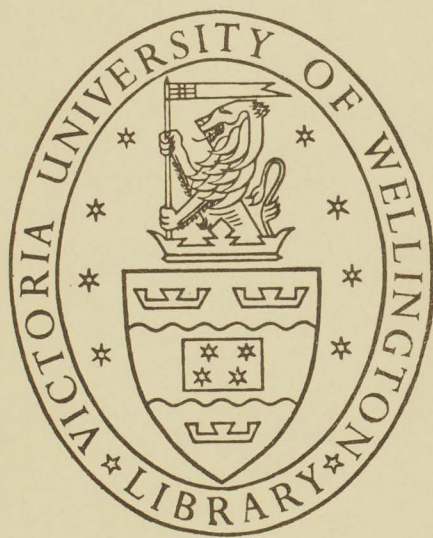


JO
Johnson W.M.
Structural Analysis of Marital Conflict

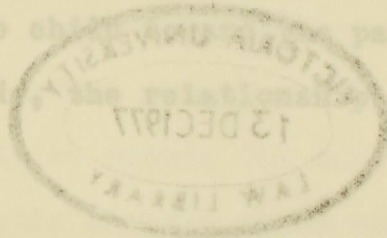
W. M. JOHNSON



WILLIAM MATTHEW JOHNSON.

A STRUCTURAL ANALYSIS OF MARITAL CONFLICT.

RESEARCH PAPER - SPECIAL PROJECTS
FOR THE LL.M. DEGREE.



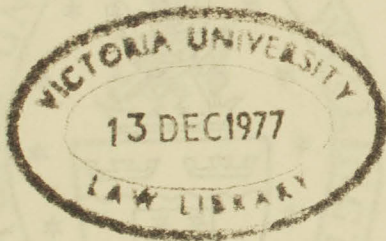
VICTORIA UNIVERSITY OF WELLINGTON,
WELLINGTON, NEW ZEALAND.
1976

J.O.
Johnson, W.M.
Structural Analysis of Marital Conflict

VICTORIA UNIVERSITY

LIBRARY

MASSACHUSETTS INSTITUTE OF TECHNOLOGY
FOR THE D. R. DEGREE



VICTORIA UNIVERSITY OF WELLINGTON
WELLINGTON, NEW ZEALAND
1978

359688

1. INTRODUCTION

In the middle ages the influence of Christianity with its emphasis on the sacramental nature of marriage produced a shift in the institutional nature of marriage; what had been in Roman Law an essentially private institution became a religious one.

The doctrine of absolute indissolubility of marriage rests in part upon the New Testament and the recorded sayings of Christ and in part upon an understanding of the natural law.¹

The natural order of things reflects the heavenly, marriage becomes sacramental in character, it is something more than a contract conferring status it is something akin to the relationship existing between parent and child or brother and sister - it is a God made thing which men can not alter. However badly the parents behave toward the child, or the child toward the parents, however great the negligence on either side, the relationship of parent and child remains.²

The fundamental problem of religious institutions in contemporary society is how to keep going in a milieu that no longer takes for granted their definitions of reality. In a pluralistic society religion can no longer be imposed, it must be marketed. The institutional location of religion is thus in the private sphere and it is marketed to the extent that it can be shown to be relevant to private life.

As a result, religious institutions have accommodated themselves to the moral and therapeutic needs of individuals in their private lives.

JOHNSON
W.M.
Structural Analysis of Marital Conflict

The cosmization of institutions permits individuals to have an ultimate sense of rightness, both cognitively and normatively, in the roles they are expected to play in society. When roles and the institutions to which they belong are endowed with some cosmic significance, the individual's self identification with them attains a further dimension; an alternative other to the society which might forget who the individual is.³

By being part of a marriage ("cosmic institution") the individual acquires yet another dimension (husband or wife) which is greater than his or her individual identity as him or herself. Once in marriage people are no longer themselves; no longer do they perceive of themselves as individuals.

In order to extend analysis beyond the particular marital relationship it was felt that empiricism ought, to some extent, to be rejected. The result is that the approach is not directly concerned with intra personal conflict within the marriage context per se - those aspects of a domestic dispute which might easily be recognised and categorised as "conflict" by an impartial observer. Rather the emphasis is directed towards a theoretical construction of the organisation of marriage as a means of defining the nature and sources of the conflict which might characterise it. *why?*

The theoretical construction begins with the premise that the "husband" and "wife" role is in contradiction with the ideological justification of the marriage institution.

The ideological justification is seen in terms of an intense erotically based, socio-emotional intimacy between the couple marrying which might be defined in popular terms as romantic love.

J O Johnson W. M. Structural Analysis of Marital Conflicts

Though a social construct itself, romantic love is in contradiction with other social constructs in the form of obligations, social and legal imposed by the society. Social obligations may be many and varied. Since intimacy is taken to be erotically based emphasis is placed upon those social and legal obligations which appear to directly impinge upon the sexual aspect of the marital relationship.

It is presupposed that man and woman within the lover relationship outside of marriage naturally, without effort, experience intimate desire for the reason that the man/woman relationship is one of original difference. How then can this essential intimacy be sustained upon marriage when the relationship becomes not one of original difference, indeed it is not a two person affair after all, but one of social unity and social obligations?

Yet though intimacy implies that the actors see each other as individuals; the unity of marriage is at once not intimate enough in the sense of social obligations and too intimate in the sense that individual personalities become merged so that they disappear.

Owing to the particular differentiation of sex roles in Western society it is assumed that two separate personalities become one social and domestic personality and that the one is closely associated with the personality of the husband. Though the vesting of the collective personality in the male partner is not of paramount importance in the analysis.

Johnson, W. M.
Structural Analysis of Marital Conflict

Every organisation contains fundamental contradictions. From a dialectical perspective, the organisation is characterised by an unstable social order with a tendency toward dissolution. The instability of the organisation grows out of inconsistencies and incompatibilities which are never fully resolved. There always exist contradictions which have not been resolved, and these provide the basis for organisational change.

Within marriage the potentially contradictory elements may be masked or concealed by a variety of devices. Essentially the actors are moving from the marital state to a state of difference between them.

This movement towards a state of difference is conceived of in terms of changes of structure and meaning, within the relationship, instigated by the actors.

In the definition of structure is implied the notion of a framework which orders human action -- in the present context marital structure has as a basic reference point the framework of marriage as commonly understood by society; those structural factors exhibited by the organisation, which are commonly understood by society at large to constitute "a marriage".

"Meanings" is defined as the quality attributed to behavioural patterns which enable actors to understand and predict the actions of co-actors.

Structures and meanings are inter-related within the organisation. A change in meaning may result in a change in structure and conversely a change in structure may equal a change in meaning.

Johnson, W.M.
Structural Analysis of Marital Conflict

Of course the basic contradictions remain unresolved and if one partner fails to adapt to changes in meanings and/or structure which might be instigated by the other the institution is brought under stress. It is at such stress points that the contradictions emerge in the form of manifest conflict, the new characteristics of the organisation challenging the older characteristics which were "agreed upon" by both parties. Ultimately this will result in the dissolution of the organisation.

Thus presented, questions as to the value of such a model arise in the context of such a paper which after all must give cognisance to some sort of legal framework for approaching the institution of marriage.

Surely, one might suppose, the law is concerned with the particular marital situation in conflict, a concern with conflict the nature of which can be evaluated and categorised in an empirical framework. Is it possible in the context of a legal framework to talk in terms of structural contradictions inherent in the institution of marriage, to question the very nature of the institution itself, when the law presupposes a value judgment of the worth of that institution?

The law is part of the reified institution of marriage. The State is a party to the marriage contract and by this intrusion an inconsistency is created with the ideological basis of romantic love needed to sustain the institution of marriage. The law is at once both a factor in creating the structural conflict endemic to marriage and a means of solving the manifestations of it. The presumptions of the law in solving the manifest conflict experienced by couples produce structural contradictions by their very emphasis on the obligatory nature of marriage.

J
O
Johnston W.M.
Structural Analysis of Marital Conflict

It is this dichotomy together with the empirical nature of the legal analysis; its concentration upon structural changes only within the conflict marriage, which gives rise to conclusions as to the reality and efficacy of the legal process in this context.

2. MARRIAGE

In 1854⁴ there was every practical reason to marry young; the unmarried state had heavy disadvantages for both sexes. Custom did not permit girls to be educated, to work, or to have social let alone sexual freedom. *a class related phenomenon* } = middle class

The single man could move about freely, yet his household comforts were less; the watchful care of the woman was needed to direct the economy of his dwelling; the very amplitude of his means exposed him to temptations of interference and vice, the results of which might be a high mortality rate effected by "social" diseases. His faculties were prone to fall, and sometimes rise, into excesses of various kinds. *m-c only*

Marriage is no longer quite so indispensable a convenience. Attitudes to pre-marital sexual activity have of course changed. The contemporary marriage is viewed as a partnership; women are expected to participate outside the home as well as in it in social activities, the emphasis being on companionship.⁵

In contrast to the nineteenth century family which exhibited an extended kin network, the structural isolation of the nuclear family in contemporary Western society has resulted in the emergence of the conjugal bond -- the husband and wife bond -- as the overwhelmingly strategic relationship of the modern family system.⁶

JOHNSON
W.M.
Structural Analysis of Marital Conflict

The married couple caught within the isolation of the nuclear family unit are very much in need of justification and support which is not forthcoming from the wider society or extended kin group.

In a rootless society with few common bases for companionship, romantic love holds a couple together long enough to allow them to begin marriage.

Since love may be related in diverse ways to the social structure, it is necessary to forgo the dichotomy of "romantic love -- no romantic love" in favour of a range between polar types. At the one pole, a strong love attraction is socially viewed as a laughable or tragic aberration, at the other, it is mildly shameful to marry without being in love with the intended spouse. This is a gradation from negative sanction to positive approval.⁷ Goode⁸ points out that the urban middle classes of contemporary Western society are found toward the latter pole.

Before marriage; love extenuates illicit sexual relations which might result from diverse social networks. If the family as a unit is important mate choice is also important; thus considerable energy and resources may be required to push individuals into desirable relationships and those who are in love into proper role discharge.⁹

Family stability is supported ideologically by insisting upon an intense, erotically based, socio-emotional intimacy between the couple marrying. Yet if marriage is a sacred relationship it is also a social obligatory relationship, the terms being synonymous.¹⁰

The concept of intimacy is contradictory to the institution of marriage in two senses;

J.O. Johnson W.M. Structural Analysis of Marital Conflict

(A) Objectively, In The Form of Obligations Imposed By Society:

Marriage differs from ordinary contracts, in that it can only exist where one man and one woman are legally united for life, whereas ordinary civil contracts may exist between two or more of either or both sexes for any stipulated time. So the marriage relationship differs from other contractual relations, in that, when the status is once created, the state becomes an interested party and thereafter the marriage, with the rights and duties assigned by the law of matrimony, is not subject, as to its continuance, dissolution, or effects, to the mere intention and pleasure of the contracting parties.¹¹

To this dictum it is added that the institutionalisation of sex and companionship needs also produces an alternative other to the parties involved in the marriage relationship, in the form of the reified institution intruding upon intimacy.

Consortium:

The nineteenth century family tended to be stable in the sense that it was patriarchal and authoritarian. Taboos on feminine sexuality existed with a double standard of morality for men and women. The ideal of the modern marriage is, of course, individualistic and democratic. Feminine sex needs are admitted with a tendency toward single sex morality; sex activity being regarded as a value in itself independent from child-bearing.¹²

Yet a significant aspect of contemporary ideology is the manner in which women have had their sexuality defined for them. Thus the popular image of nineteenth century, middle-class society being one in which the professed values placed sex in the category of an unfortunate procreative necessity, a wifely obligation, is for the most part substantiated by the contents of marriage manuals as recently as the 1950's.

J O
Johnson, W. M.
Structural Analysis of Marital Conflict

The 1950's - 70's might have been expected to produce a new sexual ethic. During the 1960's non-marital sex is openly and approvingly discussed, men and women are regarded as having equal sex needs. But for the most part sex is assumed to take place within the social context of love and marriage. In view of such sentiment extra-marital affairs are almost overwhelmingly rejected and a major concern in improving marital sexual relations is to avert this eventuality. Individuals who are not gaining the required satisfaction are thus placed in a moral dilemma to which society has no answer. On the one hand society adamantly insists that its demands, that is, the institutional obligations of marriage, be fulfilled. On the other hand, society has taught an unwillingness to tolerate a marriage without love and by structurally isolating the conjugal unit, provides no social resources for tolerating it.¹³

The contemporary woman might still be regarded as responding to cues that define socially appropriate and inappropriate situations calling for sexual response, rather than her own body. Thus women are well aware of the "right" of the husband to insist and the "duty" of the wife to submit to sexual intercourse.

Sexual intercourse illustrates the legal duty to cohabit, and traditional views suggest that the wife having consented on marriage can not withdraw from intercourse.

Thus in 1888 a husband suffering from gonorrhoea who infected his wife with the disease was not guilty of inflicting bodily harm upon her.¹⁴ In 1954 a husband could not be charged with rape of his wife because of the implied consent, though he was not entitled to use such force as was necessary to exercise his right,¹⁵ and supposedly consent to sexual perversion instigated by the husband would not be implied.

JOHNSON, W. M. Structural Analysis of Marital Conflicts

Yet even in 1891 it was said that;

"More than a century ago it was boldly contended that slavery existed in England, but if anyone were to set up such a contention now it would be regarded as ridiculous. In the same way, such joint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not now capable of being cited as authorities in a court of justice in this or any civilised country."¹⁶

The notion that a husband can without incurring punishment treat his wife with any kind of hostile force is of course obsolete.¹⁷ Neither can a husband confine his wife even to enforce a decree for restitution of conjugal rights.¹⁸

Though on the question of the husband's continuing prerogative of intercourse the courts have been loath to express new opinions even as recently as 1972.¹⁹ It should also be noted that prior to 1965, when the Matrimonial Proceedings Act 1963 came into force only the husband could claim damages for adultery a wife petitioner could not, thus indicating the extent to which the husband's right of property in his wife has remained in the law.

Although there is no prerogative in each spouse to make unreasonable demands upon the other; similarly there is seemingly no prerogative in each spouse to refuse the demands of the other unreasonably. Thus it would be wholly wrong and unrealistic to hold that because a wife comes to a husband and confesses that she is and has been for some time in love with another man and wants his help to put an end to the situation, that that would amount to a just cause for the husband to leave her. On the contrary it would be an occasion when it was a husband's duty to afford his wife all the help he possibly could that she was asking for.²⁰

J O Johnson W. M. Structural Analysis of Marital Conflict

There are anomalies with the "what is reasonable in the circumstances" approach to matrimonial rights and duties, as the above example shows. Though with regard to sexual intercourse there may no longer be a firmly established duty on the part of the wife to submit to the husband; habitual neglect of domestic duties remains a ground for divorce in New Zealand²¹ indicating an adherence to the old common law fiction that the husband and wife are one ... which has worked out in reality to mean the one is the husband.

A husband is entitled to the services of his wife, thus the law will not recognise any agreement between spouses which provides that the husband is to pay for such services or society. Similarly a wife is entitled to maintenance provided she has not breached her duty of cohabitation, a covenant by a wife not to apply for maintenance is void and can not be raised by the husband as a defence to a maintenance application²² though the position will be different if the agreement is made conditional on the court's approval.²³

The Social Unit:

The confinement of women to the home as both consumer and producer is important to capitalist society. Thus it is the woman's assumption of responsibility as child-bearer and home-maker that frees her husband for his assumption of responsibility as breadwinner. A functional division of labour generally calls for a sharing of the rewards of the labour and in consequence the man incurs an obligation to share the loaf with the woman who acquires a right to share it.²⁴

JO
Johnson W.M.
Structural Analysis of Marital Conflicts

In New Zealand it has been argued²⁵ that the traditional separation of sex roles is a mechanism to prevent sexual revelry^{???} in the occupational sphere which might cause conflict within the family unit. But the increasing number of married women in the labour market and the women's movement generally have brought about a confusion or conflict in role specification and status relationships.

Women as a result of changing patterns of fertility and child rearing, are realising the potential of a dual role or alternatives to the home-maker role.

Marital rights and obligations implied by society and the law may thus be under review. How reasonable is it, for example, to maintain that the husband's choice of family location should prevail when the wife's economic potential dictates that it should be somewhere else?

New Zealand society however reflects attitudes which mitigate against role profit potential outside the traditional circumscribed bounds.²⁶ The existence of occupations classified as "women's work" presupposes that women are well suited to occupations identified with household tasks and child raising responsibilities and those of a repetitive and "boring" nature. Attitudes of employers reflect the stereotype and thus advertisements for male employees generally stress qualities of ambition and intelligence and offer scope for development and long-term career prospects while those seeking female applicants emphasise the working environment and company that is provided.

JOHNSON, W. M.
Structure of Analysis of Marital Conflicts

Politico-administrative organs in New Zealand have reacted against challenges to the traditional conjugal role structure, by emphasising the value of the "home-maker" role. Thus the Woodhouse Report²⁷ recognised the relevance of the housewife's services to economic production and hence compensation for their impairment. The Accident Compensation Amendment Act 1973 extended compensation provisions to non-earners so that housewives became eligible for the same benefits as male non-earners. Similarly the Select Committee on Women's Rights (1975) emphasised the need for improved status given to domestic responsibility if it were to remain a viable alternative to activities outside the home. The Committee saw the "reasons for doing so" intensified with the greater participation of women in the work-force and a higher proportion of dual income families, a major inducement factor being the implementation of equal pay legislation.²⁸ In these circumstances a payment of an allowance to those with full-time family responsibilities, an "economic wage" rather than a benefit, was seen as an appropriate means of meeting a "genuine deficiency" in our social system.

Regardless of such apparent emphasis ^{on} an individuality within marriage the socially imposed unity produced by a functional division of labour is maintained. It has been suggested²⁹ that the mechanisms which circumscribe the female role are expressions of male society's anxiety lest she escape her prescribed role; much of this fear coming from an aversion to sexuality in Judaeo - Christianity. Or perhaps the female who escapes her housebound role could subvert the patrilineal system of inheritance established by men upon the initial division of labour; men gaining control of the instruments of labour and wealth.

JO
Johnson W.M.
Structural Analysis of Marital Conflict

In any event it is arguable that men have only one real advantage over women which is that they have women to dominate, to exploit emotionally and sexually and thus maintain a false sense of ego superiority. The husband is as entrapped in his economic and production orientated role as the wife is in hers of home-making and child minding.³⁰ Thus, for example, he incurs a responsibility for the maintenance and support of his wife though he can not, except in particular circumstances, demand this right from his wife for himself.³¹

As stated two lovers by their marriage become "the family" -- an institution into which they are locked by a range of social and legal obligations inconsistent with the free exchange process assumed to be needed to support that institution. Marriage might be seen in terms of what Laing³² calls a series; a type of human multiplicity in which no individual personality is essential since each is quantitatively interchangeable within the social entity. The members of the series are united in a negative unity by their reciprocal qualitative indifference to each other, since their individual personalities are no longer important, and simultaneously by their qualitative concern with what "other people" think of their arrangement.

(B) Subjective Orientations Of The Parties:

Church doctrines if taken seriously as a means of securing social identity impose a social obligation mitigating against intimacy and therefore the antithesis of romantic love. Alternatively the sacramental nature of marriage provides a justification for the social unity of marriage.

J O Johnson W.M. Structural Analysis of Marital Conflict

Even if the parties are independent of church dogma, the nature of the marital obligations imposed by society is such that the wife becomes merely an extension of the husband's ego. Husband and wife are part of the one social entity which manifests in the personality of the husband who is expected to instigate and determine the outcomes of sex play; the economic stability and social location of the unit.

Consider part of a letter written to Xaviera Hollander;³³

"I'm married to a guy who digs strange chicks, porno movies, grass and lots of sexual variations - but only outside the home. I dig the same things (except chicks). As far as he's concerned, I'm supposed to behave like the perfect Puritan housewife.... Before we were married we were very passionate and loving, but he cut all that out on our honeymoon. When I tell him our sex life is lousy, he says that's the way it is when people are married."

In this example marriage for the wife marks the beginning of trouble. The husband appears to search for the condition precedent for the occurrence of desire and it seems that the husband and wife no longer hold the place of difference for each other that they did before they were married, the relationship consists of one-ness as same-ness and without difference, intimacy and desire is impossible, the man/woman relationship being one of original difference.³⁴

How does this follow de example?

J O Johnson W. M. Structure of Analysis of Marital Conflict

Thus the simplest illustration of this model is that the same object, the union of two personalities or persons into one, can not be made to perform two opposing functions at the same time, that of creating the socially demanded "one-ness" yet also creating the difference necessary for desire the basis of romantic love. The marriage is at once too intimate in the sense of personalities (both social and individual) being merged so that they disappear and not intimate enough because of the intrusion of society in the form of the reified institution.

3. COPING WITH CONTRADICTION

The ostensible stability of any social system is at best tenuous either the incumbents of the different status categories which comprise the structure of the system are in open conflict or else are in some more or less temporary state of accommodative interaction. The question then is not; why does conflict and violence periodically shatter the status quo? But rather how does peace and tranquillity ever prevail in any social system?³⁶

As stated unresolved contradictions provide a basis for organisational change; ultimately the dissolution of the marriage in this context.

Organisational change may take place in eroticism which is a movement toward other this being its essential character. In the deep intimacy of the couple; husband and wife become for one another the same; no exchange is any longer possible between them, no giving and no conquering. Thus if they do continue to love it is often with a sense of "shame"; they feel that the sexual act is no longer an inter-subjective experience in which each goes beyond self, but rather a kind of joint masturbation. That they regard each other as a utensil necessary for the satisfaction of their own needs is a fact

J.O.
Johns... M.M.
Structural Analysis of Marital Conflict

that conjugal politeness ignores but which springs to view when and if this politeness fails.³⁷

In some instances husband and wife organise themselves around making themselves what they are not, attempting to restore themselves to a state of difference, man and woman as opposed to husband and wife, as a means to the making of love and desire -- a restoration of intimacy to avoid the problem of boredom in marriage.

As de Beauvoir says;³⁸ marriage gives rise to fantastic comedies and play-acting between the partners, which may threaten to destroy the boundary between appearance and reality; and indeed in extreme cases definite perversion does appear. The husband becomes a voyeur; he must see his wife in intercourse with a lover, or know of it, to feel again a little of the old magic, or he makes sadistic efforts to elicit remonstrances so that finally he becomes aware of her consciousness and freedom as an individual, and he feels that it is really a human being whom he is possessing. Inversely masochistic behaviour appears in the wife who seeks to arouse in her husband the master, the tyrant, that he is not in reality.

Responses:

To restrict analysis to structural change ultimately resulting in the dissolution of the institution is too limiting since it obviously does not account for the adaptive responses to conflict in ongoing "happy" marriages.

Two typical adaptive responses to potential conflict may be outlined as follows:³⁹

J.O.
Johnson, W.M.
Structural Analysis of Marital Conflict

(i) Co-operation; in which dissenting elements are brought into new relationships within the structure of the institution. This is a process involving structural change but meanings attached to the particular institution tend to be maintained.

Within marriage the potentially contradictory elements may be masked or concealed by a variety of devices; role segmentation, segregation of participants during certain time periods. Marriages can be stable indeed perhaps more stable, where a couple do not demand happiness, sharing or sexual fulfillment, in effect romantic love, but expect to carry out their matching tasks separately and to pass most of their time in different activities each with their own kin group or friends. Though structurally separated within their relationship they ascribe the meaning of spouse to each other; their structural separation masks the latent conflict endemic to the relationship of husband and wife since obviously there are few opportunities for it to be manifested.

The cultural milieu is maintained at the point of "stable marriages", though of course too radical a change in the structural relationships of the participants may lead to a negation of the institution of which they are a part, in the sense that the reciprocal expectations of each given by the social institution become meaningless within a structural relationship completely divorced from that commonly understood to represent marriage. Thus the parties may be left to granting each other no semblance of legitimacy the result of which is a repudiation of marital obligations.

J O
Johnson W.M.
Structural Analysis of Marital Conflict

The facts of Dempster v Dempster⁴⁰ serve to illustrate the absurdity of such a situation:

The husband and wife occupied the same house, "but lived entirely separate lives, she keeping her door locked and refusing to have anything to do with him. Such words as did pass between them consisted of abuse in the crudest terms directed by her towards him, which prompted similar crudities of language by him to her. They never had any meals together, and he had his food left at a neighbour's to prevent her taking it. He asserted that she ransacked his bedroom, interfered with his bedding, holed his pots and kettle, and that, whenever he planted anything in the garden, she dug it up afterwards. There had been violence between them. The police had been approached on several occasions, and both had been bound over to keep the peace. A neighbour ... deposed that the respondent and some of her girl friends had continuously entertained American servicemen during her husband's absence, 'seven days a week ... the whole twenty-four hours ... any time of the day or night'."

(ii) Institutionalisation of conflict is a second mode of adaption to potential disruption. The structural relations within the institution are maintained but new meanings are attached to them, thus:

J.O.
Johnson W.M.
Structural Analysis of Marital Conflict

"For my husband (a super-strong construction man who can really give a strong wallop) and me spankings have been an addition to our lovemaking for the four years of our marriage. Most of the time they begin as a punishment for some minor infraction or oversight. For example, last week he noticed a tiny dent on the family car. He ranted and raved about the value of a car and my lack of consideration. "Wait till I blister your ass" he said "next time you'll remember to be careful". I knew what was to happen next, and although I was excited with anticipation, I became penitent and fearful..."⁴¹

In such a situation, the fiction of which is probably a pale reflection of the reality, the domestic structure of husband and wife remains; the meanings ascribed to each by the other change. The husband dominates the wife in such a way as to create a sense of difference between them. One might say that the changes in meaning instigated by the dominant participant were adapted to the ongoing characteristics of the other, the wife is sexually stimulated by what is taking place. Yet though spanking is a method of dealing with the problem of boredom, it does not alleviate the structural contradictions creating boredom but provides only temporary relief.

Conflict:

(i) If one partner fails to adapt to the changes in structure and/or meaning instigated by the other the ground work is laid for intense conflict and possible disruption. The institution is brought under stress and it is at such stress periods that latent contradictions emerge in the form of manifest conflict. It is possible for one party to reject the other party's attempts to impose new structures and/or meanings and still continue the relationship, but ultimately such a rejection disposes to a dissolution of the institution. That is to

J O Johnson W.M. Structural Analysis of Marital Conflict

say the failure of one partner to adapt will result in new characteristics emerging for both structure and meaning which will challenge and be in direct conflict with the older characteristics⁴² as maintained by the two participants upon their marriage. Thus a young wife may be persuaded that fellatio is a "conventional" method of sexual intercourse and she may consent to it until she discovers that it is not conventional.⁴³

Two outcomes are possible though they do not appear mutually exclusive and may be thought of as opposite poles of a continuum (a) the parties may separate and form their own parallel institutions; (b) outright revolution in which the two contending parties grant absolutely no legitimacy to their adversary on any ground.

The general picture of marriage breakdown thus presumed is of one partner, usually the wife, having to escape from or to precipitate the end of the marriage against the wishes of the other party.⁴⁴ Thus in *Lang v Lang*⁴⁵ the facts were that the husband habitually placed his wife across his knee and beat her with a cane, ruler or a slipper as the mood took him. He twisted her arms behind her back and on one occasion held them there for nearly an hour. Having been advised by his psychiatrist to try "cave-man stuff" to improve his relations with his wife, on two occasions he dragged her by her hair into the bathroom and held her under the cold shower. Shortly before their final separation, he planned and carried out what he described as "the rape of Lucrece" forcing sexual intercourse on her "in circumstances of calculated and revolting indignity". He told her that he was going to use her for the same purpose whenever and as often as he wished.

Sources of tension include the diversity of social sources of the participants in the marriage and their incompatible expectations; thus:

J O Johnson W.M. Structural Analysis of Marital Conflict

"He would have made a good husband for somebody, but not for me. He was one of those men who had old-fashioned views on marriage. He thought that when he'd paid for the licence you ceased to be a person, you were just a wife you were just his. What really sickened me, I had those two children, and then in arguments he let it out that he'd given me two children and that was the way of keeping me in and keeping me satisfied. My husband used to hold it up against me if I wanted to talk to him about anything other than washing the dishes, or if I expressed an opinion. If he had an opinion that was our opinion, if you understand me..."⁴⁶

For a reasonably educated woman, valuing her independence, the stereotype of the working man may be deadly dull and even frightening to live with, the marriage resulting in a clash of distinct styles of living or ideologies. Pregnancies become enslavement and marriage breakdown represents emancipation for the wife.

(ii) It is assumed that a failure to accept changes in meaning and structure occurs at points where acceptance would involve one party's perspective of reality being questioned; one party being told that he or she has an illegitimate world view. Obviously the nature of the issue will determine whether its resolution in favour of one party will have serious repercussions for the "losing" party's world view.

The two possible reactions resulting from a non-acceptance of structure and/or meaning suggested above do not explain the possible intrusion of a third party into the conflict as mediator or adjudicator.

J O
Johnson W.M.
Structural Analysis of Marital Conflict

In the situation where both parties rationally agree to accept the intrusion of a third party into their dispute there are two possible interpretations;

(a) Both parties accept the structure of the institution and the meanings ascribed to each other within it -- what they really want is the third party to provide a decision as part of the ongoing process of their relationship which is really "other" than the conflict which lies beneath it. In this example there is in fact no conflict in the sense that we have here concerned with, although there might appear to the observer, a mild domestic disagreement. The decision of the third party becomes merely another factor in the ongoing institutional process of marking the conflict endemic to the institution;

Mr and Mrs A. are a happily married couple. Mr A. wants eggs for breakfast. Mrs A. accepts her socially prescribed role as home-maker and there is no argument that she is the one to make breakfast. However Mr and Mrs A. are expected for lunch at the "B's" later in the morning. Mrs A. contends that Mrs B. always has eggs for lunch on this particular day. Mr A. says that Mr B. remarked to him the following day that because of Mrs B's pregnancy she has lost her appetite for eggs and it is highly unlikely that eggs will be on the B's menu for lunch; Mr A. remains adamant that he wants eggs. As the B's live just next door Mrs A. suggests that she "pop over and ask Mrs B" to resolve the matter.

Superficially Mr and Mrs A. are in conflict and are resorting to Mrs B. to adjudicate. But whatever Mrs B. answers it will not shatter either Mr or Mrs A's definition of their relationship. Obviously the issue is not one which affects either of them "personally" since it is dependent upon almost magical factors beyond their control.

JO
Johnson W.M.
Structural Analysis of Marital Conflict

Mrs B's answer to this mild dispute becomes part of the ongoing process of domestic life, Mrs A. will make breakfast accordingly.

(b) Both parties do not accept either the meanings and/or structures of the institution; they ascribe no legitimacy to each other:

Mr and Mrs C. were married largely because of pressure exerted by her parents when it was discovered that they were sleeping together. Mr C. has since become a "sociologist" by attending university part-time. Mrs C. has completed the industrial design course she began at polytechnic before they were married. Mr C. wants to study at an American university for a PH.D. degree so that he may return to New Zealand and obtain a lecturing post, "dictating his own terms". Mrs C. however wants to remain in New Zealand, her father has offered her a job and it would "destroy her career" to leave. As their marriage has in fact ceased to be a viable proposition before this point, there being no possibility of any children, each suddenly realises that they have "outgrown" the other. A separation leading to divorce is mooted.

When the husband and wife discuss divorce they think of themselves as individuals. As in the ongoing process of marriage they are joined together in conflict by a negative reciprocal bond though in a totally different sense. It is now not "what other people think" which keeps them together. Being entirely "rational", they produce a semblance of co-operation for practical purposes.

Though in a general situation the parties may be mixed up and unable to formulate what they would consider favourable outcomes to the conflict, to get any favourable outcomes at all which they see as in the control of the third party agency, they must play the game according to the rules.

J O Johnson W.M. Structural Analysis of Marital Conflict

In the marriage breakdown situation, practical considerations might include minimising lawyer's fees by appearing together at the lawyer's office complete with an outline of the agreement they have reached. A resort to reconciliation might be made because counsel refers the parties to reconciliation pursuant to the Domestic Proceedings Act.⁴⁷ If the parties go through the motions their desired remedy may be legally and practically easier to obtain.

4. MARRIAGE BREAKDOWN AND LAW

"When a marriage has irretrievably broken down and it is obvious that it will be dissolved it seems to be wrong that a great deal of public time and money should be spent in deciding which of the parties is to be granted the decree. Everybody knows that (until comparatively recently) divorce cases have habitually been hotly contested in public and at great expense to the parties or to the legal aid fund solely for the purpose of securing a supposed benefit for one or other of the parties in future maintenance or custody proceedings. This can not serve any useful purpose and may indeed be property regarded as contrary to public policy."⁴⁸

Yet despite such objections, the interest of society generally in encouraging and maintaining the stability and integrity of the family unit is the major presumption of the law. Yet it is recognised that it is against the public interest that hopelessly broken down marriages be maintained.

J O Johnson W.M. Structural Analysis of Marital Conflict

The public interest has three aspects; firstly it implies that matrimonial matters will be dealt with in a way which will encourage harmony during the parties future dealings, secondly the short and long-term interests and welfare of any children involved must be protected, thirdly "justice" must be seen to be done and the "wrongdoer" should not be helped to profit from a situation which he or she has been responsible for precipitating.

The retention of the system of adversary litigation makes sense only in the context of fault. Yet it has been vigorously argued⁴⁹ that notions of fault have limited place in the law since "fault" is comprised of overt acts; the outward symptoms of a marriage which has already failed. The pragmatic view⁵⁰ however prevails, the "innocent" party is depending upon the continuance of obligations and is entitled to protection. Thus the law is seen as telling the public precisely "where they stand" in a given situation whatever that might mean.

The present emphasis is of course directed away from an adversary system of marital dispute processing. The sole ground for divorce in both England⁵¹ and Australia⁵² now being that the marriage has broken down irretrievably and there is no reasonable likelihood of cohabitation between the parties being resumed. Similarly in New Zealand, legislation of this type has been mooted by the present Government in it's pre-election manifesto; thus National will legislate for the granting of divorce where the court is satisfied, after a two-year compulsory waiting period, that the marriage has irreconcilably broken down. The legislation will require consultation and a genuine attempt at reconciliation, but will not require proof of fault.

Proposals of this nature suggest an inquiry into the condition of the marriage, the accusatorial procedure being abandoned and something in the nature of an inquest being substituted for it.

J O Johnson W.M. Structural Analysis of Marital Conflict

Perhaps what is really needed for all matrimonial cases is a system which can combine the advantages of conciliation procedures in an informal and completely private atmosphere with the advantages of a court which can formally decide, where necessary, disputed questions of fact and law.⁵³

Possibly there might be appointed court investigators or "forensic social workers" whose duty it would be to report to the court the nature and success of attempts at reconciliation and give a professional assessment of whether in fact the marriage had irretrievably broken down. The investigation should have nothing to do with matrimonial offences or with the establishment of guilt or innocence. Outrages committed by the parties against each other are of course signs and symptoms that will help the clinician in his diagnosis but the investigation as such should focus upon what has gone wrong with the relationship, why it went wrong, and what are the chances of putting it right. This is in fact what the professional marriage counsellor is doing all the time.⁵⁴

The parties would be warned by their lawyers or advised by the court that no matter how informal the setting of the interview with the investigator, any statement made might be communicated to the judge who determines the fate of the marriage. It would thus be the parties own assessment of their marital situation, their conviction that the marriage had broken down, communicated in a non-confidential setting that would furnish the major proof of marriage breakdown.⁵⁵

Questions:

Obviously any such process would be a clinical investigation rather than a legal one; and immediate questions are:

J O Johnson W. M. Structural Analysis of Marital Conflict

- (i) how is breakdown proved to the satisfaction of the court?
- (ii) are the proposed methods of fact finding practicable and acceptable?
- (iii) when do the facts found constitute marriage breakdown?
- (iv) what does breakdown mean?

Two factors may be immediately apparent:

- (v) the sheer number of cases to be dealt with by the courts; as Inglis⁵⁶ points out with respect to the New Zealand context conciliation in general must not be misunderstood. Any procedure requiring a thorough investigation of the state of the marriage relationship, whether or not such an investigation would be desirable and flexible, would take so much time that the backlog of work would soon choke the courts. The task of the conciliator is seen as to establish the parties on a proper footing for the future whether the marriage is to be continued or abandoned; rather than salvage shaky marriages at all costs.
- (vi) the vague, indefinite and uncertain nature of the breakdown concept opens the way to many divergent interpretations.

J O Johnson W.M. Structural Analysis of Marital Conflict

The investigative process can not be accomplished in any meaningful way unless significant personal details are revealed. Any "diagnostic" or investigative interview intended to determine the feasibility of counselling must necessarily touch upon the personal, intimate details of the marital relationship. If it does not, it is difficult to imagine how the interviewer can make an intelligent appraisal of the feasibility of further counselling sessions.⁵⁷

If the investigation is conducted by a marriage counsellor, the investigation itself, may be utilised to persuade the parties to submit to counselling. Are parties to be coerced into therapy or forced to reveal intimate facts? Are third persons such as in-laws and romantic attachments to be named as parties to conciliation proceedings?

Couples resorting to marriage counselling voluntarily in the ordinary situation, with no thought of gaining a strategic advantage in the form of obtaining desirable remedies to the conflict situation with the least amount of cost, and inconvenience, may well be helped by counselling to see their situation in a completely different perspective; but it is suggested, they have previously accepted their basic situation; counselling is part of the ongoing process of their marriage.

The realities of the marriage breakdown situation are that unless the marriage had broken down the parties would not be before the court. The parties are likely to be better judges of the viability of their own marriage than the court can hope to be, even with the assistance of trained investigators and the most elaborate and searching inquest. To say that the state has a right to prescribe the conditions which must be met in order to secure a divorce decree is merely to recognise the general tone of the existing legislative enactments setting forward the grounds for divorce.

J O
Johnson W.M.
Structural Analysis of Marital Conflict

Not surprisingly the comparatively recent attention of the legal profession attracted to family law and the emphasis on the breakdown principle has resulted in no revolutionary conclusions as far as the adjudicative process is concerned. Thus it is believed that, on the whole better decisions will be given by specialist judges whose attention and judicial experience are directed entirely towards the judicial resolution of problems arising out of the family relationship ... these problems must be dealt with in a judicial manner and that the disposition must be in accordance with the rule of law ...⁵⁸

A divorce case based on breakdown should involve the determination of four questions;⁵⁹

- (i) has the marriage broken down?
- (ii) if so, is there any reasonable prospect of a reconciliation?
- (iii) if not, is there any reason of public policy, including in particular justice to the parties and to the children, why the marriage should not be dissolved?
- (iv) if not, what are the appropriate consequential arrangements to be made regarding the parties and the children?

In view of the presumptions of public interest, it is difficult to limit the extent of a judicial inquiry directed towards the "real facts" or "true causes" of the disruption within realistic bounds.

J O Johnson W.M. Structural Analysis of Marital Conflict

The abandonment of fault in the Divorce Reform Act 1969 (U.K.) is more apparent than real. In an attempt to convert irretrievable breakdown into a triable issue, its establishment is made dependent upon proof of one or more of five facts;⁶⁰

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.

(b) that the respondent has behaved in such a way that the petitioner can not reasonably be expected to live with the respondent.

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted.

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

J O Johnson W.M. Structural Analysis of Marital Conflict

Ground (a) recognises that the marital role may not after all, be incompatible with limited relationships outside marriage by requiring an adultery charge to be reinforced by an assertion that the petitioner finds life with the respondent intolerable.⁶¹

Ground (b) approximates the grounds upon which a separation order may be made, in New Zealand, pursuant to Section 19 (1) (c) of the Domestic Proceedings Act 1968; presumably, proposed New Zealand divorce legislation formulated upon the breakdown principle would be similar.

The concept of breakdown takes no account of unilateral repudiation by one party. What is the position, for example, where a wife loses her youth and physical attraction can the husband unilaterally repudiate the marriage on the grounds that it has irrevocably broken down and seek a younger mistress? Indeed why not, the marriage has broken down.

To grant a divorce pursuant to the breakdown theory in such a situation runs counter to the clean hands doctrine of equity and the notion that one can not take advantage of his own wrong. Thus in inquiring into the fact it is necessary for the court to examine not only the behaviour of the respondent but also the character, personality, disposition and behaviour of the petitioner also.

A violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted, a taciturn and morose spouse can reasonably be expected to live with a taciturn and morose partner; a flirtatious husband can reasonably be expected to live with a wife who is equally susceptible to the attractions of the opposite sex; and if each is equally bad, at any rate in similar respects each can be reasonably expected to live with the other.⁶²

J O Johnson W.M. Structural Analysis of Marital Conflict

This line of reasoning suggests a return of the ancient doctrine of compensation crimonous or recrimination which denied relief on the ground of adultery to a spouse who had himself been guilty of the same offence.⁶³ Recrimination is explained by Lord Stowell in 1799 as having its ... "... foundation in reason and propriety; it would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to a charge of the same nature. It is not unfit if he, who is the guardian of the purity of his own house, has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced, if he, who has first violated his marriage vow, should be barred of his remedy; the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt ..."⁶⁴

The rule of recrimination is not necessarily associated with the acceptance of the breakdown of marriage as a ground for divorce. The rule is unknown to the laws of; Czechoslovakia, Rumania, and East Germany, and there are strong tendencies to reject it in Scandinavian legal systems.⁶⁵

However recrimination is accepted in both Eastern and Western Europe pursuant to the purposes of;

- (i) adjustment of divorce law to the moral opinion of the community.
- (ii) educative purposes, the spouse inclined to commit a breach of marital duties will be prevented from acting by the knowledge that if his actions cause the breakdown of marriage he will not be allowed to request divorce. To make it possible for the guilty spouse to claim divorce would also encourage other people to violate their marital obligations

J O Johnson W.M. Structural Analysis of Marital Conflict

in order to cause breakdown of marriage, and subsequently, to get a divorce.

But the majority of law-makers, in European countries, who advocate the rule find it too hard to enforce without limitations, hence some legislation allows the court to decree divorce at the request of the guilty spouse if the innocent partner agrees to divorce. But refusal of consent or the opposition to divorce is not always effective; even in the case of opposition an Austrian court will decree divorce if, in the light of commonly accepted custom, the continuance of a given marriage is not justified.⁶⁶

Such provisos highlight the difficulty with recrimination and similar doctrines associated with the breakdown principle. The expedient of preserving the marriage by insisting that one who has shown wanton contempt for it should be punished by remaining married is clearly non-sensical -- and it involves "punishing" the innocent spouse as well. Further, if marriage is ideologically justified by love then the dissolution of a marriage that has become loveless can not be all that morally reprehensible -- hence the norm of permanence in marital obligations is undermined by the norm of romantic love.

Justice:

The process of law must invariably bring into consideration the individual and mutual obligations of both parties to each other and to the children if any. The emphasis is not upon defending the law as it stands but upon maximising the welfare of individuals, which is seen in terms of maintaining the family unit.

J.O. Johnson W.M. Structural Analysis of Marital Conflict

Right action is defined in terms of individual rights, critically agreed upon by the whole society awareness of the relativism of personal values is attended by an emphasis upon procedural rules for reaching consensus. Two competing principles therefore arise; on the one hand the law must not appear to be encouraging permissiveness and family anarchy while on the other appearing to prop up "matrimonial drop-outs".⁶⁷

To resolve a balance the "just" result must involve looking at the party's particular problem in the wider context of the community interest. But though it is strongly maintained in some quarters,⁶⁸ that it is beyond argument that the legal buttress to the integrity of the family is in the interests of society generally; what is the ultimate good is not a matter of demonstration but of choice.

The family is a method of creating alliances by which human groups have been reconciled, united and expanded. The combination of these functions led to the conceptualisation of the idea of legitimacy, the child acquiring his status from that of the husband/father thereby enabling wealth and political power to be transmitted from one generation to another in a relatively orderly fashion.

In such a society marriage and legitimate parental relationships have repercussions extending beyond the parties into the social structure around them. In Western society, marriage no longer carries these implications, political allegiance and economic wealth are differently allocated. Even the maternal role is diminished because the proportion of a woman's married life spent in maternal care is dramatically reduced.⁶⁹

Johnson W.M.
Structural Analysis of Marital Conflict

The practical result would seem to be that the only social purpose for maintaining marital and paternal relationships lies in the value that they have for the parties themselves.

The parties are of course guaranteed formal justice, their claims being weighed equally against abstract concepts of behaviour created by legal thought itself and conceived of as constituting a complete system, but how is merit or worth to be assessed?

The criteria established to adjudicate between the parties reflects a scale of values which objectively makes no supposition as to the rightness of the particular factors chosen as a subject for reward. But, obviously, the policy considerations inherent in family law involve a value judgment and what values are chosen to affirm are not a matter of logical necessity but simply choice determined by social and economic environment and some sort of understanding of what is "fair" in the circumstances. The problem of assessing merit of competing claims remains.

Having produced the criteria upon which the conflicting parties are to have their claims judged, any rigid concentration upon the superficial issue of whether the situation from which one party is seeking relief meets that criteria, thus losing sight of the subjective nature of the original judgment of social values, may produce alarming results in the marriage breakdown context.

Law and Changes of Meaning:

Conduct between spouses in the nature of illtreatment appears to fall into various grades or categories:⁷⁰

J.O. Johnson W.M. Structural Analysis of Marital Conflict

At the lowest point of the scale is the wear and tear of married life which is disregarded by the law. At this point the meaning ascribed to the marital relationship by one partner may not be accepted by the other resulting in conflict, yet the structures are outwardly those of husband and wife and the arrangement is viewed as the spouses having made their bargain for better or for worse. The structures of marriage are ostensibly maintained and the state being a party to the marriage contract will not intervene.

A woman describes how: "On the wedding night he unleashed himself on me, and I thought to myself at the time, I thought, 'Dear God, have I got this to cope with', and I knew then that I couldn't love him. So that's why I let the children come along, I thought I'd have something to love. But in the end it got so bad that I had to get out or get into a coffin, because he just wouldn't leave me alone. He was a sex maniac. I've told my daughter little things about him, you know, since she's grown up, and she's said to me after she's got married, 'You know Mum, you didn't love my dad, well I got a lot with (her husband) but it hasn't turned me against him'. So I said to her, 'Well, perhaps you're right, love, but you didn't marry Bill (her husband) to get away from home'."

He was just like an animal or something. If he saw a bit of me when I was changing in front of him, or if I was having a bath, he always used to sit on the side of the bath and devour me. I used to say, 'Oh go and get a book or something. Don't sit there like that.' I was as though he was nicked, and he'd say, 'I've a right to sit there and watch you, and look at you like that. You're my wife, I've a right to do what I want with you.' (One night when she was trying to have a bath by herself he returned unexpectedly.) He said, 'Are you having a bath? Let me in.' And I could hear his mate saying, 'What's the matter with you man, she's only having a bath', and my husband was saying, 'She's

J.O.
Johnson W.M.
Structural Analysis of Marital Conflict

no right to have a bath without me there.' Well, he brayed and he kicked at the door, I thought he was going to knock it down. And when he came in he said, 'That's the last bath you have without me there,' and it was too!"⁷¹

At the other end of the scale is cruelty at which point the non-acceptance of changes in meaning by the "wronged" partner is accompanied by a change in the marriage structure. Such a change in the marital structure will commonly be understood at the social level to represent a breakdown of the marriage. Cruelty is not a ground for divorce in New Zealand, though it is a ground upon which a separation decree may be made pursuant to the Matrimonial Proceedings Act 1963 and the grounds upon which a separation order may be made pursuant to Section 19 (1) (c) of the Domestic Proceedings Act 1968 constitute in effect the modern law of cruelty.

The conduct which constitutes cruelty is defined in terms of danger or reasonable apprehension of injury to health. The meanings ascribed to the "wronged" partner by the partner instigating the change are unimportant. The intention to injure or foresight that injury will result go to the weight and gravity of the conduct complained of, but if that conduct and its consequences are so bad that the victim must have a remedy, that the marriage has ceased on any reasonable view of the matter to be a marriage, then the state of mind even insanity of the offender is immaterial.⁷²

"Cruelty", of course, can not be defined solely in terms of danger or reasonable apprehension of injury to health. Acts can give rise to mental or physical injury without amounting to legal cruelty.⁷³

TO Johnson W.M. Structural Analysis of Marital Conflict

It is the husband who has the power to change structures and to ascribe meanings.⁷⁴ The wife's lack of freedom to leave the marriage can not be overstressed as an influence of prolonging a marriage in conflict; there is generally economic dependence on the husband and a commitment to the children. Thus the husband, who in our society may tire of the marriage more quickly, may adopt a divorce strategy to drive the wife away.

Close behind or alongside cruelty comes constructive desertion. Again it seems that the animus of constructive desertion will go only to the weight and gravity of the conduct complained of, and no particular state of mind will be essential. The question is whether this man's conduct to this wife has been of such a nature that she could not reasonably be expected to endure it further.⁷⁵

The wife should she desire divorce uses different weapons of a less tangible nature; sulking, nagging, refusal of intercourse. As a consequence a classification of complaints may appear to place the "blame" on the husband simply because his behaviour is more public and it is suggested more easily recognised as resulting in a change of the structure of the marriage to which the law will take cognisance.

One of the easiest offences for a wife to allege against the husband is sodomy which at the same time is most difficult for the husband to refute due to the essentially private nature of marital relations.

Thus in mitigating the effect of a strict application of the doctrine of matrimonial offence by permitting the bars of consent and condonation the courts are apparently aware of this most obvious abuse.⁷⁶

JOHNSON W.M.
Structural Analysis of Marital Conflict

Because consent is a bar, the court must look closely at the circumstances and determine whether the consent was real or no more than resignation. But such emphasis involves consideration of an isolated issue rather than changes of meanings which may occur during the conjugal relationship. Thus it may be that the wife knows the requests of her husband are immoral or even illegal and she may object to them, but she may be deemed to have consented to such acts if she finds herself powerless to resist them because of her love for her husband or because she fears she might lose him.

Mrs Bampton⁷⁷ was making an honest attempt at holding the marriage together until the demands of her husband for sodomy became too much for her. She admitted that while she never "consented" to the acts she was "glad of the affection" he was showing her and was worried that she might lose him if she did not let him try. She further testified that she had not complained previously because she felt that she could handle the problem herself.

The justices were disposed to find that there had been consent and that it was real consent, which thus barred Mrs Bampton from the relief which she was seeking.

Surely such a situation involves a change in the structure of the marriage to which the law could take cognisance? Mrs Bampton would have had her remedy if she had immediately refused to accept the situation.

In *Gorst v Gorst*⁷⁸ the husband suggested to his wife that in order to help him overcome sexual difficulties in the marriage, she should permit him to have intercourse with another woman. The facts were held to amount to connivance in spite of the fact that the wife had consented with reluctance and in an effort to save the marriage.

J O Johnson W.M. Structural Analysis of Marital Conflict

The distinction between changes of meaning and structure in this context is difficult to draw since a change in meaning can become a change in structure and conversely a change in structure may equal a change in meaning. Also to suggest that the law does not cope adequately with changes in meaning because they can less easily be defined as marriage breakdown, is not to state that the law will recognise every change in marital structure.

Reverting back to a definition of structure, it is suggested that a change in structure is a change in the framework of the relationship; to justify legal intervention such a change must result in the relationship no longer resembling the reciprocal nature of marriage as commonly understood in society.

Thus it may be impossible to say that where two people commit sodomy together or connive in adultery, either of them is entitled to ask the court for a decree based on an act to which he or she was a party⁷⁹ (possibly just as any spouse might be a party to an act in the context of an ongoing marriage).

Where there is consent the object to be obtained does not matter⁸⁰ since it would seem the structures of the marriage remain largely intact, though this is not the interpretation placed on the arrangement by the parties, resulting from a non-acceptance of ascribed meanings by one of them. In terms of meanings the marriage has broken down.

It is difficult to suggest any other interpretation since while public policy demands support for the family unit; yet it is against the public interests for hopelessly broken down marriages (broken down in structure and meaning) to be maintained.

J O Johnson W.M. Structural Analysis of Marital Conflict

5. CONCLUSION

Any investigative process based on a value judgment as to the desirability of marriage as an institution, which by the very nature of an investigative process is implied, must support the proposition that the maintenance of the institution is too important to be left to the individuals concerned.

The reality of the legal process, following from its basic assumptions, whether propagated on grounds of fault or breakdown, is the same. The actions of the conflicting marital partners are measured against conceptions of the structural norm said to represent the common norm of marriage in society, the meanings attributed to the marital relationship by the parties involved being of minor importance.

In terms of social efficacy, as the examples relating to law and changes of meaning are intended to illustrate, the inadequacy of the law to deal with changes in meaning leads to some confusing results in "border line" conflict marriages where changes in meaning, unacceptable to the party seeking the legal remedy, tend almost to equal changes in structure.

JOHNSON W.M. Structural Analysis of Marital Conflict

Foot Notes

1. Timothy B Walker; "Beyond Fault: An Examination of Patterns of Behaviour in Response to Present Divorce Laws" journal of Family Law (1971) Vol. 10 p. 267; 271 - 272

"Divorce and the Church"; a lecture from the Bishop of Exeter, in Family Law Vol. 2 p. 189.
2. E. Garth Moore; "Introduction to English Canon Law" pp. 82 - 83.
3. P.L. Berger; "The Sacred Canopy; Elements of a Sociological Theory of Religion" pp. 37 - 39.
4. See in particular a comment by William Farr M.D. upon marriage as a healthy estate; "Influence of Marriage on the Mortality of the French People" in transactions of the National Association for the Promotion of Social Science 1858, p.504; pp. 507 - 508.
5. See, "Sociology Nurses and their patients in a modern society" (ed) Thompson; Miller; Bigler, 9th ed. ch. 10, pp. 135 - 136.
6. "Social Stresses on the Modern American Family" a lecture delivered to the first Unitarian Church of Albuquerque, July 3, 1966 by Harold C. Meier, Assistant Professor of Sociology, UNM.
7. William J. Goode; "The Theoretical Importance of Love" in The Family its structures and functions (2nd ed.) (ed.) Rose, Lamb, Coser, p.143; pp. 147 - 149.
8. Supra n. 7; at p. 148.
9. Supra n. 7; at pp. 150 - 155
10. Supra n. 6; "Social Stresses On the Modern American Family" a Lecture delivered to the First Unitarian Church of Albuquerque, July 3, 1966 by Harold C. Meier, Assistant Professor of Sociology UNM.

J.O. Johnson W.M. Structural Analysis of Marital Conflict

11. N.H. Dardick; "Marital Contracts Which may be put Asunder"
Journal of Family Law (1973 - 74) Vol. 13 p.23; pp. 38 - 39.
12. "Sociology Nurses and their patients in a modern society"
(ed.) Thompson; Miller; Bigler; 9th ed. ch. 10, pp. 135 - 136.
13. Michael Gordon and Penelope J. Shankweiler; "Different Equals
Less: Female Sexuality in Recent Marriage Manuals" in
Journal of Marriage and The Family Vol 33, August 1971, p. 459,
pp. 460 - 464.
14. Reg v Clarence 22 Q.B.D. 23; though a husband may not insist
upon intercourse if he knows that he is suffering from venereal
disease, Foster v Foster (1921) p. 438.
15. R v Miller (1954) 2 ALL. E.R. 529.
16. Per Lord Halsbury; Reg v Jackson (1891) 1 Q.B. 671; 678 - 679.
17. Per Cairns L.J.; R v Reid (1972) 2 ALL E.R. 1350; 1353.
18. Reg v Jackson (1891) 1 Q.B. 671.
19. R v Reid (1972) 2 ALL. E.R. 1350; see Cairns L.J. at p. 1352.
20. Per Davies J. Forbes v Forbes (1954) 1 W.L.R. 1526; 1537.
21. Section 21 (1) (e) of the Matrimonial Proceedings Act 1963.
22. Hyman v Hyman (1929) A.C. 601.
23. Per Denning L.J.; Bennett v Bennett (1952) 1 K.B. 249; 261.
24. See Lord Simon of Glaisdale (dissenting); Schaefer v Schuhmann
(1972) A.C. 527; 595 - 596.
25. By M. Gilson; "Women in Employment"; in Social Process in
New Zealand (ed.) Forster, pp. 183 - 198.

JOHNSON W.M.
 Structural Analysis of Marital Conflict

26. As suggested by the Select Committee on Women's Rights; The Role of Women in New Zealand Society, Journal of the House of Representatives 1975 I.B.
27. The Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand.
28. Equal Pay Act 1972; The Act is designed to eliminate sex discrimination in rates of remuneration progressively over a period ending on 1st April 1977.

A dual economic role for women seemingly threatens the "Family Institution" so jealously guarded by New Zealand society - see the conclusions of James and Jane Ritchie; "Proper Kiwi Mate", in New Zealand society Contemporary Perspectives (ed.) Webb/Collette pp. 82 - 89.
29. By Barbara Cavanagh; "A little dearer than his horse; legal stereotypes and the feminine personality, Harvard Civil Rights Law Review Vol. 6. p. 260, pp. 264 - 269.
30. James and Jane Ritchie; "Proper Kiwi Mate", in New Zealand Society Contemporary Perspectives (ed.) Webb/Collette p.82; p.83.
31. Note section 44 of the Matrimonial Proceedings Act 1963; the husband must be unable by his own means or labour to support himself.
32. R.D. Laing; "Series and Nexus in the Family", in Problems of Modern Sociology (ed.) Worsley pp. 239 - 245.
33. Penthouse, Vol. v. No. 4, 1973. p. 140.

J O Johnson W.M. Structural Analysis of Marital Conflict

34. Kenneth Colburn; "Hedonism, Incest and the Problems of Difference" *Theory and Society* Vol. 2 No 3 Fall 1975 p. 351; pp. 352 - 353.
35. Jessie Bernard; "Parties and issues in conflict" in *Journal of Conflict Resolution* Vol. 1 p.111; pp. 111 - 112.
36. John E. O'Brian; "Violence in Divorce Prone Families" *Journal of Marriage and the Family* Vol. 33 p. 692; p. 693.
37. Simone de Beauvoir; "The Second Sex" p. 465.
38. *Supra* n. 37; p. 466.
39. M. Joseph Smucker and Anton C. Zizderveld; "Structure and meaning implications for the analysis of social change" *British Journal of Sociology* Vol. 21 p. 375; pp. 382 - 384.
40. (1948) N.Z.L.R. 857.
41. *Penthouse*, Vol. v. No. 4, 1973 p. 32.
42. *Supra* n. 39; p. 384.
43. See *Davidson v Davidson* (1953) 1 W.L.R. 387.
44. See Dennis Marsden; "Mothers Alone; Poverty and the Fatherless Family"; p. 83.
45. (1955) A.C. 402.
46. *Supra* n 44; pp. 84 - 85.
47. Domestic Proceedings Act 1968 sections 13 and 15.
48. Per Lord Salmon; *Tumath v Tumath* (1970) 1 ALL E.R. 111; pp. 114 - 115.

JO
 Johnson W.M.
 Structural Analysis of Marital Conflict

49. See Timothy B. Walker; "Beyond Fault: an Examination of Patterns of Behaviour in Response to Present Divorce Laws" Journal of Family Law 1971 Vol. 10. p. 267; 271 - 272; J.F. Jeffries; "Matrimonial Fault - Is It Now Relevant" (1972) N.Z.L.J. p. 531.
50. As is the view expressed by B.D. Inglis, (1972) N.Z.L.J. 525; discussion of the paper "Matrimonial Fault - Is It Now Relevant" by J.F. Jeffries presented to the 1972 triennial conference of the New Zealand Law Society.
51. Divorce Reform Act 1969.
52. Family Law Act 1975.
53. As suggested by B.D. Inglis; "The Family, the Law, and the Courts"; Vol. 47 A.L.J. 647; 652 - 653.
54. See D.R. Mace; "Marriage Breakdown or Matrimonial Offence: A Clinical or Legal approach to Divorce?" 14 Am. U.L. Rev. 178, who proposes that the "verdict concerning the viability of the marriage" be made by a skilled marriage counsellor. The court would grant a divorce after a thorough clinical investigation by such a counsellor had made it apparent that the marriage had broken down beyond repair.
55. As suggested by Brigitte M. Bodenheimer; "Reflections On The Future of Grounds For Divorce" Journal of Family Law Vol. 8 (1968) p. 179; pp. 199 - 201.
56. B.D. Inglis; "Family Law" (2nd ed.) Vol. 2 pp. 312 - 317.
57. See D.E. Seidelson; "Systematic Marriage Investigation and Counselling in Divorce Cases: Some Reflections on Its Constitutional Propriety and General Desirability" 36 GEO. WASH. L. REV. p. 60; pp. 89 - 90.

J.O. Johnson W.M. Structural Analysis of Marital Conflict

58. Lee B.D. Inglis; "The Family, the Law, and the Courts" 47 A.L.J. 647; p. 653, Dr. Inglis discusses a study by a group of Canadian specialists; working paper on Family Courts (1972), University of Alberta Institute of Law Research and Reform.
59. Formulated by the Law Commission (U.K.), Reform of The Grounds of Divorce, The Field of Choice, CMND. No. 3123, p.36.
60. Section 2 (1) of the Act.
61. Cleary v Cleary (1974) 1 ALL E.R. 498.
62. Ash v Ash (1972) 1 ALL. E.R. 582; 585 - 586, per Bagnall J.
63. As suggested by H.A. Finlay; "Justiciable Issues and Legalism in the Law of Divorce" 46 A.L.J. 543; 548.
64. Beeby v Beeby 162 E.R. 755; 756.
65. Lee Jan Górecki; "Recrimination in Eastern Europe: an Empirical study of Polish Divorce Law" American Journal of Comparative Law (1965/66) Vol. 14, p. 603.
66. Supra n. 66; pp. 604 - 606.
67. B.D. Inglis; (1972) N.Z.L.J. pp. 525 - 526.
68. Particularly by B.D. Inglis; "The Family, the Law and the Courts" 47 A.L.J. 647, 648.
69. See J.M. Eekelaar; "The Place of Divorce in Family Law's New Role" (1975) 38 Mod. L.R. 241, 242.
70. L. Neville Brown; "Cruelty without Culpability or Divorce without Fault" 26 Mod. L.R. 625.

J.O. Johnson W.M. Structural Analysis of Marital Conflict

71. Example taken from Dennis Marsden, "Mothers Alone Poverty and the Fatherless Family", pp. 88 - 89.
72. Supra n. 71; p. 649.
73. B.D. Inglis; "Family Law" (2nd ed.) Vol. 2. p. 330.
74. See Generally, Dair L. Gillespie; "Who Has the Power? The Marital Struggle" Journal of Marriage and The Family Vol. 33 (May 1971) p. 445.
75. Hall v Hall (1962) 3 ALL E.R. 518; 524, per Ormerod J.
76. Davidson v Davidson (1953) 1 W.L.R. 387; 391.
77. Bampton v Bampton (1959) 1 W.L.R. 842.
78. (1952) p. 94.
79. Per Greer L.J.; Statham v Statham (1929) p. 131; 145.
80. Per Karminski J.; Gorst v Gorst (1952) p. 94; 100 - 101.

JO
Johnson W.M.
Structural Analysis of Marital Conflict

71. Example taken from Family Law, "Without their consent" and the "Revised Family", pp. 44 - 45.
72. Page 71, p. 449.
73. B.B. Inglis, "Family Law" (2nd ed., Vol. 2, p. 330).
74. See generally, John L. Gilchrist, "The Role of the Law in the Family", *Journal of Marriage and the Family*, Vol. 33 (May 1971) p. 443.
75. *Hall v Hall* (1963) 2 All E.R. 710, 724, per Goff L.J.
76. *Lawson v Lawson* (1972) 1 W.L.R. 707, 708.
77. *Langton v Langton* (1972) 1 W.L.R. 543.
78. (1972) p. 24.
79. *See Green L.J.*, *Lawson v Lawson* (1972) p. 711, 712.
80. *See Lawson L.J.*, *Lawson v Lawson* (1972) p. 741, 742 - 743.

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00443033 4

VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

F
Folder
Jo

JOHNSON, W.M.

A structural analysis
of marital conflict.

LAW LIBRARY

359,688

CU	L89/20
PLEASE RETURN BY	
14 APR 1989	
TO W.U. INTERLOANS	

A fine of 10c per day is
charged on overdue books

J
JO
Johnson W.M.
Structural Analysis of Marital Conflict.

5
6

8
5
8

8
5
8

8
5
8

F
T
C