> Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house.[45]

The 'subjection of women' described by John Stuart Mill, reinforced by law, has proven slow to pass. It was, for example, to be as late as 1970 before the United Kingdom Parliament accepted that laws which effectively retained the concept of 'woman as property' were no longer reflective of the demand for equality. Cedric Thornberry considers the reforms in the article which follows:

WHAT PRICE THE MISSUS NOW?[46]

Cedric Thornberry[47]

From New Year's Day, actions for damages for adultery, breach of promise to marry, enticement, harbouring and seduction of a child or spouse are abolished.[48] Thus, towards the end of the 20th century, one of the legal bastions of the Englishmen's right to treat his family as his property is removed.

Opinion polls in recent years have shown that the right is still regarded by most of the population as sacred. However unpalatable to the liberals' ideal of England, the brutal fact is that we are a nation of Andy Capps and his Missuses. Way back in 1912 the Royal Commission on Divorce noted that the idea of getting money for your wife was peculiar among civilised peoples to the Anglo-Saxons, and that foreigners could not understand how English law could sustain it. And when the Law Commission gingerly advised the abolition of these legal enormities two years ago its members were well aware that they were going against the popular will.

It is not, for once, the fault of the lawyers that these things have survived. Most judges (though there are Andy Capps on the Bench as well) have for years seemed baffled by the retention of these actions. Deserted husbands have had to be dissuaded by their lawyers from claiming damages 'because it will alienate the Court'. Though the legislature casually re-enacted the right to damages in 1965 it has been clear for many years that the majority of MPs were unhappy about it – as they showed earlier this year when the whips were taken off and they were given a free vote. We have the law which we not only deserve but desire.

Women slaves

Women's Liberation asserts that woman is still the most colonialised people on earth. Slavery, as such, was effectively abolished in England 250 years ago. Yet the legal history and modern rationale of the damages claim is founded on the idea of bondage. The action began while a woman was in all ways regarded as the husband's property. Everything she had went to him on marriage. Her earnings were his. She was viewed as a child and 'subject to physical punishment at his hands (provided it was moderate in extent)'.

The logic of this was that a wife, however eager, was unable to consent to going to bed with her lover. So the law made an irrebuttable presumption that intercourse was forcible. In 1620 one man was sued by an irate husband for 'for that he took his wife away for five years, *simul cum* her gown and petticoat, and

45 *Ibid*, p 196.

46 *The Guardian*, 29 December 1970.

47 At the time of writing, Lecturer in Law, London School of Economics and Political Science.

48 Law Reform (Miscellaneous Provisions) Act 1970.

lived with her in a suspicious manner'. The law was that because husband and wife were one, and that one was the husband, intercourse with the wife was assault and battery (and probably rape) on him.

Though they later became more sophisticated the law's assumptions did not greatly change with the centuries, even after the married woman became, in the late 19th century, as more or less responsible legal person. Tracing the history of the English family through the damages cases is truly a melancholy tale of man's inhumanity to woman.

Thus, where one wife had separated from her husband and years later found another man, the husband could still get money for her; 'his name was dishonoured by her; she had (since separating) become a woman of substantial means and might have chosen to give her husband some of them.' In this case, the wife had left her husband when she was 19 and there was no evidence at all that the co-respondent had even known that she was married.

In another, a seemingly faithful wife throughout her life confessed on her death-bed to a single act of adultery, years earlier. Her widower got money for it. Yet another entrepreneur had a little capital gain from the man who had been supporting not only his wife but also his children for years.

In a few recent cases where damages have been sought the Courts have embarressedly held that damages are for the loss of a man's wife, the injury to his feelings, the blow to his honour, and the hurt to his family life.

If her lover were a man of wealth or position, damages would be higher, though the converse would not be true: this on the hilarious premise that a man's honour is more (materially) affronted if his wife goes to bed with the boss rather than the dustman. Other relevant factors are whether the wife has helped her husband's business, 'the size of her fortune', 'her capacity as a housekeeper, and the state of her pre-marital virtue' (more for a virgin than a tart).

Where judges have ventured to defend the basis of the action (which has not been often), they have speculated that 'beneath the sordid basis of property, lay perhaps a cogent moral foundation – to maintain the purity of married life and defend the family's honour.' But its cogency was somewhat weakened by the absence of any comparable right for a wife against her husband's mistress.

In the last 30 years the Courts have increasingly been uneasy over the idea of damages. Three years ago, the Court of Appeal scathingly reviewed the authorities in a judgment which should have crushed the unfortunate husband (though he nevertheless departed £2,000 the richer). The psychology of the law, said the Court, was drawn not from reality but from the Victorian novelette. 'The concept of the reasonable common law cuckold (which they had been obliged to analyse) is needed so long as Parliament preserves a cause of action which is repugnant to modern and sensible ideas.'

Legal Curiosity

It would be comforting to assume that the action has been a mere legal curiosity. But it has not. It has evidently had public support. It is part of a wider whole, in which it is not deemed intolerable for a husband to treat his wife as a chattel during marriage as well as on divorce.

Perhaps its demise will permit a more rational approach by the Courts to what a woman must be expected to tolerate in marriage. Yet more than 100 years after Ibsen's *Doll's House*, an English High Court can say that he cannot begin to understand what Norah was making such a fuss about. And more than 50 years after Galsworthy satirised the proprietary English bourgeois family, Soames Forsyte can become a folk hero with the trendy English public.

FEMINIST CRITIQUES OF THE PUBLIC/PRIVATE DICHOTOMY

THE DISORDER OF WOMEN[49]

Carole Pateman

The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about. Although some feminists treat the dichotomy as a universal, trans-historical and trans-cultural feature of human existence, feminist criticism is primarily directed at the separation and opposition between the public and private spheres in liberal theory and practice.

The relationship between feminism and liberalism is extremely close but also exceedingly complex. The roots of both doctrines lie in the emergence of individualism as a general theory of social life; neither liberalism nor feminism is conceivable without some conception of individuals as free and equal beings, emancipated from the ascribed, hierarchical bonds of traditional society. But if liberalism and feminism share a common origin, their adherents have often been opposed over the past two hundred years. The direction and scope of feminist criticism of liberal conceptions of the public and the private have varied greatly in different phases of the feminist movement. An analysis of this criticism is made more complicated because liberalism is inherently ambiguous about the 'public' and the 'private', and feminists and liberals disagree about where and why the dividing line is to be drawn between the two spheres, or, according to certain contemporary feminist arguments, whether it should be drawn at all.

Feminism is often seen as nothing more than the completion of the liberal or bourgeois revolution, as an extension of liberal principles and rights to women as well as men. The demand for equal rights has, of course, always been an important part of feminism. However, the attempt to universalise liberalism has more far-reaching consequences than is often appreciated because, in the end, it inevitably challenges liberalism itself. Liberal-feminism has radical implications, not least in challenging the separation and opposition between the private and the public spheres that is fundamental to liberal theory and practice. The liberal contrast between private and public is more than a distinction between two kinds of social activities. The public sphere, and the principles that govern it, are seen as separate from, or independent of, the relationships in the private sphere. A familiar illustration of this claim is the long controversy between liberal and radical political scientists about participation, the radicals denying the liberal claim that the social inequalities of the private sphere are irrelevant to questions about the political equality, universal suffrage and associated civil liberties of the public realm.

Not all feminists, however, are liberals: 'feminism' goes far beyond liberal-feminism. Other feminists explicitly reject liberal conceptions of the private and public and see the social structure of liberalism as the political problem, not a starting point from which equal rights can be claimed. They have much in common with the radical and socialist critics of liberalism who rely on 'organic' theories (to use Benn and Gaus's[50] terminology) but they differ sharply in their

49 Carole Pateman, *The Disorder of Women* (Polity Press, 1989), Chapter 6.

50 S Benn and G Gaus (eds) *Public and Private in Social Life* (Croom Helm, 1983).

analysis of the liberal state. In short, feminists, unlike other radicals, raise the generally neglected problem of the patriarchal character of liberalism.

Liberalism and Patriarchalism

Benn and Gaus's account of the liberal conception of the public and private illustrates very nicely some major problems in liberal theory. They accept that the private and the public are central categories of liberalism, but they do not explain why these two terms are crucial or why the private sphere is contrasted with and opposed to the 'public' rather than the 'political' realm. Similarly, they note that liberal arguments leave it unclear whether civil society is private or public but, although they state that in both of their liberal models the family is paradigmatically private, they fail to pursue the question why, in this case, liberals usually also see civil society as private. Benn and Gaus's account of liberalism also illustrates its abstract, ahistorical character and, in what is omitted and taken for granted, provides a good example of the theoretical discussions that feminists are now sharply criticising. The account bears out Eisenstein's claim that 'the ideology of public and private life' invariably presents 'the division between public and private life, ... as reflecting the development of the bourgeois liberal state, not the patriarchal ordering of the bourgeois state'.[51]

The term 'ideology' is appropriate here because the profound ambiguity of the liberal conception of the private and public obscures and mystifies the social reality it helps constitute. Feminists argue that liberalism is structured by patriarchal as well as class relations, and that the dichotomy between the private and the public obscures the subjection of women to men within an apparently universal, egalitarian and individualist order. Benn and Gaus's account assumes that the reality of our social life is more or less adequately captured in liberal conceptions. They do not recognise that 'liberalism' is patriarchal-liberalism and that the separation and opposition of the public and private spheres is an unequal opposition between women and men. They thus talk of 'individuals' in liberal theory at face value although, from the period when the social contract theorists attacked the patriarchalists, liberal theorists have excluded women from the scope of their apparently universal arguments. One reason why the exclusion goes unnoticed is that the separation of the private and public is presented in liberal theory as if it applied to all individuals in the same way. It is often claimed – by anti-feminists today, but by feminists in the 19th century, most of whom accepted the doctrine of 'separate spheres' – that the two spheres are separate, but equally important and valuable. The way in which women and men are differentially located within private life and the public world is, as I shall indicate, a complex matter, but underlying a complicated reality is the belief that women's natures are such that they are properly subject to men and their proper place is in the private, domestic sphere. Men properly inhabit, and rule within, both spheres. The essential feminist argument is that the doctrine of 'separate but equal', and the ostensible individualism and egalitarianism of liberal theory, obscure the patriarchal reality of a social structure of inequality and the domination of women by men.

In theory, liberalism and patriarchalism stand irrevocably opposed to each other. Liberalism is an individualist, egalitarian, conventionalist doctrine; patriarchalism claims that hierarchical relations of subordination necessarily follow from the natural characteristics of men and women. In fact, the two doctrines were successfully reconciled through the answer given by the contract

51 Z Eisenstein *The Radical Future of Liberal Feminism* (New York: Longman, 1981), p 223.

theorists in the 17th century to the subversive question of who counted as free and equal individuals. The conflict with the patriarchalists did not extend to women or conjugal relations; the latter were excluded from individualist arguments and the battle was fought out over the relation of adult sons to their fathers ... .[52]

... [F]eminist critiques insist that an alternative to the liberal conception must also encompass the relationship between public and domestic life. The question that feminists raise is why the patriarchal character of the separation of a depoliticised public sphere from private life is so easily 'forgotten'; why is the separation of the two worlds located within civil society so that public life is implicitly conceptualised as the sphere of men?

The answer to this question can be found only by examining the history of the connection between the separation of production from the household and the emergence of the family as paradigmatically private ... As capitalism and its specific form of sexual as well as class division of labour developed ... wives were pushed into a few, low-status areas of employment or kept out of economic life altogether, relegated to their 'natural' dependent, place in the private, familial sphere. Today, despite a large measure of civil equality, it appears natural that wives are subordinate just because they are dependent on their husbands for subsistence, and it is taken for granted that liberal social life can be understood without reference to the sphere of subordination, natural relations and women. The old patriarchal argument from nature and women's nature was thus transformed as it was modernised and incorporated into liberal-capitalism. Theoretical and practical attention became fixed exclusively on the public area, on civil society – on 'the social' or on 'the economy' – and domestic life was assumed irrelevant to social and political theory or the concerns of men of affairs. The fact that patriarchalism is an essential, indeed constitutive, part of the theory and practice of liberalism remains obscured by the apparently impersonal, universal dichotomy between private and public within civil society itself ... .[53]

Nature and Culture

Patriarchalism rests on the appeal to nature and the claim that women's natural function of child-bearing prescribes their domestic and subordinate place in the order of things ...[54]

The most thorough attempt to find a universal answer to the question of why it is that women are in subjection to men, and the most stark opposition between nature and culture, can be found in the writings of the radical feminists who argue that nature is the single cause of men's domination. The best-known version of this argument is Firestone's *The Dialectic of Sex*,[55] which also provides an example of how one form of feminist argument, while attacking the liberal separation of private and public, remains within the abstractly individualist framework which helps constitute this division of social life. Firestone reduces the history of the relation between nature and culture or private and public to an opposition between female and male. She argues that the origin of the dualism lies in 'biology itself – procreation', a natural or original inequality that is the basis of the oppression of women and the source of male power. Men, by

52 Carole Pateman, *op cit*, pp 118–20.

53 *Ibid*, p 123.

54 *Ibid*, p 124.

55 S Firestone, *The Dialectic of Sex* (New York: W Morrow, 1970).

confining women to reproduction (nature), have freed themselves 'for the business of the world' and so have created and controlled culture. The proposed solution is to eliminate natural differences (inequalities) between the sexes by introducing artificial reproduction. 'Nature' and the private sphere of the family will then be abolished and individuals, of all ages, will interact as equals in an undifferentiated cultural (or public) order.

The popular success of *The Dialectic of Sex* owes more to the need for women to continue to fight for control of their bodies and reproductive capacity than to its philosophical argument. The key assumption of the book is that women necessarily suffer from 'a fundamentally oppressive biological condition', but biology, in itself, is neither oppressive nor liberating; biology, or nature, becomes either a source of subjection or free creativity for women only because it has meaning within specific social relationships. Firestone's argument reduces the social conceptions of 'women' and 'men' to the biological categories of 'female' and 'male', and thus denies any significance to the complex history of the relationship between men and women or between the private and public spheres. She relies on an abstract conception of a natural, biological female individual with a reproductive capacity which puts her at the mercy of a male individual, who is assumed to have a natural drive to subjugate her. This contemporary version of a thorough Hobbesian reduction of individuals to their natural state leads to a theoretical dead-end, not perhaps a surprising conclusion to an argument that implicity accepts the patriarchal claim that women's subordination is decreed by nature. The way forward will not be found in a universal dichotomy between nature and culture, or between female and male individuals. Rather ... it is necessary to develop a feminist theoretical perspective that takes account of the social relationships between women and men in historically specific structures of domination and subordination; and, it might be added, within the context of specific interpretations of the 'public' and 'private'.[56]

SEXUAL DIVISIONS IN LAW[57]

Katherine O'Donovan[58]

Definition and History of Public and Private

> The realm of Iife and work in *Gemeinschaft* is particularly befitting to women; indeed, it is even necessary to them. For women, the home and not the market, their own or a friend's dwelling and not the street, is the natural seat of their activity.
>
> *Ferdinand Tonnies*

Liberal philosophy has developed the ideas of public and private as separate areas of life. Both concepts are used in a variety of ways. In seeking to define the private I shall concentrate on its 19th century use. Central to liberalism is the concept of privacy as a sphere of behaviour free from public interference, that is, unregulated by law. The interest of an account of traditional usage of the concept of the private is not merely definitional. It is the prelude to an explanation for the divisions between women and the men in law.

56 *Ibid*, pp 125–26.

57 Katherine O'Donovan, *Sexual Divisions In Law* (Weidenfeld & Nicolson, 1984).

58 Currently Professor of Law, Queen Mary and Westfield College, University of London.

In a sense the private has no history. The purpose of a chapter on her story here is not merely 'a search for origins'. It is to explain how the patriarchal family form, which flourished in medieval and early modern European culture, survives today in another guise. This is accounted for, in large part, by the unregulated private.

Dichotomies

The liberal conception of the private refers to behaviour and activities unregulated by law. For Mill, 'the only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign'.[59] Mill argues for a sphere of action in which society has only an indirect interest. This 'appropriate region of human liberty' covers matters of conscience, thought, opinion, expression. It also covers 'liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like subject to such consequences as may follow'.

In liberal philosophy privacy is central to individualism as an area of life not subjected to the power of society. The importance of this area has grown in recent times, for as Benjamin Constant observed, 'nearly all the enjoyments of the moderns are in their private lives: the immense majority, forever excluded from power, necessarily take only a very passing interest in their public lives'.[60] Steven Lukes, in his review of privacy as a core idea of individualism, concludes that

> the idea of privacy refers to a sphere that is not of proper concern to others. It implies a negative relation between the individual and some wider 'public', including the state – a relation of non-interference with, or non-intrusion into, some range of his thoughts and/or action. This condition may be achieved either by his withdrawal or by the public's forbearance.[61]

An outcome of this is that law as regulator or non-regulator is a crucial expression of the limits of state intervention. Law's role in maintaining a boundary between private and public has not always been recognised by philosophers. Yet as Lukes notes: 'liberalism may be said largely to have been an argument about where the boundaries of this private sphere lie, according to what principles they are to be drawn, whence interference derives and how it is to be checked.'[62] This statement might be thought to suggest that law is discounted as a mere boundary divider. It will, however, be argued throughout this book that law is not only central to the concepts of private and public, and to the division between the two, but also plays an important part in the construction of that division.

This book uses the concepts of private and public to distinguish between areas of activity and behaviour unregulated or regulated by law, as in the classical liberal fashion. In legal discourse privacy is more often used as a concept concerned with the protection of individuals from an overly intrusive corporate state prying into personal secrets. Clearly privacy as a concept concerns itself not only with social regulation but also with data protection and evidentiary matters of access

59 JS Mill, *On Liberty* (London: Dent, 1910), p 9.

60 B Constant, *De L'Esprit de Conquête* (1814), cited by S Lukes, *Individualism* (Blackwell, 1973), p 65.

61 S Lukes, *ibid*, p 66.

62 *Ibid*, p 62.

to information. This relates to the boundaries of law, for in some cases law enforcement depends on evidence as to behaviour normally classified as private. Further difficulties of definition arise because in recent writings the concepts private and public stand for a variety of referents. 'Public' may be used to denote state activity, the values of the market-place, work, the male domain or that sphere of activity which is regulated by law. 'Private' may denote civil society, the values of family, intimacy, the personal life, home, women's domain or behaviour unregulated by law. The confusion is increased in legal discourse which calls legal relations between state and citizens public and those between individuals private.

If the private is identified as the unregulated zone of life this poses problems which are neither discussed nor recognised in liberal political philosophy. Those areas such as the personal, sexuality, biological reproduction, family, home, which are particularly identified socially as women's domain, are also seen as private. It can be argued that social differentiation between women and men in the gender order has its counterpart in the general social distinction between private and public. A simple summary is: 'the public sphere is that sphere in which 'history' is made. But the public sphere is the sphere of male activity. Domestic activity becomes relegated to the private sphere and is mediated to the public sphere by men who move between both. Women have a place only in the private sphere'.[63, 64]

The importance of the distinction between private and public lies in its influence on our perception of the social world and the maintenance of the distinction in law. Scholars of the medieval period agree that the pre-industrial household was a centre of production and consumption. Life was not experienced as compartmentalised into separate categories. It is true that a hierarchical order divided human beings according to status, and that gender was a crucial determinant. This was experienced as natural. Living conditions in the past, the presence of servants and kin, meant that most, if not all, behaviour was open to comment and control. With the revolution in production and the change of mentality that accompanied it, 'life would now be experienced as divided into two distinct spheres: a public sphere of endeavour governed ultimately by the Market; and a 'private' sphere of intimate relationships and individual biological existence'.[65]

In traditional sociological theory the term *Gemeinschaft* has been used to sum up the values associated today with the private sphere. The term originates with the German sociologist, Ferdinand Tonnies, writing in the late 19th century. *Gemeinschaft*, or community, is represented by pre-modern, organic, pre-capitalist societies, usually agrarian, where everything was produced within the household. Here individuals were regulated according to status but their interactions were mediated by love, duty and a common understanding and purpose. The emphasis is on regulation as expressing internalised norms, traditions and the will of the organic community. There is little or no distinction between public and private, between formal law and other forms of regulation. Social status and gender are primary determinants of the expectations of individuals for themselves and of others.

63 D Smith, 'Women, the Family and Corporate Capitalism', in M Stephenson (ed), *Women in Canada* (Toronto: New Press, 1974), p 6.

64 Katherine O'Donovan, *op cit*, pp 2–4.

65 B Ehrenrich and D English, *For Her Own Good* (Pluto Press, 1979), p 9.

The *Gemeinschaft* conception of justice 'elevates social harmony and subordinates both conflict resolutions and resource allocation to a conception of the total social order'.[66] It is not a description of an actual social order but rather a Weberian ideal type which enables us to understand historical ideologies of how people should live. Although *Gemeinschaft* is sometimes used as an alternative for a concept of 'the good', it has to be recognised that this type of society is status and gender-based with a consequent subordination, for the sake of the community, of women and lower-class men. That this lesser status is seen as natural and therefore internalised does not detract from the point. Modern writing which idealises the values of community often overlooks the hierarchical and dependent relationships traditionally associated with self-abnegation for the sake of others.

Tonnies contrasted *Gemeinschaft* with the modern commercial market society, the *Gesellschaft*. This represents the world of striving for profit by isolated persons. This world develops as a protest against status society and with the growth of individualism. In this atomistic marketplace the general good is seen as derived from individual competition for material advantage. A free market promoted by the liberal theory of possessive individualism enables the pursuit of self-interest through the instrument of contract. The *Gesellschaft* conception of justice emphasises formality, neutrality of adjudication, precision, rationality and predictability. Individuals are seen as abstract right- and duty-bearing entities. The distinction between law – that which is formally regulated – and the private is sharply pronounced. Contract is the model for all law, an exchange between equal individuals, the *quid pro quo* of commercial dealings.

Gesellschaft is sometimes used as a synonym for 'the bad', but it can be argued that the neutrality and equality of the market is preferable to hierarchical society. Von Ihering illustrates the advantages of contractual independence by comparing a land without hotels but general hospitality, with a land with a supply of paid accommodation. On reflection he prefers to retain his personal freedom and independence and to pay for his lodging. He argues that our moral as well as our economic independence depend on exchange.[67]

Conceptions of Privacy

Legal discussions of privacy distinguish between the definition, content and zone of privacy on the one hand, and a notion of the right to that privacy on the other. Lack of agreement about the area to he delimited has prevented a right of privacy from being enacted in English law. However, a leading American authority has shown four areas of interests in privacy that are protected by law. These are intrusion into seclusion or private affairs; public disclosure of embarrassing private facts; false publicity; appropriation of name and likeness. …[68, 69]

An attempt to arrive at a legal definition of the area of privacy through case analysis is unsatisfactory. There are few cases and they do not make clear where the lines are drawn. Yet the idea of privacy does affect perceptions of the social world and social policy, even if not translated into legal concept. Furthermore

66 E Kamenka, 'What is Justice?' in E Kamenka and AES Tay (eds) *Justice* (London, E Arnold, 1979), p 7.

67 See B Rudden, 'Real Property' (1982) 2 *Oxford Journal of Legal Studies*, 238.

68 WL Prosser, 'Privacy' (1960) 48 *California Law Review*, 383.

69 Katherine O'Donovan, *op cit*, pp 4–6.

the desire for privacy has grown in the recent past, probably as a reaction to market society. As the Younger Committee pointed out:

> The modern middle class family of two parents and their children, relatively sound-proofed in their semi-detached house, relatively unseen behind their privet hedge and rose trellis, travelling with determined reserve on public transport or insulated in the family car, shopping in the supermarket and entertained by television, are probably more private in the sense of being unnoticed in all their everyday doings than any other sizeable section of the population in any other time or place.[70]

Privacy, then, has various dimensions of which being unnoticed, not having one's seclusion intruded upon, and controlling information and knowledge about oneself, are only aspects. Those instances where privacy is regarded as having been violated largely concern individuals. The issue of state intrusion is more difficult. It is for the state to decide how, where, and in what manner it will regulate individuals lives. Zones can be mapped out as being inside or outside the state's purview. The placement of an aspect of life inside or outside the law is a form of regulation. Legal acknowledgement of its existence defines and constitutes it. So regulation may take a form within or without the law.

It has already been stipulated that the term private is used in this book as synonymous with non-regulated. This requires further elaboration. There is a distinction between areas of privacy that are unrecognised and invisible and those that are specifically delimited as private. With the non-existence or invisibility model there is no public reference to the private zone. Not being referred to, it is not brought into existence, defined or constituted.[71]

A deliberate policy of non-intervention by the state may mask a passing of control to informal mechanisms. For instance the legal doctrine of the unity of spouses serves as a justification for state policy of non-intervention in marriage. As Michael Anderson observes: 'family behaviour has become the most private and personal of all areas of behaviour, almost totally free from external supervision and control.'[72] Who then controls the family? It can be argued that nonintervention by law may result in the state leaving the power with the husband and father whose authority it legitimates indirectly through public law support for him as breadwinner and household head. A deliberate policy of non-intervention does not necessarily mean that an area of behaviour is uncontrolled.

The Distinction Between Private and Public in Legal Discourse

The idea that private and public can be distinguished is imbued in legal philosophy and informs legal policy. 'One of the central goals of 19th century legal thought was to create a clear separation between constitutional, criminal, and regulatory law – public law and the law of private transactions – torts, contracts, property and commercial law.'[73] This division is not confined to distinguishing relations between individual and state from relations between individuals. It also draws a line dividing the law's business from what is called

70 *Report of the Committee on Privacy*, Cmnd 5012 (1972), para 78.

71 Katherine O'Donovan, *op cit*, pp 6–7.

72 M Anderson, 'The Relevance of Family History', in C Harris (ed), *The Sociology of the Family* (Keele: Soc Rev Monograph No 28, 1979), p 67.

73 M Horowitz, 'The History of the Public/Private Distinction' (1982) 130 *U Penn LR* 1423, p 1424.

private. Although this boundary between the private and public shifts over time, the existence of the distinction and the notion of boundary are rarely questioned.

The dichotomy between private and public as unregulated and regulated has its origins in liberal philosophy. The 17th century liberal tradition as represented by Locke posits a distinction between reason and passion, knowledge and desire, mind and body. This leads to a split between the public sphere in which individuals prudently calculate their own self-interest and act upon it, and a private sphere of subjectivity and desire. As Roberto Unger describes it: 'In our public mode of being we speak the common language of reason, and live under laws of the state, the constraints of the market, and the customs of the different social bodies to which we belong. In our private incarnation, however, we are at the mercy of our own sense impressions and desires.'[74] The liberal conception is of man as a rational creature making rational choices and entering the political sphere for his own ends.

Nineteenth century liberal thought, as expressed by John Stuart Mill, continued the tradition of the private/public split. In his feminist work *On the Subjection of Women* the solution for Mill was the grant to women of full equality of formal rights with men in the public sphere. From public equality, he believed, would follow a transformed family, a 'school of sympathy in equality' where the spouses live 'together in love, without power on one side or obedience on the other'. Yet he did not propose the merging of the two spheres but rather sanctioned the division of labour in which women remain in the realm of subjectivity and the private. Thus he argued: 'When the support of the family depends, not on property but on earnings, the common arrangement, by which the wife superintends the domestic expenditure, seems to me in general the most suitable division of labour between the two persons'.[75] Women's role was to remain that of loving and softening men in the domestic realm. Mill's views on household management overlooked the connection between economic power and dominance in the home. Economic inequality leads to an imbalance of power. The division of labour whereby one spouse works for earnings and the other for love encapsulates the public/private split.

The Wolfenden Committee Report on Homosexual Offences and Prostitution provides an excellent example of the implementation in law of the liberal view of the distinction between public and private. The committee accepted as unproblematic the idea of 'private lives of citizens'. It stated that the function of criminal law in relation to homosexuality and prostitution was 'to preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against exploitation and corruption of others'.[76] Individual freedom of choice and action in 'matters of private morality' was upheld in the report:

> Unless a deliberate attempt is to be made by society, acting through the agency of law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a

74 R Unger, *Knowledge and Politics* (NY: Free Press, 1975), p 59.

75 JS Mill, *On the Subjection of Women* (London: Dent, 1929), p 263.

76 Cmnd 247 (1957), para 13.