

Wedlock & Well-being

What Marriage Means for Adults and
Children

Barry Maley



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Key Points

- cultural and ideological changes have reduced the prestige of marriage
- marriage is now less of an economic imperative
- cohabitation offers some of the benefits of marriage, and has become more common
- married life with children is a declining choice
- on average, married people are healthier, happier and enjoy greater wealth
- on average, children not living with both natural parents are more delinquent, do worse at school, and have more mental health problems
- feminism saw home life as unfulfilling for women, and this view influenced governments
- tax and welfare policies encourage women into the workforce
- women with young children remain reluctant to enter the workforce, preferring to assume family responsibilities
- policy should not favour either women entering the workforce or staying with children
- marriage is a voluntary entry into an institutional framework of law and expectations
- law involves conceptions of justice, so the law of marriage should define and take account of wrong conduct in marriage
- no-fault divorce undermined the idea of marriage as an institution encouraging particular forms of conduct
- the courts decide entitlements to property, custody and maintenance in a moral vacuum
- divorce should be available to those who want it, but either partner should be able to raise the issue fault in arranging divorce *settlements*
- fault may include such things as violence, habitual intoxication, and neglect of children

TAKING CHILDREN SERIOUSLY

In 1994 the Centre embarked on a program of research entitled *Taking Children Seriously*, directed by CIS Senior Fellow Barry Maley. At the heart of the program is the present and future well-being of children. This publication arises from work carried out under the program.

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Foreword

Research into human well-being stresses the importance of our institutional environment. In *Wedlock and Well-being* Barry Maley looks at the role of the institution of marriage in the well-being of the partners and their children. On a wide variety of indicators, married people enjoy higher levels of well-being than the unmarried, as do children living with married parents.

The question is why does marriage have this positive effect? Why do married couples and their offspring do better than cohabiting couples and their children? Part of the answer, at least, is that marriage allows for more stable and long-term provision of some basic human needs and desires, including the raising of children. It is for this reason that marriage remains a popular institution, even if people are marrying later and divorcing more often. By their mid-40s, it is still the case that over 90 per cent of people will have been married at some stage.

In a liberal society, no law should enforce an unwanted association between two adults. But given the importance of marriage to the well-being of adults and their children, and the clear preference of such a large proportion of the population to be married, the law should do what it can to facilitate this state. *Wedlock and Well-being* argues that the law of marriage no longer achieves this objective. By removing ideas of right and wrong from marital conduct, it changes the character of marriage in the public mind, and weakens the incentives to behave in ways conducive to continuing marriage.

When you add to this internal weakening of the marriage institution the external pressures married couples face - most particularly the financial burdens, exacerbated by high tax rates, of raising children - it is not difficult to understand why divorce rates have increased so much.

Any attempt to reduce the rate of divorce, and so avoid the loss of well-being that flows from the breakdown of a marriage, must address all the pressures placed on the marital bond. Many improvements can be made to tax and welfare policies, but economic difficulties are likely to remain for many families. Strengthening the institution of marriage, however, will leave families in a better position to survive the external economic pressures they face.

Barry Maley's proposal to reintroduce fault to divorce settlements would provide such a strengthening. Since it applies to settlements rather than the separation itself, no couple who genuinely desire to part will be prevented from doing so. But it does alter the incentives facing the couple during their marriage. If, while married, people know that

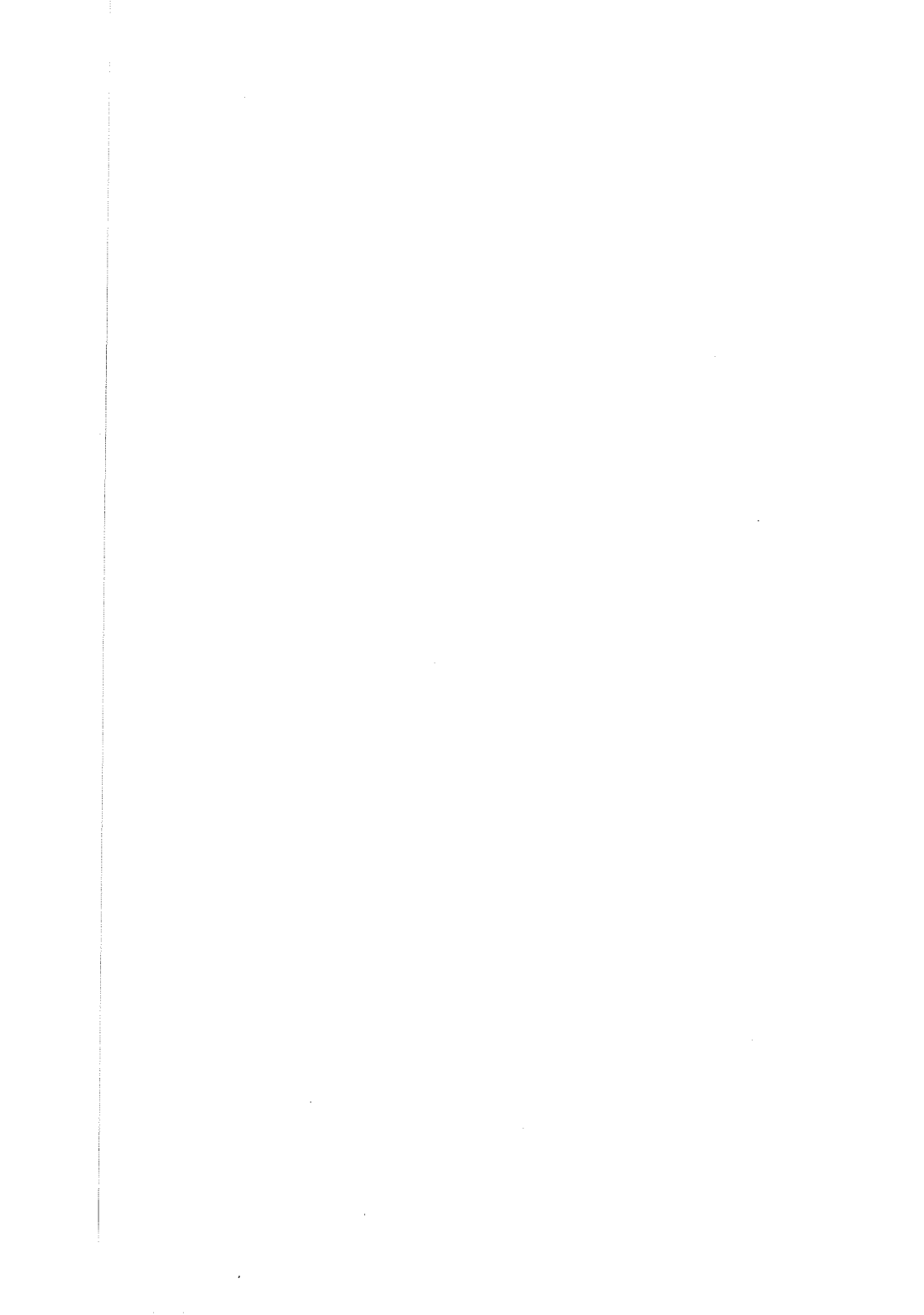
the actions that damage marriage, such as violence, adultery and child neglect, will be costly if they end in divorce, then they are that much less likely to commit those actions. Also, to the extent that the law serves to set standards, such a change will serve to clarify and raise the status of the obligations of marriage.

Greg Lindsay
Executive Director

About the Author

Barry Maley is Director of the *Taking Children Seriously* program of the Centre for Independent Studies. He has been Senior Fellow at the CIS since 1989, and prior to taking up this appointment was Senior Lecturer in Behavioural Science at the University of New South Wales. He is the author of *Marriage, Divorce and Family Justice* (1993) and *Ethics and Ecosystems* (1994) and a contributor to *Shaping the Social Virtues* (1994) and *Home Repairs: Building Stronger Families to Resist Social Decay* (1996).





Wedlock and Well-being

What Marriage Means for Adults and Children

Barry Maley

Nobody who reads, listens or watches could fail to notice the increasing attention given in the public media to reports of abuse of children, family violence, juvenile delinquency and suicide, or the misgivings being expressed about various aspects of family life and the welfare of children. Such concerns are not confined to 'family conservatives'; they are widespread and include commentators across a broad spectrum of opinion. Nevertheless, in connecting these problems to disorders within families, it is rarely the case that the commentators focus attention upon the present state of the institution which, more than any other, we expect to underpin the stability and effectiveness of family life - the institution of marriage.

Marriage, as a socially recognised, long-term compact between a man and a woman, has a central place in the lives of the very great majority of adults, whether or not they have children. For children, marriage is important in helping to secure the continuous care of their natural or adoptive parents and in giving them legal identity and kin.

To speak of marriage as an 'institution' is to draw attention to its *social* character; to the fact that it is an established practice governed by a legal, conventional and traditional framework with a long history. Within the last generation, that framework and the status of marriage have been profoundly changed. It is the connection between that change to marriage and the consequences for the well-being of adults and children that will concern us in this discussion. It is part of such a discussion to examine the roots of change as well as their consequences, and that in turn involves the interrelationships of public policy and public opinion, ideas, economic developments and legal innovations. There is evidence, for example, that public policy, under the influence of certain vigorously-promoted ideas, has misconstrued the preferences of most mothers about the relationship between work, and care of dependent children.

If marriage plays a positive role in the well-being of adults and children, then its stability is important. But the conditions of stability

cannot be considered in isolation from a clear conception of what marriage means and what is required of family law in order to support it. Accordingly, some reflection on the nature of marriage and the role of family law are necessary if we are to understand the parameters of marriage that will sustain the kind of family life that best protects against the disorder, abuse and violence that concern us.

Life-long Marriage?

Over the last 40 years the annual divorce rate in Australia has almost quadrupled from 0.7 divorces per thousand of the population in the early 1960s to 2.7 per thousand in 1994 (ABS 1986; 1994a). That increase has followed the substantial changes in family law which began with the Matrimonial Causes Act of 1959, which allowed divorce either on the grounds of fault, or on the grounds of five years separation without proof of fault, and which greatly accelerated after the passing of the more radical Family Law Act 1975, which completely eliminated fault-based divorce and reduced the period of separation to one year. The Australian Bureau of Statistics declares, quoting a study by the Australian Institute of Family Studies based on current trends, that over the next thirty years, 40 per cent of marriages can be expected to end in divorce (ABS 1995:35). It would nevertheless be precipitate to conclude that these divorce trends are entirely due to changes in family law. As we shall see, the period since the mid-1960s has been marked by other changes that have probably combined with changed family law to destroy the former equilibrium of marriage and family life.

Although marriage is now a great deal more precarious, delayed for much longer, and, by an increasing proportion of men and women, not sought at all, the majority of marriages still last for life: the idea of marriage as a life-long contract 'renouncing all others' is not dead - at least not yet. Nevertheless, married life with children is a declining choice. We do not know whether these trends will accelerate or slacken. However, since the social, economic and legal conditions which are apparently sustaining the present situation have not substantially changed, it is reasonable to expect that the trends will be maintained. Some confirmation of the continuing decay of the family household emerges from a recent survey by the Australian Bureau of Statistics (1996). It shows that 69 per cent of households have no children, an increase of 6.6 per cent since 1986 that is probably due to the ageing of the population profile and greater longevity. The number of couples aged 25 to 34 with no children is increasing, with the number of childless couples double the number of those with one child or two

children. In 1986, 573,000 people aged 25 to 34 had two children, but by 1994, despite a substantial increase in total population, the number had fallen to 487,000.

Two major trends seem to underlie these changes to marriage and family life. The first is cultural and ideological. In the 1960s the West was swept by 'liberation' ideology and critical movements that began a 'long march through the institutions' - movements that are still working themselves out and influencing public attitudes and policies. So far as marriage is concerned, there was first the attack, in the name of sexual liberation, on the restriction of sexual activity to marriage, and then the disparagement of marriage as a patriarchal and oppressive institution by a resurgent feminism. One measure of the success of these attacks is the virtual disappearance of marriage as a topic of sophisticated discussion or popular treatment, and as a suitable subject for serious policy analysis.

The second major trend was technological and industrial change, beginning during World War II, which saw an increasing number of married women entering the industrial and commercial workforce. This was reinforced by the growing education of women, their ability to command higher salaries, the ready availability of labour-saving domestic devices, the feminist critique of 'women's work' and the reduced status of domestic management, and the intrinsic attractions, for many better educated middle-class women, of a wider life outside the home (Sullivan 1996). However, as we shall see when the question of women's work preferences is discussed, it is important not to attribute to the majority of women attitudes that may, in fact, be confined to a minority.

These trends were mutually reinforcing and further exacerbated by the growth of a high-taxing welfare state which claimed higher proportions of family income (Dwyer and Larkin 1996), by the introduction of state-guaranteed incomes for divorced and unmarried mothers, and by the extinction of the concept of the 'family wage' for men, all of which increased the incentives for wives to seek workforce wages to maintain family lifestyles and disposable incomes.

All of this has had profound effects upon the private economy of marriage and its foundations in the domestic division of labour (Becker 1991). Because of women's increased earning capacity, and welfare security for unmarried or divorced mothers, marriage is no longer the economic imperative for women it once was. This greater independence and the 'opportunity costs' of marriage, in terms of what has to be given up for it, mean that marriage may be either more readily dispen-

sable or not worth having in the first place. Similar considerations apply to the 'costs', for high-earning women, of having children.

Overall, when marriage as an economic option is worth less and more uncertain, it is likely that less will be invested in it; and it is likely, if marriage's remaining attractions are sex and companionship, that simple cohabitation will suffice; and then, if marital companionability disappears, that the marriage will be quickly shed. Complementing these trends, from a male perspective, is the reduction of the previous gains from the division of labour as married women join the industrial workforce and specialise less in the production of domestic goods and services from which husbands benefit. So marriage is less valuable to men and, because men still, on average, contribute more property - an asset put in jeopardy by divorce - so they, too, will be more wary of investing in marriage and they, too, will be increasingly attracted to the less risky option of companionship (the remaining benefit) through cohabitation. The upshot is that, in the absence of countervailing constraints or incentives to keep partners together, marriage comes more nearly to approximate cohabitation. Married men and women then have little more to hold them together than a highly vulnerable relationship comprising sex and companionship, unsanctioned by law and moral censure, and less supported than previously by a mutually beneficial division of labour and an economic nexus. Also, in the face of a declining birth rate (itself not unrelated to these trends and economic pressures), couples will be bound together less than previously by the presence of children.

Cohabitation, not surprisingly, is even more unstable, lacking as it does even the nominal commitments and long-term expectations that still characterise most marriages, and attractive, as the evidence shows it to be, to individuals distinguished by a complex of motives and values different to those held by men and women who choose marriage. For example, Waite shows that 'the choice between cohabitation and marriage is affected by attitudes and values toward work, family, leisure time-use, money and sex roles, as well as values and attitudes towards marriage itself' (1995a:622-23). Noting the 'large and persistent empirical association between premarital cohabitation and subsequent divorce', Waite conjectures about the likelihood that those who choose cohabitation are a select group with 'liberal' values, and comments '...that these values are indicators of preferences for a kind of union with distinctly different characteristics than marriage. Our results are consistent with the idea that cohabitation is attractive as an alternative to marriage not only because it is a tentative, nonlegal form of a

co-residential union but, more broadly, because it accommodates a different style of life' (1995a:623).

As the rate of divorce rose through the 1970s, so too did the rate of cohabitation, albeit at a somewhat faster rate (ABS 1995:38). De facto couples represent between 8 per cent and 9 per cent of all couples and 5.2 per cent of all children now live in de facto households. About 40 per cent of de facto couples have dependent children (ABS 1995:25,27,38). Cohabitation is a highly unstable relationship and its rate of break-up is somewhere between five and ten times higher than the rate of divorce. And, contrary to the expectation of many that pre-marital cohabitation would lead to better-considered and stronger marriages, the contrary has proved to be the case (Waite 1995b).

Under these circumstances of more divorce and more cohabitation, increasing numbers of children experience childhood in homes lacking one of the natural parents, more usually the father. Today, almost one child in five lives apart from its natural father. Between the turbulent ages of 10 and 19, this is true of *more* than one in five children.

We must now turn to examine some of the consequences of these trends for the well-being of adults and children.

Marriage and Adult Well-being

It would be surprising if an institution as old as marriage should be devoid of benefit, and, on the whole, marriage is good for men and women. In view of what has just been said, we should add the qualification: 'if it lasts'. Statistics, surveys and clinical evidence demonstrate significant benign effects of a marriage relationship if it does last. In general, married men and women are healthier, happier, live longer, feel more fulfilled, and take better care of themselves. In a recent compendium of research findings in this area by various investigators, Glenn Stanton (1995) quotes the following conclusions from a review of 130 published empirical studies by Professor Robert H. Coombs, Professor of Behavioural Sciences at the University of California at Los Angeles:

- '... married people live longer and generally are more emotionally and physically healthy than the unmarried';
- 'Studies consistently find more alcoholism and problem drinking among the unmarried than the married';
- '... empirical support extending back to the 19th century shows that the highest suicide rates occur among the divorced, the widowed and the never married and the lowest among the married';

- 'The married consistently show lower mortality rates than the single, widowed or divorced persons';
- '... married people spend fewer days in bed due to acute illness than singles ... and ... divorced women have double the rate of injuries as married women';
- '... the separated and the divorced of both sexes experience particularly high mental health risks';
- '... no part of the unmarried population - separated, divorced, widowed, or never married - describes itself as being so happy and contented with life as the married'.

In the same publication, Stanton (1995:8) quotes from another review of research studies carried out at Texas A&M University:

Perhaps the most consistent finding concerning the state of marriage is its association with enhanced positive well-being and attenuated negative outcomes for both men and women. Married individuals report lower rates of psychological symptoms than do the unmarried, and they seek psychological services less frequently.

In a recent study, Professor Linda Waite (1995b) of the University of Chicago found that for both men and women, marriage increases the life span, and the benefit increases with the duration of the marriage. Married men live, on average, about ten years longer than non-married men, and married women about four years longer. She also found that married people have sex more often and enjoy it more, and that cohabitation does not increase the likelihood of a stable partnership. This latter finding is consistent with research by Professor Ailsa Burns (*The Australian*, 12 July 1994) of Macquarie University which found that unmarried couples with children were ten times more likely to split up than married couples with children.

Not only do married couples have more sex, if United States experience is a guide, they also enjoy greater wealth (Waite 1995b: 493). There are a number of reasons why this is so. Economies of scale allow two 'to live as cheaply as one', and many goods and services, such as household items (TV, car, refrigerator), food storage, heating, etc., can be shared at lower per capita cost. Marriage allows each spouse to specialise and to share the benefits of specialisation, one example of which is higher earning capacity, especially for men.

Some have argued that the findings which show that the married do better than the unmarried simply reflect the fact of *selection*; that is, that the unmarried are more likely to be inherently disposed towards pathology, find it more difficult to attract partners, and are therefore

less likely to marry; or, if they do, that the marriage is more likely to fail. Stanton quotes Coombs' conclusion from the studies he examined that this hypothesis is not supported and that 'by contrast, the evidence consistently supports the protection/support hypothesis' which argues that marrieds 'do better because of the ameliorative effect intimate, committed, lifelong companionship can have' (Stanton 1995:10). While selectivity is clearly a relevant factor in the disparities in well-being between the married and the unmarried, the benign effects of marriage are not in serious dispute. Waite also reviews the literature on this question of selectivity and quotes, as a fair summary of the situation, the conclusion by Ross that:

The positive effect of marriage on well-being is strong and consistent, and the selection of the psychologically healthy into marriage or the psychologically unhealthy out of marriage cannot explain the effect (1995b: 497).

Those factors which work against marriage and its stability, and which therefore deny its benefits to substantial numbers of men and women, reduce adult well-being. It is clear that the increasing retreat from marriage, represented by the growth in numbers of those who will never marry, or marry much later, or who will divorce, is a major but silent contributor to a range of adult disorders and unhappiness that we cannot accurately measure but whose reality can hardly be denied. On the other hand, it must also be true that some forms of misery and absence of well-being are reduced by the possibility of exit from disastrous marriages. It would seem that the optimisation of adult well-being lies in reforming the institution of marriage to strike the right balance between too-easy and too-difficult exit from marriage.

Marriage, Parenting and the Well-being of Children

A body of expert opinion has claimed for some time that divorce and unmarried parenthood are, on the whole, bad for most children. Some of the social science evidence contests this view, arguing that the deleterious effects, though real for some children, are not universal and frequently overstated; and, further, that it is conflict before divorce that does the damage, so that divorce comes as a relief (Dunlop and Burns 1988; Allison and Furstenberg 1989; Cherlin 1991; Kline, Johnston and Tschann 1991). Over the last few years, however, the balance of evidence from a variety of studies has moved towards a scenario of reduced well-being, greater frequency of lower levels of attainment, and emotional and behavioural problems amongst children whose parents have divorced. The evidence supporting this general picture is

well summarised by Morgan (1996:30), who observes:

The children of divorce are also predisposed to repeat patterns of marital disruption and single parenthood in their own lives, with daughters being far more likely to have teenage births, pre-marital births and failed marriages compared to girls who grew up in undisrupted homes. For sons, divorce can be the first link in a chain of educational failures, early termination of training, poor mental or physical health, poor employment prospects, low marriageability and an increased chance of dropping out of the workforce by the mid-30s.

There is also disagreement about the effects on children of sole parenthood and living in 'blended' or step families. This is a subject discussed in more detail below, and evidence is summarised which indicates that, on the whole, life outside the natural family is worse for most children. In short, there is little dissent from the view that, on average, the best environment for rearing children is an ordinary family of two cooperating, natural or adoptive parents motivated by their love for their own children and supportive of each other in the caring task.

To get at the truth, or at least as close as the uncertainties of social science permit, it helps to clarify what is being said on both sides. No reputable social scientist, and certainly no sensible person, would deny that many children may not be noticeably affected by divorce, or that some might thrive after it; nor would it be denied that many well-adjusted, high-performing children may emerge from sole parent and step-families. The socioeconomic and personal factors involved are large in number and variable in strength, and the way they will determine individual cases cannot be predicted by anybody.

But the social sciences deal with probabilities. What the body of evidence says is that, given adequate survey controls for differences in economic circumstances and parental education, the probabilities are that children from broken, sole parent and blended families will show significantly lower achievement and well-being on a variety of measures than do children living with their natural parents. It is ridiculous to transmute this bald fact, as some do, into an intended stigmatisation or denigration of *all* divorced, sole, or step-parents and their children. By some, drawing attention to differences in child-rearing performance by different family types is itself stigmatised as 'scapegoating', or a 'values-oriented' attack on 'family diversity' stemming from a conservative, 'patriarchal' or reactionary view of what family life *should* be. However, if children suffer from some adult decisions, it is not clear why that fact should be concealed.

The prevailing or 'politically correct' orthodoxy is that 'flexible' families should be encouraged (Inglis and Rogan 1994) and that public policy should be 'inclusive', where 'inclusive' means that one should be indiscriminating and uncritical of particular outcomes from particular family types. But this begs the question whether different family forms and circumstances produce different outcomes in terms of child well-being on some agreed measures, such as survival, health, emotional stability, delinquency and criminality, educational achievement, etc. In recording outcomes, we must deal, in the social sciences, with averages, and when the averages and the weight of evidence point in certain directions as, in these matters, they do, it is folly to ignore what they are telling us. In this case, they are telling us that some family circumstances expose children to greater risks than others. If we have the well-being of children at heart, then public policies that exacerbate or encourage those risks are bad policies, at least in relation to child well-being.

The Effects of Family Dysfunction on Child Well-being

There is now a substantial body of research on the effects of different family forms and practices on the well-being of children. In the summary which follows, findings of American, British and Australian research will be recounted. Despite some differences between the American and British situations, compared to Australian conditions, it is nevertheless true that all three countries have a great deal in common in terms of language and culture, relative economic prosperity, legal systems, basic family structures, and family law. In all three, if we exclude the special case of the disastrous black American family, there is clear comparability in ease of divorce, and in the prevalence of divorce, sole parenthood, cohabitation, and 'blended' families. It is therefore reasonable for Australians to take account of sound research in these matters in Britain and America, unless a factor peculiar to one or other of the three countries can be shown to be an important contributor to, or modifier of, whatever particular phenomenon is under investigation.

Britain

In a recent review of reported research on the effects on children of family dysfunction and breakdown, British social scientist Patricia Morgan (1995:Ch. 5) describes the observations of a variety of British and American studies, which can be summarised as follows:

- Delinquent behaviour is 10 per cent to 15 per cent more prevalent for children without both their natural parents.

- In a study of young offenders, it was found that 52 of 74 offenders were living either with neither parent or with a sole parent, and of the remaining 22, several were living with step-parents, de facto parents or grandparents.
- A Cambridge Study of Delinquent Development showed that delinquents were more likely to be born ex-nuptially, and that the risk of delinquency doubled where homes were broken by divorce.
- The British National Child Development Study found that 8 per cent of boys living with both their natural parents had been to court at some time, compared with 16 per cent of those living with sole parent mothers, and 19 per cent living with step-fathers.
- The infant mortality rate in Britain for ex-nuptial babies, registered by the mother alone, is 80 per cent higher than for babies within marriage, and absence of the father is a risk factor for infant mortality. Morgan comments on this as follows:
‘The contribution that fathers make to reduced mortality and morbidity is not simply a matter of the way in which two parents can supplement each other, and each can compensate or help to make up for the deficiencies of the other. There are indirect effects of quite impressive scope and consequences which demonstrate how being a group involves a qualitative, as well as a quantitative, difference. Satisfaction in the marital relationship is associated with good parenting and clearly makes a critical contribution to the trajectory of the mother-child relationship and the child’s development. From the earliest days, the father’s support for the mother increases her effectiveness and sensitivity in the care and feeding of her infant, as well as enhancing and reinforcing her relationship with the child and her role as a parent. New parents are even more likely to examine and tend to their babies when their partners are present’ (1995b:123).
- Lone mothers and single and divorced women are much more likely to be admitted to a mental hospital and more likely to use mental health services than married mothers. (It would seem to follow that their children would be exposed to a more hazardous situation in terms of continuing and competent maternal care.)
- Higher rates of child homicide and abuse are correlated with high rates of births to teenagers, with divorce, and with ex-nuptial parenting.
- British court records show that child abuse is 20 times more likely when the parents are not married. Also, the risk of abuse for

children whose mothers were cohabiting was five and a half times greater than for children with stepfathers.

The United States of America

For our purposes here, only a sample of the huge body of American evidence on the effects of family dysfunction on children can be recounted. It is consistent with British findings and, as we shall see shortly, Australian evidence. One of the most impressive studies - a survey by the U.S. Department of Health in 1988 - examined the well-being of a sample of 60,000 children in varying family circumstances and analysed the results according to the age, sex and ethnicity of the child and the income and marital status of the parents. They showed that, except for the richest families, 'children living with a never-married or a divorced mother were substantially worse off than those living in two-parent families. Compared to children living with both biological parents, children in single-parent families were twice as likely to have been expelled or suspended from school, to display emotional or behavioural problems, and to have problems with peers; they were much more likely to engage in anti-social behaviour' (Wilson 1993).

McLanahan and Sandefur quote the findings from five American surveys which show that children from one-parent families are about twice as likely to drop out of school as children from two-parent families (1994:41). Their overall conclusions from years of sustained study of the well-being of children from one-parent families are disturbing:

... we reject the claim that children raised by only one parent do just as well as children raised by both parents. We have been studying this question for ten years, and in our opinion the evidence is quite clear: *Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents ...* (their emphasis) (1994:1).

Echoing the comments made above by Patricia Morgan, Anstone and McLanahan (1994) observe that children in one-parent families spend less time with their fathers, but they also spend less time with their mothers than children in two-parent families.

Diana Russell (1984) has analysed interviews with 930 adult women in San Francisco which revealed that 17 per cent, or about one in six who had a stepfather as a principal figure in her childhood years, was sexually abused by him.

Barbara Whitehead notes (1993) American statistics which show that: 'Nationally, more than 70 per cent of all juveniles in state reform

institutions come from fatherless homes ...'

A large body of American research deals with the relationships between rearing practices by parents, family structure or type, and the genesis of delinquency and criminality. The results of some of the best of this research are unequivocal in pinpointing the consequences, in delinquency and incipient or actual criminality, of failure by parents 'to monitor their children's behaviour and to recognise and correct misbehaviour when it occurs' (Hirschi 1995:127). Such parental failures are more likely to occur in disrupted and stressed families. Clearly, among the most important contributors to disruption and stress are divorce and sole parenthood; and the latter serve also to exacerbate stress and disruption that might occur for other reasons, such as unemployment, residential mobility, large numbers of children in the family, drinking, etc.

Sampson and Laub (1993:95,97) conclude, from their seminal study of delinquency, that: 'A major finding of our analysis is that family process variables are strongly and directly related to delinquency ...' and that: 'Given the overall nature of our results, it is troubling that many sociological explanations of crime ignore the family'.

Australia

Australian evidence on the effects of dysfunctional and broken families on the well-being of children is consistent with findings in Britain and America.

Statistics collated by The Australian Institute of Health and Welfare (1994) indicate that the rate of sexual abuse of children in de facto couple families is more than three times the rate in natural or adoptive families.

The Australian Burdekin Report (1989) on homeless children suggests that somewhere between 75 per cent and 100 per cent of the homeless children surveyed were from step-families or lone parent households.

A study by Paul Amato (1987), sponsored by the Australian Institute of Family Studies, interviewed 402 children living in Victoria. Half were aged between eight and nine and half between fifteen and sixteen. Both groups of children reported that they got significantly less help from stepfathers than from biological fathers in intact families. The study also concluded that compared to other family types, children in stepfamilies had lower levels of reading ability, self-control and self-esteem.

In a carefully structured study of the relationships between child well-being and family and parental circumstances, using a large sample,

Zubrick and colleagues (1995) have recently released some of the preliminary findings of a continuing research program, which have been published by the Western Australian Government (1995). Some key aspects of these findings have been described and analysed by Alan Tapper (1996). As Tapper remarks, family structure or family type, and adult relationships within the family, are relevant to child well-being to the extent that they may be an indication of, or stand proxy for, the nature of the relationships between children and their parents. There is also the possibility that family type is an important variable in itself, which may preclude certain kinds of parent-child interactions that are important for child well-being. One finding from the study, for example, is the striking fact 'that poor adult relationships in original families seem to be better for children than good adult relationships in blended or single parent families' (Tapper 1996:61).

In the findings available so far from the Western Australian study, the focus is on the physical and mental health of children in different types of families. Controlling for family income, the critical variables in the study (Zubrick 1995) are family type, parenting style and family functioning and, taken together, these variables accounted for the very high figure of 83 per cent of all children with a significant mental health problem (Tapper 1996:63). Taking the single variable of family type, Zubrick finds that children in blended or step-families have more than twice the risk (2.05:1) of mental health problems as children in original or intact families, and children in single parent families have nearly three times (2.7:1) the risk compared to children in original families. When, to the risk factor of family type, inconsistent parenting and poor family functioning are added, the overall risk is multiplied, 'so that a child from a single parent family, with inconsistent parenting and poor family functioning, would face a risk of mental health problems ten times greater than that faced by a child in an original family with neutral parenting and good family functioning' (Tapper 1996:63).

Australian research does not begin to match in quantity the American research on the connections between family structure and delinquency and criminality. Nevertheless that which has been done is of high quality and consistent with the American findings mentioned above. For example, I have elsewhere described and discussed in some detail (Maley 1996a) Devery's study (1991) which uses a very large sample to analyse the socio-economic and family circumstances of criminal offenders. A major finding was the significant correlation between frequency of criminal offending and disrupted family circumstances, especially sole parenthood.

The direction in which research on the relationships between family structure and child well-being points is obvious. Allowing for exceptional cases, divorce, de facto and step-parenting, and sole parenting, are all associated, on average, with greater risks to well-being compared to natural parenting by the original married couple. Marriage, it seems, is good for children as well as adults.

Stresses on Marriage: Feminism, Public Policy and Women's Preferences

The failure to marry by a greater proportion of adults, its diminished status, and its much greater instability compared to a generation ago, constitute the most notable phenomenon of contemporary family life. We have only just begun to recover, in the light of such evidence as quoted above, the forgotten understanding of the central part played by stable marriages in underpinning the well-being of both children and adults as we have been forced to confront the outcomes, in abuse, crime and decreased well-being, of marriage breakdown and parenthood without marriage. But our social and legal policies, instead of supporting marriage as the centre of family life, now conspire with social and cultural trends to make it less attractive and more hazardous.

Human nature, poor judgment, disturbances of personality, illness, accidents and misfortune of various kinds may spoil or destroy marriages made in good faith. Many things which may make marriages unhappy and unsuccessful lie beyond the reach of social policy, law and economics. It was ever thus and always will be. Marriage, as perhaps the original and most fundamental of the 'civil associations' that have a life and a history largely independent of government, has, like other voluntary associations, its own inner processes and observances. Nevertheless, public policy has a part to play in determining family law and in shaping the economic and welfare environment of married life. What it does is important, but inevitably influenced by prevailing views.

Over the last 20 or 30 years in Australia, one of the most important influences upon government family policies has been feminism of a kind which sees marriage and family life as miserable and hate-filled, oppressive to women, and contrary to their deepest, but formerly unexpressed and unrealised, preferences.

Writing in 1971, in passages summarising the evolution of the Western family as, for example, Ibsen saw it, Germaine Greer tells us that by the turn of the century the middle-class family, '... had become a prison where the young struggled to escape the dead hand of the old, where the outside community was only represented by the policeman,

the doctor and the parson, where the servants were strangers and class enemies. Puritan morality had resulted in hypocrisy, frustration and pornography. Husband and wife danced a dance of diurnal murder. The father-protector, unable to assume any other field of superiority or prowess, was principally moral arbiter although unfitted for the role; the wife was a designing doll, disillusioned about her husband, confused and embittered by her own idleness and insignificance' (1971: 223). By the 1960s, according to Greer, 'Mother is the dead heart of the family...' (1971:224), and, 'The unfortunate wife-mother finds herself anti-social in other ways as well. The home is her province, and she is lonely there. She wants her family to spend time with her for her only significance is in relation to that almost fictitious group' (1971:225).

Within a few years this critical movement was fashioning prescriptions for change. Of the many authors of the voluminous literature of this kind, the American Betty Friedan was the most important and perhaps most influential, but by no means the most radical. What she has had to say has provided a rationale and foundation both for a feminist point of view and for a variety of policy initiatives, urged by feminists, that have won the acceptance of governments around the world, with major impacts on marriage and family life. Asserting: 'I believe that feminism must, in fact, confront the family' (1982:90), Betty Friedan goes on to develop, in *The Second Stage*, a variety of proposals that have become familiar parts of the family agenda of most Western governments, including Australia. For example:

- 'The need for child care options and restructured jobs, flexible working hours and maternity and paternity leave ...' (p.114);
- '... sharing of unpaid household labour between men and women ...' (p.117);
- In "the as yet unrealised ideal", the family will again become symmetrical, when "both the financial support and the physical maintenance of the family are equally shared between men and women" (p.118).

It is worth noting that underlying much of Greer's strictures and Friedan's program is the assumption that their views and preferences are *really* shared by the majority of women (if they knew their own minds), and express their deepest, innermost feelings about contemporary marriage, family and female roles, especially customary domestic roles. In a moment, that assumption will be tested against the available evidence of the actual choices and expressed preferences of women today - women better educated than ever before, much freer than in the past, more knowledgeable than previously about feminist theory and

practice, and not backward in expressing an opinion. Nevertheless, Friedan's program foretold what were soon to become either realities or continuing items on the change agenda in Australia. This is exemplified in the dozens of recommendations (many of which closely follow Friedan's intimations) contained in the final report of the National Council of The International Year of the Family (1994) issued by the federal government at the conclusion of the Year. They included the following:

- 'that the principle of equality between men and women as parents, partners, carers and breadwinners be embedded in all public policies ...';
- 'that government and community recognition of families incorporate full acceptance and respect for the diversity of families in Australia ...';
- 'that the positive contribution of sole parent families be affirmed, through broad community education so as to fully acknowledge their contribution to the care and nurture of their children, and their contribution to the wider community';
- 'that partnerships between families, employers, unions, governments and community organisations be forged to share the costs and benefits of providing family supportive workplace environments ...';
- 'that all family entitlements be equally available to men as well as women to enable both to be actively involved in family responsibilities.'

Indeed, much earlier, and not long after Friedan's words were written, we began to see government action in Australia to provide incentives and support for the entry of wives and mothers into the industrial workforce, led by child care subsidies explicitly intended to achieve that purpose (Commonwealth Department of Health, Housing and Community Services 1992:5).

Further, taxation and welfare policies over the last 10-15 years have had the effect of squeezing the disposable incomes of middle-income families with children and redistributing income, via the 'social wage', in ways that rob families of choice in expenditure and consumption. The result has been the restriction of family autonomy and the re-direction of the energies of wives and mothers away from domestic and child care activities and towards seeking wage incomes in the struggle to maintain as much as possible of a valued way of life. The Australian Institute of Family Studies estimates that in 1995 a family had to earn 1.6 times the income earned in 1970 to maintain the same standard of living

and housing (Bagnall 1996:18). Household indebtedness in Australia, as a percentage of GDP, increased from 29 to 44 per cent between 1988 and 1995 (Clark 1996). Dwyer and Larkin (1996) estimate that average living standards have declined by up to 13 per cent since 1983. The outcome has been financial pressure on families, strong incentives for them to add to their incomes, a massive increase in the use of out-of-home child care, and the influx of mothers into the workforce.

Between 1960 and 1995, the workforce participation rate of married women increased from about 24 to 57 per cent (Clark 1996) and the federal budget for child care expenditure has increased from \$65 million in 1982-83 to a projected \$1239 million for 1996-97. In the twenty years from 1975 to 1995, after allowing for population growth of about 35 per cent in that period, females aged 15-64 increased their total contribution to work-hours in the industrial workforce by 20 per cent. This real addition to work activity by the female population in this age group is made up of an increase in total full-time work hours of 21 per cent, and an increase in total part-time work hours of 121 per cent (Logan 1996). Since 1989, total work hours contributed by married women on both a full-time and part-time basis have been increasing at a rate faster than the rate of population increase of this group (Logan 1996). The resumption of a steep upward trend in these figures that followed recovery from the 1990-91 recession is especially noticeable.

Such major transformations of the home economy are occurring against a background of declining male workforce participation and persistently high unemployment - especially of young men - and growing levels of long-term unemployment. Their combined effects are to confront married life with a degree of turbulence and uncertainty that would be threatening even in the absence of important changes to family law.

But this does not exhaust the catalogue of forces affecting the character of marriage and the prospects of successful family formation. Much of recent public policy, based upon a perception of women's preferences promoted by a segment of feminism, has had important ramifications for marriage, family life and the care of children. Political initiatives, perhaps led by strategically-located interest groups, have taken it for granted that the movement of married women, particularly mothers, into the workforce is driven by a widespread female preference for the interest and stimulation of workforce participation compared with domestic life, and that this represents both liberation and a permanent transformation of female values in this generation. The massive public investment in child care subsidies, conditional upon

mothers joining the workforce, is but one example of policies based upon such a presumption. Undoubtedly, for many married women, especially the more highly educated and career-oriented, continued workforce involvement may be their first preference (Evans 1988; Kelley and Evans 1989), yet there is data which suggests substantial variation in preferences even within this group (Hakim 1996:185). More generally, the evidence is against the view that most women totally reject the customary division of domestic labour in preference for income-earning work. On the contrary, as we shall see, this is a simplistic view which has been indulged by public policy at the expense of a more common preference for home-based, personal care of children when they are young. Evans' research revealed that in 1988 4 per cent of mothers with *two* pre-school children were working full-time, and Australian Bureau of Statistics NSW figures for 1993 showed that 'where the youngest dependant was of pre-school age', 17 per cent of mothers were working full time (ABS 1994b:33).

Janeen Baxter of The Australian National University has studied domestic labour in Australian families for many years (e.g. Baxter et al. 1991). In a recent paper (1995), written from a feminist perspective as a contribution to 'understanding the domestic division of labour as not just a means of allocating tasks between men and women but as a set of institutionalised practices that operate to produce gender and to produce difference', she notes the persistence of the traditional division of domestic labour between husbands and wives and the expressed satisfaction of both with those arrangements: 'Overall, very few men (0.5 per cent) and women (3 per cent) report low levels of satisfaction with housework arrangements' (1995:13). Baxter further notes that: 'More broadly, these results suggest that policies aimed at integrating work and family demands, such as the provision of extensive childcare facilities, parental leave rights and a progressive taxation system, have little impact on the gender division of labour in the home' (1995:16). She conjectures that: 'While we might expect to see variations in the amount of time that men and women spend on domestic labour then, (although even here change is remarkably slow), we are much less likely to see a radical reorganisation of responsibility for tasks. Such reorganisation would require reshaping not just the division of tasks but more fundamentally, gender itself' (1995:17). While early feminist policy would see this status quo as failure, the general population more likely would view it as entirely satisfactory.

Baxter's conclusions, in the main, are echoed in Britain by Dr Catherine Hakim writing in the *British Journal of Sociology* (1995). On

the basis of her research, she concludes that by the early 1990s about one-third of adult British women were committed to full-time paid employment, while the rest were either not working at all or working part-time. However, these figures change when dependent children are involved, at which time upwards of three-quarters of women of working age are either not working at all or are working part-time. Between the ages of 25-34, when a high proportion may be expected to have young children, only 16 per cent are working full-time - a figure remarkably close to the figure of 17 per cent for NSW mothers of pre-school children quoted earlier (1995:435).

Other recent Australian research reveals similar patterns and strongly suggests that the coming of children and family responsibilities is crucial in determining preference for or against workforce participation for the overwhelming majority of women. Mariah Evans reports (1995:2-3) on the survey findings from a national sample of 2203 respondents that nearly all Australians (98 per cent) think that women ought to have jobs after marriage and *before* children. However when children arrive, 65 per cent believe that mothers of pre-schoolers should stay out of the workforce, 31 per cent believe that they should only work part-time, and only 4 per cent believe that full-time work is alright. When children begin school, 16 per cent approve of full-time work, 73 per cent part-time, and 11 per cent recommend staying at home; and when children are grown, 61 per cent approve full-time work, 35 per cent part-time work, and 5 per cent say 'stay home'.

In a recent survey commissioned by Murdoch Magazines, Andrew Brion Research (1995) investigated the attitudes of a sample of 2000 readers of *Family Circle* magazine, and of a separate, nationally representative sample of 514 parents living with children under 16. The areas covered were issues affecting family life - such as workforce participation, parenting, relations with children, pressures on families, government support for families, and so on. The target group was parents, and the *Family Circle* respondents were overwhelmingly mothers. The authors of the study claim that, in general, a comparison of attitudes expressed by *Family Circle* core readers and the general population of parents revealed 'very few differences' (1995:27). Among the findings:

- (i) 'There is a majority view that family life in general is deteriorating ...' (p.4);
- (ii) '... mothers are very unlikely to be working full-time, almost half of all mothers do not work at all' (p.4);
- (iii) 'As a whole, Australian parents are a more conservative group than

perhaps the media often paints them. Most parents still perceive that the mother, at the end of the day, takes primary responsibility for the children. While the modern day issues of a mother and her career are very much on the agenda for families; it is far more likely that a woman with younger children is working *simply* because the family needs the money; that is, if the family had more money the mother would choose to stay at home. Indeed, most (but not all) mothers explicitly state that they would choose to be at home and look after the children rather than do paid work' (pp. 4-5);

- (iv) 'The vast majority of parents, particularly mothers, believe that bringing up children and parenthood are undervalued in Australia today. Most see a role for government in providing the correct level of benefits (means tested or not), both to alleviate financial hardship and to provide the right messages to society about the value of family life' (p.5);
- (v) 'There is still relatively little questioning of the father's role as the major provider and about his role in working' (p.6);
- (vi) 'Around two-thirds of all parents see money as being the primary cause of marriage breakdown' (p.16).

This stubborn commitment to a home-based life and personal care of pre-school children, even when greater difficulties are put in its way, contradicts government policies. It demonstrates that they are premised on a mistaken and politically blinkered view of the actual and varying preferences of most women and men in regard to married life and the sexual division of domestic labour. This mistake has important implications for the success of marriage. We now have a substantial body of evidence from across the world showing a mixture of attitudes and preferences by men and women on this issue. As Hakim (1996) puts it in reviewing survey results from several European and Asian countries, there are substantial levels of support for *each* of three models of the sexual division of domestic labour. These models are: a complete separation of roles, where men are principally income earners and women principally home-minders; the egalitarian, in which the sexual division of labour is rejected; and, thirdly, what Hakim refers to as 'the *modern* sexual division of labour, which falls half-way between the completely equal sharing of income-earning and domestic functions to separate and parallel roles' (1996:181). The latter model is a compromise, and as the 'modern version of the sexual division of labour, which is relative rather than total, attracts even greater support [from married couples]' (1996:185). It is part of this compromise that most parents favour an arrangement whereby the mother stays home

and takes personal care of children when they are young, while the father continues to perform an income-earning role; and, as the children reach school age, the common pattern is for the mother to resume work, but preferably on a part-time basis. Hakim concludes:

We must stop presenting women as 'victims', or as an undifferentiated mass of mindless zombies whose every move is determined by other actors and social forces Women are responsible adults, who make real choices and are the authors and agents of their own lives. Some women choose to be home-centred, with work a secondary activity. Some women choose to be career-centred, with domestic activities a secondary consideration. Female heterogeneity is a result of the choices women make, reflecting not just different but conflicting preferences between two qualitatively different life courses (1996:186-7).

In a liberal society, government policy in family matters should be to avoid decisions that will make it difficult for couples to exercise preferences, provided no harm to third parties is involved. This means avoiding the provision of incentives that will have this effect, especially where the rearing of their children is concerned. Accordingly, neither wives who prefer to stay at home with young children nor wives who prefer to work should be induced by government incentives (such as differential child care assistance conditional upon joining the workforce) to shape their life courses one way rather than another. That is not the case under present policies, and so a form of social engineering prevails which raises the economic odds against preferred choices by couples, which works against their judgment of the best interests of their children, and which increases the pressures of married life. If government support for 'child care' is to be given, it should be in a form that guarantees even-handed treatment which is of equal value for differing parental preferences about the care of their children, whether undertaken by the parents themselves or by others (Maley 1993:79-106).

We are entitled to conjecture that the statistics of marriage and family life in Australia (and elsewhere) over the last 10-15 years or so might have been different if policies had been based upon a more accurate and realistic appreciation of the preferences of a substantial majority of men and women. These consequences might have been a less pressured and therefore more stable family life, fewer women forced into the workforce, less need for taxes to fund child care, and less need of taxation of families to pay for sole parent pensions to support

some of the casualties of failed marriages. We might also have seen less disparity between the economic circumstances of two-income couples without children and those of a single income family with dependent children, a disparity whose range and effects are difficult to disentangle because of redistribution through the tax-transfer system and the 'social wage'. However, Dwyer and Larkin make a strong case on equity grounds for believing that families with dependent children are substantially disadvantaged in comparison with couples without children (1996:9-10). Until the recent promise by the federal government to increase the income-tax threshold for families with children, this disparity, especially for middle income families with children, had been in place for many years. Its mitigation and removal is one of the more urgent needs of family policy, and one with considerable significance for moderating a source of economic stress in marriage.

The present reality is that family life has become increasingly disordered and uncertain, with unhappy consequences for the well-being of adults and children. And, because of the connection mentioned earlier between broken families and crime, with disturbing consequences also for civic safety and the quality of life for all. The causes, I suggest, are multiple and interactive, but fundamental to much else is the decline of marriage, and behind that decline are not only the trends described above, but also the changes to marital law. Before considering those legal changes, we must first, however, give some attention to just what it is we mean when we use the word 'marriage'.

The Moral-Social Character of Marriage

A crucial *moral* fact about Western marriage is that it is a *voluntary* estate created by a form of promising between men and women. One does not *have* to marry in order to enjoy sexual relations and companionship. In our society today, unmarried men and women may cohabit and choose whether or not to have children. Marriage and parenthood are not compulsory. But in all societies, including Australia, if marriage or parenthood is chosen, the parties concerned voluntarily enter an institutional framework of law and behavioural expectations which has slowly evolved and which stands ready to receive them. The common feature is the ordering of a class of adult relationships and child-rearing processes upon which societal well-being is perceived to depend.

The first imperative of any society is to survive and to reproduce itself. Saving abnormality, the adult heterosexual relationship is inherently, if not inevitably, generative. We must assume that societies which have survived could not have allowed this generative, and regenerative,

centre to remain 'unsocialised' - to be without rules, to be disordered and uncertain and to put reproduction at risk. The young must not only be brought into the world, there must be *regular* and predictable arrangements for their care; they must be socially 'placed' or 'legitimated', and they must be socialised into the norms and practices of the society lest they become unmanageable and dangerous aliens. This cannot be, without great risk, a haphazard or brief process, but a long-term and reasonably predictable one that lasts until early adulthood - up to the point when the new generation is able to continue what the previous generation has done. Marriage creates kinship units that provide continuous, long-term care, individual legal identity, rights and obligations in relation to persons, property rights and claims of descent and inheritance, which serve more distant interests of social renewal, continuity and culture.

The rules of marriage therefore provide a stable and orderly environment for the having and raising of children; but even for the childless, marriage offers certain guarantees and regularities for male-female relationships which may be valued by men and women and sought for those reasons because they may allow fulfilments difficult or impossible to attain without them. For such people marriage offers a way of life that simple cohabitation does not. Marriage laws and customs everywhere have the effect of constraining sexual relationships and of providing a rule-governed framework for sex and for economic and other social transactions and responsibilities between wives and husbands. As Posner puts it, without such restrictions 'marriage would be a contract for sex, no different from any other contract; the relationship between a prostitute and her customer would be marriage' (Posner 1992:244).

Ideally, among the fulfilments of marriage are forms of reciprocity and complementarity, of which sexual relations are perhaps the quintessential example. But there are others of importance, especially the companionate and economic. As the evidence on the effects of marriage on adult well-being confirms, for most married couples, to have a partner in life (and for life) is to have a helpmeet, a guardian, a friend, and an economic ally whose sexual and gender-distinct character and inclinations, as well as his or her capacities simply as another person, are the foundation for various kinds of 'division of labour' and joint activities that help sustain and enrich the partners and the partnership. The paired unit becomes more than the sum of its hitherto different and separate parts and, ordinarily, a more resourceful, flexible, and self-sustaining entity in facing the world than a lone individual. In emergen-

cies and hardship it is better equipped for a variety of responses; it can help sustain a hard-pressed or disabled member who might otherwise languish or perish. Marriage is certainly a kind of contract and, as such, deserves performance. However, as the truly married know, its terms can never be fully articulated or finalised; and this open-endedness cannot be mutually consummated without a wholehearted, voluntary commitment; without a profound moral engagement dedicating something more than mere agreement, promise or contract, although it must always be at *least* that. Most marriages are not as self-conscious as this suggests, but it captures the background moral 'noise' of a great many of them. Such relationships *are* marriage in its sense of a blending, which is neither mixture nor compound, of individual entities. That is why the loss of the meaning of marriage is a wound to liberty, to the means of enjoying and experiencing things which can only be made possible by marriage.

Nothing moral is unsocial; we cannot wholly define and engage in any moral commitment from our own resources, unaided and uninstructed. Marriage is everywhere a significant social event, and frequently a religious one, and the social or religious formalities are intended to carry moral force for the participants. The law now undermines this moral force, but cannot eliminate it. Even if the state wholly abandoned family law as a *specific* province, and marriage survived only as private contracts between individual men and women, this would not demonstrate the possibility of 'unsocial' and morally neutral marriage. Insofar as the parties must rely upon the enforceability of the contract under common law, they must also rely upon the public institutions that make enforceability possible and the *moral* understandings that support the common law (e.g. the 'rightness' of keeping promises) and the instruments of enforcement. Thus, the 'private' contract is nothing of the sort; it is inevitably moral-social and institutional. In this, as in so many other ways, marriage requires the complicity of the whole community, and is but one example of the way in which the institutions of society give us access to experiences impossible - even unimaginable - without them. They show us *how* our untutored moral sense and natural impulses may be given shape, direction and consummation through associations and traditions that are necessarily social and which predate us. How, for example, the instinct to mate may be transformed from simple coupling and procreation into the many-sided moral-legal-kinship order of marriage and family formation, through the tutelage of social rules and ceremony beyond the wit or power of discrete individuals to formulate or imple-

ment; but which, when we exploit what they offer, can greatly enlarge what unaided instinct can accomplish .

That even the most secular marriages still continue to be *ceremonialised* in some way is a clue to marriage's inherently social-moral character and to the need experienced by the partners that their act of union should be socially shared and recognised. Moreover, in needing and accepting the marriage ceremony and the social rules which govern marriage, men and women implicitly agree to submit themselves to the judgment of a third party, beyond themselves, of the *validity* of their marriage and, correspondingly, of the justifications for its dissolution, if it should come to that. All of this means that marriage is more than a private arrangement between individuals, and it is therefore entirely appropriate - indeed unavoidable - that marriage should formally involve society and become a *legal* event. But what then falls within the compass of the law must also fall within the compass of justice; so the laws governing marriage and divorce should pass the test of justice and procedural equity. There can be no test of justice that does not include conceptions of right and wrong conduct, no less in marriage than in any other sphere of life that engages the attention of the law. It follows that the laws governing marriage should acknowledge the requirement to define, and take account of, wrong conduct - or fault - in marriage.

Accordingly, and given the importance of decisions to marry and have children, it is fitting that those who undertake the obligations and duties entailed in their voluntary commitment to marriage should be held accountable for their undertaking towards the partners they have implicated in their promises, and only fair that the nature of these obligations and duties should be clear beforehand and reasonably stable. It is part of the thesis of this paper that clarity, stability and accountability in these matters have greatly diminished in this generation, and that the subsequent decay of the institutional integrity of marriage is denying men and women the opportunity to fortify their union with the legal and conventional supports that only the institution of marriage can offer. A variety of cultural, social and legal changes has gravely weakened the idea and reality of marriage. The bitter irony is that that loss is portrayed as a liberation.

Divorce

If the essentials upon which the Western idea of marriage is based are summed up as permanence, sexual exclusiveness, companionability and economic advantage, then marriage is threatened by developments

that put any of these in question. The possibility of divorce obviously does so. But we have to ask what is most likely to create a demand for divorce and the acknowledgment of a need for it. The loss of companionability immediately comes to mind. The erosion of affection and respect for a variety of reasons is a possible hazard of marriage, and when they go, sexual relations tend to go, too. Such a marriage may become intolerable to at least one of the parties and this creates the demand for divorce. Most people can understand the misery of a loveless marriage, and its common ancillaries of quarrelling or violence or cruelty or adultery, as the negation of what marriage is supposed to offer; so the ideal of Western marriage is put at risk when permanence and companionability become incompatible. Public opinion is therefore likely to acquiesce in the possibility of divorce on these grounds, and to see it as the necessary condition of an opportunity to seek love and companionship in another marriage. It is recognition of the legitimacy of the demand for the right of remarriage under defined circumstances that makes divorce acceptable in principle, even though that principle alone may leave unexamined the rights of the other party if the divorce is not consensual, or the claims of children if it is.

Once divorce on certain grounds is allowed, the definition of grounds gives us greater insight into what society believes the purposes of marriage to be, and especially what might be entailed in 'companionability'. Before 1960, several necessary grounds for divorce appeared in the law. They included such things as adultery, insanity, habitual drunkenness, physical and mental cruelty, failure of sexual consummation, and long-term imprisonment. It is not difficult to see that such 'faults' in marriage destroy companionability or the prospects of family formation, and not difficult to see that such failures of performance tell us what minimal kinds of conduct are expected of marital partners and supported by the law and its sanctions.

With the passing of the Matrimonial Causes Act of 1959, several grounds of 'fault-based' divorce remained, but the *necessity* of proving fault, before divorce could be granted, was abolished for those couples who had separated for five years. With the passing of the Family Law Act 1975 this ground was reduced to one year's separation, conceived as demonstrating the 'irretrievable breakdown' of the marriage, and 'fault-based' divorce disappeared entirely. Superficially viewed, this development seems to represent the apotheosis of the concept of marriage as companionship, in that the absence of a desire by one party to continue living together is a wholly sufficient ground for divorce; and this is followed through by terms of settlement which forbids that the law

should take account of the prior behaviour by a spouse in the marriage, and give no regard for the interests of children or a non-consenting partner in continuing the marriage. It lays claim to greater liberality (if not to justice and due process), through putting an end to the adversarial encounters, to the inherent difficulties of apportioning blame, and to the frequent collusion by spouses in providing grounds through trumped-up adultery and the like, which had characterised many divorces of the 'fault' era.

An unforeseen effect of the elimination from family law of several defined grounds of fault justifying a claim to divorce, conceived merely as a humane adjustment, was a radical change in the public conception of the nature and purposes of marriage. Where, previously, marital faults were acknowledged subversions of these purposes, their total disappearance from the language of marital law since 1976 is a negation of the idea of marriage as a special estate, as an institution and contract, framed by law to encourage certain regular forms of conduct which promote companionability and the establishment of an enduring joint enterprise with many aspects and ramifications, especially if children are involved. Private cohabitation, casually and instantly dissoluble at will, lacks the social embeddedness that defines and constitutes marriage and is a pale imitation of marriage. Marriage, as suggested earlier, is not an individual contrivance, but a complex social artifact, insupportable without the collaboration of the law and public opinion.

In the legal processes of divorce, as it used to be, the moral character of the institution was sustained by identifying those who fell short and those who did not, thus publicly vindicating and safeguarding standards of conduct in marriage and reaffirming principles of just treatment for those harmed or disadvantaged by the faults of others. When the law does that, one knows what marriage expects of one, and one knows the penalties for falling short. To volunteer for marriage is a free decision to accept certain responsibilities. But when transgression, or 'fault', becomes impossible in the eyes of the law, notions of responsibility are mocked, legal support for the conduct that makes genuine and enduring marriage possible is withdrawn, and the notion of marriage as a distinct estate comprising weight-bearing promises, voluntarily offered, is fatally diminished. The perverse symmetry of this mockery is completed in divorce wrangles over property, custody and maintenance, where the court must decide entitlements in a moral vacuum, sealed off by 'no fault' divorce rules from any consideration of the respective responsibilities of the parties for bringing about the situation requiring this blind and unprincipled search for entitlements.

The commitment of the law to this position was recently expressed by the Chief Justice of the Family Court, Mr Justice Nicholson, when he claimed, among the things for the Court 'to be proud of' in respect of disputes over custody and property, that: 'While these disputes are often bitter, they do not contain any determination of moral blame which was so much a characteristic of proceedings under the old system' (1996). That this 'bitterness' may at least in part be due to moral outrage and a sense of justice denied seems not to have occurred to him.

Reforming Family Law

As we have seen, not all of the difficulties of modern marriage and their consequences for the well-being of adults and children can be laid at the door of family law and no-fault divorce. Yet family law has a very important part to play in sustaining marriage, and bringing just process to divorce, which it is not presently providing. Marriage today is inconceivable without the involvement of the law and, that being so, family law, in common with the rest of our law, must strive for justice and seek it through clear, certain rules and due process. Part of the problem is to secure agreement about what constitutes serious misconduct in marriage and the principles of just treatment in marriage and divorce. As suggested earlier, the delivery of justice under family law is impossible without a clear view of what constitutes acceptable and unacceptable conduct in marriage. To admit the possibility of significant harm to those affected by unacceptable conduct is to admit their entitlement to remedies under the law.

There are three points of view about modern marriage which, it seems to me, must be taken into account in any discussion of the need for reform of family law. If I read the situation aright, most people:

- (i) wish to retain the opportunity for those who are agreed that their marriage is a hopeless failure to end it without a great deal of difficulty, expense or wrangling;
- (ii) believe that marriage should be taken seriously by partners and the law, and that those who behave unacceptably during a marriage should be held accountable for their behaviour;
- (iii) consider that, in winding up a marriage and settling questions of property, custody of children, and maintenance of dependent spouses and children, the processes of settlement should be in accord with principles of fairness for all that are clear and certain in advance, and which take account of the marital circumstances that precipitated the divorce.

As it stands, the Family Law Act 1975 satisfies the first of these

conditions, but not the second and third. For those spouses who are agreed that they want to end their marriage and who agree on questions of custody, property and maintenance, the present law is satisfactory. However, although most divorces are concluded without requiring a judicial determination, it does not necessarily follow that the spouses concerned are happy with the state of family law. We do not know how many of these 'consensual' divorces involve spouses who believe that they have been badly dealt with in marriage and by the terms of their divorce but who, knowing that the present law offers them no remedy, acquiesce against their will in terms of settlement they believe to be unjust. Under present law, a spouse who wants to keep trying at a faltering marriage has no defence against a spouse who wants, unilaterally, to end it - perhaps for frivolous or dishonourable reasons. Simple desertion, walking away from the marriage, is a legitimate option against which there is no protection and no redress.

Under present law, a spouse who may have had to suffer for years the infidelity or cruelty or habitual intoxication of his or her partner must divorce under terms of settlement which cannot take account of, or give any recompense for, this suffering, because the 'guilt' of one party or the 'innocence' of the other counts for nothing when it comes to winding up their marital affairs. This is an abdication by family law of any attempt to acknowledge the reality of marital misconduct and the harm it can do, and to dispense justice accordingly. So it fails to satisfy the second and third points of view about marriage and divorce mentioned above - namely, to take marriage seriously in the law and to provide redress for those who are the victims of serious misconduct in marriage. Is there any way of remedying these deficiencies while retaining the option of easy divorce for those partners who want it by genuine, mutual consent? I believe there is.

As discussed in detail elsewhere (Maley 1993; 1996b) and, more briefly here, the essential idea is to amend family law to open up the possibility that proven 'fault', or serious misconduct in a marriage, should influence the determination of the *ancillaries* of a divorce *settlement*. This would mean that an application for a divorce by either partner would go ahead as now, after one year's separation, and the divorce would be granted as at present. However, a partner responding to a divorce application by the other partner would have the *option* of charging the petitioning partner with serious misconduct or failures during the marriage and demanding that the Court should take this into account in determining the terms of settlement of the divorce. Correspondingly, the petitioning partner may justify his or her application

and defend the charge by attributing serious misconduct to the responding partner. In either case, charge and counter-charge would have to be tested by evidence given in Court, and a determination of the terms of settlement would hang upon the Court's judgment of the evidence, and the validity and seriousness of the respective claims. This would satisfy principles of procedural justice presently neglected by family law and, by reintroducing public, moral condemnation of irresponsibility and unacceptable conduct in marriage, it would restore the moral and legal standing of marriage as a serious commitment and promise, upon which the well-being of adults and children depends.

It would be necessary, of course, to define 'serious failures and unacceptable conduct' within a marriage and the nature of the evidence for them. I do not see this as a major problem, and debate might best begin by revisiting the criteria contained in the Matrimonial Causes Act 1959. I would be surprised if there were not broad agreement, for example, that such things as adultery, violence, habitual intoxication, abuse or neglect of children, failure to consummate a marriage, insanity and cruelty, were sufficient grounds for claiming marital injury justifying the notice of the Court at a divorce settlement.

This is but the merest sketch of an approach to restoring substance to the marital contract and its public status, and is offered as a basis of discussion. Such a discussion would quickly open up many difficult questions, but this is unavoidable if marriage is to be rescued from its present parlous state. However, if the principles behind this approach were accepted and implemented, I believe a great deal of good would follow. The possibility that marital failures and misconduct will be taken seriously by the law would be a powerful incentive for reducing them and thus enhancing the stability and mutual satisfactions of married life, with obvious benefits for spouses and children. If, as we have seen, marriage has a crucial part to play in the well-being of children and adults, anything that makes marriage more robust whilst protecting liberality and justice in marital affairs, cannot help but be a contribution to human happiness.

Conclusion

Concern about the present state of family life is widespread and frequently identified as underlying a range of serious social problems and threats to the well-being of children. At the centre of a great deal of family disorder and collapse is the fragile state of marriage. Yet the condition of marriage and family law is not yet a subject of sustained debate, despite its critical role in the stability of family life and adult

well-being. This is belatedly recognised even by those men and women who willingly, and perhaps eagerly, end their marriages. Surveys in America and elsewhere suggest that 'as many as 50 per cent of men and at least 25 per cent of women feel later that divorce was the wrong decision and wish that they were still married' (Morgan 1996:73).

The trend of cultural, economic and legal events over the last 30 years or so has conspired to make the enterprise of marriage - a consummation of adult life sought by four out of five women and men - more problematic and hazardous than it need be. Urgent social problem though this is, we are not facing up to it.

Culturally, it seems, the present status of marriage in Australia is highly ambiguous. On the one hand, it is voluntarily embraced, sooner or later, by the overwhelming majority of adults - though that majority is getting smaller. Yet marriage, as a social institution, has grown weaker. The cultural evidence for this is drift in several directions: the drift away from the connection between marriage and sexual relations; away from the firmness of the former distinction between marriage and cohabitation; away from marriage as the publicly sanctioned precursor to procreation; away from the public stigma attaching to marital misconduct and divorce; and away from the defence of marriage by an influential segment of women.

The economic evidence consists mainly in the erosion, over recent years, of concessions publicly acknowledging the special costs and claims of married couples with dependent children, and in the growth of the incentives and pressures, including legal changes, which undermine marriage as an economic compact. These act, also, to attract mothers into the workforce and away from attachment to the customary division of domestic activities even though the evidence also suggests that, other things being equal, the majority of both men and women would prefer the customary arrangements when young children are involved.

If strength and stability are to be restored to marriage, allowing it to play its part in promoting the well-being of adults and children, the cultural indifference will need to be reversed, the costs of children appropriately acknowledged, and policy neutrality established as between the preferences of husbands and wives for either customary or non-customary domestic roles.

The possibilities of movement in these directions will, of course, depend upon the extent to which public opinion turns against the status quo, and this depends upon the extent to which opinion is influenced by the evidence of social and personal problems attributable

in large part to the decay of marital stability. As mentioned at the outset, a rising level of concern about such things does seem to be discernible.

Which is chicken and which is egg in the complex of causes and effects that have shaped the events which have overtaken marriage is difficult to say, but cultural changes must be important as the repository of ideas and attitudes that have found expression at the economic, policy and legal levels. Ideas and attitudes can change, and an appropriate focus for popular concern is the present legal status of marriage which, perhaps more than anything else, encapsulates its decline and which is already a topic of intermittent, if inconclusive, discussion. Accordingly, a reconsideration of the role of family law in defending marriage could be the best place to start, and a catalyst for a wider debate.

The question of restoring justice in the marriage contract and in the procedures for divorce is a potential point of wide agreement, if not consensus. That search for justice might begin with agreement to a minimalist view of marriage as a voluntarily made, enforceable contract, and the acceptance of that principle in family law. This necessarily entails acknowledgment of accountability by the marital partners for their behaviour in marriage, the possibility of damage to the interests of a spouse through fault, and hence an in-principle entitlement to compensation by an injured partner, if he or she wishes to raise it as an issue that might affect the terms of the divorce settlement. Taking that single step would carry immense weight, both morally and practically, in restoring the importance of marriage in the public mind and in re-establishing the stability of the central human bond that underpins our family life.

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