention to those disciplinary forms that operate uniquely on the female body. We must not forget, however, that a feminist critique was quite far removed from a central concern of Foucault's work. Feminist theorists should not expect to find all of their answers within the theorising of a man whose primary concern in *The History of Sexuality* was to construct a philosophical justification for homosexuality. Indeed, Foucault does draw attention to the specific process of the 'hysterization of the female body',<sup>77</sup> although he does not develop this idea much further. This may well have been a project to be dealt with at a later time. Such speculation aside, however, this omission does certainly provide scope for some necessary supplementary feminist critique on the body as a site of power struggle.

This challenge has indeed been taken up by some contemporary feminist commentators who have focussed not only on sexuality, but also more fundamentally on the effects of discourse upon the body itself. Much of this attention has focussed upon a critique of the historical fact of scientific indifference towards the female body. This has been analysed, not as a mere academic oversight, but as a product of the dualism inherent in the Cartesian thought that heavily influences modernist science, with its ultimate goal of rationality and objectivity. This dualism divides human experience into either a

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<sup>76</sup> Bartky, S. "Foucault, Feminism and the Modernization of Patriarchal Power" in Diamond, I. & Quinby, L. *Feminism and Foucault*, Supra. Chapter One, Note 30, p.64

<sup>77</sup> Foucault, M. *The History of Sexuality*, Vol. I, Supra. Chapter One, Note 3, p.104

bodily or a spiritual realm. Within contemporary society, the female body has become a signifier for the side of the dualism that connects with embodiment and emotionality. The female body has become a metaphor for all that needs to be controlled by the implicitly (dis)embodied, objective male.<sup>78</sup>

A similar emphasis on the body has been re-vitalised in the works of Judith Butler. In *Gender Trouble*,<sup>79</sup> she establishes an influential distinction between biological bodies and the socially constructed gender differences that are imposed upon them. Building on this premise, she proposes that the distinctions drawn between male and female bodies are in themselves arbitrary, nothing more than an artefact of a social order organised by normative heterosexuality. In drawing a similar conclusion to Simone de Beauvoir, Butler concludes that women are neither born, nor made; rather they appropriate the cultural prescriptions society demands of their sex.<sup>80</sup>

The concern to link women's embodied experiences to practices of power has been fairly unanimous within all feminist work in this area. The appeal of making this connection is obvious when we note, as Davis has,<sup>81</sup> that women's bodies have historically been subjected to processes of exploitation, inferiorisation, exclusion, control and violence. However, the conceptualisation of the body may vary with the conceptualisation of power and this has caused some difficulty within the feminist camp. Initially, as we have seen in the works of MacKinnon *et al*, power was conceived of as a fairly straight-forward matter of male domination and female subordination under conditions of male patriarchy. In this light, women were conceived as the victims of oppression, and their bodies became interpreted as the primary mechanism through which masculinist power operated. The focus in feminist theory has subsequently shifted, however, from an emphasis on women's experiences of oppression towards a concern with how images of women's bodies are implicated in power

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<sup>78</sup> Davis, K. *Embodied Practices*, Supra. Chapter One, Note 74, p. 5

<sup>79</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20

<sup>80</sup> De Beauvoir, S. *The Second Sex*, Supra. Chapter One, Note 53

relations. Drawing upon the Foucaultian analysis of modern, disciplinary power, the female body has become a cultural manifestation of the nexus of gender/power relations. Feminist concern for commonality in women's bodily experiences has been replaced by a concern with the particular and with the myriad cultural interpretations that can be attributed to the female body.<sup>82</sup>

Although such critique seeks to replace the 'old' oppressor / oppressed imagery of power with a more sophisticated understanding of the dynamics of power, it seeks to do so while simultaneously maintaining a concern with the systematic elements of modern body cultures. Shifting focus away from a primary concern with patterns of domination, enables a clarification of the nature of women's engagement with their own bodies. This in turn permits the introduction of notions of agency and subversion into contemporary feminist agendas by offering a remit for study of the ways in which individuals have challenged the limitations of their bodily experiences. Dorothy Smith, for example, in *Texts, Facts and Femininity*<sup>83</sup> has posited the notion of women as 'secret agents' acting behind the gendered discourses of femininity, making their bodies a potential site for mundane acts both of compliance and of rebellion.

Foucault's work has received such a large amount of feminist interest because of his insistence that the body is an historical and culturally specific entity. This has served as a stark contrast against the works of other poststructuralist theorists, such as Derrida, who have argued that the body is a metaphorisation of the more general philosophical problems of difference.<sup>84</sup> This latter form of theory has proven unacceptable because it allows the theorist to bypass altogether the question of sexual difference and how it relates to the experiences of women.<sup>85</sup> Whether or not we agree with the criticisms lodged at Foucault regarding his oversight of the specifically female forms of disciplinary

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<sup>81</sup> Davis, K. *Embodied Practices*, Supra. Chapter One, Note 74, p.10

<sup>82</sup> Davis, K. *Embodied Practices*, Supra. Chapter One, Note 74, p.10

<sup>83</sup> Smith, D. *Texts, Facts and Femininity - Exploring the Relations of Ruling* (1990) Routledge

<sup>84</sup> Derrida, J. *Writing and Difference* (1978) Routledge

<sup>85</sup> MacNay, L. *Foucault and Feminism* (1992) Polity, p. 16

technology, what is clear is that his theory has the advantage for feminist critique of at least leaving open the scope for potential examination of this question in a way which preceding theories have failed to do. The insights originating from Foucault's work do hold considerable relevance for feminist theory in general. However, what Foucault fails to do, and what feminism must do, is look closely and critically at the issue of freedom where it concerns women's responses to structural inequality and male violence. Feminists must devote additional attention to the inner processes that condition women's sense of freedom and choice, alongside their examination of the external manifestations of power and dominance. Afterall,

"women's bodily constructions take place within a network of ideological power relations so complicated and subtle, it is difficult, if not impossible, to escape indoctrination...not only disciplines relegated to the so-called subjective sphere of taste, but also the disciplines of medicine, economics, and legality, serve to put woman in her proper place."<sup>86</sup>

Advancement towards an analysis of such inner processes conditioning our senses of freedom and choice will be the main concern of this thesis. In examining the dictates of the discourse of sexuality, we have begun to highlight the existence of gender-specific assumptions of corporeal normativity that infiltrate into the desires and preferences of the embodied self. It has been suggested above that any external ideological force that impinges upon individual character formation necessarily also has an adverse affect on the subject's ability to exercise the kind of unfettered choice that is assumed in the liberal and contractarian fantasy. Over the next two chapters, we will examine the implications of this ideology more specifically in the context of legal decision-making to highlight the obstacles to credible consent afforded by the normative power of discursive strategies.

While these gender-specific concerns are legitimate and important, we must also exercise a degree of caution to ensure that our analysis of the disciplinary techniques that operate specifically upon the female body does not develop into

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<sup>86</sup> Hekman, S. *Feminist Interpretations of Michel Foucault*, Supra. Chapter One, Note 43, p. 140

an absolute polarisation. After all, the development of the female body may hold some different characteristics from the development of the male body, but it does not constitute a separate history. We have seen that the problem of conceptualising the sexualised body without positing an original sexual difference is one that has plagued feminist attempts to build on Foucaultian theory. Although the body is clearly of central importance to any feminist critique (it being the fundamental site upon which the social differences between men and women are legitimated), caution must be exercised to prevent the affirmation of the patriarchal logic that defines women by reference to their biology. While it should still be recognised that gender is socially and culturally constructed, the woman of contemporary analysis is less a victim of oppression, whose body has become the prime site for the operation of male power, and more an agent whose body has been implicated in power relations and constructed by cultural expectations. As McNay explains -

“Although the oppression of women is based on the appropriation of their bodies by patriarchy, it does not follow therefore that oppression derives from the body or sex, or that the notion of a natural sexual difference can be used to explain gender inequalities. Rather, the natural body must be understood as a device central to the legitimation of certain strategies of oppression.”<sup>87</sup>

With this caveat in mind, it remains legitimate, however, to furnish detailed examination upon the peculiarly gender-specific forms of discipline that target the female agent. The focus of the following two chapters therefore will be on the ideology imposing upon the operation of consent in the specific contexts of rape and reproduction. These contexts, although not without relevance for the male agent, hold particular relevance to the life-experience of the female as embodied and signified agent. What's more, in dealing centrally with issues pertaining to bodily integrity, these contexts also offer the opportunity for a more extensive analysis of the manifestation of bio-power that Foucault isolates as characteristic of modernity.

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<sup>87</sup> MacNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p..21

### *Conclusion*

At the outset of this chapter, we noted the centrally important place accredited to consent, as the medium through which individual self-determination is exercised and given meaning in various contexts, the paradigmatic context being in the establishment of state and society through the social contract. Inherent in this reliance upon the notion of consent is the implication that those agents who give their consent do so against a background of freedom and unfettered choice. Within the confines of this chapter, the suggestion has been made that the reality of the exercise of consent is somewhat different from the contractarian illusion. This is an argument that will flow throughout this thesis in various guises. The particular concern of this chapter has been to introduce this line of critique by suggesting that within our traditional assumptions about the nature of law and power as one-dimensional authority has been disguised the existence of various disciplinary mechanisms of power. These disciplinary mechanisms operate in infinite ways to construct and constrain the spectrum of choice available to the consensual agent.

Upon lifting the veil of the juridical, it becomes apparent that legal power (like other forms of power in modern society) operates both at the juridical and disciplinary level. It has been the concern of this chapter to examine the nature of law's disciplinary operation, most specifically its utilisation of the medium of discourse to infiltrate the life and identity of the legal agent with normative imperatives of conduct.

Building upon the Foucaultian premise that the ultimate disciplinary technique is constituted by a network of power dynamics which operates upon the individual through its corporeal manifestation ('bio-power'), we have noted the historical tendency to connect the female more closely to corporeality than the male. This has been conceived as a significant aspect in the regimes of bio-power of modernity, and in the latter part of this chapter, this has provoked an



analysis of the most significant discourse of bio-power functioning upon the body, namely sexuality. In examining the disparate manner in which the demands of sexuality have been constructed between agents, it has been the contention of this chapter that male and female sexuality has been constructed and constrained in gender-specific yet significant ways. In terms of the focus of our analysis, the multiple discourses of sexuality have constructed the female agent towards the realisation of the ideal of submissive and self-abnegating sexuality.

Within the confines of the chapters that follow, we will examine more closely the nature of the demands of that ideal, and the implications that flow from it in terms of the female agents inability to meaningfully 'consent' to roles that do not conform to the ideal. What this chapter has established is the more general proposition that in any case where an ideal model of desire, preference and identity is imposed upon the human agent as a normative expectation, it becomes artificial to assume that the agent's choice remains as unfettered and unconstrained as the standard assumptions of the notion of consent imply.

The original notion of consent that we have inherited from the social contract conception assumes a cultural backdrop of boundless freedom and unconstrained choice. This assumption can only be supported, however, on the basis of a notion of law and authority that has consent as its originator and master. When we abandon this notion of legal power in favour of the more complex analysis discussed within this chapter, it becomes apparent that reliance upon consent does not lie above social imperatives. On the contrary, the operation of consent is heavily curtailed by the influence of the normative discursive strategies implicated in modern disciplinary techniques. By constructing the subject who 'chooses' conformity within the confines of the socially prescribed, the force of disciplinary techniques lies in the undermining of the very legitimacy of that choice.

## CHAPTER TWO

### CONSTRUCTED IDENTITIES AND THE POSSIBILITY OF FEMALE NON-CONSENT IN RAPE

“The rhetoric of bodies and pleasure...can be said to be useful for exposing and opposing, in highly dramatic fashion, the undue privilege modern western culture has accorded subjectivity, sublimation, identity and the like.”<sup>1</sup>

Foucault's work on modern power has posited the body as the surface upon which the rules, hierarchies and commitments of a culture are inscribed and maintained. His analysis, discussed in the previous chapter, of the disciplinary power wielded by discursive strategies involving female sexuality has given feminism a useful theoretical framework for conceiving of the body as a site of political struggle. Building on the Foucaultian assertion that the sexual body is both the principal instrument and effect of modern disciplinary power, many contemporary feminists have illustrated how various strategies of normalisation focussed upon the female body have been central to the maintenance of prevailing social relations. In our foregoing discussion of such approaches, we have noted the advantage that they hold over those of more traditional radical feminist analyses that have tended to submerge consideration of the manner in which women actively engage with their own bodies within gender-specific dichotomies of power distribution. In encouraging a perception of the body as a contingent entity, the Foucaultian approach to power illustrated in the previous chapter has provided feminist analysis with a useful theoretical tool to counter the problems of essentialism and biological determinism that have traditionally plagued it in its approach to the body.

Foucault's challenge to us is to fight back with our bodies by finding new meanings for them, new ways of understanding our selves and our culture.<sup>2</sup> However, a necessary prerequisite to the achievement of that prescriptive agenda lies in re-evaluating the legitimacy of the prevailing standards for

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<sup>1</sup> Fraser, N. *Unruly Practices – Power, Discourse and Gender in Contemporary Theory*, Polity (1989) P.62

<sup>2</sup> Foucault, M. *The History of Sexuality, Vol. III* (trans. Hurley, R.) (1986) Pantheon

autonomy, agency and self-determination that are manifest within the juridical conception of one-dimensional consent. Throughout discussion in the preceding chapter, the legitimacy of liberal rhetoric claiming unfettered and unconstrained self-determination was repeatedly called into question by the recognition of disciplinary normativity embodied within the discursive fields applicable to modern legal power. Upon lifting the dominant veil of juridical analysis, the extent to which we live in a social world fuelled by discourses that purposefully perpetuate stereotypical sexual identities as a means of restricting conduct and choice must be recognised. This recognition, in its turn, ought to demand a re-evaluation of the notion of consent to take into account the significance of these impinging social disciplines.

Through the duration of the next two chapters, we will look in more detail at the exact nature of the culturally constructed identity and gendered role that is imposed on the female agent in society. In so doing, we will seek to illustrate the means through which law and legal discourse operate their dynamics of disciplinary power to impose a myth which renders the female agent incapable of giving serious and operative non-consent. By a specific examination of that legal construction within the contexts of rape and enforced foetal therapy, the impossibility of female non-consent will be established and the artificiality of liberal presuppositions regarding unfettered and unconstrained self-determinism will be highlighted.<sup>3</sup>

The arenas of rape and maternal-foetal conflict illustrate these arguments particularly effectively because they invoke issues of control over a very intimate element of female existence, namely access to the body. Furthermore, they also invoke concern regarding the interplay between power and property concerns. Developing from an historical origin where the wrong of rape lay in its deprivation of the husband's or father's property rights in the victim, the modern legal approach to rape prosecution exhibits traces of a concern to treat

women as progeny by curtailing their actions to protect property interests. Similarly in the maternal-foetal conflict situation, legal concerns interact with a debatable ethical concern to protect perceived property interests in the foetus, thus providing a mechanism for the curtailment of maternal autonomy where it is felt necessary to ensure the birth of a healthy child.

Both contexts provide a particularly apt demonstration of the part which legal discourse has played in the on-going struggle for ultimate bio-power that Foucault proposes is characteristic of the interplay of power dynamics within modern, disciplinary society. Operating their disciplinary power networks increasingly insidiously within the intimate confines of individual life, normative social conceptions of appropriate gendered conduct (whether within the role of lover or mother) have been incorporated into legal discourse and legal practice. Masked behind the façade of legitimacy conferred upon the 'objective, rational knowledge' of the legal realm, these inherently inegalitarian and artificial constructions have remained unchallenged by mainstream legal critique. The purpose of the critique lodged within the confines of this chapter, and the one which follows, is to draw attention to the existence of such identity politics and to begin to illustrate the highly debilitating and prejudicial effect which these normative conceptions have upon the freedom and credibility assigned to agents who fail to conform to appropriate standards.

### *Sexual Stereotyping and Cultural Inscriptions of Female Sexuality*

"Rape trials can be seen as a barometer of ideologies of sexual difference, of male dominance and female inferiority. Rape can be seen as a metaphor for women's right to self-determination, their right to say 'no', whether in regard to giving birth, having sex, or making other choices."<sup>4</sup>

Feminist authors have commonly expressed fundamental dissatisfaction with judicial attitudes to rape and more radical feminist critics, such as Catharine

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<sup>3</sup>Radical feminist expression of similar concerns can be found, for example in Dworkin, A. *Pornography - Men Possessing Women*, (1981) Women's Press, p.205

<sup>4</sup> Lees, S. *Carnal Knowledge - Rape on Trial* (1996) Hamish Hamilton

MacKinnon, have gone so far as to allege that the legal treatment afforded to the victim of rape serves as categorical evidence of systematic male bias. In analysing trends within rape prosecutions, it has become apparent that a person who presents herself as a victim of a rape will commonly be forced to undergo meticulously detailed questioning on various intimate matters, including her sexual life. Many feminist commentators have suggested that this inquisitorial format finds its roots in a culture that is not only highly sexist but is also highly suspicious of female sexuality *per se*.<sup>5</sup> For them, the entire trial process simply adds a further level of 'secondary victimisation' to the injury because in undergoing the courtroom experience, the victim is required to relive the original violation in public view. At each stage of the investigative and judicial process, the woman is the subject of procedures over which she has no control and this provides an experiential reaffirmation of the feelings of powerlessness experienced by the victim in the initial assault.<sup>6</sup>

On reporting the offence, empirical evidence suggests that the rape victim's statements are significantly more likely to be questioned and challenged than are the statements of the victims of any other crime<sup>7</sup>. In the unlikely event that the case proceeds to a full court hearing, Mossman's critique of the adversarial court structure clearly illustrates its failure to furnish the complainant with the opportunity to tell her story in her own way. Rather she is forced to give a legally scripted account of the events, in the restrictive format of answers to the questions directed at her by counsel<sup>8</sup>. Frequently, the focus of court attention becomes the victim rather than the assailant, yet the complainant remains without legal representation. In fact, recent figures suggest that in approximately two-thirds of rape cases that proceed to trial, the victim has not

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<sup>5</sup> Brown, B., Burman, M. & Jamieson, L. *Sex Crimes on Trial*, Supra. Preface, Note 12, p.16

<sup>6</sup> Brown, B., Burman, M. & Jamieson, L. *Sex Crimes on Trial*, Supra. Preface, Note 12, p.17

Allison, J. & Wrightsman, L. *Rape – The Misunderstood Crime* (1993) SAGE

<sup>7</sup> Chambers, G. and Millar, A. "Investigating Sexual Assault" (1983) HMSO, Scottish Office Central Research Unit Study, Edinburgh

Chambers, G. and Millar, A. "Prosecuting Sexual Assault" (1986) HMSO, Scottish Office Central Research Unit Study, Edinburgh

<sup>8</sup> Mossman, M. "Feminist Legal Method - the Difference It Makes", Supra. Chapter One, Note 12

even been introduced to the Prosecution Advocate or Barrister before entering the courtroom.<sup>9</sup>

Standards used in rape laws and trial procedures tend to exemplify an orientation that makes the victim's behaviour, and not the defendant's, the subject of evaluation. Women are, and have been, conditioned to distinguish between rape and experiences of sexual violation on the basis of the propriety of their own conduct. What's more, this is a presumptive distinction that the legal system has actively encouraged and perpetuated by its continued admission of evidence regarding the previous sexual history of the complainant. Admission of this evidence has been premised upon the pervasive moralistic standpoint which divides women through the social obsession with what Edwards has called 'the virginity requirement' into dichotomous categories of madonnas and whores.<sup>10</sup> Given the discussion in Chapter One of the restrictive social mores that have historically been imposed on feminine conduct and the patent unease with which society continues to deal with operative female sexuality, it becomes easy to conceive of situations where non-conformist behaviour could be construed as sufficient to render the victim unworthy of legal protection. Incorporation of normative expectations regarding the proper role of the feminine within the disciplinary operation of legal power has perpetuated an expectation within the deliberation of the rape trial that women who fail to conform with its demands of passivity and submissiveness, for example by dressing provocatively or flirting with the assailant, cannot legitimately expect to incite the sympathy of the court.

It was a similar assumption which informed the Victorian presupposition that abandonment of the prevailing social mores of female conduct, which required docility and complicity, represented a manifestation of mental illness, to be treated only by incarceration of the unruly female agent, or by removal of her genitalia.<sup>11</sup> While it may have been hoped that such restrictive social ideology

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<sup>9</sup> 'Dispatches' Documentary – Thursday 16<sup>th</sup> March 2000, Channel 4.

<sup>10</sup> Edwards, S. *Female Sexuality and the Law* (1981) Supra. Chapter One, Note 46

<sup>11</sup> See previous discussion in Chapter One – 'Discourses of Female Embodiment'

would have long-since fallen into desuetude, it seems that modern manifestations of the same social imperatives continue to inform the normative institutions of modern society.

Research conducted by Brown, Burman and Jamieson in *Sex Crimes on Trial*<sup>12</sup> into the prosecution of rape trials within the Scottish criminal justice system found that a majority of legal professionals still consider evidence in relation to a recent history of sexually interested or provocative behaviour on the part of the complainer towards the accused (e.g. drinking, dancing together, intimate conversation, cuddling, etc.) to be relevant because it suggests that sexual intercourse could reasonably be construed by the man as a natural conclusion of events.

This remains the case despite superficial attempts at statutory restriction of the admissibility of much of this victim-centred character evidence. Set up to examine issues relating to the admissibility of previous sexual history evidence, the Helibron Committee found that most of such evidence is largely irrelevant. What's more, the committee recognised that courtroom discussion of it was not only traumatic and humiliating for the victim, but also 'inimical to the fair trial of the essential issues'.<sup>13</sup> The Committee (which had jurisdiction only over England and Wales) recommended, on this basis, that admissibility of such evidence should be firmly regulated. The strong position advocated by the Committee, however, was not adopted by subsequent legislative amendments. Instead, s.2 of the 1976 Sexual Offences (Amm) Act was passed which, although it did place a general embargo on the use of sexual history evidence in the courtroom, provided considerable scope for the defence counsel to apply to the court for leave to include such evidence. The statutory provision left the decision regarding admissibility at the mercy of recognised powers of judicial discretion to determine whether exclusion of such evidence would have a prejudicial effect upon the defendant. Hence, it replaced the common law

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<sup>12</sup> Brown, B., Burman, M. & Jamieson, L., *Sex Crimes on Trial*, Supra. Preface, Note 12

discretion of the judiciary in relation to admissibility of evidence with a statutory authority to exercise that discretion on exactly the same grounds.

This legislative provision has been largely ineffective.<sup>14</sup> Research carried out by Adler in *Rape on Trial* subsequent to its introduction in England and Wales suggested that over 75% of applications made under s.2 in rape trials heard at the Old Bailey between 1978-9 were successful on the basis that the evidence was relevant to the issue of consent.<sup>15</sup> What the judges in this study found to be relevant considerations does give scope for concern and seems to contradict fundamentally the original intention of the Helibron Committee - for example, in one case evidence that a complainant aged 17 was no longer a virgin was considered relevant.<sup>16</sup> Adler also found evidence that in many cases, defence counsel simply by-passed s.2 altogether and made references to the complainant's sexual history without troubling to apply to the leave of the court.

Ten years later, legislation with a similar motivation came into effect in Scotland via the Criminal Procedures (Sc) Act 1975, s.141 and s.346.<sup>17</sup> The Scottish legislation did not seek to place an embargo on previous sexual history evidence but rather it laid down specific conditions and procedures for its introduction. An important (and indeed promising) feature of the Scottish legislation was its purported capacity to exclude evidence not only in relation to the complainant's previous sexual history with third parties (as was the limit of the Sexual Offences Act), but also with the accused. The fact that the Scottish legislation poses the threat of such wide exclusion, however, does not necessarily imply any intention to disallow evidence in relation to the accused upon application by defence counsel. The legislation itself allows some broad

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<sup>13</sup> Helibron Committee (Advisory Group on the Law of Rape) HMSO (1975) Cmnd. 6352

<sup>14</sup> Jennifer Temkin notes in her discussion of evidentiary requirements in the Scottish jurisdiction that "the experience in jurisdictions elsewhere mostly suggests that the discretionary method is ineffective in controlling the use of sexual history evidence." : Temkin, J., "Evidence in Sexual Assault Cases – The Scottish Proposal and Alternatives" (1984) 47 *Modern Law Review* 623 @ p. 635

<sup>15</sup> Adler, Z. *Rape on Trial* (1987) Routledge & Kegan Paul

<sup>16</sup> Cited in Temkin's discussion of the Adler report – Temkin, J., *Rape and The Legal Process*, Supra. Preface, Note 12, p. 121

<sup>17</sup> As inserted by the Law Reform (Misc. Prov.)(Sc) Act 1985, s.36



exclusions from its general principles - most importantly, in situations where it would be contrary to the interests of justice to exclude the evidence. In practice, this provides "a significant loophole that acts to entirely defeat the purported purpose of the legislation."<sup>18</sup> The aim of the law reform was to minimise unnecessary investigation of the complainant's sexual life while continuing to admit all the evidence necessary to allow justice to be done. However, the research carried out by Brown, Burman and Jamieson (in relation to the Scottish criminal justice system) mirrors the findings of Adler's English study.<sup>19</sup> Both conclude that the two pieces of legislation fall markedly short of achieving their averred aims - overall, complainants continue to be asked questions about their sexual conduct in about half of jury trials and much of the evidence thus adduced is clearly contrary to the original spirit and aims of the legislation.

In 1997, a two week survey of rape cases appearing before courts in England and Wales was undertaken. Transcripts of the victim's evidence in half of those cases were studied in detail. Despite the legislative requirements established above, the victim was asked direct questions about her previous sexual history in over half of those cases. Furthermore, considerable attention was also focussed by defence counsel on more general aspects of the victim's lifestyle, including any evidence of previous drinking habits, flirtatious behaviour, and even of having undergone prior periods of depression.<sup>20</sup> This latter focus of concern clearly illustrates the centrality of victim-centred character evidence to the construction of a defensive position. In a modern society increasingly characterised by the operation of disciplinary power, the actions of the female agent are increasingly subject to intimate regulation. The inclusion of evidence regarding the victim's general behaviour and character encourages a comparative process whereby the victim will be measured against the stereotypical ideals of feminine conduct. Furthermore, discussion in the preceding chapter regarding the increasingly pervasive role of that discursive

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<sup>18</sup> Field, D. *The Law of Evidence in Scotland* (1988) W. Green & Sons, Edinburgh, p.218

<sup>19</sup> Brown, B., Burman, M. & Jamieson, L. *Sex Crimes on Trial*, Supra. Preface, Note 12

<sup>20</sup> 'Dispatches' Documentary, Supra. Chapter Two, Note 9

ideal of femininity suggests an increased potential for the introduction of this more general victim-centred character evidence in future prosecutions.

Evidence of previous sexual contact both with the accused and with third parties continues to be regarded as relevant to the issue of consent by a majority of legal professionals who argue that because a complainant has previously consented to sexual relations, it becomes more likely that they have consented to sex on the occasion in question.<sup>21</sup> This assumption has received tacit support from the judiciary despite having met with stark condemnation from critics who allege that it gives credence to the rationally unfounded premise that a woman who has had previous sexual relations thereby gives up the right to refuse her consent to sexual relations with other men, or even with the same man on a different occasion. In a recent report published by the Home Office on the investigation and prosecution of rape in the 1990s, one judge expressed the tenaciousness of this judicial attitude in his statement in regard to the relevance of previous sexual history evidence to the issue of consent, that “if you were sitting on the jury and that was the issue – in the back of the car, did she consent or did she not – would you not want to know whether she had slept with the last five men that she went to the dance hall with?”<sup>22</sup> This view is wholly dismissive of the subjective reality that consent to intercourse has to be re-negotiated on each and every occasion.

In their work on the controversial subject of date rape, Husak and Thomas have developed a more dilute position that nonetheless shares many of the connotations implicit in this argument. In an article entitled “Date Rape, Social Conventions and Reasonable Mistakes”<sup>23</sup>, they cite psychological courtship rituals whereby women give non-explicit encouragement to the sexual advances of men to establish the existence of social conventions through which women

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<sup>21</sup> Stewart, M., Dobbin, S. & Gatowski, S. “Definitions of Rape: Victims, Police and Prosecutors” (1996) 4 *Feminist Legal Studies* 159

<sup>22</sup> Harris, J. & Grace, S., “A Question of Evidence? Investigating and Prosecuting Rape in the 1990s” (1999) Home Office Research Study 196, p. 40

express agreement to sexual relations. The use of these rituals is considered understandable because of the social pressure placed upon women to be sexually passive. According to Husak and Thomas, therefore, the solution is not to subvert the socialisation of women into passivity, but rather to narrow the focus of law to operation within the dynamics of how behaviour between the genders is currently patterned. This approach, which may superficially appear to present a welcome air of pragmatism into this legal arena, is in reality not only distortive of experience, but is also dangerous. Even if it may be reasonable for a man, observing that a woman's behaviour falls within a certain convention, to believe that she *would* consent to sex, it is not justifiable for him to believe that her behaviour *is* consent since there is no convention to that effect. Furthermore, as Archard<sup>24</sup> points out, Husak and Thomas fail to acknowledge the possibility that men and women may attribute different meanings to the same behaviour. Whether responsibility for this lies with innate socio-biological differentiation between the genders, or with cultural processes of gendered socialisation, psychological research has established that men consistently read behaviour in more sexual terms than women.

Both the implicit logic of the judiciary and legal practitioners, and the explicit arguments of Husak and Thomas, attempt to draw conclusions from alleged operation of general conventions. Inherent in these attempts, however, is an irreducible tension between the generality of conventions and the particularity of each and every sexual interaction. We may be able to accept that general conventions exist which confer implicit meaning upon the behaviour of sexual agents, and that these may even imply the likelihood of ongoing sexual relations where there has been a previous sexual history. However, this far from renders legitimate the reliance of men solely upon their subjective interpretation of such conventions in particular sexual interactions, and legal critique must resist the temptation to legitimate socio-sexual inequality under the guise of arbitrary social convention.

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<sup>23</sup> Husak, D. & Thomas, G. "Date Rape, Social Conventions and Reasonable Mistakes" (1992) 11 *Law and Philosophy* 5-126

Rape requires *mens rea* of what a reasonable man should have understood in the circumstances. The problem with that is that the injury of rape lies in the meaning of the act to the victim, but the standard for its criminality lies in the meaning of the act to the assailant.<sup>25</sup> The legal system's continued cognisance of the ideology advocated by the legal profession with regard to previous sexual history evidence and victim-centred character evidence implies acceptance of the draconian insinuation that if a woman flirts with a man, or otherwise strays from the sexually passive role, she cannot expect to be taken seriously when she refuses consent to intercourse. In her article in the *Oxford Journal of Legal Studies*, McColgan<sup>26</sup> lodges a scathing criticism of the prejudicial effect which introduction of this sort of evidence has on the course of a rape trial. She suggests that where evidence of sexual experience or unfeminine character is allowed into the picture, the image of the 'ideal' rape envisaged by our male-informed legal system is necessarily departed from.

This notion of the 'ideal rape' has met with violent criticism from many feminist advocates, most notably perhaps Susan Estrich. In her book entitled *Real Rape*<sup>27</sup>, Estrich has proposed that this notion posits a highly artificial construction of the real life rape experience. Effectively, it operates to exclude the victim from her right to fair treatment unless she has been 'fortunate' enough to meet the criteria the model demands - namely, that she is a middle-class, respectable, virginal girl, who has been violently raped by a stranger, ideally of a lower-class. This presents a highly artificial representation of the dynamic of the majority of real rapes,<sup>28</sup> yet it is the operative imagery of rape that informs our legal process. Some judicial officials are so heavily influenced by this abstract ideal, for example, that they have suggested that those real rape

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<sup>24</sup> Archard, D. *Sexual Consent* (1998) Westview Press, p.34

<sup>25</sup> Smart, C. *Feminism and The Power of Law*, Supra. Chapter One, Note 10

<sup>26</sup> McColgan, A. "Common Law & The Relevance of Sexual History Evidence" (1996) *Oxford Journal of Legal Studies* 275

<sup>27</sup> Estrich, S. *Real Rape*, Supra. Preface, Note 11

<sup>28</sup> Within the confines Harris, J. & Grace, S., "A Question of Evidence?", Supra. Chapter Two, Note 22, for example, it was found that in 82% of the cases studied there had been some degree of consensual contact between the parties prior to the attack, and in 25% of cases, the complainant had had prior sexual relations with the accused.

experiences that do not conform would best be considered constitutive of a lesser crime. This attitude has been expressed most clearly by one judge,

“I wonder whether the serious type of rape of a stranger....in a public place or whatever at night, should not be a rather separate offence than, if I can put it at the other end of the scale, the misunderstanding between two people who know each other.”<sup>29</sup>

As McColgan has pointed out, introduction of evidence relating to the previous sexual history of the victim promotes a necessary departure from this ideal image. Once this is achieved, a doubt is sewn in the mind of the juror as to whether the experience that the victim describes can properly be defined as rape. In a legal climate that demands proof of guilt beyond a reasonable doubt, the implications of this for the rape victim are significant. The doubt that is sewn does not relate to the defendant's guilt in terms of the actual rape charged (which is in reality the essential point at issue), but rather relates to his guilt in respect of the illusive 'ideal' rape. Nonetheless, the practical implication remains that the complainant is punished for her inability to make her rape conform to this preconceived and highly artificial construction of the 'ideal' rape. The end result is a dramatic reduction in the real chances of conviction. As McColgan surmises :

“Admissions of sexual evidence allow the defence to feed into anachronistic cultural assumptions about women and sex. The focus is shifted from the question of whether the complainant has been raped on this occasion, to the question of whether she is a 'rapeable' woman.”<sup>30</sup>

When the question is rebounded back onto the woman in this way, we are encouraged to make judgements on the propriety of her conduct. This in turn leads us to employ some form of comparison between the particular woman's conduct in the particular circumstances of her experience and the prevailing social mores which, based upon anachronistic assumptions about female identity and female sexuality, embody what is perceived as 'appropriate' female conduct. We are skilfully manoeuvred back into a position, in Foucaultian terms, of deference to the power that facilitates the claims to 'truth' of these

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<sup>29</sup> Harris, J. & Grace, S., “A Question of Evidence?”, *Supra*. Chapter Two, Note 22, p. 35

social stereotypes. As Estrich notes, the legal system's continued belief in the relevance of previous sexual history evidence reflects the law's punitive celebration of female chastity and its unwillingness to protect women who lack its version of virtue. Simultaneously, however, courts have been unwilling to allow similar inquiries into the sexual history of the male defendant precisely because of the prejudicial effect that this may occasion in the minds of the jury!<sup>31</sup>

Throughout social history, our culture has encountered considerable difficulty in dealing with the issue of female sexuality. As has been suggested by Foucault's analysis of the deployment of sexuality by formative discourses of the 18th and 19th centuries, women found engaging in extra-marital sex have historically been considered mentally abnormal and have often been confined to incarceration in a mental institution.<sup>32</sup> The Victorian era's construction of a definite dichotomy between good (i.e. asexual) women and bad (i.e. sexual) women persists today and is, as we have seen, manifested in the continued admissibility of evidence regarding the victim's previous sexual history. Women who are 'good' and who conform to the demands which society makes upon them in terms of their role and identity will be cherished and protected. Conversely, women who are 'bad' and who abandon these shackles, even through exercise of the simplest liberties (such as choosing to accept the offer of a drink from a man) cast themselves out from the protective umbrella of society – deserving what they get because 'they were asking for it'.

This notion that women are somehow 'asking for it' is a paradigmatic manifestation of the general unease that the notion of an operative female sexuality provokes within our social and legal structures. The proposal that women desire to be raped has received prominent psychoanalytical support in the work of Helena Deutsch, who, in 1945, asserted that the essence of

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<sup>30</sup> MacColgan, A. "Common Law & The Relevance of Previous Sexual History Evidence", *Supra*. Chapter Two, Note 25, p.287

<sup>31</sup> Estrich, S. *Real Rape*, *Supra*. Preface, Note 11

femininity included masochism<sup>32</sup>. It is alleged that by a detailed examination of the operation of the female subconscious, a process that has been restricted to within the specific scientific discourse of psychoanalysis, we can discover that women secretly long for the violence and violation of rape. The suggestion that has flowed from this, then, is that we cannot hold the male assailant culpable for fulfilling the subconscious desires of the female, especially given that the central element of the crime of rape is her non-consent.

“The paradox of rape law is that reason is part of the construction of the male speaking subject but in the sexual encounter, that subject is not obliged to be reasonable. The law seeks to establish not whether the defendant believed in the woman’s consent at the level of rational conscious subject but at the level of the unconscious ‘logic of desire’.”<sup>34</sup>

It seems to be of no relevance to this school of thought that, even if we accept this proposal, these masochistic desires operate at a subconscious level and surely cannot act to infer the consent of the female agent when she herself has not given credence to them. Despite this inherent paradox of logic, and despite a vociferous condemnation of the essence of the proposal itself (most of which has been lodged by women, whom one would assume would be the best authorities on the operation of the female subconscious), this notion that women not only invite but also enjoy sexual aggression persists today.

In the context of a rape trial, male sexuality and its satisfaction tend to provide their own justification. Being a sexual predator is regarded as a norm for men. Pressing women until they submit is a natural pastime and rape trials seem reluctant to allow criticism of this. Rousseau celebrated this in *Politics and the Arts* when he wrote

“to win this silent consent is to make use of all the violence permitted in love. To read it in the eyes, to see it in the ways in spite of the mouth’s denial ... If he then contemplates his happiness, he is not brutal, he is decent.”<sup>35</sup>

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<sup>32</sup> Foucault, M. *The History of Sexuality, Vol. I*, Supra. Chapter One, Note. 3

<sup>33</sup> Deutsch, H. *The Psychology of Women* (1947) Research Books

<sup>34</sup> Duncan, S. “Disrupting the Surface of Order and Innocence – Towards a Theory of Sexuality and the Law”, Supra. Chapter One, Note 1

<sup>35</sup> Rousseau, J. *Politics and the Arts* (1986) (Trans. Bloom) Quoted in Temkin, J. *Rape and the Legal Process*, Supra. Preface, Note 12, p.75

We have already noted in our discussion of modernity's deployment of sexuality (in Chapter One) that it is an intrinsic element of the social perception of sexuality that it is uncontrollably natural. This has given further credence to the identification of the male with the sexual hunter. We have discussed in some depth the system of social conventions that operates to constrain the sexuality of the female, in order to render her sexually complicit. The female agent must either conform to this gendered identity as sexual prey, or present herself as an anomaly to our dominant culture. By choosing the latter option, however, she necessarily excludes herself from the legal protection of her peers and supplants herself firmly in the category of 'bad' women.

Female sexuality, when it cannot be controlled by prevailing techniques of normalisation, becomes a mystery to our heavily disciplined legal culture. This in turn facilitates the survival of the allegation that female sexuality is whimsical. It is alleged that there is no united front of female sexuality because women do not know what they want, not (as logic and history would seem to suggest) because women have not been allowed to have what they want. In direct contradiction, the conceived face of male sexuality is firmly united. The male is predator, and if the male is not predator he is not heterosexual (and by implication not fully male). Man is a sexual animal who knows what he wants, and it is his role to convince woman that she wants the same, whether by the issue of normative codes, by intimidation, or by violence.

Operation of such perceptions in the interplay between male and female sexuality can be illustrated by the extracts of statements of convicted rapists collected by Scully and Marolla in their work entitled *Convicted Rapists Vocabulary of Motive - Excuses and Justifications* which includes comments such as -

"she led me on but wouldn't deliver,...I have a male ego that must be fed."



‘rape is a man’s right. If a woman doesn’t want to give it, the man should take it. Women have no right to say no.’<sup>36</sup>

This suggestion of an illicit male authority to ‘guide’ the female into a better realisation of her own sexual identity has profound effects on the operation of legal judgement in rape cases. The jury must find the accused guilty beyond reasonable doubt, but in a legal process that re-affirms the general conception of women as sexually whimsical, it becomes increasingly impossible for a woman’s account to achieve this level of certainty. Sometimes, the reluctance to label coercive behaviour as criminal takes more visible and alarming forms. In a case involving a brutal sex assault by a guardsman (discussed in Pattullo’s *Judging Women*), for example, Judge Slynne stated that –

“It does not seem to me that the appellant is a criminal in the sense in which that word is frequently used in these courts.... Clearly he is a man who, on the night in question, allowed his enthusiasm for sex to overcome his normal behaviour.”<sup>37</sup>

With this summation and a mild reprimand, the accused was considered appropriately punished for his overzealous sexual pursuit and a line of highly prejudicial and borderline misogynistic judicial precedent was reinforced.

MacCahill, Meyer and Fischman in *The Aftermath of Rape*<sup>38</sup> noted that one of the most striking results of their study of defence counsel arguments in rape trials, was the extent to which stereotypes of what constitutes typical female behaviour were marshalled to discredit the testimony of the complainant. Commonly perceived myths about how women are supposed to act in certain social contexts are brought forward and, once compared unfavourably against the actions of the particular complainant, are used to ‘prove’ that her behaviour under the circumstances should rightly be viewed as suspect.

Sue Lees, in *Carnal Knowledge*, cites the example of the 1993 case of Austen Donnellan. This provides an illustrative example – Donnellan, a student

<sup>36</sup> Scully, D. & Marolla, J. “Convicted Rapists’ Vocabulary of Motive – Excuses and Justifications” (1984) 5 *Social Problems* 530

<sup>37</sup> Pattullo P. *Judging Women* (1983) NCCL, p.19-20

<sup>38</sup> MacCahill, T., Meyer, L. & Fischman, A., *The Aftermath of Rape* (1979) Lexington Books

charged with rape, was acquitted; the victim having testified that she had drunk so much as to have passed out and was barely even aware of the sex to which it was alleged that she had consented. Through the duration of the case, much was made of the fact that earlier in the evening she had behaved in an 'abandoned' way because of her drinking – she had been dancing and kissing the accused. The press gleefully sensationalised the (debatable) police forensic opinion that "from the amount she had drunk – three pints of cider, a vodka, and two drambuie – although her alcohol level would not be enough to induce a coma, drink was an aphrodisiac, and she would have been 'very, very drunk and very, very sexy'".<sup>39</sup> Seeking to justify the relevance of this kind of evidence into the trial deliberation, one police officer has suggested,

"It is a judgement call, these people are sitting in their jury room and they think that some of them are blokes and they have gone out at a night on the town and they have had a few beers and they chatted up a girl and they have made a pass at her and got a brush off, but thought oh my goodness, what would I have done if.....and that is the area where people do think do I really put this nice bloke from the students union into prison for this for rape when, you know they were both drunk as skunks, etc.etc."<sup>40</sup>

Similar stereotypes were marshalled in the famous 'hitch-hiking case' of 1982 where Judge Richards decided, contrary to all principles of criminal law, that the victim's contributory negligence was a relevant factor and accordingly imposed a fine of £2,000 on the perpetrator by way of punishment.<sup>41</sup>

The stereotypes employed in such cases invariably portray women as demure, dependent and passive. These are the 'truths' of women's existence that have been perpetuated by the pervasive epistemological imperatives of the discourses of modernity. They are truths that operate not only to bind women to a painfully restrictive gendered identity, but also to bind the truth of the experience to the highly artificial construction of the 'ideal rape'. The further either agent is placed from conformance to the social imperatives constructing and constraining their conduct, the less likely it becomes that the woman's

<sup>39</sup> Lees, S. *Carnal Knowledge*, Supra. Chapter Two, Note 4, p.81 – *Daily Mail* (19<sup>th</sup> October 1993)

<sup>40</sup> Harris, J. & Grace, S. "A Question of Evidence?", Supra. Chapter Two, Note 22, p. 37

testimony will be credited and that the accused will be found guilty. MacCahill's study concluded that there could be no doubt that use of such stereotypes in the trial proved highly damaging to the complainant's self-confidence, not to mention the effect which perpetuation of such stereotypes holds for all women.<sup>42</sup> By thus promoting the restriction of women's choices and conduct, prevailing legal discourse operates to confine women to conformity with a highly constructed and counter-intuitive gendered role. As Duncan Kennedy has noted in his study into the symbolic significance of 'sexy dressing' and its relationship to the phenomenon of sexual abuse –

"Watching women victims victimised again in the legal process, or just in the media, teaches men and women that redress for sexual abuse is conditional on being, or appearing to be, a 'perfect' victim, and that means conforming to patriarchal norms."<sup>43</sup>

A Scottish Office study conducted in the 1980s by Chamber and Millar<sup>44</sup> found evidence of stereotyped assumptions being employed in the treatment received by rape victims from police departments and agents of the criminal justice system as a whole. Despite the lack of evidence to support any such assumptions, it was generally considered that women, particularly those who are promiscuous, are prone to untruthfulness and to the lodging of false allegations of rape. A 1975 edition of *Police Review* contained advice from a detective sergeant to fellow officers in relation to the treatment to be afforded to complaining victims of rape:

"It should be borne in mind that except in the case of a very young child the offence of rape is extremely unlikely to have been committed against a woman who does not immediately show signs of extreme violence. If a woman walks into a police station and complains of rape with no such signs of violence, she must be closely interrogated. Allow her to make her statement to a police woman and then drive a horse and cart through it. It is always advisable if there is any doubt of the truthfulness of her allegations to call her an outright liar..."<sup>45</sup>

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<sup>41</sup> Report and Comment in *The Times* January 6,7,8,11,& 12 (1982)

<sup>42</sup> MacCahill, T., Meyer, L. & Fischman, A. *The Aftermath of Rape*, Supra. Chapter Two, Note 38

<sup>43</sup> Kennedy, D., *Sexy Dressing, etc. – Essays on the Power and Politics of Cultural Identity* (1993) Harvard Uni. Press, p.153-4

<sup>44</sup> Chambers, G. and Millar, A. "Investigating Sexual Assault" (1983) HMSO, Supra. Chapter Two, Note 7

<sup>45</sup> Firth, A. *Interrogation*, *Police Review* (28<sup>th</sup> November 1975)

Despite the issuing of a Home Office circular in 1986 that encouraged the police to adopt a more sympathetic approach when dealing with rape complainants,<sup>46</sup> the Home Office research study into attitudes towards rape in the 1990s indicates that police attitudes often tend to display similar presuppositions. This study cites research conducted by Jennifer Temkin in both 1997 and 1999, the results of which indicate that, "old police practices and attitudes, widely assumed to have vanished, are still in evidence and continue to cause victims pain and trauma."<sup>47</sup> Furthermore, Temkin also noted that although police guidelines provide a framework for a system of care for victims, in practice they are not always followed. Indeed, as has been suggested, disbelieving stereotypical attitudes persist about women who report rape.<sup>48</sup> It is no accident therefore that rape complainants do not benefit from the same presumption of truthfulness that is afforded to the witnesses and victims of all other crimes<sup>49</sup>. As Deborah Rhode concluded in *Justice and Gender*, "the threat of criminal charges based on female fabrications has dominated the history of rape law"<sup>50</sup> despite an absolute lack of empirical data to support such assumptions.

It seems, furthermore, that this unfounded suspicion of female honesty runs not only through the police department with whom the rape victim has initial contact, but also through the entire criminal justice system. Only a small percentage of women who report having been raped to local Rape Crisis Centres report their charges to the police, largely due to fear of a cynical and overbearing justice system. Of the minority of cases that are reported to the police, the Chambers and Millar study found that a large percentage of them are not processed. Of the dwindling percentage that are processed, what's more, the

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<sup>46</sup> Home Office Circular 69 / 1986

<sup>47</sup> Temkin, J. "Plus ça change : Reporting Rape in the 1990s" (1997) 37(4) *British Journal of Criminology* 507, p. 527

<sup>48</sup> Temkin, J. "Reporting Rape in London – A Qualitative Study" (1999) *Howard Journal of Criminal Justice*, February 1999. Discussed in Harris, J. & Grace, S., "A Question of Evidence?", *Supra*. Chapter Two, Note 22, p. 61

<sup>49</sup> To illustrate this point, let us use a different model - the essence of the crime of rape is consent. Similarly, the essence of the crime of theft is also consent. However, the man who reports the theft of his car to the police is not automatically treated with suspicion and is not required to undergo gruelling cross-examination to establish that he did not in some way, intentionally or inadvertently, imply that another person could take his car, simply say by driving it along the road in the accused's presence!

prosecution rate remains low - within the confines of the study, it was established that the Procurator Fiscal decided not to initiate proceedings in 30% of the cases reported to him by the police with a view to prosecution. This stands at a far higher no-proceedings rate than research has revealed for other crimes of violence in Scotland.<sup>51</sup> Often the attitudes displayed by legal officials offer implicit support for the assumptions that perpetuate this unsatisfactory position. Within the confines of the study conducted by Harris and Grace, for example, this attitude was illustrated in the suggestion made by one barrister that it is even more likely that those rape cases that do make it to trial are the ones premised upon false allegations because the more genuine complainant would most likely have already withdrawn her charge because of the traumatic nature of any ensuing trial.<sup>52</sup>

It may be hoped that since the publication of the Chambers and Millar study, which identified these figures, that the Scottish record for prosecution of sexual assault cases may have improved. Lamentably, this has not been the case. In fact figures suggest that the situation has only worsened over the past decade. Despite a marked increase in the number of reported cases of rape and serious sexual assault, from 1,322 in 1987 to 1,979 in 1997, and despite reports from police departments confirming named suspect being sent to the Procurator Fiscal in approximately two-thirds of those cases, the number of people being prosecuted for these crimes in Scotland has actually fallen over the same period. What's more, the number of convictions secured in the percentage of cases that make it to the courts has fallen still lower - from 173 in 1987 to only 135 in 1997. Where in the 1980s Chambers and Millar were highly critical of a prosecution rate of only 13%, the current prosecution rate in Scotland for crimes of rape and sexual assault stands at the significantly reduced level of only 6.8%. Meanwhile, the proportion of people successfully convicted in Scotland for

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<sup>50</sup> Rhode, D. *Justice and Gender* (1989) Cambridge University Press

<sup>51</sup> Chambers, G. & Millar, A. "Investigating Sexual Assault" *Supra*. Chapter Two, Note 7, p.10

<sup>52</sup> Harris, J. & Grace, S. "A Question of Evidence?", *Supra*. Chapter Two, Note 22, p. 36

other serious non-sexual assault stands three times as high, with 19.2% of all recorded cases in 1997 being successfully prosecuted.<sup>53</sup>

Furthermore, this trend has also been borne out by developments in England and Wales. Despite a three-fold increase in the number of cases of rape being reported to police departments within this jurisdiction over the past decade, the proportion of recorded rapes that result in a defendant being convicted for rape has fallen dramatically. Where the conviction rate for rape in England and Wales stood at 24 % in 1985, this figure has now dropped to an almost unprecedented low of 9% in 1997.<sup>54</sup>

Much of the discriminatory treatment encountered by the victims of rape can be explained (although not justified) by the prevalent stereotypes that infiltrate every day practice within society. As Carol Smart has suggested:

“the rape trial distils and epitomises all of the problems that feminists have identified in relation to law...The rape trial is a quintessential moment in which law provides a specific meaning to women’s bodies, reproducing cultural beliefs about female sexuality, but also constructing its own legal lexion of the female body and rehearsing its own very powerful mode of disqualification.”<sup>55</sup>

Attitudes of the judiciary and the legislature have been framed by the fear that women, who have in a moment of passion given in to their underlying sexual desires, can all too easily express regret the morning after by screaming rape. Through the pervasive deployment of sexuality within modern, disciplinary society, women’s sexuality has become constructed as something separate from the woman herself. Women are viewed as having charge of something that is of far greater value to men than to themselves.<sup>56</sup>

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<sup>53</sup> Figures taken from a report in *The Scotsman Newspaper* : Wednesday 17<sup>th</sup> February 1999. This trend has been borne out also by figures in England and Wales where a similar 6% conviction rate for rape cases has been identified despite a marked increase in the number of reported cases (Approximately 7,000 in 1998/9) – ‘Dispatches’ Documentary, Supra. Chapter Two, Note 9.

<sup>54</sup> Harris, J. & Grace, S., “A Question of Evidence?”, Supra. Chapter Two, Note 22, p. 43

<sup>55</sup> Smart, C. “Penetrating Women’s Bodies - The Problem of Law and Medical Technology” in Abbott & Wallace(ed.) *Gender, Power and Sexuality*, Supra. Chapter One, Note 45, p.162

The premise which underlies the rape trial is a premise which underlies the general social confusion over the existence and exercise of an operative female sexuality, namely that it is mysterious and whimsical, that a woman does not know what she wants, and that even when she says 'no', she probably means 'yes'. This is an assumption that has been heavily informed by 'knowledge' constituted within the field of medical discourse. It has subsequently been translated into legal doctrine as part of the general trend of inter-dependency between legal and medical discourse that was noted in Chapter One. As Edwards has suggested,

"Within medical jurisprudence, the construction of the crime of rape and the perception of the rape complainant echo the assumptions of femininity found within the paradigms of medicine, gynaecology and psychoanalysis."<sup>57</sup>

Medical, legal and psychoanalytical discourse have perpetuated the assumption that we should treat with scepticism all that a woman says in relation to sexual matters. Paradoxically, however, and despite this apparent scepticism over a woman's ability to exercise meaningful self-determination over the confines of her own body, it remains the case that the women's consent or non-consent is the fundamental definitional factor of the crime of rape.

There is nothing unique in affording such centrality to the concept of consent in the rape trial. Indeed consent, as a legal and moral concept, is often heralded as of primary importance and non-consent is certainly a definitional requirement of many crimes (e.g. theft, assault, etc.). In fact it has been suggested that,

"No idea testifies more powerfully to individuals as a source of value than the principle of consent...The existence of a doctrine of consent testifies, therefore, to the existence of personal rights....A culture that recognises personhood, where individuals are distinct entities, must recognise...consent as it bears on the institutions of property and sexual access. Without the distinction between mine and thine, the notion of a person has little meaning."<sup>58</sup>

What makes consent such a controversial notion in the field of rape law, however, is the manner in which the judiciary have traditionally constructed and

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<sup>56</sup> Holloway, W. "Heterosexual Sex's Power and Desire for the Other" in Cartledge, S. & Ryan, J. (ed.) *Sex and Love* (1984) Women's Press

<sup>57</sup> Edwards, S., *Female Sexuality and the Law*, Supra. Chapter One, Note 46, p.120

interpreted the non-consent requirement. As Whitford has alluded to in her discussion of the works of Luce Irigaray,<sup>59</sup> the corporeal reality of the male subject is a closed one, while by contrast women's sexual bodies are precariously open (in sex and in childbirth). Thus the crucial question for women becomes one of territory, and of whether a visitor is a welcome guest or an intruder. This evolves centrally around the notion of consent and illustrates the epistemological importance that women afford to having a right of meaningful consent.

### *Consent as a Threshold in Heterosexual Relations*

Edwards in *Female Sexuality and the Law* has noted that,

“The most productive way of examining sex laws is to observe the principal criteria behind the system of classification. The criterion of consent appears as the key factor, and results in a major division between activities that are illegal although the parties consent (for example homosexual sado-masochistic practices) and activities that are illegal where the parties do not consent (e.g. rape)”<sup>60</sup>

Recent figures suggest that the number of reported rapes by acquaintances and intimates has substantially increased, such that this circumstance now dominates the majority of instances brought to police attention. Within the confines of the 1999 Home Office study, for example, of the nearly 500 cases examined, only 12% of cases related to stranger rapes and the remainder were almost equally divided between rapes perpetrated by acquaintances of the victim or persons of a more intimate relationship.<sup>61</sup> The implications of this upon the process of the rape prosecution are such that the issue of consent has now become the most crucial factor in the determination of guilt or innocence.

In the context of rape cases, this determination of guilt or innocence is therefore dependent on the outcome of another pair of binaries being established, i.e.

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<sup>58</sup>Fletcher, G. *Basic Concepts of Legal Thought*, Supra. Preface, Note 3, p.109-110

<sup>59</sup>Whitford, L. *Luce Irigaray - Philosophy in the Feminine*, Supra. Chapter One, Note 57, p.160

<sup>60</sup>Edwards, S. *Female Sexuality and the Law*, Supra. Chapter One, Note 46. Quoted in Jackson, S. *Women's Studies - A Reader* (1993) Harvester Wheatsheaf, p.266

<sup>61</sup>Harris, J. & Grace, S., “A Question of Evidence?”, Supra. Chapter Two, Note 22, p. ix



consent or non-consent. Mossman's article on feminist legal method has illustrated the operation of a legal methodology that supports a rigid system of exclusion of certain information, while simultaneously allowing for the inclusion of other information that may be entirely irrelevant to the victim's experience of the rape.<sup>62</sup> Smart suggests that this legal method combines with the broader notion of a binary system of logic.<sup>63</sup> Cumulatively, these two methodologies collude to prevent what she considers a more complex understanding of the crime of rape. The binary system of logic to which Smart refers is illustrative of the way in which we think in oppositional terms, for example truth / lie, rationality / emotionality, man / woman. These binary opposites are not, however, of equal power – according to Smart, one is always subordinate to the other and the subordinate one is always associated with the female. On this basis, Smart alleges that the consent side of the dichotomy, which is of crucial significance in the rape trial, is associated with the male, while the non-consent side is associated with the female. While the male is able to consent effectively on behalf of the female (via the defence of mistaken belief in consent which we will discuss shortly), it seems that the female is not able even to consent for herself.

Even if we were to establish the invalidity of this allegation of the inequality of the distribution of credit to opposing sides of these dichotomies, the very construction of any kind of consent / non-consent dynamic within the context of the rape experience is problematic. In many situations such a dichotomy may be completely irrelevant to the female experience of rape and sex because it denies the complexity of the victim's position. A woman may agree to a certain level of intimacy but not to intercourse. In the legal model, however, consent to the former is construed as consent to the latter. There is, furthermore, no room for the concept of submission in the dichotomy between consent and non-consent which dominates the rape trial, although submission may be the

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<sup>62</sup> Mossman, M. "Feminist Legal Method – The Difference It Makes", *Supra*. Chapter One, Note 12

<sup>63</sup> Smart, C *Feminism and The Power of Law*, *Supra*. Chapter One, Note 10.

Olsen, F. "Feminism and CLS – An American Perspective" (1990) *18 International Journal of the Sociology of Law* 199

experience which the majority of raped women have endured - for example, in the fear of future violence, they have unwillingly submitted to sex. In legal terms, this falls within the consent side of the dichotomy because the woman has submitted and has failed to establish non-consent.

Some superficial attempt to accommodate the specific situation of submission within the legal treatment of rape was made in the English case of R v Olugboja<sup>64</sup>. In this case, the Court of Appeal judges found that "there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent."<sup>65</sup> The court repudiated the suggestion that consent should be given a narrow definition, pointing to the distinction between consent and submission. The dicta suggests that submission obtained by threats other than of violence might suffice for rape, and it was held that it should be left to the discretion of the jury (with adequate judicial direction) to determine whether or not, on the facts of the case, the woman had truly consented. The superficial concession that this makes is far from as promising as it may initially appear, however. The dicta is authoritative only within the English jurisdiction, and even within those confines, it has met with little success because of the continued reliance upon discretionary judgement which permits conclusions drawn on the basis of sexually stereotypical conceptions of appropriate conduct.<sup>66</sup>

Within the adversarial and dichotomous confines of the legal system, each court finding of innocence implies sexual complicity and subsequent deceit on the part of the victim, which re-affirms the perception of women's sexuality as

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<sup>64</sup> R v Olugboja (1981) 3 All ER 443

<sup>65</sup> (1981) 1 QB (CA) 320, p.332

<sup>66</sup> This is not, however, to suggest that there is no potential for improvement in this model. Similar developments in Victoria, Australia have been considerably more promising. Although not without difficulties, the 1992 Amendment to the Victorian Crimes Act statutory model at least holds the advantage over the English judicial model in that it has codified the relevant conditions of submission for application without strong discretion. A modified version of the Victorian model has been recommended for incorporation throughout Australia in the 1999 Draft Model Code on 'Sexual Offences Against the Person'. It remains to be seen, however, whether this proposal will be accepted as law at the national level.

capricious. Judicial recognition of this perception is far from uncommon.<sup>67</sup>

Patullo in *Judging Women* listed one of the most memorable -

“women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows it and makes it clear. If she doesn’t want it, she only has to keep her legs shut and she couldn’t get it without force.” (Judge Wild 1982)<sup>68</sup>

Although non-consent is a required element in the definition of many crimes, it seems that rape is unique in that court decisions have traditionally made it clear that in order to establish that she did not consent, a female rape victim must demonstrate that she actively resisted the alleged crime. A system of law which has traditionally treated women as passive and powerless in matters ranging from property ownership to voting, nonetheless demands that in intimate matters of sexual relations, women be strong, aggressive and powerful. In the 1906 US case of Brown v State of Wisconsin<sup>69</sup> it was clearly stated that “not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the women’s power to resist the penetration of the person.” It becomes apparent from dicta of this kind that the legal system has defined resistance in aggressive terms - fighting back with fists, elbows and knees - although this is quite far removed from what it generally considers to be the normal behavioural standards of the reasonable woman. As LeGrand pointed out, it seems that rape is the only crime that requires the victim’s active resistance up to the point of severe injury as an indication of non-consent.<sup>70</sup> Courts have interpreted silence and non-resistance as signs of consent and even in cases where there has been a clearly overwhelming use of force the courts have pursued the issue of consent. In the case of People v Burnham<sup>71</sup> for example, a woman was severely beaten and then forced to have sex with her husband and a dog, but the court still held

<sup>67</sup> Furthermore, such judicial approval is set to strengthen with the advent of cases such as that of Lynn Walker where a man cleared of rape allegations was able to successfully sue the alleged victim for damages of more than £500,000 – “Woman who cried Rape faces £500,000 Libel Bill”, *The Guardian Newspaper*, Tuesday 8<sup>th</sup> February 2000.

<sup>68</sup> Pattullo, *Judging Women*, Supra. Chapter Two, Note 37, p 20-21

<sup>69</sup> Brown v State of Wisconsin (1906) 127 Wis. 193; 106 N.W. 536

<sup>70</sup> LeGrand, “Rape & Rape Laws - Sexism in Society and Law” (1973) 61 *California Law Review* 919

<sup>71</sup> People v Burnham (1986) 222 Cal. Repr. 630

out the possibility of consent, or at least that the defendant might reasonably have thought that she was consenting.

Such has been the traditional definition of the crime of rape, and it is a definition that has persisted in many jurisdictions supported by a rationale which suggests that the female victim who has conformed with the appropriate social demands of sexual chastity can only be raped if they have encountered an overwhelming degree of physical force. As a converse of that premise has been the supporting rationale that those women who do not display such signs of utmost resistance have secretly welcomed the sexual interaction and are, therefore, implicitly unchaste and undeserving of legal protection. As relatively recently as 1984, we can see strong evidence of the persistence of this attitude - in an edition of the Scottish Criminal Police Duties and Procedures Handbook, a guideline is issued that,

“except in cases of a woman who through infirmity is unable to resist, the woman must resist the designs of her assailant to the last. It is not rape if, after offering resistance, she consents to sexual intercourse.”<sup>72</sup>

The current legal definition in England describes rape simply as sexual intercourse that takes place without the woman's consent. Originally, the English definition also relied on the strict interpretation discussed above. However, the 1845 case of Camplin<sup>73</sup> appeared to change the definitional slant adopted by the English jurisdiction. This case established for the first time that rape could take place despite the absence of use or threats of force in circumstances where it was clear that the victim had not consented (in this case, the victim lacked sufficient capacity to consent to any act). This cleared the way for English decisions, such as Mayer (1872)<sup>74</sup> that considered it to be rape to have intercourse with a sleeping woman. Unfortunately, however, this at least superficially more liberal trend has not been adopted by other jurisdictions.

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<sup>72</sup> Compiled by Grampian Police for the Scottish Police Service (1984) Aberdeen, Aberdeen University Press p.17

<sup>73</sup> Camplin (1845) 1 Cox C.C. 220

<sup>74</sup> Mayer (1872) 12 Cox C.C. 311

Most particularly, Scotland and many US states continue to abide by their strict definitional interpretation.

In Scotland the emphasis continues to be placed on the positive presence of a will to be overcome, rather than on the negative absence of consent.<sup>75</sup> In what continues to be the leading Scottish case on rape<sup>76</sup>, it was held that there must be some force involved in rape. This difference of approach explains why in Scotland, unlike in England, sex with a sleeping woman cannot count as rape because her will is in a dormant state. It may also explain, in part, the attitude of the Scottish police illustrated by the Chambers and Millar study. Where non-expression of affirmative consent is construed as positive consent and where only active non-consent is of a sufficient standard, the need for the additional evidentiary weight found in signs of resistance is all the more pressing. Hence, perhaps, the reason why the Scottish prosecution service seem to require such compelling evidence of force before the victim's allegations will be credited.<sup>77</sup> Such speculation aside, in Scotland, it continues to be necessary to prove that the will of the victim was overcome by violence, or by the threat of violence. This stands as a stubborn reminder within the Scottish legal jurisdiction of the thoughts of the influential institutional writer Hume. In Volume I of his *Commentaries*, Hume notes that "the knowledge of the women's person must be against her will *and* by force ... the resistance must be continued to the last, so that it is only by main force and terror that the violation is accomplished."<sup>78</sup>

A similar requirement persists in many US states. Judicial affirmation of this staunch requirement has provoked considerable agitation across Anglo-American culture. Nonetheless, the operative evidentiary requirements in these jurisdictions continue to demand satisfaction both of the fact that the intercourse was without the woman's consent, and that her will was overcome by a considerable level of violence or intimidation.

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<sup>75</sup> Gordon, G. *The Criminal Law of Scotland* (2<sup>nd</sup> Edition) (1978) Greens

<sup>76</sup> *Chas Sweeney* (1858) 3 Irv 109

<sup>77</sup> Brown, B., Burman, M. & Jamieson, L., *Sex Crimes on Trial*, Supra. Preface, Note 12, p. 24

Before we are too complacent, however, of the position under English law, it is worth noting that the apparent change in definitional emphasis post-Camplin may be somewhat deceptive. The legacy of the Camplin decision suggests that the English approach to rape has done away with this requirement of force. However, it seems that many English judges remain unaware of this shift in emphasis - for example LCJ Parker in D.P.P v Morgan<sup>79</sup> stated that

“The crime of rape consists in having unlawful sexual intercourse with a woman without her consent and by force. ‘By force’. Those words mean exactly what they say. It does not mean that there has to be a fight or blows have to be inflicted. It means that there has to be some violence used against the woman to overbear her will or there has to be a threat of violence as a result of which her will is overborne.”

The English legislative guidelines set down by the Sexual Offences (Amendment) Act 1976 do little to clarify the position. This statute expressly states that rape is an offence committed when sexual intercourse takes place without the woman’s consent. However, no definition of non-consent is provided. As Temkin notes –

“The absence of a statutory definition coupled with the dearth of juridical authority on the matter results in a situation in which the parameters of consent are by no means clear. Thus, it is uncertain whether and to what extent consent may be regarded as absent where the defendant uses neither violence nor the threat of it...Some judges favour a narrow and some a broad approach to the meaning of the term.”<sup>80</sup>

It is the judge in the rape trial who exercises control over what the jury takes to be the definitional requirements of the crime. If LCJ Parker’s dicta is representative of the popular opinion of the modern day judiciary, then we should resist the temptation to celebrate the facade of leniency which the Camplin decision suggests, and should aim our critique of the construction of consent in the crime of rape equally as sharply towards the English criminal justice system.

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<sup>78</sup> Hume, D., *Commentaries on the Law of Scotland, Vol. II*, p. 302

<sup>79</sup> DPP v Morgan (1976) AC 186-7

<sup>80</sup> Temkin, J., *Rape and the Legal Process*, Supra. Preface, Note 12, p.63

Consent is recognised as the central pivot of rape trials. It is supposed to embody women's form of control over intercourse, different from but equal to male initiative. Even as an ideal model, however, this is not an equal and mutual terrain. The textbook law of rape, even for cases of what Estrich would call 'ideal rape' is inappropriate because it presents consent as a free exercise of choice under conditions of equal power. This becomes patently inadequate when we recognise that women are socialised into passive receptivity, into a life model of 'submit to survive'. As MacKinnon puts it, "rape law takes women's usual response to coercion – acquiescence, the despairing response to hopelessness, to unequal odds – and calls that consent."<sup>81</sup> Similar forceful sentiment has been reiterated in the critical work of Ngaire Naffine who in 1994 noted that,

"We should observe that rape is a crime whose setting is a society where women are expected to repress their desires, where they are expected to want what a man wants, where woman's sexual wishes are actively (though never completely) suppressed or rendered mysterious or incredible whenever they cease to fit the possessive form."<sup>82</sup>

Alluded to in the foregoing chapter has been the existence of social stereotypes and cultural inscriptions that seek to constrain female sexuality into a precariously open and passive position. Utilising the machinery of explicit and implicit condemnation of women who fail to conform to these sexual norms, modern disciplinary society has perpetuated a regime of normalisation that operates upon docile bodies to produce constructed sexual identities. At the most simplistic level of analysis, these identities are constituted by a polarisation of male and female as between active and passive sexual agents. Even the most egalitarian of rape legislation will therefore remain inadequate because it has of necessity been formulated against a background of legal liberalism which fails to take account of this social constructionism, and of the disparate power relations which it is illustrative of. As MacKinnon has noted in *Towards a Feminist Theory of State*, "the law of rape presents consent as free exercise of sexual choice under conditions of equality of power without

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<sup>81</sup> MacKinnon, C. *Towards a Feminist Theory of State*, Supra. Chapter One, Note 33, p.186

exposing the underlying structure of constraint and disparity.”<sup>83</sup> In a similar fashion, Frazer and Lacey<sup>84</sup> have devoted much attention to criticising this aspect of the liberal legal construction of consent in the rape trial context. They beg the question of whether it is appropriate to disregard background social factors about the power of women to withhold their consent and to communicate effectively that refusal in a culture where men hold power over women in the sexual sphere.

“Not only feminist theorists and activists, but also many practising lawyers are convinced that rape law operates oppressively to rape victims, but without an analysis of the culture which sexualises power and disempowers women, partly through its construction of their sexuality as a paradoxical mixture of the capricious and the passive, political theory cannot begin to transform this area of social practice.”<sup>85</sup>

Historically, the now well-revered notion of consent presented an overtly inegalitarian dynamic – in the nineteenth century, consent was not even superficially conceived of as a matter of the woman’s will, of whether she resisted or not. Rather, it was a matter of how she conducted herself, of how she attempted to make it clear that she was the sexual property of another man (husband or father). This interpretation of consent has laid the foundations for the presumption which remains integrally implicated in the more liberal interpretation afforded to the concept today – namely that if a woman is unchaste, her consent may be implied, even if there is evidence of her resistance. This begs the question of whether the construction of consent in rape is much different today, or have these draconian assumptions simply been elevated from the status of practise to the level of disciplinary doctrine?<sup>86</sup>

MacKinnon has drawn heavily upon this insight into the unequal power distributions that operate to construct the nature of female sexuality at a pre-

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<sup>82</sup> Naffine, N “Possession- Erotic Love in the Law of Rape” (1994) *Modern Law Review*

<sup>83</sup> MacKinnon, C., *Towards a Feminist Theory of State*, Supra. Chapter One, Note 33, p. 175

<sup>84</sup> Frazer, E. & Lacey, N., *The Politics of Community* (1993) Harvester, p.92

<sup>85</sup> Frazer, E. & Lacey, N. *The Politics of Community*, Supra. Chapter Two, Note 84, p. 92

<sup>86</sup> Clark, A. *Men’s Violence; Women’s Silence* (1987) Pandora

Smart, C., *Feminsim and The Power of Law*, Supra. Chapter One, Note. 10, p. 41



legal level. In line with her overall radical position, MacKinnon puts this concern in its most dramatic construction -

"Perhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance."<sup>87</sup>

This has become a central assertion of MacKinnon's thesis on rape. She argues that the institution of male dominance within society is so pervasive and so powerful that it has become impossible for women to distinguish the experience of rape from the experience of 'normal' heterosexual intercourse. In the circumstances of the 'normal' heterosexual scenario, she alleges that the man as sexual predator can use whatever level of force and seduction the male-influenced legal system considers acceptable. Until we define rape purely in terms of the victim's violation, MacKinnon concludes that all heterosexual sex will remain indistinguishable from rape.

This is a radical standpoint with which many feminists would not seek too much affiliation. While there is considerable rhetorical and indeed at some level ideological value in making this assertion, many feminists remain sceptical of the propriety of equating all heterosexual sex with rape. While it is generally conceded that the two acts lie at different points on the same continuum, and to that extent may well bear many unfortunate resemblances, this assertion remains far removed from legitimating the proposal that we conflate the two acts<sup>88</sup>. MacKinnon's assertion presents far too deterministic a view of male-female relations. What's more, it is difficult to see how equating rape with heterosexual sex can do anything other than belittle the experiences both of the rape victim (by making her violation 'ordinary') and the voluntarily heterosexual sexual agent (by making her sexual relations into a rape attack).

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<sup>87</sup>MacKinnon, C. "Feminism, Marxism. Method and The State", Supra. Chapter One, Note. 63, p.647

<sup>88</sup>In my opinion, a better assertion of the relationship has been afforded by Kelly in *Surviving Sexual Violence* (1988) Polity where she suggests that the construction of male sexuality as dominant and active, alongside the objectification of women as the subject of male desire and the belief that men have rights of sexual access to certain groups of women, all contribute to a social order within which rape and sexual assault are endemic. This remains, however, a far cry from suggesting that rape and all heterosexual intercourse are indistinguishable

MacKinnon becomes as guilty as her patriarchal protagonists of prioritising the experience of some over those of others. While MacKinnon's patriarchites privilege the experience and testimony of men over women, MacKinnon's analysis becomes equally distortive through the privilege she affords to female experience and testimony of violation, at the deliberate expense of women's testimonies of loving and fulfilling heterosexual relationships. The point against MacKinnon's radical assertions is well assessed by Archard –

“Consent does have a meaning for women. They can and do consent to heterosexual relationships with men. That does not mean that men and women always understand consent to these relationships in the same ways, or that women are immune from various pressures to constrain and regulate these relationships, or that such constraints operate to the prejudice of women and to the benefit of men, or that the existence of such constraints cannot be explained in terms of a disparity of power between men and women, or that heterosexuality is or should be the only possible sexual choice for women, individually and as a gender. However, to understand these qualifications in a way that denies that women ever do validly consent to sex with men is mistaken. It also ironically represents a refusal to take seriously what women themselves take seriously : their own giving and withholding of consent.”<sup>89</sup>

Although much of the faith that Archard places in the inherent value and legitimacy of the concept of consent may be misplaced (for reasons that will be discussed in more detail in later chapters), there is considerable merit in his critique of MacKinnon's essentialist stance on this issue. Perhaps most significant and most debilitating of all is the tendency within MacKinnon's thesis to presuppose that it is only the construction of female sexuality into passivity which is problematic. As is often the case with traditionally radical feminist theories (such as those advocated by MacKinnon) this critique fails to appreciate the more complex and dialectical dynamics of construction that operate to constrain not only female sexuality, but also male sexuality. The debt which feminism owes to Foucault (as we have seen) lies in his revelation that the power to construct the meanings and requirements of social normativity does not divide simplistically along gender lines, and does not lie exclusively in the hands of the omnipotent male aggressor. Rather, our sexuality as human social agents is constructed regardless of gender, although the demands of that

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<sup>89</sup> Archard, D., *Sexual Consent*, Supra. Chapter Two, Note 24, p.97

construction do vary along gendered lines. This is not to imply, however, that the construction of male sexuality as aggressive and virile is any less alienating for the male heterosexual agent than is the construction of female sexuality as passive and subordinate for the female agent.

MacKinnon's rhetorical synthesis of rape with heterosexual intercourse is problematic at several levels, politically, ideologically and epistemologically. Contemporary feminist analysis has increasingly recognised, however, that we do not need to make this controversial assertion to sympathise with the point that MacKinnon makes in relation to the difficulties of constructing a meaningful notion of consent against the background of prevalent sexual stereotyping and normalisation in society.<sup>90</sup>

The dynamics of consent even in instances of what Estrich has called 'ideal rape' remain fundamentally misunderstood by the law.<sup>91</sup> The assumption underlying the current liberal legal stance is informed by a belief in an inherent equality between gendered social agents. The legal system's continued deference to consent as the appropriate medium of communication is fuelled by a presumption that men and women are operating that communication from the basis of an equal and mutually respectful terrain. Lamentably, however, this is not the case. Social stereotypes and anachronistic cultural assumptions about the appropriate conduct of gendered social agents (male and female) inform our subjectivities and render us subservient to the demands made by such identity politics. Hence, men are pressured into the role of sexual hunter, while women are encouraged to perform the role of sexual prey. This hardly represents the climate of mutual equality, dignity and respect that the liberal legal model seems to presuppose.

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<sup>90</sup> West, R. "Legitimizing the Illegitimate – A Comment on Beyond Rape" (1993) *Columbia Law Review* 1442

West, R. "A Comment on Consent, Sex and Rape" (1996) *2 Legal Theory* 233

<sup>91</sup> Estrich, S. *Real Rape*, Supra Preface, Note 11

This situation is sufficiently problematic in itself. However, in the circumstances of 'real rape', the issues become even more complex. When the social agents involved (particularly the woman, it seems) digress from the socially prescribed normative sexual categories and behaviours, or when the experience of real rape departs from the conceptualised model of 'ideal rape' the ability of the agents to give or refuse meaningful consent becomes yet more illusive. It becomes clear that only certain women (those who have conformed to normative gendered identities) have retained the right to exercise consent or non-consent. Admission of previous sexual history evidence in relation to the victim permits the legal arena's incorporation of stereotypical assumptions that in turn operate to invalidate the rights of certain social agents to the untrammelled protection of the law. What's more, the increasing modern trend, identified in the previous section, which involves the admission of more general victim-centred character evidence into the rape prosecution presents a more deeply ingrained version of the effects of previous sexual history evidence. Encouraging a reminiscent concern to compare the conduct of the particular woman with the dictates of the normative ideal of passive, chaste, submissive femininity, the increasing reliance of defence counsel upon more general aspects of the victim's conduct and lifestyle permit a more intimate regime of discipline that leads jurors to question her entitlement to the protection of the law on the basis of various 'improper' lifestyle choices.

Cumulatively, incorporation of both forms of evidence in cases that fail to meet the abstract standards of the 'ideal' rape permits continued marshalling of stereotypical female social behaviour to discredit the complainant who has drunk alone, walked alone, dressed provocatively, etc. The effects of such incorporation, as we have seen, are primarily located in reducing the credibility of the 'real' victim and reducing the likelihood of redress against a sexual violation that the jury are encouraged to perceive as invited and therefore consensual. In a recent survey of leading barristers, Jennifer Temkin discovered that amongst the most commonly relied upon defence strategies was the introduction of the charge that the victim somehow brought the attack upon

herself through her non-conformist behaviour. Such arguments imply to the jury that even if the victim did not actually give her consent to the sexual act, she is nonetheless to blame for its having occurred and therefore should not be afforded the protection of rape legislation.<sup>92</sup>

Adding credibility to the process of disqualification encouraged by this incorporation of previous sexual history and victim-centred character evidence is the manner in which the judiciary have construed the requisite *mens rea* of the crime of rape. This issue was dealt with head-on by the House of Lords in the case of D.P.P. v Morgan<sup>93</sup> where effectively it was established that the law on rape punishes those with a mental attitude of recklessness, but not of negligence. The circumstances of this case were as follows - Morgan had invited three strangers to have sex with his wife, whom he told them was a little 'kinky' and may appear to struggle in order to become aroused. Based on this information, the three claimed a defence to the charge of rape on the grounds that they believed that Mrs. Morgan was in fact consenting. The trial judge at first instance directed the jury that (as is the case with the determination of *mens rea* in all other crimes) unless the belief was based on reasonable objective grounds, it could not constitute a defence to the charge. On appeal to the House of Lords, however, this decision was overturned and it was held that there can be no conviction for rape in cases where the accused honestly believed that the woman was consenting, regardless of whether that belief is based on reasonable grounds or not. This decision did receive heavy criticism, however the Helibron Committee, which was subsequently set up to review the decision, concluded that it was correct in principle and the sentiment behind the decision has now been given statutory authority in England and Wales via the Sexual Offences Bill introduced in 1976. Similar sentiment has also been echoed in the Scottish courts where the 1982 case of HMA v Meek<sup>94</sup> adopted a similar test of subjective belief of consent.

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<sup>92</sup> Interview with Professor Temkin, 'Dispatches' Documentary, Supra. Chapter Two, Note 9

Feminist commentators have been vociferous in their condemnation of this approach - MacKinnon among others have alleged that,

“In conceiving a cognizable injury from the viewpoint of the rapist the rape law affirmatively rewards men with acquittals for not comprehending women’s point of view on sexual encounters.”<sup>93</sup>

Nonetheless, the defence of mistaken belief in consent remains a cornerstone of the current law on rape. In effect this presents a spectacular anomaly within the legal system - the male agent is given authority to consent to sexual intercourse not only on behalf of himself, but also on behalf of the victim. If the assailant believes that the victim is consenting, and if the assailant believes that the experience is one of sex and not rape, then the court will believe that the woman was consenting and that her experience was one of sex and not rape. This unshakeable conviction will remain intact regardless of her insistence that this fundamentally misconstrues her own subjective interpretation of the experience. The woman’s experience is denied a voice and is supplanted by the male impression of her experience, as it is re-enforced by the ‘truth’ of legal discourse. Even in circumstances where the agents involved have fulfilled the draconian requirements of normative social stereotypes, and the disciplinary power networks they represent, it seems that the male agent still holds the final and authoritative judgement. If he considers that the victim was consenting, then regardless of the rational founding, or otherwise, of that belief the law will accept and credit the belief of the perpetrator over the protestations of the victim.

The law’s construction of consent in the context of the rape trial has met with heavy criticism from several camps. One of the most recurrent themes is embodied in the claim that if the law is truly concerned with protecting the autonomous rights of women, it should drop this persistent requirement for resistance in a far more successful way than the relatively meagre attempts made by the English system. If we are to take women seriously as powerful agents of

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<sup>93</sup> *DPP v Morgan* (1976) AC 182

<sup>94</sup> *Meek & Others v HMA* (1982) SCCR 6143; (1983) SLT 280

<sup>95</sup> MacKinnon, C., *Towards a Feminist Theory of State*, Supra. Chapter One, Note 33

themselves, capable of meaningful exercise of self-determination, we must free the law from the shackles of sexual stereotyping and we must recognise a verbal protestation on the part of the woman as a sufficient condition for non-consent. MacGregor's article entitled "Why When She Says No She Doesn't Mean Maybe And Doesn't Mean Yes"<sup>96</sup> lodges scathing criticism of the current standards employed in the legal construction of consent. She suggests that the standards of what constitutes consent in the current criminal sex codes are so weak that they undermine the moral legitimacy of the consent requirement in general.

In seeking an improved standard for the formulation and application of the consent threshold in rape trials, or in at least seeking an improved justificatory framework for their current construction, Malm illustrates that the concept of consent can be defined in several ways. For the purposes of his discussion in "The Ontological Status of Consent and Its Implications for the Law on Rape"<sup>97</sup>, he considers it as the signification of a particular mental state, rather than as the mental state itself. This simple definitional readjustment serves to remedy many of the problems that feminists have encountered in the rape context. Carol Smart has been highly critical of the law's dependence on the construction of binary opposites and of categorical determinants because of a concern that the psychological state of women that lies behind the issue of consent is, of necessity, submerged in emotion and ambiguity. The merit of Malm's approach is that it allows us to appreciate that the mental state associated with consent may well manifest itself in degrees, but consent itself does not. Unfortunately, it remains questionable how adoption of this definition of consent can help in the situation of submission. We have noted the difficulty of distinguishing rape from heterosexual sex within the rigours of our currently inegalitarian social system - if women have been socialised to 'submit to survive' then surely we cannot in all conscience consider such submission as an exercise of valid consent. Nonetheless, it seems that such submission would adequately fulfil

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<sup>96</sup> MacGregor, J. "Why When she says No she Doesn't mean Maybe and Doesn't mean Yes" (1996) 2 *Legal Theory* 175

Malm's criteria because it would constitute an exercise of signification of a mental state that permits sex.

Let us assume, however, that Malm seeks only to address the more superficial problems with the current construction of consent. As a more simplistic device, this approach to consent does seem to hold some attraction, although it does leave us to grapple independently with the issue of the moral acceptability of the mental state for which the exercise of consent provides a vehicle of communication. In all but a few jurisdictions, the consent necessary to avoid a charge of rape is defined in the negative. In other words, the woman is presumed to have consented unless she has provided clear expression of dissent. This has long since been the premise of legal precedent on rape, and one would therefore assume that this formulation of a negative definition of consent in rape law must be supported by a particularly persuasive defence of its usefulness or necessity. Malm's article gives a detailed examination of potential candidates for this defence, such as those relying on arguments about the 'everydayness' of sex or the 'everydayness' of control over one's own body, thereby implying that the context of rape must be set apart from this as an exception to the general presumption of consent. None of these arguments seem to be satisfactory, however. According to Malm, negative definitions make sense as a starting point only if the thing in question and the proposed opposite are actually mutually exclusive and if the proposed opposite is easier to observe than the thing in question. In the context of consent, however, this is clearly not the case because it is possible to neither actively consent nor to actively dissent and the signs of active consent are as observable as the signs of active dissent. The conclusion that Malm reaches entails a fundamental reversal of the current construction of consent such that it is premised on the assumption that the woman has not consented and then demands proof (whether verbal or otherwise) that she has consented, or has in some way led the man to reasonably believe that she was consenting.

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<sup>97</sup> Malm, H. "The Ontological Status of Consent and Its Implications for the Law on Rape" (1996) 2 *Legal Theory* 147



This proposal although obviously a considerable improvement on the current situation still provides some scope for concern in the fact that it leaves it open for our discursively disciplined culture to determine what conduct on the part of the female can be reasonably inferred as constituting consent. This brings us back to the concern that the judiciary will play on pervasive sexual stereotypes to suggest that the woman who drinks on her own, who walks on her own, who goes on dates without accompaniment, who in any way deviates from appropriate feminine conduct, has impliedly consented to sex. Within the current social climate, it is doubtful, therefore, whether this proposal brings us much further forward. Although superficially a revision of the definitional requirements of rape may appear to redress the balance, the more fundamental inadequacy remains intact. This approach is equally guilty of failing to address the background social factors that operate to construct gendered identities and to incorporate social judgements upon individual conduct within the legal arena. Critique of the operation of consent in rape law that fails, like Malm's, to give credence to the deployment of social normativity, and to the influence this bears out upon the legal protection afforded to the particular social agent, will remain inconclusive primarily because of its centrality within the realms of superficial, liberal legal analysis.

The current legal construction of the concept of consent is riddled with inadequacy. The heavy reliance of legal discourse on pervasive disciplinary ideology necessarily results in legal codification of ill-founded sexual stereotypes. Once supported by such convincing institutional mechanisms, these stereotypes become accepted as a natural assertion of sexual identity and become part of the operative social mores on the basis of which we experience our subjective lives. These gendered roles and identities become representative of our subjective 'truths' in the social world. Our conception of self becomes intrinsically connected to the normative fashionings that have been elevated to the status of indisputable truth by the interplay of the legal, medical, psychoanalytical and sexual discourses of modernity. This has profound implications upon the way in which we view ourselves, upon the way in which

we are viewed by others and upon the power which we as individuals have to exercise meaningful control over our own identity and our own subjectivity.

The concept of consent has been heralded as the moral and legal notion that affords us rights of autonomy and self-determination over our bodies, and by implication, our lives. However, by analysis of the construction and operation of consent as a vehicle for communication of rights within the context of the rape trial, we can begin to see the inadequacies of this concept. Consent is not the neutral facilitator of self-determination which legal and moral discourse would purport to suggest. In the context of the rape trial, we have seen that the construction of consent has been heavily influenced by sexual ideology to such an extent that it has become more a mechanism for affording men sexual access to certain 'types' of women than a mechanism for protecting all women against unwanted intrusion. As MacGregor surmises -

"From the moral point of view, concern about personal autonomy and self-determination is represented by guaranteeing agents control over their domain through their power of consent....If consent is inferred from the mere fact of silence or submission through intimidation or implicit threats, then consent does not provide the agent with a significant instrument with which to police his / her boundaries ...Consent standards in rape laws have been a travesty against any serious account of the moral conception of consent."<sup>98</sup>

The shortcomings of this are particularly lamentable in the context of rape law, for as Archard among others have noted, at stake in any sexual encounter is the identification of the individual as an embodied self.<sup>99</sup> Sex is carnal and as incarnated beings, we have a strong interest in regulating and controlling access to our bodies. It is a concern rooted in considerations of self-esteem, integrity and personal dignity, and it is this that makes the failure of consent standards in the rape context all the more damaging. In an arena where it would be hoped that consent would command its strongest level of respect, it seems that the concept has been distorted out of recognition, and all too often out of utility.

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<sup>98</sup>MacGregor, J. "Why When she says No she doesn't mean Maybe and Doesn't mean Yes", *Supra*. Chapter Two, Note 96, p. 191-2

### *Conclusion*

"If sexuality is relational, specifically if it is a power relation of gender, consent is a communication under conditions of inequality. It transpires somewhere between what the woman actually wanted, what she was able to express about what she wanted and what the man comprehended she wanted."<sup>100</sup>

There is more at stake here than the need to review the legal discourse and methodology that surrounds the rape trial. While at a pragmatic level, this is to be welcomed as a step towards a kind of utilitarian improvement upon the lived-out lives of rape victims, there is a more fundamental problem which needs to be addressed within the concept of consent itself. In the preceding paragraphs, the effect of the incorporation of normative expectation into the legal arena of the rape trial has been illustrated. It has been suggested that pervasive social stereotypes operate at the level of individual consciousness within modern, disciplinary society to instigate a regime of normalisation. This regime posits highly artificial and arbitrary constructions of appropriate gendered identities and appropriate sexual conduct upon social agents. In an era of increased pressure for conformance, those who meet these exacting demands (for men, sexual aggression; for women, sexual passivity) are celebrated and protected, while those who fail to conform are condemned. Women who fail to comply with the passive imperative are refused the protection of the law and are effectively denied the right to communicate in a voice of non-consent.<sup>101</sup>

This loss of essential autonomy is in turn justified by continued deference to a system of highly artificial and highly restrictive ideologies and stereotypes that restrict, not only the sexual role of women, but also their social role. As Temkin

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<sup>99</sup> Archard, D. *Sexual Consent*, Supra. Chapter Two, Note 24

<sup>100</sup> MacKinnon, C., *Towards a Feminist Theory of State*, Supra. Chapter One, Note 33, p.182

<sup>101</sup> Similarly, at the other end of the spectrum – men who fail to conform to the social requirement of aggressive heterosexuality are also refused their voice. The decision in *RvBrown* offers forceful illustration of this – the parties involved were denied the ability to express their consent to homosexual sado-masochistic practices. The court considered these practices inhumane and degrading and refused parties involved the option of consensual participation. It seems to be no coincidence that the law is refusing freedom of autonomous sexual expression here to a category of people who fail to conform to prevalent normative sexual demands made upon them.

puts it, "to justify a treatment of women which denies their autonomy, resort has been had to a ragbag of ideas about female and male sexuality, varying from the bogus to the irrelevant, and culled formerly from medicine, and latterly from psychoanalysis."<sup>102</sup> In Foucaultian terms, this has the added benefit of conferring even greater power upon the claims to truth of medicine and psychoanalysis; these are claims to truth that in effect render the individual of modernity passive and docile.

In the following chapter, we will examine a similar system of artificial and restrictive ideologies that operate in the legal and social realm to structure women's maternal role. Continuing to apply our methodological critique to ensure that the extent to which disciplinary discourses in modern society have infiltrated the legal decision-making arena is drawn out from the shadow of the juridical, we will examine the effects of that incorporation upon the ability of pregnant women to refuse consent in circumstances of alleged maternal-foetal 'conflict'. In performing this analysis, it will become evident that once again in this context women's alleged right to self-determination through the vehicle of consent has been systematically denied, overruled or blatantly ignored in order to give credence to the purported social 'truths' of female existence which demand a pull towards motherhood and a selfless priority in favour of the unborn child. In the following chapter, we will examine in more detail the ideological influences and discursive strategies that have been imposed in this particular context of social living and legal interaction to legitimate this treatment of the female agent. In so doing, the similarity between this constructive process and the methodology employed in rape prosecutions to determine consent or non-consent will also be illustrated.

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<sup>102</sup> Temkin, J. *Rape and The Legal Process*, Supra. Preface, Note 12, p.82

### CHAPTER THREE

## CONSTRUCTED IDENTITIES AND THE POSSIBILITY OF FEMALE NON-CONSENT IN THE MATERNAL CONTEXT

“Women’s mothering is central to the sexual division of labour. Women’s maternal role has profound effects on women’s lives, on ideology about women, on the reproduction of masculinity and sexual inequality...”<sup>1</sup>

While the experience of the male agent in the procreative process dictates that the activity of copulation and the resultant birth are clearly demarcated and separated by a lengthy period of gestation within the female body, for the female agent the process is one of continuous progression from initial sexual contact through to the final stages of childbirth. This circumstance of biology has a profound effect, as we shall see, on the subjective experiences of these agents. Furthermore, it has a marked effect on the manner in which society distributes responsibilities to these agents along gendered lines.

We have seen in the discussion of the previous two chapters that women’s agentic capacities have historically been oppressed by the moralistic controls which society has placed upon their sexual expression and sexual activity. This chapter will be dedicated to an examination of the extent to which a similar pattern can be discerned in the social treatment afforded women’s procreative expression and activity. In perpetuating the reduction of women to their biological functions of sex and procreation, it will be alleged that prevailing social mores have imposed upon women a subjective identity that demands complicity and self-sacrifice. In the context of maternal-foetal conflict, these pervasive social imperatives have been translated most ruthlessly by medical and legal institutions to impose upon pregnant women a highly restrictive regime of subservience to the interests of another. Through the employment of a variety of disparate mechanisms of force and normalisation, the law has actively encouraged the adoption of this restrictive regime and where

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<sup>1</sup> Chodorow, N., *The Reproduction of Mothering* (1978) University of California Press, p.11

circumstances have required it, legal decision-makers have forcefully required compliance by denying women the right to refuse consent.

Just as we were led in the preceding chapter to question the imposition of a negative standard of consent in the rape trial,<sup>2</sup> in this chapter we will question the imposition of a medical imperative which operates to cancel out the necessity of maternal consent, despite a rhetoric of modern medicine which holds out the notions of autonomy and informed consent as its central ethical pillars. We will examine the extent to which the social expectation of passive and altruistic motherhood has infiltrated into the legal arena's treatment of pregnant women. The judiciary, armed once again with pervasive normative stereotypes, have relied upon a ragbag of expectations to effectively remove from women the right to exercise their powers of non-consent to deny conformity to maternal ideals. Legal power has been exercised with varying degrees of force and manipulation to ensure that pregnant women comply with requirements of self-sacrifice to the welfare of the foetus they are carrying. This is the 'truth' of the female maternal experience and once again legal interpretations of consent exhibit a tendency to punish women who seek to choose an alternative definition. The so-called maternal-foetal conflict situation – where a woman refuses consent to invasive surgery deemed beneficial for her foetus – has illustrated this judicial tendency most forcefully.

Against a clinical context of selective indifference to the averred wishes of the maternal patient must also be weighed the less dramatic, but equally as tenacious, social imperatives which construct motherhood as an essential part of the identity of woman. In Chapter One, we discussed the notion, posited by Adrienne Rich, of a regime of compulsory heterosexuality that operates within the microcosms of society, promoting the belief that socially approved heterosexual conduct is an intrinsic and essential part of female identity.<sup>3</sup> In a

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<sup>2</sup> Malm, H., "The Ontological Status of Consent and Its Implications for the Law on Rape", *Supra*. Chapter Two, Note 97

<sup>3</sup> Rich, A. "Compulsory Heterosexuality and Lesbian Existence" (1980) *Signs*, in Evans, M. *The Woman Question*, *Supra*. Preface, Note 13

similar fashion, this chapter will illustrate the existence of a parallel system of compulsory motherhood that ties women's conception of self inextricably to their fulfilment of the maternal imperative. We have seen that in the Victorian era distrust of operative female sexuality led to the incarceration of women who failed to conform to the restrictive social ideals; similarly, in the Middle Ages, women who failed to reproduce children were often reproached, ridiculed and burned as witches.<sup>4</sup> The existence of such ideology, both in its historical and more contemporary manifestations, automatically calls into question the availability of legitimate choice for women in any sphere of the reproductive arena.

MacKinnon has criticised the concept of consent in the rape trial context because it operates from what she considers to be an essentially misguided premise that the sexual interaction of heterosexual couples takes place on a forum of individual equality.<sup>5</sup> She is cynical of the possibility of legitimate consent against such a cultural background. In a similar way, by analysis of the operation of social ideologies of motherhood, including the common assertion of some kind of inherent 'maternal instinct', many feminists have become increasingly sceptical regarding the possibility of unconstructed choice in the issue of motherhood.<sup>6</sup>

### *Cultural Inscription of Expectations of Motherhood*

A well-illustrated examination of the social ideologies of motherhood, and the influence that they wield over constructions of female subjectivity has been provided by Gena Corea. In her article "What the King Cannot See"<sup>7</sup> she seeks to establish that while on first sight it may appear that women do have some inherent and natural pull towards motherhood, on closer inspection, it becomes

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<sup>4</sup> Corea, G., *The Mother Machine* (1988) Women's Press, p. 15

<sup>5</sup> MacKinnon, C., *Towards a Feminist Theory of State*, Supra. Chapter One, Note 33

<sup>6</sup> Corea, G., *The Mother Machine*, Supra. Chapter Three, Note 4

<sup>7</sup> Corea, G., "What the King Cannot See", in Baruch, E., D'Adamo, A. and Seager, J. (ed.) *Embryos, Ethics and Women's Rights - Exploring the New Reproductive Technologies*, (1987) Hamworth, p.78

apparent that this desire has been heavily constructed by social forces. In adoption of a Foucaultian position, she suggests that there is no such thing as a desire for a child which is unstructured by the society in which the agents exist. While acknowledging that men and women do indeed share some common motives for desiring children, she seeks to expose the additional forces which operate to shape a woman's will to have a child, while leaving the male's desire unaffected.

Corea posits the existence of six social forces in particular which operate exclusively upon women to structure their desire to bear children. Firstly, she notes that by fixing woman's functions to the roles of sex and reproduction, society has promoted the internalisation of these functions by the female agents as manifestations of their female destiny and as necessary incarcerations of their own fulfilled subjectivity.<sup>8</sup> Secondly, Corea draws attention to the subtle manipulation of female emotions and motivations that operate through pervasive propaganda to secure the fear that if a woman is infertile, she loses her most basic identity as a woman. Corea alleges that such propaganda has had a hugely coercive effect.<sup>9</sup>

Manipulation through propaganda is the central methodology also of Corea's third force - she asserts that by withholding vital information about the reality of motherhood, and by substituting this with a socially validated cliché of motherhood as rosy, feminine fulfilment, women are presented with a highly artificial image of the 'reality' of motherhood.<sup>10</sup> To be sure, many women do find motherhood a fulfilling and indeed empowering experience, however, many others find it frustrating, exhausting and draining. Nonetheless, women's negative accounts of motherhood are not incorporated into the social vision of 'ideal motherhood'.

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<sup>8</sup> Corea, G., "What the King Cannot See" in Baruch, E., D'Adorno, A. and Seager, J. (ed.) *Embryos, Ethics and Women's Rights*, Supra. Chapter Three, Note 7, p. 79

<sup>9</sup> Corea, G., "What the King Cannot See", in Baruch, E., D'Adorno, A. and Seager, J. (ed.) *Embryos, Ethics and Women's Rights*, Supra. Chapter Three, Note 7, p. 79



In the context of the rape trial we noted the process whereby a stereotype was constructed of the highly artificial 'ideal rape' against which all lived out experiences of real rape were measured, and where the real experience denigrated from the constructed ideal, the real victim was denied fair treatment or was led to doubt the truth of her own experience. In the context of motherhood, we can see a similar process unfolding whereby an artificial ideal of maternal bliss is heralded as the pervasive yardstick against which all experiences of motherhood are to be measured, and when found to be wanting, the blame is attributed not to the unrealistic demands of the ideal but to the mother who falls short of those demands. Once again, this acts to undermine the confidence of the female agent, leaving her deeply sceptical of the merits of her own abilities and judgements.

The final three social forces drawn out by Corea are all closely related and pertain to the overall devaluation of women's experiences and abilities in the social world - social devaluation of her labour skills, as well as of her creativity and intelligence, and continued social complacency regarding male violence and abuse toward women.<sup>11</sup> These final forces collude to encourage the female agent to retreat into the protective environment of the private sphere where her position as wife and mother will be socially valued and her status will be improved to afford her a better level of personal protection.

As an amalgamation, these six social forces operate most insidiously to reinforce woman's lack of self-worth and to structure women's choices, individually and collectively. As Rothman has noted,

"Lacking economic power, physical and emotional safety, women can be coerced into motherhood, which seems to offer a power-base from which to negotiate for some degree of status and protection."<sup>12</sup>

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<sup>10</sup> Corea, G., "What the King Cannot See," in Baruch, E., D'Adorno, A. and Seager, J. (ed.) *Embryos, Ethics and Women's Rights*, Supra. Chapter Three, Note 7, p. 80

<sup>11</sup> Corea, G. "What the King Cannot See", in Baruch, E., D'Adorno, A. and Seager, J. (ed.) *Embryos, Ethics and Women's Rights*, Supra. Chapter Three, Note 7, p. 80-81

<sup>12</sup> Rothman, B., "The Tentative Pregnancy", in Baruch, D'Adorno & Seager (ed.) *Embryos, Ethics and Women's Rights*, Supra. Chapter Three, Note 7, p. 81

The net result of these forces, according to Corea is a profound reduction in the female sense of self-definition and autonomy.

"The autonomous ability of these women to control their procreative progress is diminished. Another aspect of a woman's self-definition is undermined which, when added to her loss of political, economic and social power, transforms her consciousness of herself as an inferior being...Loss of autonomous reproduction is one more fundamental layer leading to a loss of Self."<sup>13</sup>

If we are to accept this conclusion, then we must begin also to call into question the legitimacy of the liberal and juridical notion of unfettered and unconstrained consent for the female agent in any reproductive context.<sup>14</sup>

A more radical critique of the forces bearing upon operation of a network of compulsory motherhood has been offered by Shulamith Firestone. In her controversial work, *The Dialectics of Sex*<sup>15</sup>, she alleges that it is specifically the female role as reproducers that has handicapped women throughout history and has made possible the tenacious stronghold of male power that she believes exists. She sees the future liberation of women as being heavily reliant on the promises heralded by the new reproductive technologies that will free women from the curse of their reproductive role. This suggestion has been met with mixed response from within the feminist community. FINNRAGE (Feminist International Network of Resistance to Reproductive and Genetic Engineering) writers, for example Corea, are staunchly opposed to such technological advancement. They have sought to reclaim the experience of motherhood as the foundation of women's identity and they consider the severing of sexuality from reproduction to be an attack on women, and an attempt by men to appropriate the reproductive capacities that have historically been the unique source of women's power.<sup>16</sup>

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<sup>13</sup> Corea, G., "What the King Cannot See", in Baruch, D'Adorno & Seager (ed.) *Embryos, Ethics and Women's Rights*, Supra. Chapter Three, Note 7, p. 90

<sup>14</sup> An examination of this issue will form the body of ensuing discussion within this chapter regarding the implications of constructive forces upon the legitimacy of the operation of prevailing consent standards.

<sup>15</sup> Firestone, S *The Dialectic of Sex*, (1979) Women's Press

Firestone's analysis is indeed problematic at many levels, not least because of her failure to disentangle the social and biological aspects of childbirth and childrearing. Nonetheless, her central thesis that a feminist theory of women's historical and current social position must start with the process of human reproduction has proven very popular with many other writers in the field, for example Mary O'Brien who in *The Politics of Reproduction*<sup>17</sup> argued that reproduction is not an unchanging biological constant, but rather a process of dialectics related to human consciousness and the fluid bases of human society.

By building on the insights implied at the outset of this chapter regarding the differences in epistemological experience of the reproductive process between gendered social agents, O'Brien suggests that this alienation of the male from the reproductive process is the root inspiration for the social institution of patriarchy. Adopting the insights of Hegel regarding the notion of dialectics and applying this to analyse the processes that operate to structure the frameworks of reproduction, O'Brien asserts that

"Man, the procreator, by virtue of his need to mediate his alienation from procreation, is essentially man the creator. What he has created are the institutional forms of the social relations of reproduction, forms which mediate the contradictions in male reproductive consciousness."<sup>18</sup>

Men have long since understood their separation from nature and their need to mediate this separation. Hence, according to O'Brien, patriarchy has become the medium through which they have assumed for themselves the power to transcend natural realities with historical, and man-made realities. The dialectical structure of reproductive consciousness is reaffirmed in the social relations of reproduction, and thus in a female reproductive consciousness that is aware of the child as hers, but also of the fact that she is the child born of another woman. This reproductive labour serves, then, to confirm woman's sense of genetic coherence and species continuity. By contrast, male reproductive consciousness is splintered and discontinuous, and it cannot be

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<sup>16</sup> Corea, G. *The Mother Machine*, Supra. Chapter Three, Note 4

<sup>17</sup> O'Brien, M., *The Politics of Reproduction* (1981) Routledge

<sup>18</sup> O'Brien, M., *The Politics of Reproduction*, Supra. Chapter Three, Note 17, p. 56

mediated within the reproductive process. Men, thus alienated from their children, seek to transcend that alienation by in their turn alienating women from their reproductive labour power, through the medium of patriarchy.

This important distinction between the female experience of her own reproductive consciousness and the resultant contortions of that consciousness once it has been appropriated by patriarchy is lamentably lacking in Firestone's own theory. Her assertion of pregnancy as an essentially humiliating and oppressive activity has been contra-indicated by the experiences of many women who have found the journey through pregnancy, childbirth and motherhood extremely positive and fulfilling. Feeding into this confusion, many cultural feminists have sought to redefine the experience of pregnancy to give credence to the positive aspects of the experience, not only in order to give voice to the lived-out experience of many women, but also to challenge the seemingly uncritical acceptance of the patriarchal value system that informs Firestone's assertions.

A particularly effective attempt at this reconciliation of feminist theory with female experience has been pioneered by Adrienne Rich. In *Of Woman Born*<sup>19</sup>, she takes pains to stress that it is not the biological fact of giving birth that oppresses women, but the fact that they reproduce in the context of a patriarchal society in which motherhood is (as Corea has proposed) seldom freely chosen and is controlled by prevailing social forces. In order to clarify this point, she draws a sharp distinction between the experience and the institution of motherhood, aiming her critique only at the latter form. Hence, her work is "not an attack on the family, or on mothering, except as defined and restricted under patriarchy."<sup>20</sup> While acknowledging the importance of Firestone's work, Rich criticises her for reproducing a male-influenced ideology of childbirth by failing to imagine what transformations might occur in the experience of childbirth

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<sup>19</sup> Rich, A., *Of Woman Born* (1977) Virago

<sup>20</sup> Rich, A., *Of Woman Born*, Supra. Chapter Three, Note 19, p.14

should the present realities surrounding it be changed. According to Rich, therefore, Firestone makes a fatal error in her failure to appreciate that

"It was not, then, the fact of women's capacity to reproduce that was the basis of women's enslavement...but the mode by which that fact had become integrated into the systems of male political and economic power over women."<sup>21</sup>

Rich argues that it is the male-centred control of motherhood, rather than the experience of pregnancy itself, which has turned women's reproductive power into a patriarchal institution, a form of 'penal servitude' that confines women to their bodily functions and denies their manifold potentialities.

"The institution has been a keystone of the most diverse social and political systems. It has withheld over one-half of the human species from decisions affecting their lives...In the most fundamental and bewildering of contradictions, it has alienated women from our own bodies by incarcerating us in them. At certain points in history, and in certain cultures, the idea of woman-as-mother has worked to endow all women with respect...But for the most of what we know as the 'mainstream' of recorded history, motherhood as institution has ghettoized and degraded female potentialities."<sup>22</sup>

She aims to recover that feminine experience of motherhood that has been repressed by patriarchy by reconnecting women to their bodily powers, encouraging them to think through their bodies to attain a new consciousness. This reformative proposal is, however, saddled by the same idiosyncrasies that have plagued the Foucaultian assertion that we use our bodies and our subjective experiences of them to subvert oppressive power dynamics.<sup>23</sup> The problem in either context remains one of method, of how this fundamental change is to be brought about in a social context where the most intimate aspects of self are rigidly constructed.<sup>24</sup>

A similar approach has been adopted by Nancy Chodorow in her analysis of the institution of motherhood entitled *The Reproduction of Mothering - Psychoanalysis and the Sociology of Gender*. Chodorow notes that although the

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<sup>21</sup> Eisenstein, *Contemporary Feminist Thought* (1984) Unwin, p71-2

<sup>22</sup> Rich, A., *Of Woman Born*, Supra. Chapter Three, Note 19, p.13

<sup>23</sup> Foucault, M. *The History of Sexuality Vol. I*, Supra. Chapter One, Note 3

<sup>24</sup> Fraser, N., "Foucault - A Young Conservative?" in Fraser, N., *Unruly Practice*, Supra. Chapter Two, Note 1, p. 55

physical and biological requirements of childbearing and child care have markedly decreased in recent societies, it appears that women's mothering role has in fact gained psychological and ideological importance, and has come increasingly to define women's lives. In this work, she seeks to contribute to the overall feminist effort to demystify the institutions of patriarchy by analysing the reproduction of mothering throughout the ages as a central and contributing element to the social organisation and reproduction of gender. In adoption of a more individualistic, and psychoanalytical, explanation of the phenomenon of motherhood, she alleges that

"the contemporary reproduction of mothering occurs through society's structurally induced psychological processes. It is neither a product of biology, nor of intentional role-playing...(rather) women's mothering reproduces itself cyclically. Women, as mothers, produce daughters with mothering capacities and the desire to mother...By contrast, women as mothers (and men as not-mothers) produce sons whose nurturance capacities and needs have been systematically curtailed and repressed."<sup>25</sup>

Parenting is not simply comprised of a set of non-specific behaviours, rather it involves participation in a diffuse and interpretative relationship - as Chodorow says, "good-enough mothering requires certain relational capacities which are embedded in personality and a sense of self-in-relationship."<sup>26</sup> Here again we see the suggestion that social standards of mothering are measured against the structured ideal of whatever is to constitute good-enough mothering. This ideal, however, is not an ideal that stands in abstraction from the social context in which it is elevated to the status of absolute. Rather, the very demands and ideology that inform that society's supportive structures are heavily implicated in the demands of the ideal.

"Women's mothering is tied to many other aspects of our society, is fundamental to our ideology of gender, and benefits many people. It is a major feature of the sex / gender system. It creates heterosexual asymmetries which reproduce the family and marriage, but leave women with needs that lead them to care for children...It creates a psychology of male domination and fear of women in men. It forms a basis for the division of the social world into

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<sup>25</sup> Chodorow, N., *The Reproduction of Mothering*, Supra. Chapter Three, Note 1, p. 7

<sup>26</sup> Chodorow, N., *The Reproduction of Mothering*, Supra. Chapter Three, Note 1, p. 33. In the following chapters of this work we will come to see that this sense of self-in-relationship is hugely problematic when it is juxtaposed alongside the possibility of female consent

unequally valued domestic and public spheres, each the province of people of a different gender.”<sup>27</sup>

The impossibility of compliance with demands made in the name of an artificial ideal of motherhood has also been developed by the works of Ann Oakley. Through a critical analysis of the themes most commonly highlighted in contemporary pregnancy advice literature, Oakley seeks to illustrate the traditional requirements that inform the contemporary ideal of ‘normal motherhood’.<sup>28</sup> She highlights five themes which are particularly prominent in such literature, being passed over as medical descriptions of normal motherhood - normal mothers, or mothers-to-be, are people who are especially in need of medical care and protection; they are essentially childish, but at the same time are fundamentally altruistic; they are married; and they ought to be happy but are instead beset with anxiety and depression. Of all these themes, Oakley suggests that the notion of an inherent maternal altruism is the most prevalent. She suggests that putting the baby first is perhaps the primary definition of normal motherhood in modern industrialised societies, owing much to the development of child psychology and the creation of a feminine psychology that takes self-immolation to be a sign of proper womanhood. As Oakley points out, however, this requirement is also perhaps the most artificial of all.

“To be overcome by such spontaneous feelings of ‘natural’ maternal warmth and acceptance is not...the destiny of most mothers at this particular moment in their motherhood careers. But it is, on the other hand, a very definite image of how mothers expect childbirth to be - and how they imagine that they themselves will feel and act.”<sup>29</sup>

Oakley summarises the themes heralded in the advice literature as stipulating normal motherhood as an exercise in ‘the denial of the self’.<sup>30</sup> The general approach suggests that a woman’s capacity for choice is necessarily modified by

<sup>27</sup> Chodorow, N., *The Reproduction of Mothering*, Supra. Chapter Three, Note 1, p. 218-9

<sup>28</sup> Oakley, A., “Normal Motherhood - An Exercise in Self-Control?” in Hutter & Williams (ed.) *Controlling Women* (1981) Croom Helm

<sup>29</sup> Oakley, A., “Normal Motherhood- An Exercise in Self-Control?” in Hutter & Williams (ed.) *Controlling Women*, Supra. Chapter Three, Note 28, p. 85

<sup>30</sup> Oakley, A. “Normal Motherhood – An Exercise in Self-Control?” in Hutter & Williams (ed.) *Controlling Women*, Supra. Chapter Three, Note 28, p. 89

her 'nature', thus rendering her a fit subject for the care, protection and control of medical experts. Women's interactions with the medical profession are (as Foucault would doubtless concur) an important means of conveying to pregnant and nursing women what types of behaviour are acceptable. Such translation of moral assumptions and expectations into laws of 'nature' operate to forcibly maintain the female image. Hence, 'maternal instinct' is natural while conversely it is 'unnatural' for a woman not to want children, and it goes 'against their nature' to seek an abortion. 'Good' mothers take the advice of experts, they breast-feed their babies and they stay at home, 'bad' mothers are 'selfish' and 'foolhardy' in their quests for a career, etc.

In reality, there is an inherent clash between a mother's needs and those of her child. The requirement of normal motherhood that the mother's needs be relegated to the background in order to respond selflessly to those of the child marks an extremely difficult transition for most women. The advice literature, however, cultivates an expectation within mothers-to-be and within society at large that this transition should be managed without difficulty or resentment, and that what's more women should derive personal joy and enrichment from such selfless subservience. Women who do not cope well with the strain that this transition causes are labelled at best inadequate, and at worst psychiatrically imbalanced.

### *Implication of Cultural Inscription Upon the Exercise of Choice*

Each of the foregoing writers provides highly diverse accounts of motherhood as personal experience and as social phenomenon. The purpose of this chapter is not to attempt any kind of reconciliation of these theories, nor to attempt any determination of which theory is superior. The most interesting aspect of this ongoing dialogue on motherhood, for our current purposes, relates to the common thread that is asserted by all the theorists regarding the way in which pregnancy and motherhood are implicated in what society considers the essential role of the feminine.



Each of these theorists, despite their internal disputes, has posited a scenario where the experience and institution of motherhood are held out by society as imperative components of appropriate female subjectivity. Women are constructed by this pervasive ideology, and in their turn have begun to internalise the demands that this asserts upon them. Helena Deutsch (an extremely unlikely feminist figurehead)<sup>31</sup> has been one among many academics, more or less sympathetic to the feminist crusade, who have noted that in any society, women's experience of their body in childbirth is necessarily mediated by the social attitudes that surround them. Women may well experience childbirth, and motherhood, as extremely fulfilling, however, until we dispel the social myths that surround the whole process of pregnancy, we will never be able to truly determine whether this is the case. Rich was indeed correct in her assertion that we need to separate the experience from the institution of childbirth. Simone de Beauvoir, in *The Second Sex*, has drawn on the psychoanalytical insight that

“no factor becomes involved in the psychic life without having taken on human significance; it is not the body-object described by biologists that actually exists, but the body as lived in by the subject.”<sup>32</sup>

Women's experience of childbirth derives much of its significance from the rigours of the social structure through which it is mediated. It is only when we have dispelled the myths of ideal motherhood, and of motherhood as the essential manifestation of female identity that we can begin to give real credence to the experience itself.

One of the most insidious elements of the social myth of motherhood is rooted in social assertions that the identity of woman as mother is a necessary element in the identity of woman as woman. The reduction of women to their procreative powers has been a pervasive medium of social control throughout history, and it continues (albeit in more subtle manifestations) today. All the theories on motherhood discussed above have highlighted the extent to which society exercises its forces of normalisation to pressure women into a maternal

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<sup>31</sup> Deutsch, H., *The Psychology of Women*, Supra. Chapter Two, Note 33.

role. We do not need to resort to examples of rape or incest where the woman has been impregnated against her will to illustrate the point that motherhood as an institution is rarely entirely freely entered into. Even in the circumstances of what must be considered the 'normal' pregnancy - i.e. where the woman has taken a conscious decision to fall pregnant and become a mother - it is alleged that this is not an exercise of unconstrained choice.

Rothman's work *The Meaning of Choice in Reproductive Technology*<sup>33</sup> makes a crucial point about the role of choice in personal decision-making. Although she raises the issue specifically in regard to the advent of assisted reproductive technology, the suggestion behind the premise can be applied equally to all decisions relating to the institution of motherhood. Rothman points out that while individual choice must always be defended, as an intrinsically valuable ethical imperative, exercise of that choice must always be understood within the context of the society which structures the choices available to individuals. In a society which posits the family network as ideally heterosexual, male-headed, and childrearing, women continue to gain their status from their relationship to men, whether as daughters, wives or mothers.<sup>34</sup> As Corea has noted, women seeking improved social status in such an environment will consider the protection afforded by adopting a maternal role to be a material factor in their decision to bear children.<sup>35</sup>

Choice has been the watchword of feminists arguing in favour of women's reproductive rights without state control. However, as we have seen, serious questions must be asked regarding the adequacy of the notion of choice in a social environment where women are continuously pressurised (consciously and sub-consciously) to fulfil a role as mothers. In the liberal legal model of

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<sup>32</sup> De Beauvoir, S., *The Second Sex*, Supra. Chapter One, Note 53, p.38

<sup>33</sup> Rothman, B., "The Meaning of Choice in Reproductive Technology", in Arditti, R., Klein, R. & Minden, S. (ed.) *Test-Tube Women: What Future for Motherhood?* (1984) Pandora

<sup>34</sup> Aldbury, R., "Who Owns the Embryo?" in Arditti, R., Klein, R. & Minden, S. (ed.) *Test-Tube Women*, Supra. Chapter Three, Note 33, p.57

<sup>35</sup> Corea, G. "What the King Cannot See" in Baruch, E., D'Adorno, A. & Seager, J. (ed.) *Embryos, Ethics and Women's Rights*, Supra. Chapter Three, Note 7, p. 78-81

equality and egalitarianism, issues of power distribution are masked behind a façade of neutrality that obscures from consideration the real dynamics that affect the decision of a woman to bear children in our current social structure. Any adequate critique of the notion of consent must recognise the artificiality of such liberal frameworks as part of its overall challenge.

“Perhaps what we should realise is that human beings living in society have precious little choice ever. There may really be no such thing as individual choice in a social structure, not in any absolute way. The social structure creates needs – the need for women to be mothers – and creates the technology which enables people to make the needed choices. The question is not whether choices are constructed but how they are constructed. Society, in its ultimate meaning, may be nothing more and nothing less than the structuring of choices.”<sup>36</sup>

Rebecca Aldbury in “Who Owns The Embryo?”<sup>37</sup> has argued that to define such issues within a framework of ‘choice’ for women is totally inadequate because the concept derives from a liberal philosophy which assumes no serious differentiation in power amongst social groups. In reality, however, we live in a gendered society in which women’s identities are heavily constructed. Consequently, women are pressurised into a role as mother in order to afford themselves a greater level of respect and protection. An individual’s perception of choice is shaped by what it is that society teaches each individual to want. Hence, for those women who ‘choose’ pregnancy and motherhood, the choice is very real, although in reality heavily constructed. In *The Transsexual Empire*, the point is made in relation to a woman’s ‘choice’ to enter into IVF programmes that “the appearance of voluntarism is deceptive, for the control over women begins a long time before they can voice a choice.”<sup>38</sup> Social stereotypes invoking the role of woman as mother filter through society’s institutions with the propaganda that women are nothing unless they bear men’s children. Through philosophy, psychiatry, religion, literature,

<sup>36</sup> Rothman, B., “The Meaning of Choice in Reproduction” in Arditti, R., Klein, R. & Minden, S. (ed.) *Test-Tube Women*, Supra. Chapter Three, Note 33, p. 32

<sup>37</sup> Aldbury, R., “Who Owns the Embryo?” in Arditti, R., Klein, R. & Minden, S. (ed.) *Test-Tube Women*, Supra. Chapter Three, Note 33

<sup>38</sup> Raymond, *The Transsexual Empire*, (1979) Women’s Press

“Century after century, the message seeped deeply into woman : If she cannot produce children, she is not a real woman, for producing children is the function that defines woman.”<sup>39</sup>

We live in a society that reduces women to their biological and procreative functioning by asserting that their primary fulfilment as women can only be found through adoption of the role of mother. In such a cultural climate, women’s exercise of ‘choice’ to become mothers has been fundamentally mediated by social demands. What’s more, women’s sense of subjective identity and worth have become inextricably linked to their ability to reproduce. We must, then, call into question the confidence with which we can talk of any woman’s choice to become a mother, and we must adopt a more cynical approach to the prospects of any system that relies upon the liberal presuppositions of unfettered and self-determining female choice within such a social context.

To assert some cynicism over whether the exercise of female choice in the reproductive arena is unconstructed is not, however, to dismiss the experience of the woman who believes it to be a meaningful exercise in self-expression. Indeed, the process of procreation has the potential to be one involving the utmost in self-expression. In our discussion of the experience and institution of motherhood, we must not forget therefore that motherhood as an experience holds a profoundly liberating promise, and we must exercise caution not to dismiss the positive accounts of the experience in our concern to criticise the institution of compulsory motherhood within which that experience is encapsulated.

The critique that radical feminists such as Firestone<sup>40</sup> and O’Brien<sup>41</sup> have advanced, postulating patriarchy as the pervasive enemy, and reproduction as its

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<sup>39</sup> Corea, G. “What the King Cannot See” in Baruch, E., D’Adorno, A. & Seager, J. (ed.) *Embryos, Ethics & Women’s Rights*, Supra. Chapter Three, Note 7, p.89

<sup>40</sup> Firestone, S. *The Dialectics of Sex*, Supra. Chapter Three, Note 15

<sup>41</sup> O’Brien, M. *The Politics of Reproduction*, Supra. Chapter Three, Note 17

primary tool, heralds considerable rhetorical benefit. We have seen, however, in the context of the more radical feminist theories on rape (such as those presented by MacKinnon in the previous chapter<sup>42</sup>) that we must resist the temptation to become overwhelmed by such hyperbolic potentiality. Not only should we express concern over the simplified model that this radical vision posits of the power dynamics between men and women in society (as has been discussed at length through our contrast between Foucault and MacKinnon in Chapter One), but we should also be wary of the implications that flow from often counter-intuitive radical claims.

Feminism must remain true to its methodology, and to its ideology which demands continued effort to articulate the realities of female experience.<sup>43</sup> In order to do so effectively, and realistically, we must refrain from too heavy a reliance on radical theories that posit a deterministic vision of women as eternally oppressed. While it is necessary to recognise the means through which this oppression is signified in the institutional support networks of society, it is also necessary to delineate space for the expression of women's experiences of pregnancy and childbirth, whether they be positive or negative. This remains the benefit of the more cultural analysis advocated by Rich<sup>44</sup> - this enables us to re-affirm the positive epistemological expressions of motherhood while simultaneously deconstructing the social imperatives within which they are constructed.

It seems, however, that even if this institution of compulsory motherhood could be deconstructed such that each woman's choice to become a mother was truly a choice of expression of self, rather than a coerced expression of social normalisation, the problematic nature of choice in the motherhood experience would reoccur at a stage later in the gestational process. On the assumption that

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<sup>42</sup> MacKinnon, C. *Towards a Feminist Theory of State*, Supra. Chapter One, Note 33. Discussed in Chapter Two, Note 81 onwards.

<sup>43</sup> Jaggar, A. "Feminist Ethics" in Becker, L. & Becker, C. (ed.) *Encyclopaedia of Ethics*, Supra. Preface, Note 7

<sup>44</sup> Rich, A. *Of Woman Born*, Supra. Chapter Three, Note 19

all pregnant women have voluntarily chosen their motherhood role, the issue of female choice and the ineffectiveness of the vehicle of female consent are again brought to light within the field of maternal-foetal conflict where a pregnant woman's refusal of consent to medical treatment for the benefit of her foetus strikes against the normative assumption of unlimited maternal altruism. Where the preceding discussion has critiqued the effect of the cultural assumption of woman as inevitable mother on the construction and exercise of female choice, the remainder of this chapter will centre upon this problematic interplay between female consent and the cultural assumption of pregnant women, and mothers, as inherently self-abnegating and altruistic.

### *Consent as a Threshold in Foetal Therapy*

Facilitated by recent advances in reproductive technology and ideology, a new trend has developed within the field of obstetrics that posits the foetus as a patient, distinct and separate from the women in whose body it is formed. This has allowed medical and social imperatives to interject into the maternal-foetal relationship at a far earlier stage of gestation. When coupled with the general social imperative that women sublimate themselves and their own medical care to the demands of the foetus, the advent of this new technology poses a considerable threat to the autonomy of the pregnant woman. Over recent decades this has been used to justify various infringements on female autonomy, including enforced medical treatment of the maternal patient for the benefit of the foetus,<sup>45</sup> attempts at punishment of mothers for failing to take due care of the foetus,<sup>46</sup> and even the suggestion of taking custody of the foetus (and therefore, by necessity, of the woman) to ensure that such due care is taken.<sup>47</sup> Such a shift in ideology poses the potential for considerable infringement upon the rights and freedoms afforded to pregnant women. Predictably, therefore, it has created

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<sup>45</sup> *Re. S* (1992) 4 All ER 671

<sup>46</sup> *D v Berkshire County Council* (1987) 1 All ER 20

<sup>47</sup> *Re F (In Utero)* (1988) 2 All ER 193

a storm of agitation amongst feminist commentators and condemnation of this trend has been vociferous.<sup>48</sup>

Within the confines of this work, we will examine the implications of these developments in relation to the medical care received by the maternal patient and the broader social and legal effects that this generates. Despite a general concern within medical discourse to act beneficently and only with the informed consent of the patient, it seems that many of the cases of enforced treatment have contradicted these ethical principles. This brings into question the issue of whether such derivation from the general principles of modern medical care can be justified on alternative grounds. Discussion through the duration of this chapter will suggest the conclusion that there can be no justification for such blatant breach of women's rights to bodily integrity and individual autonomy.

#### *Clinical Obstacles to the Establishment of Non-Consent*

To understand the problematic nature of the maternal-foetal conflict situation, we must first understand the nature of the dilemma that it poses to the physician involved. Technological advances in foetal treatment and therapy have allowed physicians to identify the existence of two separate and distinct patients where formerly only one was recognised. This elevation of the foetus to patient status has not occurred because of any change in the nature of the foetus, nor in the nature of the maternal-foetal relationship. It has been facilitated, rather, by the increased availability of advanced medical technologies. When a pregnant woman refuses medical treatment that has been recommended as beneficial for the health of the newly individuated foetal patient, physicians are faced with a conflict between honouring what are perceived to be competing values of foetal benefit and maternal autonomy.

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<sup>48</sup> Gallagher, J., "Prenatal Invasions and Interventions - What's Wrong with Fetal Rights?" (1987) 10 *Harvard Women's Law Journal* 9 provides an illustrative example of such condemnation.

Prior to the advent of the technological avalanche, in situations where maternal and foetal burdens associated with foetal therapy were relatively small and the prospective benefits to the foetus were substantial, the physician had a duty to consider whether the combined maternal-foetal benefits to the organic whole of mother and foetus outweighed the combined maternal-foetal burdens. If the result of this balancing equation proved positive, the physician was under a duty to recommend, but not to enforce, treatment. As the physician became armed with more complex technical machinery, s/he was enabled to see the foetus and the pregnant woman as separate patients. In this light, it was no longer appropriate to consider the effects of treatment on the two combined. On the basis of this two-patient model, when foetal problems did arise, they often posed no tangible threat to maternal health. However, to care for the foetal patient necessarily involves some degree of discomfort, harm or risk being imposed upon the maternal patient without any off-setting therapeutic benefits. On the basis of the traditional evaluation, then, maternal medical burdens outweigh maternal medical benefits and ordinarily, this would require a recommendation against treatment from the physician.<sup>49</sup> This presents a difficult dilemma for the physician to untangle. The only other area of medical practice where a comparable dilemma may arise relates to donor transplantation. In this area, moves towards a more utilitarian ethic whereby resultant medical rescue would justify the imposition of relatively small harms and risks on others have been strongly resisted (e.g. the US case of McFall v Shimp<sup>50</sup>).

On the one-patient model, conflicts between maternal and foetal medical needs occur within, not between patients and their resolution involves an internal balancing decision. On the two-patient model, however, competing maternal and foetal needs must be settled by applying a standard of justice by which the doctor is not permitted to benefit one patient by inflicting medical harms upon another.

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<sup>49</sup> Mattingly, S. "The Maternal-Fetal Dyad" (1992) *Hastings Report*, 16



Of course, in most cases, pregnant women will continue to identify foetal needs and interests with their own, and will request treatment to promote foetal health. However, a physician may not recommend foetal therapy as if it were medically indicated for both patients and the clinical dilemma arises when the maternal patient withholds consent to treatment. On the traditional one-patient obstetric model, recommended foetal therapy offers net medical benefits to the pregnant woman. Although efforts to encourage consent are appropriate, enforced treatment of a competent dissenting patient is unacceptable. Where on this model the dissenting patient is causing harm only to herself because the foetus is seen as part of her self, on the two-patient model this is no longer the case and a remit for potential challenge to maternal autonomy is established.

Despite advances in obstetrical care, interventions on behalf of the foetus continue to require the medical invasion of the mother and any such medical invasion necessarily brings with it attendant risks to maternal health. In this circumstance, refusal of treatment is refusal of treatment that is contrary to the medical interests of the maternal patient. As Mattingly explains,

“Detached conceptually from the fetus, the maternal patient suffers medical harms from fetal therapy that are no longer offset by fetal benefits. Her physician may not recommend fetal therapy for her, and the injunction against harming one patient voluntarily to help another is virtually absolute.”<sup>51</sup>

In an attempt to protect themselves from the implications of making a wrong treatment decision, physicians have tended to turn to the courts to give legal credence to their paternalistic demands. We will shortly go on to look in more detail at how it is that the courts on both sides of the Atlantic have sought to deal with such complex situations. Before doing so, however, it is important that we develop a better understanding of how this shift in the clinical perception of the maternal-foetal relationship has affected the manner in which the relationship is perceived in the broader social arena.

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<sup>50</sup> *McFall v Shimp* (1978) 127 Pitts. Leg. J 14

<sup>51</sup> Mattingly, S. “The Maternal-Fetal Dyad”, *Supra*. Chapter Three, Note 49

We have discussed at some length in Chapter One Foucault's assertion that the ideology cultivated within the field of medical discourse has a profound effect on the overall structuring of pervasive social mores. In the specific example of the maternal-foetal relationship, this certainly appears to be the case. Medical technology, having advanced to permit clinical recognition of a two-patient model, has fuelled a shift in perception of the maternal-foetal relationship at a more general level. The claim that medical discourse makes to truth and rational objectivity has promoted a ready acceptance within society at large of all the ideology that it espouses. The 'truth' of the maternal-foetal relationship has become one of two separate entities with potentially mutually exclusive and hostile interests. Women have increasingly become perceived less as the life-lines and protectors of their children, and more as incubator environments for separate individuals. This 'truth' has been adopted and perpetuated within the social field and has heralded a significant alteration in the treatment received by the pregnant woman, medically and socially.

It has been proposed by many UK commentators on this issue that the case of CvS<sup>52</sup> marked the original infiltration of this social ideology into the field of legal doctrine.<sup>53</sup> In this case, we can trace the origins of the legal separation of the foetus from the mother which has provided the basic ideology for the foetal rights movement, and which is closely linked to the development of the new reproductive technologies. As we have become increasingly able, in the clinical context, to conceptualise the foetus as separate from the mother, this has led to a rapid increase in attempts to afford the foetus rights as a legal subject. These claims have been supported by the new technologies in that the moral claim to a right to life can now be attached more concretely to an identifiable being. In turn, this new model of conceptualisation has led to the mother being viewed as a potential threat to the foetal entity inside her body. As we will come on to discuss later in this chapter, the implications of this new perception of a

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<sup>52</sup> C v S (1987) 1 All ER 230

<sup>53</sup> Smart, C., "Penetrating Women's Bodies - the Problem of Law and Medical Technology" in Abbott & Wallace (ed.) *Gender, Power and Sexuality*, Supra. Chapter One, Note 45, p. 171

potentially hostile relationship between mother and foetus has had profound effects on the liberty and status of pregnant women.

One of the most staunch advocates of the foetal rights movement has been Margaret Shaw. In her article "The Potential Plaintiff - Preconception and Prenatal Torts"<sup>54</sup> she suggests that,

"once a pregnant woman has abandoned her right to abort and has decided to carry the foetus to term, she incurs a 'conditional prospective liability' for negligent acts towards her foetus if it should be born alive."

Arguments such as this one are both common and dangerous. Not only do they posit the notion that the foetus has rights (which in itself is an extremely difficult moral and legal notion), but they also assert that these rights are different from and potentially opposed to those of the mother whose body keeps it alive.<sup>55</sup> Perhaps more disconcerting, furthermore, is that these arguments place the responsibility for implementing these 'rights' squarely on the individual woman, without any consideration that reasonable steps should also be taken at the social level to ensure that pregnant women have access to good nutrition, housing and education in order to enable them to comply with the demands made upon their body. Hubbards has summarised the duplicitous nature of new medical technology most aptly when she suggests that,

"the very availability of the new technologies, however uncertain and unexplored they may be, increases women's isolation by playing on our sense of individual responsibility to produce healthy children."<sup>56</sup>

Of all the arguments that have been asserted in favour of foetal rights, those that have generated the most support have been those based upon 'scientific' and technical developments. Janet Gallagher in "The Fetus as Patient" has been highly sceptical of any such alleged 'scientific objectivity' in these

<sup>54</sup> Shaw, M., "The Potential Plaintiff - Preconception and Prenatal Torts" in Milinsky, Aubrey & Annas (ed.) *Genetics and the Law II* (1980) Plenum, p. 228

<sup>55</sup> Diduck, A. "Legislating Ideologies of Motherhood", *Supra*. Preface, Note 14 considers rights discourse in the pregnancy context to be wholly inappropriate because its ascription of an atomistic foetal individual is inconsistent with the experience of pregnancy

<sup>56</sup> Hubbard, R., "Personal Courage Is Not Enough - Some Hazards of Childbearing in the 1980s" in Arditti, R., Klein, R. & Minden, S. (ed.) *Test-Tube Women*, *Supra*. Chapter Three, Note 33, p. 350

developments. She proposes that they simply "provide contemporary scientific rhetoric for reassertions of powerful, largely unacknowledged social attitudes in which pregnant women are viewed and treated as vessels."<sup>57</sup> Jennifer Terry has built upon this critique and, in adoption of the Foucaultian paradigm of bio-power, has proposed that the foetal rights discourse operates as a new, legitimating ideology for the deeper aspirations of control of reproduction, and pregnant women, which forms part of an overall increase in state intervention in population regulation.<sup>58</sup>

For obstetricians and gynaecologists, specific types of reproductive technology may display advantages quite separate from their impact on women and infants. These technologies often enhance the status of the medical profession by underpinning claims to specialised knowledge. New reproductive technologies establish the idea that obstetricians and gynaecologists know more about pregnancy and about women's bodies than women themselves do.<sup>59</sup>

A more fully developed connection between the Foucaultian methodology discussed in Chapter One and the increased deference to the advocacy of foetal rights has been advanced by Jana Sawacki. In her article "Disciplining Mothers - Feminism and the New Reproductive Technologies", she suggests that

"new reproductive technologies clearly fit the model of disciplinary power. They involve sophisticated techniques of surveillance and examination ... that make both female bodies and fetuses visible to anonymous agents in ways that facilitate the creation of new objects and subjects of medicine as well as legal and state intervention."<sup>60</sup>

The implications of this shift in social ideology for the life and liberty of the pregnant women are significant. Even before we consider the implications of

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<sup>57</sup> Gallagher, J. "Fetus as Patient" in Cohen & Taub (ed.) *Reproduction Laws for the 1990s* (1989) Humana Press, p. 188

<sup>58</sup> Terry, J. "The Body Invaded" (1989) *19 Socialist Review* 13-43

<sup>59</sup> Stanworth, M., *Reproductive Technologies - Gender, Motherhood and Medicine* (1987) Polity Press, p. 13

<sup>60</sup> Sawacki, J., "Disciplining Mothers - Feminism and the New Reproductive Technologies" in Jackson (ed.) *Women's Studies*, Supra. Chapter Two, Note 60, p.395

the legally enforced decisions that give credence to this peculiarly modern and disciplinary perception, we can appreciate the general effect that prevalence of such ideology would have upon the pregnant women's subjective experience of pregnancy, and upon the way society at large interacts with her. As Olsen has pointed out, the indirect implication of this ideology relates less to the disputable status of the foetus as a moral and legal agent, and more to the status of woman in current society.

"If women were not devalued, a pregnant woman's control over reproduction would seem natural and inevitable. Most people simply would not conceptualize an early fetus as a baby or as a person with interests separate from and potentially hostile to those of its mother .... If women were taken seriously, early fetal life would not be valued by society at large unless and until the woman carrying the fetus valued it."<sup>61</sup>

Although Olsen speaks here specifically in regard to the issue of abortion, the sentiment implied can be equally as well applied to the field of apparent 'maternal-foetal conflict', such that the whole notion of conflict is diffused. There is no conflict because the dilemma starts and finishes with the woman's choice in exercise of her own moral sensibilities regarding the complete situation of her life. Lamentably, however, this does not appear to have been the position generally adopted by Anglo-American legal culture in its consideration of this issue.

In adoption of a position similar to that of Olsen, Gallagher has argued that,

"The ... 'fetal rights' cases possess great symbolic and precedential significance, but they have less to do with the status of the fetus than with the moral and legal status of women. They reinforce deep societal stereotypes of women, particularly pregnant women, as somehow incompetent to make moral decisions. They also serve to legitimise a forceful, even physically violent, assertion of doctor's control over pregnancy and childbirth."<sup>62</sup>

This cynicism regarding the capacity of the pregnant woman to exercise serious and rational thought has indeed been borne out by much medical literature in this area. In an article in the *Journal of Obstetrics and Gynaecology*, for

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<sup>61</sup> Olsen, F., "Unravelling Compromise" (1989) *103 Harvard Law Review* 105, p. 126-8

example, guidance was given to physicians regarding situations in which the maternal patient refuses her consent to medically advocated treatment. Applying a tone of utmost condescension to the female patient, it was proposed that,

“Such a case may occur for different reasons : fear of surgery, prejudice, ignorance, difficulties with language, or inadequate rapport between doctor and patient. However, if all these factors are overcome and the patient continues to refuse the medical proposal, a suspicion of an occult reason arises. It is probable that the patient hopes to be freed in this way of an undesired pregnancy and in no case will the patient share her secret thought with the physician.”<sup>63</sup>

Nowhere is mentioned the patient's right to bodily integrity and self-determination, nowhere is credence given to the pregnant woman's ability to reach a rational choice. Such medical literature seems to dictate that the pregnant patient is either a foolish and ignorant child or a covert and selfish manipulator. The woman who continues to refuse treatment in the face of clinical pressure is, it seems, harbouring occult secrets and cold indifference to her foetus. This presents a highly abstracted and over-simplified analysis of the situation of the maternal patient. Nonetheless, it is an imagery which, when supported by cultural assumptions of motherhood as an inherently altruistic and selfless pursuit, has fuelled much of the legal decision-making in this arena.

Some more contemporary guidelines have sought to distinguish themselves from advocacy of such forthright enforcement of authority. A changing trend in modern medical practice has been remarked upon by some commentators.<sup>64</sup> This contemporary trend increasingly relies upon the opposing model of clinical management, whereby women are required to exercise choices regarding their pregnancy with little or no guidance from medical authority.<sup>65</sup> However, this does not represent the kind of liberation that it may seem to suggest. We have noted in our discussion of Foucault in Chapter One that the nature of modern

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<sup>62</sup> Gallagher, J “Prenatal Invasions and Interventions - What's Wrong with Fetal Rights”, *Supra*. Chapter Three, Note 48, p. 58

<sup>63</sup> Leibermann, Razar, Chaim & Cohen, “The Fetal Right To Life” (1979) *53 Obstetrics and Gynaecology* 515

<sup>64</sup> Harpwood, V. *Legal Issues in Obstetrics* (1996) Dartmouth, p. 29-30

power is primarily disciplinary, operating through increasingly subtle manifestations of power epitomised by normalisation rather than by the brute exercise of authority. As social conceptions of pregnancy and childbirth have increasingly become centred upon the two-patient model (facilitated by the visual advances in ultra-sound, etc.), medical authority has been able to implement a more disciplinary framework. It is not the case that the power wielded by medical discourse is no longer exercised to construct women's choices, it is simply the case that the *modus operandi* of that power has shifted towards a more peculiarly modern manifestation.<sup>66</sup> Agents of medical power will continue to forcibly wield the strong arm of objective scientificity and truth when necessary (as is established by the examples of enforced medical intervention), however an overall more disciplinary approach may now be adopted.

By shifting the onus of choice onto the pregnant woman, modern medical practice does little to liberate the actuality of those choices, it simply allows itself to rely upon the normalising mechanisms which are in operation both within and outwith the field of medical discourse. In reality, pregnant women are trapped at a more intimate level than ever before and the binds that ensure that entrapment are becoming increasingly invisible. As Raymonds notes,

“Social controllers have been well-known for convincing the individual that she/ he is in control”<sup>67</sup>

This mirrors the trend which was discussed in Chapter One in regard to the changing operation of law in modernity - both legal and medical discourse have traditionally exercised their authority through the imposition of command and force, however in modernity, this becomes increasingly unnecessary. Although there is always the opportunity, and institutions, to enable a resort to such methodology, the primary mechanisms of power have become heavily reliant

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<sup>65</sup> Sawacki, J. *Disciplining Foucault*, Supra. Chapter One, Note 39, p. 85

<sup>66</sup> Sawacki, J. *Disciplining Foucault*, Supra. Chapter One, Note 39, p. 86

upon the responsibility of the individual as a social agent to meet the cultural imperatives imposed upon her by a society increasingly pre-occupied with normalising its agents. The choice of the individual is structured at the micro level of personal life, thereby decreasing the need for more dramatic exercises of oppressive power. The power of medical discourse is becoming productive in the same way that the power of legal discourse has done. It is this that necessitates the need for a detailed examination of the social context in which 'choice' is exercised.

We have seen in the preceding sections the difficulty faced by a woman of child-bearing age to exercise an unconstructed choice, not only in regard to whether to have children, but also in regard to the clinical management of that pregnancy. It would be an exhaustive task to list the infinite ways in which the exercise of choice in this arena is constructed by pervasive social ideologies from outwith. For the purposes of this work, however, it is sufficient that we have now established that such construction does occur and that this is becoming an increasingly important instrument in the methodology of modern power regimes. With the benefit of at least some analysis of the medical and social ideology that forms the cultural background of this judicial exercise, we can now turn our attention toward the more specific operation of the law in this arena.

### *Legal Obstacles to the Establishment of Non-Consent*

In "Protecting the Liberty of the Pregnant Patient" Annas suggests that "we are seeing the beginning of an alliance between physicians and the state to force pregnant women to follow medical advice for the sake of the fetus."<sup>68</sup> Citing the findings of Kolder *et al* that almost half of the heads of US fellowship programs

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<sup>67</sup> Raymonds, "Fetishism, Feminism and Genetic Technology" (1979) Paper to the American Association for the Advancement of Science, Houston (Texas). This position has been approved by Gena Cora in *The Mother Machine*, Supra. Chapter Three, Note 4, p. 177

<sup>68</sup> Annas, G "Protecting the Liberty of Pregnant Patients" (1987) 316 *New England Journal of Medicine* 1231-4



in maternal-foetal medicine support the involuntary detention of pregnant woman whose behaviour endangers the foetus, and more than one quarter support 'state surveillance' during the third trimester to protect the foetus<sup>69</sup>, Annas proposes that these attitudes betray a profound suspicion of pregnant women and a failure to identify with them.

What's more forcing pregnant women to follow medical advice places an unwarranted faith in that advice - this is a very real problem given that physicians often disagree about the appropriateness of obstetrical interventions, and they can be mistaken (although the medical claim to 'truth' tends to abstract that reality). Driven to do what they can to preserve life and pushed by the fear of malpractice suits, doctors often translate their ability to treat a problem into an imperative to do so. This is not, however, always appropriate. Indeed in three of the first five US cases in which court-ordered caesarean sections were sought, the women ultimately delivered vaginally and without complication.<sup>70</sup> Perhaps more disconcertingly, this trend continues to be identifiable. Earlier this year, an enquiry was ordered by Scottish medical authorities who were concerned by findings that approximately one quarter of all pregnant women in Scotland were being advised by clinical staff that caesarean delivery would be necessary. Despite claims by hospital doctors that this dramatic increase in the occurrence of caesarean births has been at the patient's request, medical overseeing authorities have expressed concern that it actually has more to do with doctor's fear of being sued for not having taken sufficiently proactive steps to ensure delivery.<sup>71</sup>

Although traditionally reluctant to involve judicial interference in the clinical relationship, obstetricians have increasingly called upon the courts to give blessing to their actions in this complex context. Annas acknowledges that physicians often feel absolved of responsibility by deference to legal judgement,

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<sup>69</sup> Kolder, V., Gallagher, J. & Pasrons, M., "Court-Ordered Obstetrical Interventions" (1987) 316 *New England's Journal of Medicine* 1192-6

<sup>70</sup> Annas, G. "Protecting the Liberty of Pregnant Patients", *Supra*. Chapter Three, Note 68

but suggests that they should not be so complacent.<sup>72</sup> The appearance of such legitimacy is often deceptive because the judge has been forced to act quickly, in an environment where he knows little and will almost always defer to the opinion of the physician. Rhoden's article "The Judge in the Delivery Room"<sup>73</sup> has launched a scathing criticism of the manner in which legal decisions are made in this arena. More often than not, the case will pertain to an emergency clinical situation where the pregnant woman is near the point of labour. Judges are required to make hurried judgements (often in a matter of hours or minutes) within the confines of a clinical environment where the physician is lord and master, where the pregnant woman is afforded no opportunity for proper legal representation or appeal, and where there is definite social and moral pressure to decide in favour of medical action which will save lives, regardless of subsequent alienation stemming from invasion of bodily integrity.

In this environment, it is far from surprising that most judges have concurred with the physician's requests. Likewise, it is far from surprising that some of these decisions have been overturned on appeal (as we shall see in the US case of AC<sup>74</sup> and St. George's Healthcare NHS Trust v S<sup>75</sup>). After the event, the appeal judge is given the time and opportunity to consider the legal and ethical implications of these decisions in a more appropriate and procedurally fair setting. When the ideals of autonomy and self-determination (which are held to be the pillars of modern liberal legal principles) are given voice in this belated setting, it is predictable that judges will condemn the decision at first instance. In some appeal cases, this condemnation has been quite explicit. The appeal court in the Re AC case, for example, stated that,

"The procedural shortcomings rampant in these cases are not mere technical deficiencies. They undermine the authority of the decisions themselves, posing serious questions as to whether judges can, in the absence of genuine notice, adequate representations, explicit standards of proof, and right of appeal,

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<sup>71</sup> Reported in *Scotland Today*, Scottish Television, 23<sup>rd</sup> March 2000.

<sup>72</sup> Annas, G. "Protecting the Liberty of Pregnant Patients", *Supra*. Chapter Three, Note 68

<sup>73</sup> Rhoden, N. "The Judge in the Delivery Room" (1986) 74 *California Law Review* 1572

<sup>74</sup> Re AC (1990) US 573 A2d 1235

<sup>75</sup> St. George's Healthcare NHS Trust v S (1998) 3 WLR 936

realistically frame principled and useful legal responses to the dilemmas with which they are being confronted.”<sup>76</sup>

This reversal comes too late for the woman in question, however, her body having already been violated, and it leaves the overall legal position riddled with internal contradiction and confusion. It has become difficult to predict exactly how any one court will resolve any particular case of ‘maternal-foetal conflict’. Rulings of higher courts have tended to favour the principles dictated by a preference for maternal health and autonomy over foetal life. On the other hand, however, trial judges who have rushed to hospitals to answer urgent questions have felt relatively free to enforce caesarean section delivery, hospital detention, and other measures in order to protect the near-term foetus.<sup>77</sup> Few of these decisions are ever appealed and this makes it very difficult to determine any clear pattern of a legal position.

We have seen in the preceding sections, the development of a medical ideology, gaining ground with the advent of modern techniques of assisted reproduction, which defines the foetus as an independent patient with a right to medical treatment. This change in perception of the foetus has facilitated the definition of the pregnant woman as an ancillary part of the organic vessel with no right to refuse treatment. Originally, this perception was manifested in the prohibition of certain conduct from pregnant woman (smoking, drinking, etc.). This more simplistic mechanism of control was stretched to its limits by the US case of Pamela Rae Stewart that arose in California in 1987.<sup>78</sup> In this case, a woman was brought up on charges of foetal neglect for among other things not getting to hospital with due haste and for having intercourse with her husband during pregnancy. Her husband, a batterer whose brutal outbursts had summonsed the police to their home more than twelve times in one year alone was not charged,

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<sup>76</sup> *Re AC* (1990) US 573 A2d 1235, quoted in Gallagher, J. “Prenatal Invasions and Interventions – What’s Wrong with Fetal Rights?”, *Supra*. Chapter Three, Note 48, p. 49

<sup>77</sup> Kolder, V., Gallagher, J. & Parsons, M, “Court-Ordered Obstetrical Interventions”, *Supra*. Chapter Three, Note 69, p. 1192 discussed in detail in Evans, M., Fletcher, J., Dixler, A. & Shulman, J. *Fetal Diagnosis and Therapy - Science, Ethics and the Law* (1989) JB Lippincot Co., p. 237

nor even questioned! Although this case was later dismissed, it is apparent that this case is only one of the more blatant manifestations of a broader trend in which the state and other third parties have increasingly asserted what are perceived to be foetal interests in an attempt to use the law to dictate how women should behave during pregnancy.

Following on from the 'successful' promotion of such prohibitions (which rendered women incapable of eating, drinking and acting as they pleased in the same way that rape laws continue to render women incapable of walking, acting and dressing as they please), the medical profession took more active steps, encouraging the operation on pregnant women with, or without, their consent. Cases in which women are forced to undergo caesarean sections against their will provide a particularly vivid illustration of the increasing power being claimed by the state to override the wishes of pregnant women in the interests of the foetus. In one of the first US cases involving this issue, Jefferson v Griffin Spalding County Hospital<sup>79</sup> the court noted that the examining physician had found that a caesarean section was dictated in the interests of preserving the life of the pregnant woman as well as the foetus and considered this point to be exhaustive of the issue of the overall interests of the pregnant woman who was nonetheless refusing consent to the operation.

Judges who support these medical crusades often do so with such fervour that they appear to have trouble envisaging the woman in question as in any way a full and living person. In the case of Re. Madyun, a Washington Supreme Court judge ordered a caesarean section to be performed against the wishes of a 19 year old pregnant woman with the assertion that "all that stood between the

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<sup>78</sup> For Discussion of this case, see Mair, J. "Maternal-Foetal Conflict : Defined or Defused?" in McLean, S., *Contemporary Issues in Law, Medicine and Ethics* (1996) Dartmouth. Also Johnsen, D. "A New Threat to Pregnant Women's Autonomy" (1989) *12 Hastings Report*, p. 33

<sup>79</sup> Jefferson v Griffin Spalding County Hospital (1981) Ga 274 Se 4d 457

Madyun fetus and its independent existence, separate from its mother, was, put simply, a doctor's scalpel."<sup>80</sup>

A review of medical institutions in 18 states between 1981-86 is cited by Faludi. In the 36 cases where doctors had gone to court to force an unwilling woman to submit to obstetrical intervention, judges granted all but three requests. 88% were decided within six hours; 20% within one hour. In each instance, no evidence was adduced to suggest that the women were in any way mentally incompetent, yet nonetheless in each case, the woman's express wishes were overruled.<sup>81</sup>

In a legal climate where the right of the patient to refuse medical treatment was gaining credibility, pregnant women were increasingly losing battles to exercise that refusal in the obstetrical ward. In the UK, a flimsy justification for this paradox can be found in the statement given by Lord Donaldson in the case of Re T<sup>82</sup>. In this case, which involved the right of a Jehovah Witness to refuse life-saving treatment on religious grounds, Lord Donaldson alluded to the general principle that "the law requires that an adult patient who is mentally and physically capable of exercising choice must consent if medical treatment of him is to be lawful". However, through the duration of his deliberation, he also drew attention to certain areas of the law where he felt that this general principle may not be applicable – one such area concerned decisions that could affect the death of a viable foetus. This one line *obiter dictum* was never argued in court, yet it has been relied upon in subsequent cases dealing with maternal-foetal conflict to add support to the claim that these circumstances should present an exception to the general deontological rule (manifest in the requirement of informed consent) because they exhibit problems of considerable ethical and legal complexity.

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<sup>80</sup> Re Madyun (1990) 573 A 2d 1235. Discussed in Faludi, S., *Backlash - The Undeclared War Against Women* (1992) Vintage, p. 466

<sup>81</sup> Faludi S. *Backlash - The Undeclared War Against Women*, Supra. Chapter Three, Note 80, p. 466

In ordering these operations, judges are going far beyond the existing law on the parental duties owed even to live children. It has been a long-since established premise of Anglo-American legal culture that parents cannot be compelled to benefit their child's health when this would be to their own detriment. In the case of McFall v Shimp<sup>83</sup>, for example, it was expressly stated that "to compel the defendant to submit to an intrusion of his body (for the benefit of another) would change every concept and principle upon which our society is founded". Apparently, it is less of a legal and ethical leap to intrude forcibly on the body of a pregnant woman.

The argument has often been advanced that forced obstetrical surgery does not interfere with the rights of pregnant women in any serious way. However, the case of AC<sup>84</sup> shows in most dramatic fashion that this is not always the case. In this US case, a woman who was 26 weeks into her pregnancy and who had been in remission from cancer for several years, developed a cancerous tumour in her lung. She expressly informed the clinical staff that she wished her own health to have priority over that of the foetus and asked to be given the necessary radiation and chemotherapy. The doctors involved refused to do so because it would be dangerous for the foetus and they felt that the treatment would be futile in any event, the cancer being in their opinion terminal (remarkably enough, however, AC's cancer had twice before been diagnosed as terminal and she had nonetheless survived).

At 26 weeks' gestation, the foetus was unlikely to survive *ex utero*. The doctors felt, however, that if they could prolong AC's life by another two or three weeks, the foetus would have a better chance of survival. Hence, instead of treating the tumour, the clinical staff sedated AC in the hope of delaying her death. When AC tried to refuse this 'treatment' she was ignored and a tube was placed in her throat, making it impossible for her to speak. On being informed

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<sup>82</sup> Re T (1992) 4 All ER 649, *Supra*. Preface, Note 16

<sup>83</sup> McFall v Shimp (1978) 127 Pitts. Leg. J 14

<sup>84</sup> Re AC (1990) US 573 A2d 1235

of the details of the case, the hospital administration in question became concerned that medical staff were not taking sufficiently heroic steps to rescue the life of the foetus at this stage, and they proposed that an immediate caesarean section be performed. In her current state, an operation of this significance was likely to kill AC. Given that she was unconscious from the sedatives, and therefore unavailable for consultation, and given that even the hospital doctors who were in favour of saving the foetus were opposed to the operation, the hospital administration called upon the judiciary to mediate the situation.

The judge in question focused his attention almost exclusively on the foetus, and the effects of the operation on its health. Without making the brief walk down the hospital corridor to see AC himself, he concluded that the doctors should operate immediately, calling her struggle to live an almost selfish concern for her own comfort. As the sedatives were beginning to wear off, AC was told of the developments. While still foggy from the sedatives, she agreed to the operation, but half an hour later, in a clearer state of mind, she vociferously and unambiguously stated that she did not want the operation to go ahead. Nonetheless, the judge felt that her intent was unclear and that in any event, her intent had been superseded by his decision and was therefore irrelevant. Shortly after, the doctors delivered a girl whom they claim survived for two hours. Two days later, AC died. An autopsy report determined that the operation was a contributing factor in her death. Three years later, on further appeal by AC's parents, the District Court of Appeals overruled the decision. This decision came tragically three years too late for Angela Carder.<sup>85</sup>

Despite the subsequent overruling of this decision in AC, the first UK decision to deal with similar issues, Re S<sup>86</sup>, relied heavily on the reasoning of the original AC decision to justify its imposition of an enforced caesarean section delivery

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<sup>85</sup> More details of the case can be found in Faludi's discussion in *Backlash – The Undeclared War Against Women*, Supra. Chapter Three, Note 80, p.468-473

<sup>86</sup> Re. S (1992) 4 All ER 671

on a competent dissenting maternal patient. The UK legal experience traces out with much similarity the experience within the US, although the number of reported cases marking this out have been far fewer (perhaps because patients within the UK medical climate are less inclined to question and challenge clinical authority - statistics on medical malpractice suits would indeed seem to bear this out).<sup>87</sup>

In the 1987 case of D v Berkshire County Council<sup>88</sup>, the potential for conflict between the autonomy of the pregnant woman and the well-being of her foetus was brought into the legal forum. In this case, it was established that account may be taken of a woman's prenatal behaviour in determining the future care of the born child. Although the court refused to take the step of recognising the foetus as the bearer of enforceable legal rights, it did establish the premise that prenatal conduct on the part of the mother was a relevant consideration in care cases.

This recognition gave rise to questions regarding what protection would be afforded to the foetus against prenatal conduct on the part of the mother which may be injurious to the subsequent health of a born child. In Re F (In Utero)<sup>89</sup>, the court, when asked to consider making a foetus a ward of court to protect the foetus from its mother's lifestyle, appeared to retract a little from its position, stating that the foetus had no separate legal personality, and that even if it did, the freedom of the mother must take priority. The court appeared reluctant to press the issue of foetal interests to this extent, particularly given the biological imperative that taking custody of the foetus necessarily requires taking enforced custody of the mother, which presents a gross infringement of personal liberty.

It seems that in this regard at least, the UK courts have been reluctant to follow the US precedent with such fervour. In relation to the practice of enforced

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<sup>87</sup> Kennedy, I & Grubb, A. *Medical Law – Texts with Materials* (1994) Butterworths, 506-7 (Annex B)

<sup>88</sup> D v Berkshire County Council (1987) 1 All ER 20

<sup>89</sup> Re F (in utero) (1988) 2 All ER 193



caesarean section, however, this may well not be the case. In a court decision which occupies less than a page in the law reports, and which was reached in a matter of minutes, the court in Re S<sup>90</sup> ruled in favour of an enforced caesarean section on the ground that it was in the vital interests of both mother and child, despite vehement refusal from the mother on account of her religious beliefs.

This decision was premised on the at best flimsy legal basis of a one line obiter dictum in Re T<sup>91</sup> and on the wrong AC<sup>92</sup> decision. Nonetheless, judicial approval of this decision was afforded in the subsequent cases of Tameside and Glossop Acute Services Trust v CH<sup>93</sup> and Norfolk and Norwich Healthcare NHS Trust v W.<sup>94</sup> Again, these cases referred to pregnant women and their refusal to give consent to caesarean section operations. In the Tameside case, the woman in question had been suffering from paranoid schizophrenia which medical evidence suggested made her incapable of exercising a competent decision regarding her treatment. Having been sectioned under Mental Health legislation, the court authorised enforcement of a caesarean section operation despite the patient's clear refusals of consent. The Norfolk and Norwich case stands on significantly less sure ground – despite professional psychiatric evidence attesting to the fact that the woman in question was not suffering from a mental disorder under Mental Health legislation, the court felt free to apply the Re S dicta to enforce a caesarean section against the women's averred wishes. This decision was reached without the judge ever coming into contact with the woman herself. Perhaps most remarkably in this case, one of the express reasons given for the judicial decision to authorise treatment was to avoid the patient's "feeling any guilt in the future were she, by the refusal of her consent, to cause the death of her foetus."<sup>95</sup> This provides an illustrative example of the incorporation of altruistic maternal ideology within the legal arena. Surely, it is not the role of the courts to override the wishes of mentally competent patients

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<sup>90</sup> Re S (1992) 4 All ER 671

<sup>91</sup> Re T (1992) 4 All ER 649

<sup>92</sup> Re AC (1990) US 537 A2d 1235

<sup>93</sup> Tameside and Glossop Acute Services Trust v CH (1996) 1 FLR 762

<sup>94</sup> Norfolk and Norwich Healthcare NHS Trust v W (1996) 2 FLR 613

<sup>95</sup> Norfolk and Norwich Healthcare NHS Trust v W (1996) 2 FLR 613

on the grounds that, were they not to do so, the patient may later come to regret the outcome of their decision. Such legal and medical paternalism is unjustifiable in a supposedly liberal legal and clinical context.

Furthermore, there was some implication in both these cases that a woman so close to delivery would necessarily be in severe pain and distress and that this in itself would be sufficient to justify finding her incapable of exercising a rational choice.<sup>96</sup> This presents somewhat of an anomaly to our legal and medical imperatives - the judge never came into contact with the women in question so it is difficult to discern from whence he takes this knowledge about their pain and distress. What's more, arguments that patients are suffering from pain and distress are surely applicable to a great majority of patients whose health condition dictates that surgery is medically indicated. In all other contexts, however, it seems that the pain and distress of the patient is not sufficient to supplant their ability to make a rational judgement.

In the aftermath of these two decisions, it had seemed rather that the legal position within the UK had become fairly well cemented. However, a recent appeal case<sup>97</sup> has suggested that this may not yet be so. Although this decision holds only persuasive authority within the English law system, it is worth giving some consideration to because it has been received by many commentators as presenting a dramatic revision of the legal position in this arena. However, such optimism must be tempered. In line with the pattern that has been discerned by Annas and Rhoden<sup>98</sup> in the US legal system in relation to this area, it may be that cases heard on appeal will overrule those decisions that have been reached at first instance. However, this does not necessarily imply that a dramatic

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<sup>96</sup> In the case of Rochdale Healthcare (NHS) Trust v C (1997) 1 FCR 274 this was explicitly given as the reason behind the determination of the maternal patient's incompetence and attendant inability to exercise a rational choice

<sup>97</sup> St. George's Healthcare NHS Trust v S (1998) 3 WLR 936. Reported in *The Guardian*, Friday 8th April 1998

<sup>98</sup> Annas, G. "Protecting the Liberty of Pregnant Patients", *Supra*. Chapter Three, Note 68  
Rhoden, N. "The Judge in the Delivery Room", *Supra*. Chapter Three, Note 73

alteration will follow in the way in which these first instance cases are themselves decided.

Given the nature of these cases, it is rare that an appeal will ever be pursued. However, in the case of St. George's Healthcare NHS Trust v S<sup>99</sup>, where appeal was pursued, the court deemed it appropriate (having taken a more lengthy look at the issue at stake) to overrule the original decision. The appeal court declared that the health authority in question acted unlawfully in forcing a woman to undergo a caesarean section operation against her will. In far more familiar legal language, the appeal court noted that,

“When human life is at stake, the pressure to provide an affirmative answer authorising unwanted medical intervention is very powerful. Nevertheless, the autonomy of each individual requires continuing protection even, perhaps particularly, when the motive for interfering with it is readily understandable, and indeed to many would appear commendable.”<sup>100</sup>

Although the decision in this case does hold some promise, we must exercise caution in heralding its liberatory zeal. We have seen that a similar pattern can be discerned within the US legal system, and nonetheless judges at first instance continue, as a general rule, to authorise enforced treatment regardless.<sup>101</sup> Furthermore, the reasoning in this recent decision was heavily pre-occupied by the fact that the local authority had the woman sectioned under Mental Health legislation in circumstances in which the court did not consider that action to have been appropriate. Commentary in the aftermath of the Tameside case was heavily critical of what was considered to be an illegitimate use of Mental Health legislation to enforce treatment upon pregnant women. The provisions of the Mental Health Act<sup>102</sup> clearly state that the need for patient consent can only be overruled in regard to treatment related to the mental disorder displayed

<sup>99</sup> St. George's Healthcare NHS Trust v S (1998) 3 WLR 936

<sup>100</sup> St. George's Healthcare NHS Trust v S (1998) 3 WLR 936, 953

<sup>101</sup> Kolder, V., Gallagher, J. & Parsons, M. “Court-Ordered Obstetrical Interventions”, *Supra*. Chapter Three, Note 69

Evans, M., Fletcher, J., Dixler, A & Shulman, J., *Fetal Diagnosis and Therapy*, *Supra*. Chapter Three, Note 77

<sup>102</sup> Mental Health Act 1983 (especially relevant, s. 63)

by the incompetent patient. Hence in the case of Re C<sup>103</sup> a patient suffering from schizophrenia and detained in hospital under the Mental Health Act was held to be entitled to refuse consent to treatment upon his gangrenous leg on the basis that his gangrene was 'entirely unconnected with the mental disorder' and therefore beyond the remit of Mental Health provisions overruling the need for patient consent. The decision in the Tameside case to overrule a refusal of consent to the caesarean operation under the provisions of the legislation has met fierce criticism from those who have suggested that this subverts the intent of the Mental Health Act, permitting enforced treatment on incompetent patients for a range of symptoms unconnected to their mental condition. In St. George's Healthcare, the condemnation aimed at the Health Authority's attempts to section the pregnant patient under this legislation demands redress for previous misinterpretation of the Act.<sup>104</sup> Although this represents a promising recognition of patient's rights in this context, it is arguable that the decision says less about the autonomy rights of pregnant women and more about policy concerns regarding the integrity of the Mental Health Act.

The appeal court in the St. George case was also particularly critical of the lack of appropriate procedure in the first instance hearing and of the prejudicial effect that this had upon the ability of the woman involved to have her position afforded credibility.<sup>105</sup> In the original hearing, the order authorising the caesarean section had not only been made without the woman being represented, but it had also been made without her knowledge and without any attempt to inform her or her solicitor of the application. What's more, it was subsequently found that the trial judge had been told certain untruths in regard to the case and had not been informed of certain materially relevant factors prior to his deliberation. So, although the statement by the appeal court in this case does offer some promise, we must not become too complacent of the legal position in the UK at this early stage. It may prove to be the case that the judgement was motivated more by a concern to be seen to be protecting the

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<sup>103</sup> Re C (1993) 15 BMLR 77

<sup>104</sup> St. George's Healthcare NHS Trust v S (1998) 3 WLR 936, 957-962

procedural legal rights of participants in trial hearings and by a concern to ensure that health authorities do not construct the condition of pregnancy as rendering somebody mentally incapable.<sup>106</sup> In circumstances where appropriate procedures are followed and an enforcement order still arises before the courts, it is difficult to predict at this stage how the court would decide. This is of course compounded by statistical evidence from across the Atlantic that despite clear appeal court decisions condemning enforced treatment, first instance courts continue to give judicial approval for intervention.

There was also some suggestion in the St. George Healthcare case that despite the appeal courts explicit condemnation of any 'balancing test' between maternal and foetal benefits and burdens in cases of maternal-foetal conflict, should surgical techniques improve to the point where caesarean sections becomes less dangerous for the pregnant women, enforced intervention may become more acceptable.<sup>107</sup> In effect, therefore, the court has continued to implicitly accept a balancing test in its deliberation. This veiled recognition of the two-patient model is most apparent in the concluding deliberation that "the interests of the foetus cannot be disregarded on the basis that in refusing treatment which would benefit the foetus a mother is simply refusing treatment for herself."<sup>108</sup> What this suggests is that while courts may condemn enforced caesarean section operations under the current clinical environment, should less invasive procedures become viable, the courts may be willing to reassess their position in regard to the alleged supremacy of maternal autonomy and bodily integrity. As methods of foetal diagnosis and therapy advance, the likelihood of this becoming a future consideration does not seem especially remote.

While the legal position remains problematic and ambiguous across the Anglo-American legal culture, we must continue to be vigilant regarding the

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<sup>105</sup> St. George's Healthcare NHS Trust v S (1998) 3 WLR 936, 947-8 & 969-70

<sup>106</sup> Dolan, B & Parker, C. "Caesarean Section – A Treatment for Mental Disorder" (1997) 314 *British Medical Journal* 1183

<sup>107</sup> St. George's NHS Healthcare Trust v S (1998) 3 WLR 936, 951-954, esp. 953

<sup>108</sup> St. George's NHS Healthcare Trust v S (1998) 3 WLR 936, 953

implications of this trend and of the effects that this bears out upon the life of pregnant women, and on their status in society at large. One of the most pessimistic analyses of the inhibitory effect of the new reproductive technologies, and their legal enforcement upon reluctant pregnant women, has been presented by Gena Corea in her book, *The Mother Machine*.<sup>109</sup> She suggests that the ultimate aim of these new technologies is to replace biological mothers with 'mother machines'. Modern medical discourse has often proposed that the maternal womb environment is less 'safe' for the foetus than the clinical environment of an artificial womb, and Corea suggests that it is only a matter of time before the technology has developed sufficiently to replace the natural gestational environment with an artificial one.

Although allegedly in the best interests of the foetus, Corea suggests that the hidden agenda behind this lies in a concern to supplant women's source of power that is derived from their position as reproducers of the species. Furthermore, Corea laments the fragmentation of the once unified biological process of motherhood that is facilitated by these new technologies. She considers the separation of this process into separate functions as a kind of biological division of labour that has the same alienating effects upon the agents involved as Marxist analysis has suggested in regard to the capitalist division of labour. As these separate functions are increasingly taken under the surveillance and regulation of male dominated medical and legal agencies, and as the interests of the foetus begin to override the rights of the mother, Corea fears that women's claim to reproduction as their source of power in a world wrought with power imbalance will be eroded.

The Foucaultian methodology that has been discussed in Chapter One would have considerable difficulty in accepting the original premise asserted by Corea that the advent of new reproductive technologies is the result of an entirely male-constructed desire to take control of female reproduction. For the Foucaultian feminist, as we have seen, the dynamics of power relations are too

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<sup>109</sup> Corea, G *The Mother Machine*, Supra. Chapter Three, Note 4

fluid to permit of such a deterministic analysis. Nonetheless, we are able to recognise the interplay between what Nietzsche has called 'the will to power' and what Foucault has called 'the claim to truth' in the increasing level of male-influenced control being exercised over the biological processes of pregnancy and childbirth. This trend was initiated with the proliferation of medical discourse which displaced the role of midwife and replaced it with the male-defined role of obstetrician, which made the processes of the female body a subject within the expert knowledge of male-influenced medical discourse, and which in its more modern manifestations has produced a wealth of assisted reproductive technologies which have been imposed upon women, with or without their consent, often with the result of a profound alienation between the women and her own bodily processes.

Not only has the forced imposition of this technology provoked a sense of alienation in the female agent in regard to control over her own biology, it has promoted a sense of alienation from all aspects of the female right to self-determination by encouraging a social perception of women which ties them to their biology and renders them incapable of action as free and liberated individuals.

"By creating an adversarial relationship between the woman and her fetus, the state provides itself with a powerful means for controlling women's behaviour during pregnancy, thereby threatening women's fundamental rights."<sup>10</sup>

Courts, both in UK and US, have traditionally recognised the rights of the foetus on the condition that there be a live birth of the child. This was based on the rationale that the foetus was a valued part of the pregnant woman, and was asserted only in situation where recognition of such interests would be to the benefit to the mother as organic whole. Increasingly, however, courts have become more willing (particularly in the US) to recognise foetal interests that are not contingent upon a subsequent live birth. Originally this shift in legal ideology may have been well-intentioned, constructed to protect the rights of the pregnant woman to the full. However, as these rights have developed, they have

come to embody a dangerous conceptual move, gradually being extended in ways which conflict with the rights of women. We have seen this most forcefully in the cases of enforced medical treatment discussed above.

Given the foetus's complete dependence upon the body of the mother, the implication of cases asserting foetal rights (e.g. D v Berkshire CC<sup>111</sup> or Grodin v Grodin<sup>112</sup>) is that virtually every act of the pregnant women will have a potential effect on the foetus, thereby leaving the woman open to all kinds of criminal or civil liability. We have seen that the law has often permitted the enforcement of caesarean section operations on women against their will. This legal and medical phenomenon is troubling enough in itself, given the profound implications which this holds for a pregnant women's right of self-determination, the credibility given to their consent or non-consent, and their own subjective experience of self as a serious and rational agent. Kary Moss, a staff attorney on a New York Women's Rights Project has summarised this position,

"these cases for the first time force a pregnant woman to act in the service of another, the foetus. If you see a child in a burning building you are not required to risk your life to save the child. These cases ask a woman to sacrifice her right to privacy and open herself to policing during pregnancy. All of a sudden, the behaviour of the pregnant woman is open to state controls to which no-one else is subject."<sup>113</sup>

There have been few attempts at state intrusion of the rooted and personal nature involved in state regulation over the actions and medical care of pregnant women. US courts have held unconstitutional even isolated instances of the kinds of intrusion to which foetal rights advocates would have women continually subjected.<sup>114</sup> This is susceptible to even more dangerous expansion

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<sup>110</sup> Johnsen, D "The Creation of Fetal Rights - Conflict with Women's Constitutional Rights to Liberty, Privacy and Equal Protection", *Supra*. Chapter Three, Note 78, p.600

<sup>111</sup> D v Berkshire County Council (1987) 1 All ER 20

<sup>112</sup> Grodin v Grodin 102 Mich. App. 396 (1980)

<sup>113</sup> Taylor, K. (staff attorney on the ACCU Women's Rights Project) quoted in Taylor, J., "Punishing Pregnant Addicts" *New York Times Review Section*, 10<sup>th</sup> September 1989

<sup>114</sup> In Rochin v California (1952) 342 US 165, it was held that forcible pumping of a criminal's stomach violated the individual's rights to due process, calling it conduct which 'shocks the



as the new methods of foetal therapy and foetal surgery gain medical ground. Many of these procedures are still at a highly experimental stage, however as one physician has noted, "excessive enthusiasm, combined with inexperience, can be dangerous. Eager to learn and refine these procedures physicians and surgeons may rush ahead."<sup>115</sup>

Today physicians impose caesarean sections upon women, despite little clinical evidence to suggest that delivery in this manner presents any significantly better chance of a safe delivery in most case. Annas has already established that a majority of caesarean sections that are performed by physicians are not necessary operations.<sup>116</sup> Currently, therefore, physicians are willing to impose considerably serious surgery upon pregnant women in circumstances where this may well be unnecessary.<sup>117</sup> Medical imperatives and the technological fixation that they perpetuate have encouraged physicians to apply heroic measures when this is not medically required. Many commentators have already noted in other fields of medical decision-making (particularly end of life decision making) that modern medicine has a tendency to over-treat by virtue of the technology that it has at its disposal.<sup>118</sup> When this clinical environment of excessive use of surgery and technology is coupled with the development of foetal surgery, the potential implications are alarming. It is a small step from a surgical technique being medically approved to its becoming medically indicated and legally enforced - we have seen this in the context of caesarean section - and there is a real danger that we will see this again in the field of the far more intrusive techniques of foetal therapy and foetal surgery.

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conscience'; In *Winston v Lee* (1985) 105 S. Ct. 1611, the court considered it unconstitutional to violate a criminal suspect's rights by surgically removing a bullet from his body for use in evidence.

<sup>115</sup> Shriner, "Maternal versus Fetal Rights - A Clinical Dilemma" (1979) 53 *Obstetrics and Gynaecology* 519

<sup>116</sup> Annas, G. "Protecting the Liberty of Pregnant Patients", *Supra*. Chapter Three, Note 68

<sup>117</sup> Haverkamp & Orleans, "An Assessment of Electronic Fetal Monitoring" (1982) 7 *Women and Health* 115

<sup>118</sup> Kennedy, I & Grubb, A. *Medical Law - Texts with Materials*, *Supra*. Chapter Three, Note 87, p.1228

The implications of this for women's autonomy are even more alarming. Knopoff, in her article "Can A Woman Morally Refuse Fetal Surgery?"<sup>119</sup> argues that enforced imposition of foetal therapy is grounded even more solidly in a crusade for foetal rights. While in the context of enforced caesarean sections, it is often argued that the surgery is enforced to serve the best interests of both mother and child, in the context of foetal therapy, no medical benefit will accrue to the pregnant woman. On the contrary, the process will involve harm, distress and substantial risk, even of death, to the woman. Nonetheless, if the law continues to advocate this medical shift away from its deontological approach towards a more utilitarian ethic whereby benefits can be balanced against burdens, it becomes feasible that in this context more moral weight may be placed upon the rights of the foetus to receive treatment than upon the rights of the mother to make autonomous decisions and to have a protected bodily integrity.

The viability of this possibility is augmented when we consider the tendency of medical discourse, discussed by Foucault<sup>120</sup>, to make claims to objective truth that overrate the reliability and accuracy of medical determinations and surgical techniques. We have noted at length in Chapter One, the modern proliferation of disciplinary discourse and we have drawn attention to the strong relationship that Foucault has isolated between the rise of disciplinary technology and the claims to truth made by medical discourse. Although the circumstances of enforced medical treatment which have formed the main body of this chapter have illustrated the most dramatic examples of perceived maternal-foetal conflict (because the woman has attempted to expressly utilise her alleged 'right' to refuse medical treatment), we must not underestimate the proportion of clinical situations which never escalate to this scale.

There is a notable deference in society at large to the claims of medical discourse that pertain to establish 'truth' through means of scientific objectivity.

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<sup>119</sup> Knopoff, "Can A Woman Morally Refuse Fetal Surgery?" (1991) *Californai Law Review* 499

<sup>120</sup> Foucault, M. *The History of Sexuality Vol. I*, Supra. Chapter One, Note 3

In light of this, it is not unrealistic to assume that in many cases, pregnant women in an already imposing clinical environment would be inclined to accept the advice of medical staff as authoritative. Many women, although uncomfortable with the idea of bodily intrusion will defer to the decrees of the demi-god of medical discourse, not so much out of a genuine faith in their assertions as from a socially indoctrinated response which teaches them not to scrutinise such claims. We must, therefore, treat with suspicion even those cases where it appears that women have given their consent to the operation.

In a cultural climate where women are structured to be altruistic and selfless as mothers, and where such ideological deference is afforded to the claims of medical discourse, we have good cause to be critical of the legitimacy of the consent that physicians in this situation do obtain. The doctor-patient relationship is not one of equal terrain and the social requirements of the institution of motherhood do not afford women the right to consider themselves. Even without the additional complication of the cases where doctors seek legal enforcement of medical intervention upon the maternal patient, this area of socio-medical interaction is highly problematic.

Much of the problem in situations of expressly enforced medical treatment results from the over-simplistic reasoning that courts have employed in consideration of the maternal-foetal relationship. Influenced by a trend in obstetrics that has come to identify mother and foetus as separate and distinct entities, and in operation of the traditional legal dichotomous rationality discussed by Mossman in relation to rape law<sup>121</sup>, courts have too readily accepted a model of conflict between mother and foetus. For the pregnant women involved in the clinical situation, a model of conflict between herself and her foetus is highly distortive of the actual moral dilemma that she is facing. Viewing the foetus as a separate entity from the mother has allowed judges and physicians to deprive women of their decision-making autonomy. This fails to

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<sup>121</sup> Mossman, M. "Feminist Legal Method – The Difference it Makes", *Supra*. Chapter One, Note 12

appreciate the true complexity of the situation of the maternal patient, for whom her pregnancy is one factor among many in a string of complicated life circumstances, personal values and individual preferences. The situation of a pregnant woman who refuses consent to surgical intervention in the interests of her foetus (and even of herself) on the ground of religious conviction provides a useful illustration of this. In this context, the woman acts in accordance with what she genuinely believes to be in the best interests of her child, and the suggestion that there is a conflict between herself and her foetus is to apply oversimplified and inappropriate categorical and polarised modes of reasoning.

Surely, the woman herself is the person most qualified to make the most comprehensive decision regarding the fate of herself and her child. As Olsen has suggested, therefore, society's relationship to the foetus must be mediated by the woman within whose body it is located. When the situation is taken in abstraction from this context, as is the case when it is considered in the legal forum, the presence and value of these other considerations is lost and in turn the woman loses her right to control the overall trajectory of her life. Pregnancy and childbirth mean different things to different women,

“but one thing most women would agree upon is that the pregnant woman is the central participant in the process and that child-bearing is an experience that makes sense in the context of her biography as a whole person.”<sup>122</sup>

Mair, in asserting the inappropriate nature of this conflict model, has asserted that the conflict lies more often not between mother and foetus, but between mother and doctor.<sup>123</sup> While both doctor and mother believe themselves to be acting in the best interests of the foetus, the conflict stems from confusion as to what those best interests are. For the physician, best interests implies medical health and physical well-being, while for the mother best interests may involve evaluation of various moral and ethical considerations regarding what she feels is constitutive of a ‘good life’.

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<sup>122</sup> Stanworth, M., *Reproductive Technologies*, Supra. Chapter Three, Note 59, p.16

Through the judicial tendency to give automatic credence to medical determinations, judges have perpetuated a model of conflict which unfairly presents the woman as at best foolish, and at worst selfish, but in any event as acting in opposition to the interests of her foetus.<sup>124</sup> As Mair says, "this displays an arrogance and lack of understanding of the woman's life".<sup>125</sup> This lack of understanding is far from surprising, however, when we consider that all too often these decisions are taken without the judge even coming into contact with the pregnant woman.

To depict the context and relationship as one of conflict is to take the circumstances of the pregnancy in abstraction from the other constituent parts of the woman's life. This is highly artificial, since pregnancy and childbirth are experiences that are intrinsically tied to the other elements of an individual's subjectivity and external existence. The net result of this is the production of an acute sense of self-alienation in the female agent who is deprived not only of her ability to make credible choices regarding the direction of her life and the treatment afforded to her body, but also of the freedom to determine the definitions which surround her life experiences. This has implications not only for the individual woman, but also for the position of women in the broader social field.

"By substituting its judgement for that of the woman, the state deprives women of their right to control their lives during pregnancy...Furthermore, by regulating women as if their lives were defined solely by their reproductive capacity, the state perpetuates a system of sex discrimination that is based on the biological difference between the sexes, thus depriving women of their constitutional right to the equal protection of the laws."<sup>126</sup>

Only women can suffer the great intrusions of this legal development because only women have the ability to bear children. Hence, the proliferation of foetal

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<sup>123</sup> Mair, J. "Maternal-Foetal Conflict : Defined or Defused?" in McLean, S. *Contemporary Issues in Law, Medicine and Ethics*, Supra. Chapter Three, Note 78

<sup>124</sup> Diduck, A. "Legislating Ideologies of Motherhood", Supra. Preface, Note 14, p.462

<sup>125</sup> Mair, J. "Maternal-Foetal Conflict : Defined or Defused?" in McLean, S. *Contemporary Issues in Law, Medicine and Ethics*, Supra. Chapter Three, Note 78

rights, and their enforcement against the wishes of the pregnant woman, not only infringe upon the legal and moral rights of individual women to exercise a meaningful right of consent and self-determination, they also serve on the social level to disadvantage all women by further stigmatising them on the basis of the very gender-specific characteristic which has been used throughout history to perpetuate a system of sex inequality. As Johnsen notes, the ability to bear children is to sex discrimination what dark skin is to race discrimination. It is the characteristic that has been used to systematically disadvantage women by defining their proper role in terms of that ability.<sup>127</sup>

### *Conclusion*

“The implication of these judgements are considerable. It is possible that women in labour (and perhaps earlier) may only have the capacity to withhold consent so long as they do not.”<sup>128</sup>

The shift in ideology promoted by the clinical two-patient model, and the legal conflict model, has generated profound implications upon the ability of the woman to exercise meaningful consent in the pregnancy experience. We have seen earlier in this chapter that operating in the microcosms of society is an institution of compulsory motherhood which structures and perpetuates the female desire to mother. It has been suggested that the existence of such a cultural climate must lead us to question the extent to which an individual woman's ‘choice’ to become a mother is exercised ‘freely’. All choice is mediated by the society in which that choice is exercised. In a society which encourages the equation of femininity with motherhood, the extent to which the choice to become a mother is the result of social constructionism must be re-evaluated.

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<sup>126</sup> Johnsen, D. “The Creation of Fetal Rights - Conflict with Women's Constitutional Rights to Liberty, Privacy and Equal Protection”, *Supra*. Chapter Three, Note 78, p. 613

<sup>127</sup> Johnsen, D. “The Creation of Fetal rights – Conflict with Women's Constitutional Right to Liberty, Privacy and Equal Protection”, *Supra*. Chapter Three, Note 78, p. 620-22

<sup>128</sup> Widdett, C. & Thomson, M. “Justifying Treatment and Other Stories” (1997) *5 Feminist Legal Studies* 77

Furthermore, even if it were possible to deconstruct the institution of motherhood to liberate the exercise of these choices, the possibility of female consent becomes problematic again later in the pregnancy experience. Cultural prescriptions which propose women's role of mother to be one of utmost selflessness and altruism interact with the alterations in clinical and legal ideology discussed above to make it increasingly difficult for women to refuse their consent to treatments and lifestyles which will benefit the health of the foetus. By strengthening the position of foetal rights, and by depicting the relationship between mother and foetus as one of conflict, the current legal position adopts the individualistic and polarised ideology that many feminist commentators have suggested is wholly distortive of the feminine epistemological position.<sup>129</sup>

Through the legal advocacy of enforced medical treatment, Anglo-American legal discourse has given credence to the impossibility of female non-consent. By asserting the requirements of a cultural assumption of women as mother, and of mother as self-deprecating, the law has permitted the medical establishment to invade the bodies of pregnant women in wholly unprecedented ways. Pregnant women have become exempt from the general liberal legal protections of autonomy and bodily integrity that liberal rhetoric purports to afford to all other agents in the social field, even in their dealings with medical institutions.

In the context of the rape trial, we have seen in Chapter Two how legal discourse has applied cultural stereotypes about the role of women to make it extremely difficult for the rape victim to establish that she did not consent to sex. In the rape context, women's consent to sex is automatically implied because this is assumed to be woman's natural role. In a similar fashion in this context, a woman's consent to foetal treatment is automatically implied because this is assumed to be a mother's natural role, and all women naturally want to be mothers. Rich has summarised the spirit of this conclusion as follows –

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<sup>129</sup> Diduck, A. "Legislaing Ideologies of Motherhood", *Supra.* Preface, Note 14

“If rape has been terrorism, motherhood has been penal servitude. It need not be.”<sup>130</sup>

In a truly cruel gesture, it seems that the modern medical establishment have with one hand given women the power, for the first time in history, to control their reproductive lives, while simultaneously depriving them of that control with the other hand by affording the state the ideology and technology to control the lives and choices of pregnant women. Legal decisions condemning this treatment of the pregnant woman as obstetrical vessel have in real terms come only on appeal. They have, therefore, come too late and if, as is likely, the UK position is to follow the same trend as that which has been discerned in the US,<sup>131</sup> the insight of the appeal decisions will be afforded as little consideration as are the wishes of the pregnant woman when judges rush to the hospital to make their first instance ruling.

Discussion over the previous two chapters has clearly established the problematic nature of the current treatment of female consent within the specific legal arenas examined. The extent to which normative expectations regarding ‘appropriate’ identities and forms of conduct have infiltrated the legal arena through a variety of discursive strategies has been forcefully illustrated, as have the curtailing effects of that incorporation upon the alleged ability of the legal agent to choose freely and from an unrestricted remit. Most specifically, we have noted the damaging effect that the passive and altruistic requirements of such expectations have had upon the liberties afforded to female agents and the credibility afforded to their forms of agency.

Developing that thesis further, it has been implied that the operation of consent in these legal contexts remains problematic primarily because of the position of consent within liberal frameworks which fail to illustrate the extent to which choices in the social world are constructed and constrained by normative

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<sup>130</sup> Rich, A. *Of Woman Born*, Supra. Chapter Three, Note 19, p. 14



stereotype and which fail to offer an honest account of law's operation in that constructive process. We have seen in our discussion in Chapter One that a necessary prerequisite to the achievement of a more meaningful standard for the operation and interpretation of consent can only be achieved by shedding the prevailing notion of unlimited and unconstrained human agency. Through the specific examination of the contexts of rape and maternal-foetal conflict, we have illustrated the disjunction between that liberal ideal and the experiential reality of heavily constructed agentic capacity.

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<sup>131</sup> Kolder, V., Gallagher, J. & Parsons, M. "Court-Ordered Obstetrical Interventions", *Supra*. Chapter Three, Note 69

## CHAPTER FOUR

### CONSENT, INDIVIDUALISM AND FEMINIST THEORIES OF THE SELF

‘The idea (of the voluntary) is useful, and it helps to serve the purposes of justice, but it is essentially superficial; if we seek to give it greater depth, or to redefine it by pressing too hard on questions of the agent’s precise intention, state of mind or power of self-control at a particular moment, we sink into the sands of an everyday entirely justified skepticism, that is, we enter a realm of psychological reality that is – and is recognized by us to be – too indeterminate to provide a rationally motivated answer to every possible question about the correct application of our concept of the voluntary.’<sup>1</sup>

In the preceding chapters of this thesis, we have examined the extent to which stereotypical assumptions about gender identity and socio-sexual behaviour have been incorporated into legal discourse and marshalled to discredit the possibility of female non-consent. Established from the outset has been the viability of the premise that modern legal power operates not only through juridical mechanisms, but also through the manipulative power of myriad normative disciplinary techniques.<sup>2</sup> This disciplinary aspect of legal power infiltrates the life of the human agent at intimate levels. Most poignantly, as we have seen, the mechanisms of a specific species of discipline, namely bio-power, operate to construct even the corporeal manifestation of the human body through the proliferation of skewed discourses about the dictates of sexuality.<sup>3</sup>

The peculiar effectiveness of the mechanism of bio-power has provoked concern to examine the extent to which disciplinary dictates can be said to have curtailed the bodily expression of autonomy in the human agent. Given the historical and philosophical trend, which has advocated a particularly inextricable link between the female body and the female identity, our focus has primarily involved examination

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<sup>1</sup> Williams, *B Shame and Necessity* (1993) Berkeley, p.67

<sup>2</sup> See Discussion in Chapter One, “Legal Power as Disciplinary Power”.

<sup>3</sup> See Discussion in Chapter One, “Feminism and Law’s Disciplinary Power” & “Discourses of Female Embodiment”.

of the effects of the incorporation into law of disciplinary power (most especially bio-power) upon the female agent.

The constructionism implicated in the networks of normative disciplinary power has significant effects at all levels of living. At the most general, however, the prime effect of the incorporation of disciplinary techniques into our analysis of legal power is the increasing recognition of the artificiality of the notion of choice and self-determination that has fuelled legal analysis within the juridical mould. Having established the existence of networks of discipline as operative upon the human experience, and having established the force of the normative imperatives that they communicate, it becomes increasingly difficult to stand by the prevailing liberal assumption of unfettered freedom and unconstrained individual choice.

The discourses of discipline, whether legal or otherwise, operate upon the decision-making process of the human agent, obscuring from view the possibility of 'undisciplined' options, while simultaneously accrediting priority to the specific modes of being deemed more appropriate. The existence of such discourse establishes, as we have seen through our discussion of the discourse of sexuality, a regime with which the subject must comply or face the condemnation of failing to meet the ideal. A society implicated in disciplinary power becomes a society peopled by subjects who struggle to meet the ideals presented to them for fear of reprisal. In their eternal struggle to comply with the ideals presented by disciplinary discourse, of course, the power of the agent to freely and meaningfully choose from a full range of possibilities is lost. On the contrary, the agent has the ability to choose only within the restricted remit made available through their submersion within the categories of desire directed by disciplinary regimes.

Nonetheless, the rhetoric of law continues to stand by the conception of unconstrained choice, or 'consent', which took precedence in the days of the social

contract tradition,<sup>4</sup> where the power wielded by law was unanimously attributed to the realm of the juridical. In contemporary society, where the mechanisms through which legal power operates are significantly more diffuse and complex, the model of human agency that acts as a pillar to legal power remains within this artificial and historical guise. Through the more general critique of Chapter One, and the more specific treatment of particular contexts in Chapters Two and Three, it has been suggested that the time for abandoning the myth of the juridical conception is long overdue. In analysing legal power outwith the shadow of the juridical, it becomes apparent that legal power significantly affects the remit and credibility of human agency in ways that can never be understood through a continued deference to the unidirectional conception of power privileged by legal analysis to date. The disciplinary discourses incorporated on the underside of the juridical in the operations of law establish normative ideals of behaviour, identity and even embodiment that saturate the life of the individual. This process of saturation significantly weakens the autonomy of the agent by skewing perceptions of their legitimate choices and constructing their ability to express freedom of choice to within strictly pre-ordained parameters.

Highlighted through the specific examination of the contexts of rape and maternal-fetal conflict in the preceding chapters has been the existence and operation of various stereotypes which have been incorporated into the legal arena through a multitude of discursive strands. The normative demands made upon social agents by these stereotypes are restrictive and inhibitive to the development of truly chosen gender identities. In the context of the legal treatment of rape, we have drawn attention to the existence of a pervasive ideology, which asserts that the appropriate role of the female is one that assumes a passive position in sexual relations. What's more, it is a role within which the behaviour exhibited in all areas of social living should embody a clear element of submission, be it through dressing reservedly, preserving one's chastity or never leaving home without the security of some male

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<sup>4</sup> See Discussion in Preface. Particularly, Hobbes, T. *Leviathan* (ed. MacPherson) & Locke, J. *Two Treatises of Government* (ed. Laslett, P.), *Supra*. Preface, Note 4

protection. Notions of the 'ideal rape' and the 'ideal victim' in this mould render it increasingly difficult for the female agent to 'choose' to live a life of personal and sexual freedom without also casting herself from the protective umbrella offered by the legal authorities to those women who succeed in conformity. If the female agent conforms to the demands of the protective confines of legal discipline, her 'choice' to do so must be treated with some degree of cynicism regarding the extent to which that choice has been imposed upon her by social expectations and fear of reprisal. Simultaneously, however, if the female agent refuses to comply with these demands and 'chooses' a life of independence and sexual initiative, she is divested of her powers of self-determination, should she be raped. This remains the case because in flirting with a man, or having a drink alone with him, the meaning of her conduct is construed to effectively deny her the claim that she did not thereby implicitly consent to sex with him.

In the context of maternal-foetal conflict different stereotypes infiltrate the legal arena, but the end result for the female agent remains similar. Where in the rape context, the disciplinary discourses were concerned with the proper role of woman as sexual agent, in this context, the concern is to fix the proper role of woman as mother. Once again, however, the dictates demand compliance with ideals of passivity, and self-abnegation. The most prevalent theme of disciplinary discourse being associated with the inherently altruistic nature of the 'good mother', the dictates of legal power operate to enforce this ideal when necessary, even in circumstances where there may be a dangerous effect upon the mother herself. In a fundamental contradiction to the body of legal authority on medical treatment, the maternal-foetal conflict situation (fuelled by the disciplinary discourses of altruism and selflessness) represents the only arena within which an agent is not entitled to refuse medical treatment. In a legal climate where all other competent adults are entitled to refuse treatment upon whatever basis (deemed rational or otherwise), the dictates of the 'proper' role of woman as mother are so strongly implicated as to

deny the same rights to pregnant women.<sup>5</sup> Legal power in this context operates likewise to eliminate the possibility of legitimate choice – if the female agent complies with the demands of selfless motherhood, she will consent to treatment and be cherished by society, but the pressure towards compliance operating upon her makes the legitimacy of her ‘choice’ questionable. If, on the contrary, she refuses to comply with such erroneous demands, her desire to construct her own meanings around the motherhood experience are frustrated by a legal power which once again makes it impossible for her to continue to refuse her consent to the demands of the ideal at the clinical stage.

Of course, the specific contexts examined here involve particularly strong gender-specific assumptions. While this has made them particularly attractive contexts in terms of our current concern to illustrate the close relationship between conceptions of law and power and the deployment of sexuality, as we shall see, this factor also makes them a relatively open target for counter-criticism from those who wish to defend the current notion of consent.

The argument developed over the preceding chapters has implied that the prevailing operation of consent is problematic in large part because it has continued to allow for the incorporation of prejudicial and anachronistic social stereotypes in its interpretation and application in the legal arena. It has been argued that such incorporation is misguided and dangerous, perpetuating a skewed dynamic of agency that affords greater credibility to the self-determination of some and not others. This problematic interdependence between social expectation and legal standards of consent has often been isolated within critique, particularly in the specific contexts previously addressed.<sup>6</sup> However, the fact that many commentators<sup>7</sup> have criticised the incorporation of social expectation into legal deliberation

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<sup>5</sup> See discussion of case law on this issue in Chapter Three

<sup>6</sup> See Discussion throughout Chapter Two and Chapter Three on this issue

<sup>7</sup> Most notably perhaps Estrich, S. *Real Rape*, Supra. Preface, Note 11 in relation to Rape, and Corea, G. “What The King Cannot See”, Supra. Chapter Three, Note 7 & Oakley, A., “Normal Motherhood - An Exercise in Self-Control?” Supra. Chapter Three, Note 28 in relation to maternal-foetal conflict.

surrounding the consent / non-consent dichotomy does not imply that the claim embodied in this thesis, which entails a fundamental reformulation of the very notion of consent, has been unanimously advocated.

Indeed, the argument has sometimes been made that a more appropriate remedy to the problems of consent discussed over the preceding chapters lies simply in ensuring the eradication of such gender-specific stereotypes.<sup>8</sup> By eliminating the incorporation of blatant stereotypical assumptions into legal decision-making, it is claimed that the prevailing liberal conception of consent will be able to operate as its rhetoric suggests, providing a medium for the free articulation of human choice. On this account, the unsatisfactory results of the application of the current standard of consent exist as enigmas within a generally valuable and egalitarian system of self-determination. The specific contexts of rape and maternal-foetal conflict are problematic because of the particularity of the issues being dealt with, rather than because of any problem inherent in the conception of consent involved in translating those issues into the legal realm. By establishing a more vigilant and critical approach to what issues of social expectation and stereotype are considered relevant to the issue of consent or non-consent, this counter-claim argues that the uncomfortable consequences discussed previously can be avoided. Once the eradication of erroneous stereotypical assumptions has been ensured by this proposed solution, the implication remains that the prevailing conception of consent is the most appropriate vehicle for the articulation of free and unfettered choice.

Although this argument offers the benefit of simplicity and superficial redress, it is fundamentally incapable of achieving its averred aims and therefore fundamentally incapable of offering a solution to the critique of the preceding discussion. By eliminating discourse from law in the way that this proposal requires, we harness legal power once more within the confines of the juridical conception. However, we

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<sup>8</sup> Fletcher, G. *Basic Concepts of Legal Thought*, Supra. Preface, Note 3. Arguments of this kind have been implicit even in some of the most well-respected feminist critique (e.g. Estrich, S. *Real Rape*, Supra. Preface,

have seen elsewhere that this juridical conception is not only outdated but also artificial.<sup>9</sup> In hiding behind the veil of the juridical, the solution which has thus been offered to the foregoing critique may succeed in presenting the illusion of improvement, but in real terms it simply relegates the significance of discourse and discipline once more to the underside of law's power.

In underestimating the centrality of the incorporation of stereotype and discourse into the operation of modern power, this proposed solution suggests that the incorporation of discursive strategies and disciplinary techniques into legal decision-making is the result of accident or ambivalence. In Chapter One, however, it was clearly established that this is not the case. The problematic situations highlighted in Chapters Two and Three cannot be remedied merely by the adoption of a more watchful approach to the incorporation of discourse into law. On the contrary, the incorporation of such discourse into law is a central aspect of the assumption of disciplinary power within law. The dangerous effects of this incorporation must be accredited with more significance than that afforded to it within the confines of this counter-claim – the incorporation involved is not the result of a simple lack of judicial impartiality, but an index of changing networks of power with tangible effects and consequences.

Eradication of the gulf between the model of unconstrained choice assumed by the liberal notion of consent and the reality of a constructed remit of agency implicated in the contemporary rise of disciplinary power requires the development of a complex methodology far beyond the framework of superficial judicial vigilance proposed by this counter-claim. The solution to the problems inherent in the prevailing operation of consent isolated over previous chapters does not lie in such proposals. Through their enduring reliance upon the epistemological foundations of the concept of consent itself, the proposals embodied in the counter-claim discussed

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Note 11) which has primarily concerned itself with the deficiencies in the immediate operation of prevailing consent standards, brought into play by the invocation of stereotype.

<sup>9</sup> See Discussion in Chapter One, "Legal Power as Disciplinary Power"



here do not only fail to examine the place of that concept within the overall framework of changing patterns of power dynamics, but they also assume that, subject to some necessary vigilance to ensure a fairer interpretation, consent as a vehicle for the articulation of personal autonomy is unproblematic. This approach fails, however, to devote necessary attention to the nature of its foundations, and to question the legitimacy that is uncritically accredited to the prevailing conception of consent as representing the most appropriate vehicle.

In the remaining sections of this thesis, we will examine the difficulties inherent in the uncritical faith in the prevailing notion of consent that is illustrated by many of the counter-claims offered in response to the critique of the preceding chapters. In challenging the authority afforded to the prevailing notion of consent as a medium for communication of will, subsequent chapters will continue to further the methodological aim, established at the outset, namely the examination of legal power and legal concepts outwith the shadow of the juridical.

It has been alleged that the conception of consent as unconstrained choice has been heavily implicated in the assumptions of the juridical conception of law.<sup>10</sup> Over the preceding chapters, we have begun to question the legitimacy of that assumption through an analysis of the extent to which legal agents have been 'disciplined' in their choices by the incorporation of social stereotype into the interpretation of the medium of consent. This critique strikes at the heart of the claim (inherent to the liberal notion of consent) that consent is equally available to all competent adults as a medium for the articulation of their equally free and self-determined human choice.

Within the confines of what follows, we will begin to challenge another assumption that informs the framing of the notion of consent within juridical analysis - the assumption that the self for whom consent is the vehicle of self-determination is an

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<sup>10</sup> See Discussion in Preface and Chapter One, "Legal Power as Disciplinary Power"

individual and abstracted self, unaffected by relationship or social influence. Although related to the critique of the preceding chapters in the sense that the inherent assumption of individualism thus isolated may be seen as another form of social expectation, the particularly problematic nature of this assumption renders it deserving of specific critique.

The operation of consent standards in the particular contexts of rape and maternal-foetal conflict has proven problematic for various reasons, not simply because of the incorporation of erroneous and gender-specific stereotypical models into legal discourse. Although this has certainly presented a significant obstacle to the realisation of a more meaningful medium of self-determination, it will be submitted in what follows that a potentially even more fundamental obstacle to that realisation lies in the incompatibility of these contexts with the assumption of consent as the articulation of individual and rationally motivated will. Whether the context is one of a dating companion raping his victim, or a pregnant woman refusing consent to medical treatment for the benefit of her foetus, the pre-existing relationships involved establish a network of conflicting desire and dialectical interaction which is far more complex than that assumed within prevailing interpretations of consent. It is in contexts such as these that the individualism and abstraction implicit in the standard assumption of the consensual agent becomes most observably at odds with the more complex realities of the decision-making process.

Our concern to date with critique pertaining to the manner in which judicial interpretations of consent operate has been relevant and valuable. However, to leave our critique at this stage would run the risk, in Foucaultian terms of maintaining a discursive smoke-screen over the more fundamental prejudices which inform the concept of consent – the prejudices which operate to favour an abstracted and artificial concept of human subjectivity as disembodied and disembedded. Consent has been heralded, as we have seen, as the paradigm instance of self-determination, as the medium through which the integrity and autonomy of our *self* can be

articulated. In the preceding chapters we have examined the legitimacy of that claim in terms of the experiential operation of that standard, and we have found it to fall short frequently of its averred aims. We have seen in Chapters Two and Three that prevailing social imperatives have often infiltrated the legal arena and rendered consent in its current model an inappropriate vehicle for the translation and transmission of personal will. The inadequacies of counter-claims that offer remedies through the revision of the existing conception of consent to be more vigilant against the incorporation of such manipulative forces have been well-illustrated. Central amongst these inadequacies must be placed the fact that such approaches leave unquestioned the other side of the coin of self-determination, namely the extent to which the self embodied within the current conception of consent represents a valid personification of its subject. Who is the self to whom the medium of consent seeks to give voice?

The subject of the current conception of consent is, as we shall see, an abstracted and disembedded individual. However, the world in which we live is not populated by such abstract entities. The failure of the prevailing conception of consent to realise this tension and its failure to seek a manifestation more inkeeping with the epistemological realities of the human self it avers to represent render it a focus of substantial and enduring critique. Concern to evaluate not only the operation of consent, but also the conception of consent itself, must be the project of any meaningful examination of the scope of human self-determination. On that basis, the remainder of this thesis will examine the inadequacy of the conception of consent itself, highlighting the various ways in which the conception falls short of providing a true vehicle for the determination of the will of the human beings who populate our world.

In what follows discussion will commonly involve a focus upon alternative formulations of subjectivity. Implicit throughout such discussion, however, is also an evaluation of alternative formulations of the notion of consent. Consent is our

most highly prized medium for self-determination. The ensuing discussion seeks to establish, however, that the self allegedly being determined through the medium of consent is an artificial one. Before we can develop a more appropriate medium for self-determination, we must first develop a more experientially viable formulation of human subjectivity. The project of uncovering such a methodology will form the basis of the following chapters. The excursion into this search for meaningful agentic subjectivity is a necessary prerequisite to establishing the foundation from which our improved medium of self-determination will develop.

This critique, as we shall see, should be of considerable interest to a feminist academy concerned with the development of feminist ethics towards the realisation of less structured gender identities and more powerful mediums of self-determination. The essential claim made here is that *contra* the aforementioned counter-claim to the criticism contained in Chapters Two and Three, any theory based on the foundation of individual consent is necessarily unsatisfactory because of the inherently artificial nature of this foundation. Consent as a legal and moral notion can only herald the normative significance generally attributed to it on the basis of what shall be argued to be a suspect theory of the interaction between the individual and society. Any such theory presents its subject as highly atomistic, representing society as a voluntary and equal association of self-sufficient individuals, each capable of making free decisions as to how best to live their lives. Such individualist notions of human subjectivity reiterate the essential premises of an entrenched Western philosophical tradition which, being heavily influenced by Enlightenment quests for universality and rationality, favours conceptions of the human subject as self-motivating, and capable of reasoned self-determination that transcends the contingencies of personal circumstance.

As we will come on to see through the duration of this chapter, however, this is a highly artificial and deficient vision of the dynamics of social interaction. Feminist commentators have joined a vociferous trend in contemporary philosophy that has

challenged the legacy of this individualistic vision of human subjectivity. Carol Pateman's critique of social contract theory has precipitated a fury of feminist discussion on the legitimacy or illegitimacy of the claims that have been made regarding individuals and their interaction with one another within the confines of an operative society.<sup>11</sup>

Many of the most prominent advocates of Enlightenment rationalism and universalism have developed their theories from the origins of the social contract ideology. Immanuel Kant, for example, has been quite explicit in accrediting the indebtedness of his theory to the work of Rousseau.<sup>12</sup> Kant has borrowed heavily from the frameworks of contract theory and has added flesh to the bones of Rousseau's conception of subjectivity. Indeed, Kant's notion of moral rationality, made manifest in his requirements of the 'categorical imperative' (which will be examined in the following section) plays a similar role to the notion of the General Will in Rousseau's theory.<sup>13</sup> Adopting highly reminiscent views of the nature of human freedom, both Kant and Rousseau demand that the morality of our actions consists in their being directed in accordance with universal law. The implication of this for both theorists, although perhaps more famously for Kant, is that those actions that are guided merely by our passions or appetites do not constitute moral acts.<sup>14</sup> The strong nature of this linkage between Rousseau (as representative of a social contract perception of human interaction) and Kant (as representative of Enlightenment pretensions regarding the nature of human subjectivity) has been noted by much subsequent commentary. Riley, for example, notes that,

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<sup>11</sup> Pateman, C. *The Sexual Contract*, Supra. Preface Note 5

<sup>12</sup> Rousseau, J. J. *The Social Contract and Discourses* (ed. Cole, G.), Supra. Preface, Note 4

<sup>13</sup> Kant has often expressed his indebtedness to Rousseau, especially for his belief in the common man, and for having "first discovered universal human nature beneath the multiplicity of adapted human forms and hidden laws." - Friedrich, W. *The Philosophy of Kant – Immanuel Kant's Moral and Political Writings*, Supra. Preface, Note 17, Intro. xxiii.

<sup>14</sup> Friedrich, W. *The Philosophy of Kant – Immanuel Kant's Moral and Political Writings*, Supra Preface, Note 17, p. xxiii

“Kant wanted to preserve and defend Rousseau’s notion of will as an uncaused causality, but also to show how a truly free will would be determined by practical reason itself, not by feeling.”<sup>15</sup>

Hence, Rousseau’s perception of consent as a one-dimensional interchange of authority between rationally motivated and mutually distinct individuals has been incorporated and advocated within the confines of Kantian Enlightenment theory. With his emphasis on the conditions of freedom and autonomy, Kant has built upon the premises laid bare by the social contract tradition to assert a universalising imperative in the domain of morality, freedom and autonomy.

“Following Rousseau, Kant constructs a contractarian model in which the legitimacy of a law resides in its expression of the public will, although, for Kant, this does not require the active participatory consent of its citizens; rather, it merely requires that the law in question be rationally worthy of consent.”<sup>16</sup>

Since the dawn of Enlightenment rationality, all major fields of academic discipline have concerned themselves with the pursuit of all-encompassing, universal and rational truths. Although writers within the Enlightenment tradition have not always written as a cohesive collective, certain themes have commonly united disparate theories. One of the most commonly implied theses has involved the conception of human nature as fundamentally individualist, autonomous and one-dimensional. In many respects, this perception of subjectivity has been most strongly associated with the metaphysics of Immanuel Kant (who, as we have seen, owes his own allegiance to social contract theory). Despite the profound influence of Kantian ethics upon contemporary models and codes, this chapter shall seek to establish the inadequacy of his conception of the autonomous human self, not only for the legal conceptualisation of consent, but also for the purposes of moral, legal and social ethics more generally.

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<sup>15</sup> Riley, P. “On Kant As The Most Adequate of the Social Contract Theorists” (1973) *Political Theory* 400, p. 457

<sup>16</sup> Owens, D. *Maturity and Modernity – Nietzsche, Weber, Foucault and the Ambivalence of Reason* (1997) Routledge, p. 9-10

### *Who is the Subject of the Enlightenment?*

"Enlightenment is man's leaving his self-caused immaturity. Immaturity is the incapacity to use one's intelligence without the guidance of another...all that is required for this enlightenment is freedom; and in particular the least harmful of all that may be called freedom, namely the freedom for man to make public use of his reason in all matters."<sup>17</sup>

In popular analysis, the Enlightenment is considered as marking an episode in the history of thought where full confidence was placed in the universality of law based upon a strong commitment to man's intrinsic rationality. Employing a perception of subjectivity as constituted by an historically bound self-emancipating individual, writers within the Kantian species of Enlightenment theory have developed a model of autonomy as inextricably bound up with the exercise of rationality.

Kant explains the background to the development of Enlightenment spirit -

"The guardians who have so benevolently taken over the supervision of men have carefully seen to it that far the greatest part of them (including the entire fair sex) regard taking the step to maturity as very dangerous, not to mention difficult. Having first made their domestic livestock dumb, and carefully made sure that these docile creatures will not take a single step without the go-cart to which they are harnessed, these guardians then show them the danger that threatens them, should they attempt to walk alone."<sup>18</sup>

This critique bears similarity to the Foucaultian thesis, discussed in Chapter One, that presents disparate power relations as crucial to the construction of the 'docile bodies' deemed characteristic of modernity.<sup>19</sup> However, where Kant seeks to resolve the problem of enforced 'immaturity' through the encouragement of the exercise of individual rationality, Foucault finds resolution only through the recognition that power forces cannot be transcended, but can only be subverted from within. Kant's belief in the possibility of transcending power and conditioning through the employment of pure rationality is contra-indicated by the Foucaultian

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<sup>17</sup> Kant, I. "What is Enlightenment?" (1784) in Friedrich, W. *The Philosophy of Kant – Immanuel Kant's Moral and Political Writings*, Supra. Preface, Note 17, p133-4

<sup>18</sup> Kant, I. *Perpetual Peace and Other Essays* (trans. Humphreys, T.) (1983) Hackett Press, p. 41

<sup>19</sup> Owens, D. *Maturity and Modernity*, Supra. Chapter Four, Note 16

thesis discussed previously that power is omnipotent, and a site both of oppression and resistance. Furthermore, this Kantian notion, which provided the original impetus for the Enlightenment crusade, is premised upon the assumption that power is operated by a privileged elite (the State) who possess the power to restrict the development of individual rationality and therefore autonomy. The inadequacies of that assumption have been discussed at some length in Chapter One where it was argued that state power has become increasingly dispersed within the network of relationships that deny any such rigid differentiation of 'state' from 'society'.

Despite our previous condemnation within Chapter One of the 'one-dimensional' approach to legal power exhibited by this Kantian thesis, we have also been compelled to note the continued deference which liberal legal analysis has afforded to its juridical conception of state power as manifest by dynamics of sovereign command. The tenacity of that juridical conception within dominant liberal frameworks can in large part be attributed to those aspects of Kantian theory that have proven hugely influential in subsequent legal thought. Developing that link further, Carty<sup>20</sup> has argued that the survival of a conception of law as embodying a form of rationality which, because universal, positively enables social integration proclaims liberal theory's solidarity with the Western metaphysical tradition as a whole, and with the project of Kantian Enlightenment in particular.

This Enlightenment project seeks universal and rational truths, capable of reasoned, empirical representation. It seeks a place of convergence in the midst of multiplicity, and in order to do so it employs a strategy involving a subject who sees and an object that is seen. The tradition of liberal theory that dominates legal analysis exists as an attempt to design and maintain the conditions under which a universal legislator (as envisaged by the Enlightenment) may be enabled to exist.<sup>21</sup>

To that extent, therefore, there exists a strong inter-relationship between the

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<sup>20</sup> Carty, A. (ed.) *Postmodern Law: Enlightenment, Revolution and the Death of Man* (1990) Edinburgh University Press



pretensions of Enlightenment theory and the liberal analysis that provides the framework for prevailing legal ideology.

An important vehicle for this legitimation is manifest in notions of and discourse surrounding the human subject - the essence of subjectivity heralded most commonly by liberal legal theory is freedom, defined as the capacity to make rational choices. Building upon the social contract perception that freedom comes from giving consent to authority being exercised, much Enlightenment theory has likewise been grounded on the basis of similar assumptions regarding the centrality of freedom to subjectivity. This in itself is not necessarily controversial, at least not amongst the contentions of this thesis, which claims that the capacity of the competent person to meaningfully give or refuse consent (as a manifestation of personal freedom) is crucial to the realisation of their humanity. However, the dominant Enlightenment requirement that that choice can only be exercised morally and meaningfully through the employment of rational decision-making processes is significantly more jarring.

The precise nature of the problems inherent in this position will be developed in more detail shortly. For current purposes, it is sufficient to note that the demands made upon our decision-making processes and motivations by certain Enlightenment theorists are by no means uncontroversial. Nonetheless, they have been heavily incorporated within the dictates of a liberal legal philosophy that is attracted by the possibility inherent in such theorising of presenting 'illusions' of rationality and impartiality despite overwhelming experiential evidence challenging the legitimacy of such claims.

Despite the persuasive force wielded by these individualist and rationalist subject strategies in contemporary formulations of notions of selfhood, self-determination

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<sup>21</sup> Carty, A. (ed.) *Postmodern Law : Enlightenment, Revolution and the Death of Man*, Supra. Chapter Four, Note 20, p. 108

and consent, these Enlightenment-based presuppositions have also often been the focus of radical critique. Seyla Benhabib expresses the common nature of that critique,

‘the ideal of autonomy in universalistic moral theories from the social contract traditions down to Rawl’s and Kohlberg’s work is based upon an implicit politics which defines the ‘personal’ in the sense of the intimate or domestic sphere as ahistorical, immutable and unchanging, thereby removing it from discussion and reflection. Needs, interests, as well as emotions and affects, are the considered properties of individuals which moral philosophy recoils from examining on the grounds that it may interfere with the autonomy of the sovereign self.’<sup>22</sup>

In subsuming the disparate philosophical premises of writers from Rawls to Kohlberg under the category of universalistic theory, and then attributing to each theorist the same level of experiential abstraction, Benhabib makes an extremely strong claim. We have mentioned previously that even those writers consciously congregated under the heading of Enlightenment theorists have encountered internal disagreements.<sup>23</sup> Although, as we shall see, there is considerable merit in the criticism that Benhabib makes of the tendency towards rational abstraction often exhibited by the writers she critiques, we must be wary of her tendency to assume too much unity between disparate theorists. Lodging a general critique at each and every Enlightenment theorist denies the reality that these theorists are positioned along a spectrum of ranging philosophical pretensions, some of which favour experiential abstraction more strongly than others. Once again, we must resist the temptation involved in sacrificing grounded and comprehensive critique to the achievement of forceful rhetoric. Subsuming all Enlightenment theory under one category provides a remit for a radical critique that is thereby entitled to set itself apart from a long and established philosophical history. Although the hyperbolic potential of such claims is significant, a more particularist critique that attends to the specificity of individual theorists offers the more promising conceptual option.

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<sup>22</sup> Benhabib, S. *Situating the Self* (1992) Polity Press, p170

<sup>23</sup> See Discussion in Preface, Note 4

In order to offer such particularist critique within the confines of this work, we will restrict our focus primarily to that genre of Enlightenment theory associated with the works of Immanuel Kant.<sup>24</sup> Kant's ideas continue to attract considerable allegiance today and what's more, his work develops a specific focus on the problematisation of notions of autonomy and rationality that remain particularly relevant for our excursion into Enlightenment perceptions of subjectivity and their influence upon current formulations of consent. Restricting our analysis to the theory of Kant therefore seems justified within the parameters of our immediate focus. However, as will become apparent, restricting our focus to the work of one theorist does not dismiss entirely of the need for subtleties in our analysis.

An important distinction must be drawn from the outset between Kant's own philosophical intentions and motivations and the so-called 'Kantian' analysis that has built upon these premises. Often, the subtleties of Kant's own analysis have been lost in contemporary translation. Kant's premises, which will be described in some detail in this section, are by no means uncontroversial in themselves. However, much of the controversy which surrounds Kant's theory in contemporary analysis is attributable, not so much to Kant himself, as to his Kantian successors who seem to have selectively built upon his foundations to develop a conceptually distinct, albeit in some respects reminiscent, critique. Within the confine of this chapter, our interest will, therefore, not exclusively be with an examination of the deficiencies inherent in Kant's theoretical form, but also with directing attention towards the extent to which certain Kantian deficiencies may or may not be fairly attributed to the philosophical impetus of Kant's own position.

The ideal of autonomy is certainly central to Kant's original treatment of the problems of freedom and obligation. In asserting that the autonomous will is a will not subject to any set of external laws, he proposes that all ends which depend upon

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<sup>24</sup> Most Particularly – Kant, I. *Groundwork of the Metaphysics of Morals* (1964) Harper Row  
 Kant, I. *Critique of Pure Reason* (Trans. Smith, N.) (1965) St. Martin's  
 Kant, I. *The Critique of Judgement* (trans. Pluhar, W.) (1987) Hackett Press

the workings of the phenomenological realm for their realisation (for example the ends of happiness) must not be involved as more than a slight motivational force in the exercise of true agency.<sup>25</sup>

Within the confines of this chapter, we will examine the often dangerous implications of that thesis. Before doing so, however, it ought to be stressed that many of the more sweeping criticisms that have been lodged against it (such as that initiated by Benhabib above) develop from an original misunderstanding of the spirit and intent of Kantian Enlightenment. In seeking a foundation from which to establish the intrinsic meaning of normativity, Kant does not in fact wish to imply that the search for happiness (and like ends) is in anyway unjustifiable or unreal. On the contrary, Kant insists that this search is inherent in the make-up of human beings.

What does make Kant's analysis controversial, however, is the extent to which he then exclusively relegates law to the realm of rationality and abstraction from phenomenological ends. Although Kant recognises the operation of elements of human subjectivity other than reason, and this is often forgotten in more sweeping criticisms of his work, he insists upon a conception of reason as acting as a filter through which all other ends must pass before they can act as a motivational force upon the truly autonomous will. As Lloyd explains,

"The limited picture of an austere moral agent in some respects does less than justice to Kant's intentions. His point was not that genuinely moral agents must shed their natural inclinations, desires and affections, but rather that what is distinctively moral about their actions can be expressed entirely in terms of rational principles."<sup>26</sup>

Hence, although Kant accepts that people do seek ends other than those of a purely rational guise, it is only those ends that can be translated into the rational form that can be accredited with the normative significance characteristic of law. Kant seeks

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<sup>25</sup> Kant, I. *The Critique of Judgement*, Supra. Chapter Four, Note 24, p. 362. Quoted in Owens, D. *Maturity and Modernity*, Supra. Chapter Four, Note 16, p. 13

<sup>26</sup> Lloyd, G. *The Man of Reason – Male and Female in Western Philosophy* (1993) Routledge, p.68-9

to justify that position through his assertion that “to be subject to emotions and passions is probably always an illness of mind because both emotions and passions exclude the sovereignty of reason.”<sup>27</sup>

Although it is therefore unjustifiable to criticise Kant for failing to recognise the existence of phenomenological imperatives within the context of human and social life, it remains legitimate to challenge Kant’s reluctance to accommodate such concessions in his moral depiction of the transcendental self. Kant’s account remains plagued with considerable inadequacy in its failure to accommodate meaningfully the concessions made to non-rational motivation. As Sedgewick explains –

“So long as our affective natures are allowed no constitutive role in the forming of the strictly moral component of personality, that part of ourselves from the moral point of view will have to drop out on the Kantian model as simply irrelevant. No matter how great an influence Kant admits feelings to have in preparing us for the proper moral response, he nonetheless takes them to be in themselves ill-suited to determine the morally permissible maxim or the right course of action.”<sup>28</sup>

Such critique has become increasingly justified, furthermore, as much subsequent Kantian analysis has not only displaced the existence of these concessions, but has actually encouraged a public perception of Kant’s theory as having rejected out of hand the very notion of an extra-rational world.<sup>29</sup> This recapitulation of Kant’s original critique has been hugely influential in the development of liberal legal philosophy and explains the roots of the misinterpretation of Kant’s own theory that has been isolated in the critique lodged at it by Benhabib, among others.

We have proposed in Chapter One that perceptions of legal power are shifting as analysis seeks to lift the veil of the juridical. Perhaps Kant’s preoccupation with

<sup>27</sup> Kant, I. *The Anthropology from a Pragmatic Point of View* (trans. Dowdell, V.) (1978) Southern Illinois University Press, p. 155

<sup>28</sup> Sedgewick, S. “Can Kant’s Ethics Survive the Feminist Critique?” in Schott, R. (ed.) *Feminist Interpretations of Immanuel Kant* (1997) University of Pennsylvania Press, p. 88

normativity and his unthinking assimilation of law with the species of rationalism provoked by his concern with normativity can be accounted for by his place within the genre of the juridical approach to law. While this may serve as an explanation for the specific format of Kantian Enlightenment, this fails to remedy the very real effects which the influence of the Kantian thesis have marked upon prevailing legal notions of freedom, autonomy and consent even in contemporary times.

Kant's professed focus in his analysis of metaphysics has lain in a preoccupation with the role of reason. Where experience-based knowledge is deemed immanent (and therefore inferior and irrelevant to the issue of law in its juridical guise), reason is transcendent. Hence Kant's concern for

"the occupation of reason with itself alone and the supposed acquaintance with objects arising from reason as it broods over its own concepts without having need of, or being able to achieve, such knowledge through the meditation of experience."<sup>30</sup>

The pure form of reason to be striven for by the autonomous will in this respect constitutes Enlightened reason, no longer reliant upon the direction of motivation from other fields (such as the phenomenological). For Kant, the will constituted only by such purely rational motivation is a truly autonomous will. Hence, the model implicitly proposed for the development of autonomy is one that also demands the development of a sense of individual subjectivity divested of concern for experiential ends or relational priority.

In the preceding chapters, we have examined the damage that can be done by imposing stereotypical assumption over the experiential account given by the sexual or maternal agent. In many ways, the imposition of stereotype constitutes the second stage of this disciplinary approach. In what follows, we will examine the dangers of the preliminary stage involved, which abstracts the self and its

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<sup>29</sup> This has permitted critics of Kantianism to unfairly criticise the work of Kant in this regard. See Baier, A. "Hume, The Woman's Moral Theorist" in Kattay, E. & Meyers, D. (ed.) *Women and Moral Theory* (1987) Rowman & Littlefield

mechanisms for self-determination from the experiential knowledge and impulses, which, it is argued, should be of central concern in any communication of self-desire.

By excluding from legal consideration issues of personal affection and phenomenological experiences, theories born in the dawn of Kantian Enlightenment have enabled the perpetuation of a highly abstracted conception of human subjectivity. Throughout the duration of this thesis, it has been argued that any conception of subjectivity, which fails to take personal attachment into account, presents only the most hollow and inadequate of descriptions of what it is to be a self-aware and socially immersed human agent. Nonetheless, it is this hollow perception of subjectivity that continues to be represented by the primary mechanism for self-determination available within our legal culture, namely the prevailing conception of consent.

We have noted above that one of the central aims of Enlightenment methodology lies in the realisation of universal absolutes of rationality. Philosophical aspirations towards such grand meta-narratives of truth have been labelled 'logocentric' (a term devised originally by Jacques Derrida<sup>31</sup>) because they exhibit a longing for a constitutive reason (logos) and for an order of concepts that can be claimed to exist in itself as a complete, self-referring and proper entity. Such logocentric impulses have been strongly influential in the writings of many Enlightenment thinkers. This has been most commonly made manifest through a shared ascription to the belief that knowledge and truth are achievable through reliance upon a sovereign, self-conscious and reflecting human subject possessing the ability to reason through to the truths of reality itself.

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<sup>30</sup> Friedrich, W. *The Philosophy of Kant – Immanuel Kant's Moral and Political Writings*, Supra. Preface, Note 17, p.93

<sup>31</sup> Derrida, J. *Of Grammatology* (1976) Johns Hopkins University Press & *Speech and Phenomena, and Other Essays on Husserl's Theory of Signs* (1973) Northwestern University Press. Good Introductory Discussion to 'logocentrism' in Sarup, M. *An Introductory Guide to Poststructuralism and Postmodernism* (2nd Ed.) (1993) Harvester Wheatsheaf, p. 34-8.

It has been suggested above that Kant has been amongst the most celebrated exponents of this species of 'subjectivist rationalism'. Strongly influenced by the universalist impulse of many of his philosophical predecessors, represented in his own work through the establishment of the 'categorical imperative', Kant posited the belief that objectivity and reality can only be approached through the reasoning of a human subject capable of transcending the contingencies of history, context and perspective.

The formulation of the Categorical Imperative requires that one 'act only according to that maxim by which one can at the same time will that it should become a universal law'.<sup>32</sup> Kant has specified that the test for this becomes one of discerning what kind of world the moral agent, acting under the guidance of practical reason, would create, it being a world in which he would present himself as a member.<sup>33</sup> Implicit in that imperative is the assumption that moral agents are transcendent of circumstance and attachments – since the moral will in question is one involving the exercise of practical reason, and since everyone must arrive at the same conclusions as a matter of moral duty, the maxim simply cannot accommodate the possibility that what the moral agent would will is a matter of personal taste or desire.<sup>34</sup>

This belief in the possibility of transcendental human consciousness has become an integral part of the contemporary understanding of morality and legal agency. Modern day moral and political theories continue to be framed within the confines of the assumption that we, as rational human agents, can withdraw from our bodily impulses, from the conditioning of our social milieu and the limits of our natural environment in order to reflect on the basis of unencumbered reason towards the

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<sup>32</sup> Kant, I. *Groundwork of the Metaphysics of Morals*, Supra. Chapter Four, Note 24, p.96

<sup>33</sup> Kant, I *Religion Within the Limits of Reason Alone* (trans. Greene, T. & Hudson, H.) (1960) Harper Torchbooks, p. 5

<sup>34</sup> Korsgaard, C. "Kant's Formula of Universal Law" (1985) 66 *Pacific Philosophical Quarterly* 24, in Klemme, H. & Kuehn, M. (ed.) *The International Library of Critical Essays in the History of Philosophy: Immanuel Kant, Vol. II* (1999) Dartmouth



recognition of objective truth.<sup>35</sup> This assumption has been affirmed and privileged in the very notion of consent that informs prevailing legal and moral sensibilities.

Building upon the social contract notion that consent to authority arises, not because of any inherent human desire for social interaction, but because of rationalist requirements of self-preservation through the forced maintenance of social harmony, the conception of consent prioritised today continues to assume that consent is issued or refused on the basis of similar rationalistic argument. Implicit in this logic is the secondary place of non-rational (and therefore illegitimate) motivations, desires and preference that human experience suggests are often felt to be important factors in the decision-making process.

The liberal framework of consent assumes that legal agents can transcend these contingent circumstances and emotive motivations to express their autonomy in a rational manner, which, due to its rational foundation, is capable of universal expression as a general maxim. Assumptions of individualism and universalism are therefore central to the prevailing operation of the consent standard, finding their roots in the Enlightenment-based notion of subjectivity discussed above. Our critique of the operation of consent in the contexts of rape and maternal-foetal conflict has begun to offer some insight into the inadequacies of such assumptions in situations where concerns regarding relationships, emotions and pragmatic contingencies are paramount.

In recognising the legacy of individualism within prevailing liberal legal standards, however, we must cautiously distinguish the individualism of Kant's own theory from that of his Kantian successors. Within the confines of *The Metaphysics of Morals*, Kant expresses a position that offers at least some superficial concession to the significance of moral communities and personal association. Kant suggests that,

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<sup>35</sup> Rawls, J. *A Theory of Justice* (1971) Harvard University Press

"It is a duty to oneself, as well as to others, not to isolate oneself, but to use one's moral perfections in social intercourse. While making oneself the fixed center of one's principles one ought to regard this circle drawn around one as also forming an all-inclusive circle of those who are citizens of the world."<sup>36</sup>

Although this statement suggests potential dangers in terms of over-emphasising the need for universality at the expense of concrete inter-personal relationships, it does have the benefit of presenting an aspect of Kant's original theory that is less sympathetic to the merits of radical individualism. In large part, however, that promise is frustrated by accompanying aspects of his thesis that understand the dictates of moral law (as manifest through submission to the categorical imperative) to require each rational person to respect others as rational people, where that 'respect' remains entirely compatible with non-association, and in fact actually appears to contra-indicate too close an association.

### *Kant and Neo-Kantianism*

Once again, therefore, the merits of Kant's concessions are questionable. However, the very fact of their existence is significant as a means of illustrating the subtle distinctions mentioned previously between Kant's own analysis and that of more contemporary neo-Kantians. Kant's original theory, despite his aforementioned concessions, remains far from unproblematic. However, the tensions between Kantian rationalism and experiential reality have been enflamed by subsequent analysis that has, in the name of Kantianism, developed a highly selective recapitulation of Kant's original critique.<sup>37</sup> This recapitulation has commonly tended to ignore the subtleties of Kant's concessions within his theory and has thus presented a far more radically individualistic thesis than Kant himself appears to have advocated.

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<sup>36</sup> Kant, I. *The Metaphysics of Morals* (trans. Gregor, M.) (1991) Cambridge University Press, p. 474

<sup>37</sup> The inadequacies of that Kantian recapitulation have been highlighted by Herman, B., "Integrity and Impartiality" (1983) 66(2) *Monist*, 233 & O'Neill, O. "Kant After Virtue" (1983) 26 *Inquiry* 399

Although this neo-Kantian position has been privileged with affording the dominant mode of philosophical and legal discourse on the subject, it has increasingly faced challenge and critique from various fields. Traditions of thought through the twentieth century have witnessed a shift in intellectual focus away from the universalism and individualism implicit in modernist epistemology toward recognition of particularity and concreteness. As Andrea Nye comments,

“Recent critiques suggest that the pure rational ego of the Kantian tradition is an ethical nightmare in which ethics is divorced from the emotional and sexual realities of human existence.”<sup>38</sup>

The main motivation behind this sea change has been an increasing level of attack upon the centrepiece of modernist, Kantian Enlightenment epistemology – the notion of man as the rational, abstract and autonomous constitutor of knowledge. In contradiction to this conception of the subject, many contemporary thinkers have posited a subject who is embedded and situated, constituted and bound by language, culture, discourse, and history. Nussbaum has paid heed to the significance of this shift in perception –

‘Anglo-American moral philosophy is turning from an ethics based on enlightenment ideals of universality to an ethics based on tradition and particularity; from an ethics based on principles to an ethics based on virtue; from an ethics dedicated to the elaboration of systematic theoretical justifications to an ethics suspicious of theory and respectful of local wisdom; from an ethics based on the isolated individual to an ethics based on affiliation and care; from an ahistorical detached ethics to an ethics rooted in concreteness and history.’<sup>39</sup>

This challenge to the primacy of the essentially non-specific and abstract human subject of Kantian Enlightenment has prompted development of a school of moral theory that demands increased recognition of the specificity of the particularity of the individual. It is alleged that many of the epistemic incoherencies inherent in universalistic moral theories can be attributed to their tendency to ignore the standpoint of the ‘concrete’ human identity in the drive to develop an abstracted

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<sup>38</sup> Nye, A. *Feminist Theory and the Philosophies of Man* (1988) Croom Helm

<sup>39</sup> Nussbaum, M. “Virtue Revisited”, *Times Literature Supplement*, 3<sup>rd</sup> July 1992, p9

'general' human core.<sup>40</sup> The problem with the Kantian subject is that these transcendental selves cannot be individuated. When all that belongs to these subjects as embodied and affective creatures is subsumed under the suppressed realm of the phenomenal, we are left with a concept of human subjectivity which presents little more than an empty mask that is simultaneously both everyone and no-one.<sup>41</sup>

In all attempts to devise a rationalistic and abstract subject, the supreme concern has been to maintain a strong theory of the autonomous subject (of which the capacity to give consent has been the paradigm characteristic). This is central to the Kantian thesis and yet it also demands that we define human subjectivity by reference only to the capacity for agency, without any conception of the ends that that capacity would select. To be capable of transcending the contingencies of social living in the manner that the Kantian account of subjectivity ascribes, the subject must be capable of representing his or her inherent nature without the support of such phenomenological frameworks. The capacity to exercise autonomy has been accepted as a crucial defining element in what it is to be human. However, the Kantian thesis has developed the notion of autonomy as being inextricably tied up with dictates of rationality and universality. The human subject who is sketched out by these requirements is a subject who expresses his or her humanity through the capacity to exercise autonomy. However, by requiring that that exercise of autonomy must be framed only by rational reasoning, as opposed to contingent or affective motivations, the resultant subject manifests an empty conception of selfhood, exhibiting no experiential context within which to legitimate the exercise of his or her rationalistic competence. This has proven hugely problematic and, as we will see in the chapters which follow, many influential arguments have been brought to bear which propose that this conception of human selves who can be individuated prior to their moral ends is incoherent despite its centrality within the

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<sup>40</sup> Benhabib, S. "The Generalised and The Concrete Other" in Benhabib, S. & Cornell, D. (ed.) *Feminism as Critique* (1987) Polity Press

<sup>41</sup> Williams, B. *Moral Luck – Philosophical Papers 1973-80* (1981) Cambridge University Press, p.14 - 9

Kantian Enlightenment crusade and its continued prominence in contemporary formulations of human agency.<sup>42</sup>

Various species of criticism have been lodged against the notion of the transcendental and atomistic subject espoused by Kantian Enlightenment. Each of these strands of criticism has pertained to different overall philosophical theses and has been informed by divergent philosophical persuasions. Nonetheless, there are some themes and concerns which unite them all and which operate to justify their treatment as constituent parts of an overall challenge to that species of thought constituted within the parameters of the particular Enlightenment genre outlined above. Jean Grimshaw in her article "Autonomy and Identity in Feminist Thinking" has explained this synthesis of concern most lucidly. She suggests that any adequate account of the self must be able to encompass and make intelligible the ways in which human beings experience themselves. For Grimshaw (among others) the central reason for rejecting the rationalist paradigm of the self is that there are many important aspects of the self that are not easily accessible in this way to processes of individual consciousness. Indeed,

"structures of desire, emotion and fantasy have deep roots of some sort in the self which are not necessarily amenable in any simple way to processes of conscious rational argument. An adequate theory of subjectivity has to recognise and try to understand these roots."<sup>43</sup>

Hence one theme that unites criticism from various disparate fields (feminist, poststructuralist, communitarian) can be located in a common concern to establish that human beings are necessarily and primarily social beings. In direct contradiction to the Enlightenment-based liberal perception of subjectivity as essentially individualistic and self-referential, therefore, these schools of contemporary critique suggest that our very identities as human agents are inextricably tied to our communal experiences and associations. Insights of this sort have led communitarians like Michael Sandel (among others) to challenge

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<sup>42</sup> Benhabib, S. *Situating the Self*, Supra. Chapter Four, Note 22, p. 161-2

<sup>43</sup> Grimshaw, J. "Autonomy and Identity in Feminist Thinking" in Jackson, S (ed.) *Women's Studies*, Supra. Chapter Two, Note 60, p.44

liberalism's continued deference to the popular Enlightenment ideal of a 'disembodied' perception of the human subject which, in existing as a complete entity prior to its ends, is capable of rational abstraction from all its social circumstances and contexts.<sup>44</sup> Sandel argues this has led to an impoverished conception of the realities and potentialities of human subjectivity.

This concern has been echoed by developments in the fields of deconstruction and hermeneutics. Finding their roots in the critique lodged by the 'romantic' thinkers of the eighteenth century, the hermeneutic theses of Gadamer<sup>45</sup> and Heidegger<sup>46</sup> have exposed empiricist models of language as inappropriate instruments for the communication of ideas. In their place, they have proposed that the content of our experience (beyond the level of the utmost simplicity) depends upon the linguistic and cultural forms available for its expression. This thesis is in many ways reminiscent of our claim, proposed at the outset, that the individualist model of subjectivity which frames prevailing conceptions of consent renders consent an inappropriate medium for the communication of self-determination. This in turn justifies the project of this thesis that is to devise alternative formulations of subjectivity that permit of more meaningful self-determination in the reformulation of the concept of consent.

Perhaps the most distinctive feature of the species of Enlightenment discourse we have examined, and the most united field of critique against it, is centred around its assumption that each individual man or woman possesses a unique essence of human nature. Although the precise constituents of this essence may vary, as Weedon has noted, in the still dominant version of classical liberalism, it is the existence of individual rational consciousness that prevails.<sup>47</sup> This concern with individual rationalism has obvious connections with the model of autonomy established as

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<sup>44</sup> Sandel, M. *Liberalism and the Limits of Justice* (1982) Cambridge University Press, Chapter 1. Also discussed in Lacey, N. *Unspeakable Subjects – Feminist Essays in Legal and Social Theory*, Supra. Preface, Note 2, p. 54

<sup>45</sup> Gadamer, H. *Philosophical Hermeneutics* (trans. Linge, D.) (1976) University of California Press

<sup>46</sup> Heidegger, M. *Being and Time* (trans. MacQaurrie, J. & Robinson, E.) (1962) SCM Press

fundamental to the Kantian project. Foucault has noted, however, that this enduring pre-occupation with processes of self-conscious, rational and individualistic agency renders legal analysis incapable of comprehending the more subtle dynamics of normalisation which he has posited as being definitive of modern society. Most specifically, Foucault expresses concern that “what liberal theory cannot understand...is how things work at the level of ongoing subjugation, at the level of those conscious and uninterpreted processes which subject our bodies, govern our gestures, dictate our behaviour.”<sup>48</sup> When we recall the conclusions drawn from our analysis in Chapters One to Three, the dangerous implications of that blinkered approach become most palpable.

The general themes that unite the critique of the Kantian self are essentially three-fold. Firstly, there is a marked scepticism regarding the paradigmatically Enlightenment claim of the existence of a ‘legislating’ reason enabling the articulation of the necessary conditions of some abstract moral point of view (in the case of Kant the moral rationalism exemplified by the categorical imperative). Secondly, each genre of critique exhibits a scepticism regarding the abstract and disembedded ideal of the autonomous human ego that has been privileged by the Kantian tradition. And finally, there is an overall concern to unmask the inability of Kant’s universalist rationality to deal with the indeterminacy and multiplicity of life situations and contexts that eternally confront practical reasoning.<sup>49</sup> These concerns have been summarised eloquently by one commentator:

“What we lose if we are Kantians in moral theory is the sense of the uniqueness of persons and their contexts and histories, or a sufficiently informed and compassionate standpoint from which to judge them.”<sup>50</sup>

Built against the backdrop of such epistemological concerns, various alternative philosophical premises have been established. Within the confines of this work, it

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<sup>47</sup> Weedon, C. *Feminist Practice and Poststructuralist Theory* (1987) Oxford, p. 77

<sup>48</sup> Foucault, M. *Power / Knowledge – Selected Interviews and Other Writings 1972-77* (Ed Gordon, C.), Supra. Preface, Note 8, p.97

<sup>49</sup> Benhabib, S. *Situating the Self*, Supra. Chapter Four, Note 22, Intro. iii

would be impossible to examine each of the various alternative theses such motivations have produced. Hence, in ensuing chapters, analysis will be restricted to what are considered to be the two most significant fields of anti-Enlightenment and anti-Kantian critique – namely poststructuralism (specifically that associated with the work of Michel Foucault<sup>51</sup>) and communitarianism (specifically that associated with the work of Alasdair MacIntyre<sup>52</sup>). The purpose of this expedition will be to further the search for an appropriate methodology through which to arrive at a better articulation of human subjectivity and thereby a better vehicle for the communication of its self-determination than that currently afforded by our conception of consent.

It has been suggested above that the contexts of Chapters Two and Three hold particular relevance for this project at various levels – their close involvement with issues of embodiment allows for a more comprehensive analysis of the role of bio-power; their incorporation of erroneous stereotypes illustrates particularly well the disciplinary element of legal power; and their grounding in arenas of relationship, emotion and complexity allows for a striking exemplification of the inflexibility of the prevailing individualistic conception of selfhood and agency.

It is also because of the exhibition of these factors that the application of feminist theory on subjectivity to these contexts remains particularly pertinent. It has been implied above that, as a general rule, the feminist position on the Kantian model of subjectivity and autonomy has been highly sceptical. In the following section, we will examine the exact nature of the feminist concern about the abstraction and individualism of the legal subject prioritised in popular concepts and forms. By highlighting the aspects of traditional (Kantian-influenced) legal subjectivity which

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<sup>50</sup> Sedgwick, S. "Can Kant's Ethics Survive the Feminist Critique?" in Schott, R. (ed.) *Feminist Interpretations of Immanuel Kant*, Supra. Chapter Four, Note 28, p. 78

<sup>51</sup> Foucault, M. *The Archaeology of Knowledge* (Trans. A. Sheridan) & *The History of Sexuality, Volume I*, Supra. Chapter One, Note 3. Also, Foucault, M. *Power / Knowledge – Selected Interviews and Other Writings 1972-77* (Ed C. Gordon), Supra. Preface, Note 8

<sup>52</sup> MacIntyre, A. *After Virtue* (1999) Duckworth ; *Whose Justice? Which Rationality?* (1988) Duckworth ; *Three Rival Versions of Moral Enquiry* (1990) Duckworth



feminist theory finds most problematic, we will be able to cultivate a more clear-sighted approach to those elements which an appropriate theory of the self should contain, including particularly an improved capacity for meaningful self-determination and consent.

### *Feminist Concern about the Legal Subject*

“Like the Foucaultian analysis of ‘Man’, the feminist critique of masculinist uses of the ‘natural’ extends to the deconstruction of Western humanism. But for feminists, the problem with humanism is not merely that it derives from illusory assumptions about an autonomous and universal self, but that this particular self is the domain of the privileged white man.”<sup>53</sup>

In the preceding section, we have been introduced to the existence of an influential field of critique that alleges that the very concept of consent as a legal and moral vehicle for self-determination is inherently flawed because of its continued reliance upon a highly artificial and abstracted conception of subjectivity. Our brief summary of the principal tenets of the Enlightenment philosophy of Kant in particular, has suggested that this scepticism in regard to the viability of the notion of consent can be justified in light of the centrality of that notion within the rationalistic frameworks of Enlightenment thought. It has been submitted that the paradigmatic illustration of such rationalistic Enlightenment frameworks in operation can be found in the treatment afforded by Kant to the human subject. Building upon an epistemological premise that asserts that the essence of human subjectivity is atomistic and abstracted, we have seen that such species of Enlightenment rationality have developed a conception of consent as a one-dimensional interchange between disembodied and mutually disinterested human agents.

Finding the conclusions of such rhetoric both experientially counter-intuitive and philosophically dangerous, a large body of feminist analysis has joined in the attempts being made by contemporary theory to challenge the primacy of this model

of subjectivity.<sup>54</sup> The aim of such critique is to liberate the potential for the development of alternative conceptions, not only of our notions of subjectivity and inter-subjective engagement, but also of the conceptions of agency and autonomy upon which our legal principles of consent are premised. By examination of some of the most celebrated feminist theories of the self within the confines of this chapter, we will seek to pin down more accurately the locus of conflict between feminist and more traditional (Enlightenment-influenced) perceptions of human agency.

One of the greatest philosophical achievements of the feminist movement in general over the last few decades has been the successful demonstration of the absence of generic women's interests from the agendas of moral and political philosophy.<sup>55</sup> In a wide range of feminist work, it has been argued that the tradition of western thought has proceeded on the basis, not only of a Cartesian dualism between mind and body, but also of a privileging of the mind over the body.<sup>56</sup> This recognition heralds important insights for feminist theory. Most significantly, it suggests the relative absence or invisibility of the body in a western philosophical and social tradition that has implied the supremacy of rational mental capacities through a cultural association of masculinity with the mind and femininity with the body. Feminism has consistently sought to expose the inaccuracy of fundamental liberal political and ethical assertions of gender neutrality.<sup>57</sup> Many feminists have been at pains to point out the gender-specific exclusionary effect of the liberal conception of choice as causally unconstrained, as the supposed expression of our inherently rational and individualistic nature. As Jane Flax has pointed out,

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<sup>53</sup> Diamond I. & Quinby L., *Feminism and Foucault*, Supra. Chapter One, Note 30, Intro. xv

<sup>54</sup> Schott, R. (ed.) *Feminist Interpretations of Immanuel Kant*, Supra. Chapter Four, Note 28 provides some illustrative examples.

<sup>55</sup> Frazer, E., Hornsby & Lovibond, L. *Feminist Ethics – A Reader* (1992) Basil Blackwell, p. 5

<sup>56</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 107

<sup>57</sup> Minow, M. "Justice Engendered" (1987) *101 Harvard Law Review* 100

"What Kant's self calls its 'own' reason, and the methods by which reason's contents become present or self-evident, are no freer from empirical contingency than is the so-called phenomenal self."<sup>58</sup>

Some feminists, such as Luce Irigaray, have interpreted this as necessitating an absolute abandonment of all such epistemological frameworks. This assertion is based upon her belief that the very existence of these frameworks is premised upon the continued denial of female subjectivity, and the continued delineation of woman as 'other'.<sup>59</sup> Irigaray suggests that, even in the allegedly 'liberated' era of the twentieth century, the 'normal' body remains the male body and the female body continues to be constructed in significant ways as abnormal, disruptive and problematic.

Such radical assertions have been mirrored in the works of Catharine MacKinnon and Robin West who have argued that, in making man the implicit measure of all things, the whole social and legal system (including its envisaged legal agents) is inescapably patriarchal and irretrievably masculinist.<sup>60</sup> What's more, by virtue of a continued uncritical embrace of what West terms the 'separation thesis' (i.e the thesis that the paradigmatic human experience is the phenomenological experience of the male agent – inevitable separation of the self from others), all modern legal and moral theory is essentially male and exclusionary to female participation. Whereas men are essentially physically separate from all other human beings, women are essentially connected to others because of our material experience of connection through pregnancy, heterosexual intercourse and so on. Hence, for West, "while it may be true *for men* that the individual is 'epistemologically and morally prior to the collectivity', it is not true for women. The potential for material connection with others defines women's subjective phenomenological and existential state, just as surely as the inevitability of material separation from the other defines men's existential state. Our potential for material connection engenders pleasures and pains, values and dangers, and attractions and fears, which

<sup>58</sup> Flax, J. "Postmodernism and Gender Relations" in Nicholson, L. (ed.) *Feminism / Postmodernism* (1990) Routledge, p. 43

<sup>59</sup> Irigaray, L. *Ce sexe qui n'est pas un*, Supra. Chapter One, Note 38

<sup>60</sup> See Discussion of MacKinnon's Radical Thesis on power in Chapter One

are entirely different from those which follow, for men, from the necessity of separation.”<sup>61</sup>

According to this radical view, then, it is the peculiarly male sense of separateness and consequent valuation of autonomy that is represented throughout the legal system to the exclusion of the values and dangers characteristic of women’s lives.

Where West’s critique has centred around the adoption of the male value of autonomy throughout the legal system, other radical feminists have applied similar insights to the critique of other legal arenas. Lucinda Finley, for example, has criticised the law’s exclusive adoption of the methodology of ‘male’ reasoning into the methodology of the law. Most specifically, she draws critical attention to the law’s exemplification of rationality and abstraction over experiential and anecdotal evidence, and to the ongoing incorporation in legal analysis of a conflict model of social life<sup>62</sup>. We have seen in Chapters Two and Three of this thesis the tangible implications that such methodology can have upon the operation of legal decision-making in arenas where the conflict model is often inappropriate.

Similar methodological critique has been developed by Ann Scales in her delineation of the essential characteristics of feminist jurisprudence<sup>63</sup>. In her discussion of the ‘tyranny of objectivity’ reified by the legal system, Scales suggests that the pretensions of abstract universalism (as characterised by the Enlightenment) represent a specifically masculinist worldview which has made maleness the norm of humanity under the superficial guise of a pretence towards neutrality. In contrast, she proposes that feminist analysis must begin with the principle that objective reality is a myth, recognising that the claims about the law’s neutrality and objectivity, which operate as the foundations of adjudication, are presented under a kind of false consciousness made manifest as nothing more than patriarchal

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<sup>61</sup> West, R. “Jurisprudence and Gender” in Bartlett, K. & Kennedy, R. (ed.) *Feminist Legal Theory – Readings in Law and Gender* (1991) Quoted in Reaume, J. “What’s Distinctive about Feminist Analysis of Law?” (1996) 2 *Legal Theory* 289

<sup>62</sup> Finley, L. “The Nature of Domination and The Nature of Women : Reflections on Feminism Unmodified”, *Supra*. Preface, Note 10

projections of the male psyche. The essence of the radical contention has been expressed most lucidly by Catharine MacKinnon in *Towards a Feminist Theory of State* –

“The state is male jurisprudentially, meaning that it adopts the standpoint of male power in the relation between law and society...the foundation for its neutrality is the pervasive assumption that the conditions pertaining among men on the basis of gender apply to women as well.”<sup>64</sup>

This statement illustrates well the central tenet of the radical thesis. It also well illustrates the problematic tendency towards essentialism and determinism that has too often been the end result of radical feminism. The whole radical thesis on the legal subject is predicated on the assumption that all men are possessed of a specifically male identity which values separation and seeks autonomy, power and domination, and that all women are possessed of a specifically female identity which values connection and context. Elsewhere in her thesis, MacKinnon is highly critical of similar essentialist tendencies (which she attributes, as we shall see, to the care ethics of Carol Gilligan<sup>65</sup>). However, in continuing to adopt such a simplistic correlation between the rationality of the state and the rationality of the male, MacKinnon herself is open to similar criticism for having implicitly essentialised women into the realm of the irrational. What's more, she fails to give sufficient consideration to the emerging feminist proposal that the rationality of the state has less to do with the essential attributes of men and more to do with the Enlightenment roots of liberalism and the socially constructed character imperatives imposed upon the creators and perpetuators of the legal order, historically always male, but potentially also female.

In our discussion of shifting patterns of power in feminist analysis, embarked upon in Chapter One, it was suggested that in terms of this aspect of theory a relatively

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<sup>63</sup> Scales, A : *The Emergence of Feminist Jurisprudence* (1986) 95 Yale Law Journal p1373-1403

<sup>64</sup> MacKinnon, C. *Towards a Feminist Theory of State*, Supra. Chapter One, Note 33, p. 163

<sup>65</sup> Gilligan, C. In *A Different Voice – Psychological Theory and Women's Development*, Supra. Preface, Note 23. The 'care ethics' tradition of theory, established by Gilligan will be discussed in detail in Chapter Seven of this work.

clear division can be made between advocates of what is often referred to as 'radical feminism' and more contemporary manifestations of feminist critique. It was asserted in Chapter One that the essentialist tendencies employed to support the determinist thesis often associated with radical feminist commentators (most notably Catharine MacKinnon) have yielded in more contemporary feminist analysis to a more complex examination of power dynamics, which find their medium through elements of social constructionism bearing upon the life plans of both male and female agents.

A similar shift in perception can be discerned in the feminist treatment of the problematisation of the Enlightenment-based perception of the self. According to both radical and contemporary critique,

"the basic argument is that the paradigm legal subject has been constructed as an individual, and moreover, as an individual abstracted from its social context, including the context of its own body, and of the dependence of its own identity on its relationships towards and affective ties with others."<sup>66</sup>

However, the details of the analysis of the problematic interplay between the legal subject and its embodied and communal constitution have often been disparate. In many respects, this chasm is a direct result of the differing perceptions of power relations discussed in Chapter One. While radical feminism restricts its analysis within the confines of the juridical conception of oppressor-oppressed, analysis of the issue of subjectivity also remains comfortably supported by the pretension discussed above that the legal subject is quite simply the male subject elevated to the status of neutral absolute. On the contrary, more contemporary feminism has begun to question the legitimacy of this deterministic thesis on power relations. In developing an analysis of the more subtle operations of power, contemporary feminist analysis has developed an alternative explanation for the origin of the problematic legal subject.<sup>67</sup>

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<sup>66</sup> Lacey, N. "Feminist Legal Theory Beyond Neutrality" (1995) 48(2) *Current Legal Problems* 1, p.8

<sup>67</sup> An illustrative example can be found in Wittig, M. "The Mark of Gender" (1985) 5 (2) *Feminist Issues* 6

More contemporary feminism has taken on board the assertions made by members of the Critical Legal Studies movement that suggest that law has no fundamental essence, but is, rather, a belief system created and perpetuated by specific human activity.<sup>68</sup> Accepting this assertion as their point of departure, many contemporary feminists have criticised the implication inherent in the radical thesis that the law itself is inherently male. While conceding the critique of the masculine defined standards and methodology of legal liberalism, contemporary feminism attributes this deficiency, less to any essentially male essence of law, and more to the fact that historically, it has predominantly been men who have created and perpetuated the belief clusters which inform our legal system. The main contention of contemporary feminism is that the liberal ideology and Enlightenment rationalism that inform those belief clusters have made it impossible to shift prevailing assumptions.<sup>69</sup> By presenting an intractable dichotomy between the male and female experience, radical feminism has come under critical fire for deterministically perpetuating existing ideology.<sup>70</sup> Contemporary feminism, on the other hand, seeks to question the origins of these assumptions and seeks to present alternative models to legal liberalism that will enable the meaningful eradication of our most erroneous prejudices.

In this respect, Littleton's development of the notion of 'phallocentrism' has proven most useful. In "Reconstructing Sexual Equality",<sup>71</sup> Littleton has helpfully argued that it is more appropriate to suggest that those traits culturally identified as 'male' are, and have been, more highly valued than those identified as 'female'. Unlike the radical thesis, however, Littleton seeks to divert attention away from any pretension towards an inherent male or female nature characterised by the traits in question. Instead, Littleton talks of the legal system as having been constructed by authors who have drawn their perspectives from what it is to be 'culturally male'. To

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<sup>68</sup> Kennedy, D. *A Critique of Adjudication* (1997) Harvard University Press

<sup>69</sup> Lovibond, S. "Feminism and The Crisis of Rationality" (1994) *New Left Review* 72 & "Meaning What We Say – Feminist Ethics and the Critique of Humanism" (1996) *New Left Review* 98

<sup>70</sup> Cornell, D. "Sexual Difference, Feminism and Equivalency" (1991) *Yale Law Review* 100

<sup>71</sup> Littleton, C. "Reconstructing Sexual Equality" (1987) 75 *California Law Review* 1274

capture this perspective, which is not necessarily the perspective of biological males, but the perspective that culture urges male social agents towards, Littleton invokes the notion of 'phallocentrism'.

Many theorists within this tradition have accepted that although there is no reason of abstract principle as to why the frameworks of individualism could not be applied to both sexes indifferently, there remains an indisputable social legacy which makes the value of autonomy more typical to male life histories than to female.<sup>72</sup> This is not to say that such values cannot or do not figure in female life histories. What this does suggest, however, is that these values are not the most typical values of the female experience, that is to say that they are not the values which the dictates of traditional femininity require women to draw upon in construction of their own self identity.

"For present purposes, the important point about this distinctively 'feminine' character structure is its incompatibility with the image of the untrammelled, self-determining subject so familiar from moral and political philosophy. What the feminist critique of ethics has helped us to see is that if the salient features of your social experience are seeking to please, fitting in with others, being the one whom others count on,...then it is no cause for surprise if you regard that familiar image either as irrelevant or as a cue for feelings of inadequacy."<sup>73</sup>

This assertion does not seek to make the suggestion that moral autonomy is in any way inherently more difficult for women to achieve than it is for men. On the contrary, the contemporary feminist claim is that both sexes are intrinsically capable of exercising the same degree of autonomy, whatever the criteria for that necessarily revised autonomy may turn out to be. However, there remains in current social practice a massive contrast between male and female subjectivity in respect of the empirical conditions under which that subjectivity is constructed and signified.<sup>74</sup> Both forms of subjectivity are constructed and constrained by social determinants. The claim of contemporary feminism is not that men have unconstrained freedom where women are subject to inescapable constriction. Rather, the claim is simply

<sup>72</sup> Frazer, E., Hornsby & Lovibond, S. *Feminist Ethics*, Supra. Chapter Four, Note 55, p. 5

<sup>73</sup> Frazer, E., Hornsby & Lovibond, S. *Feminist Ethics*, Supra. Chapter Four, Note 55, p. 6



that the social determinants which construct traditional male subjectivity result in the production of human characteristics (of autonomy, abstraction, etc.) which are privileged within the legal sphere, while the determinants which construct traditional female subjectivity result in the production of characteristics (of selflessness and dependence) which are denigrated in the legal realm and reserved for the private sphere. As Lacey explains,

“Moral and political theory misunderstands their subject-matter by exaggerating and naturalizing not only women’s difference from men, but also – and no less damagingly – men’s difference from women. The thought that men too are embodied and vulnerable;...that they too can think and choose only on the basis of what they have learned from a finite initiation into the ‘ways of the world’; and that they are caught up, as women are, in social structures which they do not know how to alter – all these truisms are capable of serving as powerful feminist insights.”<sup>75</sup>

This realisation has prompted recognition within the feminist academy that any account of human nature, such as that typified by the species of Enlightenment theory examined above, that takes the value of individual autonomy to be paradigmatic of all human experience is radically incomplete.<sup>76</sup>

In feminist analysis, this refusal to account for the culturally and historically specific formulation of human subjectivity is the central deficiency of the traditional conception of the legal subject. It is a deficiency that strikes at the heart of a considerable body of feminist theory that has stressed the centrality of contingency and relationship in the presentation of available options for the expression both of identity and autonomy. Hence, contemporary feminism must devise the means to rectify this deficiency if it is ever to be possible for women to exercise a more meaningful right to self-determination. As Bidy Martin explains in “Feminism, Criticism and Foucault”,

“The tendency to place women outside culture, to define femininity in terms of an absolute exclusion and consequent innocence with respect to language and ideology reflects an overly simplistic understanding of the relationship between identity and discourse. It reproduces the classical split between the individual and

<sup>74</sup> Frazer, E. Hornsby & Lovibond, S. *Feminist Ethics*, Supra. Chapter Four, Note 55, p.6

<sup>75</sup> Lacey, N. “Feminist Legal Theory Beyond Neutrality”, Supra. Chapter Four, Note 66, p.7

<sup>76</sup> Frazer, E., Hornsby & Lovibond, S. *Feminist Ethics*, Supra. Chapter Four, Note 55, p.5

the social formation, assuming that we can shed what is supposedly a false consciousness imposed and maintained from the outside and begin to speak an authentic truth. The search for a more perfect self,...a more authentic 'I' too often represents a refusal to account for the position from which we speak, to ground ourselves materially and historically."<sup>77</sup>

Discussion over preceding sections has suggested that the majority of feminist commentators concerned with challenging the notion of consent manifest within Enlightenment frameworks of subjectivity have sought to do so through the radical effacement of such Enlightenment frameworks. However, this has not unanimously been the case. Certain feminist commentators have continued to express concern that in denouncing altogether the frameworks of the Enlightenment, and the notion of a transcendent, 'authentic' self to which those frameworks appeal, such feminist critique runs the dangerous risk of denying itself a notion of identity that is crucial to the pursuit of political and pragmatic ends. In expressing a fundamental reluctance to detach themselves conceptually from the prevailing assumption that agency without a distinct and self-determining subject is not valid agency at all, these feminists have suggested that a continued allegiance to prevailing Enlightenment frameworks is necessary to ensure the maintenance of a conception of agency that is integral to the achievement of feminist aims. Within the confines of the following section, we will examine some of the most celebrated attempts made by these theorists to rearticulate the notion of consent without abandoning the Enlightenment frameworks within which the prevailing notion has been enmeshed. In so doing, we will highlight the fundamental inadequacies that render such approaches ideologically difficult for feminist theorising on the issues of subjectivity and agency.

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<sup>77</sup> Martin, B. "Feminism, Criticism and Foucault", in Diamond, I. & Quinby, L. (ed.) *Feminism and Foucault*, Supra. Chapter One, Note 30, p.15

### *Feminism and the Revival of the Enlightenment*

In foregoing discussion, it has primarily been asserted that the criticism lodged at the subject of Kantian Enlightenment by feminist commentators has provoked unanimous feminist concern to dislodge the primacy of that subject within current theory and practice. Certainly, it is true that the majority of feminist commentary on this issue has conceded that the criticisms lodged at the abstract and rational subject have been sufficient to necessitate the revision, not only of the formulation of the legal subject, but also of the general trend of contemporary reliance upon Enlightenment pretensions.

We have noted, however, the existence of a small (but important) field of feminist theory that develops from the premise of dissatisfaction with current fashionings of human subjectivity towards a markedly different conclusion. Contrary to the dominant feminist approach that involves determining alternative anti-Enlightenment ethical models of subjectivity that avoid the polarities and artificial abstraction of the Kantian subject, these feminist commentators have sought to redefine key elements of subjectivity, not by seeking doctrinal alternatives to Enlightenment, but by internal modification to the main pre-existing authorities of rationalistic thought.

One of the most significant attempts at such feminist modification of Enlightenment thought has come from Diana Meyers. In her work *Self, Society and Personal Choice*, Meyers has sought to redefine the concept of autonomy within the parameters of Enlightenment frameworks. On that basis, she has developed at length a conception of autonomy as a procedural life requirement, involving people in the pursuit of life according 'to their own lights'. By cultivating a life plan which conforms to the requirements of personal autonomy in this way, Meyers proposes that an individual will be able to separate her 'authentic self' from that which social experience has moulded her identity towards. To be truly an autonomous self,

according to Meyers, an individual does not need to be possessed of a personality composed solely of original characteristics. Rather, the question of somebody's autonomy is settled by assessment of whether that person is in possession of, and is capable of employing successfully, those skills that Meyers stipulates in her criteria for autonomy competence. Meyers justifies this revised conception of autonomy-

"Viewing autonomy as competency allows us to evade the traps set by the primary ontological account of the self without unhinging conduct from all standards of faithfulness to self."<sup>78</sup>

According to Meyers, the authentic self remains a viable philosophical notion despite a necessary recognition of the existence of social influence upon the development of that self. This is the case because the authentic self is constituted by the evolving coalition of those traits that emerge when an individual makes the appropriate use of their skills of autonomy competence. This is not, however, to say that the authentic self thus envisaged should be conceived as necessarily socialisation-transcending. The authentic self revised by Meyers is a self shaped both by social experience and by individual choice.

Nonetheless, the theory of the self that Meyer proposes stands in stark contrast to the majority of feminist theory that recognises both social influence and personal self-determination. We have noted that the general trend of such theory has been to recognise the centrality of social construction in identity formation, and on that basis to seek alternatives to the idea of a pre-existing 'true' self inherent in Kantian thought.<sup>79</sup> Meanwhile, Meyers has sought to admit of the significance of socialisation while continuing to posit the possibility of realisation of some core 'authentic' self, discoverable through a personal application of the requirements of self-definition and self-examination that constitute the skills of autonomy competence. As Meyers explains,

"the account of the authentic self that emerges from my treatment of autonomy competence is a self that is shaped by social experience as well as by individual

<sup>78</sup> Meyers, D. *Self, Society and Personal Choice* (1989) Columbia University Press, p.55

<sup>79</sup> Amongst the most drastic feminist examples of this trend is displayed in Butler, J. *Gender Trouble*, Supra. Preface, Note 20

choice. Presupposing as it does, self-discovery, self-definition, and self-direction, this conception does not ignore nor deplore people's socialisation, but neither does it abandon people to it. This balance can be maintained because autonomy competence takes advantage of the reciprocity that can hold between one's self-portrait and one's personal ideals and, more broadly, between one's desires and conduct and one's life plans."<sup>80</sup>

Problems abound in relation to Meyer's thesis, however, in regard to whether we can be convinced by the logical premise upon which her thesis is developed. If an 'authentic' self can be realised through the scrutiny of autonomy competence, it must be the case that an individual may be possessed of the skills of self-definition independently of their development within societal influence. Surely, this is of dubious grounding when we note the concessions that Meyers makes throughout her argument to the existence and influence of social mores. In the quote above, we see that Meyers has presupposed self-discovery, self-definition and self-direction. The existence of these personal skills are fundamental to her overall thesis, however, their very viability is called into question by the incorporation of recognition of socialisation pressures into the framework of the authentic self. The only justification Meyers offers relies upon the ability of autonomy competence to mediate between socialisation and self-direction.<sup>81</sup> However, the existence of autonomy competence is itself parasitic upon the existence of self-direction.

Hence, Meyers argument becomes fatally circular. Meyers seeks to redefine the Enlightenment conception of subjectivity in order to continue to give credence to the possibility of a core self while simultaneously recognising the role of social constructionism in the development of individual identity. In making this latter concession, however, Meyers concedes too much because she necessarily recalls into question the possibility of a process of self-definition that stands uninfluenced by social pressure toward conformance. This renders Meyers attempt at revision of subjectivity within the paradigms of Enlightenment self-defeating.

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<sup>80</sup> Meyers, D. *Self, Society and Personal Choice*, Supra. Chapter Four, Note 78, p.96

<sup>81</sup> Meyers, D. "Personal Autonomy and the Paradox of Feminine Socialisation" (1987) 84 *Journal of Philosophy* 619, p. 624-5

What's more, it renders its compatibility with feminist ethics somewhat questionable. Meyers explicitly notes that compliance with the principle of responsibility to self is necessary for the continuation of on-going autonomy. However, in recognising the existence and force of trends of socialisation, Meyers is also forced to recognise that the modes and demands of that socialisation are gender-specific. Most particularly, Meyers acknowledges that women have historically been socialised to accord priority to responsibilities to others over responsibilities to themselves.<sup>82</sup>

Although Meyers seeks to accommodate socialisation pressures within her framework, she fails to give sufficient consideration to the gender-specific nature of social norms in terms of the resultant discrepancy in the development of autonomy competence skills in male and female agents. Indeed, where she does consider the issue, Meyers concedes that socialisation tends to render women more altruistic and servile in a way that necessarily must curtail autonomy competence.<sup>83</sup> Meyers fails to recognise, however, that this has seriously damaging implications for her overall theory that then becomes more readily available to men than to women, and therefore remains fundamentally at odds with feminist ethical aims.

Meyers has not been the only influential feminist theorist to attempt such a revisionary project, however. Most notably, Meechan has attempted to build feminist theory on the foundations laid by Habermasian theory that stands squarely in the tradition of the Enlightenment.<sup>84</sup> For Habermas, identities are formed in webs of social relationships through the undertaking of myriad social roles, most especially the role of 'generalised other'. This generalised position can be achieved

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<sup>82</sup> Meyers, D. *Self, Society and Personal Choice*, Supra. Chapter Four, Note 78, p. 136 & 143

<sup>83</sup> Meyers, D. "Personal Autonomy and the Paradox of Feminine Socialisation", Supra. Chapter Four, Note 81, p. 627

<sup>84</sup> Habermas, J. *The Philosophical Discourse of Modernity* (1987) Polity Press & *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy* (1996) MIT Press

by subjects distancing themselves from particular roles in the recognition that all roles are structured by shared social norms.<sup>85</sup>

While seeking to reject the Kantian view of moral subjects as capable of discerning moral law for themselves through reflection, Habermas continues to adopt many other Enlightenment characteristics of human subjectivity, especially its pretensions towards universality. Although he recognises that even the very possibility of social action rests upon the intersubjectively constituted forms which originate in communication, he does not seek to present a neo-Aristotelian or communitarian ethics in the way that many others who have accepted these principles have tried to do.<sup>86</sup> On the contrary, he suggests that the rationalisation of the modern lifeworld entails that all claims be justified by an appeal for valid criteria when challenged, and that the validity of those criteria does not derive in any simple way from the shared values of the community. It is the existence of such universalistic and rationalistic conceptions within his framework that continue to render Habermas amongst the main Enlightenment thinkers.

Interestingly, however, the elements of Habermasian thought which Meechan seeks to build upon in her feminist recapitulation do not relate to his highly rationalistic notions of the 'ideal speech situation' or to his other peculiarly Enlightenment notions. The main element that Meechan develops pertains, on the contrary, to his recognition of the fundamentally intersubjective nature of human subjectivity, and to his proposals as to contexts of non-coercive discourse.<sup>87</sup> His appreciation of the intersubjective constitution of identity is expressed in his belief that we become human selves through social interaction. The constitution of the self is concomitant with the establishment of relationships in the context of a shared lifeworld. What's more, development of meaningful self-identity is only possible through the

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<sup>85</sup> Meechan, J. "Autonomy, Recognition and Respect – Habermans, Benjamin and Honneth" in Meechan, J. (ed.) *Feminists Read Habermas – Gendering the Subject* (1995) Routledge, p. 240

<sup>86</sup> Meechan, J. (ed.) *Feminists Read Habermas*, Supra. Chapter Four, Note 85, p. 4

<sup>87</sup> Meechan, J. (ed.) *Feminists Read Habermas*, Supra. Chapter Four, Note 85, p. 3

development of a capacity for mutual understanding within inter-subjective relationships.

This may well sound resonant of the claims of communitarian theory that, as will be suggested in Chapter Six, represent an important field of distinctly anti-Enlightenment and anti-liberal critique. In many ways, these elements of Habermas' thought do indeed bear a striking resemblance to the communitarian contention that the individual self can only be developed and given meaning by her place within a network of communal and associative ties.<sup>88</sup> The most significant difference here between Habermas and communitarianism, and the difference which justifies Habermas' continued position within the Enlightenment school, relates to his assertion that human subjects must be able to conceptually abstract from the relationships which they form to the intersubjective meanings which mediate those relationships. Where for communitarianism, the link between relationship and meaning is intrinsic, for Habermas the two must remain conceptually distinct in order to make sense of the processes of their interaction.

This does indeed constitute an important influence within the overall Habermasian project. However, on reading Meehan's commentary on the development of feminism upon Habermas, it does not seem that this element of his thought is given a particularly important place within her overall framework. In fact, the main premises that are borrowed from Habermas continue to be in regard to the development of self within relationships of mutual understanding and the cultivation of discursive sites of agency. These premises, however, are not of a genre that is typical to Enlightenment rationality. Indeed, they are more typical to the theses of communitarianism and social constructionism to be developed in detail elsewhere in this thesis. This renders Meehan's claim to be reformulating feminist theories of subjectivity in the mould of Enlightenment thought somewhat dubious.

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<sup>88</sup> See ensuing discussion of the communitarian critique of selfhood discussed in Chapter Six of this work



It may well be the case that Meechan succeeds in presenting a viable model for the reformulation of the self. And it cannot be disputed that her thesis is in many respects built upon the foundations of Habermasian ethics. However, her reliance upon Habermas is selective. Most noticeably, her reliance is premised upon a selective incorporation of Habermasian theories that stand least centrally within the general frameworks of Enlightenment pretensions. Although there is nothing inherently wrong with Meechan's method of selective appropriation from Habermas (in fact, in many respects, this presents a very favourable method), the nature of the bases that she chooses makes her claim to preservation of the Enlightenment highly questionable. Habermas has indeed been heralded as an influential Enlightenment thinker. However, more is required to support a claim to feminist Enlightenment theory than the selective incorporation of *some* Habermasian insight, especially when the genre of the insight selected is precisely that which has distinguished Habermas from many other Enlightenment theorists. In fact, when we come on to discuss the idea of a 'contextual self' in later chapters, it will become apparent that there is more to unite the strands of Habermasian thought selected by Meechan to that 'alternative' field of ethics than there is to justify their continued claims within Enlightenment rationalism.

In many respects, Habermas presents himself as an attractive partner in dialogue with feminism. His critique of the legacy of the Kantian transcendent subject, his requirement of the plurality of participants in dialogue and his insights into the interdependence of conceptions of knowledge and conceptions of community resonate particularly clearly with certain aspects of feminist epistemology.<sup>89</sup> However, these insights inform the work of many thinkers, both within and outwith the Enlightenment tradition. It is insupportable, therefore, to argue that by continued allegiance to these aspects of Habermasian theory (without full incorporation of the more rationalistic aspects of his theory), feminists like Meechan are forging a pathway for feminism within the Enlightenment.

When we examine Habermas' notions of the ideal speech situation, etc. the tensions between himself and feminism become patently clear – his implicit claim that the ideal speech situation represents the ideally emancipated, coercion-free form of human interaction rests upon the specific concepts of autonomy, coercion, community and social integration which have informed the work of a great number of thinkers who have been challenged by feminist critique (most clearly, perhaps, Lawrence Kohlberg who had his own allegiance to Kant).<sup>90</sup> Hence while Habermasian consensus theory departs from Kant in theorising reason as inherently dialogical, it retains the Kantian association of community with autonomy, of autonomy with rationality, and of rationality with the ability to discover laws, both natural and ethical. These are the elements in Habermas' thought that are most central to his critique, and also the ones most problematic to feminist theory. Nonetheless, they are the very aspects which Meechan's theory fails to deal with. This being so, Meechan's theory presents only the most superficial attempt at the development of a truly Habermasian feminist ethics.

Another influential attempt has been made to revive Habermasian ethics by Seyla Benhabib in *Situating the Self*.<sup>91</sup> Far more willing than Meechan to incorporate the tenets of the notion of the ideal speech situation, Benhabib has developed a position known as 'interactionist universalism' based upon the communicative ethics developed by Habermas. This interactionist universalism continues to seek recognition of the Enlightenment vision of a rational justification for morality. However it attempts to do so through the employment of strategies that have been developed within post-Enlightenment thinking.

Although Benhabib professes to be developing a Habermasian reformulation, the extent to which the spirit of the Habermasian (Enlightenment) ideal remains intact is

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<sup>89</sup> Green, K. *The Woman of Reason – Feminism, Humanism and Political Thought* (1995) Continuum

<sup>90</sup> Kohlberg, L. *The Philosophy of Moral Development* (1981) Harper & Row. For further discussion of the relationship between Habermas, Kohlberg and Kant, see Bracken, J. "From Communicative Rationality to Communicative Thinking" in Meechan, J. (ed.) *Feminists Read Habermas*, Supra. Chapter Four, Note 85, p. 143

again debatable. Remaining strongly in favour of the need for universalisability in theory, Benhabib suggests that universalisability is a necessary procedure that brings multiple moral subjects into an ideal conversation. The ideal conversation she envisages is one between equally informed interlocutors, free of communicative barriers, with the aim of achieving universal agreement. Despite her concern to retain this essential element of universalism, however, Benhabib worries that stressing universal rational argument (the central pillar of Enlightenment thought) may lead to the assumption of a single model of human rationality and selfhood like that which has informed the Kantian legacy. To avoid this essentialist tendency, Benhabib revises the conception of discourse such that it will emphasise the historical and culturally embedded nature of the moral conversationalists who join in the dialogue. Benhabib's account seeks to build upon Habermas while demanding that agents achieve inter-subjective understanding, not by erasing either the differences between moral conversationalists or the social particularities of the vision, but by requiring that participants in the dialogue are able to acquire multiple points of view.

Although this presents an attractive arrangement, in many ways aligned with the celebrated feminist conception of an ethics of care (which we will discuss in Chapter Seven), once again the appeal is largely superficial. Benhabib claims to be developing her theory on the foundations of Habermas' thought. In many arenas she does indeed borrow heavily from him. However, she seeks to revise one of the central elements of his ideal speech situation. In doing so, however, her argument is far from convincing. She offers little account of what is to be involved in competently recreating the point of view of the 'other', of what level of knowledge of the other one must have, and of how one is to acquire it.<sup>92</sup> What's more, she seems to assume that conceptual frameworks are commensurable and, as a result, she takes for granted a significant degree of cultural homogeneity which may result

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<sup>91</sup> Benhabib, S. *Situating the Self*, Supra. Chapter Four, Note 22

<sup>92</sup> Shrager, L. *Moral Dilemmas of Feminism* (1994) Routledge, p. 13

in the obscuring of important differences between ourselves and cultural others.<sup>93</sup> Perhaps most damagingly of all, Benhabib remains overly optimistic about the ability of participants in dialogue to recognise and maintain their own distinctiveness in moral conversation.<sup>94</sup> Her failure to consider the tendency of participants to conclude by validating their own culturally and historically engrained common sense renders her particular treatment of the idea of 'generalised' and 'concrete' others liable to damaging critique. One commentator, for example, has concluded that in real terms,

"Benhabib's communicative ethics belie the Enlightenment conceptions of human selves and human reason contained in the Kantian and liberal theories from which interactionist universalism is derived. She does have one extremely important insight though, and that is that the aim of moral analysis should be tentative political agreements between different and interested agents rather than intellectual homogeneity. This insight can and should be disconnected from the formalist apparatus she has developed."<sup>95</sup>

In seeking to maintain some allegiance to the claims of Habermas, Benhabib continues to make too many assumptions based upon the existence of inherent human rationalism. However, this fails to conform to the main thrust of the feminist critique. Most significantly, Benhabib's theory allows for the submersion of the identity of the 'concrete other' within the demands of the 'generalised other' because of her continued allegiance with universalist philosophical pretensions. Although many of the modifications that Benhabib makes to the notion of the 'ideal speech situation' are to be commended for their success in alleviating its most alienating and artificial aspects, in the final analysis, her allegiance with universalism frustrates the potential insights of her original alterations.

Benhabib's establishment of a model of dialectical discourse within which moral particularity can be taken into account represents a most promising vision for feminist ethics in particular, and legal ethics more generally. Furthermore, it holds considerable promise for the ensuing reformulation of the medium for the

<sup>93</sup> Diprose, R. *The Bodies of Women – Ethics, Embodiment and Sexual Difference* (1994) Routledge, p. 14

<sup>94</sup> Diprose, R. *The Bodies of Women*, Supra. Chapter Four, Note 93, p.15

communication of self-determination towards the realisation of a more fluid and less rigidly rationalistic and abstract standard. However, her unshakable conviction in favour of the necessity of universalisability in theory frustrate these more promising aspects by effectively subsuming the concrete (situated) agent within the more abstract category of the generalised other.

Just as Foucault has criticised Habermas' ideal speech situation for its failure to recognise the normative role of discipline in the imposition of privileged identities,<sup>95</sup> so we can criticise Benhabib's reformulation of that situation for its failure to recognise the imbalances of power implicated in the envisaged co-existence of 'general' and 'concrete' identities within the discursive interaction. In both situations, the resultant model of subjectivity remains one that is too artificial to be accredited with existence outwith the shadow of the juridical. However, from what has been established elsewhere, it remains the case that lifting the veil of the juridical is a necessary pre-condition of the realisation of any truly valuable theory of the self or of self-determination.

In seeking to defend the conception of autonomy in terms that theoretically demand only a limited revision of the original Enlightenment notion, theories such as those proposed by Meyers, Meechan and Benhabib have done little more than to state that autonomy is not inconsistent with the existence of social influence. A careful reading of even the most staunchly anti-Enlightenment theories of subjectivity and agency do not, however, seek to dispute this. Where Meyers presents a theory which leaves us question-begging as to its epistemological possibility, Meechan develops a theory based on those strands of Habermas' thought which exist where he

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<sup>95</sup> Shrage, L : *Moral Dilemmas of Feminism*, Supra. Chapter Four, Note 92, p. 14

<sup>96</sup> Foucault, M. "The Ethic of Care for the Self as a Practice of Freedom" (1987) *Philosophy and Social Criticism* XII, p. 117. Foucault comments "The thought that there could be a state of communications which would be such that the game of truth could circulate freely, without obstacles, without constraint and without coercive effects, seem to me to be Utopia.... The problem is not of trying to dissolve them in the utopia of a perfectly transparent communication, but to give one's self the rules of law, the techniques of management, and also the ethics, the ethos, the practice of self, which would allow these games of power to be played with a minimum of domination." Quoted in Hoy, D. "Foucault and Critical Theory" in Moss, J. (ed.) *The Later Foucault* (1998) SAGE, p. 20-1

stands least in the centre of Enlightenment theory (in fact where, upon the kind of limited interpretation afforded by Meehan, he stands more in line with anti-Enlightenment critique). Although Benhabib's account relies more strictly upon a fuller exposition of Habermas' original critique, her attempt to re-conceive the ideal speech situation to avoid the essentialist tendencies which have plagued Enlightenment rationalism remains unconvincing and results in continued deference to the generalised other.

Species of feminist thought, such as those discussed within this section, which purport to make feminist claims about subjectivity and agency from within the Enlightenment tradition are all too often based upon illusory premises. Their claims are illusory because, in reality, the feminist theories in question develop what are more appropriately called anti-Enlightenment insights through the selective appropriation of strands of Enlightenment thought, or through the misrepresentation of the claims of anti-Enlightenment proposals. In either case, this hardly presents the most convincing defence of this minority feminist claim in favour of the maintenance of Enlightenment frameworks and polarities. What this should also establish is that the strongest and most promising feminist position on subjectivity and agency continues to be the Enlightenment-sceptic approach developed in the preceding section. This more radical critique demands not only the revision of contemporary models of selfhood, but also the eradication of uncritical reliance upon the rationalistic and individualistic paradigms privileged in the Enlightenment frameworks of the Kantian tradition.

### *Conclusion – Alternative Visions of Self and the Concept of Consent*

“That it could never pass from the I to the We, that in spite of Kant's genius, it always remained within the framework of bourgeois individualist thought, these are the ultimate limits of Kant's thought.”<sup>97</sup>

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<sup>97</sup> Goldman, L. *Immanuel Kant* (trans. Black, R.) (1971) New Left Books, p. 170

The subject who populates legal analysis is constructed in line with highly artificial expectations and assumptions. Since the time of Kelsen, theorists have been concerned to illustrate furthermore that the law has engaged in this act of creation quite self-consciously, aware that it is constructing an entity to be contrived as 'the legal subject'.<sup>98</sup> Amongst the most oppressive of such expectations and assumptions is the notion, clearly explicated in much Kantian analysis, that the legal subject is inherently individualistic and capable of rational abstraction from emotion and context.

Commentators within a range of disparate theoretical traditions have produced a critique of the alleged inadequacies of such Kantian assumptions. Amongst such commentators has been a large contingent of feminist theorists who express concern regarding the counter-intuitive and restrictive nature of abstract frameworks of subjectivity. Critique illustrating the incompatibility of such individualistic frameworks with the realities of exercising agency and choice within connected and contingent life circumstances has challenged the liberal pretensions behind the prevailing notion of consent. Portraying their own philosophical and political motives more explicitly, feminist theorists have also commonly expressed concern with the problematic interaction of the legal subject with the paradigmatic character traits prioritised in the disciplinary character formation of the female.

Diverse genres of feminist critique have been united in their belief in the artificiality of the subject that populates the legal realm. In the body of feminist critique discussed above, the prime source of this artificiality has been located in the perpetuation of pretensions towards rationality and abstract individualism inherent in the assumed character of the legal subject. It has been alleged that these pretensions have found their roots in the frameworks of subjectivity and agency established in the era of Enlightenment rationality, most specifically within the model of subjective rationalism espoused by Immanuel Kant.

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<sup>98</sup> Kelsen, H. *The Pure Theory of Law* (trans. Knight, M.) (1967) University of California Press, p. 170-4

Although the focus of discussion in this chapter has often involved specific examination of competing conceptions of subjectivity, implicit throughout that discussion has been the necessity of a fundamental reconstruction and challenge to the dominant notion of consent. Within the confines of this chapter, the centrality of the Enlightenment perception of an essentially autonomous and atomistic self to the prevailing interpretations of consent that inform liberal legal analysis has been continually illustrated. It has therefore been proposed that any meaningful examination of the role and construction of consent cannot be undertaken without also a lengthy examination into the nature of the self that lies behind the medium of consent.

The thrust of the critique of the preceding sections has established that one of the primary difficulties with the model of consent isolated in Chapters One to Three lies in the artificial perception of human interaction which it privileges. Assuming the basis of human interaction to be one founded upon an equal engagement of disinterested and highly individualist agents, the medium of consent has been developed as reflective of this dispassionate interchange. However, our experience dictates that this model of interaction is counter-intuitive, and the contexts isolated in Chapters Two and Three serve as stark illustrations of life situations within which this model is particularly jarring.

This conclusion that the prevailing model of consent fails to account for the realities of human interaction, and therefore fails to act as a vehicle for human self-determination in any meaningful way, has provided the justification for re-vitalised theorising about the notion of consent. A necessary prerequisite to that theorising, however, demands devoting attention to the realities of human interaction. Within the confines of this chapter, our critical examination of the model of selfhood that informs existing perceptions of the medium of consent has provided this theoretical foundation. Having now established the inadequacies of that model, we may commence our search for an emerging conception of the self that is more



experientially appropriate. Within the following chapters, therefore, we will illustrate alternative models of subjectivity that have been fashioned within the anti-Enlightenment schools of poststructuralist and communitarian thought. In doing so, our aim will be the realisation of a conception of subjectivity and inter-subjective interaction that permits a more experientially appropriate analysis. Once such an analysis has been established, we will be able to re-evaluate the prevailing conception of consent and seek its re-emergence as a more meaningful medium for the determination of this more comprehensive self.

Such re-conceptualisation will not necessitate, however, the rejection of the traditional concern to facilitate human agency. A desire to avoid the dissolution of human agency has often lain behind those attempts within the feminist community to reconceive subjectivity in alternative terms while maintaining affiliation with Enlightenment frameworks. The supposition that we cannot have a conception of agency without the epistemological foundations of the Enlightenment has been framed precisely by the 'Enlightenment blackmail' Foucault has warned us against. Our recognition that agency and abstraction are not mutually dependent permits the development of theory outwith the demands of this rationalist imperative and frees feminist theorists, such as Meyers, Meechan and Benhabib, from the tenacious legacy of superficial concession to Enlightenment dictates.

In its search to develop the criteria that would render the frameworks of legal subjectivity (and thereby legal consent) more complete, feminist theory has often employed insights developed within alternative fields of anti-Enlightenment critique. Over the next two chapters, our examination of the affinities which unite and the tensions which divide feminism from these other schools of theory, will enable our progression towards a fuller awareness of the demands which any adequate conception of human selfhood must satisfy. By looking specifically at the feminist critique's interaction with poststructuralist and communitarian problematisation of the legal subject of contemporary liberalism (framed as it is by the dictates of

Kantian Enlightenment), we are also able to pursue our original quest for an improved methodology with which to envisage the realities of subjectivity and agency outwith the shadow of the juridical framework.

Once we recognise the realities of the human condition – namely that it is not inherently transcendent and disinterested – we can begin to question anew the legitimacy of the current concept of consent as providing the most appropriate vehicle for the communication of desire and intent within an inter-subjective arrangement. By developing a more associative conception of the self, critique over the following chapters will precipitate a more truly contextual version of the possibilities of human agency than that currently offered by the concept of consent that dominates our legal tradition. This contextual version of human agency departs from traditional liberal legal frameworks in various ways. Most importantly, however, in terms of its implications for the conception and operation of standards of consent, it asserts the necessity of an augmentation of peripheral vision in the resolution of moral and legal dilemmas.

## CHAPTER FIVE

### POSTSTRUCTURALISM AND FEMINISM

“To the extent that atomism, individualism and the impoverishment of relationship are objects of feminist critique, that critique is not feminist critique alone. The future of feminism lies in the development and exploitation of the links between feminist analysis and radical social critique more generally. To the extent that the ‘return to sex’ dulls our appreciation of our links with these other radical projects it should be undertaken with caution and with a constant eye on the possible necessity of future diversions or even strategic reversals.”<sup>1</sup>

We have discussed at some length in the preceding chapter the nature of feminist concerns regarding the individualism and rational abstraction considered inherent in the Kantian notions of selfhood and agency that have informed prevailing liberal frameworks of consent. Implicit throughout our evaluation of such feminist critique has been the assertion that the most appropriate remedy to the inadequacies highlighted in the operation of consent lies, not in the internal modification of the application of the consent standard, but in radical challenge to the one-dimensional and isolated legal subject who populates liberal analyses.

In seeking the means to reconceptualise the legal subject in a manner more inkeeping with our experiential accounts of subjectivity, feminist theory has begun to seek strategic allegiances with other fields of anti-individualist critique. Within the confines of this chapter, we will examine the nature of the allegiance between feminism and that school of anti-individualist and anti-liberal critique commonly referred to as poststructuralism.

In the preceding chapter, we noted the existence of a long tradition of normative social criticism that has centred around individualist notions of autonomy and consent. Traditionally, as we have seen, these have depended in their turn on a particular Enlightenment conception of the metaphysics of subjectivity manifest

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<sup>1</sup> Lacey, N. “On the Subject of ‘Sexing’ the Subject” in Naffine, N. & Owens, R. (ed.) *Sexing the Subject of Law* (1997) Sweet & Maxwell, p. 76

most clearly in the work of Immanuel Kant. A vociferous challenge to such ideology has recently been lodged in the name of poststructuralist theory. This poststructuralist account has sought to explicitly reject the metaphysics of subjectivity embodied in prevailing liberal assumptions. Not only does such poststructuralist theory deny the possibility of objective knowledge of an independently existing real world, it also stresses (as we have seen in our discussion of Foucault in Chapter One) the potentially manipulative powers of 'discourse' that has attained the status of knowledge and the implications of that discursive power upon prevailing conceptions of consent.

The overall project of poststructuralist theory (such as can be discerned from within such a diverse school of thought) can generally be categorised under a concern to challenge manifestations of liberal rhetoric, most specifically its universalising theories about the human subject and the values to which it appeals. United in their common assertion that the subject is merely a derivative product of particular contingent and historically specific sets of linguistically infused social practices,<sup>2</sup> various theorists congregated under the poststructuralist header have challenged the legitimacy of any critique oriented around the notions of autonomy, mutual recognition and dignity framed by the Kantian legacy.

Despite certain unifying moments, such as those mentioned above, it must be conceded that the 'school' of poststructuralist theory suffers from significant internal disagreement and critique.<sup>3</sup> In reality, there is no one form of poststructuralist theory and to assume too much unity between disparate theorists within this tradition would be inappropriate. Furthermore, in terms of our immediate project, it would also be dangerous because not all forms of poststructuralism are necessarily productive for feminist analysis.<sup>4</sup> Of the most fruitful forms of poststructuralist theory for feminist critique are those that attend to

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<sup>2</sup> Derrida, J. *Of Grammatology*, Supra. Chapter Four, Note 31

<sup>3</sup> Weedon, C. *Feminist Practise and Poststructuralist Theory*, Supra. Chapter Four, Note 47, p. 19

<sup>4</sup> Weedon, C. *Feminist Practise and Poststructuralist Theory*, Supra. Chapter Four, Note 47, p. 19

the manner in which social power is exercised and to the potential for transformation in social relations of gender, class, etc. In this regard, it seems that the work of Foucault (discussed in Chapter One) lends itself particularly favourably to feminist theorising.

On the basis of that claim, this chapter will therefore be primarily concerned with an examination of the poststructuralist theory of Michel Foucault. Our discussion in Chapter One has already provided an introduction into the Foucaultian critique. In what follows, we will build upon that first stage of critique (which was concerned primarily with the disciplinary role of modern power) to illustrate (as Foucault himself has done in latter volumes of his work<sup>5</sup>) the forms of agency embodied within the frameworks of disciplinary power. Having drawn attention to this aspect of Foucaultian theory, we will move on in a later section of this chapter to examine the similarities that unite and the tensions that divide Foucault from feminist theorising on agency and the self.

### *The Poststructuralist Critique of Subjectivity*

"I do indeed believe that there is no sovereign, founding subject, a universal form of subject...I believe, on the contrary, that the subject is constituted through practices of subjection, or in a more autonomous way, through practices of liberation, of liberty, as in Antiquity, on the basis, of course, of a number of rules, styles, inventions to be found in the cultural environment."<sup>6</sup>

For Foucault, as for many other poststructuralist theorists, language and discourse play a crucial role in the construction and perpetuation of power relationships and conceptions of subjectivity. Unlike the Kantian theory discussed previously, which implies a conscious, knowing, unified and rational subject, poststructuralists generally conceive of subjectivity as a site of discursivity and conflict. Most importantly in terms of our analysis of poststructuralist accounts of agency, this

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<sup>5</sup> Particularly Foucault, M. *The History of Sexuality Vol. II – The Use of Pleasure* (1985) Viking Press & *The History of Sexuality Vol. III – The Care of Self*, Supra. Chapter Two, Note 2

conception of the formation of subjectivity is rendered central both to processes of political change and to preserving the status quo.<sup>7</sup>

The centrality of language to poststructuralist theory is largely attributable to the influence which structuralist theory has had upon its development. While building upon the structuralist assertion that language, rather than reflecting some pre-given reality, actually constitutes social reality through its operation and articulation,<sup>8</sup> much poststructuralist theory moves beyond this critique to challenge the assumption inherent in structuralist theorising that meaning can be in any way 'fixed'.<sup>9</sup> Emphasising the plurality of meaning in diverse discourse, poststructuralist theory implies that there can never be a fixed meaning in language because meaning is eternally deferred from one locus to another. The significance of that claim for poststructuralist theory is that it permits a greater concern with the role of language as a site of political struggle than that afforded to it within the frameworks of its structuralist predecessor.<sup>10</sup>

The influence of language has gained further ground in poststructuralist theorising because of the strong reliance that such theorising places upon techniques of hermeneutics. Hermeneutics has been amongst the most influential methodologies to develop within the confines of anti-Enlightenment theory. As a broad school of method, hermeneutics disputes the thesis that understanding and truth are based on timeless intuitions of the eternal, transcendental subject (envisaged by Kant). On the contrary, it is suggested that all understanding takes place in particular historically-bound and linguistic contexts. In direct contradiction to the Enlightenment thesis developed in the preceding chapter, this alternative approach suggests that the subject, rather than being the foundation of knowledge, history and the world, is itself thrown into history as a contingent entity. We, as human

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<sup>6</sup> Foucault, M. "An Aesthetics of Existence" in Kritzman, L. (ed.) *Michel Foucault – Politics, Philosophy, Culture: Interviews and Other Writings of Michel Foucault 1977-84* (1990) Routledge, p.50

<sup>7</sup> Weedon, C. *Feminist Practice and Poststructuralist Theory*, Supra. Chapter Four, Note 47, p. 22-30

<sup>8</sup> de Saussure, F. *Course in General Linguistics* (1974) Fontana/Collins

<sup>9</sup> Derrida, J. *Of Grammatology*, Supra. Chapter Four, Note 31

subjects, are nothing more than a creation and conglomeration of those customs, practices and prejudices in which we find ourselves enmeshed.<sup>11</sup>

Much of the general poststructuralist concern to challenge the classical liberal subject (framed by the assumptions of Kantian theory developed in the preceding chapter) has found its roots in the deconstructive insights of Nietzsche.<sup>12</sup> In a commentary on Nietzsche, Micheal Haar gives voice to the poststructuralist revelation that a number of philosophical ontologies have been trapped within certain illusions of 'being' and 'substance'.<sup>13</sup> These illusions have been fostered on the premise that the grammatical formulation of subject and predicate reflects the prior ontological reality of substance and attribute. Integral to the poststructuralist thesis is the claim that these constructs constitute the philosophical means by which simplicity, order and ascribed identity are instituted despite their lack of legitimate fit to experiential realities. Haar presents the essence of the Nietzschean thesis –

"All psychological categories (the ego, the individual, the person) derive from the illusion of substantial identity. But this illusion goes back basically to a superstition that deceives not only common sense, but also philosophers – namely, the belief in language, and more precisely, in the truth of grammatical categories. It was grammar (the structure of subject and predicate) that inspired Descartes' certainty that 'I' is the subject of 'think' ... The subject, the self, the individual, are just so many false concepts, since they transform into substances fictitious unities having at the start only a linguistic reality."<sup>14</sup>

Hence, while structuralists see truth as being 'behind' or 'within' a text, poststructuralists stress the interdependent and constructive relationship between the reader and the text.<sup>15</sup> The poststructuralist thesis strongly implies that there is no position or perspective available outwith language. Hence there can be no distinction between subject and object and no self-evident structure for the binary

<sup>10</sup> Weedon, C. *Feminist Practise and Poststructuralist Theory*, Supra. Chapter Four, Note 47, p. 30

<sup>11</sup> Gadamer, G. *Truth and Method* (1985) Sheed & Ward. See also discussion in Douzinas, C. & Warrington, R. *Postmodern Jurisprudence – The Law of the Text in the Text of the Law* (1991) Routledge.

<sup>12</sup> Nietzsche, F. *On the Genealogy of Morals* (1969) Vintage Books

<sup>13</sup> Haar, M. "Nietzsche and Metaphysical Language" in Allison, D. (ed.) *The New Nietzsche – Contemporary Styles of Interpretation* (1977) Delta.

<sup>14</sup> Haar, M. "Nietzsche and Metaphysical Language" in Allison, D. (ed.) *The New Nietzsche – Contemporary Styles of Interpretation*, Supra. Chapter Five, Note 13, p.17-8

opposites that have produced the polarised logic that certain radical feminist theorists have asserted to be characteristic of modernity.<sup>16</sup>

In *Thinking Fragments*, Jane Flax characterises the poststructuralist position as essentially involving submission to the content of three main propositions<sup>17</sup>. The first, she stipulates as a conviction in favour of 'the death of man'. Poststructuralists tend to challenge any and all essentialist conceptions of human nature or subjectivity. Refusing to accept the Kantian thesis of Man as transcendental, rational being, poststructuralism as a genre of thought has insisted upon the contingent existence of Man as a social, historical and linguistic artefact. The second poststructuralist thesis proclaims the 'death of history', suggesting that the notion of history accompanies the conception of Man as transcendental, privileging and presupposing Enlightenment values of unity, homogeneity and identity. The third and final thesis deals with the 'death of metaphysics'. According to most poststructuralist thought, the Enlightenment quest for the 'real' conceals the desire of most Western philosophy to master the world by enclosing it within an illusory, but absolute, system which it is believed corresponds to a unitary Being, beyond history, particularity and change.

The belief that poststructuralism has caused, or at least announced, the 'death of the subject' is a pervasive one in today's intellectual climate. It is, however, somewhat misleading because far from being in a position of having abandoned the subject, many poststructuralist theories are better characterised as being obsessed with subjectivity. While some poststructuralist theories overemphasise the instability of subjectivity (producing difficult conceptions of inherently fragmented, conflicting and over-determined selves<sup>18</sup>), others (such as Foucault's) attempt to reformulate subjectivity into a more discursive formation that is considered to be more

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<sup>15</sup> Sarup, M. *An Introductory Guide to Poststructuralism and Postmodernism*, Supra. Chapter Four, Note 31 p. 3

<sup>16</sup> For discussion of such critique, please see Chapter Four – "Feminist Concern About the Legal Subject"

<sup>17</sup> Flax, J. *Thinking Fragments : Psychoanalysis, Feminism and Postmodernism in the Contemporary West* (1990) University of California Press, p. 32-4



appropriate to the epistemological concerns of the subject in the contemporary world.

Of the most celebrated advocates of the former variant of poststructuralist theory is Jacques Derrida.<sup>19</sup> With a significant methodological reliance upon the insights of hermeneutics, semiotics and psychoanalysis, Derrida has emphasised the linguistic constitution of the subject, fostering an approach in favour of a strict deconstruction of the transcendental subject. This Derridean deconstructive project

“arises out of a fundamental critique of humanist discourses and their conception of subjectivity and language. It rejects unitary intentional subjectivity, locating meaning in texts and their relations with other texts, insisting that this meaning is not only plural but constantly deferred in the never-ending webs of textuality.”<sup>20</sup>

While deconstructive method is useful for feminism to the extent that it offers a method capable of decentring certain hierarchical oppositions and binaries that are seen to underpin gender oppression, its failure to attend sufficiently to social context and particular power relations renders it a duplicitous ally. As Weedon notes,

“While its stress on the plurality and non-fixity of meaning is a helpful move beyond criticism which attempts to identify one true meaning, the implicit assumption that there is a free play of meaning not already located in a hierarchical network of discursive relations is to deny social power by rendering it invisible and therefore to reaffirm the status quo.”<sup>21</sup>

Many commentators have built upon Weedon's critique to make the claim that pursuing such semiotic strands of poststructuralism to their logical ends presents an unproductive distraction for social criticism generally. Essentially, two main problems have been isolated with the method of deconstruction employed by these ‘strong’ poststructuralist ideological trends. Firstly, theorists like Derrida do not make any pretence towards offering an alternative theory of the subject on the

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<sup>18</sup> See ensuing discussion of the poststructuralist thesis of Jacques Derrida in this chapter.

<sup>19</sup> Derrida, J. *Of Grammatology, & Speech and Phenomena, and Other Essays on Husserl's Theory of Signs*, Supra. Chapter Four, Note 31

<sup>20</sup> Weedon, C. *Feminist Practise and Poststructuralist Theory*, Supra. Chapter Four, Note 47, p. 163

<sup>21</sup> Weedon, C. *Feminist Practise and Poststructuralist Theory*, Supra. Chapter Four, Note 47, p. 165

grounds that to do so would be to succumb to the epistemological dictates of modernism. This refusal to discuss an alternative conception of knowledge tends, however, to result in pursuit of a philosophical dead-end that prevents the theorists who advocate this position from developing arguments in support of their own thesis. Furthermore, Derridian and semiotic strands of poststructuralism encourage us to conceive of subjectivity as play by equating the subject with a fiction of modernity.<sup>22</sup> Although it is an important and valuable insight of these theories that the subject is constituted by the play and interaction of meaning in language, what these theories tend also to ignore is that this 'play' is a serious moral enterprise pursuant of end products that are by no means fictitious. On the contrary, the play of meanings in language produces real subjects with complex subjectivities that constitute their identities and experiences. As noted above, this latter criticism has significant implications in terms of the viability of collaboration between feminist theory and strict deconstructive methodology.

Such ideological shortcomings of the 'strong' poststructuralist thesis have led many commentators to concern themselves more progressively with the claims of an alternative poststructuralist thesis often associated with Michel Foucault. Foucault has been critical of the tendency within Derridean theory to deliberately restrict its focus to textual analysis without evaluating that textual analysis as a social and political practice. Furthermore, Foucault alleges that Derrida's self-professed desire to avoid questions about the extent to which a particular text arises out of and reflects underlying social practices actually precludes the very possibility of such questioning and therefore implicitly perpetuates the underlying status quo.<sup>23</sup> Without abandoning the insights provided by Derrida regarding the plurality and non-fixity of language and discourse, and without denying the imperative deconstruction of the subject, as it has been framed by liberal and neo-Kantian thought, Foucault has fused such concerns with his peculiar brand of theorising about modern power to provide a far more appealing partner to feminist dialogue.

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<sup>22</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 79

*Foucaultian Perspectives on Subjectivity and Agency*

Foucault's contribution has been unique within the school of poststructuralism particularly because of his concern to distinguish Enlightenment categories of thought (such as those espoused by contemporary liberalism) from the original Enlightenment spirit that provoked such categories. We noted previously in Chapter Four that the 'spirit' of the Enlightenment isolated by Immanuel Kant bears certain notable resemblances to the notion, established by Foucault, that modern power operates to produce 'docile bodies' and that the project of critique should encourage the production of means of resistance to power forces. Where Foucault diverges from Kant is in the Kantian assumption that power forces can be transcended and overcome through the employment of rational abstraction. Where Foucault agrees with Kant, however, is in the claim that freedom and autonomy are being curtailed by the operation of power forces in society and that procedures ought to be devised to minimise the impact of such forces. Foucault's thesis is anti-Kantian, then, to the extent that it rejects many of the metaphysical assumptions regarding the self-reflective power of the individual that are inherent in Kantian theory. However his thesis can only be conceived of as anti-Enlightenment to the extent that we can establish that the Enlightenment spirit presented by Kant (and accepted by Foucault) has been subsequently distorted by the dangerous metaphysical assumptions mentioned within our discussion in Chapter Four.<sup>24</sup>

Furthermore, unlike many other poststructuralist theories, the Foucaultian project does not entail the entire rejection of identity-based politics in the sense of political strategies that focus upon the human being as the centrepiece of reformism. Rather, what is required is a rejection of the search for some 'true' and inherent human identity that will form the basis of universal emancipation (in the case of Kant's

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<sup>23</sup> Sarup, M. *An Introductory Guide to Poststructuralism and Postmodernism*, Supra. Chapter Four, Note 31, p. 54

<sup>24</sup> Foucault, M. "What is Enlightenment?" in Rabinow, P. (ed.) *Michel Foucault Ethics – Essential Works of Foucault 1954-84, Vol. I* (1997) Penguin, p. 303

theory through the rational transcendence of enforced curtailments upon individual autonomy).<sup>25</sup>

“The individual is not a pre-given entity which is seized on by the exercise of power. The individual, with his identity and characteristics, is the product of a relation of power exercised over bodies, multiplicities, movements, desire forces.”<sup>26</sup>

Foucault refuses to see the individual (subject) as the point of origin in the way that the metaphysical assumptions of popular (inherited) Enlightenment would require. The world is not peopled by autonomous, self-legislating Kantian moral subjects. On the contrary, the subject that populates the modern world is the resultant outcome of the social life in which it is immersed. Relations of power script the subjects envisaged by Foucault - they are subjects who are subjected rather than transcendent.

Foucault deconstructs the basis of the Kantian subject by establishing the historical and discursive origins of its defining characteristics in order to establish that the characteristics which modernity associates with subjectivity (namely agency, autonomy, and separation) are not paradigmatic. Contrary to traditional interpretations, Foucault suggests that these characteristics of the human subject have evolved as the constituted products of the discourse of the modern (Kantian) subject. In other words, these characteristics are historical, discursive products, rather than given attributes of subjectivity itself.

In respect to this aspect of his thesis, Foucault adopts an approach not dissimilar to that developed by Heidegger in relation to the constitution of the subject. In *The End of Philosophy*<sup>27</sup>, Heidegger argued that the subject and the object taken by modern philosophy to be necessary, universal and ahistorical fundamentals are actually contingent, historically situated products of the modern interpretation of

<sup>25</sup> Sawacki, J. *Disciplining Foucault – Power, Feminism and the Body*, Supra. Chapter One, Note 39, p.5

<sup>26</sup> Foucault, M. *Power/Knowledge– Selected Interviews and Other Writings 1972-77*, Supra. Preface, Note 8, p.73-4

Being. Foucault couples this thesis with his overall insight into the operation of power regimes to suggest the existence of historically specific systems of norm-governed social practices that define and produce distinctive subjects and objects of knowledge and power in differing eras. Thus, the subject is always produced as the result of social processes that give rise to the 'subjectivity' within which individuals experience themselves.

"One has to disperse with the constituent subject, to get rid of the subject itself, that is to say, to arrive at an analysis which can account for the constitution of the subject within a historical framework."<sup>28</sup>

Foucault's project can thus be seen as developing a new historiography that can demonstrate that the Kantian concepts of subjectivity and objectivity that have operated in the post-Enlightenment epoch to legitimate liberal values are in actuality mere 'fictions'. They are fictions that operate to legitimate certain social, moral and legal practices that, once divested of their aura of legitimacy, take on an unsatisfactory appearance and call into question again the legitimacy of the practices they support.

This suggestion that the notion of agency so closely associated with the modernist subject is not the only possible definition holds important consequences for the development of moral and legal theory. Perceiving this dominant definition as a specific attribute of the Kantian subject suggests that other definitions of agency can and have been defined which are specific to other definitions of subjectivity. Through the development of his thesis on technologies of the self, Foucault intends to examine some of these alternative conceptions of subjectivity and agency.

In line with developments in hermeneutical critique, Foucault's genealogy of the subject as a critical category has suggested that the subject, rather than being identified strictly with the individual, ought to be designated as a linguistic category

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<sup>27</sup> Heidegger, M. *The End of Philosophy* (trans. Starnbaugh) (1973) Harper & Row

<sup>28</sup> Heidegger, M. *The End on Philosophy*, Supra. Chapter Five, Note 27, p.117

eternally in formation. Individuals come to occupy the position of subject and this position provides the linguistic occasion for the individual to achieve and reproduce the constrained subjectivity that is the condition of its existence and agency. The essence of Foucault's thesis suggests that no individual becomes a subject without first becoming subjected in this process of 'subjectivization'. In recognition of this epistemological fact, Foucault alleges that the point of modern politics is no longer to liberate the subject from social constraints, but to interrogate the regulatory mechanisms through which 'subjects' are produced and maintained.

"I will call subjectivization the procedure by which one obtains the constitution of a subject, or more precisely, of a subjectivity which is of course only one of the given possibilities of organisation of self-consciousness."<sup>29</sup>

One of the main criticisms that Foucault lodges against liberalism and the liberal perception of the human subject lies in the ability of these concepts to disguise the processes of subjectivization which occur at the level of everyday life. The imposition of this liberal discursive smoke-screen operates, in terms of our analysis, to encourage a one-dimensional conception of agency which demands recognition of a simplistic operation of consent. On the contrary, the Foucaultian suggestion of a necessary recognition of subjectivization demands examination of the social processes structuring the remit and format of that consent before it is even available to the agent in question. Application of such methodology heralds significant implications in terms of the contexts isolated within Chapters Two and Three of this thesis, where we drew attention to the experiential reality that the agency of the legal subject is heavily constructed and constrained by the prevalence of normative imperatives. Foucault's criticism of the inability of liberalism to recognise this reality has been re-cast by the legal postmodernist, Carty, in the following terms –

"Liberalism, in theorising power as sovereign power, and sovereign power as the relationship between abstract subjects – each characterised by an autonomous, responsible will – and the law, ignores those practices of government by which living individuals become the objects of detailed manipulation and management. In ignoring them, it has also concealed them and, by the same movement disguised the extent to which state power itself has been progressively

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<sup>29</sup> Foucault, M. "The Return to Morality" in Kritzman, L. (ed.) *Michel Foucault – Politics, Philosophy, Culture*, Supra. Chapter Five, Note 6, p.253

governmentalised, that is, the extent to which these mechanisms of 'disciplinary' power have been taken over and utilised by the state."<sup>30</sup>

In the latter volumes of *The History of Sexuality*, Foucault initiates a deliberate shift in emphasis away from the body, and towards consideration of the human self. Although many commentators have suggested that this change in emphasis is indicative of recognition on Foucault's part of the failure of his thesis on power and its operation on the body<sup>31</sup>, Foucault seems to staunchly reject this interpretation. In fact, he explicitly states that this change in emphasis should be seen as part of the ongoing process of his work, at most a modification of his previous thesis:

"Having studied the field of power relations taking domination techniques as a point of departure, I should like...to study power relations, especially in the field of sexuality, starting from the techniques of the self."<sup>32</sup>

By Foucault's own admission, then, an analysis of the techniques of domination must be counterbalanced with an analysis of techniques of the self. Foucault's earlier work in relation to how it is that the subject is constituted as an object of knowledge is now to be supplemented and complimented by an analysis of how the individual comes to understand himself or herself as subject.

In *The Use of Pleasure*, Foucault no longer talks of the individual as a docile entity. Rather, he seeks a more dynamic conception of the manner in which individuals interpret their own experiences.<sup>33</sup> He identifies the era of Christianity as founded upon a morality orientated more towards codes than ethics. Hence the emphasis today placed upon the individual's conformity to externally imposed codes of behaviour. He contrasts this to the position he considers characteristic of the era in classical Greek thought which had a strong orientation towards ethics. In this

<sup>30</sup> Carty, A. (ed.) *Postmodern Law: Enlightenment, Revolution and the Death of Man*, Supra. Chapter Four, Note 20, p.109

<sup>31</sup> For example, O'Farrell, C. in *Foucault – Historian or Philosopher* (1989) MacMillan. Makes the suggestion that this shift in emphasis represents a turn-around in his work, forced to come about by his recognition that his previous focus on disciplinary power and docile bodies neglected the role of the subject, leading to a theoretical dead-end

<sup>32</sup> Foucault, M. "Sexuality and Solitude" in Blonsky, M. (ed.) *On Signs – A Semiotic Reader* (1985) Basil Blackwell, p.367

<sup>33</sup> Foucault, M. *The History of Sexuality Vol. II – The Use of Pleasure*, Supra. Chapter Five, Note 5

classical Greek era, there was a “strong dynamic interchange with relative autonomy” between systems of law and the individual’s own ethical conduct.<sup>34</sup> The emphasis within classical Greece lay less with conformity to systems of law, and more with the formation of the individual’s relationship to themselves, and on the methods by which this relationship was to be cultivated. No Greek thinker ever found a definition of the subject, and nor did they ever look for one. This “does not mean that the Greeks did not strive to define the conditions in which an experience would take place – an experience not of the subject, but of the individual, to the extent that the individual wants to constitute itself as its own master”.<sup>35</sup> In line with a large amount of the critique which we will discuss within this thesis<sup>36</sup>, Foucault has harked back nostalgically to this era of thought based on promotion of ‘ethics of self’ where the concern was,

“a matter of forming and recognising oneself as the subject of one’s own actions, not through a system of signs denoting power over others, but through a relation that depends as little as possible on status and its external forms, for this relation is fulfilled in the sovereignty that one exercises over oneself.”<sup>37</sup>

For Foucault, the individual may exercise a degree of choice in the way his or her existence is fashioned, however the practices through which this self-formation is achieved are always over-determined by the socio-cultural context. At the same time, however, although these practices of the self are necessarily defined by social context, the way in which the individual is related to them is by no means reducible to such a context. Foucault explains this,

“I am interested...in the way in which the subject constitutes himself in an active fashion, by the practices of the self; these practices are nevertheless not something that the individual invents by himself. They are patterns that he finds in his culture, and which are proposed, suggested and imposed upon him by his culture, his society and his social group.”<sup>38</sup>

<sup>34</sup> McCarthy, T. “The Critique of Impure Reason – Foucault and the Frankfurt School” in Kelly, T. (ed.) *Critique and Power*, Supra. Chapter One, Note 28, p. 267

<sup>35</sup> Foucault, M. “The Return to Morality” in Kritzman, L. (ed.) *Michel Foucault – Politics, Philosophy, Culture*, Supra. Chapter Five, Note 6, p.253

<sup>36</sup> Similar nostalgia for the ethics of pre-Homeric Greece have been heavily influential in the work of Bernard Williams, Alasdair MacIntyre and Martha Nussbaum – These will be discussed in detail in the following chapter.

<sup>37</sup> Foucault, *The History of Sexuality, Vol. III - The Care of Self*, Supra. Chapter Two, Note 2, p.85

<sup>38</sup> Foucault, M. in Bernauer, J. & Rasmussen, D. (ed.) *The Final Foucault* (1988) MIT Press, p.11



Within the social realm of Antiquity, the main emphasis was on self-formative processes that enabled individuals to escape enslavement, and to achieve a desired model of being,

“the elaboration of one’s own life as a personal work of art, even if it obeyed certain collective canons, was at the centre of moral experience and of the will to morality in Antiquity; whereas in Christianity, with the religion of the text, the idea of the will of God, and the principal of obedience, morality took on increasingly the form of a code of rules.”<sup>39</sup>

This model of technologies of the self enables us to make sense of the possibilities of resistance and revolt to power dynamics that Foucault had always insisted were inherently implicated in systems of power. The subject thus produced through subjectivization is not produced immediately in its totality; rather, it is in the continual process of being repeatedly produced. It is the very possibility of such repetition which denies any rigid consolidation of the subject and which proliferates the technologies of the self with which to undermine the forces of normalisation. Making creative use of whatever space for formation of the self these power dynamics allow, these technologies of the self provide the means for infinite and minute disjunctions between the dictates of power forces and the resultant production of subjectivity in flux.

This more complex notion of difference, proposed by Foucault’s practices of the self, bears many resemblances to the concern amongst a large section of contemporary feminists to demolish the assumed primacy of sexual difference.<sup>40</sup> Foucault’s ethics of the self (“based on the problematisation of any straightforward causal connection between social determinants and individual practices”<sup>41</sup>) brings his work in line with feminist pursuit of a non-reductive analysis of women’s social status which recognises that gender is not the only determining influence in a woman’s life. This correlation of concern has been seized upon by many feminists,

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<sup>39</sup> Foucault, M. “An Aesthetics of Existence” in Krtizman, L. (ed.) *Michel Foucault – Politics, Philosophy, Culture*, Supra. Chapter Five, Note 6, p.49

<sup>40</sup> See discussion of ‘contemporary’ feminist approach to the legal subject discussed in the previous chapter, particularly Littleton, C. “Reconstructing Sexual Equality” (1987), Supra. Chapter Four, Note 71

particularly, as we shall see, by those members of the French Feminist school who have been particularly receptive to the Foucaultian notion of a limited remit of agency within the confines of repetitious acts of character formation. This has become an important focus of much contemporary feminism, and later in this chapter, we will examine the merits of Judith Butler's most celebrated attempt to build upon Foucaultian ethics of the self to derive a more appropriate premise for feminism.<sup>42</sup>

For the moment, it is important that we notice the deference that Foucault's ethics of the self admits to the overall social context of individual identity fashioning. Foucault, in the final analysis is never unaware that practices of the self are eternally introduced and imposed by their wider social context. However, he also recognises that this imposition is never straightforward, and that in order to capture the dynamics of power we must examine the manner in which individuals interact with and interpret the imperatives demanded by these practices.

One of the main problems with Foucault's notion of an ethics of the self, based upon pursuit of personal aestheticism, lies in the inability of this thesis to differentiate between those practices which are imposed upon us more heavily than others.

"By reducing the varying techniques of the self to the same effective level of self 'stylization', Foucault fails to distinguish between practices that are merely 'suggested' to the individual and practices that are more or less 'imposed' in so far as they are heavily laden with cultural sanctions and taboos."<sup>43</sup>

Not all practices of the self are simply an exercise in aesthetics (as Foucault seems to suggest).<sup>44</sup> If this ethics is to hold any potential for expansion by feminism, it must be able to recognise that some practices of the self are linked in a more intimate way with the maintenance of prevailing social hierarchies. Embedded in

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<sup>41</sup> McNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p.66

<sup>42</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20

<sup>43</sup> McNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p. 74

<sup>44</sup> McNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p. 77

this idea of a stylisation of the self is a notion of choice, but this remains inadequate to fulfil the purposes demanded by feminist ethics, most specifically because of its failure to tackle the involuntary and biological dimensions of sexuality. In order to challenge certain aspects of sexuality effectively, we have seen in Chapters Two and Three that we must engage in a detailed study of the network of entrenched cultural norms in which our bodies are implicated. However, the imperatives of stylisation and aesthetics presented by Foucault are insufficient for this purpose because they fail to explain why certain modes of stylisation are not equally available to men and women.<sup>45</sup>

While Foucault's theory heralds an advantage (in terms of feminist analysis) over Derridean theory in that Foucault takes into account more seriously the relationship between discursive analysis and power relations, his failure to further conceptualise the relationship between power relations and aestheticism proves particularly damaging. Despite the subtle and penetrating critique of power that Foucault initiates in Volume One of *The History of Sexuality*, Foucault's prescriptive thesis fails to pay sufficient attention to the interaction between stylisations of the self and the differential degrees of embeddedness of social expectation. Although Foucault constantly refers to his perception of power relations as all-pervasive, his theory fails to accommodate the experiential fact (central to feminist analysis) that some cultural expectations are far more implicated within the frameworks of the social status quo than others. Cultural inscriptions bearing upon the lives of women are often supported by immensely oppressive power machinery. This renders the potential for contravening stylisation of the self far harder to achieve in these situations than it is in those contexts where the power machinery wielded in support of the expectation is less firmly embedded in the constitution of dominant social trends.

"Although Foucault is right to reject the idea that gender is definitively imposed on individuals by external forces, at the same time, his notion of style

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<sup>45</sup> McNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p. 80

significantly underestimates the force of the cultural norms that come into play in the formation of individual's gender identity."<sup>46</sup>

Realisation of the inadequacy of this aspect of the Foucaultian thesis has been particularly damaging to many contemporary attempts to develop his insights. Nancy Fraser, for example, has been highly critical of what she considers to be an 'agnostic' theory of power developed by Foucault, which assumes that because power is productive and ineliminable, it is therefore normatively neutral.<sup>47</sup> The danger of this, from a feminist perspective, lies in its inability to distinguish between good and bad social practices in any meaningful way.<sup>48</sup> While this presents a locus of legitimate concern amongst many feminist commentators, many others have sought to revise Foucaultian aesthetics in a manner that avoids arising such concerns. In later sections of this chapter, we will examine such attempts in more detail.

In a series of more general engagements with Foucaultian critique, Richard Rorty has noted with disapproval what he perceives to be a tendency to make the drama of the legal subject into a melodrama.<sup>49</sup> Rorty is keen to demonstrate that liberal constitutional philosophy (such as that developed by Rawls<sup>50</sup>) is not committed to any definitive notion of the subject, and certainly not to the definitive thesis suggested for it by Foucault and his fellow deconstructionists. According to Rorty, the prime value to be defended by such liberal theories is the principle of justice. Justice, however, is not a matter of our ensuring that something conforms to a pre-given order, but rather (and more simply) that it accords with the idea we make of ourselves, given the history and traditions of our public life. In this light, liberal

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<sup>46</sup> MacNay, L. *Foucault & Feminism*, Supra. Chapter One, Note 85, p.82

<sup>47</sup> Fraser, N. "Foucault – A Young Conservative?" in Fraser, N. *Unruly Practices*, Supra. Chapter Two, Note 1

<sup>48</sup> Deveaux, M. "Feminism and Empowerment – A Critical Reading of Foucault" (1994) 20 (2) *Feminist Studies* 223. Reprinted in Hekman, S. (ed.) *Feminist Interpretations of Michel Foucault*, Supra. Chapter One, Note 43, p. 221

<sup>49</sup> Rorty, R.. *Objectivity, Relativism and Truth* (1991) Cambridge University Press & *The Linguistic Turn : Essays in Philosophical Method* (1992) University of Chicago Press & *Truth and Progress* (1998) Cambridge University Press. Discussed by Carty, A. (ed.) *Postmodern Law: Enlightenment, Revolution and the Death of Man*, Supra. Chapter Four, Note 20, p.29

<sup>50</sup> Rawls, J. *A Theory of Justice*, Supra. Chapter Four, Note 35

philosophy no longer seeks to delineate the existence of a subject distinct from the network of desires and beliefs in which the subject is supposed to be immersed. Rorty accuses poststructuralist theorists, including both Foucault and Derrida, of being 'crazed' and 'confused' because of their continued (yet unnecessary) distinction between the essence of the subject and its accidents. Instead of pursuing such a categorical distinction between the subject and its situation, and instead of concerning ourselves with the conditions that define the identity of the subject, Rorty proposes that we should be concerned more with those conditions that define citizenship in a liberal society. This leaves us free to engage in the systematisation of the principals and institutions that characterise those who wish to live within the frameworks of such institutions.

Foucault believes, however, that contemporary society has reached such a degree of scepticism about large-scale systems of belief that it must seek a more individuated and localised basis for modern morality.<sup>51</sup> What he values most highly in ancient Greek thought is the degree of autonomy exercised by the individual in relation to more general moral and social codes.

"what was missing in classical antiquity was the problematization of the constitution of the self as subject. Beginning with Christianity we have the opposite because of an appropriation of morality by the theory of the subject. But a moral experience essentially centred on the subject no longer seems satisfactory to me today."<sup>52</sup>

His main objection to contemporary society lies in its tendency to embed social norms and rights in what are deliberately misperceived to be the rational and objective structures of the law. As discussed in Chapter One, this process leaves the individual trapped within a normalising web of law and medicine that produces a pressure to conform that is so great that it operates to obliterate the liberal conception of the autonomy of the individual.

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<sup>51</sup> McNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p. 85

<sup>52</sup> Foucault, M. "The Return to Morality" in Kritzman, L. (ed.) *Michel Foucault – Politics, Philosophy, Culture*, Supra. Chapter Five, Note 6, p253

"Unlike postmodern theorists, Foucault refuses to reject completely certain concepts derived from Enlightenment thought, for example autonomy, domination, self-determination in the name of an undifferentiated celebration of plurality. Rather, he recognises the importance of these concepts for formulating effective strategies of social transformation and political resistance and he therefore seeks to redefine them in relations to his ethics of individual praxis."<sup>53</sup>

Foucault is as critical as any poststructuralist commentator of the Kantian (liberal) definition of autonomy that emphasises the need for the individual subject to act on abstract, impartial moral principles, regardless of the network of relations and dependencies in which they operate. Unlike many critical commentators, however, Foucault stops short of proposing abandonment of the whole ideal of autonomy as a moral and legal notion. Instead, Foucault seeks to reformulate the concept in line with what he considers to be the original emancipatory aim of the Enlightenment (which became corrupted by claims to scientificity, etc.).

We have mentioned previously in this section the correlation of concern between Foucault and the original spirit of the Enlightenment. In keeping with the original Enlightenment quest for advancement through permanent critique, Foucault's conception of an ethics of self presents a notion of autonomy that is likewise embodied in an attitude of unending challenge to pervasive authority.

"Foucault's notion of the radical interrogation of identity converges with the internal feminist critique of essentialism while, at the same time, it retains a notion of agency upon which a politics of resistance could be articulated."<sup>54</sup>

Within the framework of this permanent critique lies the potential for the autonomy that is central to Foucault's latter work. Contrary to the notion of autonomy presupposed by liberal theorists (which assumes that autonomy is manifest through the exercise of unconstrained rational abstraction and unconstructed choice), Foucaultian autonomy exerts itself through a continuous process of negotiation and subversion.

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<sup>53</sup> McNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p. 117

<sup>54</sup> McNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p. 193

Having conceded the omnipotence of power relations, Foucault has also sought to challenge the Kantian aspiration towards the realisation of autonomy through the transcendence of power. If all choice is inevitably curtailed and all identities inevitably constructed, autonomy cannot be located in any simplistic exercise of unilateral choice. Autonomy is not located outside prevailing power structures, but rather its exercise is located centrally within them. Autonomy, on the Foucaultian analysis, manifests itself when subjects consciously subvert expectation and deny the consolidation of their identity within expected parameters. Continual subversion of expectation presents a gradual means of producing change and thereby exercising agency.

Although Foucault remains committed to the principle of freedom, therefore, he refuses to theorise that freedom in terms of an abstract and transcendent subject. Instead, he opts for a theory of freedom which is minimal in the sense that it offers as little as it needs to make an ethical commitment to freedom without stipulating innate structures of the autonomous subject. For Foucault, it is essential that we de-centre subjectivity by challenging the pervasive belief in the subject of Enlightenment rationalism, a subject assumed to have a consciousness governed by reason and thus to have access to a universal and atemporal form of truth. Because the agency of the subject is not a property of the subject (according to the Foucaultian thesis), not an inherent will or freedom, but an effect of power dynamics, it is constrained but not determined in advance.<sup>55</sup> The freedom that Foucault has in mind is a relative freedom. If, as has been suggested, the subject is produced in speech through a set of foreclosures and expectations, this very process of repetitive formation actually sets the scene for the agency of the subject because the agency of this subject is dependent on the conditions of such foreclosure. Simultaneously, however, this agency is never fully determined because the action of foreclosure can never be completed, but relies instead upon the repeated consolidation of its power through acts of repetition.

This 'rediscovery' of the subject in poststructuralism has been precipitated by reaction to the pessimistic determinism of approaches that have conceived of the subject as a mere reflection of those social structures that have been accorded theoretical priority. In this sense it has been interpreted as an attempt to rescue poststructuralist theses of the fragmented and diverse self from charges of nihilism and destruction of agency.<sup>56</sup>

Many commentators have found this claim less than convincing, however. Most prominently perhaps, Jurgen Habermas has accused Foucault of elaborating a 'total critique of modernity' that is necessarily both theoretically paradoxical and politically suspect.<sup>57</sup> It is theoretically paradoxical, according to Habermas, because it cannot exist without a fundamental reliance on those very categories of modernist thought that it claims to have surpassed, such as the self-motivated and self-aware human agent, or a belief in the validity of notions such as truth, rationality and freedom. Furthermore, it is politically suspect because it aims less at a dialectical resolution of the problems of modern society, and more at a radical rejection of modernity as such. Hence, according to Habermas, Foucault's thesis, which purports to be postmodern, is at best modern, and at worst anti-modern.

In contrast to this, Habermas seeks to preserve and extend the 'emancipatory impulse' behind the Enlightenment's success in overcoming pre-modern forms of domination, while remaining in a position sufficiently critical to enable him to attack the less desirable features of modern society. He distinguishes this from the Foucaultian enterprise in recognition of Foucault's place within the tradition of rejectionist criticism, originating in the work of Nietzsche, which upon his interpretation aspires toward a total break from the Enlightenment.

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<sup>55</sup> Sawacki, J. "Feminism, Foucault and the 'Subjects' of Power and Freedom" in Hekman, S. (ed.) *Feminist Interpretations of Michel Foucault*, Supra. Chapter One, Note 43, p. 160-176. See especially her discussion of Kolodny's thesis entitled "The Late Foucault", p. 173-175

<sup>56</sup> Ramazanogulu, C. *Up Against Foucault* (1993) Routledge, p. 134

<sup>57</sup> Habermas, J. *Philosophical Discourse of Modernity*, Supra. Chapter Four, Note 84. Discussed in Carty, A. (ed.) *Postmodern Law: Enlightenment, Revolution and the Death of Man*, Supra. Chapter Four, Note 20, p. 29. See also Ashenden, S. & Owen, D. (ed.) *Foucault Contra Habermas* (1999) SAGE.



We have seen from our discussion throughout this section, however, that this particular criticism makes too many assumptions about Foucault's radical intentions. Nancy Fraser, commenting on the Foucault-Habermas debate, despite her own scepticism about the merits of the Foucaultian project, has recognised that Habermas' critique "jumps the gun with the alarmist supposition that if Foucault rejects a 'universalistic' or foundationalistic meta-interpretation of humanist concepts and values, then he must be rejecting those concepts and values entirely."<sup>58</sup> We have seen already, through our discussion of Foucault's acceptance of the spirit of Enlightenment and his insistence upon the maintenance of a conception of revised agency, that this is not necessarily the best interpretation of the aims of the Foucaultian enterprise.

This Foucaultian reassertion of a notion of agency presents a different range of difficulties for feminists seeking to develop a more poststructural foundation to their ethical approach.

"feminist critics of Foucault find in his critique a wholesale rejection of subjectivity and agency. But to focus on the ways in which the subject is in fact constituted, and on the broader social and political forces that determine the parameters and possibilities of rational agency is not to deny agency. It does, however, point to its limits."<sup>59</sup>

Many subsequent feminist commentators have drawn attention to Foucault's examination of the technologies of the self in an attempt to defend him against the charge that his development of a constitutive concept of discourse, necessarily linked to power dynamics, has dissolved the agency of the human subject. Nonetheless, many others have continued to find the relation between Foucault's overall thesis and his attempt to stand by the principal of human agency difficult to accept. Nancy Fraser has been highly critical of the possibility within Foucault's work to ascertain a 'doer behind the deed'<sup>60</sup> while MacNay finds his notion of an

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<sup>58</sup> Fraser, N. "Michel Foucault – A Young Conservative?", Supra. Preface, Note 1

<sup>59</sup> Sawacki, J. *Disciplining Foucault – Power, Feminism and the Body*, Supra. Chapter One, Note 39, p.103

<sup>60</sup> Fraser, N. *Unruly Practices*, Supra. Chapter Two, Note 1

aesthetics of existence problematic precisely because it continues to privilege what she considers to be an undialectical and disengaged theory of the self<sup>61</sup>.

In an attempt to rescue Foucault's theory from the throws of this debate, Hekman has argued that any critique which sees such discursive analysis as necessarily disempowering the subject is itself caught up in the kind of polarity which is characteristic of Enlightenment thought.<sup>62</sup> This parallels claims made by Foucault in his latter works, especially "What is Enlightenment?"<sup>63</sup> where he defers in many respects to the insights of Kant's own philosophy. He explicitly refuses to be drawn into 'the blackmail of the Enlightenment' which seeks to determine polarised categories of thought, establishing an intractable dichotomy between those for and those against the Enlightenment. In real terms, what Foucault seeks to undercut is not the agency of the human subject, but the essentialist conception of the subject that provides the framework of liberal thought and which has traditionally encapsulated our notions of subjectivity and agency. He refers appreciatively to Kant's ideas of maturity and autonomy. However, by presenting autonomy as aesthetic self-invention he provides a very different twist to its definition, a twist that seeks to eliminate the universality at the heart of traditional appropriations of the doctrine.

Even when Foucault's thesis is recast in this light (i.e. outwith the blackmail of the Enlightenment), his position in regard to human agency continues to encounter resistance within the ethical position of certain feminist commentators. Nancy Harstock (a prominent critic of poststructuralism generally) has argued that Foucault's alleged rejection of modernity and its emancipatory theories, together with his emphasis on resistance and destabilisation over transformation, have robbed feminists of certain elements of theory and practice that are indispensable to

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<sup>61</sup> MacNay, *Foucault & Feminism*, Supra. Chapter One, Note 85

<sup>62</sup> Hekman, S. *Gender and Knowledge* (1990) Polity Press

<sup>63</sup> Foucault, M. "What is Enlightenment?" in Rabinow, P. *The Foucault Reader*, Supra. Chapter One, Note 73. Also in Rabinow, P. (ed.) *Michel Foucault Ethics*, Supra. Chapter Five, Note 24

their goals.<sup>64</sup> She warns that his ascending analysis of power encourages a mentality of victim-blaming insofar as it highlights the agent's participation in their own oppression. This concern leads Harstock to conclude that Foucault's theory "fails to provide an epistemology which is usable for the task of revolutionising, creating and constructing".<sup>65</sup>

These criticisms are actively taken on board and challenged by Judith Butler in her reformulation of the Foucaultian thesis. In her influential work *Gender Trouble – Feminism and the Subversion of Identity*,<sup>66</sup> Butler has argued that, contrary to the concerns voiced by Harstock, a feminist politics without a feminine subject is both possible and desirable. Objecting to identity-based politics on the grounds that they tend to appeal to a pre-discursive identity as their ground and support, Butler argues that feminism need not assume that there is a 'doer behind the deed'. Rather, the thesis she advocates proposes that "the doer is invariably constructed in and through the deed."<sup>67</sup> Reiterating the Foucaultian assertion introduced in previous discussion, Butler argues that suggesting that the subject is discursively constituted does not necessarily preclude the possibility of agency – this only appears to be the case because of feminist tendencies to confuse social constructionism with determinism. This confusion is explained by Butler to be a result of their enshrinement within a system of binary logic whereby the idea of a free will necessitates a form of agency that transcends the world in which it must negotiate its identity. On the contrary, according to Butler's Foucaultian thesis, "the subject is not a thing, a substantive entity, but rather a process of signification within an open system of discursive possibilities."<sup>68</sup>

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<sup>64</sup> Harstock, N. "Foucault on Power – A Theory for Women" in Nicholson, L. (ed.) *Feminism / Postmodernism*, Supra. Chapter Four, Note 58

<sup>65</sup> Harstock, N. "Foucault on Power – A Theory for Women" in Nicholson, L. (ed.) *Feminism / Postmodernism*, Supra. Chapter Four, Note 58, p.164

<sup>66</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20

<sup>67</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.142

<sup>68</sup> Gutting, G. *A Cambridge Companion to Foucault* (1994) Cambridge Uni. Press, p.299

Hence, Butler's thesis, seeing identity as neither wholly determined nor wholly arbitrary, seeks to move beyond this dichotomy towards recognition of the possibility of critical agency which does not require the establishment of an absolute ground of knowledge and experience beyond power relations. According to Butler, feminist identity politics that appeal to a founding subject (such as Harstock's) presume, fix and constrain the very 'subject' that they hope to represent and liberate. In contrast,

"if identities were no longer fixed as the premises of a political syllogism, and politics no longer understood as a set of practices derived from the alleged interests that belong to a set of ready-made subjects, a new configuration of politics would surely emerge from the ruins of the old."<sup>69</sup>

This is the trajectory upon which Foucault has placed contemporary philosophy and his challenge has been taken up by many influential feminist commentators. In the following section, we will examine the merits of such an approach to feminist ethics in more detail and will evaluate the successes and failures attributable to it.

### *Feminism and Poststructuralist Accounts of the Fragmented Self*

"As a shifting and contextual phenomenon, gender does not denote a substantive being, but a relative point of convergence among culturally and historically specific sets of relations."<sup>70</sup>

We have seen in our discussion in the previous chapter that the liberal conception of the legal subject tends to assume a substantive person who is the bearer of various essential and non-specific attributes. We can assume, on that basis, that a liberal feminist position would understand gender as an attribute of a human agent who is characterised generally as a pre-gendered entity with a universal capacity for reason and moral deliberation. Many feminists have been keen to point out, however, that any such understanding is disjointed by historical and anthropological evidence which posits gender as a relation among socially

<sup>69</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.149

<sup>70</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.10

constituted subjects in specific social and personal contexts.<sup>71</sup> The implication flowing from such evidence suggests that one's subjective identity is intrinsically related to the social constructions and determinants under which it is constituted. This species of constructivism has become a prevalent theme within contemporary feminism and the correlation between this premise and the concerns of poststructuralist theory is palpable.

Many of the contemporary theorists who have analysed the 'crisis of modernity' have challenged this liberal notion of the unitary and abstracted self. Luce Irigaray, for example, has argued that the legal subject is a construction of patriarchy that specifically excludes woman by positioning her traditional subjectivity in an antithetical position to the ontological condition that has become paradigmatic of the unitary subject<sup>72</sup>. Such disregard for the constitution characteristic of humanist subjectivity in Irigaray's work does not, however, imply a disregard for the notion of subjectivity *per se*. In fact, in her commentary on Irigaray, Whitford has noted the continued centrality of the question of female subjectivity within Irigaray's philosophical frameworks<sup>73</sup>. The task Irigaray sets women is not the abandonment of pursuit of subjectivity, but rather the displacement of their current object status through the eradication of their linguistic limitations as eternal predicate.

In recognition of the relative invisibility of corporeality within the liberal philosophical tradition, and in direct opposition to the Kantian privileging of disembodied rationality over embodied emotionality, poststructurally influenced feminists (like Irigaray and Butler) have demanded the reconstruction of our world view in recognition of the inevitability of human corporeality. This insight has constituted the motivation behind Butler's celebrated claim in *Bodies that Matter* that bodies are actively materialised through practices of citation within established

<sup>71</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p. 10

<sup>72</sup> Irigaray, L. *The Sex Which is Not One*, Supra. Chapter One, Note 38

<sup>73</sup> Whitford, M. *Luce Irigaray – Philosophy in the Feminine*, Supra. Chapter One, Note 57

cultural discourses such as law.<sup>74</sup> These practices inscribe meanings upon corporeal surfaces that produce a cultural signification of bodies that have specific power and capacities (i.e. bodies that matter), and those that do not.

Pursuant upon the development of such feminist insight, many feminist theorists have drawn heavily upon the poststructuralist assertion that subjectivity, rather than being the expression of a fixed core or essence, is in reality a composition that is structured through language and other processes of signification such that it is an open-ended and culturally specific entity. Recognition of the existence of important arenas of parallel concern between poststructuralism and feminism in this regard has led many commentators to call for a far stronger strategic link between the two schools of thought. While some feminists have been more optimistic than others in relation to the possibility of forming any such coalition, it cannot be disputed that there are certain important overlaps of concern that render this an at least superficially attractive proposition.

One of the most significant arenas within which the insights of poststructuralism may prove most fruitful to the feminist academy lies in the assertions of Foucault in regard to the construction of meaning within pervasive power networks. The overlap of concern in this context has been well illustrated by MacNay in her commentary on Foucault –

“Foucault’s ethics of active intervention opens a space for feminists to understand and intervene in the processes through which meaning is produced, disseminated and transformed in relation to the changing configurations of modern power and domination.”<sup>75</sup>

Poststructuralism offers to feminism the methodological tools required for the deconstruction of the gendered liberal subject, and of the gendered notions of truth and reason upon which it is parasitic. Feminism, in allegiance with poststructuralism, becomes equipped to illustrate the extent to which these features

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<sup>74</sup> Butler, J. *Bodies That Matter*, Supra. Preface, Note 21

<sup>75</sup> MacNay, L. *Foucault & Feminism*, Supra. Chapter One, Note 85, p. 115

of subjectivity are in fact the constructed artefacts of the demands of the dominant (male-influenced) discourse, as expressed in the text of the law and in other authoritative statements. The synthesis of such authoritative discourse constitutes a system that constructs and engenders both male and female subjectivity. Collusion of a host of linguistic strategies along side a variety of processes of cultural signification operates to naturalise resultant gendered identities which link men and women to differentiated and prioritised images.

“By deploying these images, legal discourse rationalizes, explains and renders authoritative the ... body rule network. The impact of the rule network on ... reality in turn reacts back on the discourse, reinforcing the ‘truth’ of these images.”<sup>76</sup>

This idea of the cultural manufacture of gendered identity through the construction of a body rule network has made a significant contribution to the feminist school of theory. In recognition of the psychoanalytical insight that the individual subject as a gendered entity is at once produced by a complex interplay of unstable social and discursive forces, it has become apparent that the relation of the subject to his or her body can likewise no longer be complacently considered unproblematic. The merit of this insight for the feminist academy has been recognised by Diamond and Quinby –

“if the individual’s experience of and relation to the body, and other bodies, is seen as culturally produced at every level, feminists can work more effectively to generate new concepts that permit a recognition of that experience as one that is in struggle and whose destructive aspects can be altered.”<sup>77</sup>

In terms of the development of alternative stylisations of existence, this insight has significant implications. Indeed, Judith Butler goes so far as to suggest that if feminism were to ignore such insights of poststructuralist theory, it would open itself up to legitimate charges of gross misrepresentation<sup>78</sup> – in continuing to conform to a requirement of representational politics which dictates that we must articulate a stable and essential subject, non-poststructural feminists are offering continued deference to the central pillar of the illusion of legal liberalism.

<sup>76</sup> Frug, M. *Postmodern Legal Feminism* (1992) Routledge, p.129

<sup>77</sup> Diamond, I. & Quinby, L. *Feminism and Foucault*, Supra. Chapter One, Note 30, p.174

For many feminists, the first introduction to the possible synthesis of feminism and poststructuralism has come from within that school of theory referred to as 'French Feminism'. The figureheads of this movement (namely Irigaray, Cixous and Kristeva<sup>79</sup>) have developed a number of themes that have transformed discussion of the human subject in feminist theory. They have been among the most prominent advocates of the suggestion introduced above that there is an important link between discourse and subjectivity. In addition, they have also made an important contribution towards a possible re-definition of the nature of resistance to the processes of subjectivization they stipulate.

We have seen in our discussion of Michel Foucault, that his treatment of the possibility of resistance to imposed identity categories has often provoked a degree of unease. Many commentators have expressed concern particularly about Foucault's suggestion that power and power networks are all pervasive. This has frequently been interpreted to imply the impossibility of resistance and the eradication of the possibility of human agency. Within the feminist camp, Seyla Benhabib has expressed these concerns most clearly,

"the subject that is but another position in language can no longer master and create that distance between itself and the chain of significations in which it is immersed such that it can reflect upon them and creatively alter them."<sup>80</sup>

If we exclusively focus upon Foucault's work in regard to power and domination, this may well appear to be a reasonable assessment. However, we have noted throughout this chapter that a more careful reading of Foucault's latter works on the stylisation of the self posits an arena of resistance and agency, albeit a limited one.

Such a sympathetic reading of the agentic potential identifiable within Foucault's work has been cultivated within the school of French feminist thought. According

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<sup>78</sup> Butler, J. *Gender Trouble* Supra. Preface, Note 20, p. 5

<sup>79</sup> Cixous, H. & Clement, C. *The Newly Born Woman* (1986) Manchester University Press

Irigaray, L. *The Sex Which Is Not One*, Supra. Chapter One, Note 38

Kristeva, J. "Motherhood According to Giovanni Bellini" in *Desire in Language – A Semiotic Approach to Literature and Art* (1981) Basil Blackwell.

<sup>80</sup> Benhabib, S. *Situating the Self*, Supra. Chapter Four, Note 22, p. 214



to the works of Cixous, Irigaray and Kristeva, the human subject (male or female) does not spontaneously arise from some essential core of subjectivity, as Kantian theories would suggest. On the contrary, the subject is discursively and culturally constituted. Upon this basis, they have developed a theory of resistance that is similarly independent of the illusion of the autonomous, self-legislating liberal subject. This alternative version establishes that resistance is simultaneously and inextricably both discursive and political. In real terms, this demands that resistance involves a commitment to 'disruptive excess', i.e. to strategies of subversive signification which will challenge the pretensions of our constitutive machinery by rejecting its sustenance through mundane acts of repetition.

This latter thesis of 'French Feminism' has gone a long way towards elimination of a large amount of the critique often lodged at poststructuralism in general, and feminist poststructuralism in particular. We have noted in our previous discussion of Foucault that poststructuralist approaches of all genres have been criticised for the emphasis that they place upon the ways in which meanings and identities (in the case of feminist poststructuralism, gendered meanings and identities) are constructed by discourse. If our identity is inevitably constructed by discourse, meaning and language, then we must call into question the very possibility of a meaningful notion of human agency. This has been an uncomfortable conclusion for many contemporary feminists who remain keen to retain at least a modified conception of the capacity for self-determination. The notion of agency through subscription to subversive strategies of signification (initiated by Irigaray, Cixous and Kristeva) furnishes feminism (and poststructuralism in general) with a methodological tool to permit this.

Gender and meaning are constantly recasting themselves within the modern power networks – they evolve new interpretations through the continuous act of mundane repetition of prescribed meanings. Butler puts the point in relation to agency and resistance most plainly,

"The injunction to be a given gender produces necessary failures, a variety of incoherent configurations that in their multiplicity exceed and defy the injunction by which they are generated."<sup>81</sup>

Where traditional theories of the agentic self have required the existence of a self that exists outside of and prior to discourse, this alternative conception argues that the existence of any such 'antecedently individuated self' is in itself illusory. Any such self does not and cannot exist. Instead, agency can only consist in "a taking up of the tools where they lie, where the very 'taking up' is enabled by the tools lying there."<sup>82</sup>

Providing the groundwork for the development of Foucaultian feminist theory, Wendy Brown has challenged the legitimacy of the tenacious hold that many more sceptical feminists seek to maintain upon the agentic subject of liberalism. In *Feminist Hesitations*, she argues that such enduring feminist attachment to the notion of an agentic human subject is rooted in a reluctance amongst certain feminists to reject their long-standing project of grounding the moral and epistemological authority of women's experiences as sources of political truth<sup>83</sup>. This enterprise has riddled feminism with a paradoxical inconsistency – on one hand, it is recognised that female identities are constructed under patriarchal conditions, while on the other hand, this species of feminism continues to seek out a secure ground of experiential truth which is beyond this construction.

Sawacki has likewise noted the misguided nature of enduring feminist scepticism regarding the Foucaultian position on agency,

"feminist critics of Foucault find in his critique a wholesale rejection of subjectivity and agency. But to focus on the ways in which the subject is in fact constituted, and on the broader social and political forces that determine the parameters and possibilities of rational agency is not to deny agency."<sup>84</sup>

<sup>81</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.145

<sup>82</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.145

<sup>83</sup> Brown, W. *Feminist Hesitations*. Discussed in Sawacki, J. "Foucault, Feminism and Questions of Identity" in Gutting, G. (ed.) *A Cambridge Companion to Foucault*, Supra. Chapter Five, Note 68, p. 302-5

<sup>84</sup> Sawacki, J. *Disciplining Foucault*, Supra. Chapter One, Note 39 p.103

The Foucaultian subject is neither entirely autonomous nor entirely enslaved. This has a palpable link with the feminist praxis of consciousness-raising, which seeks to highlight both the elements of domination to which we act as collaborators, as well as the possibilities for re-interpretation of the inherently fluid meanings enshrined in such collaboration.<sup>85</sup> These critics of Foucault appear therefore to be misguided in their interpretation of his thesis – the discursive constructionism that Foucault posits as inescapable within disciplinary society does not entail historical determinism, nor elimination of agency.

A correlation of concern between feminism and poststructuralism in relation to the revision of the concept of human agency towards a recognition of subversive strategies of signification has led many feminist commentators to seek a similar allegiance in regard to the idea of an 'aesthetics of existence'. As discussed above, this 'aesthetics of existence' constitutes the Foucaultian prescriptive thesis of self-identity formation. Essentially, it advocates a return to classical Greek ethics where the emphasis of human agency lay, not in conformity to social imperatives (as is the case in modernity), but in the cultivation of a life that exhibits itself as a 'work of art'. Stylisticisation of the self in this sense requires the active subversion of social imperatives and the development of creativity and aestheticism within one's life plan.

Although many of the most ardent feminist followers of Foucault have continued to adopt this proposal, a large proportion of those poststructuralist feminists who owe a debt of philosophical gratitude to Foucault have suggested that this 'aesthetics of self' represents the point of necessary departure between feminism and Foucault. We noted in our previous discussion on aestheticism<sup>86</sup> that an inherent problem, at least with its Foucaultian development, lies in its inability to distinguish between those patterns of behaviour and identity imposed upon us with varying degrees of force.

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<sup>85</sup> Bartlett, K. "Feminist Legal Method" (1990) *103 Harvard Law Review* 829

Critique pertaining to this aspect of Foucaultian aestheticism has escalated pre-existing and widespread feminist concerns that in a context where male embodiment is perceived as 'normal', and female as 'abnormal',

"To suggest that those women, and others, already excluded from social exchange, should practice an aesthetics of self outside existing social, economic and political structures would perpetuate their exclusion."<sup>87</sup>

In a social and political context where the prioritised 'mainstream' expectations of female identity are currently rendered peripheral to the concerns of public life, the notion that agency ought to be exercised through the adoption of identity formations entirely outwith existing frameworks presents the dangerous spectre of further exclusion and isolation for the female subject.

Just as no ethos or identity is developed outwith the influence of social discourse, no conception of a work of art is created in a cultural vacuum. Failure to recognise this fact constitutes a glaring omission in Foucault's own philosophy. Despite his respected critique of the omnipotence of power forces, Foucault fails to accord sufficient attention to the fact that the value that will be attributed to any body as a 'work of art' will be generated through a process of comparison with, and thereby implicit denigration of, the other. In a social context where the male body is assumed already to be a work of art, it seems implicit that female forms of embodiment will be less recognised and less valued.

"The generation of identity and value by the denigration and exclusion of others is apparent in Ancient Greek ethics, and without any indication to the contrary, would also be true of the production of Foucault's contemporary corporeal artefact – the self as a work of art, its meaning and value is not given outside its relation to others, even if it is built without explicit reference to a universalizing moral code."<sup>88</sup>

When the remit for one's agentic capacity is determined by one's ability to express one's life as an aesthetic work of art in the manner envisaged by the Foucaultian thesis, the gender-specific attribution of credibility to agency that has been criticised over preceding discussion is reinserted within the ethical framework. In

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<sup>86</sup> See Chapter Five, "Foucaultian Perspectives on Subjectivity and Agency", esp. p. 227-8 above

<sup>87</sup> Diprose, R. *The Bodies of Women*, Supra Chapter Four, Note 93, p31

failing to pay due attention to the systemic difficulties presented to female agents in their attempts to render an appropriate stylisation of the self, Foucault's thesis implicitly accredits greater legitimacy to the aesthetic inventions of male agents under the kind of superficial guise of neutrality that he has been highly critical of in his critique of the juridical framework.

Despite the existence of significant similarities that unite the poststructuralism of Foucault with the concerns of feminist ethics, therefore, this oversight within his thesis points to a necessary divergence between the two camps. Although we have identified considerable affinity between feminism and poststructuralism in terms of the critique of the Kantian subject, and in terms of the association between discourse and subjectivity, the prescriptive stylisations of existence which Foucault proposes represent a more problematic interplay with feminist concerns.

We have discussed at length the main criticism lodged at Foucault's ethics of the self in regard to the invisibility and impossibility of agency within such ethical parameters. This is not, however, the concern that presents the most significant obstacle to feminist poststructuralist accounts. Indeed, feminist commentators within this tradition have generally accepted that Foucault's theory does not preclude the possibility of agency or resistance *per se*.<sup>89</sup> However merited concern remains in regard to the manner in which Foucault's ethics of the self are to be realised. Foucault's reliance upon aestheticism in abstraction from social discourse is recognised by many feminist theorists to be arbitrary and artificial.

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<sup>88</sup> Diprose, R. *The Bodies of Women*, Supra. Chapter Four, Note 93, p. 34

<sup>89</sup> Butler, J. *Bodies That Matter*, Supra. Preface, Note 21, p. 30 – "To problematise the matter of bodies may entail an initial loss of epistemological certainty, but a loss of certainty is not the same as political nihilism. On the contrary, such a loss may well indicate a significant and promising shift in political thinking."

*Butler's Reformulation of Foucault*

In an attempt to rescue this species of poststructuralism from the limitations of this oversight, and in order to preserve a claim for feminism built upon its foundations, Judith Butler has employed a revised conception of Foucault's aesthetics of existence that continues to pay credence to the existence and influence of societal pressures. While Butler continues to promote the development of alternative styles of existence, she refuses to adopt the Foucaultian paradigm that demands development of the self as a work of art in isolation from an awareness of the socially-influenced disjunction between what is and what is not 'valued' aestheticism. In contrast, Butler proposes development of the self through a detailed critique of the social discourses that construct identities in particular ways, eliminating the possibility of unconstructed choice. In developing that critique, Butler seeks to overcome the difficulties uncovered in the Foucaultian methodology of stylisations of existence. She seeks to do so through an incorporation into Foucaultian frameworks of the feminist insight that certain forms of existence and forms of embodiment are more strongly imposed upon us by power forces than others. It is this insight that, as we have seen, has been lamentably lacking in Foucault's own critique.

In her discussion of the concept and possibility of agency, Butler notes that within the parameters of modernist epistemology, the poststructuralist claim that a subject is necessarily constructed entails the assumption that it is incapable of any exercise of free will or agency. Seeking to deconstruct this modernist dichotomy between the constituting, agentic subject and the constituted, non-agentic subject, Butler reiterates the poststructuralist premise that to claim that a subject is constituted is not to claim that it is wholly determined. Rather, it is to claim that the constituted character of the human subject is in fact a very condition of the possibility of its agency. Challenging the modernist assertion that agency must be grounded in the action of some prediscursive 'I', Butler has claimed that,

“there is no self that is prior to the convergence or who maintains ‘integrity’ prior to its entrance into this conflictual cultural field.”<sup>90</sup>

Like the Foucaultian subject characterised in preceding discussion, the subject posited by Butler is constituted but not determined. Unlike the Foucaultian subject, however, she exercises the remit of her agency, not by making herself into a work of art in isolation from her social milieu, but by challenging and subverting the role scripted for her by social imperatives. The essence of the distinction between the two accounts therefore is this - while for Foucault, this process of original character formation takes place in abstraction from social influence over the valuation of aesthetics, for Butler, this same process relies upon and draws its subversive significance from the existence and influence of such social imperatives. In Butler’s own words,

“there is no possibility of agency or reality outside of the discursive practices that give those terms the intelligibility that they have. The task is not whether to repeat, but how to repeat, or, indeed, to repeat, and through a radical proliferation of gender, to displace the very gender norms that enable the repetition itself.”<sup>91</sup>

In developing a specific focus upon the role and influence of gender as a part of personal identity within modern disciplinary frameworks, Butler’s thesis applies a considerable amount of more general poststructuralist theory. Mirroring its recognition of the eternally constituted and socially implicated nature of all artefacts of human selfhood, Butler comments that,

“Gender ought not be construed as a stable identity or locus of agency from which various acts follow; rather, gender is an identity tenuously constituted in time, instituted in an exterior space through the stylised repetition of acts. The effect of gender is produced through the stylisation of the body, and hence, must be understood as the mundane way in which bodily gestures, movements and styles of various kinds constitute the illusion of an abiding gendered self....the abiding gendered self will then be shown to be structured by repeated acts that seek to approximate the ideal of a substantial ground of identity, but which, in their occasional discontinuity, reveal the temporal and contingent groundlessness of the ‘ground’.”<sup>92</sup>

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<sup>90</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.145

In her reformulation of the Foucaultian notion of subjectivization, Butler undertakes a perception of the subject position as simultaneously a position of potential resistance. According to Butler, subjectivization is not a causal process resulting in a fixed identity, rather it is a practice which requires repeated performance by the subject. Hence, gendered identity consists in the repeated stylisation of the body and the continued repetition of normative requirements. As explained previously, resistance remains eternally possible on this basis because in each act of repetition is inherent the possibility of subversion and continued subversion will result in a challenge to the demands of prescribed meanings and behaviours.

“the agency denoted by the performativity of ‘sex’ will be directly counter to any notion of a voluntarist subject who exists quite apart from the regulatory norms which he or she opposes. The paradox of subjectivization is precisely that the subject who would resist such norms is itself enabled, if not produced, by such norms. Although this constitutive constraint does not foreclose the possibility of agency, it does locate agency as a reiterative or rearticulatory practice, immanent to power, and not a relation of external opposition to power.”<sup>93</sup>

This conception of agency stands in opposition to the assumptions embodied in the liberal model developed from the Kantian conception of the self discussed in the previous chapter. The kind of agency delineated within the poststructuralist account, being conditioned by social regimes of power and discourse, simply cannot be accommodated within the paradigms of the voluntarist, choosing individual of the Enlightenment. However, employing Foucaultian arguments regarding the possibility of continued agency and resistance within the confines of such a social constructionist account, Butler maintains an at least limited remit for a conception of human agency and self-determination outwith the paradigms of the autonomous, abstracted and self-legislating Kantian subject.<sup>94</sup>

Like Foucault, Butler devotes detailed examination to the mechanisms of agency and resistance inherent in the power networks of society and in the very existence

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<sup>91</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.148

<sup>92</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20, p.140

<sup>93</sup> Butler, J. *Bodies that Matter*, Supra. Preface, Note 21, p.15



of the constituting demands of social imperatives. However, she also recognises the contention that arises between the poststructuralist demands of Foucault and the feminist ethical enterprise in terms of the more specific details of the operation of these mechanisms of agency. In so doing, Butler makes a more specifically feminist contribution to the poststructuralist tradition, embarked upon in the hope of remedying the deficiencies noted above within Foucault's original ethical framework of aestheticism.

Although Butler continues to support the Foucaultian idea that human agency is manifest in the subjective exhibition of traits which challenge existing social requirements and categories, Butler takes Foucault to task for his failure to recognise that any such pursuit of aestheticism continues to obtain its relevance only through its relation to those same social categories. In contrast, Butler develops the notion of a subversive strategy of signification which will cultivate an ethics of self to challenge existing categories while simultaneously acknowledging the relevance of those categories in giving subversive meaning to the acts of agency thus embodied. What's more, her theory seeks to accommodate the experiential reality, denied in Foucault's account, that certain forms of subjectivity are imposed upon human agents more strongly than others, rendering subversive strategies increasingly unattainable. In a context where social expectation is manufactured through the promotion and denigration of gendered identity traits, a competent theory of agency must recognise the phenomenon of entrenched phallogocentric power.

In seeking to accommodate these more progressive insights, however, Butler has developed a theoretical position involving an immanent critique that opens the gateways to different complications. Butler's development of Foucaultian poststructuralism has the advantage of presenting more clearly the correlation of concern between feminism and poststructuralism in regard to the role of social

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<sup>94</sup> Butler, J. *Bodies that Matter*, Supra. Preface, Note 21, p. 109

constructionism and expectation. However, Butler's concern to explicate Foucault from the deficiencies of his prescriptive thesis leads to an overzealous incorporation of certain less desirable aspects of poststructuralist critique.

Motivated by a desire to provide a more attractive version of Foucaultian aestheticism, Butler seems to accord insufficient attention to certain of the more subtle aspects of Foucault's critique which, as we have seen, set him apart from other poststructuralist critics and render him a more attractive partner in feminist dialogue. Most specifically, Butler often affords too much credence to the notion of an inherently fragmented self privileged in the Derridean theory discussed in the previous section. Her concern to emphasise the artificiality of notions of inherent gendered identity provokes an anti-essentialist position that rules out of hand the possibility of communal affiliation in any guise.

While many feminist commentators have recognised the merit of Butler's development of Foucaultian social constructionism within the specific confines of gender identity, many have likewise found this exposition of the inherently fragmented human subject deeply problematic. In developing her poststructuralist critique into a project of permanent deconstructive challenge, Butler has been critical of those species of feminism that remain committed to some assertion of a 'situated self' or of a 'doer behind the deed' because such assertions betray an acceptance of some level of pre-discursive essentialism. However it remains the case (at least at the level of pragmatic politics, if not at the level of metaphysical philosophy) that there is much to commend such approaches. If we disarm feminism of its ability to talk of a female subject, we render the pursuit of tangible improvements to the existence of women all the more difficult. Indeed, as Assiter comments, a morality (such as that presented by Butler) that is not underpinned by any attachment to particular ends or virtue runs the risk of not being a morality at all.<sup>95</sup>

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<sup>95</sup> Assiter, A. *Enlightened Women – Modernist Feminism in a Postmodern Age* (1996) Routledge

A self that continually creates itself in the way that Butler's ethics of the self demand, may find itself in a position where it is incapable of forming any commonalities at all with others. Assiter warns that this will render the fragmented self incapable of occupying a position from which to describe common sources of and ways of overcoming oppression<sup>96</sup>. This has made Butler's strongly poststructuralist theory the target for a considerable amount of feminist concern -

"Feminists must continue to address the personal costs of patriarchal domination, through attention to developing empowering practices of self-creation, while at the same time avoiding the tendency to reduce politics to personal transformation."<sup>97</sup>

The model of agency as subversive resistance offered by Butler is useful to the extent that it encourages feminist theory to beg questions regarding the nature of its foundational assumptions. However, while it may present an interesting theoretical position, it does damage to feminist political agendas. In the preface to this thesis, we noted with approval the assertion of feminist aims established by Alison Jaggar. Those aims which were,

"first, to articulate moral critiques of action and practices that perpetuate women's subordination; second, to prescribe morally justifiable ways of revisiting such actions and practices; and third, to envision morally desirable alternatives that will promote women's emancipation"<sup>98</sup>

embody both theoretical and political concerns equally. For the future advancement of feminism generally, it is imperative that that balance be maintained. In presenting a model of agency as subversive resistance, Butler's account fails to offer sufficient consideration to the political agenda of feminism. Most specifically, she fails to offer a convincing account of agency as anything more than reactive and defensive.<sup>99</sup> This limited remit for proactive agency is

<sup>96</sup> Assiter, A. *Enlightened Women*, Supra. Chapter Five, Note 95, p.108

<sup>97</sup> Gutting, G. *A Cambridge Companion to Foucault*, Supra. Chapter Five, Note 68, p.308

<sup>98</sup> Jaggar, A. "Feminist Ethics" in Becker, L. & Becker, C. (ed.) *Encyclopedia of Ethics*, Supra. Preface, Note 7, p.361

<sup>99</sup> Sandland, R. "Between 'Truth' and 'Difference' - Poststructuralism, Law and the Power of Feminism" (1995) 3 *Feminist Legal Studies* 4 has made a similar critique in regard to the thesis of Carol Smart - "This, it seems to me, is to offer a strategy of 'no resistance', one posited on the 'end of identity' but which is unable to deal with the Here and Now, which offers no mechanism to actualise its vision. To forsake politics for philosophy in this way is...methodologically suspect." Quoted in Bridgeman, J. & Milnes, S.

dangerous in itself. However, when compounded with the assumption, inherent in Butler's thesis, that the self is fragmented and incapable of meaningful collaboration with others, the danger is augmented. Cumulatively, this leaves feminist political agendas without any capacity for strategic group affiliations. This is particularly lamentable given that most of the major feminist political successes in previous decades have been the result of the development of strategic communities of communal concern and experience.<sup>100</sup>

Building upon the Foucaultian assertion that resistance is a necessarily localised phenomenon, Butler has done nothing to counter the implication flowing from this that as soon as resistance receives official recognition, it becomes caught up in a network of controlling power relations.<sup>101</sup> Even if it were possible, then, for the fragmented self of Butler's thesis to develop a means for group affiliation and community, such affiliation is contra-indicated by the very assumptions of her model of agency. To be effective, it seems that agency as resistance can only operate at the particular and individual level. However, in real terms the individual locus of this radical fragmentalism and subversive dislocation requires an implicit replication of the artificial idea of the abstract individualism that has been vociferously criticised by feminist critique of the Kantian subject. By developing a theory of resistance that demands a fundamentally individualist approach, Butler's prescriptive thesis inadvertently provides a remit for the reinsertion of the dislocated and atomistic agentic subject within ethical theory. The deficiencies inherent in that form of subjectivity have been well-established throughout preceding critique. Feminist political methodology has long-since stressed the need for 'asking the woman question'<sup>102</sup> to illustrate the shared nature of certain power forces and to convene a community of challenge. Whether that challenge takes the

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(ed.) *Feminist Perspectives on Law – Law's Engagement with the Female Body* (1998) Sweet & Maxwell, p. 99

<sup>100</sup> Willis, E. "Comment" in Grossberg, L. & Nelson, C. (ed.) *Marxism and the Interpretation of Culture* (1988) MacMillan Press, p. 118

<sup>101</sup> Harstock, N. "Focault on Power" in Nicholson, L. (ed.) *Feminism / Postmodernism*, Supra. Chapter Four, Note 58

<sup>102</sup> Bartlett, K. "Feminist Legal Methods", Supra. Chapter Five, Note 85

form of transcendence or subversion, it remains crucial to feminist theorising that that challenge be available on the very kind of communal forum implicitly denied by Butler's Foucaultian recapitulation.

In this respect a potentially more promising feminist account of Foucaultian theorising has been initiated in the work of Donna Haraway. Like Butler, Haraway challenges the unitary self of liberal theory and advocates its replacement with a 'split and contradictory' self.<sup>103</sup> Also similarly to Butler, Haraway concludes that "subjectivity is multidimensional...The knowing self is partial in all its guises, never finished, whole, simply there and original." However unlike Butler, Haraway's thesis goes on to comment that this subjectivity is "always constructed, situated together imperfectly and therefore able to join with another, to see together without claiming to be another."<sup>104</sup> Haraway is keen to critique the Kantian subject without making the assertion (often identified in certain poststructuralist accounts) that the very notion of subjectivity itself is fictitious.

Linked to this, and of particular relevance in terms of feminist political concerns, is the fact that the subject postulated by Haraway avoids the deficiencies of essentialism while also retaining the capacity to join together with other 'situated' selves to form a strategic collective.<sup>105</sup> Where the denunciation of essentialism and universalism in Butler's theory implies a necessary denunciation of any kind of unity between disparate selves, Haraway's thesis has the advantage of illustrating that unity is still possible without employing essentialist assumptions. We do not need to be united by any inherent 'nature', 'essence' or 'identity' to be successfully united politically. On the contrary, a strategic collaboration formed on the basis of a common desire to achieve a particular end is sufficient. The self developed in Haraway's theory permits this realisation and permits the kind of strategic

<sup>103</sup> Haraway, D. "Situated Knowledges" (1988) *14 Feminist Studies* 575. See also Haraway, D. "A Cyborg Manifesto" in *Simians, Cyborgs and Women* (1991) Routledge

<sup>104</sup> Haraway, D. "Situated Knowledges", *Supra.* Chapter Five, Note 103, p. 586

<sup>105</sup> Hekman, S. *Moral Voices, Moral Selves*, *Supra.* Preface, Note 24, p. 100

association that Butler's theory would have considered counter-productive to the pursuit of agency as subversive resistance.

While this aspect of Harraway's thesis presents a promising alternative to the thesis of Butler developed within the confines of this chapter, it must also be noted that problems abound regarding other aspects of Harraway's 'cyborgian' thesis. Although discussion of these difficulties lies outwith the scope of our current critique, their existence continues to provoke concern. While the argument has been made here that Butler would do well to reconsider an approach to group affiliation and politics more in keeping with that of Harraway, this is not, however, to suggest that Harraway's thesis necessarily presents a better overall account of selfhood and agency.<sup>106</sup>

"Rather than emphasizing autonomy as continual self-creation and re-creation, I would emphasise autonomy as continual commitment to re-evaluating one's desires and values, in the light of critical interaction with others. Political action is based not on a shared identity, but on a critical adherence to shared values and beliefs – on the notion of a community of individuals sharing ends in common."<sup>107</sup>

It is a recognised facet of feminist theory that the individualist, abstracted subject presents an inappropriate model of subjectivity. However, the recognition of an inherent degree of 'situatedness' and context in human identity fashioning does not lead all feminists to the extreme anti-essentialist position advocated by Butler. Although there is a great deal in Butler's (and indeed Foucault's) work which commends it to the overall feminist enterprise, we must remain eternally aware that feminism is not merely an abstract philosophical tradition, but also a political movement with pragmatic concerns and tangible interests to protect. Feminists should retain an element of caution in their clamour towards the wholesale adoption of Butler's philosophical pretensions. We can accept the importance attributed to the poststructuralist examination of the interplay and influence of social forces

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<sup>106</sup> Hekmans, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 100-1

<sup>107</sup> Assiter, A. *Enlightened Women*, Supra. Chapter Five, Note 95, p. 109

upon character formation without stretching this to its logical limits. As McNay comments, "although there is a need for feminist theory to develop analytical tools to deal more adequately with the category of difference, in the final analysis the basic idea of a postmodern feminism is unviable"<sup>108</sup> because at some basic level, feminist critique necessarily rests on certain normative judgements about what constitutes legitimate and illegitimate forms of action in the overcoming of female subordination.

We can accept Butler's assertion that human subjectivity is neither wholly constituting nor wholly constituted without necessarily divesting ourselves of the notion of the 'situated self' which many other species of feminist theory have found of considerable pragmatic and epistemological merit. Butler has argued that the notion of the 'situated self' is inadequate because it continues to betray too strong a reliance upon the idea that the existence of some pre-discursive core of subjectivity can be ordained. While strongly sceptical of the autonomous self of the Enlightenment, postmodern feminist commentator Patricia Waugh expresses similar scepticism in regard to the fragmented self supported by such permutations of the Foucaultian thesis. Waugh suggests that both conceptions of the self are representative of the same cultural tradition.<sup>109</sup> Hence, despite her claims to the contrary, Butler is privy to the blackmail of Enlightenment by seeking too strenuous a distinction between the pre-discursive humanist self and the critically constituted and fragmented self. As Waugh explains, where the Enlightenment self is a transcendent rationality that makes an artificial split from the emotional, the poststructuralist schizophrenic self is the *fin de siècle* parody of that dualism.<sup>110</sup>

Neither representation of subjectivity, then, presents an altogether liberated or alternative conception appropriate to the ends of feminist theory and practice. While it is certainly true that "powerlessness comes from the very attempt to define

<sup>108</sup> McNay, L. *Foucault and Feminism*, Supra. Chapter One, Note 85, p. 117

<sup>109</sup> Waugh, P. *Postmodernism – A Reader* (1992) Hodder & Stoughton

<sup>110</sup> Waugh, P. *Postmodernism – A Reader*, Supra. Chapter Five, Note 109, p.199

a collective identity instead of defining the common interests of a diverse group of people,"<sup>111</sup> it is equally true that powerlessness also comes from the failure, manifest in Butler's thesis, to provide for the articulation of such common interests amongst diverse groups. When agency requires subversive and strategic self-formation above all else, the capacity for meaningful group affiliation is lost because each self becomes radically fragmented and contingent. Feminist insistence upon the relational nature of identity has, and should, emphasise the need to move away from the preservation of enforced and artificial universal identities. However, that insistence must also be capable of moving towards the exploration of different forms of coalition between diverse groups with the ultimate aim of achieving greater social justice.

It seems then that despite the improvements rendered to Foucaultian theory in terms of its compatibility with feminism by Butler's reformulation, in the final analysis certain fundamental inadequacies remain unaltered. Perhaps most significantly, Butler's emphatic insistence upon radically fragmented and localised forms of resistance has perpetuated the Foucaultian tendency to analyse power relations only from the perspective of how they are installed in social institutions, and not in any experiential way from the point of view of those who are subject to power.<sup>112</sup> This proves particularly damaging to the feminist political project because to address meaningfully women's freedom, one must look at both external and internal impediments to the exercise of choice.<sup>113</sup>

What Foucault and Butler fail to do, but what feminism must do, is look closely and critically at the issue of freedom where it concerns responses to perceived structural inequality and violence. At points where Foucault's theory is premised upon his assumption that violence and power are different phenomenon (as it implicitly is in some respects of his thesis on stylisations of the self), feminism must draw

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<sup>111</sup> Sawacki, J. "Identity Politics and Sexual Freedom" in Diamond, I. & Quinby, L. (ed.) *Feminism and Foucault*, Supra. Chapter One, Note 30, p. 187

<sup>112</sup> McNay, L. "The Foucauldian Body and the Exclusion of Experience" (1991) 6 *Hypatia* 125, 134

<sup>113</sup> Deveaux, M. "Feminism and Empowerment", Supra. Chapter Five, Note 48, p. 224



attention not only to the experiential inadequacies of that position, but also to the common transformation of power into violence and vice versa.<sup>114</sup>

### *Conclusion*

“It would be a mistake to jettison appeals to identity and confessional truth telling in slavish devotion to Foucault’s skepticism. His discourses also bear the traces of his own social and historical locations as a white male theorist...But it would also be a mistake to assume uncritically feminist political theories and practices developed in the context of patriarchal capitalism.”<sup>115</sup>

Although in the final analysis, an exclusive focus upon poststructuralist foundations has proven insufficient for feminist purposes, this is not to say that feminism has nothing to gain from the strategic incorporation of poststructuralist insight. Both the ‘strong’ poststructuralist thesis of Derrida, and the poststructuralist thesis of Foucault developed in detail in this chapter have problematised our uncritical acceptance of the validity of Enlightenment visions of human subjectivity in a way which we have seen in Chapter Four is to be welcomed by the feminist academy. Where Derrida has sought to challenge the foundations of knowledge and agency, Foucault’s thesis has been potentially more welcoming to the maintenance of these categories of humanist ontology, subject to the condition of their reformulation outwith the demands of Enlightenment rationality. Both manifestations of the poststructuralist genre have employed insights of semiotics, hermeneutics and psychoanalysis to question the legitimacy of the liberal notion of the atomistic, abstracted, and transcendental human subject that has proven problematic and counter-intuitive. Both manifestations have in their turn abandoned this conception in favour of a vision of the self essentially constructed by the interplay of linguistic meaning and symbolic interpretations that characterise the social contexts and networks in which social agents find themselves enmeshed.

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<sup>114</sup> Plaza, M. “Our Damages and Their Compensation” (1981) *1 Feminist Issues* 25

<sup>115</sup> Sawacki, J. *Disciplining Foucault*, Supra. Chapter One, Note 39, p. 108

Admittedly, translation of this notion of the 'radically situated self' within the epistemological parameters of the 'strong' poststructuralist thesis has proven somewhat problematic. The reluctance of Derridean followers to posit alternative visions of knowledge and existence have led this species of theory into theoretically difficult ground – deprived of any conception of human agency, or even of a human capacity for extended self-awareness, this perception of the self has become essentially fragmented. When coupled with the Derridean tendency to equate constructionism with an elaborate 'play' of meaning, this presents a form of critique incapable of accommodating feminist concerns in any experientially or politically viable way.

Incorporation of the notion of the radically situated self within the Foucaultian poststructuralist thesis, on the other hand, has proven far less jarring. Recognising the inherently socially-determined, complex and contingent nature of the human self, Foucault has advocated a revival of classic Greek ethics with their emphasis upon techniques of the self. This will replace the Christian ethics of the post-Enlightenment epoch whose primary concern has been with deference of the subject to normative categories.

Development of these techniques of the self would encourage a deeper understanding of the self than that afforded by the abstracted construct of the Kantian subject. Operating eternally within the confines of ever-changing regimes of power and demands for normalisation, the Foucaultian self is afforded a limited arena within which to challenge categories of meaning and identity. This can be contrasted against the highly artificial conception of agency privileged within the Kantian thesis. Where this artificial conception (prioritised today in liberal frameworks of consent) assumes an unlimited remit of self-determined and unfettered autonomy, the Foucaultian conception accepts and draws attention to the eternal limitations imposed upon the operation of consent by pre-existing networks of omnipotent power forces.

Foucault's techniques of the self have been heralded by many feminist commentators as containing the methodological seeds that will enable moral theory not only to give credence to the socially-situated and socially-constructed nature of human subjectivity, but also to admit of the possibility of exercising a level of subversive control over the social contexts which determine that subjectivity. Hence, the Foucaultian self becomes perceived as occupying the epistemological middle ground between a conception of the transcendental, isolated human subject (of Kant) and a conception of the inescapably socially constructed and fragmented self (of Derrida).

However, it seems that more is required from a feminist theory of the self than a simple matter of occupation in the terrain of compromise. Although Foucault's thesis lends feminism important methodological tools of critique that nonetheless enable the preservation of some limited conception of agency, his own prescriptive thesis remains inadequate. A thinker obsessed with power regimes, having failed to problematise the gender-specific power dynamics that operate in the valuation of aestheticism, he renders his own thesis unconvincing, certainly for feminist purposes.

Although in many respects Butler presents a convincing re-formulation of the Foucaultian approach to aesthetics, her more fundamentally subversive approach casts up significant obstacles to the achievement of certain important political aims. As an essentially political movement, feminism must remain wary of any ethical theory of the self that demands fragmentation and dislocation as its primary mechanism of reform. Most specifically, it must exercise caution in its advocacy of any theoretical position that implicitly denounces group affiliation as being counter-productive to the pursuit of agency. A reformulation of agency that demands such high levels of individual abstraction and inter-personal isolation ought to be approached with cynicism by feminist commentators concerned to eradicate the transcendent individualism isolated within the Kantian position.

“While Foucault does not have all the answers for contemporary feminism, his ethical work signals some of the political routes feminists might consider in an attempt to reconfigure the links between the subject and politics.”<sup>116</sup>

While it may be wise to borrow from poststructuralist critique, the truly wise feminist will do so only selectively. While the challenge to the Kantian transcendental subject lodged within the confines of this chapter offers many important insights and methodologies to those feminist theorists concerned with a similar challenge, the subversive fragmentation of its final form presents a less attractive political vision. In the following chapter, we will examine alternative feminist attempts to redirect the notion of the ‘situated self’ in ways which do not fall prey to the pragmatic deficiencies of the poststructuralist gendered self. In the final analysis, it could be argued that this is exactly what a truly Foucaultian feminism would require – that we conform to doctrinal categories which fit our pragmatic ends and move beyond the limitations of those categories when they no longer meet those ends.<sup>117</sup> We take from the poststructuralist account the relevant insights in regard to the inherently artificial nature of the Kantian constituting self, but we move beyond the paradigms of the fragmented self in pursuit of a practical feminist politics that will satisfy pragmatic ends.

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<sup>116</sup> Lloyd, M. “A Feminist Mapping of Foucauldian Politics” in Hekman, S. *Feminist Interpretations of Michel Foucault*, Supra. Chapter One, Note 43, p.260

<sup>117</sup> Sawacki, J. *Disciplining Foucault*, Supra. Chapter One, Note 39, p. 109

## CHAPTER SIX

### COMMUNITARIANISM AND FEMINISM

“Politically, the idea of communitarianism evokes a transcendence of the liberal legal emphasis on individual rights as the basic units of both constitutional entitlement and legal reasoning, and promises to reconceive legal justice and equality in terms which reach beyond the formalism of liberal individualism to a recognition, and even realisation, of alternative goals and values – the assertion of collective over individual interests, of reintegration over exclusion, and the pursuit of empathy, solidarity, reciprocity and care – within legal practice.”<sup>1</sup>

As part of the progressive development of twentieth century thought towards critique of the tenacious hold of Kantian Enlightenment rationality, an alternative philosophical thesis has been produced which can broadly be categorised as ‘communitarian’. In many respects, the communitarian philosophical position is not dissimilar to that of poststructuralism discussed in the preceding chapter. Communitarianism, like poststructuralism, has been concerned to highlight the inadequacies of the construction of the neo-Kantian, liberal subject as essentially individualist, atomistic and abstracted from all social, cultural and environmental contingencies. What’s more, both approaches have developed their critique of the transcendental Kantian subject in terms that present it as a fictitious entity<sup>2</sup> and that propose its replacement with a more experientially appropriate account of the human self as firmly embedded within, and constructed and constrained by, its membership of specific human associations, relationships and communities. There are some fundamental differences, however, between the communitarian and the poststructuralist position. While most of these differences will become more apparent as we proceed with our discussion of the communitarian critique, it is perhaps worth noting at the outset that one important point of divergence between communitarian and poststructuralist theory lies in the ability of the former theory to

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<sup>1</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p.144

<sup>2</sup> For Example, MacIntyre, A. “Community, Law and The Idiom and Rhetoric of Rights” (1991) 26 *Listening* 104 – “The individual *qua* individual, to be conceived apart from and independently of, whatever social roles she or he may occupy, or whatever social relationships he or she may find him or herself in, is of course a distinctive member of the dramatis personae of emerging modernity”

accommodate the political role of the communal in a way that, as we have seen, is not easily available to many poststructuralist commentators.

### *The Communitarian Critique of Subjectivity*

The most fundamental assertion of communitarian ethics is that, *contra* the implications of the individualistic notions of human subjectivity suggested by the Kantian thesis, human beings are essentially, and primarily, social beings. Not only are our aims, desires and preferences inextricably linked to the networks of relationships which constitute the communities to which we belong, but so too are our very identities as human agents.<sup>3</sup> Recognition of this epistemological premise has led communitarians (such as Alasdair MacIntyre<sup>4</sup> and Michael Sandel<sup>5</sup>) to challenge liberalism's continued deference to an Enlightenment assumption of a 'disembodied' and 'disembedded' conception of the self. Most specifically, Sandel challenges the liberal tendency, which this perception encourages, to privilege the concerns of abstract justice between disconnected individuals at the expense of an interest in the achievement of collective values.<sup>6</sup>

Amongst the most common liberal retorts to such criticism has been to suggest that the embodied and socially-situated perception of the self posited by communitarian theory encounters significant problems in terms of its fragmented and determined nature. In practice, it is alleged that this results in a conception of selfhood that offers little room for the concepts of agency, will and subjectivity which are essential not only to the liberal political vision, but also to the political vision of many groups with whom communitarianism seeks allegiance (such as feminism).<sup>7</sup> We have seen in our preceding discussion of the 'strong' poststructuralist thesis of Derrida that too vehement a conviction in favour of the socially determined and

<sup>3</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 54

<sup>4</sup> MacIntyre, A. *After Virtue & Whose Justice? Which Rationality?*, Supra. Chapter Four, Note 52

<sup>5</sup> Sandel, M. *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44

<sup>6</sup> Sandel, M. *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44. Discussed in Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 55

<sup>7</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 55

inherently contradictory development of the self can indeed lead to such theoretical difficulties.<sup>8</sup> Even those commentators in favour of a communitarian ethic have, at times, recognised the potentiality for communitarianism to encounter similar difficulties. Nicola Lacey, for example, has noted that

“in escaping the implausibility and exclusions of the liberal concept of the atomistic subject identified in terms of pre-social characteristics, some communitarians seem to move towards a radically situated conception of subjectivity in which the person is simply engulfed or determined by her social and bodily context. To do so is to abandon altogether the idea of critical reflexivity which must be necessary to any radical political consciousness.”<sup>9</sup>

However, to suggest that this liberal counter highlights an arena of potential concern for communitarian theory is not to imply that it therefore strikes a final blow to its claims. On the contrary, our discussion of Foucault's prescriptive thesis in the preceding chapter has established that alternative forms of subjectivity can be devised that continue to permit a remit for the exercise of agency, albeit a remit hitherto unrecognised within the frameworks of pervasive Enlightenment perceptions. Whether or not we stand convinced by the prescriptive claims that Foucault makes in this regard, it remains the case that his arguments present a powerful critique of the ‘blackmail’ exhibited in the liberal presupposition that agency exercised by a non-self-determining human subject is not valid agency at all. The requirement of a self-determining and transcendental ‘doer behind the deed’ is a fiction of liberal theory that, as we have seen, says more about the entrenched nature of such theory than it does about the legitimacy of its forms of agency. The communitarian position to be developed over this chapter does not deny the possibility of agency in the way that the liberal counter suggests. On the contrary, it seeks a redefinition of our conceptions of agency to incorporate the experiential realities of social living that have been denied by the rigidly abstract Kantian form. The concerns voiced by Lacey in the quote above do not imply the impossibility of achieving a model of agency within communitarian frameworks. Rather, they simply express the need for caution to avoid taking the communitarian

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<sup>8</sup> See Discussion in Chapter Five relating to Derrida and strict deconstructionism

<sup>9</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p.139

model of subjectivity to an antithetical extreme that would effectively encourage the polarities that have dominated many previous attempts to determine an anti-liberal position.

Developing this defensive position further, Sandel has voiced the communitarian thesis that recognition of the fact that humans are socially constituted does not entail the non-reversibility of human ends and attachments in the way that the liberal counter suggests.<sup>10</sup> Where liberalism takes the individual and his / her interests as their point of theoretical departure and develops from this premise a framework for the satisfaction of communal needs and wants, communitarianism requires a logical deduction in the opposite direction. On the premise that human beings are necessarily social beings, it becomes apparent that even the most basic provisions valued by liberalism can only be achieved within a social context. Hence, it becomes apparent that the social structures and collective provisions of human society represent, if not the most appropriate starting point for theoretical deliberation, at least a starting point equally as legitimate as the liberal emphasis on individual personhood.<sup>11</sup> Nicola Lacey explains this position most lucidly in her book, *Unspeakable Subjects*. Throughout this work, Lacey has

“argued for a proper recognition of the social location of the individual of the ways in which our communal ties and affective attachments, along with our cultural history, our geographic location, and so on, fundamentally affect what we are like, our sense of our selves, who we are. Such recognition dictates that political theory give a greater emphasis than has been the case with modern liberal theory to social context, social institutions, communities and cultures. This is not to say that our sense of ourselves as distinct and autonomous should not have an important place: clearly, it should. But the recognition that what is good for persons can only be fostered in social contexts must render those contexts at least as important a focus for political theory as the rights, interests and claims of the individual. The liberal ideal is that of persons living autonomous, choosing lives, pursuing their conceptions of the good. This carries with it, implicitly, a conception of political society and public culture, and this must have more priority in political theory than most liberals have been willing to give to it.”<sup>12</sup>

<sup>10</sup> Sandel, M. *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44. Discussed in Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 55

<sup>11</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, pp. 55-6



Incorporation of such an increased recognition of the primacy of the social would permit inclusion into political theory of the considerations of social context that influence individual and collective judgement. This in turn would have a profound effect in illustrating the inappropriate nature of assumptions about the possibility of obtaining the detached, observer status implicit in transcendent, atomistic conceptions of the self and its forms of agency because,

“in such a conversation of moral justification as envisaged by communitarian ethics, individuals do not have to view themselves as ‘unencumbered’ selves. It is not necessary for them to define themselves independently either of the ends they cherish or of the constitutive attachments which make them what they are.”<sup>13</sup>

In terms of the project of this thesis, the significance of that communitarian insight upon the frameworks and assumptions that inform the model of legal consent are considerable. Most importantly, recognition of the communitarian contention that decisions are made and consent given or refused on the basis of a complex calculus involving relational and contextual factors framed by one’s communal associations offers a mechanism for theoretical challenge to the assumptions of abstraction and individualism that dominate current interpretations of consent.

While all genres of communitarian critique are united by a common concern to dislodge the legacy of liberal individualism in favour of what is considered to be an enriched conception of the role of the communal, disparate theorists within the tradition have employed differing approaches to this challenge. The impetus for such divergence can be located in the differing ways in which communitarian theory has sought to deal with the notion of community itself. Employing the framework and terminology utilised by Hekman in her discussion of communitarianism, this work will argue that there are two basic conceptions of community that inform the work of those disparate theorists united under the common header of communitarianism. These have been referred to as firstly the ‘dialectical’ account of community, and secondly the ‘premodern’ account.<sup>14</sup> As

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<sup>12</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p.67

<sup>13</sup> Benhabib, S. *Situating the Self*, Supra. Chapter Four, Note 22, p.73

<sup>14</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 58

we proceed over the duration of this chapter to examine the merits and demerits of each conception, the differences between the two will become more apparent.

### *Dialectical Communitarianism*

One of the most observable characteristics of the dialectical genre of communitarian theory lies in the tendency for its advocates to seek a terrain of compromise in their prescriptive theses. United with premodern communitarianism in their critique of the abstract and atomistic liberal individual, the dialectical genre diverges from the premodern in terms of the proposals for improvement that are suggested. While, as we shall see, premodern theorists tend to require a radical effacement of liberal perceptions, dialectical theorists call for the inclusion of communal concerns within pre-existing frameworks. In seeking a terrain of compromise between abstract individualism and communal constructionism, dialectical theorists have largely sought to retain at least some allegiance to the notion of a 'core self' that is inherent in the Kantian notion of transcendence discussed in Chapter Four. While this moderate vision presents itself as superficially attractive, certain difficulties inherent in the delineation of compromise have rendered dialectical communitarianism the subject of substantial critique.

One of the key texts within this dialectical communitarian tradition is Michael Sandel's *Liberalism and the Limits of Justice*.<sup>15</sup> This text provides critique of the attempt made by Rawls<sup>16</sup> to reformulate a concept of the liberal subject in a form that avoids the inadequacies and incoherencies that have increasingly become associated with the inherited Kantian proposition. The Rawlsian thesis seeks the middle ground between the Kantian conception of the radically disembodied subject on the one hand,<sup>17</sup> and the poststructuralist notion of the radically situated

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<sup>15</sup> Sandel, M. *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44

<sup>16</sup> Rawls, J. *A Theory of Justice*, Supra. Chapter Four, Note 35

<sup>17</sup> See Discussion in Chapter Four, "Who is the Subject of Enlightenment?" and "Feminist Concerns about the Legal Subject"

subject on the other.<sup>18</sup> From the outset, however, Sandel asserts that this project is doomed to failure because central to Rawls' theory continues to be the presupposition that human beings are distinct individuals first, and only subsequently do we form relationships with, and attachments to, others (or in Rawlsian terminology, subjects are 'antecedently individuated').<sup>19</sup> Despite Rawls' disclaimers in regard to the Kantian subject, then, it seems that they bear many similarities – both the Rawlsian and Kantian self are deemed to be beyond experience, with community never being recognised as fulfilling a role as a constituent element in that self's character formation.

According to Sandel this presents a particular difficulty for Rawlsian theory from which other social contract theorists (like Hobbes and Locke<sup>20</sup>) have remained immune.<sup>21</sup> The model of justice essential to the Rawlsian thesis (namely distributive justice) requires the very constituent concept of community that his notion of subjectivity effectively precludes and undermines. Against the Rawlsian subject, Sandel proposes what he terms a 'wider subject', which is marked by a constitutive community, a common vocabulary of discourse and a background of implicit practices and understandings. In opposition to the Rawlsian idea of the 'antecedently individuated' human agent, Sandel puts forward the paradigmatic communitarian proposition that the relationships we form with others (through family, community, nation, etc.) are both definitive and constitutive of human subjectivity.

We have noted above that Sandel, taking on board the cautionary concerns voiced by Lacey, is keen to avoid the tendency for this notion of the socially constituted subject to dissolve the legitimacy and possibility of the concept of human agency. From the outset then, Sandel rejects the notion of the wholly socially conditioned

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<sup>18</sup> See Discussion in Chapter Five, specifically in relation to Derrida and Butler

<sup>19</sup> Sandel, M., *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44, p. 53

<sup>20</sup> Hobbes, T. *The Leviathan*, Supra. Preface, Note 4

Locke, J. *Two Treatises on Government*, Supra. Preface, Note 4

<sup>21</sup> Sandel, M. *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44, p. 153-60

and fragmented subject as epistemologically incoherent. Furthermore, he informs his reader that collapsing the distinction between self and situation obviates the possibility of a coherent concept of the subject.<sup>22</sup> In so doing, however, Sandel positions himself within a long tradition of philosophical thought (traditional and alternative) that has implicitly accepted the entrenched dichotomy between the disembodied and the radically socially constituted subject.<sup>23</sup> We have seen in our previous discussion of the 'blackmail of the Enlightenment'<sup>24</sup> that such dichotomies have systematically stifled the possibility of more meaningful critique and have encouraged a polarisation of those 'for' the Enlightenment and all its liberal values and those radicals who stand 'against' the Enlightenment. While Sandel's intentions in making the assertion that his 'wider self' does not preclude the possibility of agency are well-meant, his methodology is flawed. His desire to maintain some allegiance with the model of agency framed by prevailing liberal presuppositions renders his thesis a less than satisfactory compromise between the two competing conceptions of the self. As we shall see, any such compromise is faced with substantial adversity because its very existence is premised upon the polarities that it professes to transcend.

In delineating this terrain of compromise, Sandel displays the classic formulation of the dialectical account of community and its insistence upon the need to augment liberal individualism with the inclusion of communal concerns without destabilising the idea of a definite and determinate self. By positing the existence of a subject that is only partially constituted by its immersion within communal relationships, Sandel proposes that the subject would retain a 'core self' that, although partially socially constituted, is not radically situated. This continued assertion of some element of 'core self' enables Sandel to stand by his thesis on the need for any theory of subjectivity to accommodate the possibility of self-reflection in a way that the Rawlsian thesis fails to do. While this criticism of the Rawlsian

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<sup>22</sup> Sandel, M. *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44, p. 16 & 20

<sup>23</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 52

<sup>24</sup> See Discussion of the 'blackmail of the Enlightenment' in Foucault's treatment of Kant in Chapters Four and Five.

thesis may be well-founded, Sandel's reluctance to abandon altogether the notion of some pre-existing 'core self' provides a superficial allegiance to the Enlightenment claims about a transcendent and self-determining subject that the communitarian critique has generally sought to undermine. Restricted by his desire to delineate a remit for the exercise of agency along the lines dictated by the liberal model of self-determination, Sandel is forced to make a concession to the notion of pre-existing selfhood that undermines his communitarian intentions.

Seeking to justify that concession, Sandel argues that if agency is to consist in something more than the exercise of efficient administration (which he ultimately attributes to the Rawlsian self), we must be capable of a deeper level of introspection than that implied by the 'direct self-knowledge' of immediate wants and desires which have been privileged in accounts of the radically constituted self discussed in the preceding chapter. However, we likewise cannot simply be wholly unencumbered subjects of possession, individuated in advance and prior to our given ends as the Kantian thesis implies. Accordingly, we must be subjects constituted in part by a pre-existing 'core' and in part by our aspirations and attachments. Where aspects of subjectivity are determined by constitutive aspirations and attachments, we comprehend a wider subject than the individual alone (be it the family, tribe, class or nation). To this extent these aspirations and attachments define a community in the constitutive sense. The existence of such a community is marked not merely by a spirit of benevolence, nor by the prevalence of communitarian values, nor even by the existence of shared 'final ends' alone, but by a common vocabulary of discourse and a background of implicit practices and understandings.

Where the deontological rationalism attributable to Kant and Rawls insists upon our conceiving of ourselves as thoroughly independent, Sandel proposes that we cannot regard ourselves in this light without undermining the loyalties and convictions whose moral force consists partly in the fact that living by them represents an

intrinsic element of personal identity. In recognition of this paradox, Sandel concludes that the imagining of a person incapable of constitutive attachments results not in the conception of an ideally free and rational agent, as Kant and Rawls would argue, but in the construction of an artificial and hollow subjectivity wholly devoid of character and moral depth.

Contrary then to the dominant tradition of interpretation of the liberal humanist self, Sandel argues that this transcendental vision actually fails to accommodate the demands which liberalism makes of the value of autonomy. While the incorporation of constitutive attachments may at first appear to present an obstacle to the realisation of human agency, Sandel argues that incorporation of such attachments along the limited remit dictated by the 'wider self' actually enables the reliance upon a relative fixity of character which is essential to the prevention of the lapse into arbitrariness of which the transcendental self is frequently guilty.<sup>25</sup> Hence, Sandel seeks to justify his part-essentialist, part-constitutive conception of subjectivity by claiming that in reality it presents a more appropriate embodiment for the liberal model of autonomy and agency. Challenging the Kantian and Rawlsian notion that the truly autonomous self is one divested of aspirations and attachments, Sandel presents a convincing argument in favour of the incorporation of certain elements of context and connection.

However, his failure to challenge the liberal notion of agency itself has rendered Sandel a target for subsequent critique by many other communitarian commentators. In seeking a mode of subjectivity that he feels better accommodates the requirements of liberal perceptions of autonomy, it seems that, despite his assertions, Sandel has conceded too much to the accompanying liberal conception of the self. While Sandel has succeeded in presenting a convincing case for the incorporation of some element of context into the notion of selfhood, his strong allegiance to the existence of a 'core self' has relegated those contextual factors as

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<sup>25</sup> Sandel, M. *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44, p. 180

subsidiary to the constitution of a primarily pre-determined subject. For many commentators, this result is highly unsatisfactory.<sup>26</sup>

A number of other related problems have been identified in Sandel's thesis.<sup>27</sup> Perhaps the most fundamental of these has pertained to his seemingly uncritical acceptance of the entirely socially conditioned subject as an incoherent entity primarily because of its lack of what he considers to be a 'true self'.<sup>28</sup> Without providing any examination of the dichotomy that defines the gap between constituting and constituted selves, and without any indication as to the components of the 'true self' (specifically its relationship to the transcendent self), Sandel's theory becomes in many respects somewhat hollow. In his attempts to defend the possibility and legitimacy of humanist notions of agency, etc. outwith the paradigms of Enlightenment rationality, it may well be the case that Sandel has conceded too much of his original communitarian ethic.

These criticisms are not, however, exclusively applicable to Sandel. In the foregoing, we have used the work of Sandel to present an illustrative example of the dialectical model of community. The criticisms lodged at Sandel's thesis can likewise be lodged at many of the other dialectical theorists who have, like Sandel, sought to satisfy the communitarian critique of the liberal individual through a search for compromise between individualism and communality. One such theorist is Charles Taylor.<sup>29</sup> In seeking to avoid the polarities that have structured the debate between the individualism of modernity and the communal concerns of communitarianism, Taylor has explicitly demonstrated his allegiances by developing a notion of a 'dialectical' conception of community within which individuality and communality are intertwined. By implication, this suggests the existence of a self that is also dialectical, reconciling the tensions between the individual and the social self through inhabiting these communities.

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<sup>26</sup> See, for example, subsequent discussion of MacIntyre in this Chapter

<sup>27</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 53

<sup>28</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 53

Recognising the shortcomings of Sandel's attempt at a compromise between the disembodied transcendent self of Kant and the radically situated self of constructionism, Taylor claims to be offering a more sophisticated version of the dialectical account. Despite the more subtle form of his dialectical analysis, however, Taylor's thesis likewise falls prey to the inadequacies that have been isolated above in relation to Sandel. In Taylor's case, the difficulty centres around the fact that his means of resolution is actually predicated on the existence of a dichotomy between individual autonomy and communality that it never seeks to challenge. Taylor's recognition that, as in any dichotomy, the one pole cannot exist without the other because they are defined in opposition to one another,<sup>30</sup> is of notable value and supports the criticisms lodged previously at Sandel's thesis. However, Taylor fails to recognise that attempting a dialectical interaction between these two forms of polarised discourse does nothing in real terms to alleviate the polarity upon which the existence of these poles are premised, and nor does it make any contribution towards the forging of a discourse which will displace that polarity. The significance of this oversight has been noted previously in our discussion of the difficulties faced by any theory of selfhood that fails, in this way, to transcend meaningfully the dichotomous frameworks of rationalistic thought.

The dialectical account of community that inhabits the theory of both Sandel and Taylor insists upon a resolution of conflict between the opposing sides of the metaphysical debate. Whether that resolution is framed in terms of a compromise or a polarised dialectical interface, the fact remains that such approaches fail to challenge the foundations of their theory sufficiently. Both the theory of Sandel and the theory of Taylor are predicated upon the existence of a dichotomy between the constituted and the constituting self. While their attempts at resolution may seem attractive, they are only superficially so because at a deeper level, they fail to offer any substantial challenge to the existence of this dichotomy itself. This oversight proves fatal to any communitarian account because it demonstrates a

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<sup>29</sup> Taylor, C. *Sources of the Self – The Making of the Modern Identity* (1989) Harvard University Press

<sup>30</sup> Taylor, C. *Sources of the Self*, Supra. Chapter Six, Note 29, p. 36



fundamental inability to challenge the modernist presuppositions and dichotomous frameworks that have proven so integral to the maintenance of the primacy of the liberal individual in ethical and legal theory. The dialectical account offered up by Sandel and Taylor leaves us in the final analysis only with a concept of the 'wider self' that retains the definitive aspects of the modernist self (i.e. its exclusionary claims to agency and self-knowledge). This has, however, proven insufficient to the purposes of many communitarian critiques. Increasingly, therefore, attention has turned towards the second genre of theory mentioned above, namely the premodern.

### *Premodern Communitarianism*

One of the most prominent advocates of the premodern communitarian position has been Alasdair MacIntyre. In his most influential works, *After Virtue* and *Whose Justice? Which Rationality?*,<sup>31</sup> MacIntyre has criticised the ethical discourse which has been characteristic of modern thought. Most crucially, he is critical of the conception of the self on which it rests. Placing strenuous reliance upon the tradition of virtue ethics originating in the work of Aristotle, MacIntyre seeks to replace this individualist, modernist self with a premodern conception of the 'narrative self'. Unlike the dialectical approach, MacIntyre's premodern thesis seeks a more fundamental challenge to prevailing liberal dogmas through a radical effacement not only of the notion of the transcendent self but also of the notion of atomistic autonomy upon which that notion of selfhood is premised.

In adoption of a position resonant with Foucault's,<sup>32</sup> MacIntyre proposes a return to the ethical dogmas characteristic of historical societies. In particular, he makes a call for a return to the concept of virtue that was of central significance to ancient Greek societies. Virtue of the kind envisaged by MacIntyre<sup>33</sup> operates in a society

<sup>31</sup> MacIntyre, A. *After Virtue & Whose Justice, Which Rationality?*, Supra. Chapter Four, Note 52

<sup>32</sup> Foucault's prescriptive thesis regarding classical greek stylisations of the self has been discussed in detail in Chapter Five.

<sup>33</sup> in a contemporary revival of the concepts of virtue adopted by Aristotelian ethics

in which each individual has a specifically designed role and status. This socially assigned role and status represents a crucial element in the delineation of one's selfhood and one's own conception of identity, and acts as a filter through which socially condoned paths of action are presented to the agent as legitimate choices. Central to MacIntyre's understanding of the role of virtue is its dependence upon the narrative character of human life. Within a society that is dominated by consideration of the ethical principles of virtue, subjects find their identity and subjective coherence in the construction of a narrative which links birth to death. The unity of human life, within this model, lies in the unity of its 'narrative quest' and personal identity is the identity presupposed by that narrative unity.

Hence, MacIntyre's thesis uncovers the experiential reality that the choices presented to human agents are heavily scripted by social requirements and expectations. While this presents a significantly less attractive proposition than the model of transcendence and unfettered self-determination presented by Kant, MacIntyre's thesis boasts conformity with experiential reality. As discussed in Chapter One, this conformity with reality represents a crucial starting point from which to commence the project of determining a more operative model for the facilitation of human agency and consent.

The purpose of MacIntyre's development of the concept of 'narrative selfhood' is to offer up an alternative to the dominant conception of selfhood proposed by liberal individualism. Where liberal individualism conceptualises a self that is separate from the role it assumes in social life,<sup>34</sup> the very definition of MacIntyre's narrative self is dependent upon the roles ascribed to it in a given community. The narrative selfhood thus achieved is a selfhood whose general form is pre-determined by the communities in which the individual finds him or her self. Nonetheless, the narrative self retains the capacity for individual interpretation of their ascribed role. Based upon the premise of an operative network of social

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<sup>34</sup> See Discussion in Chapter Four, "Feminist Concerns about the Legal Subject"

virtue, then, MacIntyre develops a conception of the self that presupposes a community of fixed and ascribed roles.

Within the confines of such a virtuous community, selfhood is achieved by knowing 'one's proper role' and by embracing the narrative required by it. Subject to the satisfaction of these requirements of virtue, the subject is then free to define that role in terms of their own characteristics. Hence MacIntyre delineates a remit for the exercise of agency within the confines of his virtuous community. Not dissimilarly to the model of agency offered by Foucault in the preceding chapter, the agency envisaged by MacIntyre is a relative form of agency. Its operation is not unconstrained and self-determining in the way that the Kantian thesis proposes. Rather, it is heavily constructed by prevailing traditions and requirements for virtuous conformity. Despite such construction, however, a narrow remit for self-stylisation and agency remain. Once again, the difficulty lies in accessing that remit and providing a workable platform for group action. In grounding the remit for agency within communal parameters, however, MacIntyre's thesis has the benefit of providing scope for communal action in a way that the radically dislocated subversion tactics of poststructuralism fail to do.<sup>35</sup>

Narrative selfhood represents the moral theory accompanying the epistemological theory developed by MacIntyre within his *Three Rival Versions of Moral Enquiry*.<sup>36</sup> Within the confines of that work, MacIntyre contrasts the formalist position of what he calls the 'encyclopaedist' tradition (epitomised by Kant) which has been concerned with the realisation of universality and objectivity, and the poststructuralist or 'genealogist' tradition, which has been concerned to discredit the possibility of any valid claim to truth through continual affirmation of the particular and the subversive. These two epistemological forms relate in broad terms to the accompanying theories of subjectivity which in their turn posit the

<sup>35</sup> See Discussion in Chapter Five of the failure of Butler's account to accommodate group affiliation

<sup>36</sup> MacIntyre, A. *Three Rival Versions of Moral Enquiry*, Supra. Chapter Four, Note 52

human subject as inherently self-willed, transcendent and constituting, or alternatively as essentially constituted, fragmented and internally contradictory.

MacIntyre recognises that acceptance of the dichotomies inherent in the relation of these competing claims obscures from consideration the possibility of a third thesis. This rival version of moral enquiry suggests that reason only moves towards being genuinely universal and impersonal insofar as it is neither neutral nor disinterested. Accordingly, membership of a particular type of moral community (one in which virtue ethics are paramount) is a necessary condition of genuinely rational and moral enquiry. Recognising the development of such moral enquiry to be a type of craft (in terms not dissimilar to the Foucaultian idea of a stylisation of existence through the process of making one's life into a work of art<sup>37</sup>), MacIntyre suggests that "only insofar as we have already arrived at certain conclusions are we able to become the sort of person able to engage in such enquiry so as to reach sound conclusions."<sup>38</sup> Flowing as a direct consequence of this proposition has been MacIntyre's development of the narrative theory of the self and its attendant forms of relative agency.

This notion of narrative selfhood presents a more radical vision than the 'wider selfhood' discussed by Sandel in the preceding section. Where Sandel's dialectical leanings lead him to graft some communitarian insight onto the continued assertion of the modernist subject, MacIntyre's premodern thesis demands the absolute rejection of that subject. In providing a theoretical mandate to transcend the lingering polarities of Enlightenment rationality, this premodern thesis certainly presents a more promising vision than the dialectical position. However, MacIntyre's premodern thesis becomes problematic in different ways. For one thing, the virtuous societies that present the inspirational model for his thesis are essentially hierarchical societies in which everyone has a designated place in the

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<sup>37</sup> Foucault, M. *The History of Sexuality Vol. III – The Care of the Self*, Supra. Chapter Two, Note 2

<sup>38</sup> MacIntyre, A. *Three Rival Versions of Moral Enquiry*, Supra. Chapter Four, Note 52, p.63

order of things.<sup>39</sup> Such societies have, however, been thoroughly patriarchal and the achievement of virtue within them has traditionally been predominantly restricted to the male sphere. This presents the alarming possibility for feminism that the narrative selfhood applauded by MacIntyre can only be achieved at the high price of ascription to traditional roles associated with societies that have been saturated with confirmations of sex discrimination.<sup>40</sup>

To say that this appears to be the consequence of MacIntyre's ethical project is not necessarily to assume, however, that such obstacles are unsurpassable. A more sympathetic interpretation of some of MacIntyre's concluding remarks in *After Virtue* appear to present the seeds of some progressive potential. He specifically asserts that the fact that the self has to find moral identity in and through their membership within specific communities (e.g. the family) does not entail that the self has to accept the conventional moral limitations of the particularity of those forms of community.<sup>41</sup> Without these moral particularities to begin from, the self would be without a requisite plateau from which to commence their search for the good. However, it is specifically in the moving forward from these beginnings that the search for the good consists. That said, however, MacIntyre reminds us that the structures of such particularity may never be simply left behind or obliterated and perhaps this is sufficient to justify the feminist concern. In an attempt to undermine any such residual feminist concerns in this regard, Martha Nussbaum<sup>42</sup> has sought to reassert the proposal for a return to neo-Aristotelian virtue ethics embodied in MacIntyre's thesis in a more women-friendly manner. In later sections of this chapter, we will examine in detail Nussbaum's attempt to restructure the theses of Aristotle and MacIntyre into a format more compatible with the requirements of feminist ethics, and we will evaluate the success that this attempt has enjoyed.

<sup>39</sup> MacIntyre, A. *After Virtue*, Supra. Chapter Four, Note 52, p. 122

<sup>40</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 55

<sup>41</sup> MacIntyre, A. *After Virtue*, Supra. Chapter Four, Note 52, p. 205

<sup>42</sup> Nussbaum, M. "Human Functioning and Social Justice : In Defence of Aristotelian Essentialism" (1992) 20 (2) *Political Theory* 202 & "Equity and Mercy" (1993) 22 (2) *Philosophy and Public Affairs* 83

An alternative field of criticism has been developed by Bernard Williams in his discussion of MacIntyre within his work *Shame and Necessity*.<sup>43</sup> While not seeking to challenge the premodern conception of community developed by MacIntyre, Williams expresses concern regarding the origins of the narrative self that populates this analysis. Williams attributes to MacIntyre the belief that one of the major reasons for a necessary abandonment of the legacy of the Enlightenment lies in its unanimous assertion of the featureless moral self as a characteristic expression of human identity.<sup>44</sup> Contrary to this, however, Williams suggests that the Enlightenment (represented by a set of social and political ideals in favour of truthfulness and objectivity) has no need for such images of the self. In fact, Williams argues that we can continue to adhere to these ideals, and indeed make better sense of them, by returning to the ethics of Homeric Greece.

Although Williams thus makes a claim similar to MacIntyre in that both prescribe a return to ancient Greek ethics, the motivations behind these theses are markedly different. Both MacIntyre and Williams propose similar prescriptive theses regarding the development of improved ethical positions and conceptions of the self, but while MacIntyre considers his thesis representative of a radical restructuring of the whole ethical enterprise, Williams suggests that the process of a return to Homeric Greek ethics "need not condemn the ideals of the Enlightenment inasmuch as they are identified with the pursuit of social and political honesty, rather than with a rationalistic metaphysics of morality."<sup>45</sup> Williams' concern, then, is not to dislocate altogether the frameworks of Enlightenment. Indeed, to the extent that they betray allegiance to the original 'spirit of Enlightenment' discussed by Kant in Chapter Four, such frameworks ought to be supported. What Williams seeks to propose by a return to Homeric Greek ethics is the eradication of those metaphysical assumptions and claims to universality that have polluted the original merits of the Enlightenment quest.

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<sup>43</sup> Williams, B. *Shame and Necessity*, Supra. Chapter Four, Note 1

Pursuing that aim further, Williams suggests that MacIntyre's thesis is flawed even in terms of this less radical project because of his fundamental reliance upon the work of Aristotle. Williams warns that we should be wary of those theories (such as MacIntyre's and Nussbaum's) that seek a return to the virtue ethics of Aristotle in the name of denouncing the Enlightenment because Aristotle has himself been influenced by the kind of 'ethicised' conception of the self that produces claims towards rationalism and essentialism. Despite popular claims from members of the virtue ethics tradition (such as MacIntyre) that Aristotelian ethics avoid the deficiencies of rationalism that have plagued the Platonic account (that has been heavily influential in subsequent Kantian theory), Williams suggests that Aristotle has also fallen foul of such assumptions. With Plato, it was precisely because all desirable conduct was motivated by the rational exercise of the mind that no other features of the human agent (e.g. character) needed to be considered relevant in the progression toward an ethical life.<sup>46</sup> For Aristotle, on the other hand, the good person requires a character formed centrally by contingent circumstances.<sup>47</sup> However, Aristotle also implies that character is controlled by reason. Hence, reliance upon Aristotelian virtue ethics is equally likely to revert to a psychology structured in ethical terms around the dictates of rationalism, albeit in a more subtle fashion than the Platonic self.

The tendency which Williams isolates within MacIntyre's thought to associate the Enlightenment with ideas of total critique and rationalistic social imagery makes it far from surprising that he is tempted to fall back on Aristotle to determine a philosophical position that does not abstract humans, as pure moral consciousness, from society, but instead sees them as contingently formed by society. However, Williams suggests the threat of a different illusion within such trends of thought – this illusion is encapsulated by “the idea that the relation of human beings to

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<sup>44</sup> Williams, B. *Shame and Necessity*, Supra. Chapter Four, Note 1, p. 159

<sup>45</sup> Williams, B. *Shame and Necessity*, Supra. Chapter Four, Note 1, p. 159

<sup>46</sup> Williams, B. *Shame and Necessity*, Supra. Chapter Four, Note 1, p. 160

<sup>47</sup> Williams, B. *Shame and Necessity*, Supra. Chapter Four, Note 1, p. 160

society and to each other, if properly understood and properly enacted, can realise a harmonious identity that involves no real loss.”<sup>48</sup>

We have seen in our discussion of the strong poststructuralist thesis that many commentators have recognised the existence of this metaphysical illusion, and are struggling with mechanisms to remedy the paradox. In a sense, Williams suggests that Plato, Kant and Aristotle are all on the same ethical side – each believing in the possibility that the universe, history or the structure of human reason, once properly understood, can yield a pattern which makes sense of human life and human aspirations.<sup>49</sup> On the contrary, Homeric thought represents human agents as dealing sensibly, foolishly and sometimes catastrophically in a world that is only ever partially intelligible to human agency. In the final analysis, Williams concludes that we should look to a reflection upon Homeric Greek thought before the advent of Plato and Aristotle for an option that invokes neither a featureless moral self, nor an absolute constitution of the self by society. Within these ethical parameters, we will find a conception of the self that promises ultimate reconciliation of these two epistemological extremes. MacIntyre’s idea of the narrative self and of a return to Greek ethics may have a level of merit. However, his reliance upon the virtue ethics of Aristotle makes his thesis difficult for Williams to accept uncritically.

### *Feminism and Communitarianism*

“Communitarians share with most feminist theorists a rejection of the abstractly individualist conception of self and society so prominent in modern liberal thought. This self – atomistic, presocial, empty of all metaphysical content except abstract reason and will – is able to stand back from all the contingent moral commitments and norms of its particular historical context...In contrast to this vision of the self, the new communitarians pose the conception of the self whose identity and nature are defined by their contingent and particular social attachments.”<sup>50</sup>

<sup>48</sup> Williams, B. *Shame and Necessity*, Supra. Chapter Four, Note 1, p.162

<sup>49</sup> Williams, B. *Shame and Necessity*, Supra. Chapter Four, Note 1, p. 163



Even this relatively brief introduction to the principles of communitarian thought should be sufficient to illustrate the existence of several potentially connected arenas of concern between feminism and communitarianism. A social constructionist thesis of the sort advocated by communitarianism has always been central to feminism.<sup>51</sup> Building upon that realisation, Nicola Lacey has noted that a communitarian commitment to the construction of a rich conception of collective values and the institutional public goods which would facilitate their realisation resonates with the feminist political concern to achieve advancement in considerations such as child-care provision and the environment where liberal, market-based solutions are inappropriate and inadequate.<sup>52</sup> What's more, the communitarian concern with the community as a source of political value parallels the powerful feminist critique of the arbitrary distinction between public and private spheres imposed by liberal philosophy.<sup>53</sup> Perhaps most significantly of all, the communitarian recognition of the 'situated' and socially immersed self provides a remit for accommodating as politically relevant the embodied and connected aspects of human subjectivity that have historically been rendered peripheral to issues of politics and law.

Communitarianism, as we have seen, is a species of theory that recognises the embodied and contextual nature of human subjectivity. Feminist theorists have (with the potential exceptions discussed in Chapter Four<sup>54</sup>) largely argued that the disembodied conception of selfhood employed by legal liberalism is implicitly 'male' because of the correlation between the atomism and autonomy of the legal subject and the atomism and autonomy prioritised in male (but not female) social development. While liberalism sees the individual as prior to social reality, communitarianism sees the individual as its product. Such a social constructionist

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<sup>50</sup> Friedman, M. "Feminism and Modern Friendship – Dislocating the Community" (1989) 99 *Ethics* 275 p.277-8

<sup>51</sup> This concern dates back to 'first-wave' feminism, eg. Friedan, B. *The Feminine Mystique*, Supra. Chapter One, Note 52. See also discussion in Chapter One, "Feminism and Law's Disciplinary Power"

<sup>52</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 136. See Also Gavison, R. "Feminism and the Public - Private Distinction" (1992) 45 *Stanford Law Review* 1

<sup>53</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 137

<sup>54</sup> See Discussion in Chapter Four, "Feminism and the Revival of the Enlightenment"

view of subjectivity has significant importance to the overall feminist enterprise, because it enables the critical analysis and transformation of the social processes through which gendered identities are constructed and perpetuated.

Furthermore, the communitarian thesis is resonant of feminist concerns to explicate the role of connection and intersubjectivity in individual identity formation. The traditional communitarian concern with the 'situated self' in ethical theory brings with it the possibility of accommodating as politically relevant differing embodied aspects of human subjectivity. This is of clear importance to a feminist movement concerned to illustrate the ways in which female bodies have been inscribed with meanings inimical to autonomy in the legal sense, while male bodies have been constructed as 'normal' and paradoxically disembodied.<sup>55</sup> In our discussion of the discourses of female embodiment in Chapter One, the centrality to the feminist critique of the imposition of expectation and meaning upon corporeal manifestations of gender was illustrated. Individuals, developing their identity and conception of selfhood from their place within specific communities, are social beings in every sense. Building upon this communitarian view of personhood, many feminists have alleged that the woman who lives in a patriarchal culture is peculiarly powerless because her position as a socially constituted being makes her a victim of her own conditioning.<sup>56</sup> The embedded nature of such conditioning renders it difficult for the woman as a serious moral agent to transcend the social expectations required of her because from her internal perspective such expectations are 'natural'.<sup>57</sup>

Drucilla Cornell, in *Beyond Tragedy and Complacency*<sup>58</sup>, has argued that this kind of social constructionist account of the subject (which emphasises our development of complex identities within concrete historical and social contexts) is the inevitable

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<sup>55</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 136-7. See Also Discussion in Chapter Four, "Feminist Concerns about the Legal Subject"

<sup>56</sup> Frazer, E & Lacey, N. (ed.) *The Politics of Community*, Supra. Chapter Two, Note 84, p. 151

<sup>57</sup> This bears important similarity to the critique lodged by Foucault regarding the insidious nature of disciplinary technologies discussed in Chapter One

result of continued feminist allegiance to the conception of relational subjectivity. Human life and human identity outwith the context of human society and human interaction is not only impossible, according to Cornell, but also an eminently unsuitable starting point for political theory. This commonly voiced feminist proposition

“turns the tables on liberalism, as it suggests that the liberal conception of the autonomous individual agent is itself a product of social construction, an ideal or model of human life which has emerged in this particular form within the liberal tradition. So if liberalism is true as a social theory, this is only because it is, in a wider sense, false.”<sup>59</sup>

Nonetheless, and despite an array of important arenas of parallel concern, building a feminist ethics on the back of communitarian critique has proven far from unproblematic. Communitarianism has often come under critical fire for the potential conservatism inherent within its thought.<sup>60</sup> More specifically, the failure of communitarianism to generate an adequate account of the conditions under which subjects gain membership within powerful, meaning-generating communities presents a significant arena of potential conflict with feminist political concerns<sup>61</sup>. The tendency of communitarian theorists to afford considerable deference to the role of tradition has perpetuated a failure to challenge those communities that, although steeped in tradition, are also steeped in patriarchal assumptions. As such, these communities have often exhibited reluctance to include women as active participants and to promote their incorporation through fair and equitable channels. This should be of real concern to a feminist movement that has been dedicated to highlighting and overcoming institutionalised obstacles

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<sup>58</sup> Cornell, D. “Beyond Tragedy and Complacency” (1987) *Northwestern University Law Review* 81

<sup>59</sup> Cornell, D. “Beyond Tragedy and Complacency”, *Supra*. Chapter Five, Note 58. Quoted in Frazer, E & Lacey, N. (ed.) *The Politics of Community*, *Supra*. Chapter Two, Note 84, p. 57

<sup>60</sup> Laey, N. *Unspeakable Subjects*, *Supra*. Preface, Note 2, p. 137

<sup>61</sup> See, for example, the communitarian approach adopted by Michael Walzer in *Spheres of Justice* (1983) Basic Books. Walzer posits his ethics on the basis of the existence of an egalitarian community with pluralistic principals of justice. The image he presents of an egalitarian, pluralistic, non-dominating society is certainly attractive and inspiring but it leaves precariously open the question of how that society is to grapple with the problems of moral diversity, and competing moral claims. Walzer himself admits that under conditions of dominance, no shared meanings are possible.

to equal opportunity between the sexes. In failing to challenge such inherited prejudices, communitarian theory has thus become a subject of feminist critique.

Not only have feminists expressed concern regarding the failure of communitarianism to question the means through which access is gained to certain prioritised communities, many have also expressed concern regarding the very nature of those prioritised communities themselves. In *Unspeakable Subjects*, Lacey worries that, "normative appeals to communitarianism as a means of escaping the limitations of liberal individualism present a dangerous potential for the re-institution of excluding universalism in a new, and potentially more damaging, way."<sup>62</sup> This potential of communitarian critique has been highlighted by Friedman who, in "Feminism and Modern Friendship",<sup>63</sup> has taken communitarian ethics to task for their tendency to invoke communities of the family, or nation, which have consistently been established to be problematic by feminist critique.

For both dialectical and premodern communitarian commentators the relevant communities are those in which we are involuntarily bound – they are not simply the 'associations' in which people 'cooperate', but more specifically, the communities in which people 'participate'.<sup>64</sup> Friedman proposes, however, that we need to develop a far greater interest in those voluntarily entered into moral associations (citing friendship as the paradigmatic case). Indeed, she suggests that,

"The constitution of identity and moral particularity, for the modern self, may well require radically different communities from those so often invoked by communitarians. The whole tenor of communitarian thinking would change once we opened up the conception of the social self to encompass chosen communities, especially those which lie beyond the typical original community of family-neighbourhood-school-church."<sup>65</sup>

<sup>62</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 137-40 & 149

<sup>63</sup> Friedman, M.. "Feminism and Modern Friendship", Supra. Chapter Six, Note 50

<sup>64</sup> Friedman, M. "Feminism and Modern Friendship", Supra. Chapter Six, Note 50, p. 283-4. See Also Sandel, M. *Liberalism and the Limits of Justice*, Supra. Chapter Four, Note 44, p. 151-2

Friedman asserts that by expanding communitarian analysis to incorporate also such communities of choice, feminists are empowered to provide for the possibility of an effective counter to the oppressive and abusive relational structures often inherent in the non-voluntary communities cited by Sandel and MacIntyre among others.

“From such a perspective, the uncritically assumed communities of place invoked by the communitarians appear deeply problematic. We can concede the influence of those communities without having unreflectively to endorse it. We must develop communitarian thought beyond its complacent regard for the communities in which we once found ourselves toward (and beyond) an awareness of the crucial importance of dislocated communities, communities of choice.”<sup>66</sup>

The remainder of this chapter will be dedicated to a more detailed examination of these emerging tensions between feminism and communitarianism and to an assessment of the merits of feminist attempts to rescue communitarian ethics from the spectre of such conservatism. Within the confines of the preceding discussion, what has become evident is that commentators of all persuasions ought to carefully assess the manner in which the notion of community is being used in disparate communitarian theories before uncritically advocating a communitarian position. Hekman expresses this caveat to feminist theory in the following terms,

“If feminists are enjoined to jump on the communitarian bandwagon, to embrace this alternative to modernist moral theory, then they must know exactly what ‘community’ entails. Embracing a romantic conception of community, without scrutiny, will not solve the problems posed by the disembodied self of the liberal tradition...What is required is a discourse about subjects and communities which rejects not only the disembodied subject of liberalism, but also the liberalism/communitarian dichotomy on which that concept rests.”<sup>67</sup>

### *Feminism and Dialectical Communitarianism*

It has been suggested above that feminist theorists have generally been concerned by the level of conservatism deemed inherent in certain species of communitarian

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<sup>65</sup> Friedman, M. “Feminism and Modern Friendship”, *Supra*. Chapter Six, Note 50, p.285

<sup>66</sup> Friedman, M. “Feminism and Modern Friendship”, *Supra*. Chapter Six, Note 50, p.290

<sup>67</sup> Hekman, S. *Moral Voices, Moral Selves*, *Supra*. Preface, Note 24, p. 58

thought. One of the major contributory factors involved in the perpetuation of such conservatism relates to the common failure of communitarian theorists to adequately characterise the various senses in which they use the notion of community.<sup>68</sup> We have discussed in preceding sections the tendency for communitarian theorists to deal with the notion of community in one of two ways. What's more, we have been introduced to the basic elements of both approaches and have examined some of the shortcomings that have plagued each genre of theory in turn.

In the dialectical version, we saw that an attempt has been made to fuse elements of both liberal individualism and communitarianism while simultaneously making the claim to be rejecting the primacy of individualism inherent in liberalism. However, we also saw that upon a closer inspection of such attempts at a dialectical affinity, this averred rejection of individualism emerges as highly superficial. The dialectical position, by its very nature, is plagued by difficulties inherent in seeking a compromise between dichotomous ethical positions without thereby perpetuating the very polarities in question. Furthermore, the position advocated by Sandel and Taylor admits a disappointingly residual remit for communitarian values through its continued privileging of the notion of a 'core self'. By failing to reject the notion of 'fraternity' that is rooted in the liberal tradition, i.e. the notion of community as an association of rational individuals bound together by a mutual search for autonomy and freedom, the dialectical approach presented by Sandel and Taylor fails to present any serious alternative to the liberal tradition.<sup>69</sup>

Recognising the deficiencies of this dialectical account has led many commentators, feminist and otherwise, to seek more progressive potential within the frameworks of the premodern alternative. While it has been argued above that this premodern account offers a more promising option for development by communitarian theorists, the significance of the problems affecting this conception

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<sup>68</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 138

of community must not be understated. In particular, it ought to be recalled that the premodern account poses some particularly problematic dilemmas for feminist commentators seeking to appropriate its insights. This has led some to embark upon a re-examination of the merits of the dialectical approach.

Such feminist commentators have felt confident that, subject to some necessary revision, this branch of communitarian critique continues to offer the most appropriate philosophical ally to feminism in its battle against liberalism. Marilyn Friedman, for example, has argued that although a simplistic adoption of communitarian principles by feminism would be inappropriate (largely due to the sexist assumptions inherent in the communities to which it traditionally appeals), a more complex development of a dialectical interaction between self and community would represent a favourable model for feminist political discourse.<sup>70</sup>

Developing the critique lodged by Lacey in the preceding section regarding the problematic nature of the communities which communitarian theorists generally rely upon as constitutive of identity, Friedman has sought to develop an alternative delineation of meaning-generating communities. Pursuant upon this methodological aim, Friedman attempts to replace the traditional notion of a community that is comprised of imposed associations (such as family, church, state) with a vision of community comprised of voluntarily chosen relationships (such as friendship). These voluntarily entered into 'communities of will' would be necessitated by motivations arising from one's needs and desires, rather than by motivations arising from social assignation, expectation or demand.

This heralds the advantage, from a feminist perspective, of liberating communitarian critique from its previous connotations of sexism and gender-exclusionary tradition. In requiring the incorporation of 'communities of will'

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<sup>69</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra Preface, Note 24, p. 59

<sup>70</sup> Friedman, M. "Feminism and Modern Friendship", Supra. Chapter Six, Note 50

within the category of meaning-generating communities, Friedman's approach presents the means through which women would be able to overcome the institutionalised patriarchy that forms the framework of those communities that have traditionally dominated communitarian critique. This in turn presents the possibility for a more women-friendly form of communitarianism that allows women equal participation in those attachments and affiliations that determine one's status in society and one's conception of self.

Hence, the community that Friedman presents, being one in which the voluntary choice of the individual, based on personal needs and desires, is given a central role, offers a significant improvement upon previous communitarian theories. However, her uncritical reliance upon the expectation that human agents are free to choose between an unlimited range of social communities in determining their communities of will lends implicit support to the liberal contention (criticised within this work) that the individual has an unfettered remit for self-determination, unconstrained by countervailing social imperatives as to the propriety of their choices. We have noted in discussion throughout the preceding chapters that this liberal ideal does not correspond to experiential reality. In developing her legitimate critique of conventional conceptions of relevant meaning-generating community, Friedman fails to attend sufficiently to equally legitimate feminist critique of the artificial model of choice assumed in prevailing ideology. Placing exclusive reliance upon the relevance of communities of will in this uncritical manner perpetuates a failure to appreciate that social discipline operates to curtail choice as to which communities human agents may or may not choose to join. Therefore, while communities of will, unlike communities of association, represent communities into which agents have expressed some desire to enter, it overstates the case to suggest that they represent thoroughly voluntary expressions of personal will.



This underlying perpetuation of liberal assumptions is further augmented by Friedman's having developed this conception of community in the dialectical form. In framing her critique within the parameters of the dialectical account, Friedman renders her thesis liable to the same problematic inferences that have troubled the theses of both Sandel and Taylor. In both instances, the conception of community that is developed remains closely tied to the epistemology and discourse of the autonomous individual that is the foundation of liberalism.<sup>71</sup> In real terms, all these theses rely upon a presupposition that agents are individuals first and community members second – after all, before one can have achieved the requisite level of agency and selfhood from which to make a 'choice' regarding which communities to attach oneself to, one must first have developed an individual locus of identity. Hence, Friedman's account is equally guilty of assuming a notion of fraternity that implies the primacy of the individual despite her expressed communitarian disclaimers in this regard.

Recognition of such shortcomings in feminist attempts to revise the dialectical approach has reverted many commentators back to the conclusion that a meaningful challenge to the polarities upon which the liberal-communitarian, individual-community debate is premised can only be lodged through a re-evaluation of the premodern conception of community. In Hekman's critique of feminist genres of dialectical communitarianism, for example, their inability to displace the modernist dichotomy between the individual and society has been heavily challenged. The significance of this inability is particular lamentable for Hekman who sees such displacement as an epistemological prerequisite of the articulation of a moral theory capable of accommodating the different moral voices with which feminism is concerned.<sup>72</sup>

Hence, despite merited attempts at revision of the dialectical genre of communitarianism, feminist commentators have generally continued to find

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<sup>71</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra Preface, Note 24, p. 59

inherent in such approaches an unsatisfactory allegiance to the dichotomies of liberalism. That said, however, it should be noted that the criticism made by Friedman in regard to the communitarian tendency to uncritically adopt communities of necessity remains legitimate whether our method of resolution is dialectical or premodern. Her concern with the kinds of community adopted by communitarian theory as relevant and meaning-generating illustrates well an arena of significant friction between the feminist and communitarian projects more generally. In latter stages of this chapter, we will return to an examination of this issue in order to determine whether feminist accounts can overcome the obstacles thus presented to affiliation with communitarianism. Before going on to set the scene within which this problematic interaction re-emerges, however, we ought first to examine the attempts that have been made by feminist theory to re-develop the premodern conception of community which has largely been attributed to Alasdair MacIntyre.<sup>73</sup>

### *Feminism and Premodern Communitarianism*

In the premodern conception of community developed by MacIntyre, a more serious alternative to liberalism can be identified. MacIntyre's approach (although not without its flaws) constitutes a genuine rejection of liberalism and modernism in that it more meaningfully transcends the polarities of Enlightenment thought and seeks to reject the notion of 'fraternity' that stands unaltered in the dialectical thesis. Abandoning altogether the notion of a 'core' transcendent self as a mere fiction of modernity, MacIntyre seeks a far more revolutionary alteration to prevailing perceptions of subjectivity and agency. His thesis of the narrative self lays particular emphasis upon the fact that identities are developed first and foremost by the place of the agent within certain meaning-generating and hierarchical communities. His insistence upon the primarily socially-situated nature of the human self offers welcome support to the critique of feminist

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<sup>72</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24

<sup>73</sup> MacIntyre, A. *After Virtue & Whose Justice, Which Rationality?*, Supra. Chapter Four, Note 52

commentators who have alleged that the connected and gendered role of women has had a profound effect upon the development of conceptions of 'female identity' and female autonomy.

While such affinities have encouraged an increasing tendency amongst feminist commentators to appropriate selectively aspects of MacIntyre's thesis in support of their own claims regarding relational subjectivity and socially constructed identities, significant obstacles to a closer association between feminism and this genre of communitarianism remain. One of the most commonly expressed feminist concerns relates to the strong reliance that MacIntyre places upon the network of virtues developed by Aristotle.<sup>74</sup> Although it has been argued that there is nothing in such virtue ethics which renders them inherently sexist, the troubling fact for feminism remains that the narratives and virtues upon which MacIntyre's thesis are developed constitute a discourse within which only one script is written for women.<sup>75</sup> That script confirms the social requirements of reproduction and nurturance. Our discussion in Chapters Two and Three of the harmful effects that such scripted expectations can have upon the lived experiences of women in specific contexts (legal and otherwise) should serve as a stark illustration of why such tendencies ought to ignite feminist concerns. Without the aid of feminist revision to eradicate such oppressive expectations, this species of communitarianism is likely to be of little real help in the pursuit of alternative conceptions of female (and male) identity.

In our previous discussion of MacIntyre, we noted the problematic hierarchical nature of his conception of community and we noted that in many respects this inherent hierarchical conservatism could likewise be attributed to his reliance upon the virtue ethics tradition originating in the work of Aristotle.<sup>76</sup> Inherent in the

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<sup>74</sup> Nussbaum, M. "Non-Relative Virtues : An Aristotelian Approach" in Nussbaum, M. & Sen, A. (ed.) *The Quality of Life*, Supra. Preface, Note 22, p. 243

<sup>75</sup> Deslauriers, M. "Sex and Essence in Aristotle's *Metaphysics* and Biology" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle* (1998) University of Pennsylvania Press, p. 139

<sup>76</sup> Harraway, D. "Situated Knowledges", Supra. Chapter Five, Note 103, p. 592

ethical frameworks of both Aristotle and MacIntyre is the notion that the human self originates from a specific place in the social and communal order. These social and communal orders are therefore hierarchically organised on the basis of whatever characteristics are deemed virtuous. Within Aristotle's thesis women were eternally relegated to the lower levels of the hierarchy because of their perceived inability to exercise the capacities central to the achievement of a virtuous life.<sup>77</sup> While MacIntyre has improved upon this position through his concession that individuals may be able to move beyond the limitations of their social 'starting platform' in their search for virtue, his reluctance to develop that concession further has alerted justifiable feminist concern. Indeed, given the pervasiveness of the ranking tendencies of Aristotle (and the premodern species of communitarianism built upon the foundation of Aristotelian virtue ethics), many have expressed surprise that feminists should find anything of interest or utility in the premodern account.<sup>78</sup>

Nonetheless, despite such feminist concerns regarding reliance upon Aristotelian virtue ethics, there has been a significant contemporary drive amongst premodern communitarians to define and promote a specifically Aristotelian approach to ethics, and many feminist commentators have lent their support to this.<sup>79</sup> Amongst the most celebrated exponents of such a women-friendly redevelopment is Martha Nussbaum.<sup>80</sup> Refusing the dichotomous framework implicit in the dialectical approach, Nussbaum seeks an ethical theory that rejects any simplistic opposition between universalism and particularism. In thus seeking to transcend the dichotomies of modernist thought, Nussbaum appeals to the premodern conception of community. We have noted above that this premodern thesis represents an

<sup>77</sup> Aristotle, *Nicomachean Ethics* VII 9, 1160b 32-74

<sup>78</sup> Modrak, D. "Aristotle's Theory of Knowledge and Feminist Epistemology" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 93

<sup>79</sup> Aristotle, *Politics* I 5, 1254a 21-3. Discussed in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 171

<sup>80</sup> Nussbaum, M. "Human Functioning and Social Justice : In Defence of Aristotelian Essentialism" & "Equity and Mercy" , Supra. Chapter Six, Note 42. See Also "Virtue Revived" (1992) *Times Literary Supplement* 3<sup>rd</sup> July, 9, Supra. Chapter Four, Note 39 & *Love's Knowledge – Essays on Philosophy and Literature* (1990) Oxford University Press

attempt within communitarianism to move beyond the dualistic and polarised assumptions that have weakened other species of communitarian critique. Pursuing a similar methodological aim, Nussbaum has argued for the existence of a link rather than a polarity between universal normative principles and contextual factors. In defining the nature of that link, Nussbaum has relied heavily upon the works of Aristotle and in so doing has rendered her support to the project of premodern communitarianism.

In *The Fragility of Goodness*,<sup>81</sup> Nussbaum explains the peculiarity of the Aristotelian ethical position through its comparison with Socratic ethics. Where Socratic ethics necessitate a definition of virtue that entails abandonment of responsive intercourse with others, resulting in the production of an ethical code that is individualistic, abstract and disembodied, Nussbaum defines Aristotelian ethics as recognising the fragility of human love in its central position within human ethical life and achievement of happiness.<sup>82</sup> Hence, Nussbaum suggests that Aristotelian ethics produce an ethical code that is neither universalistic nor particularistic, neither individualistic nor communal, and perhaps most importantly of all is not a compromise between either of these opposing poles.

In her latter work, *Love's Knowledge*,<sup>83</sup> these themes become more pronounced. Explaining in more detail the nature of the resultant Aristotelian ethical code, Nussbaum places specific emphasis upon the concept of 'perception' that she considers central to the premodern virtue ethics tradition.<sup>84</sup> The concept of 'perception' constitutes the ability to discern accurately and responsively the salient features of one's particular situation and context. Nussbaum maintains that such Aristotelian particularism provides a contrast to the dominant tradition in moral philosophy while simultaneously escaping the pull of the dichotomous liberalism-communitarianism debate through its continued ability to encompass normative

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<sup>81</sup> Nussbaum, M. *The Fragility of Goodness*, Supra. Preface, Note 22

<sup>82</sup> Nussbaum, M. *The Fragility of Goodness*, Supra. Preface, Note 22, p. 195

<sup>83</sup> Nussbaum, M. *Love's Knowledge*, Supra. Chapter Six, Note 80

<sup>84</sup> Nussbaum, M. *Love's Knowledge*, Supra. Chapter Six, Note 80, p. 37

principles of broad applicability. In developing the virtue of 'perception' therefore, Nussbaum alleges that the human agent develops the capacity to see oneself simultaneously both as a unit in a broader (perhaps even universal framework) and as a specific identity with contextual attachments and affinities. Perception, when actualised completely, seems to avoid occupying the terrain of compromise between universalism and particularism because it offers the possibility of being simultaneously both universal and particular, and as such encompasses the whole spectrum rather than the terrain of middle-ground.

In this regard, Nussbaum's expectations of the concept of perception bear strong similarity to Aristotle's expectations regarding what constitutes good practical judgement. Aristotle has argued that such judgement ought to be informed by a detailed understanding of the whole history and context of the problem, including the specific characteristics of the agents involved. Hence, general rules alone cannot offer useful guidance in particular situations. On the other hand, however, Aristotle has also recognised that in approaching a particular context, a good judge is trying to fix in and for that context a general view of the human good that is applicable to all human beings in all places and times, by virtue of their human similarities. Aristotle's view thus is particularistic without falling prey to the practical difficulties of relativism.<sup>85</sup>

The balance of the particular with the general that Nussbaum finds in Aristotle's work represents the first arena of parallel concern that she suggests ought to unite feminism and the premodern communitarian thesis that builds upon Aristotle's ethics.<sup>86</sup> Feminist critique has long-since struggled to find the mechanisms by which to encourage a communal voice for the articulation of women's gender-specific suffering without marginalising the particular claims of individual women and without advocating an essentialised perception of womanhood. The disjunction

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<sup>85</sup> Nussbaum, M. "Aristotle, Feminism and Needs for Functioning" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 253

between the feminist political agenda that requires communal affiliation and broad applicability and the feminist ethical agenda that requires attention to particularity and context has provided the impetus for internal critique and external confusion within feminist theory. Nussbaum's suggestion that feminism ought to re-evaluate their position in regard to Aristotle to help remedy this dilemma should, therefore, be given serious consideration. If she is correct in her claims regarding the ability of Aristotelian ethics to transcend polarities and to attend to the universal and the particular simultaneously, then feminism certainly has something to learn from Aristotle and the premodern communitarian account.

While significant, this presents only one of the advantages that Nussbaum suggests could be offered to feminist theory through a re-evaluation of their position in regard to Aristotle and in regard to the neo-Aristotelian virtue ethics tradition that has provided the impetus behind the premodern communitarianism of MacIntyre. Another potential advantage to which Nussbaum draws our attention relates to Aristotle's thesis in regard to the rationality of the emotions.<sup>87</sup> In the *Rhetoric*, Aristotle offers a subtle analysis of emotions such as anger, fear and pity to suggest that their base is found in certain belief judgements that justify their recognition as playing a crucial role in an individual's rational response to life contexts and dilemmas.<sup>88</sup> In short, Aristotle has argued that a human agent cannot think or act virtuously (and implicitly, therefore, rationally) without also being possessed of the passions appropriate to the situation. In so doing, Aristotle has initiated a strong philosophical justification for treating emotions as rational and therefore relevant in the sphere of legal and moral decision-making. In developing their conceptions of narrative and virtue, premodern communitarian theorists have likewise placed heavy emphasis upon the rationality of emotions. Should feminist theorists seek to

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<sup>86</sup> This claim has been mirrored by Hirschmann, L. "The Book of A" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 202

<sup>87</sup> Nussbaum, M. "Aristotle, Feminism and Needs for Functioning" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 250

<sup>88</sup> Aristotle, *The Rhetoric*. Discussed by Nussbaum, M. in *The Fragility of Goodness*, Supra. Preface, Note 22, p. 307 – "Far from seeing them as obstacles to good reasoning, Aristotle makes proper passivity and passional responsiveness an important and necessary part of good deliberation."

build upon this premise, they would become equipped with a strong counter-claim with which to challenge the liberal assumption (attributable to Kant<sup>89</sup>) that emotionality is antithetical to rationality and ought to be disregarded in making legitimate use of one's autonomy.

The defence of the rationality of emotions initiated in Aristotle's work and developed in the virtue ethics framework of premodern communitarianism makes a significant contribution to feminist theory in terms of adding strength to their experiential claims that emotionality constitutes neither a weakness of spirit nor an indulgence best left to the 'private sphere'. Indeed this defence of the rationality of emotion offers the potential for a redistribution of value to both rationality and emotionality and for the logical inclusion of emotional motivation within the frameworks of agency and consent. This has a profound implication at a variety of levels for a feminist movement which has long-since acknowledged that women are generally socialised to be more emotional than men, and that this female propensity for greater emotionality has often been used against women to justify their exclusion on the basis of their deficient powers of rationality. Furthermore, in terms of the immediate project of this thesis, recognition of the role of the emotional in rational and legitimate decision-making and self-determination could offer a profoundly liberating effect upon the experiential account of female subjectivity and could present the opportunity for a far more meaningful medium of consent.

The third and final arena of common concern highlighted by Nussbaum relates to the premodern challenge upon the traditional dichotomy between personal separateness and communal affiliation.<sup>90</sup> Although Aristotle recognises some inherent degree of separation amongst individuals, to the extent that they must be free to reflect upon and choose their own life plan, he also acknowledges that

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<sup>89</sup> See Discussion in Chapter Four – "Who is The Subject of Enlightenment?" and "Feminist Concern About the Legal Subject"

<sup>90</sup> Nussbaum, M. "Aristotle, Feminism and Needs for Functioning" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 252



human beings are not separate in any hard or impenetrable way.<sup>91</sup> This assertion has been incorporated within the frameworks of premodern communitarianism and is manifest in their claim that the reality of human life is such that we need, love and care for one another in many ways. This resonates particularly strongly with the feminist thesis, discussed at length in preceding chapters, that the nature of human existence is not abstract and individualistic, but is rather relational and communal.<sup>92</sup> Where traditional theory has dealt with these elements of human subjectivity as though they were inherently paradoxical, the premodern reliance upon Aristotle has permitted the claim that, when properly understood, this commitment to affiliation is not in tension with a commitment to the separation of choice. Rather, the deepest and most valuable affiliations are between those persons who are both separate choosers of life plans, and who respect one another as such.<sup>93</sup>

This claim holds particular relevance for those feminist commentators who have sought to explicate the reality that we experience our selves and our choices within a network of close relationships with others that are mediated by bonds of mutual emotion. What's more, it has the distinct advantage of allowing such claims to be made while also maintaining a remit within which exercise of personal choice can still be actualised and given meaning. This latter aspect benefits feminist theory most strongly by providing a counter to those who have expressed concern that if our ethical and legal codes accept the claim that our selfhood and agency are implicated in relationship 'all the way down', we run the serious risk of dissolving the moral agent who stands before us. In providing a remit for simultaneous connection and separation, the Aristotelian account relied upon by MacIntyre provides a means for feminism to challenge the neo-Kantian rhetoric of abstract individualism while also maintaining a legitimate scope for the exercise of agency.

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<sup>91</sup> Nussbaum, M. "Aristotle, Feminism and Needs for Functioning" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 252

<sup>92</sup> See Discussion in Chapter Four, "Feminist Concerns about the Legal Subject"

Despite the foregoing promises from Nussbaum, a number of feminists have retained their scepticism regarding the possibility of such a feminist re-vitalisation of premodern Aristotelian ethics.<sup>94</sup> Although Nussbaum has made claims to be changing the face of Aristotelian ethics to make them more women-friendly while simultaneously standing true to the original impetus behind Aristotle's ideals,<sup>95</sup> many feminists find the whole Aristotelian tradition so fundamentally objectionable that all attempts to build upon its foundations are unacceptable. Such feminist critique has essentially centred around two main concerns. We will look at each of these in turn because they relate not only to Aristotle's ethics, but also to that whole school of virtue ethics and premodern communitarianism that relies so heavily upon a return to neo-Aristotelian premises.

The first criticism relates to the inherent sexism explicitly laid bare in Aristotle's own work. According to Aristotle, the ultimate human function is rational activity in accordance with the good. However, as we have mentioned above, he also suggests that women are not fully rational and are deficient in the rational capacities by comparison to men.<sup>96</sup> Since, according to Aristotelian ethics, true virtue and human flourishing depend upon the exercise of one's rational capacity in an excellent manner, women are necessarily excluded from both virtue and flourishing by their very nature. Hence, the role that Aristotle scripts for women is one under the rule of men, singularly devoted to their service and care. For feminist critics of Aristotle, manifestations of such blatant sexism simply cannot be treated as a peripheral element within his work. On the contrary, the centrality of his patriarchal assumptions to his overall ethical theory must be highlighted. Having done so, it should become apparent that reliance upon the work of Aristotle in any capacity is as ludicrous an option for feminism as is reliance upon the work of any other blatantly misogynistic philosopher.

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<sup>93</sup> Aristotle, *Nicomachean Ethics* VIII.1156b8-1158a1

<sup>94</sup> Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75

<sup>95</sup> Nussbaum, M. *Virtue Revisited*, Supra. Chapter Four, Note 39

<sup>96</sup> Aristotle, *Politics I* 5, 1254b 5-19. Discussed in Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 174

Susan Moller Okin has built upon that critique to argue that Aristotle's account of human nature, relying as it does upon the notion of function, is inherently hierarchical and forces human relationships into oppressive moulds because of the reliance it places upon the perpetuation of the hierarchical traditions of the virtuous community.<sup>97</sup> It has often been argued that a similar sexist conservatism plagues the contemporary school of premodern communitarianism that seeks to adopt a generally Aristotelian account of rationality and the virtues. MacIntyre's reliance upon the Aristotelian assumption, that only those who have been properly brought up in allegiance with the prevailing rules which structure society will be suitable candidates to engage in moral reflection,<sup>98</sup> has already been criticised for its tendency to build conformity with tradition into any account of rational deliberation in ethics.<sup>99</sup>

From the feminist perspective, of course, any ethical dogma that actively seeks to protect and cement a tradition that has been characterised by exclusion is highly problematic.<sup>100</sup> As a recurring theme within our discussion of the relationship between feminism and communitarianism, it seems that this issue of inherent sexism has proven difficult to overcome altogether. The issue for feminist commentators to determine must be whether those aspects of Aristotelian ethics that seem profitable for feminist theorising can be distinguished from his undesirable presuppositions about the abilities of the female gender. For those feminists who believe this to be the case, the further issue must be whether the advantages to be gained from a selective incorporation of Aristotelian ethics are sufficient to justify this kind of selective blindness.

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<sup>97</sup> Okin, S. *Women in Western Political Thought* (1979) Princeton University Press, Chapter Four. Discussed in Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 175

<sup>98</sup> Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 176

<sup>99</sup> Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 175-6

In determining the answer to those questions, feminist theorists ought also to devote attention to a second arena of criticism that has been lodged at the premodern Aristotelian framework. This criticism relates less to the objectionable nature of the specific content of his ethics in regard to the conception of women he employs, and more to the political structure his theory necessarily produces. We have noted elsewhere that Aristotle's ethics are perfectionist, and as such incorporate a necessarily hierarchical conception of politics that is essentially at odds with the general feminist rejection of hierarchies and imbalances of political power.<sup>101</sup> Where feminist methodology has sought to explicitly renounce the use of hierarchical forms of organisation, MacIntyre's premodern communitarianism has relied heavily upon such hierarchical forms to legitimate its foundations.

Placing those people deemed more capable of virtuous conformity in positions of control over those deemed less capable, and therefore less fully human, it cannot be disputed that Aristotle's ethical framework is intrinsically hierarchical. However, this does not necessarily present an obstacle to the development of Aristotelian ethics within a feminist campaign. In an attempt to defend Aristotle against precisely this genre of critique, Groenhout makes the point that the question of whether any and all hierarchies are objectionable is separate from the question of whether a particular hierarchy is objectionable.<sup>102</sup> On that basis, Groenhout suggests that the locus of feminist concern with hierarchy lies not so much in a general concern to obliterate the logic of hierarchy, but rather only to deconstruct those forms of hierarchy that have encouraged the subjection of women and the perpetuation of phallocentrism. The concept of hierarchy is, Groenhout argues, necessary to allow the possibility of making value judgements, and of evaluating

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<sup>100</sup> Frazer, E. & Lacey, N. (ed.) *The Politics of Community*, Supra. Chapter Two, Note 84. Discussed in Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 176

<sup>101</sup> Aristotle, *Politics I* 5, 1254a 21-3. Discussed in Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 171-2

<sup>102</sup> Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 177

some societies, or some humans, or some abilities to be better than others<sup>103</sup>. These are distinctions that many feminist theorists would wish to make and thus feminists should be hesitant about rejecting all hierarchies out of hand.

That said, however, Groenhout accepts that it remains appropriate for feminist theory to critically examine the criteria and content of all hierarchies that are discovered to remain vigilant against the perpetuation of prejudice. While it may, on that basis, be fair to say that the criteria employed by Aristotle's hierarchical framework are less than satisfactory, this does not preclude the possibility of revision of those criteria towards the recognition of a more agreeable framework. In Groenhout's opinion, the fact that the criteria employed by Aristotle in the delineation of his hierarchy are (perhaps as a product of his time) misguided and misogynistic, does not mean that feminist theorists should automatically abandon the possibility of reformulating those hierarchies in a more compatible form.

These criticisms represent important arguments in regard to the potential alliance between Aristotle and feminism upon which feminist appropriations of premodern communitarian theory are necessarily parasitic. However, neither species of criticism seems entirely conclusive. In terms of the first critique, it seems that the possibility of treating Aristotle's sexism as peripheral cannot be altogether obliterated despite the legitimacy of the concerns expressed by more sceptical feminist commentators. Likewise, in terms of the second critique, Groenhout's argument makes a convincing case for not abandoning out of hand the notion of hierarchy and the possibility of a reformulation of Aristotelian frameworks in a less objectionable manner. So long as these possibilities remain open, we cannot *prima facie* dismiss the potential for a convincing revision of Aristotelian ethics along lines that are not only compatible with feminism, but also supportive of it. Furthermore, we cannot on these grounds dismiss the possibility of an enduring allegiance between feminism and premodern communitarianism.

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<sup>103</sup> Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra.

### *Nussbaum's Reformulation of the Premodern Account*

Throughout this chapter, we have generally heralded Nussbaum as being the foremost proponent of the potential for allegiance between feminism and the Aristotelian ethics that form the foundation of premodern communitarian theory. As an indicator of the general trend of such feminist theorising, the remainder of this chapter will be dedicated to gauging the success of Nussbaum's enterprise and to evaluating the merits and demerits of her thesis. It is possible to isolate two significantly problematic areas within Nussbaum's theory. These have been intelligently brought to light and examined by Susan Hekman in *Moral Voices, Moral Selves*.<sup>104</sup> In what follows, we will examine each area in turn.

The first problem that Hekman draws our attention to relates to the continued polarisation inherent in Nussbaum's work. Although Nussbaum claims to revise the communitarian and Aristotelian conception along lines that avoid traditional polarities of thought, aspects of her thesis continue to pay credence to precisely such dichotomies. Most notably, her entire argument is cast in terms of the absolutist – relativist dichotomy characteristic of modernist approaches to moral philosophy.<sup>105</sup> Essentially her thesis sets out to defend Aristotelian ethics against charges of relativism by proposing that his attention to particularity and to the concrete does not preclude the possibility of a universalisability within his work. In an attempt to justify this claim, Nussbaum defines her position as one of 'internal realism' – i.e. she claims to subscribe to the thesis that although reality is not given to us independently of our moral convictions, within the world as perceived and interpreted by human beings, it is still possible to discern universal truths.<sup>106</sup> Hekman suggests that in feeling the need to take a stance on this issue, Nussbaum has made her claim self-defeating.

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Chapter Six, Note 75, p. 178-9

<sup>104</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 39 ff

<sup>105</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 39

Despite making the claim to be presenting an alternative to modernist moral theory, Nussbaum clearly simultaneously feels herself confined by the epistemological parameters of that theory (specifically the absolutist – relativist dichotomy). This has significant implications in terms of our assessment of the first of Nussbaum's claims for affiliation between feminism and Aristotle. Central to Nussbaum's theory has been her assertion that Aristotle's ability to transcend polarities of modernist thought not only justifies the project of premodern communitarianism but also encourages an affinity between that project and feminism. However, if Hekman is correct in her assertion that both Aristotle's and Nussbaum's theses fail to transcend polarities in the way that Nussbaum claims, then Nussbaum's first argument in favour of a feminist reliance upon Aristotle is undermined. What's more, the advantages that the premodern communitarian thesis has claimed over its dialectical counterpart are necessarily called into question.

In seeking a philosophical position that avoids the inadequacies isolated within the dialectical genre, Hekman argues that feminism may also have to move beyond the premodern conception initiated by Aristotle. To encourage feminist theorising in that enterprise, Hekman has offered implicit support to an alternative and contextual conception of moral theory that will be examined in detail in the following chapter. One of the main advantages that will be claimed in favour of this contextual thesis lies in its ability to meaningfully transcend the epistemological confines of the dichotomies inherent in modernist thought in the way in which Nussbaum's premodern theory can only superficially claim to do.<sup>107</sup>

The second shortcoming highlighted by Hekman once again relates not only to Nussbaum's own thesis but also to the theses of her fellow premodern Aristotle followers (including MacIntyre). Hekman suggests that this whole line of thought tends to ignore the important issues of power and the hegemony of dominant moral

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<sup>106</sup> Nussbaum, M. *Love's Knowledge*, Supra. Chapter Six, Note 80, p.223-4

<sup>107</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 40

discourses.<sup>108</sup> One of the principal themes to unite disparate members of such neo-Aristotelian theory has been the claim that ethical systems are specific to particular cultural and social settings. Nonetheless, such theories have consistently failed to explore the hegemonic forces that operate to establish the dominant ethical systems within any cultural setting. Although they argue for a particularised approach to the constitution of morality, Nussbaum and her allies fail to problematise the dynamics that have operated to construct the community that they idealise. This criticism relates not only to the kinds of community celebrated by traditional communitarian approaches (i.e. those of state, nation, family, etc.) but at a more fundamental level to their uncritical acceptance of the dominant claims of that larger community in the first place.

By assuming that only one moral discourse is voiced in a given community, both Nussbaum and MacIntyre in their development of Aristotelian ethics have ignored the hegemonic forces that have structured that discourse.<sup>109</sup> This is a failure illustrated by Foucault in his discussion of such theory. Foucault consistently demands that we must always question what 'we' means when it is used in reference to ethical frameworks.<sup>110</sup> In the genre of thought developed by MacIntyre and Nussbaum, the 'we' often referred to is simply the dominant moral discourse within the community. Uncritically appealing to this 'we' in the way that Nussbaum and MacIntyre have done perpetuates existing power relationships. The significance of that criticism in terms of feminist theorising is considerable. We have discussed at length in preceding chapters of this thesis the need for feminist theorising to critically evaluate issues of power and power distribution within social contexts. The failure of premodern communitarian theory to question the communal voice deemed dominant in a particular context constitutes a potentially dangerous omission within its methodology.

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<sup>108</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 40

<sup>109</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 61

<sup>110</sup> Rabinow, P. *The Foucault Reader*, Supra. Chapter One, Note 73, p. 385



In *The Quality of Life*,<sup>111</sup> Nussbaum does appear to go some way towards recognising the deficiency of this oversight. Indeed, she explicitly states that past writers on virtue, including Aristotle, have lacked sensitivity to the ways in which different traditions of discourse structure experience. She goes so far as to suggest that “The Aristotelian should begin...by granting that with respect to any complex matter of deep human importance, there is no ‘innocent eye’, no way of seeing the world that is entirely neutral and free of cultural shaping.”<sup>112</sup>

This may seem to suggest an important concession in Nussbaum’s work that opens the way for consideration of hegemonic power and the effect that it has upon the experience of the singular voice of the community. However, Nussbaum’s critical zeal stops here. No discussion is afforded to the implications upon her overall thesis of carrying this recognition of social constructionism to its logical limits. Perhaps the reason for this omission lies in the fact that conjecture along this line would prove highly damaging, removing the simplistic reliance upon unitary community which is central to her own and MacIntyre’s thesis.

This suspicion has been confirmed to some extent by Nussbaum’s treatment of similar issues within her recent work, *Sex and Social Justice*.<sup>113</sup> To her credit within this work Nussbaum seeks to devote significantly more attention to the issue of hegemonic power forces that has been lacking in her material to date. While this development is welcome in some respects, the effect that it bears upon the overall tone of her claims within the book suggest that she has indeed encountered difficulties trying to reconcile this new awareness alongside her previous communitarian leanings. In attending to the particularity of community at the micro as well as macro level, *Sex and Social Justice* finds itself struggling for criteria with which to delineate communal concerns. In attending to issues of the

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<sup>111</sup> Nussbaum, M. “Non-Relative Virtues : An Aristotelian Approach” in Nussbaum, M. & Sen, A. (ed.) *The Quality of Life*, Supra. Preface, Note 22

<sup>112</sup> Nussbaum, M. “Non-Relative Virtues” in Nussbaum, M. & Sen, A. (ed.) *The Quality of Life*, Supra. Preface, Note 22, p.260

<sup>113</sup> Nussbaum, M. *Sex and Social Justice* (1999) Oxford University Press

management of power forces *within* the constitution of a communal discourse, Nussbaum recognises that her theory can no longer rely upon the singular and one-dimensional communal voice that communitarianism's superficially context-specific theory has tended to attribute to a particular community. Dealing consciously with issues of sub-cultures within society, Nussbaum has been forced in her most recent work to recognise the superficiality of the means through which communitarian theory has generally sought to attribute communality.

However, recognition of the hegemonic power forces of the micro level leads Nussbaum into an uncomfortable dilemma – committed to the development of theory that attends to both the particular and the universal, the question becomes one of how to incorporate this recognition without encouraging a disintegration of theory into relativism. In struggling to achieve this aim, Nussbaum has somewhat out of hand rejected her communitarian position in favour of a re-evaluation of the liberal tradition. Indeed, within the book, Nussbaum goes so far as to state that “this volume is therefore centrally shaped...by the tradition of Kantian liberalism represented, today, in the writings of John Rawls.”<sup>114</sup>

While this change of position may be unexpected, it is certainly not surprising. What it illustrates most clearly is the basic tension between standard communitarian theory and recognition of the effects of structural power forces that operate behind the scenes of even the most particularist and context-specific ‘communal’ voice. The turn towards liberalism in Nussbaum's recent work is best explained by her dawning recognition of the significance of the oversights regarding hegemony inherent in the communitarian position and the tension which this recognition has generated with her commitment to the confines of the absolutist – relativist dichotomy discussed above.

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<sup>114</sup> Nussbaum, M. *Sex and Social Justice*, Supra. Chapter Six, Note 113, p. 23-4

Although the implications of this oversight may have been less damaging for MacIntyre in the development of his ethical enterprise, for Nussbaum (writing as a feminist theorist) the implications are far graver. Exposition and destruction of the hegemonic power dynamics structuring social existence has been a well-recognised aim of the feminist movement yet Nussbaum's previous ethical approach remained ill-equipped to perform such a task. Many communities are characterised by practices of exclusion and suppression of non-group members, especially outsiders defined by ethnicity and sexual orientation.<sup>115</sup> What's more, the practices and traditions of many communities are exploitative and oppressive toward many of their own members. It has been the avowed project of feminism to illustrate the existence of such oppressive mechanisms and to challenge their legitimacy. Nussbaum's original Aristotelian thesis, however, demanded blind complicity to the demands of such power networks and normative requirements on the basis of their continued privileged status as the dominant cultural expression. Feminist theory is necessarily rooted in recognition of the need to challenge those traditions and practices which show arbitrary gender differentiation – many of these are located in just the sorts of communities invoked by communitarians. As Friedman notes, "any political theory that appears to support the hegemony of such communities and which appears to restore them to a position of unquestioned moral authority must be viewed with grave suspicion."<sup>116</sup> Recognising the merits of this critique, Nussbaum has sought to redevelop her position to accommodate its insights. In doing so, however, she has felt compelled to divest herself of many of her original premodern Aristotelian leanings and to replace them with a strong liberal influence.

While Nussbaum's recent position offers an improvement in terms of ensuring a greater recognition of the important role of power forces, in many respects it is also a considerable blow to those feminist theorists who have persistently maintained the merits of a feminist reliance upon communitarianism. We have discussed at

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<sup>115</sup> Friedman, M. "Feminism and Modern Friendship", *Supra*. Chapter Six, Note 50, p. 281. See also Young, I. "The Ideal of Community and The Politics of Difference" (1986) *12 Social Theory and Practise*

length in Chapter Four the nature of feminist concerns regarding liberalism and the liberal legal subject. By substantially flying in the face of such concerns, Nussbaum's dramatic return to liberalism ought to generate some concern. What she has gained in terms of recognition of the important factor of hegemonic power forces, she has lost in terms of the benefits she had convincingly portrayed in favour of reliance upon the situated self of communitarianism.

The fact that this is the end result of Nussbaum's attempt at reconciliation of premodern communitarianism and the existence of hegemonic power forces in given communities does not necessarily imply, however, that this is the only possible outcome of such reconciliation. While Nussbaum's philosophical options have been constrained by her implicit self-confinement within the polarities of the absolutist – relativist dichotomy, such that a return to liberalism has been necessitated by her desire to avoid relativism in the incorporation of issues of hegemony, other theorists who have more genuinely transcended these modernist dichotomies suggest the existence of a considerable scope within which to incorporate a critical attitude to power relations into the communal concerns highlighted over the duration of this chapter. What the discussion of Nussbaum's recent work illustrates is that this incorporation is far from simplistic. However, recognition of the difficulties involved in the project does not imply that feminist theory should abandon its attempts at reconciliation in the way that Nussbaum has done. Feminist critique has consistently established the liberal frameworks that Nussbaum reverts to in her latter works to be hugely oppressive and problematic. What's more, her turn to liberalism undermines the significance of the potential benefits offered to feminism by communitarianism that have been highlighted within this Chapter. These benefits are significant and the possibility for their achievement ought to be examined in a more determined manner than that proposed by Nussbaum in her latter works.

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<sup>116</sup> Friedman, M. "Feminism and Modern Friendship", *Supra*. Chapter Six, Note 50, p. 281

The role of Nussbaum in preceding discussion has been to illustrate the potential for feminist recapitulations of premodern communitarianism to remedy many of the inadequacies highlighted within the Aristotelian framework that is central to MacIntyre's thesis. The fact that Nussbaum's latter works have rejected communitarianism because of its inability to account for the role of hegemonic power does not necessarily imply that all subsequent feminist commentary ought to do the same. On the contrary, many feminist commentators have continued to highlight the potential merits of a feminist recapitulation of premodern communitarianism. Most particularly, emphasis has continued to be laid upon the relevance for feminism of Aristotle's account of the role of emotion in rationality discussed previously. Aristotle's recognition that knowledge itself is not separable from emotional engagement has allowed Lorraine Code, for example, to develop a conception of empathy as a way of knowing which emphasises that the capacity that human beings have to understand and relate to other humans is an intellectual trait as well as a 'merely' emotional response.<sup>117</sup> This has a palpable link with the well-documented feminist methodology of practical reasoning<sup>118</sup> and provides valuable legitimation to the feminist enterprise of determining an ethical model based upon values of 'care' alongside values of justice.<sup>119</sup>

Likewise, Homiak<sup>120</sup> has argued that Aristotle's account of the good life offers a useful corrective to women who too often define morality in terms of what they give to others. By providing theoretical room for the agent to be concerned about her own self-definition and self-determination (through Aristotle's discussion of the detrimental effects of humility which include lack of self-knowledge<sup>121</sup>) such women are liberated to reject other's claims upon them when to do otherwise would

<sup>117</sup> Code, L. *What Can She Know? - Feminist Theory and the Construction of Knowledge* (1991) Cornell University Press.

<sup>118</sup> For further discussion of the method of practical reasoning – See Bartlett, K "Feminist Legal Methods", *Supra*. Chapter Five, Note 85

<sup>119</sup> Gilligan, C. *In A Different Voice*, *Supra*. Preface, Note 23. See Discussion of Care Ethics in Chapter Seven for more on link between Aristotle and care ethics.

<sup>120</sup> Homiak, M. "Feminism and Aristotle's Rational Ideal" in Anthony, L. and Witt, C. (ed.) *A Mind of One's Own - Feminist Essays on Reason and Objectivity* (1993) Westview Press

<sup>121</sup> Aristotle, *Nicomachean Ethics IV 3*, 1125a 19-28

make their own self-definition impossible.<sup>122</sup> This has important consequences in terms of the dilemma discussed particularly in Chapter Three of this thesis where we noted the trend towards self-denigration often assumed to be an integral part of the social role of motherhood.

“Aristotle’s general conception of rationality exhibits many of the features contemporary feminist thinkers consider important. His account of moral reasoning also has attractive features from a feminist point of view. Feminists have criticised contemporary moral theory for its limitation of moral reasoning to the production of abstract, universal, impersonal principles, often generated by a contractual model of human relationships. Aristotle’s accounts of moral reasoning, on the other hand, offer a model that recognises the particularist nature of ethical decisions, the importance of individual circumstances and the rejection of abstract rules.”<sup>123</sup>

These illustrations of continued allegiance to the notion of an association between feminism and premodern communitarianism represent important statements about the reticence amongst many feminist commentators to abandon the beneficial insights of communitarianism out of hand. Determining a method that can re-discover these benefits, without abandoning Nussbaum’s dawning insights into the operation of power forces, will be the aim of the following chapter.

### *Conclusion*

In this chapter, we have examined the affinities and tensions between communitarianism and feminism. Most specifically, we have noted the significant parallel in concern regarding the socially embedded and constituted nature of the human self, which stands antithetically to the subject who populates the Enlightenment realm of Kantian influence. Although this has provoked a belief in the absolute compatibility of communitarianism and feminism within some commentators, we have also examined claims that on a closer inspection of both schools of theory, we can unearth many areas of potential divergence.

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<sup>122</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra Preface, Note 24, p. 181

<sup>123</sup> Groenhout, R. “The Virtue of Care” in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 183

Taking the categories of communitarian thought developed by Hekman as our foundation, we have examined the superficiality implicit in the dialectical model's uncritical reverence to the notion of 'fraternity'. What's more, we have noted that subsequent feminist re-evaluations of that dialectical model (such as that offered by Friedman) have continued to betray similar superficiality. Hence, the main focus of the latter part of this chapter has centred around the premodern conception of community, originating in the ethics of Aristotle, but most often associated today with Alasdair MacIntyre.

It is impossible to critically examine a potential link between such premodern communitarianism and feminism without also giving detailed consideration to the strong foundations of Aristotelian virtue ethics within this tradition. Unfortunately, however, the relationship between Aristotle and feminism has often been a difficult one. Nussbaum's work on Aristotle has enabled us to assess the likelihood of meaningful affinity between feminism and any version of communitarianism that remains heavily reliant upon Aristotelian ethics. In the final analysis, however, although it may be possible for a feminist reconception of Aristotle (and by implication premodern communitarianism) to redress elements of hierarchy and conservatism often found disagreeable in virtue ethics, problems continue to abound in regard to the invisibility of power dynamics within the communitarian framework.

One of the most valuable insights gleaned from the poststructuralist account that formed the body of the preceding chapter is encapsulated in that spirit of permanent critique that is necessary to enable us to invoke meaningfully any notion of communal voice. Lamentably, this critique is largely absent from communitarianism, and once brought into play calls into question the very reliance upon communal discourse that is central to the whole communitarian project. We have seen that feminist attempts to develop poststructuralism have often been crippled by the exhibition of too strong a critical zeal, which has perpetuated a

fragmented and experientially difficult account of the self. Meanwhile it seems that feminist attempts to build upon communitarian foundations have been crippled by a lack of critical analysis of the forms of community which we take as central to our identity formation and sense of self.

The dangers of such lack of critical zeal are particularly pertinent, as we have seen, in terms of feminist ethical analysis. However, our discussion of Nussbaum's recent attempt to eradicate such oversights illustrates well the difficulties inherent in making such concessions while also seeking to maintain a communitarian allegiance. Finding the conflicting impulses of such a compromise too conceptually jarring to her continued negotiations of the absolutist – relativist dichotomy, Nussbaum has abandoned her premodern communitarian roots in favour of a modified embracement of Kantian liberalism. It has been argued, however, in the previous three chapters that the Kantian model of the self-legislating, rational and individualist human subject is epistemologically inappropriate and philosophically misguided. In recognition of that critique, the majority of feminist commentators have demanded the expression of a moral theory that no longer hides behind the paradigms of liberalism and the polarities of Enlightenment, but instead offers a conception of selfhood that can be expressed outwith the shadow of the juridical. Our discussion over preceding chapters of the inadequacies highlighted by feminist critique within the liberal frameworks of subjectivity and agency should illustrate the reasoning behind the well-founded reticence of many feminist commentators to follow suit with Nussbaum in this regard.

In the following chapter, we will reevaluate the possibility of arriving at a conception of self and of self-determination that not only recognises the constitutive role of the communal and the relational but also recognises the role of hegemonic power in the determination of that communal voice. In so doing, we will seek a fluid conception of the self that offers the benefits of both Foucaultian poststructuralism and premodern communitarianism without falling prey to the



shortcomings brought to light by previous feminist attempts to build upon such 'mainstream' foundations.

## CHAPTER SEVEN

### A MODIFIED ETHICS OF CARE AND CONTEXTUAL SUBJECTIVITY

“The self in connection with others appears neither stranded in isolation screaming for help, nor lost in fusion with the entire world as a whole, but bound in an indissoluble mode of relationship that is ostensibly different but hard to describe”<sup>1</sup>

In the preceding two chapters, we have examined the attempts which have been made by certain contemporary feminists to develop the philosophical foundations established by both poststructuralism and communitarianism towards the realisation of a more progressive feminist ethics. The project of any such feminist ethics is to recognise the artificiality of the individualist notion of Kantian subjectivity, and of the imperatives of abstracted autonomy to which that subjectivity is directed. In place of this modernist paradigm, an appropriate feminist ethical position would give credence to the centrality of affective ties, social expectations and relationships in the construction of identity and would seek the epistemological ground for a more fluid version of self-determination which permits concrete rather than abstract decision-making. In examination of some of the most influential attempts at such re-directive processes, however, problems have come to light that have illustrated the existence of significant tension between feminism and the schools of poststructuralist and communitarian thought.

Although concern with the deficiencies of the Kantian subject of legal liberalism represents an important arena of united concern between these disparate schools, and although many of the insights characteristic of these schools can herald significant merit for the feminist academy, a simplistic and wholesale adoption of either of these theses has proven neither desirable nor appropriate. In the case of poststructuralism, Judith Butler’s attempt<sup>2</sup> to build upon and re-develop the Foucaultian thesis on agency in a line more compatible with feminist theory has

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<sup>1</sup> Gilligan, C. *In a Different Voice*, Supra. Preface, Note 23 (2<sup>nd</sup> ed. 1993), p.47

<sup>2</sup> Discussed in Chapter Five, “Butler’s Reformulation of Foucault”

encountered a structural fragmentalism that renders it an ineffective medium for the pursuit of the feminist movement's very real political ends. In the case of communitarianism, Martha Nussbaum's attempt<sup>3</sup> to develop the neo-Aristotelian idea of virtue ethics (upon which MacIntyre's premodern communitarianism is parasitic) has proven equally as unsatisfactory because of its continued cognisance of modernist epistemological dichotomies and because of its inability to critically examine the play of power relations in the construction of particular community's dominant discourses.

However, the failure of the attempts made by Judith Butler and Martha Nussbaum to accommodate feminist theory within the ideological frameworks of poststructuralism and communitarianism respectively cannot simplistically be attributed to any inherent incompatibilities between these frameworks. On the contrary, the work done by these contemporary feminists has gone a considerable way towards exposing the parallel concerns between these schools of theory. The shortcomings of each of their attempts can, however, be attributed in large degree to the manner in which they have likewise sought to marry their disparate schools of concern. In both Butler's and Nussbaum's project similarly flawed methodologies and ideological priorities have undermined their analyses. For differing reasons, both theories have been found to be incompatible with the original and enduring political and epistemological aims of feminism as a movement. In both contexts, the end result of theorising has been the debilitation, at least to some extent, of feminism's power to attend to its aims and concerns.<sup>4</sup>

Despite significant arenas of parallel concern and resonant arguments, therefore, it seems that more is required from a feminist conception of agency and self than can be afforded by feminist modifications upon pre-existing poststructuralist and communitarian positions. Nonetheless, it remains the case that much of great

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<sup>3</sup> Discussed in Chapter Six, "Nussbaum's Reformulation of the Premodern Account"

import can be discerned through the employment of a process of selective incorporation of specific poststructuralist and communitarian insights. Within the confines of this chapter, it will be argued that the benefits of this process of selective incorporation may remain an achievable end. However, a preliminary to the satisfaction of that end is the re-evaluation of a dedicated feminist ethical framework that will form the basis upon which alternative 'mainstream' insights may be grafted. We must remain vigilant in ensuring that, in our clamour to borrow theory from alternative bodies of thought, we do not trample over well-established feminist foundations. The surest way to ensure compliance with that caveat is to base our incorporation of poststructuralism and communitarianism on a pre-existing feminist base. Illustration of the merits of this approach, both in general terms, and in terms of the implications for our critique of consent, will form the body of this chapter. While Butler and Nussbaum graft feminist thought onto the mappings of different schools of mainstream theory, it will be argued here that we should be developing feminist ethics with different priorities in mind.

In Chapter Four of this work, we examined in some detail the primary claims of the feminist critique of the Kantian subject and have drawn attention to the characteristics of subjectivity that an adequate feminist theory of the self would seek to accommodate. Within the confines of this chapter, we will examine in more detail what many have considered to be the most celebrated feminist attempt to theorise upon alternative conceptions of the self, namely the notion of care ethics originating in the works of developmental psychologist Carol Gilligan.<sup>5</sup> In so doing, we will draw attention to the inadequacies that have plagued this 'pure' feminist framework of critique and we will examine the extent to which these inadequacies can be remedied by selective incorporation of poststructuralist and communitarian insights. The end result of this process will give rise to the creation

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<sup>4</sup> The feminist aims and concerns referred to relate to the skeletal agenda for feminist theory highlighted at the outset of this thesis and explained most clearly in the work of Jaggar, A. "Feminist Ethics" in Becker, L. & Becker, C. (ed.) *Encyclopedia of Ethics* (1992), Supra. Preface, Note 7, p.361

<sup>5</sup> See, for example, Freeman's commentary on Feminist Thought in *Lloyd's Introduction to Jurisprudence* (1994) Sweet & Maxwell, Chapter 13.

of a stronger, more experientially appropriate conception of the self that, unlike those conceptions discussed in the preceding chapters, has been designed specifically to meet the feminist moral, legal and ethical agendas accepted at the outset of our discussion.<sup>6</sup>

This approach of grafting poststructuralist and communitarian insights onto an established core of feminist theory of the self offers the most progressive potential for feminist ethics. Selective incorporation within a feminist framework will continue to enable a reliance upon valuable poststructuralist and communitarian insights while also allowing us to escape the double-bind of too strong a reliance on these genres of thought which has led to the weakness exhibited by the positions developed in both Chapters Five and Six. Furthermore, in employing such eclectic methodology we will be able to remedy many of the inadequacies that have traditionally plagued such 'pure' feminist theories of the self.

### *Feminism and Developmental Moral Theory*

Carol Gilligan's influential work, *In a Different Voice*<sup>7</sup>, has been utilised in feminist debate for its support of a variety of assertions. Her relevance to the current discussion can be located specifically within her claims in relation to the alleged differences that her research has uncovered between the traditional development of male and female morality. Recognition of the existence of this differential has prompted Gilligan to set up opposing models of gendered psychological development – these have been referred to as an 'ethics of justice' and an 'ethics of care'.<sup>8</sup> Although, as we shall see, many of the assertions that Gilligan makes have generated justifiable criticism, subject to some necessary modifications her work continues to offer strong potential for the development of an experientially appropriate and philosophically enriched conception of human subjectivity (both male and female).

<sup>6</sup> See Discussion in Preface and also Chapter Four, "Feminist Concerns about the Legal Subject"

<sup>7</sup> Gilligan, C. *In a Different Voice*, Supra. Preface, Note 23.

<sup>8</sup> Gilligan, C. *In a Different Voice*, Supra. Preface Note 23, p. 63

The principal motivation behind Gilligan's project was to question the model of psychological development originating in the work of Lawrence Kohlberg.<sup>9</sup> According to this Kohlbergian paradigm, female moral development arrests at an earlier stage than male moral development. Hence the reason why men are inherently more capable of autonomous decision-making and meaningful operation in the public and legal sphere and why women are inherently more suited to the confines of the private sphere and the lifestyle it promotes. Gilligan's work has sought to challenge these conclusions by questioning the implicit assumptions about the context of completed moral development that informs Kohlberg's model. Kohlberg's theory is based on the notion that completed moral development is exemplified by a subject's mastery of the life skills of autonomy, rationality and free will. Gilligan notices, however, that these are also the skills that have been epitomised as characteristic of male subjectivity and the public realm. Those characteristics that typify traditional female subjectivity are nowhere to be found in Kohlberg's model. Gilligan seeks to redress the imbalance produced by this cultural bias through examination of alternative models of moral coherence which accept the significance of life skills of care and nurturance, and which no longer uncritically take reason, determinism and formalism to be paradigmatic. As Gilligan herself explains her project –

“Theories of psychological development and conceptions of self and morality that have linked progress or goodness with disconnection or detachment and advocated separation from women in the name of psychological growth or health are dangerous because they cloak an illusion in the trappings of science: the illusion that disconnection or disassociation from women is good.”<sup>10</sup>

This genre of critique of the Kohlbergian tradition in moral theory parallels in many senses the critique that we have examined in preceding chapters in relation to the universalist neo-Kantian ethical model of subjectivity. Reiterating Sandel's concern that a polity based only on the procedural and judicial model of human relationships would lack any serious depth of identity,<sup>11</sup> Gilligan has reported her

<sup>9</sup> Kohlberg, L. *The Philosophy of Moral Development*, Supra. Chapter Four, Note 90

<sup>10</sup> Gilligan, C. *In a Different Voice*, Supra. Preface, Note 23, xxvii

<sup>11</sup> Sandel, M. “The Procedural Republic and the Unencumbered Self” (1984) 12 (1) *Political Theory*

female subject's bewilderment at a language of morality which poses even the most personal dilemmas in the format of abstract rights. Susan Hekman has noted that *In a Different Voice* is both an indication of, and a major contributor to, the shift in contemporary analysis away from its previous aspirations towards universalism and absolutism.<sup>12</sup> In developing a greater emphasis upon particularity and context, this shift in analysis has encouraged an ascending attack upon a modernist epistemology that perceives the legal subject as rational, abstract and autonomous.<sup>13</sup> Although Gilligan is not a moral philosopher, and although she never explicitly attacks the subject of modernist thought, her work forms a significant contribution towards this deconstruction of the neo-Kantian moral and legal subject. Gilligan stipulates the existence of a potential alternative to this traditional conception by articulating a subject that is the product of relational and discursive experiences. It is this aspect that renders her thesis so compatible with the current project of uncovering an agenda for the ethical and legal treatment of the operation of consent that accounts for the realities rather than the ideal abstracts of social living.

Like the communitarian thesis discussed in the preceding chapter, the relational self envisaged by Gilligan accepts that the role played by relationships and context is one constitutive of self-identity. In challenging the liberal presupposition that there is a definitive and given 'core' self, Gilligan presents the potential for a fluid perception of agency that sees the existence of autonomous selves as itself a product of relationships. The essential claim that Gilligan seeks to make is that woman's moral judgement tends to be contextual rather than formal such that when making moral judgements women tend to combine "the recognition of interconnection between self and other with an awareness of the self as the arbiter of choice."<sup>14</sup> Where Kohlberg has discerned a similar tendency within female decision-making and has labelled it as evidence of moral immaturity, Gilligan has attempted to promote this reasoning in a 'different voice', positing the ability to

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<sup>12</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 2

<sup>13</sup> See Discussion in Chapter Four, "Feminist Concerns About the Legal Subject"

<sup>14</sup> Gilligan, C. *In a Different Voice*, Supra. Preface, Note 23, p.96

consider context and the viewpoint of the particular, concrete other as an essential component of moral maturity.

Most specifically, Gilligan's work exposes a certain relationship between moral theory and models of identity. While a priority in favour of moral reasoning based on rights and justice assumes an identity of atomised individualism, a priority in favour of reasoning based on responsibility and care assumes an identity comprised of an essential interconnection between self and others. Without necessarily seeking to reject universalist moral theories based on atomistic individualism, Gilligan proposes that we should at least give equally valid recognition to her model of an 'ethics of care' based on the assertion of a fundamental connection between self and other.

This recognition of the interdependence between one's moral voice and one's identity highlights a common nexus of concern amongst many of the commentators discussed within this work. In taking seriously women's 'stories' as exhibitiv of women's moral frameworks and senses of self, Gilligan aligns herself alongside many other contemporary anti-Enlightenment theorists who stress the role of the narrative in the moral landscape. In the preceding chapter, we discussed at length the role ascribed to narratives in the premodern form of communitarianism. While concern has been expressed that the reliance upon narratives in this genre has posed the spectre of conservatism, the use of narratives as a methodological tool for substantial change has also been highlighted. Donna Haraway, whose poststructuralist work was discussed in Chapter Five, for example, also places a strong reliance upon the role of narratives as a means of exacting social change.<sup>15</sup> The common reliance upon the concept of the narrative amongst these disparate theorists illustrates the existence of a shared concern with the relationship between one's experiences of morality and one's conception of self. This in turn highlights

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<sup>15</sup> While in our discussion in Chapter Five, specific focus was placed upon her assessment of the possibilities of communal association for the fragmented self (Supra. Chapter Five, Note 103), particularly relevant in this context is her discussion of the role of narratives in Haraway, D. *Primate Visions – Gender, Race and Nature in the World of Modern Science* (1989) Routledge



the specificity of the notion of the atomistic and abstract legal subject to the Enlightenment moral framework of universality and objectivity that dominates prevailing legal analysis.

While Gilligan's psychological hypotheses have undoubtedly provided much of the inspiration behind the genre of care ethics, it ought to be noted that many disparate theorists now align themselves with this school of theory. This remains the case despite the existence of internal variations in their theoretical dispositions. Nonetheless, a number of features are generally recognised as being constitutive of this particular genre of thought. In the context of her discussion of care ethics, Groenhout has isolated the main components that unite those disparate strands of theory congregating under this ideological header.<sup>16</sup> Their unity, according to Groenhout, can be located in their common impetus towards the development of a new ethical theory that will successfully articulate a female (caring) perspective on ethics. Based upon the assertion that female moral reasoning is marked by a concern to maintain nurturing relationships, rather than a concern to protect individual rights or to obey abstract ethical principles, care ethicists have sought to place care at the centre of moral life. The aim of this conceptual shift is the realisation of an ethics that emphasises special relationships rather than impartiality, and which recognises that human agents have a body, a history and a socio-cultural background that heavily influence their self-conceptions and remit for the exercise of agency.

In placing the affective value of care at the centre of ethical life in this way, advocates are not necessarily requiring the abandonment of concepts such as justice or rationality. On the contrary, many are simply requesting the supplementation of the dominant justice voice of liberalism with the historically subjugated voice of care. It is hoped by such theorists that this incorporation will redress the imbalances that have encouraged a problematic one-dimensional conception of the

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<sup>16</sup> Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 183-4

self in legal analysis as radically individualist and abstract. While liberal theory has failed to question the epistemological veracity of that conception of self, the care ethics approach suggests that the perpetuation of this abstract perception has constituted an assault upon the realities of social living in a contextual framework of relationships, responsibilities and affective ties.

Developing the care ethics impetus of Gilligan with specific reference to the liberal legal system, Worden<sup>17</sup> has argued that the incorporation of an ethics of care into legal decision-making offers a pragmatic counter to the tendency exhibited by the dominant frameworks of liberalism to generalise and class human beings as valid only as part of the legal order, or as part of some category of persons within that order. Building upon Gilligan's assertion that the masculine mode, deemed to be unemotional, impersonal and objective, coincides with cultural expectations of justice and sound moral judgement, Worden contends that this masculine mode has been transposed in an idealised form into the liberal legal systems of modernity. While the dominant rationality sees social reality as a set of hierarchically ordered rules and normative truths, the rationality characterised by imperatives of care perceives the same social reality in terms of interconnected dynamics held together on a morality of continuity, communication and interdependence. In real terms, therefore, the care ethics approach requires a more serious recognition of the centrality of relationship both in terms of personal identity formation and in terms of exercising personal and communal forms of agency. As we shall examine in ensuing sections, the conception of self that thus emerges facilitates the creation of a less restrictive model for the exercise of agency and self-determination than that currently embodied within the prevailing liberal conception of consent.

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<sup>17</sup> Worden, C. "Overshooting the Target – A Feminist Deconstruction of Legal Education" 34 *American University Law Review* 1141

### *Criticisms of Care Ethics & The Possibility of Their Strategic Eradication*

While these ideological aims of the care ethics movement have been widely applauded within the feminist community, the epistemological dichotomies upon which the overall project is erected have been less well received. Concerns in this regard have lead many commentators to adopt an unnecessarily sceptical position in regard to the potential merits of care ethicist theorising. Within the confines of this section, we will examine the nature of many of these concerns. Having done so, we will go on to illustrate in each case the extent to which these concerns can be significantly redressed through the incorporation into care ethics of the elements of communitarian and poststructuralist theory advocated as relevant to feminist critique over the duration of the preceding two chapters. Applying our foregoing analysis of significant arenas of parallel concern between feminism and these alternative schools of anti-Enlightenment theory, we will develop a more concrete framework for the integration of these insights to remedy many of the most central deficiencies that have been highlighted in regard to the care ethics tradition.

Care ethicists have often been criticised for their tendency towards essentialism, and in this particular context, for their tendency to demand a dichotomy between justice and care that is reminiscent of the problematic liberal division between public and private spheres. In *Justice, Gender and the Family*,<sup>18</sup> for example, Okin has provided a criticism of such polarised logic, suggesting that the appearance of a deep and abiding conflict between care and justice (which the care ethics tradition has often been criticised for being supportive of) arises from a fundamental misunderstanding as to the ways in which these two values may be related. Questioning the assumption that justice necessarily takes away from intimacy, harmony and love, Okin asks why the values of care and justice should necessarily be seen as mutually exclusive and asks why we should feel compelled to choose between two apparently dichotomous ethical frameworks.

While claims that Gilligan's model establishes an intractable dichotomy between male and female forms of moral reasoning have been met with debate from subsequent defenders of her position,<sup>19</sup> what has been challenged significantly less is the assertion that her model establishes precisely this kind of dichotomy between the values of care and justice. However, recognising the existence of this polarity within Gilligan's theory necessarily requires recognition that her perpetuation of this dichotomy offers implicit support to the dualistic ideological frameworks that are characteristic of Enlightenment rationalism.<sup>20</sup> Any theory that exhibits even shades of reliance upon such problematic dichotomous categories offers itself up as a conspicuous target for varying genres of feminist critique. This feminist critique has attributed to such categories an integral place in the overall perpetuation of social gender oppression.<sup>21</sup>

While these criticisms of Gilligan's theory are, therefore, significant, they are far from unsurpassable. There is nothing in Gilligan's position that renders an inherent dichotomy between care and justice necessary in the sense that is often suggested. Through the selective incorporation into Gilligan's account of certain aspects of the premodern Aristotelian position discussed in the preceding chapter, it becomes possible to conceive the relationship between the ethics of care and the ethics of justice in a form other than the mutually exclusive framework attributed to her own approach. In our previous discussion of premodern communitarianism, attention was drawn to its reliance upon the Aristotelian ethical claim that exhibiting emotionality constitutes an integral part of what it is to act rationally. By employing this virtue ethicist approach in defence of the rationality of emotions in this context, we furnish care ethicists with the conceptual ability to accept the notion that care is not in fact antithetical to justice. What's more, we present the

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<sup>18</sup> Okin, S. *Justice, Gender and the Family* (1989) Basic Books

<sup>19</sup> The nature of this debate will be discussed in more detail later in this section. See, for example, Worden, C. "Overshooting the Target", *Supra*. Chapter Seven, Note 17

<sup>20</sup> See Discussion in Chapter Four, "Feminist Concerns about the Legal Subject" & "Feminism and the Revival of the Enlightenment"

<sup>21</sup> See, for example, Smart, C. *Feminism and the Power of Law*, *Supra*. Chapter One, Note 10 who lodges scathing criticism of the binary system of logic that establishes such dichotomies between the emotional

possibility for their reinsertion as complementary virtues existing at different positions along the same continuum of social relations.

This reformulated position has been adopted in the works of many of the theorists who continue to ascribe to the care ethics position. One of the most well-received assertions of this altered position has been forwarded by Noddings through the claim that care, rather than being antithetical to rationality, is actually amongst its most important components.<sup>22</sup> Similar sentiment has also come from the more unlikely source of John Rawls who has argued that,

“It is also the case that the sense of justice is continuous with the love of mankind..... the difference between the principles of justice and the love of mankind is that the latter is supererogatory, going beyond the moral requirements...yet clearly the objects of these two sentiments are closely related, being defined in large part by some conception of justice.”<sup>23</sup>

In developing a feminist theory that borrows the notion of compatibility between care and justice from the premodern communitarian framework, we alleviate many of the concerns of feminist commentators regarding the fundamental dichotomy at the base of Gilligan's thesis. While this is to be welcomed because of its ability to counter an important field of criticism that has been lodged against the care ethics tradition, incorporation of this Aristotelian insight into the care ethics framework is far from unproblematic. In dissolving the legitimacy of the dichotomy between justice and care that many have considered central to Gilligan's theory, the question arises whether this incorporation of justice into care, and vice versa, will in the final analysis also dissolve the legitimacy attributed to the care ethics approach itself.

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and the rational while according priority to the side of the binary associated with traditional perceptions of masculinity.

<sup>22</sup> Noddings, N. *A Feminine Approach to Ethics and Moral Education* (1984) University of California Press

<sup>23</sup> Rawls, J. *A Theory of Justice*, Supra. Chapter Four, Note 35 p. 476. Importantly, however, Rawls is here discussing his peculiar conception of justice, namely justice as fairness, which in many respects differs from more traditional liberal conceptions of justice specifically in regard to its heavy reliance upon notions of fairness, etc. which by their very nature have a close affinity to the notion of love than more abstract concerns such as equality, reciprocity, etc.

Although at first sight it may appear that Gilligan's care ethics tradition necessarily relies upon a support network of definitions and dichotomies which posit care and justice as mutually exclusive, this perception is in fact illusory and recognition of its artificiality does little to render the impetus of the care ethics tradition insupportable. While accepting that care and justice are not necessarily antithetical may slightly dilute the impact of Gilligan's critique, it does not dissolve the importance of her insight that care and justice are *perceived* as typifying alternative ethical frameworks. What's more, it does not alter the experiential validity of her assertion that male and female agents are disproportionately encouraged to adopt gender-specific moral identities. After all, it has never been Gilligan's concern to act as a moral philosopher examining whether care and justice are actually mutually exclusive ethical systems. Gilligan, as a psychologist, has been concerned instead to examine the ways in which individual agents perceive these frameworks, and her conclusion that people perceive them as mutually exclusive remains not only feasible, but continues to gain support from the critique of the rational-emotional, public-private dualisms which have formed the body of feminist theory.

Gilligan's theory does not seek to develop an emancipatory project. Rather, it simply seeks to examine the ways in which human agents perceive their own developmental processes. This project does not preclude the possibility that people actually perceive justice and care as mutually exclusive and perceive their own psychological development as entailing a choice between either care or justice. This remains a valid assertion and it is only when we project our own pretensions towards moral philosophy onto the framework laid bare by Gilligan that we are presented with problems as to whether care and justice are in fact dichotomous. Of course this is an issue that any adequate ethical theory must eventually encounter, but it is not an issue that must necessarily be dealt with by Gilligan's project which evolves around perceptions of reality rather than reality *per se*.

That said, however, we cannot build an ethical program from the foundation of care ethics without giving detailed examination to this concern. Once again, however, satisfactory treatment of the issue can be realised by a selective incorporation into care ethics of specific communitarian insights developed outwith the feminist academy and discussed in some length in the preceding chapter. Through examination of the treatment of justice and care afforded by premodern communitarian and neo-Aristotelian approaches comes the realisation that where Gilligan's conclusions may represent our perceptions of the status quo, this is not the only possible option. While the tenacity of the perceived dichotomy between justice and care manifests the dominance of binary logic and rationalistic polarities, it indicates nothing about their metaphysical legitimacy. Developing this recognition further allows us to abandon the more deterministic ethical vision often falsely attributed to Gilligan's psychological theory. Care ethicists, thus liberated, are better equipped to examine potential means through which individual agents can realise the parallel unity between care and justice which theory dictates to be logically and ethically possible.

While the recognition that care and justice are not necessarily antithetical and mutually exclusive may not affect the legitimacy of Gilligan's claim that social agents continue to perceive them as such, it does forcefully highlight the need for an appropriate definition of what it is to comply with the virtuous demands of caring. Once disarmed of the possibility of defining caring as that which is opposed to justice, care ethicists must develop determinate and identifiable conceptions of the characteristics of 'caring'. Despite the centrality of this notion to the entire care ethics tradition, however, the definition attributed to 'care' has often been less than satisfactory.<sup>24</sup> In fact, problems abound in relation to the exact definition of caring employed by care ethicists. Although many propose the mother-child relationship as being paradigmatic,<sup>25</sup> this of itself is largely circular because it seeks to define

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<sup>24</sup> Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 184

<sup>25</sup> Held, V. *Feminist Morality – Transforming Culture, Society and Politics* (1993) University of Chicago Press & Ruddick, S. *Maternal Thinking – Towards a Politics of Peace* (1989) Ballantyne

caring in terms of good mothering, while defining the good mother as one who cares.<sup>26</sup> This lack of clarity in the definition of its central virtue has been seized upon by more sceptical commentators as illustrative of another significant obstacle to the meaningful development of this ethical tradition.

However, as has been the case in regard to the previous criticism discussed above, much is offered to feminist theory of this genre by a selective incorporation from the school of premodern communitarianism discussed in the preceding chapter. With its strong reliance upon neo-Aristotelian virtue ethics, this school of thought has devoted a considerable amount of energy to the development of more adequate definitions of notions reminiscent of care. For example, although care may not have been dealt with specifically, much emphasis has been placed upon the Aristotelian conceptualisation of the notion of friendship which shares many common characteristics with what we perceive to be in keeping with caring.<sup>27</sup> On that basis, therefore, care ethicists of a feminist disposition would do well, once again, to look towards a selective incorporation of some of these insights to furnish them with a more adequate definition of the central component of their ethical framework.

One of the most promising aspects of this turn to the Aristotelian analysis of friendship in the pursuit of a more meaningful definition of care is the potential thus discovered for the elaboration of an ethical theory of caring which does not simultaneously establish a moral imperative of selfless altruism. The unmodified conception of an ethics of care established by Gilligan has often encountered vehement criticism over its tendency to prioritise the value of care above anything else. However, as one feminist commentator has warned,

“when I reflect on the history of women I realise how much our caring has nurtured and empowered others. I see how good it has been, for others.

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<sup>26</sup> Groenhout, R. “The Virtue of Care” in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 184

<sup>27</sup> Shollmeier, P. *Other Selves – Aristotle on Personal and Political Friendship* (1994) State of New York University Press



However, I also see how terribly costly it has been for women. And so the first question that arises for me is one that arises for many of Gilligan's subjects. Can an ethics of care avoid self-sacrifice?"<sup>28</sup>

Deficiencies inherent in the ethics of care tradition in this regard have been commonly noted and built upon in the criticisms lodged against it. Catharine Mackinnon among others has often expressed concern about the inability of an ethics of care to politicise and problematise the ongoing subordination of women through the valorisation of their social role as benevolent carers.<sup>29</sup> The damaging implications of such assumptions of feminine selflessness and altruism have been well-established within this thesis, particularly within the discussion in Chapter Three of the oppressive effects of ideologies of maternal subservience upon the experiences and liberties of pregnant women. To critics of the care ethics tradition, its inherent valorisation of the capacity to care seems to require the extension rather than the elimination of the trends of cultural expectation discussed within that Chapter. Understandably, this has provoked considerable concern amongst feminist commentators.<sup>30</sup> Accepting the legitimacy of these concerns, many theorists within the care ethics tradition have conceded the need to establish a limit upon the extent to which it is appropriate for a human agent to care. However they have often encountered difficulties in establishing this limit in a non-arbitrary fashion. After all, if caring is the central feature of one's ethical theory, it would seem that only care itself could limit our ethical obligation to care for another.

Nonetheless, as Groenhout notes "It would be preferable...to have some way of limiting the obligation to care short of complete self-sacrifice."<sup>31</sup> Through incorporation of the premodern communitarian emphasis upon a neo-Aristotelian conception of a rational life, we are enabled to distinguish healthy relationships of

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<sup>28</sup> Houston, *Prolegomena to Future Caring*, p.7. Quoted in Rhode, D. *Theoretical Perspectives on Sexual Difference* (1990) Yale University Press, p.171

<sup>29</sup> MacKinnon, C. "Difference and Domination – On Sex Discrimination" in *Feminism Unmodified*, Supra. Preface, Note 9

<sup>30</sup> Amongst such concerned critics has been Harding, S. "The Curious Coincidence of Feminine and African Moralities" in Kittay, E. & Meyers, D. (ed.) *Women and Moral Theory*, Supra. Chapter Four, Note 29, p.296-315

care from unhealthy relationships of subordination and self-sacrifice. Hence, the conceded need for a concern for the agent herself and her own development within an ethical model of care can be satisfied by the incorporation of the Aristotelian notion of care and friendship in the broader sense – i.e. as incorporating care for oneself and one's own intellectual and moral development as a necessary balance to one's concern with care for others. A definition of care that permits this broader interpretation<sup>32</sup> provides a much needed limit upon the operation of the obligation to care and renders criticisms of an inherent call to self-sacrifice redundant. Self-sacrifice is only implicated in an ethics of care position to the extent that the definition of care involved implies only the narrow notion of offering care to others. The premodern model of virtue, however, provides philosophical grounding for the adoption of a broader notion of care which encompasses both care for others and care for oneself, thereby imposing necessary limits on the level of care demanded by the imperatives of this ethical tradition.

Similarly narrow interpretations of the ambit of care involved in the care ethics tradition have resulted in the generation of another line of significant critique. It has been contended that, by placing strenuous emphasis on a perilously vague notion of care, this ethical tradition runs the risk of limiting the focus of the moral agent to those people in close proximity to her.<sup>33</sup> This presents an anomaly to a feminist tradition that has been committed to a respect for the well-being and needs even of those at a distance from oneself. Once again, however, the deficiencies inherent in this aspect of the definition of care can be remedied through the invocation of a broader conception of the practice of 'caring'. In developing this broader and therefore more adequate definition of caring to answer this line of

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<sup>31</sup> Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p.194

<sup>32</sup> 'Broader' here is used to refer to that which is the opposite of the 'narrow' conception set out, for example by Bubek, D. in *Care, Justice and Gender* (1995) Clarendon Press. As "Caring for is meeting the needs of one person by another person where face-to-face interactions between carer and cared for is a crucial element of the overall activity." (p.129)

<sup>33</sup> Benhabib, S. *Situating the Self*, Supra. Chapter Four, Note 22, p. 178-202

critique, care ethicists should again employ a selective incorporation of insights from 'mainstream' premodern communitarian and neo-Aristotelian ethics.

Particularly relevant in this context is not only the communitarian reliance upon the Aristotelian definition of the reminiscent virtue of friendship to encompass concern for the needs of others, but also the notion discussed above that justice is an element of caring, and caring an element of justice. By attending to the insights asserted within the premodern virtue ethics school, feminist ethicists are able to chart theoretical grounding for an account of the proper relations between people unconnected by ties of affection within the ethical frameworks of both care and justice. By incorporating the Aristotelian notion of the virtuous life to suggest that true human excellence involves not only rational decision-making, but also caring, it becomes apparent that the virtuous life cannot be understood as requiring the distancing of oneself from those who are weak, or needy. Rather, it is precisely in the maintenance of such relationships that one is able to develop part of what any appropriate definition of caring must demand, namely a concern for the needs of others, whether they are closely related or not.<sup>34</sup> This would remedy the concern with the limitations of care ethics by mediating relations between unrelated others, without necessitating our abandonment to the fictitious pretensions of purely self-interested, rational agents resorted to by alternative dynamic models.

This Aristotelian perspective is closely related to the conception employed by premodern communitarianism regarding the relationships that exist between different individuals. As we have seen in the preceding chapter, there is much in that conception which renders it a valuable ally in the development of a feminist ethical program. Briefly, this perception has been summarised by Nussbaum as involving a belief that each human being is, and necessarily is, a definite individual establishing her own track through life, with her own pleasure and pains located

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<sup>34</sup> Groenhout, R. "The Virtue of Care" in Freeland, C. (ed.) *Feminist Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p. 190

within the confines of her own body.<sup>35</sup> Nonetheless, each human being is not separate in the kind of hard and impenetrable way assumed by Kantian and contractarian models. On the contrary, each human being needs and depends upon others in a variety of complex ways and through a variety of relationships. The value of this model in transcending the difficulties inherent in both the staunch individualism of Kant and the radical fragmentalism of poststructuralism is, as we have seen in the preceding chapter, immediately observable to those feminists involved in the project of seeking the realisation of a new ethical paradigm.

Against this theoretical background, the emerging definition of care that mediates these relationships between distinct but dependent human agents necessarily becomes more complex than the narrower conception of care permits. The emerging definition becomes one of care in the broadest sense as involving care for oneself alongside care for others, as involving care for those at a distance as well as those in close proximity, and as involving care as an aspect of justice rather than an antithesis to it. By the incorporation of the premodern communitarian reliance upon Aristotelian premises within the definition of care in this manner the care ethics tradition become equipped to counter criticism of its lack of clarity in the nature of what is involved in care. What's more, it is also enabled to counter concerns about its lack of limitation on the demands of care and its alleged restriction of the ambit of human relationship to those of close proximity. This takes the care ethics tradition a long way towards a stronger and more promising model.

However, a less easily remedied line of critique of care ethics centres around the potentially essentialist approach it takes towards the identification of a generic woman's voice. Many care ethicists have been interpreted as suggesting that women's moral experiences are *naturally* those of nurturing, self-sacrifice and the maintenance of relationships even at high personal costs. This in turn lends support

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<sup>35</sup> Nussbaum, M. "Aristotle, Feminism and Needs for Functioning" in Freeland, C. (ed.) *Feminist*

to the conclusion that women are naturally suited to a life of subservience to the needs of others. This has to be questioned, however, because the traits thus identified as feminine are common to women who are raised under restrictive circumstances, and as such are perhaps better understood as mechanisms for survival rather than virtues.<sup>36</sup> The significance of the problem that this presents to care ethics depends very much upon the interpretation afforded by these thinkers to the roots of the gender differentials that they identify. Are the differentials that Gilligan picks up on natural, or are they the result of social conditioning? What's more if it is the case (as the dominant body of this thesis has argued) that these differences are in main part the result of social construction, does Gilligan's valorising an ethics of care in women as a complement to the masculine ethics of justice not run the dangerous risk of entrenching further those familiar (but constructed) gender stereotypes?

Although Gilligan shows some inclination towards the mothering theory of Nancy Chodorow that exhibits a heavy reliance upon the notion of inter-personal and social constructionism,<sup>37</sup> Gilligan herself never really examines the roots of the gender differential that she isolates. The dominant tradition of feminist theory suggests, however, that there is nothing natural or immutable about such gender difference.<sup>38</sup> On that basis, we may assume that any such differences in moral reasoning can be attributed to some extent at least to the pressures of social conditioning. Gilligan's theory never asks that we question the gender specific forms of reasoning to which we as gendered subjects are assigned. This, however, has difficult implications for the development of feminist ethics outwith the demands of social constructionism and renders impossible the realisation of meaningful autonomy (male or female) through continued compulsory ascription to

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*Interpretations of Aristotle*, Supra. Chapter Six, Note 75, p.252.

<sup>36</sup> Harding, S. "The Curious Coincidence of Feminine and African Moralities" in Kittay, E. & Meyers, D. (ed.) *Women and Moral Theory*, Supra. Chapter Four, Note 29, p.296-315

<sup>37</sup> Chodorow, N. *The Reproduction of Mothering*, Supra. Chapter Three, Note 1

<sup>38</sup> For a detailed analysis of this biological essentialism v. social constructionism debate within feminist theory, See Sayers, J. *Biological Politics – Feminist and Anti-Feminist Perspectives* (1982) Tavistock Publishing

constructed gendered roles. Claudia Card has expressed this concern particularly strongly in her claim that Gilligan's valorising of the morality of care and responsibility produces a gender-specific version of Nietzschean slave morality.<sup>39</sup> In order to eradicate this tendency within the care ethics tradition, Card suggests that theorists must recognise and try to accommodate an examination of the underside of women's ethics in line with the poststructuralist notion that the origins of morality are the internalised controls and expectations imposed upon the powerless by those wielding power.<sup>40</sup> What such an examination would illustrate is the extent to which the gender-specific traits manifest in Gilligan's opposing moral voices are the result of heavily curtailed social constructionism in an environment within which women are expected to care and gain their social status from their continued role as carers.

Building upon this critique, many other feminist commentators have challenged the superficiality of Gilligan's categories not only in terms of her affirmation of the scripted role of women, but also her affirmation of the scripted role of men as autonomous, rational and objective. Specifically in relation to female identities, these theorists have expressed concern that Gilligan's reliance upon the role of care in female morality denies the significance of other aspects of social living in which female agents are involved. In so doing, it is alleged that Gilligan's theory continues to implicitly marginalise the role of women in these political and economic spheres. As Onora O'Neill has commented -

"even if we find commonalities in women's experiences, take them at face value, and use them to construct a moral voice that is to replace the voice of justice with the voice of care and concern for relationships, we will still need to say something about the political and economic contexts of women's lives. An ethics of caring and relationships will be adequate only if we assume lives that are confined to the nursery or the boudoir."<sup>41</sup>

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<sup>39</sup> Card, C. "Women's Voices and Ethical Ideals – Must We Mean What We Say?" (1988) *Ethics* 125

<sup>40</sup> The legacy of this Nietzschean insight into the relationship between power and morality has been discussed in some length both in Chapter One and Chapter Five of this thesis in regard to the work of Foucault.

<sup>41</sup> O'Neill, O. "Friends of Difference" (1989) *London Review of Books*, September 14th

In *Situating the Self*,<sup>42</sup> Benhabib seeks to remove the need to address this problem by suggesting that an ethics of care ought not to be seen as simply representative of an alternative mode of moral reasoning characteristically the domain of women, but should also be seen to represent a mode of moral reasoning that ought to be applied alongside an ethics of justice in both male and female deliberation. In seeking new ways to deal with gender difference, Benhabib theorises the inherently interactive nature of self-other relations. Referring to the subject of Kantian premises as the 'generalised other', Benhabib posits the existence of a 'concrete other' who is understood as an individual with a concrete history, identity and affective-emotional constitution. Applying the Gilligan-inspired notion that mature moral reasoning manifests itself in the ability to contemplate the specific interests of such concrete others, Benhabib develops an interactive remit for communication between the generalised other (who populates the justice realm) and the concrete other (who populates the care realm). Hence, Benhabib develops a theory of social interaction reminiscent of Gilligan's in its demands that in our dealing with others we should operate our reasoning in ways that will allow our differences to compliment rather than exclude others. Where Benhabib's theory differs from Gilligan's, however, is in her recognition that the appropriate moral solution does not lie in achieving equal social and legal treatment for a specifically female voice of care, but in the actual inclusion of this morality of care within the ethical parameters of each person's sense of self. Hence the ethics of care becomes a mode of moral deliberation towards the recognition of which *all* social agents will be educated.

While successful in its attempt to eradicate concern about the potential for continued gender differentiation inherent in Gilligan's work, Benhabib's theory suffers from significant shortcomings that render her thesis significantly less credible at the level of operation. In our previous assessment of Benhabib's work in Chapter Four, we noted that her insistence that some element of an ethics of justice embodied within universalist principles ought to remain within all moral

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<sup>42</sup> Benhabib, S. *Situating the Self*, Supra. Chapter Four, Note 22

reasoning renders her thesis incapable of achieving its averred aims. Although her work is sufficient to illustrate that the models of justice and care originating in Gilligan's work need not continue to be utilised along gender specific lines, her claim to have established an improved and more holistic theory of selfhood may hold more rhetorical than real value. Roslyn Diprose, for example, expresses concern that,

"there is little in this proposal to integrate justice and care, formal principles and context, which provides a safeguard against the possibility that the differences of the 'concrete' other are subsumed within those of the 'generalised' other under the guise of 'collective dialogues'."<sup>43</sup>

In making too many assumptions based upon the existence of inherent and universal human rationalism, Benhabib fails to circumvent the submersion of the identity of the 'concrete other' within the demands of the 'generalised other'. Hence her claims to be attending to context and particularity become questionable in a similar manner to the claims made by Nussbaum in the previous chapter regarding her claim to be attending to the role of the communal. In both contexts, the crucial shortcoming has lain in their respective failure to examine the significance of power relations in determining the nature of the 'concrete' or the communal voice. It seems that a similar methodological oversight plagues the care ethics tradition that has been discussed within this chapter. Advocates of the care ethics approach have likewise failed to attend sufficiently to the role of social expectation and hegemonic power forces in determining the expressed desires and moral voices of social agents. The critique discussed above in relation to Claudia Card continues to highlight the inadequacies of the care ethics position in this regard. If they are to avoid continuing charges of superficiality and essentialism, care ethicists must involve themselves in the theoretically difficult ground of constructionism and hegemony.

One care ethics theorist who has begun to attend to this deficiency in the theory's traditional form is Worden. Although Worden's work represents only a very



skeletal starting point from which the project of incorporating the role of power forces and constructionism into care ethics is to commence, her work offers some valuable insights into the direction that project should take. In "Overshooting the Target",<sup>44</sup> Worden develops the notion originating in Gilligan's theory that the feminine mode of moral reasoning (which values connection and care) has been repressed and undervalued in its expression by female agents. She takes this idea of the repression of the feminine one step further, however, through her assertion that male agents in society may also exhibit this feminine mode in their moral deliberation. Challenging the assumptions often inherent in critique of care ethics that the moral voices of justice and care are not only mutually exclusive but also gender-specific, Worden makes the more complex assertion that their diversity originates from the social and historical fact that the culturally expected masculine voice has been associated with the dominant mode of liberalism while the culturally expected female voice has been associated with all other forms of cognition and expression. Hence, the prevalence of the care voice amongst female agents does not relate to any assertion of a gender-specific social attribution of the propensity to care. Rather, its prevalence is explained by the fact that female agents have historically had their moral voices more significantly marginalised and repressed than male agents. This is not, however, to imply that all women speak exclusively in the care voice because certain women (specifically white, middle-class women) have historically encountered less marginalisation than other cultural groups and as such have enjoyed greater recognition in the realm where the justice voice is the native tongue. Conversely, this is equally not to say that all men speak exclusively in the justice voice because certain male groups (specifically ethnic minorities and homosexuals) have similar experiences of repression and marginalisation affecting their ability to speak and be heard.

While Worden's developments are to be welcomed because of their ability to overcome any lingering notion of a gender-specific attribution of caring capacities

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<sup>43</sup> Diprose, R. *The Bodies of Women*, Supra. Chapter Four, Note 93, p13

<sup>44</sup> Worden, C. "Overshooting the Target", Supra. Chapter Seven, Note 17

within Gilligan's work, her introduction of notions of repression and marginalisation into the care ethics tradition requires significantly more examination. While such introduction offers the important potential to overcome the criticisms lodged against the care ethics tradition by commentators like Card and MacKinnon, recognising the role of power and constructionism within this framework generates a variety of issues for consideration. It is in this regard that a selective incorporation into the care ethics framework of the poststructuralist theory discussed in Chapter Five of this work may prove particularly beneficial.

One of the main projects of the poststructuralist thought discussed previously has involved an 'immanent critique' of identity politics and a concern to critically examine social imperatives operating upon and constructing an individual's 'desire' to conform to a particular model of being. Although it was noted in our discussion that too vehement an allegiance to this status of perpetual subversion and critique can prove inimical to the realisation of pragmatic ends, the tendency towards essentialist distribution of identity exhibited by the care ethics tradition exemplifies the problem facing a model with too little critical zeal. A selective incorporation of some of the insight laid bare by poststructuralist critiques of the power of discourse and the existence of disciplinary technologies would furnish care ethicists with the mechanisms for a less superficial thesis of identity development.

Incorporation of some of this critique would eradicate much of the concern about the degree of essentialism inherent in those models of care ethics that have assumed the nurturant characteristics of women to be both natural and desirable. By incorporating some more stringent element of the poststructuralist essence of critique and challenge to existing attributions of identity, the ethics of care tradition is enabled to combat those valid criticisms of its tendency to uncritically assume and re-affirm prescribed gender roles and identities. Without unavailing itself of the possibility of political cohesion through emphasis on situational affinities, the care ethics tradition remains capable of formulating a theory adequate to the aims

of feminist politics in a manner that is, however, no longer feasible for the purely poststructuralist position.

Through a reliance upon poststructuralist insights and deconstructive methodologies, members of the contemporary care ethics tradition will be able to illustrate more securely their transcendence of any lingering gender-specific assumptions within Gilligan's model. Incorporation of poststructuralist insights into the pervasive and disciplinary nature of modern power provides theoretical grounding for care ethicists to examine alternative ethical codes and alternative forms of subjectivity without making any simplistic correlations between women and care, and men and justice. On the contrary, invocation of deconstructive methods will offer to care ethicists the potential for alternative emerging paradigms that will recognise the genuine multiplicity of moral voices in a given social field. This in turn will promote a greater recognition of the interdependence between care and justice in personal identity and the ongoing competition between the dominant and the marginalised forms of non-gender specific morality that exist in complex and pluralistic societies.

While Gilligan's critique of the dominant liberal ideology's exclusive embodiment of the justice voice is legitimate, her accompanying assumptions regarding the masculinity of that voice are far more conceptually and experientially jarring. Armed with poststructuralist methodologies and perspectives, contemporary care ethicists will be able to challenge the gender specific attribution of the characteristics of justice and care without abandoning the extremely astute criticisms lodged by Gilligan in regard to the artificiality of the moral and ethical models employed in prevailing liberal frameworks. This in turn allows care ethicists to continue to challenge the legitimacy of the legal subject who populates such frameworks without having to make any essentialist assumptions about the gender of that subject. What's more, it allows a continuation of the care ethicists' project of ensuring greater contextual awareness and greater accrediting of the role

of relationships in personal and communal decision-making without perpetuating the more problematic notion that only female agents currently experience the pull of such contextual factors. The reality is that both male and female agents experience the relevance of context and relationship in the exercise of agency. Incorporation of poststructuralist critique into care ethics provides a remit for recognition of this reality alongside a continued challenge to the artificiality of the abstract and individualist ideal embodied within liberal frameworks. This seems to stand well alongside the contemporary feminist project discussed in preceding chapters that seeks to avoid the simplistic correlation between the law and the male subject that have dominated more radical feminist critiques.<sup>45</sup>

Cumulatively, selective incorporation of communitarian and poststructuralist critique into the framework of care ethics in the manner thus suggested provides a far more promising option for feminist theory than has been offered by the accounts discussed over preceding chapters. Maintaining a fundamental reliance upon the care ethics framework ensures an enduring priority in favour of theorising feminist ethical and legal agendas that has been lamentably lacking in both Butler's and Nussbaum's positions. What's more, strategic incorporation of insights culled from the parallel concerns of communitarian and poststructuralist critique provides the mechanisms for a more complex and more satisfactory version of care ethics that is equipped to challenge many of the serious criticisms that have been lodged against it. The model of modified care ethics that emerges from this eclectic process offers a valuable resource to feminist theorising and, as we shall see in the remainder of this chapter, also offers an experientially appropriate and pragmatically viable conception of the self with which to challenge the entrenched position of the neo-Kantian individualist self within the liberal tradition.

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<sup>45</sup> See Discussion in Chapter Four, "Feminist Concerns About the Legal Subject", particularly discussion of Littleton's emerging concept of 'phallocentrism', *Supra*. Chapter Four, Note 71

### *The Merits of Modified Care Ethics*

In the preceding sections of this chapter, we have tentatively established a framework for an emerging conception of the self that offers an alternative to the neo-Kantian subject that has proven so problematic to feminist theory. Building upon the foundations of well-established feminist critique of the individualist subject of liberalism through a fundamental reliance upon care ethics, we have selectively appropriated the most beneficial aspects of both communitarian and poststructuralist thought to eradicate the deficiencies that have previously been highlighted in regard to the care ethics tradition. In developing this modified version of care ethics, it has been suggested that we have arrived at a more acceptable and experientially viable account of the self than has been offered through an exclusive reliance upon any of the fields of anti-Enlightenment critique discussed previously within this thesis.

In her recent work *Moral Voices, Moral Selves*,<sup>46</sup> Susan Hekman highlights two major inadequacies that she believes have plagued all contemporary attempts to theorise an alternative to the dominant model of abstract subjectivity embodied within the liberal tradition. Without challenging the legitimacy of Hekman's criticisms in regard to previous attempts, such as those discussed in preceding chapters, that seek alternatives to this Kantian model through an exclusive reliance upon either poststructuralist, communitarian or feminist critique, we will spend some time in this section examining the extent to which the emerging model of modified care ethics, and the eclectic and holistic methodology it supports, successfully overcome the more general deficiencies that Hekman's critique has isolated.

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<sup>46</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24

Using the work of Thomas Nagel<sup>47</sup> to illustrate the two deficiencies in question, Hekman suggests that Nagel's thesis offers a paradigmatic illustration of the tendency of most contemporary theorists to evaluate inadequately the foundations of their theorising. In terms of the first deficiency Hekman highlights, she is particularly critical of the tendency amongst such theorists to perpetuate the modernist dichotomies that have traditionally framed debate on the issue of subjectivity. Hekman argues that in *The View from Nowhere*, Nagel exhibits precisely the kind of confined theorising that has characterised previous attempts to challenge modernism and liberalism. Nagel's own work originates with the assertion that all people are both particular persons in the world *and* they are people capable of taking an objective view of that world. The main project of Nagel's work is to illustrate the tension between these two elements. Although he makes a claim to be treating the elements of contingency and transcendence equally, Hekman argues that it becomes clear that he is more interested in the formulation of a positive account of objectivity than in the exploration of the contingencies of morality.<sup>48</sup> This is not to say, however, that he ignores the element of contingency – he concedes that morality is socially ingrained, that it varies in disparate cultures, and that the application of objective standards in certain personal relationships would be self-defeating because it would destroy precisely what is valuable in those relationships.<sup>49</sup>

Nonetheless, according to Hekman, Nagel's work is illustrative of the general trend discernable amongst most contemporary moral theorists who claim to be seeking alternatives to the modernist, Kantian conception. Such contemporary theorists predominantly seek to account for the situatedness of moral agents that they consider an important, yet unrecognised, aspect of the modernist paradigm. However, it is alleged that the manner in which they try to do this more often than not defies their purpose. As a general rule, Hekman suggests, contemporary theorists have pursued this end through an attempted negotiation of the absolute-

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<sup>47</sup> Nagel, T. *The View from Nowhere* (1986) Oxford University Press

<sup>48</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 45

<sup>49</sup> Nagel, T. *The View from Nowhere*, Supra. Chapter Seven, Note 47, p. 147-55

relative or objective-subjective dichotomies. Any such attempts at negotiation are futile, however, because they merely perpetuate a false polarisation that presents a distraction from the meaningful pursuit of improved moral knowledge.<sup>50</sup> Despite their appearance as immutable frameworks for the discussion of morality and ethics, according to Hekman, such dichotomies and frameworks are in fact ideological facades constructed by the master narrative to obscure from view potential alternatives. In continuing to comply with the dictates of such frameworks, Hekman suggests that most contemporary theorists have failed by their own standards in their attempts to offer alternatives to this master narrative.

This first critique bears considerable similarity to the concerns raised in the preceding chapters by those attempts at theorising the self (including dialectical communitarianism) which fail to detach themselves entirely from the confined parameters of the sterile dichotomy between absolutism and relativism that has plagued modernist epistemology. What's more, it mirrors the criticisms that have been lodged in the preceding section at advocates of an unmodified version of care ethics. It has been alleged in that discussion that the attempts made by care ethicists to develop an 'alternative' to Kantian individualism, have been marred by continued ascription to the conceptualisation of justice and care as antithetical moral values. The danger of this tendency has already been discussed and it has been noted that an appropriate remedy to this critique can be found through a selective incorporation of certain aspects of the premodern and neo-Aristotelian communitarian thesis. Hence the modified version of care ethics advocated within this chapter, in recognition of this deficiency within its original form, has moved beyond such sterile dichotomies towards the realisation of a more complex notion of care and justice as interrelated. In so doing, it has also successfully moved beyond the sterile dichotomies between public and private and between objective and relative that had previously been implicitly supported in its critique.

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<sup>50</sup> See Discussion in Chapter Six, "Dialectical Communitarianism"

In discussing the lamentable nature of the deficiencies in Nagel's characteristic account, Hekman has noted that unless and until we move beyond such dichotomies, specifically through examination of moral voices and moral subjects, moral theory in general (and feminist moral theory in particular) will never be able to abandon its modernist boundaries. Hekman is undoubtedly correct in her analysis of the deficiencies of previous attempts to transcend such modernist dichotomies and indeed in her prescriptive claim that the only possible means of successful transcendence lies in accrediting greater priority to the relationship between moral voices and moral selves. However, it is precisely the nature of this relationship that has provided the common nexus between care ethics, poststructuralism and communitarianism from which the emerging model of modified care ethics has developed.

In recognising the close relationship between moral voices and moral subjects in the way that Hekman suggests, contemporary moral theorising must also seriously accredit the significance of women's 'stories' within the moral framework. Affording a greater role to such narratives has been a common concern amongst the various strands of care ethics, poststructuralism and communitarianism discussed within this work. Even by the standards of Hekman's own critique, therefore, the contextual model of modified care ethics succeeds both in transcending the dichotomies that have hitherto proven irrevocable in the determination of alternatives to Kantian individualism and also in ensuring a greater ethical remit for concern with the intimate relationship between narratives, moral voices and moral selves. In thus successfully overcoming the first critique isolated by Hekman, it seems that the model's selective collaboration between those aspects of care ethics, communitarianism and poststructuralism that relate to moral voices and narratives offers not only a promising vision for feminist ethical development, but also, as was hoped,<sup>51</sup> a promising vision for the ethical development of various divergent groups.

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<sup>51</sup> See Discussion in Preface relating to the remit of the model of subjectivity identified within this thesis



While this regeneration of interest in the role of narratives epitomised by the modified version of care ethics delineated in the preceding section thus offers the potential for substantial improvement upon previous theorising of the experiential self, a second inadequacy in the dominant trend of theorising has been highlighted by Hekman which must also be overcome by an adequate theory of subjectivity. Again using Nagel's work as paradigmatic, Hekman illustrates the inadequacy of the conceptualisation of the situated aspect of human subjectivity that has dominated 'alternative' theoretical accounts. Nagel's characteristic account of situated persons entirely fails to notice that they are involved in human self-other connection and that their moral perspectives are thus communally grounded. Indeed, Hekman argues that the treatment of the situated self in most contemporary moral theory likewise tends to be radically one-dimensional, isolated and blessed with the capacity to take the objective view even in the most personal of moral dilemmas. As Hekman notes, "There are two points in Nagel's moral landscape – the isolated individual and the perspectiveless observer. Communities of moral belief do not make an appearance."<sup>52</sup>

Once again, this critique is reminiscent of the criticisms that have been lodged both in the preceding chapter at premodern communitarianism and in the preceding section at the unmodified version of care ethics. In terms of this latter focus, we have seen that in seeking a conceptualisation of a different moral voice of care, care ethicists have often failed to characterise adequately both the notion of care itself and the nature of the caring social agent. Assuming a vague definition of their central component and failing to attend to the power issues that encourage the acceptance of caring positions within feminine moral development and the acceptance of autonomous positions within masculine moral development, care ethicists have been equally guilty of paying insufficient attention to the realities of self-other relations. That said, however, we have also noted in the preceding discussion the potential for a more critical reconsideration of these assumptions

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<sup>52</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p.46

through a selective incorporation of the attitude of 'permanent critique' provided by poststructuralist accounts.

The more complex analysis thus offered to the modified version of care ethics presents the possibility for a far more involved characterisation of the situated subject. Armed with the mechanisms with which to examine issues of power distribution and hegemony, the emerging ethical framework is able to develop a significantly less abstract perception of the forces impinging upon the socially immersed agent. What's more, it is able to challenge the superficial claims to communality that have all too often lain behind the one-dimensional analyses of the situated self which Hekman attributes to Nagel and which we, in our preceding discussion, have attributed both to MacIntyre and Nussbaum.

Hence, it seems that the ethical model of care ethics, once modified by poststructuralist and communitarian insights in the manner specified, is indeed capable of overcoming the obstacles to effective theorising that Hekman suggests have debilitated the majority of attempts that have gone before. While the self that emerges from this ethical model may not offer a perfect characterisation of the realities of social living, it does at least boast the advantage of being able to offer a far more experientially appropriate model than that encompassed within the Kantian transcendent self. What's more, it does so without offering any implicit support to the frameworks that have accorded priority to that same transcendency.

In latter stages of her work, Hekman expressly accepts the arguments presented within this section in favour of a model of selfhood encouraged by the collaborative ethical framework developed over preceding chapters.<sup>53</sup> Although Hekman does not give detailed account of the nature and extent of the collaborative process that she advocates, from the indications that she gives in this regard it seems that our modified version of care ethics would certainly meet her demands of an appropriate

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<sup>53</sup> Hekman, S. *Moral Voices, Mora Selves*, Supra. Preface, Note 24, p. 86 ff

‘alternative’ moral theory. In particular, Hekman specifically praises the Gilligan-inspired insight, central to the emerging model, that moral voices and moral selves are inseparable. While Hekman’s failure to pay sufficient attention to the fact that this stance has been echoed both in the poststructuralist work of Donna Haraway and the premodern communitarian thesis of MacIntyre prevents her from fully appreciating the merits to be gained from cautious and selective incorporation of their insights within our moral framework, her insistence that we can only deconstruct the foundation of modernist moral theory (i.e. the autonomous subject) through the maintenance of a strong connection between morality and subjectivity offers significant support to the modified care ethicist model developed within this thesis.

The conception of self that emerges from the ethical framework advocated, presents, therefore, a more serious challenge to the separate, autonomous self that is the cornerstone of the modernist legal subject than has previously been offered. In transcending the dichotomies and polarities of modernist epistemology, it is able to avail itself of the insight that this dominant model of selfhood is itself a product of relational forces. Building upon the objects-relations premise so influential in Gilligan’s work that “difference is not distinctiveness and separateness, but a particular way of being connected to others,”<sup>54</sup> the contingency of the neo-Kantian self is recognised within the frameworks of modified care ethics. In its turn, this recognition encourages the development of an ethical program that seeks to definitively remove the separate self from its position as the paradigm of subjectivity. Having illustrated the merit heralded by the modified version of care ethics, not only over its unmodified predecessor, but also over previous attempts at determining an alternative to the neo-Kantian liberal individual, we will devote the remainder of this chapter to a specific characterisation of the nature of the contextual self who populates this emerging analysis.

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<sup>54</sup> Chodorow, N. *The Reproduction of Mothering*, Supra. Chapter Three, Note 1, p.257. Discussed in Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p.73

### *An Emerging Contextual Subjectivity*

The self who emerges from the confines of the modified care ethics position is neither poststructuralist, communitarian, nor exclusively feminist because its construction has sprung from a process of selectively borrowing disparate insights from each of these schools of thought. In attending seriously to the role of people's 'stories' within the moral landscape (through its common concern with the notion of narrative discussed in the preceding section) the self expressed within this tradition is a 'contextual self' whose identity is defined by the relationships and circumstances within which s/he is enmeshed. That said, however, this emerging contextual self also recognises and accounts for the need to critically evaluate the legitimacy of his/her choices in light of subtle power operations within those social situations and to seek subversive positions when necessary to ensure strategic agency.

The contextual self thus emerging seeks to redefine key elements that have been central to dominant perceptions of legal subjectivity, most particularly identity and agency. While for the Kantian subject of liberalism, identity is disembodied, transcendent and ontologically prior to social influence, for the contextual self identity is constituted, multiple and fluctuating. Recognising the relevance of circumstance and relationship in the formation of self-identity allows the contextual self to attribute significance to these influences in mediating interactions between one's self and others. Furthermore, it allows the contextual self to articulate the experiential reality that these factors matter in the moral and legal realm, thus challenging the dominant liberal perception of their irrelevance and peripheral status. In terms of these elements, then, it seems that the contextual self successfully offers to feminist theorising what it has requested, namely an account of subjectivity that, in seriously listening to the voices and stories of moral agents, attends to, rather than denies, the realities of social living and experience.

Fashioned from the discursive tools at its disposal as a situated and social subject, the contextual self also retains a remit for the exercise of agency that permits the creation of a variety of stories and moral voices to be utilised in various specific human contexts. Conscious of its constituted and fluctuating identity, the contextual self no longer attends to the abstract paradigms of liberal agency that assume an unlimited remit for choice and an unconstrained individualist power of self-determination. On the contrary, the contextual self provides a vehicle through which to articulate the reality that living both in a network of relationships and in a social framework infused with pervasive disciplinary regimes restricts one's remit of choices. Once again, therefore, the remit for agency and resistance afforded to the contextual self is a limited one. Without providing any grand liberatory claims to transcend that restriction, the contextual self thus presents a more realistic depiction of the operation of agency than that afforded by the idealised and universally emancipated liberal contention.

Having thus successfully departed from the epistemological confines of modernist dichotomies, recognition of the contextual self also necessitates the redefinition of the concepts of agency and political action upon which much modernist thought has been premised. We have noted in discussion of previous genres of 'alternative' moral theory the existence of a marked reluctance to abandon the reliance upon agency as a meaningful vehicle for self-determination.<sup>55</sup> One of the most important contributions of Hekman's work has been to illustrate that a large proportion of such concern is unfounded. Those who insist that we must retain certain elements of the modernist subject (specifically its capacity for agency) to provide the grounding for feminist politics are mistaken. On the contrary, what we ought to recognise is the illegitimacy of trying to 'borrow' agency from the modernist subject in this way because the very conception of agency expressed by that subject is itself a discursive product of modernist thought. The Kantian subject, although now reified into the paradigm of all subjectivity, is in fact a historical product itself

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<sup>55</sup> As Discussed in Chapter Five, for example, concern about the abandonment of agency implicit in some of Foucault's earlier work has caused many commentators to reject his theory out of hand.

and its key characteristics (autonomy, rationality and agency) are products of a particular discursive formation and not the transcendent elements of subjectivity that they have often been taken for.

As has been discussed elsewhere<sup>56</sup>, we can continue to stand by the idea of some conception of agency and self-determination, while recognising the possibility of alternative discursive formations that define the concept of agency differently from the dominant model and in a manner more appropriate to the feminist moral enterprise. This feminist moral enterprise has sought to attend to experiential realities and to listen to the 'stories' of particular women. However, the model of agency specific to the Kantian subject fails to attend to experiential reality through its continued reverence to abstraction and individualism. We have noted throughout this thesis that ordinary people do not experience their lives in this abstract and radically individualist framework. In reflecting more accurately the manner in which social agents do in fact experience their lives and senses of self, recognition of the contextual self also highlights the irrelevance of the liberal model of unfettered and unconstrained agency for most subjects in the contemporary world (particularly those marginalised on account of race, class or gender).

It has often been alleged that models of selfhood, such as the contextual, that attend to the particular and the relational realities of social living actively preclude the possibility of resistance because they strip the subject of any coherent sense of identity.<sup>57</sup> While it is certainly true that the contextual subject presented here is disarmed of those abstract principles of reason upon the invocation of which the Kantian subject was empowered to express resistance, this in no sense means that the contextual subject is without recourse to resistance. On the contrary, resistance for the contextual subject comes, not from recourse to abstract principles, but from

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<sup>56</sup> See Discussion in Chapter Five on Foucault's prescriptive thesis and Butler's reformulation of Foucault

<sup>57</sup> See, for example, Harstock, N. "Foucault on Power – A Theory for Women" in Nicholson, L. (ed.) *Feminism / Postmodernism*, Supra. Chapter 4, Note 58

the inhabitation, in particular contexts, of a subjectivity other than that which has been scripted for them. As Hekman herself explains, this

“redefines agency in a way that explodes the boundaries imposed by the constituting / constituted dichotomy. It does not entail reference to a prediscursive ‘I’ but, instead, entails that subjects find agency within the discursive spaces open to them in their particular historical period.”<sup>58</sup>

The spirit of such resistance has been the fuel of the feminist movement over previous decades. Offering women a spectrum of ‘alternative’ scripts of the feminine has been the root of a large amount of contemporary feminist political success. In pragmatic terms, what this illustrates is that resistance does not require reference to a core, disembodied and autonomous self in the way that legal liberalism tends to assume. Rather, resistance can be crafted from within the subjugated knowledges that we already possess as situated and discursive subjects.

We live in a highly diverse and pluralistic society within which no all-encompassing and universally applicable master narrative can be articulated to express the epistemological and experiential realities of each of the moral agents present. It is time to recognise the superficiality and artificiality of attempts (such as those of modernist liberalism) to impose such a narrative and to draw attention to the exclusion of important moral voices that the imposition of any such narrative entails. These are the demands which development of moral theory must seek to meet in contemporary times. The Kantian centrepiece of the abstract, autonomous subject is no longer the appropriate agent for that purpose. In seeking alternatives to that paradigm, it seems that the contextual subject offered here provides the most promise. Incorporating the insights of the communitarian idea of an affectively tied and situated self alongside the poststructuralist concern to highlight issues of the construction of power networks, the contextual moral subject remains capable of the exercise of meaningful self-determination, resistance and agency. The project of political theory which seeks to build upon the foundation of that contextual subjectivity must now be to determine the form which that self-determination,

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<sup>58</sup> Hekman, S. “Subjects and Agents - The Question for Feminism” in Gardiner, J. (ed.) *Provoking Agents* (1995) University of Illinois Press, p.202

agency and resistance will take in specific circumstances where reference to abstract principles and self-centred autonomy are no longer appropriate.

While the forms of agency employed by the contextual subject are reminiscent of the forms of agency advocated by Butler in her recapitulation of the Foucaultian thesis of the fragmented self, certain important differences distinguish the two accounts. Although both seek to remove reliance upon the modernist conception of agency as intrinsic to human subjectivity, the alternative formations that Butler presents are radically fragmented in a way in which those of the contextual self are not.<sup>59</sup> Hence the contextual self remains free to employ a more far-reaching agentic potential than the ever-imposed upon model of sporadic resistance necessitated by Butler's more fragmented thesis. Although the contextual self is antithetical to all forms of essentialism (be they modernist or feminist) and as such demands a focus upon particularity reminiscent of the fragmented self, the ability of the contextual subject to unite with others through historically structured affinities and choices (rather than the essentialist considerations of female or human nature employed in prevailing accounts) permits of the realisation of feminist political ends in a manner obviated by too stringent a reliance upon the fragmentation thesis. At the other end of the spectrum, however, the contextual self is a self eternally aware of its constructed position and of its place within a network of social relationships and meanings mediated by the kinds of power dictates ignored by the less critical observations of communitarian critique. In this respect, the model of agency emanating from the contextual self expresses a more obvious awareness of the constructed nature of its origins and operation which attunes it towards an application against hierarchy and arbitrary tradition.

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<sup>59</sup> Butler, J. *Gender Trouble*, Supra. Preface, Note 20. See Discussion in Chapter Five, especially "Butler's Reformulation of Foucault".



### *Conclusion*

“Once we recognise the complexity of human subjectivity – the way in which we can hold multiple commitments, relationships, view, desires and roles together without collapsing under the weight of incoherence – the idea of the unitary subject becomes less plausible, just as the ideal of the unitary subject becomes less attractive.”<sup>60</sup>

With a reliance upon Gilligan’s concepts of an ethics of justice and an ethics of care, contemporary feminists have been enabled to posit the potential for an improved model of moral deliberation which demands developments of both ethical formats within the moral code of each human agent. However, such advocates of the care ethics tradition have still met with substantial criticism in regard to other aspects of their thesis. Within the confines of this chapter, we have examined the possibility for care ethicists to overcome such criticism through the selective appropriation of certain aspects of poststructuralist and communitarian thought. In so doing, we have developed a hybrid ethical theory that, in maintaining a foundational allegiance to the aims and agendas of feminist critique, offers the benefits accredited to poststructuralism and communitarianism over preceding chapters while successfully avoiding the shortcomings that have likewise been identified within these frameworks.

The emerging model of contextual subjectivity that is promoted by the generation of this hybrid ethical theory reconceives human subjectivity in its situated and concrete reality and thereby challenges the dominant liberal ideal of subjectivity as abstract and radically individualist. Utilising Hekman’s assertions as to the historically and discursively constituted nature of these liberal conceptions of identity and agency to legitimate its alternative thesis, the modified version of care ethics has offered a substantial improvement upon previous attempts to deconstruct such paradigms. Removal of the modernist emphasis on the abstract individual through a strong reliance upon the connection between narratives, moral voices and

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<sup>60</sup> Frazer, E & Lacey, N. *The Politics of Community*, Supra. Chapter Two, Note 84, p.199

moral selves enables recognition of the inherently socially constituted nature of human selfhood. This in turn highlights the centrality of normative social ascription upon the roles and identities inhabited by social agents in a far more effective way than previously achieved.

In thus restructuring our conceptions of human subjectivity into the fluid and relational format presented by the contextual model, the modified version of care ethics has also successfully challenged the conceptions of autonomy, agency and consent that have been considered intrinsic within the frameworks of liberal theory as paradigmatic expressions of rational and individual determinism. This permits the philosophical remit within which to promote a more fluid notion of self-determination which no longer requires reference to abstract principle, but which can be enunciated within the intricate web of meanings attributable to human life as a 'situated' and 'relational' self. Within this chapter, we have begun to examine the merits of this contextual approach to agency and we have highlighted the nature of its divergence from the prevailing liberal model. In the following chapter, we will develop that discussion in greater depth with particular reference to the application of contextual agency within the specific arenas of rape and maternal-foetal conflict and to the implications of that application upon the prevailing conception of the legal notion of consent.

## CHAPTER EIGHT

### CONTEXTUAL AGENCY AND ITS IMPLICATIONS FOR CONSENT

“The question of consent also assumes and exacerbates a misleading distinction between private and public spheres of behaviour. Consent is conceived as the private exchange of permissions between isolated individuals. Yet little about the permitted behaviour is private...Our ‘consent’ .... is not really free because it is not free in the sense of being the autonomous choice of an atomistic individual...The social and cultural nature of choice, per se, is not problematic...for we are all social creatures. What it is crucial to acknowledge is that ‘private consent’ is nonexistent and go on from there.”<sup>1</sup>

Over the course of previous chapters, we have examined various conceptions of subjectivity that offer potential alternatives to the dominant liberal notion of Kantian individualism. In so doing, we have also examined the nature of the forms of self-determination that would be encouraged by these alternative perceptions. Having conceded the need for continued cognisance of feminist political aims and agendas, it has been submitted within Chapter Seven that the most satisfactory alternative vision of subjectivity can be located within the modified care ethics model developed within that chapter from an eclectic and strategic incorporation of poststructuralist and communitarian insights into the pre-existing care ethics critique of the neo-Kantian subject.

Having thus arrived at a more pragmatically viable ethical theory towards the end of the preceding chapter, we have begun to examine in more detail the characteristics and capacities of the contextual self who populates that analysis. We have noted at length the merit that ought to be accredited to the contextual self because of its ability to attend to the relational and the experiential in a manner denied to the abstract and artificial subject of liberalism. What’s more, we have noted the divergence both in terms of identity and agency between the contextual self and the liberal subject. In maintaining allegiance in favour of the former model, we have praised its capacity to reflect the realities of social living rather than the idealised abstract. As noted elsewhere, these realities of social living entail recognition of the communal and relational nature of selfhood alongside recognition of the socially constructed and determined

nature of certain prioritised desires and identities dominant in disciplinary societies.

Accompanying this model of contextual selfhood, we have noted a peculiar model of contextual agency that likewise attends to the realities of relationship, embodiment and constructed choice. Challenging the pervasive liberal assumption that valid agency is necessarily constituted by the self-legislating choices of an abstract, rational and individualist agent, the model of contextual agency recognises the particularity of that vision of agency to the model of neo-Kantian selfhood upon which it is parasitic. Adopting the notion of restricted agency common to the theses of both Foucault and MacIntyre, the contextual model has proposed a conception of the operation of agency and consent as restricted by the confines of circumstantial parameters and by the position of the agent in the network of disciplinary requirements.

Within the confines of this chapter, we will examine the nature of this contextual agency in more detail and will illustrate the advantages it offers over more traditional forms of analyses. That examination, however, will take place against the background of an implicit denunciation of the tendency amongst the modernist and liberal theories challenged within this thesis to seek over-arching and universal frameworks. Recognising that the end result of that grand theorising has almost exclusively been the perpetuation of abstraction and artificiality, our ensuing analysis of the fluctuating and complex forms of identity and agency embodied within the contextual self will resist the temptation to replace the meta-narrative of constituting agency with an alternative meta-narrative of contextuality. Through a context-specific re-examination of the operation of contextual subjectivity, agency and consent in the specific legal arenas of rape and maternal-foetal conflict, this chapter will not only bring the thesis full-circle, but will also ensure a greater understanding both of the potential advantages of the contextual model over the liberal model, and of the highly specific and particular nature of those advantages.

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<sup>1</sup> Archard, D. *Sexual Consent*, Supra. Chapter Two, Note 24, p. 149

### *Contextual Selfhood and Consent*

The conception of constituting agency and its peculiar model of the one-dimensional vehicle of consent have become regarded as the paradigmatic expressions of the liberal conception of self-determination and subjectivity. However, as we have noted, this is not the only available manifestation of these human capacities. On the contrary, despite the automatic credence afforded to them, these models of agency and consent are nothing more than manifestations of the discursive formations of self-determination that have proven most complimentary to the Enlightenment pretensions towards universalism and rationalism. The fact that these Enlightenment pretensions and the conception of consent as a one-dimensional interchange between abstracted subjects which these pretensions encourage have held the dominant position in our legal perceptions for so long establishes nothing about their validity. The tenaciousness of their hold upon our ethical imagination says less about their entitlement to that position of undisputed truth than it does about the power of the liberal discourse which has elevated them to the position of indisputable doctrine for so long.

In challenging the entrenched nature of the notion of constituting agency and unfettered self-determination through the individualist and dichotomous notion of consent, the contextual form of agency illustrates the existence of an equally viable alternative. Its existence provides an important counter to the scare-mongering concerns of many commentators whose work has been discussed throughout this thesis.<sup>2</sup> These commentators have argued that if we abandon the problematic Kantian model of abstracted moral and legal subjectivity, we must of necessity also abandon the concept of agency altogether. However, we have seen that this is simply not the case. Throughout our discussion in Chapters Five and Six the feasibility of a restricted form of agency has been continually asserted. Furthermore, the merits of that restricted form of agency in terms of offering a more experiential expression of the realities of the operation of consent have also been noted.

As Hekman has argued, our ethical enquiries have been paralysed by the kind of polarised logic which suggests that an ideological shift from abstract individuality to connected and situated personhood would necessitate the fusion of the whole world into an indistinguishable mass of connected and merged identities.<sup>3</sup> It is in fact not only logically possible, but also ethically desirable, that we develop from the emerging conception of human subjectivity as substantially relational and connected a vehicle of communication that retains the capacity for executing self-determination. The contextual subject has as much need of vehicles of self-determination as does its Kantian predecessor. However, the realisation of that need does not require that we constrain ourselves to compliance with the models of agency and consent which have best suited that same predecessor. On the contrary, alternative conceptions of agency and consent are required. These alternative conceptions originate from alternative discursive formations, from formations which do not wield the institutional support advanced in favour of the models prized by legal liberalism but which nonetheless present equally as valid a vision of self-determination. Originating from differing conceptions of what constitutes human subjectivity, these alternative visions demand a more fluid and relational base for both personal and communal decision-making. Liberated from a locus that centrally evolves around dynamics of one-dimensional consensual interchange between separate and distinct human entities, the conception of consent that emerges from this process can demand consideration of context and connection to present a more holistic view of human agency and interaction.

Where the traditional conception of consent has relied upon an overtly abstracted view of human subjectivity to ensure the elimination of issues of social pressure, stereotype and bias from legal concern,<sup>4</sup> this emerging conception would require that issues of precisely this kind be drawn into the centre of the decision-making arena. This emerging conception of consent entails a sense of self-direction and self-determination that grows in relation to,

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<sup>2</sup> Harstock, N "Foucault on Power – A Theory for Women" in Nicholson, L. (ed.) *Feminism / Postmodernism*, Supra. Chapter Four, Note 58 provides an illustrative example of such arguments.

<sup>3</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 45

<sup>4</sup> See Discussion in Chapter One re. juridical legal operation and its capacity to marginalize and conceal the operation of disciplinary power at the social level

and with the help of, a sense of affiliation and connection with others, rather than in competition against them. Adoption of this position does not necessitate the abandonment of all models of justice and agency. On the contrary, incorporation of this model into legal deliberation will actually operate to strengthen the moral legitimacy of such models. A commitment to the appreciation of contextual factors permits eradication of the Enlightenment-based notion that the pursuit of fairness requires the adoption of a position that stands aloft from the social realities of the cases at issue. Building upon the ideas of compassionate and contextual judging introduced by Aristotle,<sup>5</sup> the model of contextual agency promotes the development in the legal arena of a relational concern about human flourishing. This yardstick of flourishing is not determined abstractly, but in relation to concrete contexts about the material and social conditions of people's daily lives and the relation of those concrete conditions to their own hopes, fears and relationships. When the remit of agency is expanded to accommodate context and relationship, the medium for its articulation and expression must also become more expansive. Consent as the prime medium for the communication of agency must become more deeply imbued with context and particularity than the traditional one-dimensional model. This requires analysis of the context within which consent is alleged to have been given or refused to determine the realities of any such exercise of agency.

The project of this thesis has been to realise the kind of holistic view of human consent facilitated by the recognition of such concerns. In so doing, our journey has necessitated a lengthy excursion into the nature of the legal subject who is to act as issuer of those self-determining dictates. Our analysis has established the specificity of the Kantian subject celebrated in prevailing notions of individualistic consent as one manifestation of subjectivity among others. Our pursuit of a more experientially appropriate model of subjectivity has led us to the propagation of the contextual self. It has been argued thus far that the contextual model of selfhood presented heralds the most significant potential for the development of a conception of consent that brings to the fore (rather than

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<sup>5</sup> See Discussion in Chapter Six, "Premodern Communitarianism" and "Feminism and Premodern

conceals) the power forces and social imperatives within which the human subject is immersed in her struggle for meaningful self-determination.

### *Contextual Agency and its Applicability to Law*

It has been suggested that employing a more fluid standard of consent, such as that embodied within the contextual form of agency advocated within this thesis, provides a substantial improvement upon the manner in which the dominant liberal legal framework deals with issues of agency and consent. While that is certainly true, and continued support for that suggestion can be located in the sections that follow, it would be naïve to assume that ensuring such improved fluidity and experiential validity in standards of self-determination is sufficient to cause the demise of many other undesirable aspects of the liberal form that have gained support from neo-Kantian premises.

Establishing a potentially alternative paradigm of subjectivity and agency for application in specific moral and legal deliberation represents only the first step in an overall project of deconstructing the liberalist assumptions inherent in the legal arena. To be sure, the elimination of one-dimensional and abstract individualism effected by the preceding critique constitutes an important attack upon the centrepiece of modernist legal epistemology. However, various other entrenched presuppositions regarding the nature of the modernist self remain at least partially intact despite this critique. While accommodating a contextual form of agency permits an impressive counter against liberal presuppositions about the abstract, disembodied and radically individualist nature of the legal subject, it offers only subsidiary critique of the other integral component of liberal subjectivity, namely rationality.

It has been accepted throughout this thesis that the liberal legal subject can be characterised primarily by its reliance upon artificial conceptions of its abstract individualism and its attendant forms of rationality. While challenging the former characteristic explicitly, the critique of preceding chapters and the



emerging model of contextual agency have only implicitly challenged the latter characteristic. While it is submitted that emerging forms of rationality can be uncovered from within the psychology of the contextual agent that will provide useful counters to dominant liberal forms, further exposition of those forms lies outwith the scope of the current project. Nonetheless, it ought to be noted that the model of contextual agency uncovered here offers significant potential in this regard and as such offers subversive possibility beyond that which can be claimed by the critique of individualism that has formed the focus of this thesis.

Linked to this concession that the effects of the contextual form of ethical theory and agency upon prevailing liberal contentions can only be fully appreciated when examined, not only in terms of its challenge to the abstractly individualist frameworks of consent that form the concern of this thesis, but also in terms of its challenge to attendant forms of rationalism, is the further concession that in illustrating the influence of contextual agency upon specific applications of legal consent within prevailing legal structures, other aspects of its potential will be less observable. In challenging the cornerstone of legal liberalism that assumes abstract and disembodied individualism, the contextual model discussed over preceding chapters provides an important critique and offers an improved model for re-evaluation. However, other cornerstones of liberalism must also be challenged before the full benefits of the contextual model can be appreciated. We have mentioned above that one such cornerstone relates to liberal presuppositions regarding the nature of legal rationality and we have suggested that the contextual model may present potential for challenge to this presupposition within the confines of another project.

While the contextual model emerging within this thesis therefore represents an important line of attack against the liberal legal subject and its attendant forms of agency and consent, it must also be noted that it cannot singularly and simplistically produce a radical effacement of existing models of law. To effect this kind of ideological revolution, we would also have to be able to invoke successfully not only varied and competing models of rationality, but also a more mediatory rather than accusatorial legal structure. The structural conflict

inherent in legal confrontation finds its manifestation in an adversarial framework and an objectively projected and universally rationally founded authoritative decision. We have noted in previous discussion<sup>6</sup> the tendency for such adversarial models to promote an abstract and overly-simplistic model of conflict between the parties involved. This in turn promotes the perpetuation of an exclusionary legal impulse through which issues considered central to the agents involved are deemed peripheral because their complexity renders them an inappropriate fit within the polarised legal conflict model. In providing the mechanisms for a re-evaluation of what constitutes relevance in the legal arena and for a more inclusive approach to concerns impinging upon particular legal agent's choices, the contextual subjectivity and agency developed over preceding chapters offers a meaningful counter to these entrenched tendencies. However, it ought to be noted that the operation of contextual agency and the operation of traditional legal frameworks are diametrically opposed in this regard. As such, continued cognisance of these frameworks of legal liberalism in the operation of contextual legal agency will necessarily dilute the impact of this model.

Without arbitrarily positing a legal utopia within which these entrenched standards can simply be abandoned in favour of a more flexible approach, it ought to be noted that while changes can be made through the employment of the contextual agenda within the pre-existing adversarial framework that will benefit legal agents in significant ways, a more fundamental reconsideration and restructuring of these frameworks would be required before the full impact of the model of contextual agency can be realised. Once again, however, expanding the potential for contextual agency to effect this fundamental change must be the project for another thesis. Having developed the parameters of the contextual subject over foregoing chapters, the concern of this thesis is to illustrate how its forms of agency can improve the problematic operation of legal consent in a pragmatic and concrete manner. While more revolutionary changes may well be available through a more transformative incorporation of contextual ethical and legal theory, the project of this thesis has been to attend

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<sup>6</sup> See criticism in both Chapters Two and Three in regard to the model of conflict encouraged by the

to the realities of current social living and to devise the means through which to improve that reality without positing abstract utopian notions of future possibilities.

In light of that fact, it must be conceded that the application of contextual agency within the arenas of rape and maternal-foetal conflict to be examined in the following sections will not therefore produce the radical displacement of all of the systematic biases and procedural inadequacies that presently plague deliberation on these issues. Contextual agency working within the restrictive confines of an adversarial court structure, for example, finds aspects of its holistic impulse paralysed by external constraints. Nonetheless, the application of contextual agency within these remits can still produce significant improvements for many female agents and as a pragmatic starting point, this in itself must be applauded. While without the additional support of an accompanying critique of liberal rationalism and the adversarial legal model, application of contextual forms of agency to challenge liberal presuppositions about individualism and abstraction may never radically displace existing frameworks. Nonetheless, its application does successfully alter the treatment afforded to legal agents within those frameworks in positive and significant ways. Amongst the most observable manifestations of such alterations relate to the improvements thus rendered upon the interpretation afforded to consent standards within legal deliberation.

Whether or not challenge to the remaining cornerstones of legal liberalism may be available within the confines of the contextual ethical system remains to be seen. What are already far more observable are the advantages offered to human agents by the application of a contextual conception of agency in specific legal arenas and the potential for expansion of those advantages as the residual aspects of dominant liberalism face increasing challenge from a variety of sources, all of which recognise the importance of the contextual model's attendance to the real rather than the ideal of social and personal decision-making.

*Contextual Agency and Its Implications Upon  
Consent in Specific Legal Contexts*

The changes accorded to the legal notion of consent through the invocation of contextual forms of agency offer the possibility of a more flexible medium for the articulation of self-determination. This more flexible medium would not only ensure a greater concern with the relationships and affiliations that mediate the context within which consent is being issued or refused, but also with the constructed identities and stereotypical expectations that influence the agent's own perception of available choices. Given the inherently context-bound nature of its application, the effects to be borne out by this more flexible and concrete standard of consent will vary considerably from case to case. As mentioned previously, we must be careful therefore not to frustrate its merits by attempting too generalised an analysis of its operation. While it is imperative that we resist the modernist temptation to make grand statements regarding the nature of application and the potential advantages of its forms of agency, however, it is equally imperative that we offer some more detailed analysis of the operation of contextual standards of consent in specific legal arenas. Within the confines of this work, it would be impossible to attempt a catalogue of legal forums within which the application of contextual forms of agency would remedy many of the deficiencies of the prevailing liberal consent / non-consent dichotomy, even within those fields of particular concern to feminist analysis. In the remainder of this chapter, therefore, we will restrict our analysis to an examination of the implications of the application of contextual agency upon consent standards within the specific arenas of rape and maternal-foetal conflict discussed in Chapters Two and Three.

For various reasons, these arenas provide particularly illustrative examples of the alterations effected by contextual agency. Within our discussion of previous chapters, we gave detailed consideration to the inadequacies that have plagued the operation of the prevailing model of consent in these arenas. Furthermore, we noted the extent to which incorporation of anachronistic stereotypes about 'proper' social roles into legal evaluations of exercises of consent have made it

difficult for agents in particular circumstances to communicate their will without undue constraint. In the following sections, it will be alleged that one of the most important advantages offered by the application of contextual agency in these arenas lies in its ability to alleviate a significant amount of such constraint. By allowing legal authorities to evaluate issues of consent from the perspective of the agents involved, the fluid and context-specific approach of contextual agency promotes the inclusion of issues of relationship and expectation within the legal arena where previously they were ignored. The significance of such inclusions in terms of the overall feminist ethical and political project has been well-expressed by Benhabib who notes,

“To explicate women’s oppression, it is necessary to uncover the power of those symbols, myths and fantasies that entrap both sexes in the unquestioned world of gender roles. Perhaps one of the most fundamental of these myths and symbols has been the idea of autonomy conceived in the image of a disembedded and disembodied male ego.”<sup>7</sup>

In the previous section, we highlighted once more that the primary concern of this thesis has been to attend to the realities of social living and to the possibilities available for improvement upon those realities without invoking grand liberatory critiques. In terms of the application of contextual agency within the specific arenas of rape and maternal-foetal conflict, the concern has been to devise mechanisms that will ensure a greater capacity for the female agent to have her voice heard, her moral and ethical standpoint considered and her consent or non-consent accredited. While greater transformative potential may lie within the model of contextual agency than has been claimed for it within the confines of this chapter, our concern with such experiential realities promotes a more immediate interest in the pragmatic benefits of its application in specific contexts that continue to be dominated by other aspects of legal liberalism. Without excluding the possibility that greater benefits may yet accrue, therefore, the following sections will illustrate the advantages that can be offered to female agents confronting pre-existing legal frameworks and ideology through the invocation of contextual agency. The employment of this self-imposed restriction is significant because it illustrates the ability of the

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<sup>7</sup> Benhabib, S. *Situating the Self*, Supra. Chapter Four, Note 22, p. 290

contextual model to operate both at an immediate and pragmatic level but also potentially as a more long-term and revolutionary ethical vision.

### *Implications for Rape Contexts*

“In focussing upon an individualised notion of consent, rather than the conditions under which choices can be meaningful, the prevailing idea of sexual autonomy assumes the mind to be dominant and controlling, irrespective of material circumstances. Furthermore, the liberal discourse of autonomy appears to leave no space for the articulation of the affective and corporeal dimensions of certain violations of autonomy...While the idea of autonomy as independence seems directly relevant to the wrong of rape, it dominates at the expense of the development of a positive conception of what kinds of sexual relationships matter to personhood.”<sup>8</sup>

Throughout our discussion in Chapters Two and Three, we repeatedly noted the difficulties facing women seeking to have their intimation of non-consent accredited by the legal system. In the particular context of the rape trial the tenacity of the notion that women do not know their own minds and lack the capacity to express their true desires has proven particularly problematic. Meanwhile, and paradoxically, men have been accredited with the ability, not only to give consent on their own behalf in the face of apparently overwhelming sexual desires, but also to effectively give consent on behalf of their victim through the defence of mistaken belief. Central to the critique of these issues has been the idea that in real terms, the discourses thus structuring this perception of consent deny the autonomy of both male and female agents by a manipulative process of categorisation into normatively affirmed and stereotypical roles. By constructing the agent into the abstract and individualist form necessary for the articulation and communication of a one-dimensional expression of consent, the legal discourse identified acts to frustrate the realisation of more meaningful achievement of self-determination.

Critique over the foregoing chapters has suggested that implicit within the prevailing notion of consent is a necessary privileging of the individuality of the legal agent. The process of artificial abstraction embodied in this privileging

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<sup>8</sup> Lacey, N. *Unspeakable Subjects*, Supra. Preface, Note 2, p. 117

denies the recognition not only of the embedded, situational and relational nature of human subjectivity, but also of the importance of those contexts and relationships to the agent's sense of self-determination. Models of contextual agency draw in from the periphery these issues of personal attachment. What's more, contextual agency privileges them in the legal decision-making arena with the same centrality with which they are accorded in the arena of personal decision-making.

The process of artificial individuation encouraged by prevailing neo-Kantian models of subjectivity exists, in the sexual arena, alongside a network of complex discursive strategies illustrated in Chapter Two that operate to control and confine the expression of sexuality -

"Since our sexuality has been constructed for the most part through social structures over which we have had no control, we all 'consent' to sexual desires and activities which are alienating at least to some degree. However, there is a vast difference between consent and self-determination. The latter includes the former, but in addition, also entails (some sensation of) control over the social structures which shape our lives."<sup>9</sup>

It is this wider notion of self-determination that is brought to the fore by the invocation of contextual agency. The prevailing model of consent not only artificially removes the legal agent from its relational and affective connections, but once it has completed this process, its operation imbues the legal subject with an array of culturally imposed interpretations. The model of contextual agency therefore must challenge not only the artificiality of the model of individualism exhibited by consent, but also the artificiality of the cultural expectations superimposed upon the individualist model. With its demands for increased honesty in the legal system, exhibited by increasingly experientially appropriate accounts of agentic decision-making, this is precisely what the contextual model seeks to do. By a more extensive interest in the issues of power and normative construction that operate upon the process of identity formation, the proposed shift in legal emphasis towards contextual forms of consent permits of the demarcation of a remit within which more meaningful

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<sup>9</sup> Linden *et al* : *Against Sadomasochism* (1982) Frog in the Well Press, p.94. Quoted in Sawacki, J. *Disciplining Foucault*, Supra. Chapter One, Note 39, p.37

control can be taken by the individual over the structures which frame her personal experience.

By emphasising the need for direct recognition of the power forces, affective relationships and demands for stereotypical conformity that operate to structure the result of the agent's decision-making process, the model of contextual agency highlights the fact that agents operate in everyday life under the spectre of heavily constructed dictates regarding 'appropriate' behaviour. In broadening the focus of judicial concern from the narrow remit of evidence of force and resistance to a remit encompassing concerns about power imbalances between the parties involved and within society more generally, and about the significance of forces of social constructionism, the model of contextual agency adopts an experientially sensitive expectation of consent.

The most significant and the most promising effect of the application of contextual agency in the rape trial arena will be the re-evaluation of which issues are and are not relevant to deliberation. Matters, such as personal attachments, relationships, power forces and expectations, currently considered peripheral, despite their centrality in the mind of the agent whose consent is at issue, will become significantly more accredited. Through the invocation of contextual agency, we will be able to reassess what issues are considered relevant and irrelevant so that concerns that were central to the agents involved in issuing their decisions would be accredited relevance in the legal decision-making arena.

It ought to be noted, however, that so long as contextual agency operates within the enduring confines of the adversarial legal model, this will do nothing to challenge the ongoing existence of some standard for determining legal relevance and irrelevance. That remains the case despite strong criticisms of the invocation of any such standard for determining relevance amongst certain feminist commentators. Nonetheless, continued allegiance to the existence of such a standard, subject to modification by the contextual framework, does not necessarily entail the unsatisfactory consequences attributed to it by such



feminist critique. In our discussion of Aristotelian hierarchy within Chapter Six, we noted with approval Groenhout's argument that feminist concern to challenge the legitimacy of dominant forms of hierarchy should not promote an uncritical feminist renunciation of any and all hierarchies. In a similar fashion within this context, while feminist concern regarding the manner in which prevailing standards have determined issues of relevancy in the legal arena is entirely merited, it would be a mistake to jettison altogether the notion of legal relevance.

Our critique within Chapter Two has illustrated that more often than not it is the issues central to the decision-making process and circumstances of the female agent that are rendered peripheral in the legal arena. As such invocation of contextual agency is likely to provide a more inclusive approach to the female agent's voice that ought to be welcomed by feminist commentators. However, this invocation ought also to be welcomed by commentators concerned with the protection of the interests of male agents in the trial process because it affords the opportunity for any issues that, despite their relevance to their experiences of decision-making, are currently excluded from the legal arena to also be considered relevant in the courtroom setting.

While these alterations to the standards of relevance are therefore to be welcomed, this does not necessitate any kind of challenge to the existence of such standards. On the contrary, maintenance of these standards (subject to necessary modification by contextual agency) is crucial in enabling challenge to anachronistic stereotypes regarding both the role of gendered sexual agents and previous sexual history evidence. Within the discussion in Chapter Two, we noted the hugely detrimental effect that the incorporation of such stereotypes can have upon the course of rape prosecutions. By maintaining a standard with which to judge relevance and irrelevance, feminist theorists are able to demand its modification to render such admissions irrelevant. What's more, the invocation of contextual agency permits such demands in a more meaningful way than has currently been available to the feminist movement because in attending to issues of relationship, embodiment and societal disciplinary power

forces as legally relevant, the artificiality of stereotypes becomes far more observable and their relevance within the legal arena becomes increasingly questionable.

This process of simultaneously broadening and narrowing the field of legal relevance in rape trials encouraged by the invocation of contextual agency will in turn precipitate a need for re-evaluation of the standards employed in regard to the admissibility of evidence in the trial procedure. Employment of standards of contextual agency will require a more flexible approach to the admission of evidence such that testimony will become less constrained by restrictive demands on content and format. In maintaining its concern with allegiance to experiential realities, satisfaction of standards of contextual agency will require that the testimony offered to the court will be more directly admissible in the form of the witness' own words.<sup>10</sup> As part of an ongoing modification to the standards for determining legal relevance, models of contextual agency in the rape arena recognise the artificiality of testimony that has been scripted into pre-existing legal terminology. In so doing, their invocation will challenge the dominant format of answering questions directed by counsel and will seek its replacement with a more flexible forum within which witnesses will be able to give account not only of what counsel considers relevant, but also of factors that they consider relevant. While not necessarily seeking to abandon the pre-existing tendency for counsel to direct questions at witnesses, application of contextual forms of agency would also require that witnesses be offered a platform through which to add any other factors they deem relevant that may not have been addressed by counsel or may have been curtailed in the interview format of testimony.<sup>11</sup> The particular benefit of this in the rape trial arena will be in allowing the female victim to give account of her experiences in language and forms that express the reality of those experiences and therefore express more meaningfully the circumstances in which her choice to give or refuse

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<sup>10</sup> The merits of a more flexible approach to the admission of evidence have been highlighted by Nicola Lacey in regard to her model of relational autonomy – Lacey, N., *Unspeakable Subjects*, Supra. Preface, Note 2, p. 121

<sup>11</sup> It should be noted, however, that encouraging this more flexible approach to the format of testimony does not in any undermine the need for such testimony to meet relevant legal standards of proof and corroboration where appropriate.

consent was made. In ensuring a greater remit for more flexible testimony in this manner, the model of contextual agency promotes a greater capacity for empathetic judging of all agents involved because it encourages judicial officials to place themselves more concretely than has previously been possible in the position and context of each party.

This will bear out significant changes to the manner in which numerous rape cases are heard, tried and deliberated upon. Amongst the most illustrative examples of such changes relate to those cases within which the female agent has exercised her choice to consent to or refuse sexual intercourse against a background of contextual factors that prevailing analysis have historically rendered peripheral. Imagine, for example, the case of a woman who 'consents' to sex in a relationship based upon a long-standing dynamic of emotional abuse. Where the traditional model would conclude from the lack of physical resistance or non-consent displayed that the act was consensual, application of a model of contextual agency provides a remit for judicial enforcement of the opposite conclusion. Although the woman in question may have submitted to the sexual act, it is only within the peculiar framework of the prevailing standards that this necessarily implies that she consented. In attending more seriously to the circumstances within which the woman has issued her decision through a hitherto unprecedented concern with factors of relationship and power that affect her capacity for agency, the contextual model challenges the conspicuously one-dimensional and superficial approach of that prevailing consent standard. In circumstances such as this, where listening to the voice of the woman in question illustrates that countervailing pressures have restricted and impinged upon her assumed ability to freely issue or refuse consent, the incompatibility of the liberal model and its assumptions regarding radically individualist and autonomous consent becomes most observable.

In concerning itself more concretely with the broader issue of self-determination rather than the abstract and artificial consent / non-consent dichotomy, the contextual model is able to reconceptualise the relevant issues in such circumstances. Taking into account the countervailing emotional pressures

affecting her decision, the contextual model highlights that the crucial issue is not one of whether she failed to express non-consent (and thereby effectively consented) but one of whether, in the context in which the decision was made, the female agent's submission can be considered a voluntary act partly constitutive of the narrative unity of her fluctuating conception of self. Where the perspective of the woman involved implies that the act does not accord with this narrative requirement, the contextual model takes seriously the implications of that moral voice and may well require a judicial conclusion that the sexual act was therefore non-consensual in the legal sense.

Taking on board our previous criticism of the defence of mistaken belief,<sup>12</sup> the contextual model looks to the mental state of the victim whose consent is crucial to the issue of criminality rather than to the assailant's perception of it. When a model of contextual agency is applied to this kind of example, the interplay of emotional abuse which frames the relationship does not remain a peripheral issue of circumstance, but exhibits within the legal decision-making arena the central position which it holds within the personal decision-making arena of the female agent. The question is no longer one of what did the woman consent to (or more accurately, what did the man think that the woman was consenting to), but what acts would the woman, in light of a critical awareness of context-specific affections and expectations, consider as acts determinative of a broader sense of self-determination? Only these more internally motivated sexual acts remain seriously consensual in the contextual framework because only these acts are capable of withstanding its more involved and concrete motivational analysis.

An analogous illustration could be drawn from the example of sexual encounters against a background of disparate power relationships. Without going to the radical extremes of Catharine MacKinnon's thesis that all sex is rape because all sex occurs against a social background of profound power imbalances,<sup>13</sup> we can accept the notion that power dynamics affect the interplay

<sup>12</sup> See Discussion in Chapter Two, particularly in relation to *DPP v Morgan* and *HMA v Meek*

<sup>13</sup> MacKinnon, C. *Towards a Feminist Theory of State*, Supra. Chapter One, Note 33, p. 186

of sexual relationships. Where disparities in power are exhibited between victim and assailant under the traditional model of consent, such issues are deemed peripheral to the determination of key issues unless the power in question manifests itself physically.<sup>14</sup> However, power can be manifest in a range of other and more subtle forms. Where the traditional analysis ignores such subtleties, the model of contextual agency invokes its concern with broader social imperatives and issues of power distribution amongst disparate social groupings to establish the centrality of non-physical power relationships within the legal arena. For the woman who has not welcomed sexual interaction but who has felt herself incapable of expressing refusal because of the pervasiveness of power disparities or because of the expectation that women should be passive and submissive in sexual relations, the application of contextual agency offers a welcome opportunity for the legal system to understand the difficulties of her situation. What's more, it allows a far more engaged concern with the woman's experience of such expectations and power imbalances that in turn frees up a judicial remit within which the tendency to uncritically equate her submission with consent may be reevaluated.

In terms of broadening the scope of concern and the potential for more sensitive understanding of victim and assailant, the more fluid and particularised contextual approach developed over preceding chapters is indeed most promising. However, in terms of its specific application to the situation of rape, certain issues require some clarification. Perhaps the most important caveat to be noted is that the application of contextual agency in legal deliberation does not imply that all sexual interactions that have not been consciously considered and evaluated by the female agent should be condemned to illegality.

While the contextual model demands a far more involved critical interaction between the female agent and countervailing factors impinging upon her agentic capacity in determining the validity of her consent, this is not to imply that consensual relations must necessarily demand this conscious level of introspection on each and every occasion. The classic example of sexual

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<sup>14</sup> See discussion in Chapter Two, "Consent as a Threshold in Heterosexual Relations"

relations between the long-standing and loving couple hardly become non-consensual when the parties involved do not take the time to consider seriously the level to which they accept each sexual interaction as a coherent exercise of self-determination within their life narratives. The reason for that, importantly, however<sup>15</sup>, does not relate to the existence of any kind of 'habit' or 'convention' that renders the existence of consent in these contexts in any way implicit. On the contrary, consent ought never to be so simplistically implied. What is significant in this case, however, is that when pressed on the issue of the motivation behind the sexual act, the couples involved would still consider the act a self-determining one in the overall concrete context of their relational lives. The model of contextual agency does not require that consensual relations must operate eternally under an artificial model of conscious and explicit self-examination. However, when the issue of consent is raised, the model does require serious examination of the extent to which the action has been motivated by an informed concern with a sense of self-determination rather than by a desire to avoid some harm or ridicule or other difficult conflict within the relationship.

Concern that the contextual model demands a highly unrealistic level of conscious self-examination to legitimate the consensual nature of the sexual act is not the only potential objection that may arise in the rape context. There may also be some concern that application of this standard will actually operate to limit female freedom by necessarily restricting the number of sexual partners to be chosen. To have consented meaningfully within the framework of the contextual model, the female agent must have adopted a seriously self-engaged approach to the sexual act in question. Some may find in this requirement an implicit assumption that the female agent must therefore only become involved in sexual relationships when the relationship itself is one constitutive of her sense of self. This, however, is to misunderstand the requirements of the contextual model. The model does not require that, in seriously determining her sexual actions, the female agent should necessarily determine serious actions.

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<sup>15</sup> Especially in light of Husak and Thomas arguments about couple-conventions explicitly criticised in Chapter Two. See Husak, D. & Thomas, G. , "Date Rape, Social Conventions and Reasonable Mistakes" *Supra*. Chapter Two, Note 23

On the contrary, the female agent is equally as free to engage in frivolous sexual relations as committed ones. To comply with the requirements of the contextual model, the frivolous sexual agent must seriously engage with the decision to define herself through frivolous sexual relations. However, this by no means implies that the sexual agent must therefore engage only in serious sexual relations.

The model of contextual agency thus applied heralds the potential for significant improvement in the interpretation of the consent threshold in the rape trial arena. It allows the serious treatment of the complex discursive and relational circumstances that define the confines of the legal agent's decision-making arena without submerging the agent's ability to speak within the structural dictates of these circumstances. In providing the ideological grounding for a more honest approach to the legal analysis of issues of choice and self-determination, contextual agency enables an empathetic yet applicable standard of consent to be realised. Recognition of the discursive and normalising mechanisms that seek to tie women to particularly privileged categories necessitates abandonment of the legal systems' spurious condemnation of women who fail to comply with these standards. When the artificiality of these constructs becomes apparent, and the erroneous nature of their demands is accepted, as would be the case within the model of contextual agency, the legal decision-maker no longer feels bound by any pressure to re-affirm these constructs through the explicit and implicit disapproval of non-conformity.<sup>16</sup> Instead, the decision-maker is made aware of the confines within which the operation of the choice to give or refuse consent to sexual relations is made. In turn, this facilitates a more serious evaluation of issues of economic necessity, emotional insecurity, etc. which operate upon the lived-out experience of giving or refusing consent. Such issues have hitherto been rendered peripheral and irrelevant by a legal system that has been structured by an interest in the medium of choice exercised by the rational, self-determining individual.

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<sup>16</sup> For example through the judicial tendency noted in Chapter Two to imply that women who fall short of approved standards of femininity (by walking alone, dressing provocatively, flirting with men, etc.) have signalled sexual willingness to men and therefore cannot complain when men mistake their behaviour as constituting a willingness for intercourse with them.

This model of the rational, self-determining individual and the model of agency which it privileges do not rest well alongside the issues brought to bear upon decision-making in the complex and multi-faceted arena of sexual relations. Abandoning this model in favour of the model of contextual subjectivity and contextual agency permits this realisation within the legal realm and paves the way for a more serious analysis of these impinging complexities. The end result will be the eradication of the confined and rigid notion of absolute consent or absolute non-consent. Such eradication presents the possibility for its replacement with a more realistic model of communication which demands that agents not only issue their consent to certain acts in the sense traditionally assumed, but also recognise the act in question as being constitutive of their complex narrative life-plan or fluctuating sense of self. Only then can we be confident that the act has been participated in out of an experiential sense of free will rather than as the result of oppressive cultural imperatives.

While thereby seriously accrediting the role of social constructionism in the character formation and choices of the individual, the model of contextual agency resists the temptation exhibited in the work of many theorists who, in seeking to reconcile perceived tensions between this constructionism and a workable conception of agency, have implicitly reinserted the notion of a 'core self' into ethical theory. Given the centrality of normative formations in the operation of modern power that was discovered in our Foucaultian analysis in Chapter One, legal agents continually negotiate within frameworks of social expectation. Often these expectations will be so internalised by the agents involved that they will act to confirm those expectations while genuinely believing those acts to represent a moment of self-determination. The dilemma presented by this recognition lies in determining how best to accommodate the pervasiveness of social constructionism without marginalising the experiential voices of moral agents. Often theorists concerned with reconciling this perceived conflict have sought to do so through an implicit reinsertion of a notion of the 'core self' into ethical theory. This reinsertion has implied that social constructionism has produced a variety of forms of 'false consciousness' that it is the project of ethical theories of agency to deconstruct. In employing



this methodology, however, these theorists have afforded credibility to the possibility of achievement of processes of self-formation outwith the confines of such determinism. What's more, they have thereby marginalised the voice of the experiential agent by denying the validity of its account of the reality of the decision-making process.

In destabilising the epistemological confines that have framed this dilemma, namely the dichotomy between a core self and a socially constructed self, the model of contextual agency heralds the benefit over existing liberal models in that it not only recognises the existence and force of social imperatives, but also simultaneously encourages the development of some critical attitude towards them. Where the traditional model requires blind compliance, masked under the guise of a restrictive format of consent, the contextual model opens up a remit for evaluation and critique of social imperatives. To be sure, some such imperatives will be more deeply ingrained in the consciousness of the agent than others. However, by encouraging critique of those dictates which are less integral, the model of contextual agency sets in motion a critique which will gradually promote the critical evaluation of more cemented social imperatives. Where the traditional model ignores the relevance of background factors of social constructionism, and where more radical theories seek to impose a paternalistic stance to overrule its effects upon the experiential consciousness of the legal agent,<sup>17</sup> the contextual model offers an approach which simultaneously encourages critical awareness within the agent while also displaying a necessary level of respect for that agent's felt convictions. Without ignoring its significance or presenting a utopian model for its transcendence, the contextual model's gradual escalation of critique and continued commitment to ongoing subversion presents the most promising agenda offered to date for dealing with the dilemma of social constructionism without implicitly paying credence to a core self beyond the realm of such constructionism.

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<sup>17</sup> For example, the radical thesis of MacKinnon which seeks to deal with false consciousness by denouncing the voices of women who express its imperatives and by replacing their voices with those of women who consider the perpetuation of such imperatives a sign of weakness. – See Discussion in Chapter One, "Feminism and Disciplinary Power"

Perhaps the most significant contribution of the application of a model of contextual agency in the deliberation of the rape trial lies in its ability to accommodate the insight that certain kinds of sexual relationship matter profoundly to personhood alongside a serious treatment of the conditions under which sexual choices are made. In the circumstances of life, agents often succumb to pressures that encourage them to consent to acts that are not necessarily welcome. This consent does not represent an articulation of self-determination. While the aim of the legal notion of consent is to present a medium for such articulation, application of the prevailing consent standard within the confines of the rape trial falls markedly short of achieving that aim. By eliminating concern with a one-dimensional utterance of consent, the contextual model demands more than simple consent. Its focus upon the life circumstances and relationships of the agent involved encourages a concern to establish that the act in question was of a self-determining quality. In demanding a high level of critical awareness of countervailing relationships, pressures and expectations that confine and construct each agent's perception of choice, the contextual model of agency provides a far more experiential account of the articulation of consent than has hitherto been offered. Furthermore, in seriously accrediting the significance of these impinging factors, it offers a more realistic manifestation of the nature of human subjectivity than that embodied in the neo-Kantian model. Incorporating a concern with the reality rather than the abstract ideal of agency in the sexual arena, the contextual model introduces a far less superficial legal concern with whether the act in question was not only not resisted, but also truly welcome, voluntary and non-alienating. The arena of sexual encounter represents an arena intrinsically related to a person's sense of self. In the context of sexual autonomy, no lesser a standard of consent should suffice.

### *Implications for Maternal-Foetal Contexts*

“The problem about the biomedical model of the body is its implicit understanding of identity and difference...By treating bodies as self-contained and as either absolutely different or identical, it effaces as it contributes to the ambiguity inherent in embodied existence. At a general level, the biomedical model of the body shares assumptions with the liberal and contract models of the self...”<sup>18</sup>

Where the situation in the rape trial arena has been complicated by the existence of long-standing imperatives which have sought to dichotomise women into the categories of ‘good’ and ‘bad’, depending upon the level of sexual initiative which their conduct displays, the situation in the maternal-foetal conflict arena has been complicated by the model of anatomy envisaged by the discourses of bio-medical ethics. Mirroring the critique lodged throughout this thesis at the traditions of thought that have framed our perceptions of consent in the legal arena, Rosyln Diprose has highlighted the problematic nature of clinical traditions of thought and their implications upon the perception of consent in the medical arena -

“biomedical ethics in general, in forgetting the body, and armed with its universal rules, relies on an inappropriate model of the relations between the individual and her body and misconceives the nature of the relationship between the individual and the other.”<sup>19</sup>

Female agents in the maternal-foetal conflict context do not only have to overcome the abstract individualism that has been prioritised in prevailing legal notions of consent, but they also have to overcome the inappropriate conception of the relationship between woman and foetus that dominates prevailing biomedical ethics.

The circumstances of maternal-foetal conflict established in Chapter Three show this biomedical model to be not only logically incoherent, but also entirely arbitrary in its division of the body of the pregnant woman. Carol Pateman has been vociferous in her condemnation of such a division and has continually demanded that in the case of the pregnant woman, the foetus is a part of the self. Pateman notes that, “there is something fundamentally problematic about

<sup>18</sup> Diprose, R. *The Bodies of Women*, Supra. Chapter Four, Note 93, p.127

<sup>19</sup> Diprose, R. *The Bodies of Women*, Supra. Chapter Four, Note 93, p.2

dividing a self, pregnant or otherwise, into a conscious agent and a passive, divisible body.”<sup>20</sup> Iris Young has added veracity to this critique by suggesting that in pregnancy, as in other models of embodiment, the self *is* her body.<sup>21</sup> Pregnancy, in fact, represents a model that offers significant challenge to the model of the contractarian tradition, which demands separation of a distinct self and a distinct other. In pregnancy, the assumption of a given border between the inside and the outside of the self is challenged because it is no longer clear where the body of one person ends and where the body of another begins.

Traditionally, both biomedical and legal ethics have noted the peculiarity of the pregnancy context. However, instead of embracing this difference as providing the potential for a revision of our overall perceptions of human existence, the common tendency has been to seek to constrain the pregnancy experience within pre-existing, but ill-suited, frameworks of abstract individualism. As Diprose has noted,

“Through its atomised model of identity, biomedical science builds a single model of a singular body with reference to familiar assumptions about what is proper to bodies. And, as constituting any body as proper and self-contained involves the negation of ambiguity, of thoughtless gifts, difference can only be understood in terms of deviation from this norm. Given this model of identity and difference, it should not be surprising if the general tendency to identify women’s bodies against a male norm...gets reproduced within its specific knowledge of society.”<sup>22</sup>

In our discussion in Chapter Three of the strong inter-dependence between dictates of medical discourse and dictates of law, the profound affect that these conceptualisations have had in the legal arena has been noted. Indeed, it was suggested that their incorporation into the legal arena has gone a long way towards providing a *prima facie* justification for the growing ascription of legal claims on behalf of the foetus.<sup>23</sup> While it will be argued in this section that the invocation of contextual agency in this arena will enable a transcendence of the

<sup>20</sup> Pateman, C. *The Sexual Contract*, Supra. Preface, Note 5. Discussed in Diprose, R. *The Bodies of Women*, Supra. Chapter Four, Note 93, p.7

<sup>21</sup> Young, I. “The Ideal of Community and the Politics of Difference”. Discussed in Diprose, R. *The Bodies of Women*, Supra. Chapter Four, Note 93, p. 115

<sup>22</sup> Diprose, R. *The Bodies of Women*, Supra. Chapter Four, Note 93, p.128

problematic individualism and constructionism of the liberal legal framework of consent, the ability of contextual agency to eradicate the deficiencies inherent in this biomedical ideology will also be examined. It is specifically through its concern with circumstance and its interest in the artificiality of the confines that establish the relevance of such circumstance that contextual agency locates the ability to deal with both these problematic models within its application.

It has certainly historically been the case that the context within which legal issues in regard to maternal-foetal conflict arise has been that of the biomedical model illustrated above. However, it can be convincingly established that this is not the only possible framework available. Indeed, the critique examined in Chapter Three and advocated here suggests that this uncritical reliance is in fact highly inappropriate. The tenacity of the prevailing biomedical model lies less in any claim to inherent good sense and more in a concern to avoid the peculiarities presented by the pregnancy experience through the submersion of its analysis within perceptions of anatomy that have been developed to accommodate and privilege the distinct human body. In pregnancy, neither the body of the woman, nor the body of the foetus are distinct in the way that the model seeks to pre-suppose. Instead of dealing with the anomaly of pregnancy as presenting the opportunity to question the assumptions of the overall context of embodiment, biomedical ethicists have instead sought to superimpose this model onto the antithetical experience of pregnancy. Aside from the debatable presumption inherent in this that we can divide the pregnant body into two autonomous entities, this analytical imposition also betrays a highly questionable conviction in favour of the abstract individualism that has been privileged in the legal realm. Implying that autonomous decisions are *about* one's body rather than enmeshed in it, the model celebrates an arbitrary division of the body and a distinction between the agent and her experiences of embodiment that preceding critique has found to be hugely problematic.

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<sup>23</sup> See Discussion in Chapter Three, especially in relation to Shaw, M. "The Potential Plaintiff - Preconception and Prenatal Torts" in Milinsky, Aubrey & Annas (ed.) *Genetics and the Law II*, Supra. Chapter Three, Note 45

The contextual model of agency offers the opportunity to challenge this pattern. In line with its focus upon prevailing social imperatives which operate to construct human identities, invocation of contextual agency can permit critique of the artificiality of the biomedical model, both in general terms and in terms of its lack of fit with the pregnancy context. This is sufficient to challenge the foundation that lies behind the legal privileging of sovereign rights and interpersonal conflict that flow from this perception. By alleviating the need to make the pregnancy context conform to the dictates of the self-legislating model of Kantian individualism, the entire context of the embodiment of pregnancy can be considered anew. Liberated to consider the alternative discursive formations that may be constitutive of subjectivity, it becomes increasingly feasible that we can analyse the foetus as related to the pregnant women, rather than as an alien entity with potentially competing claims upon her body. This not-one-but-not-two patient model represents a better and more truthful articulation of the manner in which the pregnant woman herself experiences the pregnancy.<sup>24</sup>

As such, it is submitted that this should also represent the setting within which the law considers her choice to give or refuse consent to medical treatment. In adopting a perception of the foetus as of concern to the pregnant woman, it becomes more logical to adopt a *prima facie* belief that the woman will act in the interests of herself and her foetus as a connected (although not combined) unit.<sup>25</sup> As we shall see, the social imperatives that act to structure women as mothers, and mothers as altruistic, may actually add support to this assumption once it has been liberated from the two-patient model that has made these assumptions so oppressive to women.

In offering potential liberation from the dominant two-patient obstetric and legal model, invocation of contextual agency also allows us to examine more clearly the nature of the factors that may influence the calculus of the maternal decision

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<sup>24</sup> I am grateful to Professor Seymour of Australian National University law school for his discussion of the merits of this not-one-but-not-two patient model within the obstetric arena

<sup>25</sup> We have examined the extent of that *prima facie* assumption in Chapter Three, "Consent as a Threshold in Foetal Therapy"

to issue or refuse consent to foetal treatment. To be sure, when the choice to give or refuse consent must be made in terms of the best overall result for the connected entity of woman and foetus, the calculus involved in the decision becomes more complex. However, this is not a reason for the legal arena to shy away from an examination of these issues. After all, that is the experiential framework within which the female agent herself has had to make her decision. Within this more complex analysis, a range of countervailing factors become relevant to the woman's decision. Once again, the benefit of the application of contextual agency lies in its ability to render these countervailing factors relevant considerations in the legal arena where formerly their incompatibility with the conflict model or their overtly affective and emotional origin rendered them irrelevant.

Amongst the most illustrative examples of the advantages that may be gained by the invocation of this contextual approach relate to those circumstances within which the pregnant woman has refused her consent to treatment out of a concern for the emotional, spiritual and relational framework within which the decision must be made, rather than out of the assumed motives of selfishness or disinterest for the foetus that have dominated legal analysis. Often in circumstances such as these, the decision to refuse treatment is an agonisingly difficult one for the pregnant woman to make. In continuing to frame that decision in terms of a conflict between herself and her foetus, both the prevailing legal and biomedical models perform her an extreme injustice.

Imagine, for example, the woman who has refused consent to treatment because of a genuine concern for the welfare of her living children. As we have noted in Chapter Three, the surgical procedure of caesarean section is far from uncomplicated and often carries with it the potential of serious illness and complication, and even the possibility of death.<sup>26</sup> For the woman who already has a family to consider, refusing treatment to ensure that she is fit, well and present to care for her current children is an entirely justified, albeit often difficult choice. In circumstances such as this, the countervailing and

contextual factors involved in the decision, once accredited with the significance that they accord within the personal deliberation of the female agent, present the nature of the choice in an entirely new light. Not only does this incorporation act to dispel the artificial conflict model, it also presents a welcome opportunity for medical and judicial officials to reevaluate the appropriateness of their commitment to intervene in such decision-making arenas. By encouraging a more fluid remit of relevance in the legal treatment of maternal-foetal conflict cases, contextual agency once more encourages a greater capacity for empathetic adjudication and particularised recommendations without entailing an over-simplified dichotomy between the autonomy of the pregnant woman and the welfare of the foetal patient.

The instance of the pregnant woman who refuses consent to treatment because of a concern with the welfare of other born children represents only one instance amongst many in a range of experiential complexities that may become relevant through the invocation of contextual forms of agency. This example is particularly helpful, however, because it illustrates effectively the arbitrary and over-simplified nature of the assumed correlation between complying with the broader culture's demands upon a selfless maternal concern with the welfare of children and giving automatic consent to foetal treatment. Surely the decision to undergo medical surgery with potentially serious consequences upon the health of the woman *should* require that the 'good' woman give serious thought to the effects of that decision upon her living children. In refusing to give their consent to treatment, women in this situation may actually be conforming in a more serious sense to the maternal ideal. In drawing factors relevant to the maternal decision such as these in from the periphery in legal decision-making, contextual agency in this arena illustrates the artificiality of the presupposition that women who refuse treatment do so out of malice or selfishness and offers a far more experientially empathetic means of translating the realities of the decision into the legal arena.

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<sup>26</sup> Annas, G. "Protecting the Liberty of Pregnant Patients", *Supra*. Chapter Three, Note 68



A similar illustration of the potential advantages of the application of contextual forms of consent in the legal treatment of maternal-foetal conflict cases arises from our discussion in Chapter Three of cases where the pregnant woman has refused consent to treatment on the basis of religious beliefs. While the prevailing legal model has interpreted that refusal as a selfish insistence on the part of the mother that her religious affiliations should accord priority over ensuring the birth of a healthy child, once again this overtly abstract and polarised form of analysis fails to take into account certain other important factors involved in the decision. Often in cases such as these, the refusal of maternal consent relates less to any concern regarding her own spiritual and religious well-being and more to a concern with the spirituality of her child. In many of the religions that prohibit the use of medical technologies, ensuring the birth of the foetus through artificial medical means imposes upon any subsequently born child the heavy burden of spiritual alienation and religious reproach. For the mother who holds deeply-felt religious convictions, the decision to refuse consent to treatment that may medically benefit the foetus is a decision to refuse an interference that not only poses serious detriment to the spiritual well-being of any child that may subsequently be born, but also poses the threat of exclusion from a final resting place for any foetus that does not survive surgery. It is overly-simplistic in cases such as these to suggest that the mother is selfish in her desire to refuse treatment on religious grounds. From the perspective of the female agent, that decision has been issued on the basis of a complex calculus of competing imperatives and in the final and firm belief that the decision offers the greatest possibility of spiritual redemption for the foetus, born or unborn. While prevailing standards of consent render such motivational factors irrelevant because of its continued adoption of a model of conflict, contextual models not only challenge the uncritical inference of conflict but also demand a more sensitive awareness of the various motivations behind the maternal decision and the centrality of those motivations to the belief-systems within which any subsequent child would be born and raised.

In a variety of other arenas, application of the more complex model of contextual agency would similarly allow judicial officials to appreciate that the

woman in question has made her decision to refuse consent to treatment on the basis of a complex calculus of factors. The woman herself must surely be in the best position to make that decision because the woman herself has the best understanding of the relevant imperatives that ought to be considered. Our discussion in Chapter Three has highlighted furthermore that there is little objectionable in that proposition because the woman who has carried her foetus to term despite the possibility of pursuing an abortion should be accorded this *prima facie* assumption in favour of her legitimate concern with the welfare of the foetus. In being compelled to consider and accredit the nature of those complex and often contradictory impulses bearing upon the maternal treatment decision in these cases, courts employing a more flexible contextual standard should feel a greater willingness to give credence to the maternal decision.

By delimiting the focus of consent to the immediate moment of proposed medical treatment, and to the medical opinion of the doctors involved, the treatment of maternal-foetal conflict cases to date have barely permitted the woman a voice to explain the factors bearing upon her decision. The case law examined in Chapter Three exhibits a marked judicial tendency simply not to attend to the explanations of the pregnant woman – rarely, does the judge take the time to meet with the woman herself and even more rarely does the judge pay serious attention to any opinion brought before the court other than the interpretation of events offered by medical staff.<sup>27</sup> Yet the concern of medical staff remains firmly fixed within the present pregnancy and with what are deemed to be the best medical interests of the foetus. The medical staff involved have no concern for the welfare of other children, and nor should they have, for their concern is with the clinical context.

The mistake of legal treatment to date has been to assume blindly that despite the narrow focus of medical opinion, this presents the best evaluation of the extremely complex issues involved in the decision. This is quite frankly misguided. The person with the best awareness of the complex and interconnected factors bearing upon the treatment decision is the pregnant

woman herself. The first improvement which application of the contextual model would demand, therefore, would involve the creation of a place within which the voice and perspective of the pregnant women is to be heard.

This, however, does not take us far enough. Even if such a forum were available within the trial procedure, the dynamics of the prevailing model of legal consent examined in preceding chapters suggests that the relevance of the factors involved in the calculus pursued by the pregnant women may still not be accredited sufficiently. The prevailing model, as we have repeatedly seen, is adept in the art of relegating issues of personal experience, relational complexities and affective ties to the underside of the operation of consent. By constructing the legal agent as abstract and individualist, by its very nature, the prevailing model of consent systematically denies appreciation of the very issues involved in the complex calculus suggested. In contrast, the application of the contextual model of agency would draw these issues of affection and circumstance to the fore. In the arena of maternal-foetal conflict, this would not only give the woman a hitherto unrecognised voice in legal proceedings, but would also allow for the serious consideration of concerns about the effect of surgery upon other relationships, etc. which have a profound effect upon the decision-making process of the woman herself. By removing the current tendency towards the uncritical acceptance of medical authority exhibited by the legal realm, the model of contextual agency takes us a long way towards improvement.

Through its focus upon the nature and operation of prevailing discourse and cultural imperatives, the model of contextual agency can establish the constrained nature of the clinical context and can establish the existence of a variety of more complex and more expansive imperatives that impinge upon the pregnant woman's decision. Where the operation of legal and medical imperialism implicated in the prevailing conception has tended to render these imperatives irrelevant to the issue of consent to treatment, the contextual model demands their serious examination. In establishing its premise that the legal

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<sup>27</sup> Rhoden, N. "The Judge in the Delivery Room", *Supra*. Chapter Three, Note 73

arena must engage with all the issues, dictates and circumstances which the agents have engaged with in their personal decision-making process, the contextual model brings these more complex considerations to the centre of legal analysis. This makes it impossible for a judge to issue an order for enforced medical treatment without first not only hearing the voice of the pregnant woman, but also engaging empathetically with the reasons why she has decided to refuse her consent to treatment.

Having undergone this process of empathetic judging required by the contextual model, it is increasingly unlikely that the judge in question will be so quick to construe the maternal actions as selfish and to construe the maternal-foetal relationship as one of conflict. Conversely, it becomes increasingly likely that the judge will be inclined to accept the legitimacy of the decision reached by the woman herself, recognising the reality that she is in the best position to evaluate and adjudicate on the complex and inter-related imperatives involved. A woman who has carried her foetus to the point where caesarean section is viable can be assumed to have a genuine wish to bear the child. This should be sufficient to establish the *prima facie* supposition that the pregnant woman has engaged with her decision to refuse consent seriously on the basis of an experiential belief that herself and her foetus are part of a connected unit and on the basis of the desire to exact a calculus which takes this into account in rendering the best overall result.

Replacing the prevailing model of individualist consent and abstract conflict with a flexible and concrete model of contextual agency permits a significant reconceptualisation of the maternal-foetal relationship. This in turn heralds the potential for a marked improvement in terms of the fate of the maternal patient who refuses consent to medical treatment through its insistence upon a greater concern with attending to the experience of the pregnant woman and the various complex factors that have framed the context within which she has made that decision. The abstract liberal model and its rigid criteria for legal relevance are particularly ill-suited to the pregnancy context within which identification of a rigid differentiation between self and other is impossible and within which the

motivational factors involved are commonly of a relational and emotional nature. In presenting a workable standard of consent that acknowledges the peculiarity of pregnancy and its attendant forms of experience, the contextual model offers an alternative remedy to maternal-foetal conflict cases that can diffuse the conflict involved and allow a more subtle and sensitive analysis through the respect with which it deals with hitherto peripheral matters of personal motivation.

### *Conclusion – Contextual Agency and the Disciplinary Agenda*

It has been argued throughout this thesis that the current legal construction of consent finds its roots firmly within that species of abstract individualism that the alternative conceptions of situated subjectivity developed over preceding chapters seek to displace. Recognition of the inherent superficiality of the Kantian subject necessarily entails recognition of the artificiality of the present one-dimensional notion of consent. Through our analysis of prevailing forms of subjectivity and agency, it has become evident that the notion of an abstract and disinterested communication of individual preference inherent in the notion of consent is no longer the most appropriate vehicle for the self-determination of the situated and discursive subject. In determining alternative forms of subjectivity and agency, we have arrived at a hybrid ethical theory that envisages a form of agency referred to as contextual agency.

Throughout this chapter, we have examined the potential implications heralded by the application of standards of contextual agency in favour of prevailing models of consent. In terms of the specific arenas of rape and maternal-foetal conflict, we have recognised that despite the limitations inherent in its application within the existing adversarial, objective and rationalistic framework of legal liberalism, the model of contextual agency offers the opportunity for considerable improvement upon the credibility afforded to female self-determination. Our discussion in regard to both arenas in earlier chapters highlighted, not only the obstacles to establishing non-consent at the individual level, but also at the level of systematic bias and procedural inefficiency. While

the application of the model of contextual agency within existing legal frameworks may only allow for the recognition of some of its potential benefits, the importance of employing this immediate form of analysis lies in offering pragmatic options for improvement upon current operations of the consent standard. In terms of the ethical dictates of this work, which require a concern with experiential realities and improvements at the level of everyday life, this localised form of analysis is crucial. As we have mentioned, however, this is not to say that there is not considerably more dramatic potential within the contextual model that may be developed in line with other projects to form a more progressive and transformative prescriptive ethical and legal vision.

Recurring throughout our analysis of the application of contextual agency in specific arenas has been the recognition that employing this model within prevailing legal accounts will encourage a greater judicial concern with circumstantial, relational and emotional factors. This is massively significant in terms of improving the realities of interactions between the legal system and female agents, particularly but not exclusively in the specific contexts of rape and maternal-foetal conflict. Without seeking a grand meta-narrative with which to replace the paradigms of liberalism, the contextual form outlined within this thesis remains capable of application in a variety of social situations. Its application, although inherently flexible and context-sensitive, will in all such cases not only challenge the problematic and artificial presumption of individualism that has dominated previous legal application and interpretation of the consent standard, but will also ensure a far greater remit for determining relevance that will encompass crucial factors of relationship, expectation and power hitherto considered irrelevant in the field of legal deliberation. In so doing, it will reflect far more satisfactorily the experiential reality encountered by legal agents in their decisions to issue or refuse consent. As Hekman comments, “there is nothing arbitrary, anarchic or idiosyncratic about this. It is, quite simply, what we do.”<sup>28</sup>

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<sup>28</sup> Hekman, S. *Moral Voices, Moral Selves*, Supra. Preface, Note 24, p. 163

In light of the Foucaultian assertion, advocated within Chapter One, that legal power is increasingly taking the form of disciplinary power, the need for a contextual agenda of the kind thus suggested becomes paramount. In a period of modernity characterised by an increasingly insidious operation of legal power with an increasingly transparent medium of articulation, the most appropriate means of challenge and resistance itself becomes infiltrating and subversive. With the explosion of discourse that is characteristic of modernity has come a medium for the articulation of power that finds its roots firmly in the identity formation of the legal subject. The legal subject is becoming increasingly overdetermined by the dictates of social discipline yet the trajectory of those dictates becomes harder to isolate and identify. Subversive resistance remains the most promising means of attack. Employment of contextual agency permits this kind of subversive resistance through its insistence upon the relevance of circumstance, power and relationship to all matters of self-determination. In a disciplinary legal regime, the model of contextual agency sets its sights at the most appropriate line of attack – the human agent. By broadening the perceived identity of the agent in the legal arena to include a sensitivity to issues of disciplinary power distribution, contextual agency acts as an integral part of an overall framework of resistance that defies the tendency towards increased marginalisation of the significance of power structures. Despite the necessity of its immediate operation within the adversarial frameworks of legal liberalism, therefore, the model of contextual agency represents a most promising challenge to abstract individualism and the inadequacies that it has promoted in the legal conception and operation of consent.

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