mockery' the 1922 Act required a new pretence: that of endeavouring to fit what happened into medical theories about childbirth producing mental disorder.

The Infanticide Act 1938 reformed the 1922 Act in two directions. It altered the definition of the victims of infanticide from 'newly born' to 'under the age of 12 months' and it extended the medicalisation of the crime through the addition of language about 'the effect of lactation'. The cases which brought about the fixing of the age at 12 months illustrate the tension between the socio-economic model of the crime, which informed the statute of 1623, and the medical model which informed the 1922 and 1938 Acts. In *O'Donoghue*[99] the defendant who had killed her 35-day-old child was sentenced to death and duly reprieved. The admitted facts, on which her counsel based his argument on appeal, were that the mother 'was in great distress at the time of the birth for some weeks from poverty and malnutrition, and had only just obtained employment when she killed the child'. In an unsuccessful effort to persuade the court that the trial judge was wrong in holding that a 35-day-old child was not newly born, counsel also argued that 'there was between insanity and sanity a degree of mental derangement which the medical authorities called "puerperal"'.[100] Thus, a mixture of socio-economic causes and medical theory was used in argument. *Hale*[101] was a case in which the mother killed her second child when it was three weeks' old and inflicted injuries on herself. The medical evidence was that at the birth of her first child the mother had symptoms bordering on puerperal insanity. The trial judge, claiming himself bound by *O'Donoghue*, directed the jury to find the defendant 'guilty but insane'.

Medical or socio-economic model?

The Infanticide Act 1938 makes explicit the medicalisation of the crime. It provides for the reduction of the offence from murder to infanticide where the defendant is a woman who causes the death of her child under the age of 12 months by wilful act or omission:

> but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reasons of the effect of lactation consequent upon the birth of the child.[102]

As the wording makes clear, it is to the process of giving birth, the effect of this on the mother's body, and the hormonal and other processes that are involved in lactation that the statute refers. The idea behind this is that physical processes, whether they are called chemistry or hysteria, can influence behaviour in such a way as to reduce criminal responsibility. There is no apparent consistency to this theory, for if a woman who has given birth within 12 months kills adults or other children the Infanticide Act does not apply. This suggests statutory acknowledgement that social role change may produce psychosis. But other members of the household, such as fathers, who may also be affected by role change, cannot rely on the Act.

The medical model for the Act has come under attack in recent years. In 1975 the Butler Committee stated that the medical principles on which the Act is based

99 (1927) 20 Cr App R 132.

100 *Ibid*, p 133.

101 (1936) *The Times*, 22 July, p 13.

102 Section 1(1) of the Infanticide Act 1938.

are probably no longer relevant, and that 'puerperal psychoses are now regarded as no different from others, childbirth being only a precipitating factor'.[103] The Committee's view was that the purposes of an offence of infanticide 'are now sufficiently covered by the more recent provision for diminished responsibility'.[104]

The Criminal Law Revision Committee (CLRC) in its Fourteenth Report accepted that there is little or no evidence for an association between lactation and mental disorder, and that this reference should be removed from the Act. However, despite evidence from the Royal College of Psychiatrists that 'the medical basis for the present Infanticide Act is not proven',[105] the CLRC argued for the retention of an amended version of the present law. It is clear that both the Butler Committee and the CLRC were uneasy about the medical theory upon which the 1938 Act is based, yet neither found a satisfactory basis for their proposed reforms.

The Butler Committee recognised that 'the operative factors in child killing are often the stress of having to care for the infant, who may be unwanted or difficult, and personality problems'.[106] But if this is so, and if mental disorder is 'probably no longer a significant cause of infanticide' then diminished responsibility is not an appropriate defence plea. Even if the Butler Committee's other proposals for the abolition of the mandatory life sentence for murder and consequently of the necessity of a defence of diminished responsibility were to become law there would still be pressure in infanticide cases on psychiatrists 'to conform their medical opinion to the felt need for mercy',[107] by giving evidence of medical disorder so as to avoid a conviction for murder. The current 'stretching' of the law and medical principles because of sympathy for infanticidal mothers would continue, as would the myths that surround the crime.

The CLRC recognised that a medical model for infanticide as a crime is inadequate, and that mental disturbance may arise either from the effects of giving birth or from 'circumstances consequent upon the birth'. The recommended reform involved the inclusion of the latter phrase in the wording of the statute. From the report it is obvious that the Committee wished to extend the definition of the crime to cover 'environmental or other stresses,' including poverty, incapacity to cope with the child and failure of bonding. The social and economic nature of these factors was acknowledged in the report although the Committee was careful to link them to 'the fact of the birth and the hormonal and other bodily changes produced by it'.[108] Thus, to enable the court to take account of socio-economic factors, the medical model was retained. The CLRC was definite that cases 'where the social and emotional pressures on the mother consequent on the birth are so heavy that the balance of her mind is disturbed',[109] would not be covered by the defence of diminished responsibility.

103 *Report of the Committee on Mentally Abnormal Offenders* (Cmnd 6244, 1975), p 245.

104 *Ibid*, p 251.

105 Criminal Law Revision Committee, *Fourteenth Report, Offences Against the Person (*Cmnd 7844, 1980), para 103.

106 *op cit*, p 245, n 27.

107 AJ Ashworth, 'The Butler Committee and Criminal Responsibility' [1975] *Crim LR* 687 at 694.

108 *op cit*, n 29, para 105.

109 *Ibid*, para 102. The CLRC identified this type of case as 'battered baby syndrome'.

Conclusion

From its inception as a sex-specific crime in 1623 infanticide has been concerned with theories about women. The initial object of the law was to punish single women for becoming pregnant and for refusing to live with their sin. Thus the crime was created to affect moral and social behaviour. In the 19th century the discourse changed.[110] Symptoms of temporary madness were discerned including catatonia, hallucinations, delirium and depression. These were labelled lactational insanity, puerperal psychosis, or exhaustion psychosis. In the 20th century, in order to mitigate the severity of the crime this discourse was utilised by the law. It is only in the past 20 years that explanations for infanticide related to the mother's social and economic environment have been resurrected.

Proposals for reform have vacillated between the two models of the crime. It is not hard to understand why. To admit that social and economic circumstances, or motherhood, may cause crime is to open a hitherto tightly closed box. To deny recognition of infanticide as a separate, lesser crime is to invite juries to refuse to convict for murder. So the solution has been to fudge the issue by retaining discredited medical theory. Edwards has pointed out that 19th century discourse on puerperal psychosis was used to justify women's exclusion from participation in public life.[111] The danger is that continued emphasis on biological difference perpetuates that reasoning. Yet there is public sympathy for infanticidal mothers based on beliefs about childbirth. Perhaps this has something to do with the mystery of birth itself. F Tennyson Jesse's prison doctor expresses it thus: 'The dark consciousness of the womb was present with every man who had to do with the business, of the womb that was the holder of life, from which every living soul had issued in squalor and pain.[112]

LAW REFORM AND HUMAN REPRODUCTION: IMPLICATIONS FOR WOMEN[113]

Rebecca M Albury[114]

Biological reproduction, that most 'natural' of human activities, has been the subject of major technological change during the past 30 years. Although scientific understanding of the processes of reproduction is still under-developed, it is possible to intervene at several stages in the process, at least in the female body. The older technologies of contraception are well accepted if not understood by the majority of the population in industrial countries. They provide a model for some discussion about research on new techniques of abortion that will be separated from the physical termination of pregnancy just as the contraceptive pill and the IUD are separated from the physical activity of sexual intercourse. The new technologies of *in vitro* fertilisation (IVF) and embryo transfer (ET) are the subject of scientific, moral and legal interest. In combination with artificial insemination (AI) they open the possibility of technological reproduction for humans, a possibility that has provoked a growing debate in Australia and other countries where IVF teams are working.

110 N Walker, *Crime and Insanity in England* (1968), Chapter 7.

111 S Edwards, 'Medico-Legal Conundrums' paper given to the BSA Conference (1982).

112 F Tennyson Jesse, *A Pin to See the Peepshow* (1979), p 392.

113 Marian Simms (ed), Australian Women and the Political System (Melbourne: Longman, 1984), Chapter 13.

114 Susan Moller Okin (1979).

As the techniques have become more successful and better understood the debate has shifted to questions of how to reform the laws about paternity and custody to accommodate the new methods of conception, allowing less time for discussion of the social effects of the techniques themselves.

Law reform will certainly occur, the scientists, politicians, and law reform commissioners are all agreed that it must. They have not yet agreed on the nature of that reform and the discussions continue to formulate the questions the proposed legislation must answer. However, the general drift of the legislation can be predicted. A useful beginning for such a speculation is the course of debate and law-making about another contentious aspect of human reproduction – abortion. Many of the same issues are involved: the role of medical technology, the power of the medical profession, the needs of society, the desires of the woman, the place of her partner, the function of the law. In this paper I examine the similarities and differences in the formulation of the questions and the answers in the two points of intervention in the process of human reproduction. Throughout both debates run a set of related but unspoken assumptions about women in the family. By discussing those assumptions it is possible to point to the consequences of likely law reforms for women. Giving voice to the unspoken may also have the effect of shifting the terms of debate about the technologies of human reproduction by asking questions that previously did not have a place.

Women in the realm of private life

In common with other English-speaking countries, Australian political institutions are founded in liberal democratic theory. It is within the boundaries set by the definitions and categories of liberal democracy that the now familiar debates about human reproduction take place. At one level it is assumed that society is made up of individuals who share equally the responsibilities and benefits of their common life. This assumption is, however, a myth that denies the multitude of inequalities that are the consequence of another level of assumption: the profound separation of public and private (or personal) life. This division has served as a model for the division of many human experiences and institutionalised relations and thus has provided ways of viewing the world and of acting in it. Public life is the location of politics and the institutions of liberal democracy parties, parliaments, legal systems, trade unions and popular movements. The whole range of affective relations is located, by definition, outside of the public sphere in private life.

The separation of public and private life has been accompanied by the allocation of men and women into separate areas of action and concern. Women are commonly defined by their biological function as childbearers and assigned the social function as childrearers while men are defined by their capacity for rational thought and their transcendence of the purely biological.[115] This separation of public and private has contributed to the subordination of women by confining women to the private realm of the family, thus isolating them from the main arenas of political and social debate and by disguising the power relations between women and men. Liberal theorists seem to be discussing equal genderless individuals while it is clear that male heads of households are the actual theoretical individuals. The interests of all family members are assumed to be the same, though no argument has been produced for that position. At the same time, even the potential for women to take part in public life is denied on the grounds of their biological functions and the personal qualities that are said

115 A Rich, *Of Woman Born* (1976).

to come 'naturally' from those functions – emotional tenderness, empathy, nurturance, altruism – all qualities ill-suited to the harsh competitive public world, but assumed necessary for the survival of human beings.

Although feminist writers have long pointed to the conflict of interests in the power relations of family life their criticism of the contemporary social order has received little serious attention from social commentators with the exception of desperate defences of institutionalised sex roles and a gender-based division of human capacities and labour from both the left and right. The family is treated as a 'natural' and unproblematic feature of society and the contradictions that exist in any institution are ignored with the result that in any political debate a basic premise of liberalism remains unchallenged with women securely placed in male-headed families in the private sphere.

The assumed role of women in those families is central to the opposition to abortion and the justification of technological conception. In the family women gain their status from their relationship with men; they are daughters, wives, mothers. There are no words to describe autonomous women, all of the phrases used suggest the woman's deviance from the expected position of women as appendages of men – childless women, single mothers. Pregnancy and birth, or at least motherhood, are a part of the definition of women in our culture as in many others.[116] Motherhood is the foremost institutional structure in the lives of women; women who resist institutionalisation, even briefly, are regarded with suspicion and contempt – think of the abortion debate or the charge of selfishness levelled at women who remain child free by choice. It is no surprise, then, that infertile women in the *in vitro* fertilisation programme at Monash University/Queen Victoria Hospital speak of their childlessness in strong terms:

> I went through all those feelings about how unfair it was that women who don't really want kids can have them when I can't. I really felt I had a disability … I don't see how being infertile is so different to being deaf or blind. You just aren't complete … It was probably silly but I felt that Len might not love me as much if I couldn't have a baby. Perhaps he wouldn't consider me as feminine.
>
> Stephen is the child I have been attempting to conceive for the past 17 years. Stephen is why Toby and I are involved in the IVF programme: Stephen is waiting inside my mind. His spirit lives inside and waits for nature or my doctors to form his body – the body that will set him free to live … Stephen's story started somewhere in my childhood when I began to realise I would have a child one day. Later on the seed began to take shape, and at the age of 14 I named him, and the seed started to grow roots … Stephen and I are the survivors of a tragedy in which I lost my fertility and the body of my child. His deformed state is part of the quality of my life. What quality of life can I give him? … The only way I can give quality to my child's life now is by giving him a body through which he can live. The only alternative is to destroy him. Who can help this mother practise euthanasia on her deformed child? How can you destroy a child with no body? How can you bury a child who hasn't known life, who is held back from any attempt at realising his life because of his mother's deformity?[117]

The desperation of these women who cannot meet the cultural definition of feminine womanhood by becoming mothers is accepted as unproblematic by

116 Walters and Singer (1982), pp 120–22.

117 (1982) *Sun-Herald*, 28 March.

medical researchers and law reformers. The Monash medical team says their work is the result of 'intense public demand',[118] but does not discuss the responsibility of the medical profession for establishing that demand. Both of the women quoted above lost their fallopian tubes as a result of misdiagnosed pelvic infections, of repeated complaints of pain that were ignored or dismissed as an excuse to get out of work.[119] Today women who were defined as malingering teenagers by medical professionals must rely on members of the same profession for a technical solution to the infertility created by that definition. Those women are not alone, but joined by thousands made sterile by contraceptives as well as misdiagnosis.[120] Further, the role of the medical profession in the definition of women's sexuality and life experiences is never raised, nor is the increasing literature analysing that role ever acknowledged, much less discussed. It would seem that medical technologists and their apologists are ignorant of a serious and systematic critique of their practices.

Mechanisms of control

Even if the assumptions about female sexuality and women's place in society are not formally articulated, they are present in the social practices surrounding the techniques of AI and IVF as they are in all other aspects of health-care delivery related to reproduction. Medical practitioners are acknowledged as experts about the functioning of female bodies and thus occupy a privileged place in defining the standards of normality and deviance.[121]

The laws of all states in Australia grant doctors the power to authorise abortion not women.[122] A woman must demonstrate her worthiness to become a part of a technological conception programme; she must fit the practitioners notion of a 'good mother'. First she must be married; the technical solution to the inability to give birth and fulfil the total definition of 'woman' is reserved for those who have indicated their willingness to accept the definition by the act of marriage. The Commission of Enquiry into IVF recommended that this become law in Victoria, but 'stable' *de facto* relationships will be included. In addition women must demonstrate the suitability of their skills and motives for parenting. Then a woman must be a 'good patient'. She must be willing to undergo a series of exhaustive and expensive tests to demonstrate her fertility before the relatively simple procedure of artificial insemination.[123] Couples must also submit to considerable counselling. Women in the IVF programme undergo considerably more testing and abdominal surgery but, at the Royal Women's Hospital, Melbourne, are not permitted open expression of their emotional reactions to the alternations of hope and disappointment. The Monash/Queen Victoria Hospital programme does not add this additional requirement.

The medical profession has added a new technique to its practice of social control of women; a control that remains unacknowledged either by the practitioners and their supporters or by the critics they recognise. For in the debate on *in vitro* fertilisation the feminist critiques of social attitudes and medical practices are dismissed as inappropriate to the questions at hand. One writer critical of

118 Walters and Singer (1982), pp 14, 121.

119 See now Artificial Conception Act 1984 (NSW); The Artificial Conception Act 1985 (WA); The Infertility Treatment Act 1995 (Vic); and see Gabrielle Woff (1966) 10 AJFL 71.

120 Seaman and Seaman (1978).

121 Ehrenreich and English (1979).

122 Finlay and Sihombing (1978); Treloar (1982).

123 Hanmer and Allen (1980).

technological conception, discussing the desire of an individual woman to have a baby says:

> An extreme feminist might take umbrage at such a feeling, and claim that the cure for it is not IVF but a change in the attitudes of society. I doubt if the woman in question would be much helped by this approach. Her need is real enough to her, and the object of it, surely is a good one: the having of a baby. I propose we accept that the desire of a childless couple to have a child of their own is a reasonable one.[124]

William Daniel SJ seems to be saying here that because some infertile women want babies then he need not think about the mechanisms of social control that made them feel 'that somehow you weren't a real woman unless you were fertile' (at p 73). He uses the word 'reasonable' in a way that suggests that any investigation into the social origin of the couple's desire is to call their rationality (sanity?) into question. It is also unlikely that anyone so unwilling to question the equation of woman with mother would notice the shift from a woman's 'need' to the couple's 'desire', much less examine the distribution of social power in a society in which that shift can be made.

While most writers are quick to dismiss feminist social criticism some are willing to use, out of context, Shulamith Firestone's vision of the technical eradication of childbirth as a means of ending women's oppression to appeal to sceptical women for support for research into the gestation of foetuses outside female bodies. They ignore the social structure of communal responsibility for children that Firestone postulates and the significant feminist literature that challenges her optimistic view of technology. Firestone's feminist critics emphasise the masculine control of science and the past, present and future potential of science to control and define women in the interests of a male-dominated vision of human life and social order.[125]

A brief examination of the rhetoric of the abortion debate raises a number of questions about the authenticity of the claim that medical services are delivered according to public demand and the desires of women. The laws in Australia give decision-making powers to doctors and the legal system not to women. The events in Queensland during March 1983 again demonstrated the willingness of the courts to grant every avenue to men who seek control of women. Women are exhorted to be responsible and unselfish, to use high technology contraception regardless of their personal evaluation of its dangers, to think of the moral fibre of the nation, and to support the hierarchy of authority in the family by submitting to the will of men or the inevitability of biology. The President of the National Right to Life Committee in the United States accused all of those who support the demand that women make the final decision about whether or not to terminate a pregnancy of doing 'violence to marriage by helping to remove the right of a husband to protect the life of the child he has fathered in his wife's womb'.[126] Fatherhood is reduced to an act of fertilisation and childhood is extended to before birth. The Right to Life has achieved a considerable success with this kind of polemic: the headlines of reports of the Queensland case asserted 'Father Fights For His Unborn Child!' even though the story made it clear that the man involved did not want to care for a living infant but proposed that the pregnant woman give birth then give the infant away for adoption.[127]

124 Walters and Singer (1982), p 73.

125 Rose and Hanmer (1976); Birke *et al* (1980); Roberts (1980).

126 Wilke as quoted in Petchesky (1981), p 221.

127 (1983) *The Telegraph*, 24 March.

What would happen to the terms of the abortion debate if it included the sympathy towards women's 'needs' that Daniel expresses when he opposes IVF? A paraphrase of his original argument reveals that his sympathy rests on the same assumptions of the social role for women as the practices of the doctors that he opposes. If the discussion is changed from a woman who wants a baby to one who wants to terminate an unwanted pregnancy his basic argument can be used to answer one of the many questions or statements of the Right to Life. Abortion is no solution to the social problems of women with unwanted pregnancies.

> An extreme anti-feminist might take umbrage at such a feeling, and claim that the cure for it is not abortion but a change in the attitudes of society. I doubt if the woman in question would be much helped by this approach. Her need is real enough to her, and the object of it surely, is a good one: the having of a baby when she wants one. I propose we accept that the desire of a woman [couple] to terminate an unwanted pregnancy is a reasonable one.

The assumption of the 'reasonableness' of the desire to terminate as well as the desire to achieve a pregnancy indeed changes the position of various parties to the abortion debate. Women seeking abortions are no longer distressed or misguided but fully rational decision-makers. Those with moral objection to abortion could continue to counsel women to avoid abortion but would find it more difficult to recommend laws that make abortion a criminal offence or that deny women their decision-making powers. Doctors might even begin to lobby through the AMA for the repeal of those laws that criminalise abortion just as they support efforts to clarify the law regarding technological conception. While such a course would be welcomed by many, including feminists (moderate or extreme), it is not very likely because it challenges the assumption that women are mothers and thus belong in families.

The law, like other liberal institutions, supports the assumption that women are not a part of public life. Its function as an enforcer of the dominant sexual politics can be seen in studies of judicial decisions of cases involving protective or exclusionary legislation (see Sachs and Wilson, 1978). Until the early 20th century judges ruled that women were not 'persons' under the law and could therefore be excluded from various professions, jury duty etc. Both United States and English courts ruled in similar ways leading scholars to point to an underlying shared double standard applied to women and men as an explanation for their consistency. The assumption that a woman's place is at home bearing and raising children and caring for men was/is central to judicial thinking, further supported by notions of women's physical weakness and moral inferiority to justify protective or discriminatory legislation.[128] In addition to continuing to serve men at home, women should not increase the competition for men at work.[129] Mary Eastwood suggests that many United States decisions were based on the relatively unsophisticated formulation: 'Men are in power; they have established their control, and it should stay that way.'[130] Australian law is based on the same assumptions and thus encodes the same social relations in both law-making and judicial decisions.[131] Similar beliefs inform the law reform process even though reformers recognise the injustice of some old laws.

128 Eastwood (1971).

129 Sachs (1978).

130 Page 285.

131 Ross (1982); NSW 1978.

Abortion law reform

During the 1960s and early 1970s one publicised type of law reform sought to relieve the unequal burden placed on different social groups by laws that were no longer suited to changing economic and social conditions. Changes in social services are an example of this type of law reform in its redistributive form, that is the reforms were an attempt to ease the effects of the unequal distribution of wealth. Abortion law reform has been claimed to be an example of the regulatory form of law reform, though with obvious redistributive aspects with regard to State responsibility for the cost of medical treatment for certain groups.[132] The social effect of illegal abortion was regarded as an individual problem of specific women not as a collective problem of an economic or ethnic group. Reformers sought to remove the stigma of criminal abortion from women who they regarded as marginal in a basically just social order. Such women were in need of abortion because of an individual problem: ignorance of contraception, irresponsibility in sexual activity, psychological disturbance, temporary or permanent social deprivation, extreme youth, or medical unfitness. In these special cases the decision-making was put into the hands of doctors and it was assumed that 'normal' women would not seek abortions.[133]

Abortion law reform was the focus of both feminist and anti-feminist organisation. In English-speaking countries abortion laws were changed to give more access to legal abortion during the years between 1967 and 1973. In Australia legal reform took place in some states in both judicial and legislative form. In other states the practice of law, enforcement has responded to political pressure in a variety of ways. The result of the formal and informal reforms has been to make medically safe abortions available at a greater or lesser cost for most women in Australia based on the right of a doctor to make decisions about medical treatment, not the right of a woman to control her fertility. Thus the reforms have also achieved the transfer of women from the control of individual men in families to the control of State sanctioned groups of specialist men. Located within the liberal tradition, the reforms to abortion laws have given 'women more rights without giving them a right to themselves'.[134]

The false assumption that only 'marginal' women demand abortions laid the groundwork for subsequent struggles. 'Normal' women also wanted abortions so demand was higher than anticipated. Most legislation introduced in English-speaking countries since 1973 has been to limit access to abortion either by increasing the obstacles to obtaining the operation or by denying medical benefits. These struggles have made clear the limitations of the reformist perspective as feminists argued for abortion on the demand of women and anti-feminist 'Right to Lifers' argued for an absolute prohibition on abortion. The reformist stance has been assumed to be a 'compromise' position which allows some abortions while maintaining a check on the 'frivolity' of women who might demand abortions for reasons the reformers think are specious. The reformist position can be located beside the anti-abortion position on the same side of a more basic contemporary political division than the abortion debate. Neither group is willing to acknowledge women as autonomous political and moral agents, though they differ on how to best enforce their views, the gender-based hierarchy that is sustained by the liberal democratic legal systems is supported

132 Randall (1982), p 171.

133 Greenwood and Young (1976).

134 Kickbusch (1981), p 153.

by both groups. The reformist approach to abortion law and, by extension, all aspects of human biological reproduction continues to regard regulatory reform as appropriate since they see redistributive reform as dealing with financial resources rather than access to social power (money being only a part of that power). Regulatory abortion laws establish the parameters of 'lawful' abortion – establishing who, what, where, when and why. A genuinely redistributive abortion law would reassign decision-making power over fertility to women and thus alter the social relations between women and men and challenge the function of the law as an enforcer of the sexual division of labour and power that places women in the politically subordinate domestic sphere under the authority of men.

Custody and technological conception

Law reform discussions in Australia about human reproduction have been largely technical examinations of how the accepted structure of law and legal practice can assimilate new technology, not about how the new technology reinforces the social relations already encoded in the law. This is no surprise since such discussions fall within the boundaries of liberal democratic categories that separate public and private life, that reinforce the male-headed family as the basic unit in a hierarchical society, that hold up a vision of a progressive and rational science. The Chairman of the Australian Law Reform Commission summarises the three elements of law reform as: assuming that a proposal will fit into the existing social order in a way that conserves what is good; it will involve some action as a recognition of the variety of social and technical changes that challenge the current legal system; and implementation of the proposals will mean a change for the better – though there are differences about what constitutes 'better'.[135]

Although the debate about *in vitro* fertilisation and artificial insemination includes a variety of legal and ethical questions, the law reformers see questions of property as their particular brief with the custody of the resulting child in cases of technological conception as an area of considerable concern. To what extent does the contribution of sperm to the biological process of reproduction entail legal and economic responsibilities? In the past the usual method of determining a man's legal relationship with a child was to enquire of his relationship with the child's mother – if he was married to her the child was deemed to be his and legitimate: the beneficiary of the man's rights and duties.[136]

Artificial insemination by donor (AID) raises a series of problems for this assumption because a child born within a marriage is demonstrably not the child of the husband. The problem for the law has been further compounded by the usual practice of such husbands, who declare themselves as the father when registering the birth of the child, though there is no provision for the legal recognition of a social rather than biological father except by adoption. Just as there has been little disapproval of the provision for *de facto* couples to register a child as legitimate there is likely to be little opposition to the legislation providing equal legal rights for children born as a result of AID, in spite of difficulties enacting uniform legislation throughout Australia. On the other hand, there is reluctance about allowing women without husbands to use artificial insemination; the opposition is usually couched in terms of the threat to marriage

135 Kirbyu (1983), p 10.

136 Mason (1982), p 349.

and the family posed by the practice.[137] Although the option of conception by means of sexual intercourse has no means of institutional regulation by the law or medical profession there is a desire to ensure that women using technological means of conception will be 'fit' to be mothers.[138] Both the law that does not recognise the concept of social fatherhood and the desire to restrict AID to married women rest on the assumption that a woman should be under control of a man in a family and that a man need only be responsible for a child to whom he has made a genetic contribution. The legal recognition of the child is dependent on the woman's legal relation to the man, that relationship is what legitimises the presence of his semen in her vagina.

International case law has not clearly determined whether the presence of semen alone is sufficient evidence of sexual intercourse making AID equivalent to adultery, or whether there must also be evidence of penetration of the woman's vagina by a penis.[139] (Remember that the presence of semen is often necessary to prove rape or sexual assault and that sexual assault has included attacks other than penetration of vagina by penis only during the last decade.) Laws regulating custody also establish the authority of men over the mothers of their children, an authority that continues after the marriage is dissolved.[140] Recent discussion of the rights of men over their biological children when they are not married to the woman who gave birth to and cares for them would further extend the control of women by men through the control of children.[141] The law reform literature seems to point to this as a possible outcome for custody law when it considers whether the sperm donor in AID could be made legally responsible for the child as its 'father'. Custody laws are to be reformed to preserve male authority in the family for any other change would not conserve the social order, might not allow the legal system to survive the challenge of social and technical change, certainly might not be a change for the 'better'.

In vitro fertilisation poses further legal problems of ownership. Who owns the components of the biological processes that are assisted by technology, the sperm, the ova, the embryo? The ownership of the embryo has profound implications beyond the often raised questions of frozen embryos in the laboratory. If the ownership of an embryo *in vitro* is legally established, what will the status of an embryo *in vivo*? Will a man be able to prevent an abortion because he is joint owner of the implanted embryo regardless of whether the woman consents to continuing the pregnancy? Could a man take out an injunction to enforce a particular diet, non-smoking, or regular exercise on a pregnant woman as an expression of his concern for the care of his property – his share of the foetus? Such speculations reduce women to little more than ambulatory incubators, but are not as far-fetched as they might seem, for men have already gone to court in attempts to deny women abortions in several countries. Again, the legal solution to the challenge of technical change could reinforce the social control of women by men.

While the custody of a child conceived *in vitro* using the sperm and ovum of the couple who will be her biological and social parents should pose no major legal difficulties, the custody of a child born of a 'surrogate mother' is highly

137 Walters and Singer (1982), p 78.

138 Scott (1981), pp 210–11.

139 Mason (1982), p 352; Scott (1981), p 206.

140 Delphy (1976); Brown (1981); Sutton and Friedman (1982).

141 Sutton and Friedman (1982), pp 124–25.