The Future of Marriage

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Introduction

Over the last 40 years the behaviour of Australians in marriage, divorce, and the having of children, has changed markedly. So much so that it is not extravagant to describe the changes as revolutionary. Divorce has increased fourfold. A child born today has a one in three chance that any future marriage will end in divorce.[1] Living together before marriage has more than quadrupled. The proportion of married, natural parents in charge of children in families is now the lowest in our history. The percentage of children in single parent families has increased more than fourfold since the 1960s. There are more step and blended families. About 28% of children are living apart from one of their natural parents – almost always the father. The number of children affected by the divorce of their parents has increased fivefold since 1960. In 1960 the average number of births in a woman's lifetime was 3.4. By 2000 it had halved to 1.75, and mother's age at first birth was substantially higher. Rates of abortion have tripled since 1970. In 1960, 5% of births were outside marriage; in 2000 it was close to 30%.[2]

A number of social developments are statistically correlated with these trends. For example, family breakdown is a common background factor in juvenile depression and suicide, in

educational underperformance, and in emotional disturbance and behavioural problems of children whose parents have divorced or separated. Parental neglect is strongly associated with single parenthood and the absence of one of the natural parents, and neglect in turn is closely associated with juvenile delinquency, violence and criminality. Many studies in developed countries have replicated these findings and strongly suggest that there are causal links at work.[3] The fragility of marriage, the retreat from marriage revealed in delayed or rejected marriage and divorce, the greater frequency of cohabitation and unmarried motherhood, together with the rapid increase in children growing up away from their natural fathers, are deeply implicated in these unhappy circumstances. The condition of marriage is therefore a key issue for social policy. But it is an issue embedded in the interaction between economic and social changes over the last generation, and changes in family law.

Among these, the change in women's expectations in relation to marriage, work, and the having of children has been of crucial importance. This happened against a background of declining support, through the taxation system, to meet the costs of rearing children—a development that has given added impetus to delayed marriage and the movement of mothers into the workforce in order to manage these costs. Between 1976 and 1996, the proportion of mothers with pre-school children entering the workforce part-time and full-time almost doubled.[4] As these trends gathered momentum, a major change in family law with the advent of no-fault divorce in 1975 reinforced the diminishing status of marriage that had begun with the sexual and values revolution of the 1960s.

Historically, within the Western tradition and its English-speaking variants, the rules governing marriage and divorce have had the effect—at least until the modern period —of supporting the continuity and the predictability of the bond formed between a man and a woman when they come together to form a family. Men and women are different. Those disparities, for most, may be expressed in differing interests and priorities within marriage in ways which may strain the marriage bond—not to speak of the attitudinal and temperamental differences that are endemic and potentially threatening to all human relations. Ideally, one would expect that family law should have a role to play in discouraging division and conflict, in supporting permanence, and in delivering justice to separating spouses and their children. The Family Law Act 1975 does not do this. Its divorce law is framed to deal with spouses after they have separated. It is primarily concerned with dealing with marital failure, not with promoting marital success. Yet the rules governing divorce inevitably feed back to influence the behaviour that will largely determine the future of a marriage. This monograph argues that family law today is not supportive of marriage, and that this failure is being exacerbated by attendant social and economic changes which are having their own independent effects on the stability and viability of this central human bond.

The outcome has been the emergence of incentives and disincentives in family law that work against the desirability and durability of marriage. Exploring this structure of incentives and disincentives and their consequences is the theme of this monograph.

If family life is the foundation upon which a society is built, then marriage has been the foundational institution around which family life is ordered. To play that role effectively, marriage needs the support of family law, strong informal social norms and sanctions, and wise public policy. In the discussion that follows, I focus on the present state of marriage and divorce, the role and effects of family law, and what might be considered in the way of reforms. But no matter how well-based and argued any proposals for reform of the law might be, and no matter how desirable, they would not be sufficient in themselves to achieve what needs to be done to restore vigour and stability to our family life. Such reforms are only half the story. At best, they would constitute a broad framework of law and policy within which perverse incentives and clear injustices might be minimised, thus delivering a legal basis for more durable marriages. Further support for marriage has to be found in public policies, taxation and welfare arrangements, and social conventions that privilege marriage as the preferred site for family formation and the rearing of children.

Chapter 1

The Evolution of Marriage in the West

It is not in the social interest that marriage should ever become a prison, from which neither party can ever escape. On the other hand it is equally not in the social interest that parties who have taken on the responsibilities of marriage should be able to cast them off if they feel like it. – B.D. Inglis, *Family Law.* [5]

Many threads in our humanity are woven together in the act of marriage and in the family life that follows it. Men and women are inevitably drawn together by love and the urge to mate. In all societies, those fundamental drives towards male-female bonding and the having of children are shaped by the prevailing mores, customs, and laws of the society concerned, and authoritatively expressed in rules of marriage. In our own society in recent times these social constraints, both in the law and in informal norms, have become less restrictive, vaguer, and much more subject to disagreement. We are less sure about what constitutes acceptable behaviour in matters of male-female partnerships and in fulfilling responsibilities towards children. A confused and woolly toleration has supplanted a clear and articulated view of what people should take responsibility for and how we should react when they behave irresponsibly. Confusion about what is required of us and the silence of the law when it should speak inevitably lead to harm for others, and the most vulnerable, whether adult or child, are the first victims.

In a highly individualistic culture emphasising self-fulfilment rather than obligation, marriage today places little stress on the importance of committing oneself to an enduring relationship and family duties of wider compass. It was not always so. For centuries, Western societies emphasised the permanence of marriage against the fluidity of the affections, and the strong obligations upon sons and daughters to care for their aged parents. It is only within the last century that divorce has become easily available and that prosperity and the growth of the welfare state have relieved the burdens of filial duty. In understanding the changes taking place, we are compelled to take account of social, economic, cultural and legal factors which condition marriage and which may modify the sentiments that sustain it.

Until the modern period in the West, the indissolubility of marriage was coeval with continuity of land tenure within families. In 1981, Mary Ann Glendon published *The New Family and the New Property*. It showed the intimate connection between conceptions of marriage and its functions, and laws governing the holding of property. Arranged marriages, for example, which sought to ensure that holdings of land would be kept within the family blood line during medieval times, began to disappear early in the modern period when property or wealth no longer consisted primarily in land, but in income from earnings and profits. In 1870 the United Kingdom parliament passed the Married Women's Property Act which ended the practice whereby a woman's property automatically passed to her husband upon marriage. New developments in family law and the institution of marriage, Glendon argued, followed such changes. Marriage, in short, was influenced by the locus of wealth generation, and wealth in the modern era was becoming increasingly located in human capital—in the individual capacity to earn income or to prosper in business.

First in England and later elsewhere, as the link between marriage and land tenure weakened, conceptions of marriage changed. Companionship and the importance of romantic love, although incidental but by no means absent in the old regime, became central to the idea of marriage, and the acquisition or retention of land as a primary concern faded. But, since love may falter and companionship wither, and because marriage-for-land-and-wealth was no longer central, divorce became thinkable - though permanence remained the ideal.

By the 19th century, secular authority having almost wholly replaced religious authority in marriage, reconciling an ideal of permanence with the possibility of divorce had become the task of family law. It was accomplished by dealing with marriage as akin to a lifelong 'contract', although in strict legal terms it was not a contract. It was a legal bond of indefinite scope that could only be ended by serious misconduct by a spouse which subverted the central aspirations of marriage for love and mutual support, fidelity, reasonable behaviour, and the having of children.

That conception of what marriage meant was morally and religiously supported by widely accepted and informally enforced social norms and stigma, including norms against pre-marital sexual relations and bastardy. It was legally reinforced by the doctrine of marital fault and alimony. Proof of marital fault (serious misconduct) was necessary before a divorce could be allowed; and fault was recognised as damaging the interests of the victimised spouse, justifying

'compensation' for the damage done to marital expectations. Marriage was economically reinforced by division of labour between husband and wife and by the gains from specialisation—with the husband concentrating on market income and the wife on domestic services and the care of children. Again, this informal assignment of roles was socially supported by norms stigmatising their dereliction, and approval and status for faithful performance. Also significant was the idea of marriage as a heterosexual *union*, transforming two individuals into a single social and legal entity comprising two complementary parts.

Still in the 1950s, and up to the end of the 1960s, that conception of marriage and its moral, legal, and economic supports, survived, underpinned by growing prosperity and robust fertility. But the seeds of change had been laid for the dissolution of the sexual code discouraging sexual relations outside marriage; for the weakening of the traditional sexual division of labour; and for demands for less restrictive rules of divorce.

By the beginning of 1975 Australian marriage had evolved over two centuries from a virtually indissoluble bond in which the place of the husband as formal head of the family and holder of property was paramount, to a relationship of legal equals in which divorce, although available, required that one party had to prove marital misconduct or 'fault' before divorce was allowed. After 1975, with the advent of no-fault divorce, misconduct became irrelevant to the terms of a divorce and its settlement, and dissolution of a marriage became readily and easily available. This has turned out to be a crucial event in the history of marriage.

The Change in Women's Roles

In the immediate post-World War II period the continuation of a marriage tradition based upon the dependency of wife and children on the man's earnings required that married women should be discouraged from 'displacing' men from jobs and that their wages should be lower. Uncertain control of their fertility meant that married women were exposed to greater risk of having work and career plans interrupted by children.

As many commentators have noted, the most significant change of recent times has been the transformation of women's roles for a variety of social and economic reasons. This was assisted by a renascent feminist movement from the 1950s onwards emphasised demands for equality of the sexes, by a revolution in sexual morality, and by ideological movements attacking 'bourgeois' institutions, including marriage and the family. These movements provided the intellectual foundations and legitimation for a transmogrification of custom and morals in matters of sex and family life.[6] The economic aspects of women's changing roles assumed particular importance. Greater freedom, more equality, and expanded opportunities for women followed and were rapidly explored.

Between the 1960s and 1990s, women's wages—driven by increasing national wealth, demand for labour, feminism, industrial agitation, and the social legitimation of post-marital workforce participation—began to move steadily towards parity with male wages (**Table 1**). More extended education of young women occurred in tandem with this trend (**Table 2**). A crucial outcome was the growth of women's human capital through advanced education and work experience. Women expanded their capacity for wealth generation in the market place, and their aspirations. Social and moral change, new expectations of men and women, and the increasing labour market value of women's growing human capital, were remoulding the traditional conception of marriage and the division of labour. In the early 1960s, the advent of the 'Pill' gave women reliable control over their fertility. This promoted access to workforce participation, income predictability, and security against unplanned interruption and loss of income for a married woman. Delaying marriage, or leaving an unsatisfactory marriage became easier, at least for those women with marketable skills and unencumbered by children.

As female wages and education increased, so did the incentive for married women and mothers to work. This was a development further encouraged, especially during the late 1970s and 1980s, by the erosion of taxation concessions and government support for the costs of children.[7] Government-subsidised child care for working mothers made it easier to join or stay in the workforce. For all married couples the rewards from working wives increased. Wives began to match husbands as bread-winners, and the relative importance of the husband's economic, family-supporting role diminished.

Implications for Marriage

The availability of easy, no-fault divorce, together with women's greater capacity for earned income, have reinforced each other in a number of ways that were not foreseen. The rate of divorce, and hence the uncertainty of marriage, increased. This challenged the rationality of domestic and child-rearing specialisation within both marriage and cohabitation for at least a proportion of women who, under more propitious circumstances, might have preferred that way of life. This would tend to reduce birth rates; a situation compounded by the 'opportunity costs' of giving up an earned income for child-rearing, particularly for highly educated women with superior income-earning capacity. And, to repeat, compounded also by the diminished recognition by the income-tax and benefits system of the rising costs of dependent children, and the growth of relatively greater disadvantage, in this respect, of single-earner, middle-income families. The single-earner family, at risk of losing its socio-economic status, came under pressure to convert to a two-earner family. Doing so meant abandoning or diminishing the intra-family welfare benefits of spousal specialisation and increasing the difficulties of having children.

The opportunity costs of having children for high-earning professional women, in particular, can be very large. Data from the 2001 Census is revealing. Female lawyers without children in the 35-44 age group, for example, received the same median salaries as their male counterparts and rather more than their female lawyer colleagues with children (**Figure 1**). George Megalogenis points out that 87.4% of female lawyers aged 25-34 were childless in August 2001: 'By contrast, almost 41.2% of generation X women in all other jobs below the rung of professional (tertiary qualified) had children in August 2001'.[8] Also, as Andrew Norton points out, the childless, single nature of many highly educated professional women may be because they are finding it hard to meet suitable husbands of equal stature.[9]

For men, a husband's specialisation in income-earning and in increasing the scope of his human capital and future earning capacity through an uninterrupted career, builds an asset that is his alone and portable. On the other hand, a woman's specialisation in domestic work and child-rearing usually entails the erosion of her marketable human capital and income-earning capacity. The more children she has, the greater the loss. A rational woman in these circumstances, wanting to protect her future and way of life, would therefore value institutional safeguards against the loss of her partner, the collapse of her marital expectations, and the prospect of rearing children alone in conditions of relative impoverishment. Traditional marriage, under fault-based divorce rules and access to alimony in the event of break-up, used to provide those institutional guarantees – if not completely, then certainly to a greater extent than at present. It is likely, for a great many women, that reduced marital protection, the rising relative costs of children, and the opportunity costs of sacrificing employment by a working wife, are eroding female domestic specialisation and birth rates and undermining the incentives for marriage. At the present time more women than men file divorce applications (47% by the wife, 30% by the husband, and 23% jointly), [10]which could be interpreted as a stronger wish by women than men to divorce under current no-fault rules. There is some American evidence, discussed in Chapter 3, which suggests that expectations of child custody may be a factor influencing women to initiate divorce proceedings.

Other things being equal, less marital specialisation in household production reduces the welfare gains of marriage, making it less attractive and less costly to shed. At the same time dvanced education and greater income potential of women generally, reduces the former male advantage in these respects and hence the incentive for a woman to marry in order to profit from this advantage. Cohabitation without marriage or children is sufficient, since she can support herself if the relationship ends.

It is clear that wage parity or near-parity with men, the increased inducements for women to work, and the income advantages for women arising from this, will have two effects. It will make wives less dependent upon their husbands and better able to survive divorce. From the husband's perspective, it will erode the traditional male-female division of labour and its benefits—although offset by the higher joint income and the capacity to purchase goods and services formerly produced within the home. However, for families of moderate total income, it is likely that at some point the gains from a wife's income may not match the lost value of her home services and production, particularly if young children are involved.

It is worth observing, as the divorce rate continued its rise in the late 1970s and 1980s, that unemployment, especially male unemployment, also increased. In his economic analyses of marriage and divorce, Gary Becker and others[11] include unemployment as an important factor in divorce. Divorce and unemployment rose in tandem from the late 1970s to the 1990s, with some stability in both rates occurring together in the late 1990s (**Insert Figures 2 and 3**).

Reported research in Britain by the Institute for Social and Economic Research at Essex University,[12] involving 5,500 households and interviews with more than 10,000 people, indicates a connection between unemployment and failure to marry. It was found that cohabiting relationships where the man did not have a job were less likely to convert to marriage and more likely to dissolve.

In calculating the costs of divorce for a woman, particularly if she is likely to have one or more children in residence,[13] the extent of welfare support she can expect is an important consideration. The relative generosity of current welfare benefits for such women, compared to the situation a generation ago, would undoubtedly be a positive factor influencing a woman towards divorce in an unsatisfactory, low-income marriage, other things being equal.

Developments over the last 40 years support Becker's hypothesis that the rate of divorce will be higher when the expected advantages and opportunities of the post-divorce state exceed the value of remaining married.[14] It is clear that many more men and women today, compared to 40 years ago, can contemplate divorce with greater confidence that the benefits might outweigh the losses—subject to the material and emotional costs of the divorce.

The upshot is that the expectations of men and women today about marriage are different to those of 40 years ago. Men are less likely to find a wife content simply to manage home and children. Wives expect more help from their husbands, who are now under greater pressure to change their roles from simply cash-provider and companion to more active domestic helper and child carer. The evidence, however, shows only slight changes in this direction.[15] Resistance by men to relieving the double burden on women is likely to be a cause of marital tension, and, reprehensible or not, is indirect evidence of the value many men place upon marital division of labour and domestic specialisation by women.

For men, as for women, unilateral no-fault divorce without questions being asked or penalties imposed has made ending a marriage easier and cheaper, but at the cost of making marriage itself a much more uncertain enterprise. The social legitimation of cohabitation without marriage has abetted delayed marriage and the abandonment of marriage, while allowing sexual fulfilment. The Child Support Scheme has regularised male support for children after partners separate. However, where former male partners are unemployed, or succeed in deliberately evading their responsibilities, relief for child support is available through Federal government allowances.

An accumulation of trends and statistics tells a disturbing story. The rate of marriage is falling[16] while the rate of cohabitation is rising (**Insert Figure 4**). Age at marriage for both men and women has risen substantially. In 1970, the median age at marriage was 23 for men and 21 for women; in 2001 it was 31 for men and 29 for women,[17] which is a reversion to marital ages in the early twentieth century (**Insert, Figure 5**). The divorce rate is the highest it has ever been. The proportion of adult men and women who will never marry is climbing. The Australian Bureau of Statistics estimates, on the basis of present trends, that 29% of men and 23% of women will never marry—increases of about 35% and 65%, respectively, in the space of just 12 years.[18] The halving of the birth rate in 40 years indicates that adults are losing interest in having children.

Yet, in the face of all this, most men and women will eventually marry, commonly after a period of cohabitation. It seems that the marriage ceremony and promises, or what remains of them, still carry considerable moral and emotional weight despite a high degree of legal and institutional hollowness that leads to the dissolution of one in three of those marriages.

The great majority of late adolescent boys and girls express the hope that they will get married and have two or more children,[19] but if present trends continue these hopes will not be realised when they have to make decisions in the face of the realities they will later confront. Public policy and the present state of family law are helping to shape those realities. Matrimony and matrimonial law in this generation are not supporting the aspirations of young adults and this is one reason why they are delaying and rejecting marriage to an unprecedented degree.

Cohabitation or Marriage?

Forty years ago, marriage for the overwhelming majority of men and women preceded living together and having children. That pattern has changed profoundly as cohabitation before marriage has become a normalised, majority practice and as a rising percentage of children are born to unmarried couples who remain unmarried, or born to women who mother without partners.

Under the Australian Constitution, Section 51 gives the Commonwealth Parliament power to legislate, *inter alia*, in matters of marriage and divorce, parental rights, and the guardianship of infants. Until 1959, the Commonwealth had not exercised all of these powers and matrimonial legislation rested with the states. There was a transfer of powers from the states (with the exception of Western Australia) from 1959 which completed the Commonwealth's jurisdiction in relation to both nuptial and ex-nuptial children. However, all the states have retained powers over property and maintenance issues for unmarried couples in de facto or cohabiting relationships.[20] Some state laws governing cohabiting couples (including, in some cases, same sex couples) are becoming similar to those of marriage, especially in matters of property division and sometimes partner maintenance. At the same time, marriage with no-fault divorce has come to mimic the easy dispensability of cohabitation. The situation at the moment is that 'neither the Commonwealth nor the states have exclusive legislative competence in the area of family law. This has meant that a complex and fragmented system for determining family law issues has developed and has been exacerbated by attempts to interpret constitutional powers in various ways'.[21]

This 'fragmented system' does have potential for incoherence in family policy. At the present time, 72% of couples cohabit before marriage—up from 31% in 1981.[22] The proportion of children under 15 within cohabiting relationships now constitutes 11% of all children under 15.[23] Bettina Arndt, quoting research by the Australian Institute of Family Studies, points out that parents of children in de facto relationships are usually from low socio-economic backgrounds and more poorly educated than married couples with children. All children have a crucial stake in the stability and character of their parents' relationship. Insofar as marriage, or its absence, affects that relationship for better or worse there is potential to affect children for better or worse.

The trend towards convergence of cohabitation and marriage is not confined to Australia. In the United States it has received impetus from the American Law Institute, a body composed of judges, lawyers, and legal academics. In its recent publication, *Principles of the Law of Family Dissolution*, the Institute recommends that family law and the courts 'treat the break-up of live-in partners much as they would that of a married couple, including where appropriate, the division of property and the payment of alimony'. In the words of one of the authors: 'If it looks like a marriage, it should be treated like one'.[24]

Interestingly, the Australian Bureau of Statistics subscribes to the coalescence of married and unmarried couple families by not making that distinction in its routine, readily available statistical publications dealing with families. It simply speaks of 'couple families' without indicating proportions of married and unmarried couples. For example, in its *Australian Social Trends* 2002, under the heading 'Living Arrangements', it tells us the percentage of de facto couple families out of all families (1% in 1971 and 12% in 2001)[25] and the percentages of 'couple families' with children of various ages. But it does not tell us what percentage of children are living with married parents compared to the percentage of children living with unmarried (de facto or cohabiting) parents. 'Couple families' is the prevailing blanket category for most of its frequently consulted publications. Since a large body of research has identified systematic variations in the life chances of children of unmarried couples compared to children of married couples, with fortune favouring children of married couples,[26] readily available statistical information on family trends in this respect is relevant for an informed public and for public policy considerations. This information is in fact held by the Australian Bureau of Statistics, but is not readily accessible except to specialists and those persistent enough to pursue it. As noted above, 11% of children under 15 are living with unmarried couples. Also, 19.6% of children under 15 are living with a lone mother or a lone father.[27] In other words, nearly one out of three children under 15 (30.6%) now live in families where the parent or parents are unmarried.

As with Australia, the trend in most other developed countries is towards a greater percentage of children being born to unmarried couples (**Insert Figure 6**) . This rise in non-marital child-bearing by cohabiting couples has important implications for adults and children. For adults, such relationships are more unstable than marriages[28] and, for children, less conducive than marriage to their well-being and subsequent life chances, mostly because of this greater parenting instability.[29]

Why Marry?

Marriage may be better for children, but more adults are avoiding or delaying it. Given that marriages are breaking down much more frequently than in the past, it is not surprising that adults might be asking themselves whether they should get married at all.

Love, sexual attraction, and companionship can bring individual men and women together and keep them together. The attraction and the bond can be more efficiently consummated by setting up house together. This is convenient and reduces the 'transaction costs' of separation by distance in pursuing a liaison. It also brings other instrumental benefits—sharing the rent, one refrigerator instead of two, one television set, some division of labour in maintaining the house and sharing the costs of doing so, uninterrupted companionship and mutual affection, and so on. Can marriage offer any additional inducements? Clearly, there must be some perceived differences and expectation of benefits, given that most men and women will eventually marry.

Economists have stressed the importance of 'comparative advantage' and extended and sustained division of labour in the attractions of an enduring male-female partnership.[30] The comparative advantage of women over men in giving birth and nurturing children is the most obvious. The comparative advantage of men, on average, in earning income is still important, especially if the woman's capacity to earn income is hampered by children. So, if a couple want children, some division of labour is virtually inevitable for shorter or longer periods, depending upon the wealth, preferences, and human capital of the partners. Specialisation by the man in income-earning and specialisation by the woman in child-rearing and domestic maintenance is still the default mode for the majority of couples with pre-school children - though modified much more, nowadays, by the frequency of part-time work by the mother, fewer children, and more pressure upon men (to little effect) to help with housework and child care. A body of evidence shows that spousal specialisation has an economic payoff not only in terms of domestic production by women but also in enhanced earnings by men. Married men earn more than unmarried men, other things being equal, for two main reasons. First, because women's domestic specialisation releases men to concentrate their time and energies on work productivity and career advancement; and second, because the responsibilities of marriage, a dependent wife, and perhaps dependent children as well, deliver a stimulus for harder work and earning more family income. Another possibility, but not so well supported, is that marriage selects men with better career prospects.[31]

The instrumental efficiencies of marriage make it a utilitarian partnership in an enterprise yielding benefits for both parties. A cohabiting relationship with children permits exactly the same kinds of comparative advantage and division of labour, and hence maximisation of welfare, that marriage permits. A degree of specialisation by the partners, whether married or unmarried, enables both to maximise the satisfaction of their preferences and hence their welfare. Why, then, choose marriage instead of cohabitation?

A proposal of marriage is a gift. It is a declaration and offering of love and still seen as a promise to commit oneself to a lifetime of mutual support and cooperation. It is an unconditional gift that honours and esteems its object, as does acceptance of the proposal. It is the all-embracing character of marriage and the promise of long-term commitment that distinguishes it from cohabitation. It carries no time limit except death.

Frequently in practice (if not legally, because Australia has a 'separate property' regime), marriage merges the property of both spouses. Traditionally, and in practice for most, marriage carries freedom-limiting obligations of each to the other and the exchange of services. It conveys those assurances of support 'in sickness and in health' which constitute much of what marriage has always meant. Of course, none of this finds formal expression in the Family Law Act 1975 which is concerned not with exhortations but with the dissolution of marriage and its consequences. The scope of marriage and its duties is better intimated, but still not fully

captured, in the vagueness and generality of the marriage vows and the 'loving', 'honouring' and 'cherishing' sentiments they express.[32] Such attitudes are essential supports of marriage in full. They have their genesis not in the law but in tradition and a tacit ethos that fashions conduct with an authority, range, and subtlety beyond what can be said in legal terms or legally enforced. Yet without them, the modest ambitions of the law would themselves be unanchored.

The wish of the partners to have children, or to legitimise children already conceived, is an important motive for marriage. So marriage, for most, carries the promise of children, the satisfaction of the desire for a stable, cooperative union, and the prospect of sharing long-term pleasures and responsibilities. The promise of firmness and committed reciprocity in marriage is the basis upon which a variety of investments by both parties may be more confidently made, and to the fruits of which the couple may jointly look forward.

In contrast to that vision of marriage, implicit in cohabitation, no matter how deep the affection between the partners, is a (usually unspoken) reservation – the choice of opting out when it suits without any ties or obligations except questions of ownership of property and its division, on separation. For most, cohabitation is a 'thinner', more conditional, and less reliable relationship than marriage, with less expectation of permanence and interdependence. Thinner because it does not encourage the investments that depend upon the predictability and the presumption of permanence that still, for most, are expectations associated with marriage; and usually less reliable because it is predicated as much on convenience as on devotion. The promise in cohabitation is not 'I will', but 'I might'.

In a climate of routine acceptance of cohabiting relationships, setting up house together is the most natural thing in the world for most young couples. Once formed, the relationship drifts along ambiguously in the lengthening shadow of a marriage that might never come. Twenty-five years ago, two out of three cohabiting couples were married within five years. Today, about 40% are married within five years, 40% have broken up, and the remainder are still living together. Most younger men and women wait until they are married before they have children.[33]

The drift and uncertainty of cohabitation compared to marriage is probably an important reason for reluctance to have children within the relationship and hence its lower fertility rate. By extension, this becomes a factor in the falling fertility of married couples. With 72% of married couples cohabiting for some years beforehand, and with a proportion of these cohabiting with more than one partner, it is not surprising that *average* age at marriage is increasing to the late 20s and that more women are delaying having children. Delayed age at marriage brings more and more women to the point where their biological capacity to have children is decreasing. From the early 30s on, the likelihood of conception significantly diminishes for most women. And, for both men and women approaching 40 after years of 'freedom', the prospect of children begins to appear formidably burdensome and disruptive of a settled way of life.

Natasha Cica, writing about unfaithful husbands who seek out single women in their 30s, opens her discussion as follows:

Tune into talkback radio, or open any lifestyle magazine or newspaper opinion page, and you'll hit a throbbing vein of anxiety about the state of straight, single, childless 30-something career women in Australia. Without men and babies of their own, they are now a big 'problem'—and talked about in a way that used to be reserved for communists and witches.[34]

In an article entitled 'The unbearable lightness of modern coupling', Virginia Haussegger writes:

The mating rules have collapsed. And we, women and men, have allowed it to happen. Those unwritten rules that drive to romance, courting, love and an oath to commitment have disintegrated. And we've largely given up on the structures that once supported these rituals, such as engagements, marriages, vows 'for better or worse, till death do us part', and so on . . . Living with a lover is as simple as shifting a bit of furniture. Leaving can be just a matter of handing your keys back. [35]

So, cohabitation for most, especially the young, tends towards caution and holding back. It is less committed; implying less confidence and less willingness to invest in work, mutual support, and personal sacrifice to enlarge the human capital of one's partner, and less selfless sharing in a joint enterprise with a long-term future that might include children. Marriage, on the other hand, is, or used to be, the institution that secured men and women who wanted to live that way. But marriage underwrites insurance for such investments only when its special status is explicitly

expressed and supported by legally enforceable duties. We have steadily surrendered the conviction that marriage entails a range of duties to fulfil the promise of acceptable marital and parental conduct, and that failures of performance deserve the notice of the law. This has been of crucial importance in diminishing marriage and reducing its status to one almost equivalent to cohabitation—to just another 'relationship', or, as Maggie Gallagher puts it,[36] 'merely a private exchange of sentimental wishes'. In effect, it has become impossible for those who want a marriage of mutual dedication to commitment and permanency, to have such a marriage supported by family law as it now stands. And, ironically enough, it is increasingly difficult under state laws, for couples who simply want to live together in an unmarried non-permanent, unregulated arrangement to have the law recognise it as such.

From an instrumental perspective, it is the promise of reliability and durability of marriage that distinguishes it from the more uncertain state of cohabitation. That both reliability and durability have become more illusory as divorce and separation rates have risen, seems not wholly to have extinguished the idea of marriage as a declaration and symbol of commitment and love in which one may still place a degree of confidence. The idea of marriage as a pledge lingers on, even though it is a pledge that may be broken without penalty. The implicit 'contract' inherent in marriage no longer has legal standing, and marriage therefore has less meaning.

Chapter 2

No-fault Divorce

Prior to the change to no-fault divorce in 1975, the availability of divorce in Australia, as in other English-speaking countries, depended upon a spouse being able to claim and establish 'fault' by the other spouse. 'Fault' consisted in committing one of a number of matrimonial offences, such as adultery, desertion, habitual intoxication, cruelty, et cetera. The victim of fault – the innocent party – could pursue divorce proceedings in court in adversarial fashion if the claim of fault was contested. Fault could be established either by an adversarial contest before the court to prove guilt, or by an admission of guilt (substantiated before the court) by the offending spouse.

When the Commonwealth acquired power to legislate divorce law for the states the first significant expression of this power (post-dating minor 1945 legislation relating to war brides) was the *Matrimonial Causes Act* 1959, which came into force in February, 1961. Under this Act a divorce could be granted on one or more of 14 grounds, which included adultery, desertion, separation for five years in certain circumstances, cruelty, drunkenness, and failure to comply with a restitution of conjugal rights decree. In the period following this Act, until the passing of the no-fault Family Law Act of 1975, the relative frequency of the more important forms of marital misconduct leading to divorce is given in **Table 3**. This Table shows that desertion, adultery, separation, and cruelty were the most frequent causes of action.

It is also worth noting that in 1972 women were the applicants for divorce in around 60 percent of cases. (I**nsert Table 4**)

In many cases prior to 1975, a spouse wishing to divorce a spouse who wanted the marriage to continue, might persuade the unwilling spouse to collaborate in faking evidence of fault in order that the court, on the basis of an application filed by the unwilling spouse, would permit the divorce. Persuasion might consist in 'buying' the agreement of the unwilling spouse by offering a favourable, privately agreed divorce settlement. An implication of this is that the spouse who wanted the marriage to continue possessed a 'property right' over the marriage that the spouse who wanted the divorce had to 'purchase'.[37] Where this happened, faked evidence of fault would be presented to the court, guilt would be admitted, and the court would grant the divorce under the privately agreed settlement terms without an adversarial contest being necessary. Contesting a divorce was expensive and traumatic and the outcome, for both parties, uncertain. In effect, the fault system allowed the hypocrisy of faked fault to achieve divorce by mutual consent. British figures show that only a small fraction of divorces (5%) were contested under fault rules.[38] In an article discussing proposed amendments to family law, Professor Sackville,[39] Professor of Law at the University of New South Wales, estimated that in the early 1970s, prior to 1975, undefended cases constituted 'about 90% of divorce applications in Australia'.

Although there were significant changes to Australian family law in 1959 and 1961, the most radical was effected by the Family Law Act 1975 when 'no-fault' divorce on the basis of 'irretrievable breakdown' of a marriage on the evidence of separation for one year was made available. This followed the introduction of no-fault divorce in California in 1969. As from 1976 in Australia, a no-fault divorce could be given on the application of either spouse, or both together, who could demonstrate that the parties had been separated for one year. No-fault divorce allows either spouse, or both, to apply for a divorce; fault divorce allowed only the 'innocent' party to apply. It could be inferred that where both spouses apply for a divorce under no-fault rules, the decision to separate is consensual, with both agreed that their marriage is over and that it is better to end it. Be that as it may, almost four out of five divorce applications (77%) are made by one spouse only (47% by wives, 30% by husbands, and 23% jointly).[40]

The change to no-fault divorce virtually inverted the former juxtaposition of the spouses and their relative powers. Either spouse could now end the marriage unilaterally without any issue of fault or proof of misconduct, and without needing the consent of the other spouse. Indeed, the spouse who wanted to leave now held the 'property' rights in the marriage and the other spouse had no legal leverage for bargaining over the terms of the divorce settlement. As Allen Parkman observes: 'No fault divorce reduced the bargaining power of spouses who did not want to divorce,

with the potential of shifting some costs of divorce from the divorcing spouses to the divorced spouses'.[41]

In theory, a spouse unwilling to divorce could, however, offer inducements (financial, for example) to the spouse intending to apply for divorce in order to persuade him or her to refrain from doing so, if in possession of such inducements.[42] However, for most women, and low-earning men, the scope for financial or property inducement was small.

The divorce rate was rising slowly before the advent of no-fault divorce in 1975. Because the change in the law in that year allowed speedy dissolution of marriages which, though legally still intact had in fact already failed, there was a large and immediate rise in the divorce rate post-1975. After these 'waiting' divorces had been cleared, the rush abated, but thereafter the rate settled at a significantly higher level than the pre-1975 rate (**see Figure 2, p.???**).

We cannot assume that the change in the law alone prompted the continued higher rate of divorce. It is more likely that it constituted one of the two major lines of development which were reinforcing each other in the process of undermining the stability of marriage. The other was the complex of social, economic and cultural trends referred to earlier. The change in family law allowed those other trends (of which *pressure* for legal change was a part) to express themselves in divorces made easier by the absence of the former legal restraints.

Some Consequences and Implications of the Change to No-fault Divorce

The move from fault-based to no-fault divorce had three consequences. It no longer gave public or legal recognition to the reality of serious misconduct in a marriage and the injury or distress that it may cause to spouse and children, thus tending to diminish marriage as a kind of contractual bond with obligations both to spouse and children. It abolished the possibility of compensating a victim of a destroyed marriage and its expectations with a favourable property settlement and/or maintenance/alimony provisions arrived at by private bargaining or a court order. It diminished the notion of marriage as a serious and permanent bond, thus foreboding its easy and more frequent dissolution. As Parkman remarks:[43]

No fault divorce changed the assumptions that people make before marriage. Knowing that it is easier to dissolve a marriage may lead people to enter marriages that they would not have considered when dissolution was more difficult, resulting in an additional number of fragile marriages and eventually an increase in the divorce rate.

This sounds plausible if marriage were to be the generally accepted mode (both legally and in terms of social convention) of male-female couple-formation. In present Australian circumstances it is less plausible given the falling marriage rate and the acceptability of unmarried cohabitation.

Settlement Bargains Under Fault Divorce

A key point is that fault divorce encouraged bargaining and agreement about the post-divorce settlement. Since divorce was impossible unless a spouse was guilty of fault—defined as a form of marital misconduct—there were several possibilities. A spouse wanting to divorce because his or her partner had committed marital fault could apply to the court for dissolution on that ground and be obliged to prove his or her case before dissolution was allowed. If permitted, the court would determine the terms of the property and children's residence (if relevant) settlement. The settlement could include more favourable property and/or alimony arrangements for the victimised spouse. Alternatively, if one spouse wanted to leave the marriage and the other wanted the marriage to continue, the spouse wanting to leave could simply separate from the household and live elsewhere in a separated, but still married, state. If this suited the other spouse, such a situation might continue indefinitely. If it did not suit, the deserted spouse could apply to the court for 'restitution of conjugal rights'. If the application was allowed the separated spouse could return or, if unwilling to do so, face an application for divorce on the grounds of desertion, that is, marital fault. If one spouse wanted a divorce, and the other spouse was prepared to agree to divorce only if certain conditions were met, and if neither spouse was guilty of any form of marital misconduct constituting fault under the legislation, recourse could be had to faking fault so that a divorce would be allowed. Where both spouses simply wanted to divorce and no question of genuine misconduct as defined in the legislation was involved, they could only achieve divorce by faking fault evidence to be put before the court.

In situations where cooperation to achieve divorce through collusion in fraud was necessary, private bargaining about the terms of the post-divorce settlement would normally take place. Faking fault could be achieved by issuing an application for restitution of conjugal rights applying to a spouse who had left home, for example, when the last thing actually wanted by the applicant was a genuine restitution and resumption of the marriage. This required lying to the court. Another method might be to fake an adultery situation where one spouse would agree to be set up in a staged 'caught *in flagrante delicto*' situation so that 'fault' could be proved before the court. Since faking was, of course, illegal and frowned upon by the court (although recognised as a common problem), we have no reliable figures on its frequency. Under the headline, 'Judge's Warning on False Testimony', *The Sydney Morning Herald* newspaper, for November 15, 1973 (p.10), reports on a gaol sentence imposed by a judge on a private inquiry agent who, for a fee, faked an adultery set-up designed to influence the hearing of a property settlement action in divorce proceedings.

Commenting on the pre-1975 fault divorce situation in Australia and the public debate leading up to the passing of no-fault legislation, Ailsa Burns remarks:

Over the same period the media made frequent attacks on the existing law. The manifest absurdities involved in trying to attribute guilt and the embittering effects of enforced adversary litigation were often described. People who admitted to faking evidence, particularly adultery evidence, were interviewed sympathetically on television. By 1973 the activist Divorce Law Reform Association was marketing a 'Do-it-yourself Divorce Kit' for $50 and reported excellent sales.[44]

It is clear that the pre-1975 system allowed what amounted to divorce by mutual consent, albeit by hypocritical and fraudulent methods. Nevertheless, scope for bargaining worked towards balancing the interests and powers of both parties and reducing the possibilities for exploitation of a weaker or more vulnerable spouse unwilling to agree to divorce unless his or her interests were protected. This was likely to lead to fairer, optimising outcomes for both spouses and their children. An uncoerced settlement agreement is evidence that both parties have achieved the best available result under the circumstances of a failed marriage. The flaw, of course, was the subterfuge and collusion to fake fault. This was a matter that concerned the courts and public opinion and which, together with the distastefulness of court probing of family intimacies and evidence from 'bedroom raids' in the approximately 10 percent of contested divorces, gave fault divorce a bad name. In 1973, a Morgan Gallup Poll asked the following question: 'If both husband and wife tell the Court their marriage is hopelessly broken – do you think a divorce should be granted or not?' In all Australian states more than 75% were in favour.[45] There are two points to note here. First, this was a vote in favour of divorce, and was used to bolster the push for no-fault divorce; but it was not a declaration that genuine marital fault is irrelevant to the terms of a divorce settlement. It was not foreseen that the disappearance of fault as a legal issue, although a permanent marital reality, would have some unintended consequences. And, second, the survey question speaks of '*both* husband and wife' telling the Court their marriage is hopelessly broken. This is an important qualification. It presumes *consensus* about the desire for divorce. What was in fact delivered by the no-fault regime which followed was not consensual divorce but a mixture of consensual and non-consensual possibilities. It made *unilateral* divorce possible. This is an issue to be pursued in more detail in Chapter 5.

Pre-divorce Bargaining Before 1975

If we take marriage or traditional marriage as sharing many aspects of an ordinary contract, fault divorce, in making it possible for the partners to negotiate their post-divorce property and residence arrangements from positions of comparable power, mimics commercial contractual precedents and established practice whereby individuals with a legal grievance may avoid litigation by searching for a private settlement, with or without the help of non-court mediation. As with the dissolution of a routine contract between two parties, the party who wants to get out of the contract because it no longer suits has to induce the consent of the party who wants it to continue. In other words, a form of agreed compensation for the loss of the benefits legitimately expected from the contract was the fair and efficient outcome. From another perspective, when the parties to a contract are fully aware of the likely or certain outcome, under the law, if they go to litigation over the dissolution of a contract, they are more likely to avoid the trouble and

expense of litigation and seek privately agreed solutions. This is one of the boons of the rule of law, and certainty about its requirements. On the other hand, where there is uncertainty about what a court will decide - which usually means where judges have considerable discretion - private settlements are less likely and parties are more prepared to risk litigation and an outcome more favourable to their interests. This is a criticism which has been levelled at the Australian Family Court in matters of property settlements and residence of children.[46]

Divorces under no-fault rules entail property and child residence/contact contests in less than 10% of cases, and the great majority of spouses arrive at private agreements about the distribution of property and arrangements for children. However, because divorce may be unilaterally invoked, it offers little scope for bargaining. A spouse bent upon ending a marriage has no need to bargain because the divorce must be allowed irrespective of the wishes or unwillingness of the other spouse, who can raise no issues of fault or misconduct to affect the outcome and settlement, or use such things as bargaining levers. Questions of property settlements, maintenance and residence/contact lie with the rules and discretions of the Court, which must ignore issues of fault. A spouse who wants to divorce may be content to stay with the rules and guidelines of the Court in respect of property settlement and maintenance, confident that no 'penalty' in the form of property or maintenance/alimony compensation will be imposed. Also, in some cases privately agreed property settlements may have been influenced by the threat of a residence/contact battle over children. A spouse who has been seriously affected by such a threat, or by misconduct in a marriage, may therefore be dealt with unfairly by a court acting with perfect legality. Even in the absence of questions of misconduct, adherence to the property rules in a court settlement may unfairly disadvantage some spouses.

Burns makes the following points:

The [1975] Family Law Act changed the fundamental principles on which financial and residence/contact settlements were made, both in the divorce courts and the magistrates' courts. Under the old legislation a matrimonially 'innocent' wife was entitled to 'handsome maintenance' from her 'guilty' husband, even where she was well able to support herself; a 'guilty' wife, on the other hand, was not normally entitled to maintenance unless she was responsible for young children and unable to support herself. The Act reversed this policy and changed the emphasis to need rather than matrimonial conduct. The economically stronger spouse is now only obliged to support the other to the extent that he or *she* is reasonably able to do so, and only if the party claiming maintenance cannot support himself or herself adequately because of responsibility for minor children, age, or incapacity, or 'any other reason' (emphasis in the original).[47]

The Effects of No-fault Divorce Settlements for 'Traditional' Wives

An important effect of no-fault divorce was to disempower a victimised spouse, or a spouse unwilling to divorce, by depriving him or her of leverage to bargain over the terms of settlement of property and financial matters. It raised questions about the long-term consequences of this change in the 'fundamental principles' referred to by Burns. In particular, whether the Family Court would tend to make determinations of property settlements simply on the basis of financial contributions to the acquisition of property both before and during marriage; whether there would be systematic differences between husbands and wives; and whether 'traditional' domestic-specialisation wives would be specially disadvantaged.

In relation to such questions, Parkman comments upon some relevant American findings, following the introduction of no-fault divorce, by Lenore Weitzman in her 1985 book *The Divorce Revolution*:

She [Weitzman] notes that a third of divorced women reported that their husbands had threatened to ask for residence/contact as a ploy in negotiations to reduce the amount of child support. This situation further illustrates the change in position of spouses under no-fault divorce. Under fault divorce, the husband who wanted a divorce had to negotiate with the wife; under no fault the wife who wants the children has to negotiate with the husband.[48]

Australian experience is illuminated in data collected and analysed by the Australian Institute of Family Studies.[49] By and large, Grania Sheehan and Jody Hughes' work, in conjunction with previous work on this subject by the Institute of Family Studies, answer the questions raised above in the affirmative. They found, in their survey of 650 divorced Australians, that:

…the financial burden of divorce on women who have taken time out of paid work to have and to care for children is not always reflected in a distribution of property that is sufficiently in their favour'. And, further, that 'contributions to non-domestic assets, such as superannuation, investments and businesses, is to a large extent attributed to the partner who contributed financially to its acquisition. Thus non-financial contributions to those assets, particularly the domestic activities performed by the one spouse that frees the other spouse to work directly for financial rewards, are disregarded when property is divided [by private agreement or Court determination].[50]

In a preliminary discussion of policy changes subsequent to the earlier studies by the Institute of Family Studies, and prior to presenting their survey findings, Sheehan and Hughes point out that:

One of the core changes has been the introduction of the Child Support Scheme (collection in 1988 and assessment in 1989)—a major legislative reform that has arguably reduced the need for day-to-day support of children to be taken into account in property proceedings.[51]

The prime objective of the Sheehan and Hughes survey was to investigate the way property is divided on divorce. They found:

In essence, the Divorce Transitions data suggest that current practice in dividing property does not reflect the full ambit of the legislative provisions. Non-financial contributions to non-domestic assets were unlikely to be reflected in the share of property received. As regards future needs, the needs of dependent children appear to have been the most important consideration, and the financial needs of the former spouse may have been overlooked.

And later

…the wife's share of the assets is reduced where non-domestic assets, such as investments, businesses and superannuation, comprise a high proportion of the couple's wealth.[52]

Sheehan and Hughes conclude:

This finding suggests that direct financial contributions to non-domestic assets still have major impact on the way property is divided, with the husband receiving the majority of these assets. On the other hand, financial and non-financial contributions made to the acquisition and improvement of domestic assets (such as the home and furnishings) appear to have been considered equal by the parties, with the majority share of assets going to the resident parent—usually the wife—in recognition of her and the children's future financial needs. The proportion of domestic to non-domestic assets that make up the total asset pool is thus a key source of variation between property settlements. [53]

And:

Women who report having taken a traditional role in household management—that is, primary responsibility for the day-to-day care of children and cleaning, while the husband had primary responsibility for household maintenance and paying the bills—received a share of property well below the mean share for women overall.

The Sheehan and Hughes findings are consistent with American evidence, especially for longer-term marriages, which are more likely to approach the 'traditional' model of female specialisation in domestic and child-rearing work. In discussing the consequences of the introduction of no-fault divorce for property settlements in America, Parkman observes:

In practice, the average couple has few assets at divorce [similar to the situation in Australia]. This is not surprising because many divorces occur in the early years of marriage. The women who are most adversely affected by a reduction in negotiating power at divorce, however, are women who have been married for a long time. These women are more likely to be in marriages in which some property has accumulated, and no-fault divorce has a particularly adverse effect on them. Under fault the wife usually received most of the couple's property at divorce, but the percentage of cases in which the community property was divided equally rose dramatically after the introduction of no-fault divorce. Between 1968 and 1972, that percentage rose in San Francisco from 12 percent to 59 percent and from 26 percent to 64 percent in Los Angeles. Over the same period, the percent of women receiving most of the property fell in San Francisco from 86 percent to 34 percent and from 58 percent to 35 percent in Los Angeles. By 1977, equal division of property was typical.[54]

It should be noted that, as mentioned earlier, Australia has a separate property regime. Parkman is writing in an American context in which a community property regime operates. Equal division of property would be more likely after the advent of no-fault divorce where questions of compensation for fault, which in the past might have justified and entailed unequal division of property, no longer applied. Nevertheless, the salient point is the disadvantage to women in 'traditional' marriages that has followed the advent of no-fault divorce.

In Australia, family law now makes provision for superannuation entitlements to figure in property settlements upon which divorcing wives may have some claim.

Lenore Weitzman, in her 1985 book, *The Divorce Revolution*, reported a 73% decline in American women's standard of living after divorce and a 43% increase in men's standard of living after divorce. Richard Peterson[55] replicated Weitzman's study, re-analysed the data, and claims that Weitzman erred in overestimating the effects on living standards. Peterson concludes that the corrected figures should be a decline in women's standard of living after divorce of 27%, and an increase in men's standard of living of 10%. There are, of course, difficulties of measurement in establishing declining or increasing 'standard of living'. For instance, it is not clear whether, and if so how, Peterson calculated the loss of domestic and other services provided by wives.

The whole issue of what constitutes 'property' in a marriage and the principles which should govern its distribution in a divorce settlement is a complex and vexed one. It has occupied the Court and legal and academic opinion for some time, and continues to do so. Australian law subscribes to a separate property regime. In relation to marriage and divorce, Tom Altobelli comments:

The distinction between community property and separate property is an important one to maintain. As a general proposition, in a community property regime, property brought into the marriage by one spouse (save for accretions in value during the marriage), and property acquired after separation (unless acquired using money accumulated during the marriage), is not property divisible in the property adjustment on separation. In a separate property regime, however, the time and manner in which property was accumulated is relevant only in so far as it is a contribution by one of the spouses. Thus, property brought into the marriage, and property accumulated after separation are not special categories of assets which are somehow excluded from the claims of the non-owning spouse. Even though Australian family law is technically a separate property regime, the focus is on contribution in the broadest sense, and on the future needs of one or both spouses.

This is not the place to delve into a range of difficult technical issues but to draw attention to the last sentence in the above quotation and its relevance to the fair treatment of husbands and wives when it comes to the divorce settlement. It is also worth noting, in passing, that spouses may now form nuptial and pre-nuptial agreements about the disposal of property at divorce, and that provision is now made for superannuation entitlements to be the subject of claims by spouses who do not own them.

The conclusion to be drawn from the Australian and American evidence discussed above is that women in traditional marriages where spousal specialisation is more commonly the rule, may be exposed to disadvantageous property and financial settlements following the advent of no-fault divorce because the possibility of a more advantageous settlement in compensation for victimisation through serious marital misconduct no longer applies. Where the husband has contributed most to the acquisition of non-domestic assets and investments and retains the bulk of these assets, it is likely that a traditional wife will lose, upon dissolution, the future lifestyle *expectations* she would legitimately have had if the marriage had continued—even though she may receive a distribution recognising her contribution to domestic assets plus a further amount to meet her (and perhaps her children's) future 'needs'. Such settlements, particularly for traditional marriages, and especially where children are involved, might systematically disadvantage housewives with lesser capacity and opportunity for income in comparison with their husbands. Additionally, they could be facing the costs and responsibilities of child residence and lifestyle reductions insufficiently recognised under a 'needs' formula rather than an 'expectations' formula.

Traditional marriages are more likely to be marriages of above-average duration, but Catherine Hakim's evidence indicates that spousal specialisation of varying degrees characterises the great majority of marriages, especially if children are involved.[56] She concludes that a

significant proportion of marriages with children at the present time are still traditional marriages, with the wife either not in the workforce or working only part-time. Divorce under present rules tends systematically to disadvantage such wives *vis a vis* their husbands.

Additionally, the divorced wife who has specialised in domesticity during her marriage, and who has residence of dependent children, is particularly disadvantaged in finding a new partner. Research involving several thousand households and more than 10,000 people in Britain, carried out by Essex University's Institute for Social and Economic Research, showed that 70 percent of people in live-in relationships that broke down, met and moved in with a new partner within five years.[57] For married women, only 43 percent would meet and move in with someone within five years and those with children were less likely to get married. This probably reflects an age factor (plus the presence of children) disadvantaging older married women with children compared to cohabiting women without children, but the reality of disadvantage is there nonetheless.

To sum up, the realities that women confront today are that:

- divorce affects one in three marriages;
- wives who specialise in child-rearing and domestic production are more likely to be disadvantaged at divorce settlements;
- substantial specialisation is inevitable for most women when children are born;
- the more children a woman has, the more difficult and the more drawn out domestic specialisation becomes;
- mothers are much more likely than fathers to have residence of children after divorce, and more likely to have difficulties meeting the expenses and work demands of raising them;
- the longer the period of specialisation, the more vulnerable to disadvantageous property settlements and impoverishment at divorce she becomes and the less able she is to support herself either in the marketplace or by finding another partner;
- the real costs of raising children, and the opportunity costs of having to give up work, have greatly outpaced public support (through the tax and transfer system) for dependent children;
- for most women, divorce means a substantial decline in standard of living unless they are able to re-enter the workforce on favourable terms and avoid the costs of child-rearing.

A rational response by a young woman aware of these facts, including a woman initially preferring a 'traditional' marriage and children, would be to:

- cohabit and delay or avoid marriage;
- invest less in marriage (or cohabitation) and domestic specialisation;
- seek advanced education, prepare for a career, and maintain and improve her job skills;
- keep working if she gets married or cohabits;
- abandon the having of children or have fewer than she would have liked;
- protect her options for comfortable exit in the event of marital (or cohabitational) dissatisfaction, or an opportunity for a better partnership;
- be reluctant, if married, to act in support of advancing her husband's career (that is, as a marital investment) at the expense of her own improvement and her possible post-divorce or separation future.

Ironically, as women and men may be driven by marital uncertainties to invest less in their home, in domestic production, and in children, marriage comes to offer less meaning and satisfaction to both spouses, divorce becomes more likely, and marriage and birth rates fall. Indeed, the statistical connection between falling fertility rates and falling marriage rates between 1965 and 2001 is very close, with a correlation coefficient of .95 (**Figure** 7).

Parkman[58] quotes a study by Elizabeth Landes in the United States which found that in American states that prohibited alimony there is a lower rate of marriage and a reduced fertility rate compared to states that do not restrict alimony awards. The suggestion is that when the law changes, women thinking about marriage and children take the effects of those changes into account, reducing their willingness to marry, to specialise in home production, and to have

children. This sounds plausible, but it could well be the case, in the study quoted, that uncontrolled intervening variables are relevant. For instance, that more rural or ethnically diverse, high-fertility states tend to retain alimony.

Parkman later remarks:

The empirical results from my [American] study suggest that married women are sensitive to the effect of no-fault divorce on their human capital and the married women who are most adversely affected by no-fault divorce have reacted by increasing their labour force attachment.[59]

On the question of having children, it also seems that what young women want at age 18 changes radically with maturity and an awareness of the legal, social, and economic realities they confront in their 20s and 30s. Surveys in Australia show[60] that when asked how many children they would like to have, over 90 percent of 17-18 year old girls opt for two or more children; with about one-third of them wanting at least three or more (**Figure 8**). If these preferences were to be realised, the Australian birth rate would well exceed the 2.1 children per woman needed simply to maintain the present population. This contrasts sharply with an actual Australian birth rate of 1.73 children per woman.[61]

Men, Women, and Opportunistic Divorce

In the preceding discussion, the focus was on some of the particular disadvantages faced at divorce by women in a 'traditional' marriage entailing female domestic specialisation and children, and the seemingly systematic bias of the courts (and custom) when it comes to dealing with property settlements. Part of the problem was due to the reduction of the scope for bargaining over the settlement terms with the coming of no-fault divorce. But this may cut both ways; men, as well as women, may be vulnerable to exploitation by their partners.

For both men and women, no-fault divorce offers scope for opportunistic behaviour without penalty, where opportunism is defined as self-serving (and often deceitful) behaviour which reaps a benefit at the expense of a spouse. For example, achieving a unilateral divorce that suits one's own purposes whilst disadvantaging one's spouse; or behaving badly towards one's spouse within a marriage, confident that that behaviour cannot be brought to book by compensation at settlement, if divorce is forced upon the offended party.

If women and men are asked about the causes of their divorce, consistently cited problems include 'poor communication, basic unhappiness, loss of love, and incompatibility, infidelity, mental illness or emotional problems, conflict over men's and women's roles, and spouses' mental traits'.[62]

Such statements point to real and perennial problems that have precipitated divorce at all times. But, many of these words suggest symptoms rather than causes and Irene Wolcott and Jody Hughes recognise as much when they go on to speak of the way in which such symptoms or factors are contextualised by the 'social institutions that structure individual experience'. The suggestion is that what is expressed at the micro level is conditioned by the broad pattern of institutional incentives and disincentives (such as family law) which individuals confront within the marriage relationship. So, in giving reasons for divorce, a description of precipitating behaviour by some respondents may omit some underlying, self-interested motives that they would prefer not to admit or discuss.

It would not be unknown, for example, for individuals to be attracted by the prospect of a new partner, or an extra-marital fling, or escape from poverty, or the prospect of getting more out of the divorce settlement than the marriage, or securing a financial or residence/contact advantage, and so on. Under no-fault divorce rules, where no questions may be asked about the reasons for seeking the divorce and the legitimacy of those reasons, such motives are unconstrained. In discussing the way in which no-fault matrimonial law may open up such possibilities, Anthony Dnes comments:[63]

Two adverse incentives are of particular interest. Financial obligations may create incentives for a high-earning partner to divorce a low-earning, or possibly simply ageing spouse if the law does not require full compensation of lost benefits. Elsewhere, I have called this the '*greener grass*' effect. (Or, as others have put it, the 'trophy wife'—or husband—incentive.)

Dnes continues:

There could be an incentive for a dependent spouse to divorce if payments based on dependency allow the serial collection of marital benefits without regard to the costs imposed on the other party. I call the second adverse incentive the 'Black Widow' effect.

Margaret Brinig and Steven Crafton also observe that because there are no real damages granted for reprehensible marital behaviour under what they call the 'illusory marriage contract' of no-fault law, incentives are created for opportunistic behaviour:

The types of resulting opportunistic behaviour that could be predicted in such an illusory marriage contract involve situations where one spouse leaves shortly after the other has worked to allow his or her graduate education, where one spouse has swindled the other systematically of assets for a separately held business enterprise, where there is adultery, or where there is spousal or child abuse.[64]

In Australia, as in America and Britain under no-fault legislation, it is impossible to know to what extent opportunistic or reprehensible behaviour lies behind applications for divorce. Such issues are not permitted to be raised in court. One might reasonably suppose that many marriages continue to fail for the same reasons reported before 1975, namely, desertion, adultery, cruelty and habitual intoxication, but, given the higher rates of divorce, presumably now on a larger scale, and with the possibility that abuse and violence might be more common. I am not aware of any Australian statistics that would allow us to compare the pre- and post-1975 rates of marital violence and abuse in failed marriages. Brinig and Crafton point out that, similarly in America, no federal or state authority collects data on spousal abuse within failed marriages.[65] However, Brinig and Crafton have collected information on spouse abuse held by crisis and shelter care authorities on a state basis. They ranked American states by the number of crisis calls per thousand of the population and compared the figures in relation to the various states' dates of enactment of no-fault divorce in order to see whether the rate of crisis calls went up after the enactment. They concluded: 'Abuse indeed seems to be related to the absence of penalties embodied in the divorce statutes'.[66]

Where marital law is indifferent to the reasons and motives behind an application for divorce and a divorce is granted against the wishes of the other party, there is no opportunity for that party to negotiate a satisfactory settlement. The ending of the marriage may represent a substantial and 'undeserved' loss or hardship for that party, frustration of legitimate expectations, or an escape from abuse, for which no claim for compensation or redress can be entertained by the Court.

Australian family law presently provides incentives and opportunities for divorce, and opportunistic exploitation of divorce, that were not previously available. The scope for pre-divorce negotiation under fault rules and hence consensual settlement agreements, or Court-determined compensation for aggrieved spouses, provided opportunities for more 'efficient' divorces and significant deterrents both to opportunistic exploitation and precipitate divorces. Reconciliation, stepping back from the brink, would have had its attractions. That being so, it is possible that divorces are now occurring that would not have occurred under the earlier, different legal regime; a possibility perhaps reflected in today's much higher divorce rates. There is no way of establishing the facts, but it is surely the case that many unilateral divorces today must entail unjust or 'inefficient' outcomes, where 'inefficiency' means that a divorce does not suit both spouses and one of them suffers 'unfair' disadvantage or hardship. Anecdotally, judging by occasional conversations and letters addressed to this writer, this certainly occurs—as one might expect. To the extent that might be occurring, it indicts marital law as a factor in high divorce rates and the retreat from marriage. This has ramifications not only for adults and for children and their rearing, but perhaps also for the reluctance to have children in the first place.

Chapter 3

Women's Choices and Gender Equality

In addition to the different roles that men and women tend to assume, there are different kinds of risk that they confront in marriage, and hence different forms of exploitation to which they might be exposed. In what follows, the position of women will be explored first, with particular attention to the notions of 'equality' and 'equal treatment' in marriage.

In the absence of paid help, for most women the fundamental choices in marriage are domesticity and the care of children, or commitment to work and a career, or some combination of both, with oscillation towards and away from these choices over a woman's life-cycle. For the overwhelming majority of their husbands, on the other hand, the decision is plain - it is the primacy of work and career with variable degrees of commitment to family responsibilities,[67] on the presumption that their wives will assume the major responsibility for home care and child rearing. Give or take some variations on these themes at the margin, crucial decisions for women revolve around the conflicting pulls of employment and career, and the demands of children and domesticity. For men, a crucial issue is the risk of separation from their children and loss of regular contact after divorce if residence and primary care rests with the mother.

Whether or not to have children within a married or de facto relationship, and what to do if one does have them, are key dilemmas. The presence or absence of children largely determines the work and career paths that women may follow, and hence their financial independence or otherwise in a marriage. For public policy, the dilemma is how, against this background, to fashion a matrimonial legal regime that is fair to both men and women, especially women who choose to specialise in domesticity and children.

From the perspective of some feminists, it is claimed that women will forever be disadvantaged in marriage, compared to men, while they place themselves at an economic disadvantage by neglecting to invest in a career to the same extent as men. Gender specialisation within marriage, which many have seen as fundamental to the investments that sustain a marriage, will, in this feminist view, forever keep women in dependence upon men and therefore relatively disempowered and disadvantaged in both marriage and divorce. For feminists of this disposition, provided property is equally distributed upon divorce and provided divorce rules remain gender neutral in other respects, no-fault divorce is compatible with gender equality and the emancipation of married women.

It follows from this view that if, upon divorce, family law were to specially compensate innocent women who have specialised in home and children to a greater or lesser extent, this would protect and perpetuate female dependency. On the other hand, failure to protect and compensate will tend to drive women to seek economic security through participation in work and careers, and that this will be in the best long-term interests of women. June Carbone and Margaret Brinig,[68] summarising observations by feminist Herma Hill Kay,[69] point out that if fault-based divorce were to be reintroduced, and produced higher settlements for women on the basis of compensation for lost career opportunities, this would encourage women to make 'economically disabling' choices—by rejecting careers—in the future. So, the feminist problem is to engineer the circumstances of marriage and divorce to ensure that women will not be so foolish as to make 'economically disabling' choices. In other words, they should not commit to gender specialisation in marriage but maintain full-time workforce participation; and divorce law should not make special provision for women who choose otherwise. It should observe strict gender equality.

Central to 'traditional' marriage and female specialisation within marriage is a wife's major responsibility for having and caring for children. This is the key 'economically disabling' choice. Female emancipation in marriage therefore revolves mainly around this issue. The emancipated wife has to be willing to give up the care of her children to outsiders or to share the burden equally with her husband, who must agree to do so. Is emancipation on these terms, which allow no half-measures such as part-time work for the woman (or the man), feasible or likely? Would there always remain stubborn women who will not hand their children over to others, who will compromise housework and market work; and men who will not sacrifice full-time work for housework and child care, except in relatively marginal ways? In other words, is it realistic to

foresee the fulfilment of the more radical feminist dream of a coalescence of 'men's' work and 'women's' work into an ungendered lifestyle, characterised by strict 'equality' between men and women? Whilst a less-than-wholehearted movement in this direction is occurring amongst a tiny proportion of married couples with children,[70] a full-blown and near-universal conversion is unlikely. There is scant evidence that either men or women want to change to any marked degree, and the position of the great majority of women is unlikely to do so without massive injections of publicly-funded, virtually full-time, child care, a huge increase in nannies, or further decline in the birth rate. Yet, even if given the availability of full-time relief from care of pre-school children at minimal cost, the expressed preferences of women suggest that a majority of mothers will not willingly surrender the full-time care of babies and young children to strangers.[71]

The situation we face, in fact, is a mix of families with dependent children choosing different paths. A majority of mothers with pre-school children stay home full-time or work less than full-time, while a minority, with access to full-time voluntary or paid child care, work full-time. As their children go to school, a majority of mothers choose part-time work rather than full-time work, but increase their hours as their children grow older, while minorities choose to stay home full-time or work full-time.[72]

Catherine Hakim's detailed studies of the work-related, domestic, and child-bearing preferences of Western women in response to the equal-opportunity and contraceptive revolutions, reveal three main categories of choices or preferences by women. She calls them 'home-centred', 'adaptive', and 'work-centred'.[73] Although Mariah Evans does not use this terminology, her survey findings identify similar patterns in Australia.[74] The characteristics of these three groups, as summarised by Hakim, are set out in **Table 4**. She emphasises the overlaps that occur between these three groups, and changes over the life-cycle. Quoting research by others on the financial dependence of working wives aged 23, Hakim points out that:

On average, wives contributed 39% of family income when they worked full-time, 24% when they worked part-time, and were totally dependent when they were full-time home-makers. Across all couples, wives contributed an average of 21% of family income. Even in this group of very young couples, half of them childless, with almost half of the wives in full-time employment, four-fifths of family income was contributed by the male partner. The pattern of this younger generation was no different from the pattern in the adult population as a whole in 1991.[75]

She remarks that, after having a child, four out of five women choose to work only part-time or not at all, and concludes:

As a result, the great majority of wives (75% or more) are either totally dependent, or else secondary earners contributing a minor share of family income, even in this younger generation.[76]

Australian evidence on the division of labour within families with dependent children reveals the emergence, and persistence over recent decades, of what Robert Drago,[77] following Phyllis Moen, refers to as the 'neotraditional family'. Moen defines such a family as 'one where both heterosexual parents participate in the labour market and in household and child care tasks, but the division of labour is highly unequal, with the man performing a disproportionate amount of paid work and the woman undertaking most unpaid work for the family'. The 'neotraditional' is distinguished from the 'traditional' family by the movement of the wife from exclusive concern with domestic production and child care to substantial engagement with the paid workforce. In Australia, it has been argued 'that virtually all of women's increased labour force participation can be accounted for by the expansion of part-time jobs'.[78]

Data from the HILDA Survey[79] provides information on the distribution of hours of work by men and women in various family situations and age and educational groups. Drago[80] has analysed this data to reveal men's and women's employment patterns. As one would expect, women's workforce participation tends to increase as their children grow older and leave home. In this group average weekly hours of employment are 46.19 for men and 31.50 for women. For men and women about ten years younger (late 30s) in couple households with children, average weekly hours of employment are 47.56 for men and 27.85 for the 61% of women in this group who are in employment (compared to 89.95% of men in this group in employment).

In a group Drago[81] characterises as 'egalitarian' (comprising 1.37% of the total population) the men and women tend to be a little older, to have slightly fewer children, are far more likely to have English as a second language, and the women are around 7% more likely than the men to be professionals. The average working hours of the men and women in this group are almost

identical, at 42.55 hours per week and 42.16, respectively. With the exception of this group, the overall position for the remaining groups of men and women with children at home is a clear distinction between the employment patterns of men and women. Men, on average, worked around 24 hours more per week than the women, who were much more heavily engaged in domestic and child-caring work than the men, and 39% of women were not in the workforce at all and presumably full-time at home.

Commenting on the rarity of 'egalitarian' family work patterns in both Australia and the United States, Drago wryly observes:

It is conceivable that household tasks and child care require such extensive training that only one partner in any couple will rationally undertake the years of training required to achieve even a modicum of expertise in these areas, but this argument has never stopped individuals from parenting with virtually no experience at all.[82]

The conclusion we can draw from Evans' and Hakim's findings, and Drago's analyses, is that marriage or cohabitation with children, under modern conditions, drives couples towards a 'neotraditional' division of labour. This represents a compromise arising from a variable mixture of necessity for a second income, the intrinsic attractions of work and career, gender preference and choice, and the family benefits of specialisation. This division of labour, although diluted in comparison to the full 'traditional' model, remains extensive and stubborn. This is the abiding fact of modern family and economic life, and it is highly relevant for family law and public policy.

Dependency, Vulnerability, and Equal Treatment

The attitudes and incentives which drive these varying preferences may change in the future, but in the meantime they must be respected as reflecting what women and married couples want. It is the job of family law to fashion a regime that recognises their validity and the claims by the partners to just treatment in the event that a marriage breaks down. This is the problem to be solved; rather than the supposed 'dependency' of wives upon husbands, where this is necessarily, but invalidly, equated with powerlessness and subordination.

Some forms of dependency may represent demoralisation and a refusal to take responsibility for oneself when well able to do so. But there is nothing inherently wrong with dependency, per se. We are all, at various times, dependent upon others—children upon parents, parents upon children, wives upon husbands, husbands upon wives, employees upon employers and employers upon employees, and all of us sometimes upon the army, or the police, or doctors and nurses. Forms of dependency, inequality, and asymmetries of power and wealth are unavoidable categories of social life and personal relationships. They are frequently situations which we choose voluntarily, and only rarely do they represent absence of choice, repression or injustice.

Certainly, women are especially vulnerable and dependent upon others, particularly their husbands, when it comes to child bearing and rearing. So long as marriage and child-bearing remain voluntary decisions, putting oneself thereby in a position of dependence on a spouse is nobody's business but the person so choosing. It is *vulnerability, not dependency*, which raises problems. The ubiquity of the vulnerable dependency of mothers within marriage is especially important. It is this which makes a mockery of the feminist insistence upon strict equality between the sexes both in marriage and divorce where children are involved, because its attainment would work against, not for, the interests of the great majority of women living the lives they want to live and having the children they want to have. And it would work against the interests of children and, ultimately, most men as well.

In practice, then, the 'sameness of treatment' equality which some feminists advocate may lead to injustice if it undercuts legitimate and freely-chosen inequalities. The chosen lives of men and women in most marriages, particularly where they have children and where employment of mothers is involved, are not 'equal' and cannot be made so. From the perspective of family law, the major difference is the self-imposed and domestically specialised role of dependent wives and mothers from which husbands and children benefit. Of course, wives and children benefit also from the income-earning, career specialisation of men. But the point is that it is the relative and mostly unavoidable economic withdrawal of women with children, and the attendant long-term responsibilities of children that make women especially vulnerable to exploitation. In such

circumstances sameness of treatment on the presumption of 'equality' would aid and abet the exploitation of such women's vulnerability.

This is recognised by some of the more reflective and realistic feminists. For instance, Martha Fineman[83] criticises one version of feminism for an unintended outcome of its push to establish an 'equal partnership' view of marriage in order to raise the symbolic status of the wife in a marriage - an otherwise desirable result that they have, in fact, substantially achieved. But, says Fineman, this has led, in America (and to a considerable extent in Australia also), to a legal climate in family law which strives to treat wives and husbands equally when it comes to the dissolution of a marriage, and determination of property settlements and residence/contact. She claims, in effect, that mothers may have a special in-principle claim to privilege in matters of residence/contact and/or financial settlements. As we saw in the previous chapter, this used to be a central principle in pre-no-fault divorce law. Although that is no longer the case, in practice the Family Court awards child residence to mothers in 70% of cases where the question of custody comes before it. This has become a burning issue with many fathers who believe they have been unfairly treated in matters of custody. This is a subject discussed later (page refs??).

Fineman's general point is that absolutist equal treatment may sometimes be unfair treatment of women in marriage if it leads to overlooking certain justifiable, special claims. In Fineman's view, the concentration of certain feminists upon removing discrimination within institutions has led to an almost exclusive push for sameness-of-treatment-equality, which ignores real and inherent differences between men and women where children and gender specialisation are involved:

Contemporary analyses focus on existing institutional structures and their historical inadequacies in incorporating women, not on the different, and implicitly 'deficient' or 'vulnerable', characteristics of women as a group. Therefore, difference of treatment is desirable not because of women's inherently different internal qualities but because of the discriminatory qualities of the institutions with which they must deal.

Under this approach, the significant question of differences between men and women is externalized. Because such arguments identify the root problem as involving the failure of institutions and do not concede an unalterable biological or physiological basis for such treatment, it follows that disadvantages will disappear if the institutions can be changed. Thus the protection that women are perceived as needing lies in assuring them access to these structures and the opportunity to function within them without being disadvantaged by institutional inadequacies.[84]

Fineman is not, of course, objecting to the removal of institutional discrimination, but rather to the presumption that this constitutes the whole of equal treatment. What is also needed is recognition of, and remedy for, exploitation of the vulnerability inhering in certain situations (for example, child bearing and bearing and its consequences) because of the 'characteristics of women as a group', the species of dependency, that arise from these characteristics, and the inappropriate application to them of 'a pure rule-equality model within the family context'.[85]

Fineman is claiming privileges for women, more particularly mothers within marriage, on the basis of their biological characteristics and the biologically-influenced differences in behaviour between men and women in relation both to occupations and the nurture of children and interest in them. She does not herself pursue the basis of this argument in evolutionary theory or refer to the relevant biological, hormonal and behavioural evidence which has grown rapidly in recent years to support evolutionary accounts of male and female behavioural preferences. Excellent summaries of this evidence are to be found in the works of Steven Pinker and Kingsley Browne.[86] On average, this evidence shows, children are more important in the lives of women than in men's lives. Mothers are more ready to make sacrifices for children than men, and having children is a powerful preference in the lives of most women. Browne quotes psychologists Maccoby and Jacklin, who observe that:

Women throughout the world and throughout human history are perceived as the more nurturant sex, and are far more likely than men to perform tasks that involve intimate care-taking of the young, the sick, and the infirm.

Browne goes on to refer to studies which 'routinely show that women are more empathic than men, and their nurturing tendency is present from a very young age and increases at puberty'.[87]

Summing up the drift of recent evidence, Pinker says:

Mothers are more attached to their children, on average, than are fathers. That is true in societies all over the world and probably has been true of our lineage since the first mammals evolved some two hundred million years ago. As Susan Estrich puts it, 'Waiting for the connection between gender and parenting to be broken is waiting for Godot.' This does not mean that women in any society have ever been uninterested in work; among hunter gatherers, women do most of the gathering and some of the hunting, especially when it involves nets rather than rocks and spears. Nor does it mean that men in any society are indifferent to their children; male parental investment is a conspicuous and zoologically unusual feature of *Homo sapiens*. But it does mean that the biologically ubiquitous tradeoff between investing in a child and working to stay healthy (ultimately to beget or invest in other children) may be balanced at different points by males and females. Not only are women the sex who nurse, but women are more attentive to their babies' well-being and, in surveys, place a higher value on spending time with their children.[88]

Children are important to most women and women are more prepared than men to make sacrifices for their children. In short, having children is a powerful preference for the great majority of women. And if they do have them, on average, they are more committed than men to fulfilling their responsibilities to them. Women, on average, have a higher demand for children than men, invest more than men in responding to their children's needs, and spend more time with them.[89]

Recognising the differences between women and men, and comparing women and men in this way, does not diminish the reality of fathers' attachment to their children, their eagerness and competence to care for them, and the legitimate claims that fathers have to participate in the rearing of their children. At the present time we seem to be witnessing a greater awareness by men of their responsibilities towards their children and a greater willingness to be more active in helping to rear them. Nor can there be any doubt about children's love for their fathers, their deep need for their fathers, or doubt about the unique contribution that fathers can make to the full and benign development of boys and girls.[90] The fullness of parenting consists in what both conscientious mothers and fathers can give to their children and do for them. The breaking of the parental relationship is the source of much of the anguish, conflict, and poignancy of divorce when mothers or fathers are confronted with the possibility of less contact with their children; and when their children face the prospect of seeing less of one parent than the other. The loss to all may linger for years.

In arguing for the relevance of the differences between men and women and the implications of these differences for marriage and divorce, Fineman concludes that the outcome of (inappropriately) applying a rule equality model to men and women in marriage and divorce is that:

Commitment to the equality ideal, typified by the use of the partnership metaphor as the appropriate analytical construct to guide divorce policy, does not permit us to face the fact that women's and children's needs in this society have continued to be undervalued and ignored. The equality rhetoric now associated with the marriage relationship must be challenged as inappropriate for resolving the difficult questions in situations such as divorce, where men and women, husbands and wives, stand in culturally constructed and socially maintained positions of inequality.

An equality view of marriage denies the reality of many women who assume, during and after the marriage, more than a partner's share in the conduct and burdens associated with household and child care. Further, the partnership metaphor slips easily into equal sharing of property, children, debts, and so on at divorce.[91]

So, on this view, the conflict which arises for women is between their interest in children and their much greater interest nowadays in work and careers and, indeed, the need of their families for extra income from work. Compromising the two presents women with their key dilemma which is not resolved except at considerable economic and personal cost. It is the main source of their dependency upon men in marriage or in cohabitation and therefore of their vulnerability within marriage and especially at divorce. They need protection for their vulnerability, and this is an obligation that should be met by appropriate amendments to family law that avoid the pitfalls of working to a 'gender equality' model in divorce settlements affecting 'traditional' wives who

have taken responsibility for domestic services and the care of children. This does not mean overlooking the interests of husbands and fathers. Husbands may be exploited opportunistically by their wives, as we have already suggested, and an opportunity may arise in relation to custody of children.

Custody and The Vulnerability of Men

For men, a particular cause of dismay and anger at divorce may be the loss or partial loss of contact with children they have loved, protected, and helped raise.

Under present circumstances, a wife may leave a marriage for various reasons, stay away for a year, apply for a divorce, be awarded ownership of the family home and child support payments, and gain residence of the children with her. A conscientious husband and father, not guilty of misconduct, may find himself struggling to gain regular access to his children, to have them stay with him on occasions, and be constantly frustrated by an uncooperative ex-wife for self-serving reasons or for revenge. A similar situation might arise out of an acrimonious divorce with intense, antagonistic emotions on both sides, followed by a struggle over custody (i.e. residence and contact) where primary care of children is awarded to the ex-wife, with contact visits allowed to the ex-husband. However, the embittered mother may constantly put difficulties in the way of visits and overnight stays by the children, and the father accordingly loses regular contact with his children.

It is becoming increasingly recognised that conscientious fathers are much more important in the lives of their children than was previously thought. The evidence shows that effective fatherhood makes a highly significant contribution to children's development and both boys and girls who lose sustained contact with a father who is still alive miss him greatly and may be disadvantaged by his absence. [92]

This new recognition of the importance of the fathering role has happened at the same time that evidence has accumulated, as we saw above, of the biological underpinnings of maternal and nurturing predispositions in women. Such predispositions have always been taken for granted by folklore and tradition, and this has been reflected in family law in relation to custody – at least up until recently. At the beginning of the 20th century family law privileged mothers as care givers, especially of young children, and the judiciary regularly favoured mothers as custodians unless there was clear evidence of unfitness. However, the 'gender revolution' of the 1970s and 1980s attacked such sex-role stereotyping and promoted equal legal standing of the sexes in family law issues, including custody. The 'maternal preference' presumption gave way, in the law, to the concept of 'the best interests of the child'. However, discretionary judicial practice has continued to observe maternal preference in matters of contested custody. Where questions of custody and contact arrangements have been agreed between divorcing spouses and endorsed by the Court, the mother has had residence in around 80% of cases, the father in 13 to 18% of cases, and the balance split. Similar percentages have been recorded for the United States. In contested custody cases coming before the Australian Family Court in the early 1980s and 1990s, primary custody was given to the mother in 54 to 60% of cases and the father in 31%, with the balance mostly shared, or awarded to other persons in a very small percentage of cases.[93] Later figures for 2001 (**see below page ????**)show a small decrease in primary custody going to the father.

The issue of custody and substantial, regular father-child contact has been a running sore for many years, with constant agitation by fathers' groups for reform of a system which some fathers see as responsible for denying them, and their children, the contact and continuing intimacy that both once enjoyed. At the time of writing, the Federal government has announced an inquiry into the issue of possibly legislating to establish a presumption by the Family Court of 'rebuttable joint residence'. One of the arguments put forward for moving in this direction is the claim that, in those American states where joint residence is provided for, the divorce rate has fallen (Insert end note). If there is a direct connection between joint residence and lower divorce rates, this might indicate that wives who would readily divorce in the firm expectation that they would have primary custody of their children, are less prepared to do so in the absence of that assurance.

This is supported by the fact noted earlier that more women than men apply unilaterally for divorce and that mothers are awarded child residence in contested custody cases much more frequently than fathers. According to Murray Mottram, Court figures for 2001 show that in

contested custody cases mothers were awarded primary care in 70% of cases and fathers in 20%, with 2.5% joint residence.[94]

An American study by Brinig and Allen,[95] using a sample of 46,000 divorces, compared divorce statistics (including a number of variables pertaining to the parties) with expectations of custody to see if this helped to explain why wives filed for divorce more often than husbands. The underlying hypothesis was that children are a marital asset, that women have a stronger interest in having and controlling this marital asset, and that in an unsatisfactory marriage a woman will be more likely to apply for divorce if custody is a confident expectation. They concluded:

Our results are consistent with our hypothesis that filing behaviour [applying for a divorce] is driven by self-interest at the time of the divorce. Individuals file for divorce when there are marital assets that may be appropriated through divorce, as in the case of leaving when they have received the benefit of educational investments such as advanced degrees. However, individuals may also file when they are being exploited within the marriage, as when the other party commits a major violation of the marriage contract, such as cruelty. …We have found that who gets the children is by far the most important component in who files for divorce, particularly when there is little quarrel about property . . .[96]

In a study of the relationships between child custody policy and divorce rates in the United States, Kuhn and Guidubaldi compared divorce rate trends in states that encourage joint physical custody (shared parenting) with those states that favour sole custody. They found:

- 'As joint custody awards increase, states in general have greater declines in divorce rates. (p.4)
- If women can anticipate a clear gender bias in the courts regarding custody, they can expect to be the primary residential parent for the children. If they can anticipate enforcement of financial child support by the courts they can expect a high probability of support monies without the need to account for their expenditures. Clearly they can also anticipate maintaining the marital residence, receiving half of all marital property [under the United States communal property regime], and gaining total freedom to establish new social relationships.(p. 6)
- If a parent considering a divorce is told by an attorney that a judge will probably not permit him or her to relocate with the children, and that the other parent will continue to be involved, he or she may decide that it is easier to work out problems and remain married.(p. 6)' [97]

It has already been said by some commentators[98] on the federal government's decision that there are logistical and other issues involved in moving to a less flexible, 50-50 residence system which would reduce the present discretions in this matter of the Family Court. It is obvious that the issue is a vexed one that arouses strong emotions, and the situations of particular families is so variable that a simple and straightforward solution will be hard to find.

This is not the place prematurely to discuss the possible arguments for and against the proposal, except to say that it is an issue which cannot be adequately debated or understood without putting it in the context of reform of other aspects of family law and divorce. In particular, the need to move away from unilateral divorce on the one hand, and the need, on the other, to consider the ways in which serious misconduct in a marriage may influence a divorce settlement. Also, given the recent interest in re-emphasising the biological forces that influence female behaviour in relation to children and nurturance, and the recognition of children's need for their fathers and the strong attachment of most fathers to their children, reaching wise decisions will be very difficult.

Chapter 4

Marriage As Contract

Adequately protecting 'traditional' wives with children would counter some current disincentives to marriage and remove a source of uncertainty, and unfairness at divorce. So would protection for men in relation to custody and post-divorce child contact. For both, protection against exploitation through serious misconduct, and failure to recognise its consequences at the divorce settlement are important issues. Uncertainty, including marital uncertainty, is always destructive of human plans and expectations, and where uncertainties about human behaviour can be reduced with benefit there is a strong incentive to look for ways of doing so. In non-marital civil and commercial relations, contracts between parties seeking benefits from each other serve this purpose. Enforceability of the contract and compensation for breach of contract protect the contracting parties and give guarantees against loss, thus promoting certainty and greater confidence to act and invest on the basis of the contract.

If marriage is to be made more certain and stable, and to be restored as an estate within which women and men will more confidently invest, including investment in children, family law should, so far as possible, include rules for breach of the marriage contract and divorce. This will offer some protection for women and men against the consequences of serious misconduct and reduce the incentives and opportunities for exploitation permitted, if not encouraged, by no-fault.

As surveys quoted earlier suggest, it is highly likely that there will always be a substantial number of women, probably a clear majority, who, given propitious circumstances, would have more children than is presently the case within marriage. It is further likely that, given favourable circumstances, they would accept the major role in caring for their children and would willingly give up or significantly reduce their commitment to the workforce at least until their children go to school and, for a significant proportion, even longer. This presumes that many women are prepared to accept gendered marriage roles provided they are not punished or exploited for doing so. If these assumptions are valid, they suggest the hypothesis that high divorce rates and low fertility rates may be linked; that in the absence of confidence in the continuity of marriage and the dependable, mutual support that it promises, women (and men) would be more reluctant to invest in the expensive, long-term project of having and raising children. In other words, marital uncertainty and the risk of exploitation under present divorce rules, may figure among the many (difficult to control) variables that have been suggested as influencing fertility rates. All that can be suggested in this context is that confidence in marriage may be a foundational condition for 'propitious' or 'favourable' circumstances, but not the whole story. The rest of the story includes questions of taxation, support for children, better employment prospects for men, changes in social attitudes, and much else that are outside our immediate concerns here. Leaving such questions aside, what might 'propitious circumstances' in marriage include?

O'Connell, quoted by Carbone and Brinig,[99] puts the emphasis upon mitigation of the disadvantages of 'traditional' wives discussed earlier. In her view, this would entail (assuming a no-fault regime), a *consensual* divorce, and no question of compensation for misconduct by the husband, so ordering the total resources of the couple that the post-divorce circumstances of each are as equal as can be and would continue to be so until children are independent, or the circumstances of either partner change. The idea behind this is to put equal value upon traditional feminine and masculine roles within marriage, rather than implicitly assuming that the masculine role is the standard against which all others are to be measured; a presumption which devalues the feminine familial role and which insults women who make that choice, either because they prefer it or because they assume it only while their children are being reared.

These proposals represent precisely the approach of one kind of 'equal treatment' feminism criticised by Martha Fineman. It is superficially fair in calling attention to the undervaluing of the investments by traditional, gender-specialising wives, but inadequate in simply calling for equal treatment as the appropriate recognition of its value. Fineman's point is that the nature of the burden falling upon a divorced woman many years out of the labour market, and with responsibility for residential care of children, calls for adjustments that go beyond 'equal treatment' in order to fully recognise what is at stake. It is a key issue in divorce settlements,

along with the role that marital misconduct might play. But, as discussed earlier, it cannot be separated from the vulnerability of husbands and fathers to opportunism by their wives.

However, neither O'Connell nor Carbone and Brinig consider the issues involved in non-consensual divorces or explore the reality of breach or marital fault as factors that might justifiably affect divorce settlements, and thus feed back into stabilising marriage and reducing uncertainty and loss of confidence in marital investments.

The problems in trying to reconcile equal and fair treatment of divorcing spouses and their children with a recognition of the damage done by divorce and the breaching of the marriage compact, are immensely difficult, as many commentators have pointed out. Yet the demand for just divorce will never be met unless the reality of fault is acknowledged and allowed to play a role in determining the *divorce settlement*.

At the moment in Australia, we have either unilateral divorce or divorce upon application by both parties after separation for a year, with a property settlement by mutual agreement or by the Court. This settlement may be further influenced by the spouses' formal pre-nuptial or nuptial financial/property agreements (possible only since 2000 and still relatively rare), or by relative contributions of the parties, or by need; and with maintenance determinations, if any, according to need and capacity to pay. But these determinations cannot be influenced by considerations of marital misconduct and breach. It is this which is a major cause of dissatisfaction, resentment of the Court, and feelings of injustice. It is also a good reason for loss of confidence in marriage by both men and women. The difficulty of apportioning and measuring fault in a marriage must be acknowledged. But its importance there, as indeed in other social contexts where crucial matters of a civil and commercial kind depend upon promise-keeping, demand that the attempt must be made if, in certain circumstances, the interests of justice are to be served. In fact, such attempts are a daily and mostly successful routine in courts concerned with breaches of commercial contracts. It used to be routine in matters of family law.

Marital Misconduct As Breach of Contract

Marriage is based on a bond between the partners, a commitment to permanence, and joint investments in the union, perhaps including children. The incoherence lodged in no-fault divorce is its lip service to such a conception of marriage on the one hand, and its refusal, on the other, to legally recognise the implications of such a view of marriage by sanctions or disincentives against actions that mock that view with impunity.

The road to recovery is easier to see if we regard marriage as a kind of contract, whilst recognising that the open-ended obligations of marriage are supernumerary to ordinary contracts. A formal contract with limited terms is much more impersonal, instrumental, and usually of defined duration. Hence the difficulty in equating the two. Nevertheless, marriage is a kind of contract, and legitimate contracts in other areas can depend upon the law to defend the rights and entitlements of the parties, including a right to compensation or restitution if the contract is breached. In the absence of such contractual protections, few would invest in an unenforceable agreement. Yet marriage in a no-fault legal regime has become precisely this—an unenforceable agreement which those wanting to get married have no alternative but to accept. For these reasons, analysing contemporary marriage from a contractual perspective makes it easier to see its deficiencies—particularly, as we have seen, the invitations it offers for opportunistic behaviour when the terms of the marriage bargain are unenforceable. A vital function of the law of contract in commercial contexts is to provide certainty about the future behaviour of those upon whom the carrying out of the contract depends and to prevent parties to the contract from engaging in opportunistic behaviour. Insofar as marriage has important contractual or quasi-contractual elements and expectations, it requires the same guarantees.

An Aside - Covenant Marriage and Private Marriage Contracts

Ever since no-fault divorce in slightly varying forms was progressively introduced in the American states (under state laws rather than federal law) there has been steady agitation in several states for changing no-fault divorce in the direction of greater restrictiveness in order to reduce high divorce rates. By and large, there have been no significant changes—with one exception, covenant marriage. The state of Louisiana in the late 1990s introduced 'covenant marriage' as a second, legal form of marriage additional to its no-fault regime. Couples have the

choice of no-fault marriage or covenant marriage. Less than five% of couples are choosing covenant marriage. The choice requires them to:

- swear that they will live together until death as husband and wife;
- undertake that they will disclose to each other anything which could adversely affect their marriage;
- sign an affidavit that they have undergone pre-marriage counselling and considered the responsibilities of marriage;
- agree that they will seek counselling if the marriage runs into difficulties;
- meet more onerous conditions of proof of marital breakdown in order to obtain a legal separation;
- accept the reinstatement of adultery, desertion, abuse and cruelty, and living apart for two years as grounds for divorce;
- wait longer (three years and eight months) for a divorce if they have dependent children.

If we have a preference for regarding marriage as a single institution with common rules for all who marry, providing two forms of marriage, as in Louisiana, abandons that conception of marriage. It indicates social and conceptual confusion and opens the way, logically, for many alternative forms of marriage contracts. If marriage can mean more than one thing, why not many things? Why not allow a variety of marriage contracts that will suit individual couples, give greater flexibility in choosing more, or fewer, restrictions as they wish? Since an infinite variety of contracts may be legally devised to meet all sorts of civil and commercial needs, why not allow the same for couples who want to form 'marriage' partnerships? Indeed, such suggestions have been seriously canvassed as a way of reducing divorce.

To some extent we have already gone down this path now that Australian family law allows the making of prenuptial and nuptial contracts ('financial agreements') in matters of property and financial assets. This could be seen as the thin end of the wedge towards the private ordering of the marriage relationship and movement away from the conception of marriage as a unitary, *social* institution in which the whole community, through its legislators, has a final say in determining its general, universally applicable character, duties, and responsibilities.

Enlarging the scope for private contractual agreements to cover other marital issues (conduct, for example?) would spell the end of marriage as a particular institution. There is a strong public interest in the nature of marriage and the manner of its dissolution, especially as the institution within which (until recently) children were almost exclusively reared.

If an important aim of allowing private 'marriage' contracts is to allow couples to devise flexible arrangements that would be more likely to promote marital stability and permanence, such confidence must surely be misplaced. Marital life under private contracts would be no less exposed to disputes and appeals to the court for interpretation and determination when the parties fall out with each other than any other contract, or ordinary marriage. Indeed, many private contracts might be more likely to be unrealistic and ill-conceived than public marriage. Couples will fight about the contract itself.

I believe, therefore, that to have more than one form of marriage, or to allow a variety of private marriage contracts, would spell the end of marriage as a particular kind of relationship shared by many citizens, and as the preferred and privileged relationship within which a family with children might be formed. There is a wider social interest at stake in having a single institution with universal rules for the men, women and children who are involved in it, to underpin the vital social functions that the family fulfils. Toleration of a variety of marriages would come to mean indifference to the idea of marriage understood as a single system of 'appropriate' marital conduct. When we become indifferent to the way people conduct themselves we begin to fragment as a society.

Preserving a Contractual Element in Marriage

Dismissing the idea of various forms of marriage and private marital contracts does not mean dispensing with the idea of contractual obligation and duties of performance within a marriage. Such notions are essential to marriage.

Because an ordinary bargain or a business contract is a promise or set of promises exchanged by the contracting parties for the delivery of goods or services, and on the basis of which the parties make life-plans, failure by a party to live up to the promises made clearly damages the interests of the other party whose plans and prospects depend upon those promises. The notion of failure or 'breach' is fundamental to the theory and practice of contract; along with the cognate notions of 'specific performance' (strict adherence to the terms of the contract), and compensation, redress, or restitution due to the victim of the breach. Where the law formally acknowledges the notion of breach of contract and makes provision for the injured party to claim enforceable damages or compensation for the breach, an incentive is created for parties to live up to their promises. If these provisions are not made, a disincentive to opportunistic breaches of contract is missing.

It is immediately obvious that the notion of marital 'fault' or misconduct is assimilable to the notion of breach of contract. Promises, such as mutual support, reasonable behaviour, and fidelity, implicit or explicit in the act of marrying and fundamental to its success, are broken when one of the parties behaves badly by committing adultery, deserting a spouse, acting cruelly and unreasonably, and so on. Until the 1970s in Australia, the notion of marital breach, although difficult to define and to police, had a real meaning in convention, public understanding, and the law. With the advent of no-fault marriage and its divorce rules, the notion of breach went into limbo, along with remedies (both material and psychological) for the victim of breach. Misconduct in marriage lost the legal and informal sanctions of fault-based divorce. No-fault divorce made it unnecessary for a spouse seeking divorce to 'buy' the agreement of the other non-consenting spouse via forms of 'compensation' for the loss of marriage expectations. No-fault divorce is praised for the fact that there is less litigation now than under the previous regimes, but this may represent no more than the loss of remedies through negotiated private settlements, and through the courts, and hence submission to unavoidable injustice. The predictable results have been the growth of opportunities for one spouse to exploit the other through divorce.

Some commentators have argued[100] for the retention of fault and alimony to compensate women, innocent of misconduct at divorce, for the costs of lost opportunities incurred in undertaking home and child care in traditional marriages. Lloyd Cohen argues from the asymmetry between men and women that in the early stages of marriage women, particularly in a traditional marriage, sacrifice more and work harder on average than men in maintaining a home and bearing and looking after children. Furthermore, women in general 'are of relatively higher value as wives at younger ages and depreciate much more rapidly than men'.[101] Thus men tend to gain more in the early stages of marriage, and women more in the later stages when the children are grown up and their husbands are earning more. Accordingly, 'this long term imbalance provides the opportunity for strategic [opportunistic] behaviour whereby one of the parties, generally the man, might find it in his interest to breach the contract unless other wise constrained'. Cohen believes this opportunism, and the failure of family law to attend to it, leads to fewer marriages, fewer children, and avoidance of domestic commitment by women.

These observations are not necessarily less relevant in non-traditional marriages where wives are as committed to the workforce as their husbands. Carbone and Brinig comment:

In line with Cohen's analysis, even if men and women enjoyed equal career opportunities, and even if they shared child care responsibilities equally, women would still enjoy fewer opportunities for remarriage than men because of differences in mortality and the nature of sexual attraction. Accordingly, even in an era of economic equality, men would have greater incentives than women to breach their marital obligations, and women would have less of an incentive to enter into marriage if they could not enforce marital commitments.[102]

The point here is not to emphasise the species of vulnerability peculiar to women, or to overlook the different sorts of vulnerability that may be peculiar to men. The point is the danger that lies in the indifference of family law to opportunism and the damage it does. If it does not search for remedies, there will be fewer marriages and less investment in marriages and children. The answer is not to outlaw divorce itself but to ensure that the costs of separation are fairly distributed which, as argued earlier, does not necessarily mean equally distributed. By analogy with ordinary commercial contracts, this would mean, in theory, compensating the breached-against party (i.e the party who wants the marriage to continue, or who has been the victim of marital misconduct) for the loss of the benefits or expectations promised under the marriage

'contract'. Such a principle may be acceptable, but in the real world and in actual contracts or partnerships (including marriage) adequate compensation for 'breach of contract' may simply be impossible or impracticable because the resources or assets at the disposal of the parties may simply not permit it. Some marriages might permit it, but certainly not all. Nevertheless, the opportunity to pursue the issue should be there in family law, even if the outcome is no more than a declaration by the Court that a party has been ill used.

Chapter 5

The Problem of Unilateralism and the Need for Reform

'The possibility of separation is already the fact of separation, inasmuch as people today plan to be whole and sufficient, and cannot risk independence. Imagination compels everyone to look forward to the day of separation in order to see how he will do. The energies people should use in the common enterprise are exhausted in preparation for independence… The goals of those who are together naturally and necessarily become a common good; what one must live with can be accepted. But there is no common good for those who are to separate. The presence of choice already changes the character of relatedness. And the more separation there is, the more there will be'

– Allan Bloom on divorce in *The Closing of the American Mind.*[103]

The abolition of fault as an issue in divorce was a seductive idea. Matrimonial fault is not easy to define and is difficult to prove and adjudicate. Removing these difficulties and reducing the expense of divorce looked like an attractive initiative. It seemed to many that spouses who were agreed that their marriage was barren of pleasure and satisfaction should be allowed to end their relationship in dignity and privacy without the necessity of a court battle to prove serious misconduct—often by faked misconduct and perjury, and with the reluctant complicity of barristers and judges. There is much to be said in favour of a no-fault approach to failed marriages. Serious misconduct is not an issue for many of them, and even in some where it is the cause of estrangement, a swift 'clean break' without a contest may be the partners' preferred course. Nevertheless, there would no doubt be many remaining for whom the law's refusal to acknowledge the reality of serious misconduct, and its material and psychic costs, would represent a significant injustice. And there is yet another aspect of no-fault that is crucially important.

The problem of no-fault divorce lies less with the idea of no-fault than with the opportunity it provides for a unilateral decision by one spouse to invoke divorce against a partner who may not wish to separate, or to have separation forced under conditions of powerlessness and disregard for that partner's interests in the marriage, and perhaps the interests of children as well. We do not know how often this might happen. Of the 55,330 divorce applications lodged in 2001, 30% were lodged by the husband, 47% by the wife, and 23% were joint applications.[104] Children are involved in approximately half of all divorces. We cannot infer from the fact that 77% of the applications were from one person (husband or wife) that all of these represented unilateral decisions to apply for divorce. But it seems reasonable to suppose that a percentage, possibly a high one, did. 'Desertion' was one of the most common causes of separation and divorce under the pre-1975 regime, despite the serious misconduct it legally constituted and the penalties it might attract. In the absence of illegality and penalty under the present regime, might not we expect more of it?

The option of unilateral divorce provides incentives and opportunities for exploiting the vulnerability of one's partner for personal benefit. This power to act unilaterally, and without regard to the costs imposed on others, is a fatal flaw. Some of those uncompensated costs, and the costs of lost opportunities, we have already discussed. Many of them arise from attempts by men and women to avoid, or to compensate for, the threat to marital certainty and predictability that unilateral divorce poses. Such as investing in building one's human capital rather than in the marriage; reluctance to have children; not taking the risk of supporting one's spouse at personal cost and then being rejected; and so on. Unilateralism promotes self-interest at the expense of mutual investment and cooperation, and works against the marital specialisation and the having of children that are the foundation of much of the welfare benefits and meaning of marriage. It encourages focus on the short-term rather than the long-term, because there is a greater risk that there will be no long term. Those who offer commitment and permanency are put at risk, and what they may give to a marriage can count for little when unilateral divorce is forced upon them. Two of the key accompaniments of the previous divorce regime—compensation for fidelity and commitment betrayed; and the negotiating leverage of a non-consenting spouse—have disappeared. With them have gone also some vital incentives for fair and responsible marital conduct; and balanced negotiating power over the terms of settlement in divorce. Also, in one out

of every two divorces, a third party—the children—stands by silent and powerless while their family life is destroyed.

The outcome of the no-fault initiative has been a marital regime that erects perverse incentives that undermine the very motives and conditions that successful marriages need. Instead of confidence it provokes wariness; instead of predictability it provides uncertainty; instead of encouraging investments for shared benefits it encourages self-interest; instead of cooperation, divisiveness. It substitutes 'protective individualism' for altruism. It invites spouses to look away from common interests in favour of behaviour designed to protect oneself against the likelihood and consequences of divorce. It allows opportunism to flourish because there are no penalties for its expression.

Insofar as this behaviour is not apparent in many marriages, the reason lies not in the incentives or encouragements of family law, but in an ethos of personal commitment to certain moral principles and sentiments—unselfishness, consideration, loyalty, and perseverance. These attitudes are more sustainable if backed by legal sanctions and the public consensus they represent. No-fault divorce lacks such sanctions.

What Reform Should Aim To Achieve

We need to retain the virtues of no-fault while removing the key deficiency of unilateralism. No-fault's prime attraction is the capacity to end a hopeless marriage with little difficulty and to give the estranged partners a chance of a better life. This is true, however, only when the partners are amicably agreed on this course of action. But such an agreement is frequently not the case and all sorts of costs and pain may be unilaterally inflicted without any recourse being available to the victim to mitigate the costs and misery.

So the first aim of reform should be to give both partners an equal voice, and equal powers, in arriving at a decision to separate and in shaping a divorce settlement that will at least offer an opportunity to salvage as much as possible for both parties.

We need also to recognise the reality and consequences of serious misconduct in a marriage. Wives and husbands can be sorely afflicted and betrayed by their partners in ways which impose costs that cannot be compensated without the help of the law. In circumstances of abuse and intimidation that fall below the criminal threshold, for example, or sheer bloody-mindedness, the possibility of 'equal voice' and 'equal power' in negotiating would be missing. There is a need, therefore, to take account of this and to make provision for a divorce to be pursued and a settlement determined that may provide 'damages' (at least in principle, even if unenforceable in practice) for breach of contract by serious misconduct, without requiring that proof of fault must be an essential *condition* for a divorce, as was necessary under the old fault regime.

Where both spouses are agreed upon separation and where no question of fault is involved, or where neither spouse wishes to raise it as an issue affecting a settlement, the equitable solution would be to allow them to abide by any previous financial and property agreement, or to freely negotiate one, or to leave it to the Court to settle. And provided, also, that the interests of any children are protected in the usual way by a mutually agreed and approved parenting/custody arrangement.

In an extended discussion of marriage-as-contract and the contractual rules that might apply to modern marriage, Dnes argues that divorce may be fair, or, as he puts it, 'optimal', provided compensation is paid to the breached-against party for lost expectations. He continues:

Awarding 'expectation damages' is indeed the standard remedy for breach among commercial parties, and has the characteristic of placing parties in the position they would have been in if the contract had been completed. The common law may be considered efficient (wealth maximizing for the parties) in awarding expectation damages for the breach. One would not insist on specific performance of a commercial contract. However, so as not to over-insure the victim of breach, there is an important requirement for the victim to take any possible steps to mitigate the loss . . . Marriage vows would be taken quite literally and promises would be seen as binding. For example, a traditionalist view of the marriage contract is an exchange of lifetime support for the wife, in which she shares the standard of living ('output') of the *marriage*, for domestic services such as housekeeping and child rearing. The classical-contract view could easily include less traditional frameworks. Breach of contract by one party would allow the other to reclaim lost expectations subject to an obligation to mitigate losses.

All the traditional marital offences, such as adultery, unreasonable behaviour and abandonment, would be relevant to a divorce system based on classical breach of contract, in determining who had breached. Equally, no-fault divorce would be consistent with the notion of efficient breach as it would simply represent either (i) a decision by one party to breach the marital contract and pay damages, or (ii) a mutual decision to end the contract with a negotiated settlement.[105]

Dnes's discussion here is intended to paint an ideal or theoretical picture of how the principles of breach of contract and 'expectation damages' may be applied in marriage. It is obvious, however, that 'expectation damages' *in full,* could simply not apply in divorce settlements for most couples. If a mother has been shown to have committed serious misconduct, for example, but the Court nevertheless gives her primary care and residence of the children, plus child support payments, the innocent husband's legitimate 'expectation' of completing the marriage in the company of his children simply cannot be met; nor can he be compensated adequately if the wife has no financial capacity to do so. In other words, in most cases, 'expectations' unfulfillable in the nature of things may often not be adequately compensated for. All that can be done is to offer such financial or other forms of repair as are possible within the resources of the couple and consistent with priority obligations to children and provision for the essential needs of the offending spouse.

Implementing Some Principles of Reform

How would such principles be implemented while retaining the virtues of no-fault divorce and without requiring fault as *condition* of applying for divorce?

As at present, divorce would continue to be available after one year's separation of the spouses, but certain conditions would have to be met before the divorce proceeds. It would be possible, as Dnes suggests without going into detail, to retain important elements of the no-fault regime with provision under certain circumstances, but no *necessity*, for serious misconduct to be raised as an issue that *could* play a part in *determining the terms of settlement*[106]. Also, in combination with no-fault, provision would be made for spouses to divorce by *mutual consent* and to arrange the divorce settlement through negotiation of an agreement. Let us consider examples of divorce under such a regime.

For a first example, let us assume that a couple has become radically estranged for reasons which do not include serious misconduct (to be defined in the law, e.g. adultery, desertion, abuse, drunkenness, cruel or unreasonable conduct, etc.). As presently required, they must be separated for one year before they can apply for divorce. The application must include a statement by each that they have freely consented to divorce and that they have negotiated an agreed settlement of financial, property, maintenance, and children's residence/contact issues, as detailed in the application, for approval by the Court and an order for dissolution of the marriage. Alternatively, they may state that they have freely consented to divorce but have agreed to leave it to the Court to determine the settlement terms in accordance with the law and any discretions open to the Court. In other words, divorce ('breach of contract') would be by mutual consent with either a privately negotiated or Court-determined settlement. One would expect few of the latter.

In a second example, the spouses have separated for one year because one, or both, have committed serious misconduct. They, or one of them, will apply to the Court for divorce, charge breach of the marriage contract by misconduct, and plead that the misconduct be taken into account in determining a settlement by the Court. The misconduct would need either to be admitted or proved adversarially before the Court, followed by the Court's findings, determination of the terms of settlement, and an order for dissolution.

In a third example, a spouse applies for divorce after one year's separation and claims misconduct during the marriage by his/her spouse. Whether or not both spouses want the marriage to end, the application for divorce must be heard and the non-applying spouse's alleged misconduct taken into account as defeating the legitimate marital expectations of the applying spouse for the purposes of Court-awarded 'expectation' damages. The spouse charged with misconduct can either defend the charge adversarially (perhaps by claiming that he/she was driven out by the other spouse's behaviour) or admit misconduct without contest and accept the Court's determination of the terms of settlement, which could include expectation damages.

It is, of course, conceivable that neither spouse being guilty of serious misconduct, that only one spouse wants to end the marriage while the other spouse does not. The recourse open to the spouse who wants the marriage to end is to leave the marriage for one year, admit desertion (misconduct), and apply for dissolution on the understanding that his or her 'desertion' may lead to the award of 'expectation' damages; unless it can be shown that leaving the house was the only way of moving to end an impossible marriage; in other words, that leaving was justified and legitimate. If the Court is not satisfied on this score, the divorce would nevertheless go ahead, with the Court given discretion in relation to the terms of settlement. The more likely resolution in such cases is that the spouse wanting to leave will 'buy' the consent of the unwilling spouse by offering favourable settlement terms. If both spouses are willing to act in this way an adversarial contest would be avoided, and the divorce would be 'efficient' and fair, since both parties would have got what they wanted.

It is important to emphasise that the question of fault (serious misconduct) can only arise by a spouse claiming, and proving, it as a matter that may affect the terms of a divorce settlement. Proof of fault would not (as under the pre-1975 regime) be a necessary condition of winning a divorce. The purpose is to provide protection for spouses against misconduct in the first place. American evidence mentioned earlier indicated less spouse abuse in family law jurisdictions which had retained alimony as a form of compensation for misconduct.

There is no way of predicting the extent to which contested divorce settlements would occur under the regime suggested here. The requirement for consensual divorce where no issue of serious misconduct is to be raised would encourage bargaining on a basis of legal equality more likely to lead to private agreement, thus tending to lower the number of contested settlements. On the other hand, opening up an opportunity to raise serious misconduct as a factor to be taken into account in the settlement might be thought, at first sight, to lead to more contests. But if serious misconduct has occurred and may be proven, there would be an incentive for the perpetrator to avoid having the issue raised in Court and to provide a more favourable private settlement for the offended spouse. The upshot could well be an overall increase in satisfactory private settlements, more 'efficient' divorces with better outcomes for all concerned, and less litigation. Nevertheless, some settlement contests would occur, especially if serious misconduct is raised, and one of the central issues to be sorted out would be the rules to govern the award of 'expectation' damages for the aggrieved spouse to an extent reasonable and practicable within the resources available.

Reforming divorce law along these lines would achieve several desirable ends. It would:

- allow no-fault divorce to continue, but with protection against opportunism through the requirement of mutual consent and a mutually agreed settlement;
- by the requirement of consent and negotiation, empower those (such as traditional wives) who, as evidence produced earlier showed, are systematically disadvantaged by the present system, and, for fathers, help enable them to sort out fair custody arrangements;
- acknowledge, and provide remedies for, the reality of serious misconduct in some marriages and provide an avenue for adequate 'expectation' compensation for the victims, but without making proof of misconduct a necessary condition for divorce;
- erect a system of disincentives for marital misconduct and thereby work to reduce it;
- provide incentives for more responsible marital behaviour and strengthen those marginal marriages that might otherwise fail;
- remove the invitation that unilateral no-fault offers for bad decisions since there is no penalty for them;
- restore confidence in marriage as a serious commitment that cannot be unilaterally, unfairly or opportunistically revoked without the notice of the law and the possibility of penalty;
- reduce the pressures to invest outside the marriage in order to protect oneself if unilaterally divorced;

- encourage greater care in choosing a partner; more carefully considered marriages; and more investments in marriages;
- mean that fault, or breach, would only become a *settlement* issue for the Court when consensual divorce and a private settlement agreement was impossible - a situation less likely to occur when opportunities for negotiation exist;
- in sum, work towards greater marital stability, more protection for the vulnerable, just treatment, and better serve the interests of children.

An important outcome would be to secure the interests of spouses who have acted in good faith by protecting them against opportunistic divorce and adequately compensating them by meeting, as far as possible within the resources available to the parties, their legitimate expectations through the divorce settlement. However, as already mentioned, the scope for acting in this way would be limited for most couples, and some spouses could not avoid substantial losses of both a material and emotional kind for which no compensation would be possible.

More spouses would get their just due, and simply making provision for expectation damages in the law would send the message that the marriage bond and its responsibilities must be taken seriously. Doing this would encourage marital investment by women and men who, in the absence of such safeguards, would continue to be vulnerable. It would be fairer overall than the present system.

Some Objections, and Responses

In some cases the Court would be required to judge whether a breach had been committed and by whom, but this would occur in the context of apportioning responsibility, determining the terms of a divorce settlement, and possibly awarding damages, when divorce by consensus could not be achieved. This could lead in some cases to lengthy and extensive contests in court. Such problems should not be underestimated, but they should be seen as a necessary part of doing justice and strengthening the standing of marriage as a key social institution. As a society, we have no hesitation in using the law to support fair dealing and good faith in the upholding of voluntary commercial contracts, and we do not resile from detailed court investigations to arrive at judgments. Do Australians believe that a marriage deserves less than a business deal?

Attitudes To Fault-based Divorce Settlements

A generation has passed since fault was an issue in divorce. In that time, no-fault divorce has become firmly entrenched in policy, the law, and, seemingly, in public acceptance. Attitudes towards marriage seem to have changed quite markedly, and a much more relaxed stance towards the conduct of relationships has gained ascendancy. It might be expected, therefore, that any suggestion of again recognising fault as an important issue in marriage and divorce, even in the limited way suggested here, would be speedily rejected as an unacceptable retreat to the past. On this score, we have some indications of public opinion.

In February/March, 2003, the AC Nielsen survey and market research organisation conducted one of its regular (twice-yearly) Australian Internet User Surveys on a variety of subjects, using a large sample of Australian internet users. The survey[107] achieved a sample size in excess of 5700 respondents, and although caution needs to be exercised when making whole population estimates from a sample size like this, external validity checks suggest that the final weighted sample is reasonably representative of the Australian population as a whole. The Centre for Independent Studies commissioned the inclusion of a number of questions in the survey. Among these questions was the following:

'It has been suggested that serious misconduct in a marriage (for example, desertion, adultery, drunkenness or abuse) should be taken into account when the Family Court decides the settlement following a divorce. Select one of the following – Strongly agree, Agree, Neither agree nor disagree, Disagree, Strongly disagree, Don't know/no opinion'.

There were 5,721respondents to the question. Overall, three out of four respondents (74.6%) 'strongly agreed' or 'agreed' with the proposition that serious misconduct should be taken into account at a divorce settlement.

Cross-tabulations of the answers by respondents' *age*, *sex*, *marital status*, and *whether or not they had children under 18*, are shown in **Table 5.** It is worth noting, within these sub-categories, that strong agreement or agreement with the proposition ranges from 67.99% to 81.8%. This

indicates that the principle suggested by the question has strong, widespread support by all age groups, by the engaged, by the married, by the unmarried, by de factos, by the divorced, by men and women, and by those with or without children under 18. It seems that a substantial majority of Australians, irrespective of age, sex, marital status, or family status, believe that serious misconduct in marriage is an important issue that should not be ignored by the law when it deals with divorce.

The Incentive Effects of the Fault-based Settlement Option

As suggested earlier, the mere possibility of a court confrontation is a powerful incentive to avoid it and to have recourse to negotiation and consensus instead. It is this, along with the requirement of a consensual agreement between the spouses, that sharply distinguishes the 'dual' regime proposed here from the unconditional unilateralism of the present system, and from the former fault system where consensual divorce without fraudulent collusion was not available and where proof of fault was the sole and necessary condition of divorce. It would not resurrect the deceit and hypocrisy involved under the former regime in faking fault to get a divorce. A valid application for divorce after a year's separation must lead to a divorce, as at present, and the issue of fault could only affect a settlement if a spouse had provable cause and a desire to raise it. Even if raised, the divorce application must proceed and lead to dissolution.

We should not delude ourselves that the present system of unilateral no-fault divorce is free of fierce conflicts, anger, hatred, and the recruitment of children to one or other parent's side in the pre- and post-divorce blaming and animosity. No doubt in a great many divorces, perhaps most, some blame is due on both sides. But it also seems reasonable to assume that many divorces are due to selfish, capricious, unreasonable, or unconscionable conduct by a spouse who, in effect, destroys the marriage and causes great pain to partner and children alike. No-fault divorce offers no legal forum for the notice and censure of misconduct, and hence the opportunity for catharsis of the overpowering emotions and the sense of injustice that consume many divorcing spouses. In a recent survey, Anna Byas records a divorcing spouse seeking a settlement through the Court who, in her own words, was 'bursting with all that pain'.[108]

An objection to what I am proposing, or certainly a difficulty, concerns the situation where a marriage is dead but no *serious* misconduct is involved. Imagine that one spouse has, in effect, resigned from the marriage but still goes through the motions, or is impossible to live with although not abusive, violent, or adulterous. The marriage is ruined despite the fact that the other spouse has continued to behave well. Let us further assume that mutual consent to divorce cannot be achieved because the offending spouse wants the dead marriage to continue, even though the continuation simply extends the agony of the other spouse. How are his or her eroding interests in the marriage contract to be protected? The marriage is being destroyed by a breach of the marriage contract, along with the long-suffering spouse's legitimate expectations. Does this breach constitute grounds for seeking compensation damages if it comes to divorce? Certainly, it would be hard to adjudicate, but there does seem to be a case for including such a situation within the bounds of serious misconduct, construed here as 'constructive desertion' or 'marital negligence of such a nature as to render living together insupportable'. If the victim spouse in such a situation separates for a year, he or she could apply for divorce and seek a favourable settlement on the grounds of misconduct, as suggested. The purpose here, as with the forms of serious misconduct mentioned earlier, is to install in family law the principle of marital duties and obligations which cannot be ignored without the possibility of an award of 'expectation' damages to the victimised party.

There would thus be two ways out of a marriage:

(i) by mutual consent, without fault as an issue, where both parties are in a position, and willing, to negotiate a settlement agreement from positions of equality and mutual empowerment; or

(ii) by raising fault (that is, breach of legitimate marital expectations, to be defined) as an issue which would allow a spouse to apply for divorce, after a year's separation, in the absence of consent to an application by the other spouse. Such an application would be deemed to be an application by a deserting spouse and, *prima facie*, as an admission of serious misconduct to be taken into account in determining the terms of the divorce settlement; but with the opportunity

for the deserting spouse to counter-claim justification (that is, fault by the other spouse). It would be up to the Court to adjudicate and determine the terms of settlement.

Either way, the marriage contract is treated seriously, the terms of its dissolution fairly determined, and the interests of the parties protected by the Court.

Needless to say, wilful destruction of a marriage may inflict such pain and damage that no practicable settlement can compensate for it. Also, to repeat, the assets of the marriage and the income of the spouses may be so meagre as to allow little possibility of compensation. But, in the total absence of any attempt to do so under the present regime, even partial compensation, or formal legal recognition of offence, would represent a great improvement. For those who choose to separate consensually, divorce, under conditions of negotiation rather than unilateral impost, is more likely to be amicable; and if not amicable, at least as fair as can be. And it must be remembered that even under the old fault regime, the overwhelming majority of marriages were ended by mutual agreement, even though some spouses were forced to resort to the dishonest device of arranging a faked 'fault'.

None are better equipped to measure the costs of divorce than the partners themselves, including the costs involved with children. When given the opportunity to really face these costs in detail and in a bargaining situation, the outcome is likely to be either a sober recognition of the advantages of reconciliation, or a better-considered and 'optimal' divorce settlement. Either way, all concerned, and society too, will be better off. A major spin-off will be a more marriage-supporting structure of incentives and disincentives confronting those yet to marry when the twin threats of unilateral divorce and marital misconduct without remedy are removed. It will mean the return of enforceable duties and obligations to marriage and therefore restraints upon selfish and malicious conduct within marriage. In turn, this will increase confidence in marriage and more mature consideration of what is involved in marriage. The incentives to invest in the marriage will return, the spouses will have a greater stake in the marriage's success, and stronger motives to make it work and overcome the hazards that are endemic to all marriages. It will create a more propitious environment for raising children to maturity under the care of both their natural parents.

In this context, we need to return briefly to the issue of custody. If consensual divorce were to become the rule, it is to be hoped that appropriate post-divorce parenting arrangements could be part of the divorce bargaining and agreement and avoid making custody a contestable issue. Inevitably, however, custody will become an unresolved issue in some divorces. So the formulation of custody rules will be necessary, and, once formulated, they will be the shadow within which private, pre-divorce bargaining and agreement will take place. It would be inappropriate here to try to second-guess the findings of the Federal committee which will be appointed to inquire into the issue of custody and whether or not 50-50 joint custody (residence and contact) will become the rule. But if it did become the rule, it is to be hoped that scope will still be allowed for parents to depart from that rule if both agree to do so, particularly if they reach such a decision in the knowledge that the Court may reach a more restrictive rule-abiding arrangement if it came to a custody contest. Most parents want to do the best for their children after divorce, and the rules to be made should have the flexibility to allow that to happen. This probably implies, however, that freedom for a parent with primary custody to re-locate after a divorce involving dependent children should be subject to some restrictions.

Among other objections to the reforms suggested here, it might be said that what is proposed here will discourage young people from marriage if there is a possibility of penalties for flight. The obvious riposte is that young people do not need discouragement; discouragement and avoidance are rampant now under a regime that makes marriage little more than the cohabitation that is replacing it. As for penalties, the more likely response is a greater inclination towards marriage because it would be less open to the predatory and opportunistic motives that family law now tolerates. Under the more restrictive regime before 1975, marriage rates were then much higher than they are now under a much more relaxed regime. Effective protection for the mutual good faith essential for the success of a serious cooperative enterprise is impossible without the prospect of penalties for its absence. Given some assurances for good faith, marriage would be the choice of those who want to commit to each other whilst receiving protection by the law against vulnerability to exploitation and easy, inexpensive, unilateral abandonment.

Unmarried Parents and Dependent Children

I have argued in a previous book,[109] and reiterate here, that an unmarried couple who become responsible for a dependent child by birth, adoption, or through a previous marriage or de facto relationship, should be regarded as a married couple for the purposes of family law - as reformed along the lines proposed above.

The purpose of this proposal is to emphasise that having, or acquiring, a dependent child obliges a couple living in a continuing unmarried relationship to provide for that child the best prospects for its future within their power. In addition to providing the essential care and sustenance which is the child's due, the stability of their own relationship within matrimonial rules is also a crucial element in the child's long-term well-being. Research shows that children of married parents fare better, on average, than children of unmarried parents. Becoming responsible for a child converts a two-party relationship of mature adults into a tripartite one where the duty of the law is to protect the interests of the immature and voiceless party. The obvious way to do that is to bring the child within the added security and guarantees which marriage provides (or should provide). It is one thing for a couple without dependent children to eschew marriage; that is their right as mature, independent citizens and there is no obligation upon them to be treated by family law as subject to promises they have not made and do not wish to make. Civil law and ordinary civil agreements or contracts are available to them if they want to constrain their relationship in any way by certain limited promises. Otherwise, they should be free to come and go as they please within the law. But responsibility for dependent children makes a difference, and immediately attracts obligations for stability and sustained care. Moving in the directions I am suggesting, whilst assuring freedom of action for cohabiting adults without dependent children, reinforces marriage as a special status entailing law-backed promises for those who wish to choose it, and hence certain guarantees for any children they might have. At the same time, it would end the present confused trend towards the convergence of a pallid and uncertain form of marriage, and cohabitation, that ill-serves both those couples who wish to marry in a firm and meaningful way, and those childless couples who do not want to marry.

Chapter 6

Conclusion

There now exists a huge body of research demonstrating that marriage enhances the wealth and well-being of men and women. For children, on average, the importance of a stable family for their optimal progress towards adulthood is beyond question. The present high level of marital instability and its consequences for children is one of our most important social problems. Less investment in marriage weakens the family system, with all that implies for future generations, the economy, and the welfare of the nation.

A quick and easy no-fault family law regime, where a year's unilaterally determined separation is routinely accepted as evidence of irretrievable breakdown and grounds for divorce, simply endorses desertion without comment or reproof. It means that marriages begin in the shadow of uncertainty, opportunism, and separation. As we have seen, the regime may be deeply unfair to many, and its unfairness is concealed because no legal avenue or court forum is provided for its exposure. The lives, expectations, and futures of adults and children can be ruined without examination, and many years' faithful investment in a marriage simply cast aside. Under present law, if a man and a woman want more than simple cohabitation, and would prefer voluntarily to bind themselves to each other in a firmer compact expressing enforceable matrimonial duties and obligations, they are not allowed to do so. That sort of marriage is simply no longer available. Instead, the law, as instructor of us all, tells us that that is not an important or legitimate aspiration. A couple may sign up to an enforceable financial/property agreement within their marriage, but not one about their conduct towards each other.

We have had 27 years' experience of this regime and its unhappy outcomes. It is highly appropriate that we should attend to its failures. This does not mean retreating en bloc to the past, and there is no suggestion here that we should do so. Yet proposals for reform will inevitably invite opposition and hence political reluctance to act. Those wishing to resist reform would be likely to appeal against reform on several grounds.

The first would be a defence of the status quo. The present regime, it might be said, is working well. If there is more divorce, the reasons are not due to deficiencies in the law but to changing social values, and those values are not to be denounced but welcomed. The expression of those values in present family law has not only allowed greater freedom of choice and action, it has also made it possible to end failed marriages with a minimum of trouble and expense. Marriage is no longer the prison it used to be, and those who want change are motivated by a narrow, moralistic, and restrictive view of human relations. Accordingly, there is no need to fence marriage in with rules. Couples who want to stay together will do so without the help of the law, and those who want to part should be able to do so with a minimum of fuss. It might be argued that any suggestion of resurrecting 'fault' as an issue in divorce will take us back to the 'bad old days' of bedroom raids, perjured testimony, and unseemly court battles. Marriage is such an intimate, private estate that the truths of a relationship can never be firmly established and that attempting to do so is futile and damaging. It might be said that no-fault divorce rules have played no part in increasing the divorce rate, because the rate was rising before its introduction, albeit more slowly. Making divorce more difficult will lock some spouses into miserable, conflict-ridden marriages. In such marriages children are at risk of unhappiness and emotional disturbance and it is imperative that that risk should be avoided by speedy divorce; children are better off outside such an environment.

It is true that there are grounds for criticising the pre-1975 family law regime, particularly on the issue of faking fault in order to be able to apply for a divorce. But it was not the prison it is reputed to be, even though escape was often fraudulently won. What such criticisms ignore are the grounds for grave dissatisfaction with the present regime. This study has described them. More importantly, the criticisms suggested above do not apply to the reforms being proposed here. The results of the AC Nielsen survey detailed earlier show remarkably widespread support for making misconduct an issue that could affect a divorce settlement. There is a body of evidence[110] that the change to no-fault in America had a significant and independent effect in raising the divorce rate, and earlier discussion and evidence presented here give good reasons why that could be so.

It is true that 'changing social values' have played, and continue to play, a part in transforming marriage and attitudes to marriage. I have discussed these changes and their effects in more detail elsewhere.[111] Additionally, as we have seen earlier, the economics of marriage, including especially the movement of wives and mothers into the workforce and its effects on male-female specialisation in marriage, have been of great importance. They have interacted with legal and values changes to alter profoundly the structure of incentives and disincentives underlying decisions to marry and divorce. We must also include among the economic factors, the steady evolution of a family tax regime that raised the costs of children and that de-privileged marriage.

The reforms being proposed here are not more restrictive than the present regime, unless it is deemed restrictive to move from unilateral divorce and abandonment to consensual divorce or divorce where misconduct can be properly recognised and adjudicated. Divorce after a year's separation would remain unaltered. Indeed, in promoting mutual bargaining and agreement as a prelude to divorce, it is fairer and more likely to lead to more optimal outcomes for all concerned, including children. Nor is it more restrictive in opening up the *possibility* (not the *necessity*) of allowing proof of 'fault' to influence the terms of a divorce settlement within a divorce process that must end in dissolution irrespective of the outcome of a court-adjudicated claim of serious misconduct. There is no chance of re-introducing proof of serious misconduct as a necessary condition of applying for a divorce.

Overall, the proposals will certainly not lock spouses into failed marriages. Withdrawal from a failed marriage would not be more difficult; but it would be arranged under circumstances where both parties have an equal voice in determining the terms of dissolution. And, for those who need it, an avenue for legal recognition and possible redress of proven misconduct. As for the necessity of proving serious misconduct before the Court, this is no more extraordinary, in legal principle, in difficulty, and in the delivery of justice, than the adjudication of claims made every day before the courts in relation to breach of commercial contracts and contracts of employment. It would be truly remarkable to declare the irrelevance of serious misconduct in the pursuit of a marriage and in its dissolution. And, similarly, to declare the Family Court incapable of adjudicating a claim of breach of the marital contract if asked to do so.

The law alone does not make people happy, wealthy or wise. But it can help remove or counter some of the causes of unhappiness and conflict, encourage better considered decisions, raise the likelihood of cooperation, and offer some forms of redress when people are treated badly or dishonestly. This is as true of marriage as of any other law-governed institution. The rules governing divorce have an important, indeed essential, role to play here. The conditions of divorce feed back into determining behaviour in marriage and the success or otherwise of individual marriages. If the costs of divorce are not fairly distributed, divorce may be used by some for selfish exploitation of a spouse, and insufficient care for the interests of children. Having to face the need to bargain and agree exposes the costs of divorce to the parties. This encourages realism and fairness. I have emphasised the vulnerability of many wives and husbands to species of opportunism and appropriation because of unilateralism and the importance of fair settlements for both. Requiring either consensus or a fault-based settlement may not be the whole answer, but it cannot help but be an improvement upon the present system.

The future of marriage in Australia depends importantly on re-fashioning family law to remove some of these impediments both to marital success, and to fair divorces for those marriages beyond redemption. The fundamental objectives of the proposals put forward here are thus fourfold:

(i) to make divorce less likely by establishing a balance of incentives and disincentives supporting reasonable and responsible marital behaviour;

(ii) to continue to make no-fault divorce a realistic option by putting no expensive or unnecessarily punitive obstacles in the way of couples who, in the absence of serious misconduct, have nevertheless become deeply alienated from each other and want consensually to negotiate their way out of the marriage, whether or not they have children;

(iii) to ensure that no spouse need suffer under marital misconduct without any attempt by family law to acknowledge the fact and do its best to remedy or limit the damage by appropriate compensation;

(iv) to counter unilateralism in divorce by empowering both spouses through the principles of consensus upon separation, or recourse to a fault-based settlement if a spouse is shown to be a victim of marital misconduct.

No system of family law will perfectly suit the infinitely varied vicissitudes of the marriage relationship. Marriage is at once the most fundamental, potentially the most fulfilling, and yet in many ways the strangest, most exacting and, unfortunately, sometimes the most anguished, of human relationships. It is a voluntary, individual commitment of the most intimate and private kind, yet a social institution in whose success every nation has an unremittable stake. For these reasons it must be law-governed and the law should serve its complexities and its problems as well as it can. But law is not the whole answer. The continuing vigour of civil customs, traditions, and informal conventions which elevate, dignify, and support marriage and its responsibilities, and whose underlying ethical principles shape our attitudes and sentiments, is also essential. If the proposals made here were to remove some of the perverse incentives to divorce and make divorce itself more fair, this, in turn, would make marriage more attractive and enhance its stability. Given the pivotal role that marriage plays in our family system, this would contribute greatly to the happiness and well-being of adults and children. That would be a notable gain.

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(b) Of those completing the internet user survey before 12 March, a random sample of 4,369 were contacted again later to ask if they would like to do ours (1,352 agreed to do so).

This sampling strategy introduces three potential sources of bias.

First, this is not a probability sample design, for it is based on self-selection. This means that inferential statistics (including standard errors) are inappropriate for analysing these data.

Second, the target population consists of all Australian internet users, but this diverges from our theoretical population of all adults in Australia. There are good reasons to believe that people who use the internet are a peculiar and specific section of the whole population—not a cross-section of it.

Third, there is the normal survey bias problem that those in the target population who agree to participate in the survey may be quite unlike those who refuse.

These three problems can be rectified to some extent by weighting. The final sample was weighted by gender, age, state of residence and annual income to bring it into line with population estimates by the Australian Bureau of Statistics. This is a standard survey procedure for correcting sample biases, but it is not ideal. It controls only for certain characteristics, and there is no guarantee that the sample will turn out to be representative on other, uncontrolled, characteristics. To check for this, it is important to run various tests of 'external validity' (i.e. to check sample distributions for uncontrolled variables against other, external, sources).

One such test compares our respondents' stated voting intentions and reported past voting behaviour with opinion poll data for the same period. Roy Morgan polls conducted in March and April 2003 gave the Coalition between 39.5% and 45.5% support (the ACNielsen/CIS survey gives 44.9%); similarly, Morgan gave the ALP 36% to 42% support (ACNielsen/CIS gives 33.4%). It seems from this that there may be a small skew against Labor supporters in our final, weighted sample, and this is borne out by our data on how people claim to have voted in the November 2001 federal election: Roy Morgan gives 43% to the Coalition, 38% to the ALP and 19% to minor parties, while AC Nielsen/CIS gives 45.6%, 34.3% and 20.1%, respectively.

A second external validity test is to compare our data on marital status with that recorded in the first wave of the Household Income and Labour Dynamics (HILDA) survey. The HILDA survey shows: 21% had never been married, 56% were married, 8% had been either divorced or separated, 10% were in a de facto relationship, and 2% had been widowed. The ACNielsen/CIS survey gives 26.2%, 48.4%, 12.8%, 11.1% and 1.6%, respectively. Thus, the two surveys appear broadly consistent, although our survey slightly overestimates those who had never been married and those who had been divorced/separated, and slightly underestimates those who are married.

Overall, the weighted survey therefore appears to generate reasonably valid population estimates.

[108] Anna Byas, 'Family Law: Old Shadows and New Directions', paper presented to the 8th Australian Institute of Family Studies Conference, Melbourne (12-14 February, 2003).
[109] Maley, *Family and Marriage in Australia*, pp.194-196, see note 3.
[110] Jonathan Gruber, 'Is Making Divorce Easier Bad for Children? The Long Run Implications of Unilateral Divorce', *Working Paper* No.W7968 (Cambridge, Massachusetts: US National Bureau of Economic Research, 2000). See P.A. Nakonezny, R.D. Shull and J. l. Rodgers, 'The Effect Of No-Fault Divorce Law on The Divorce Rate Across the 50 States and its Relation to Income, Education, and Religiosity', *Journal of Marriage and the Family* Vol.57 (1995), pp.477-88.
[111] Maley, *Family and Marriage in Australia*, pp.35-49.