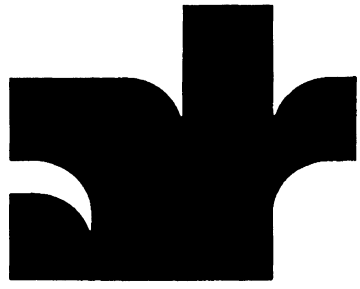

ARTICLES

*Sandra Berns**

THE TIES THAT (NO LONGER) BIND: TENSION AND CONTRADICTION IN FAMILY LAW

INTRODUCTION

DESPITE the iconic status of 'the family' in contemporary legal and political culture, 'family' is, increasingly, a slippery signifier.[1] The archetypal family form is almost an anachronism, a vanished icon of an earlier age. Defended with increasing vehemence by traditionalist forces, including militant fathers' rights groups,[2] it achieves its potency as an ideal against which contemporary family forms can be found sorely wanting.

As a legal phenomenon, the family rises and falls with marriage or, increasingly, a marriage-like relationship. It is more significant than is commonly thought that the legal regime regulating dissolution of marriage is styled the *Family Law Act 1975* and the court established by it the Family Court. Our legal and political institutions regulate marriage,

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1 For a discussion of changing family forms and the importance of recognising the diversity of contemporary family forms see Justice Alastair Nicholson, 'The Changing Concept of Family: The Significance of Recognition and Protection' (1996) 3(3) *E-Law Murdoch University Electronic Journal of Law*. <http://www.murdoch.edu.au/elaw/issues/v3n3/nicholso.html>

2 These forces include, but are not limited to, conservative politicians, some religious leaders, and fathers' rights groups. In the US, the archetypal example is the group known as the Promise Keepers. The Promise Keepers movement emphasises male responsibility and authority within the family. See Nancy Levit, *The Gender Line: Men, Women and the Law* (1998) 173–5, 179–80.

divorce and the adoption of children. Both marriage and adoption are identified by name.[3] The various events in the creation of a new family are thus particularised. Only at dissolution does the signifier 'family' move from the shadows to centre stage.[4] The legal regimes governing family life are largely concerned with external events, marriage, adoption, and dissolution of marriage, rather than with relationships within the family. These events are the public signifiers of the family, the machinery by which the law knows it.[5] They establish the parameters of the public family.

These phenomena are largely Western and a product of the late twentieth century. Whereas, in many traditional cultures, the extended family or kinship group assumes primacy, our conventions emphasise pair bonding. Whether we speak of 'the family', or of 'family law' or of 'family policy', a heterosexual couple and the children of their relationship are at the centre of discourse. Both this emphasis and this family form are relatively recent innovations.[6] Collectively they have had a number of very important consequences both for law and for policy and without them family law would not exist in its present form.

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3 Marriage is a Commonwealth matter, governed by the *Marriage Act 1961*. Adoption is regulated by the several States and territories. Typical is the *Adoption of Children Act 1965* (NSW).

4 As Nicholson states:

> By way of another example, family law in common law countries does not attempt to impose duties or responsibilities on family members until and unless a marriage breaks down. The laws of many countries may be more explicit. As Parkinson points out Australian family law neither defines 'family' nor gives it any special status, but rather concentrates on the rights and obligations of individual family members. In contrast, many non Anglo-Saxon legal systems emphasise the importance of collective values, with marriage, reflecting an alliance of families and including an extended network of kinship.

Justice Alastair Nicholson, 'Ethnic Family Values and the Family Law Act' (Keynote Address, University of Sydney Law School, 4 August 1998). <http://www.familycourt.gov.au/papers.html>.

5 For a discussion of the importance of these signifiers and their development see Sandra Berns, 'Regulation of the Family: Whose Interests Does it Serve' (1992) 2 *Griffith Law Review* 152, 153–173. More generally, see Stephen Parker, *Informal Marriage, Cohabitation and the Law 1750-1989* (1990) esp chh 2–4.

6 I do not mean that within countries such as Australia and the United States all families conform to this pattern. They do not. Practices such as the 'other mother' in Afro-American communities or the extended family common among Aboriginal and Torres Strait Islander peoples constitute very different understandings of family. In addition, many migrant groups within Australia and the United States have brought the traditions of their homelands with them. Often family conflict erupts as individual family members adapt, more or less rapidly, to the mores of their new environment. I do, however, believe that these assumptions lie behind the dominant legal and policy regimes.

Powerful legal and cultural traditions encourage us to understand marriage as a voluntary consensual relationship between equals that depends for its continued existence upon affection and mutual respect. On this understanding, the family becomes ephemeral, an effect of relationships rather than an entity. Because the family is understood in terms of the choices of its adult members, the position of children becomes conceptually anomalous, forming a stark contrast to the increasing legal emphasis upon 'children's rights'.[7]

All of these facts are, on one level at least, well known, even self-evident. Less well understood is the relationship of these facts to the political understandings and conventions which have rendered them inevitable. Deeply embedded among these understandings are cultural traditions emphasising the privacy of the family and figuring privacy as a kind of quasi-proprietary right. Linked to these traditions are profound understandings of authority and representation and the ways in which these operate to bind families to the state. In what follows, I shall argue that our contemporary belief in equality cannot be reconciled with these traditions and the conceptions of family privacy and autonomy they entail. I shall argue further that recognition of the incompatibility of these traditions with the egalitarian and rights-oriented impetus of much of the contemporary legal agenda, including the family law agenda, is essential to any understanding of the outcomes that it generates. To make out this claim fully, it is necessary to examine the conceptual underpinnings of our traditions of family privacy and autonomy and the understandings of authority and representation that sustain them.

ATTACHING FATHERS TO FAMILIES: THE BREADWINNER REIMAGINED

Some contemporary family law scholarship[8] suggests that the dominant contemporary paradigm in family law focuses upon attaching men to families. Thus, confronting the increasingly apparent fragility of marriage (and of de facto relationships) the legal focus is upon ensuring that men support their children and maintain contact with them following the breakdown of a relationship. I like to think of this response as 'manning the dykes'[9] in a postmodern variation on the 'breadwinner' role of the 1950s. From the perspective of the government, I suspect that the first objective is substantially more important than the second, given that the most important purpose of the child support provisions is to relieve the burden on the revenue. This is made perfectly clear by the fact that, while legal sanctions are routinely available should the parent with whom the children reside refuse access to the non-residential parent, the non-residential parent is not normally compelled to

7 See *Family Law Act 1975* s 60B(2) for an example of the incorporation of rights discourse into family law. Like 'family', rights talk is also a slippery signifier. Despite the paraphernalia of separate representation it is not always clear that children's voices are being heard. We also have no clear understanding of what it might mean if 'children's rights' were taken seriously.

8 See, for example, Richard Collier, *Masculinity, Law, and the Family* (1995).

9 All possible puns intended.

maintain contact. When the issue was canvassed in *B and B*, the Family Court took the view that it would be quite exceptional for such an order to be made.[10] I am not aware of any cases in which the residential parent sought to prevent the non-residential parent from moving interstate or internationally. At the most extreme, the supporting parent becomes the ultimate breadwinner, providing income without commitment, except for fleeting episodes of visitation.

The increasing emphasis on attaching men to families is curious, particularly since the sought after 'attachment' is a response to the end of marriage rather than to the relationship itself.[11] The attachment sought takes two quite specific forms, one primary and one secondary. The primary form of 'attachment' is financial rather than affective and takes the form of compulsory child support provision.[12] The underlying impetus may be found in the accelerating policy shift from social provision to private provision where individuals

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10 *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676. The matter was put thus at 750:

> 10.62 We consider that there is power to make an order that may have the indirect effect of restricting the movement of a contact parent. That issue would ordinarily arise when a contact parent seeks to relocate and applied to the Court to vary the existing contact order. If the Court refused to do so because it considered that it would be contrary to the children's best interests to have contact reduced, it may do so by refusing that application, and this may place the contact parent under an obligation to adhere to the existing order. It may also arise in other ways — for example, an application by the residence parent for contact orders to be made in particular terms which may be inconsistent with relocation by the contact parent. The use of injunctions is much less clear because it would raise the issue whether the best interests of the children is the paramount consideration in such applications: see s 68B.
>
> 10.63 In any of those eventualities it is possible that the failure of the contact parent to comply with those orders may amount to a breach of the orders in respect of which proceedings by way of enforcement could be brought.
>
> 10.64 However, we are not aware of any such order ever having been made in Australia and we think it unlikely that in the exercise of its discretion a court would do so. Essentially the reason is that it would be most unlikely that the children's best interests would be served by requiring the contact parent to have contact which he or she did not wish to have, although it is possible to envisage circumstances where the continuance of contact is so overwhelmingly in the best interests of the children as to nullify that circumstance.

11 One of the major causes of dissolution of marriage is men's failure to commit actively and emotionally to the marital relationship, women suggesting that they might as well have been single parents. An important aspect of this involves the sharing of parenting and domestic labour. See, for example, Kathleen Swinbourne, 'Women won't go back to '50s', *Sydney Morning Herald*, 3 December 1997, Opinion 21.

12 See pt VII, div 7, *Family Law Act 1975*, in particular, ss 66C, and see the *Child Support (Assessment) Act 1989* (Cth).

are unable to provide for themselves.[13] On a social level, the perceived need for this emphasis has its origins in a variety of factors. Among them are the increasing incidence of marital breakdown, incontrovertible evidence that a majority of non-residential fathers do not maintain contact with their children for a sustained period following separation or dissolution and widespread disregard of court-ordered maintenance payments. Against the background of statistical evidence strongly suggesting that women (and children) tended to be impoverished by marital breakdown while men's overall standard of living rose, political pressure grew to compel support, particularly where the residential parent relied upon state provision for resources. This pressure was exacerbated by a convention under which family law practitioners and judges structured maintenance orders to maximise the supporting parent benefit available.[14]

While these mechanisms for shifting financial responsibility from the state to the individual[15] have been reasonably successful, they have also aroused considerable anger and fuelled the development of fathers' rights groups. In an attempt both to defuse some of this hostility and to encourage fathers to maintain their relationships with their children following dissolution of marriage, the *Family Law Act 1975* was substantially reformed in 1995. Under the reforms, the old terminology of guardianship, custody and access was replaced with the concept of parental responsibility.[16] Separating parents are encouraged to agree upon 'parenting plans'[17] and the Family Court has the power to make parenting orders dealing with residence, contact, child maintenance and other 'specific issues' as may be appropriate.[18] In this way, the textual emphasis has shifted from the quasi-proprietary notion of exclusive possession of children towards an emphasis upon joint responsibility and upon the rights of the children to maintain a good relationship with both of their parents, rather than upon the rights of the parents. The statute itself uses the language of rights, providing by s 60B(2) that:

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13 The depth of this push towards 'private provision' may be gauged by the announcement on 4 August 1998 by the Prime Minister of Australia, John Howard, of the income splitting portion of his taxation package. According to media reports, in families with a single primary breadwinner, the 'reforms' will enable the breadwinner to allocate income to a dependent spouse and to one or more dependent children, thus rewarding private provision for unemployed adult children and reinforcing the authority and control of the breadwinner. See 'Howard's $12bn Tax Return', *The Australian* (Canberra), 4 August 1998, 1.

14 See John Dewar, 'Reducing Discretion in Family Law' (1997) 11 *Australian Journal of Family Law* 309, 317.

15 The vehicle was the *Child Support (Assessment) Act 1989*. Responsibility for both assessment and collection was removed from the courts and bureaucratised.

16 See pt VII, div 2, ss 61A–D. For a discussion of the history and background of the reforms see Family Law Council, 'Patterns of Parenting After Separation: A Report to the Minister for Justice and Consumer Affairs', April 1992. <http://www.anu.edu.au/law/pub/family/council/reports/patterns.html>

17 *Family Law Act 1975*, pt VII, div 4, ss 63A–H deals with parenting plans.

18 *Family Law Act 1975*, pt VII, div 5 and 6, ss 64A–C, 65A–L address the various orders that may be made regarding such matters.

> (2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
>
> > (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
> >
> > (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development.

Despite the apparent legislative focus upon the rights of the children rather than those of their parents, Professor John Dewar suggests that the practical effect of the provision has been to strengthen

> the legal position of the non-custodial parent, usually the father by giving him greater control over the mother. For example, almost all respondents in research conducted in Brisbane into the effects of the new Pt VII of the *Family Law Act* 1975 were clear that the legislation had substantially weakened the negotiating position of the primary carer, reflecting a perceived weakening in her legal position. This bears out the suggestion that the legislation ... was as much a response to claims for fathers' rights as for those of children.[19]

He suggests further that an escalating level of disagreement over 'minor' issues accompanies this perceived weakening and comments:

> Here what seems to be happening is that the new language of shared parental responsibility, or perhaps the expectations generated by that change of language, are leading to an *increase* in disagreement over these subsidiary issues ... [T]he non-resident parent is relying on his or her (formally) equal involvement in the child's life, and is trying to dictate to the other the exact terms under which the child will be brought up — how they will have their hair cut, which dentist they will go to, how many parties a week they can attend, etc. While not all of these disagreements are enough to warrant a court application, they are a live area of disagreement for some time.
>
> So, there is evidence that the framework of shared parental responsibility, which was partly intended to promote agreement by creating clear background rules and by reassuring the non-resident parent that they retain

19 Dewar, above n 14, 321.

> their parental status, has actually had the opposite result. It has opened up new areas for disagreement where none existed before.[20]

In practice, then, the statutory recognition of children's rights has enabled some non-residential parents to re-assert a degree of power and control over a former spouse by manipulating the rights conferred by Part VII. While the desire to maintain power and control has a long history in litigated parenting disputes,[21] preliminary evidence in Australia suggests that the new provisions have encouraged disagreement over minor issues concerned with parenting. Decision making in parenting thus becomes an effective and legitimate mechanism through which to control the lifestyle and parenting of the residential parent.

That parenting issues should be used in this way is not surprising. Following dissolution of marriage the non-residential parent often has no clear parental role. Usually, prior to separation, the non-residential parent was not the primary caretaker and spent comparatively little time in parenting activities. In such cases, the roles of breadwinner and (usually) head of the household were identified with the parental role. Following dissolution, any attempt to reclaim a 'parental role' is likely to replicate previously learned behaviours, irrespective of their appropriateness to the changed circumstances and irrespective of whether these behaviours are productive or counterproductive.

The dissonance between learned parenting behaviours and the role shift brought about by dissolution is exacerbated by two demographic factors. First, the non-residential parent is the father in the vast majority of cases, not least because the mother tended to be the primary caretaker during marriage and because of the prevailing social assumption that caretaking and nurturing roles are intrinsically feminine.[22] Second, in Australia, as in other no-fault jurisdictions, empirical evidence suggests that women initiate a clear majority of separations. It also suggests that men both find the end of a marriage more difficult psychologically and are somewhat more likely to re-partner.[23] In the context of a

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20 Ibid 324.

21 See the cases cited in Sandra Berns, 'Living Under the Shadow of Rousseau: The Role of Gender Ideologies in Custody and Access Decisions' (1991) 10 *University of Tasmania Law Review* 233. In a surprising number of cases, the custody action was brought to enable the non-residential parent to obtain greater control of the residential parent.

22 Between 70 and 80 per cent of residential parents are female. Fathers' rights groups argue that this is evidence of the bias of the Family Court. However, parenting arrangements are litigated in no more than 10% of cases and in litigated cases the ultimate residential parent is male in slightly more than 30% of cases.

23 Kathleen Funder, 'His and Her Divorce' in Peter McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia* (1986) 237. Commonwealth, Standing Committee on Legal and Constitutional Affairs, *To Have and to Hold: Strategies to Strengthen Marriage and Relationships: A Report of the Inquiry into Aspects of Family Services* (1998) cites surveys that suggest that 43% of current marriages will fail. Of those, approximately 69% of men will re-partner within five years and 65% of women. The report notes at p32 that a Griffith University study noted that of 4000 suicides studied 70%

bureaucratic child support regime and a desire to ensure that the child support payment is used for the needs of the children rather than those of the residential parent, blurring of the line between parenting children and controlling a former partner is not surprising.

Against this background, the legal emphasis upon attaching men to families (financially) rather than upon attaching women to marriage (emotionally) is misguided and potentially counterproductive. I specify attaching women to marriage rather than to families because the evidence suggests that, overwhelmingly, after dissolution, as before, women remain responsible for the primary care of children. To a greater extent than ever before, the functional family (as opposed to the legal family) is the mother and her children. It is the male role in the family that is unmoored, dysfunctional in a changed environment. While the attempt to minimise child poverty and to foster contact between children and non-residential parents is laudable, it potentially exposes the residential parent to ongoing intervention and to attempts at control by the non-residential parent. Thus, paradoxically, measures aimed at remedying the subjective loss of parental status that often accompanies family breakdown encourage ongoing disagreements in respect of parenting while other provisions seek finality in determining the affairs of the parties.[24]

In the recent past, families remained intact because religious and legal sanctions left women no viable alternative.[25] Women were both unable (in general) to support themselves, and at risk of losing their children should they attempt to do so. For most women, both financial survival and their relationship with their children depended upon remaining within a relationship irrespective of the quality of that relationship. This is no longer the case. Many women are able to support themselves adequately, and those who encounter difficulty are supported to a basic level by state provision. These changes have had a very important consequence. In the past, powerful forces bound women to their husbands, legally and socially if not emotionally. These forces are either spent or severely diminished. Today, for many couples, the only replacements are the affective bond between husband and wife and the quality of their relationship, and these frequently prove inadequate. As the Chief Justice of the Family Court notes:

> The experiences of men before and following marriage breakdown are often different from those of women. Whereas the research shows that women are more likely both to initiate separation and begin divorce proceedings, men are less likely to realise that their marriages are in

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were caused by relationship break ups and that men were nine times more likely to commit suicide than women. In *Suicide*, written in the early 1950s, Emile Durkheim identified marriage and family life as essential to male emotional health and disadvantageous to female emotional health. See Emile Durkheim, *Suicide: A Study in Sociology* (1952) 275.

24 *Family Law Act 1975* s 81 provides that the court shall, so far as is practicable, make such orders as will finally determine the financial relationships between the parties and avoid further proceedings between them.

25 Men have always had an alternative.

> difficulty and are more likely to experience difficulty in adjusting to that fact. Women are more likely to suffer financially from the aftermath of marriage breakdown, men miss their children, who usually remain in the care of the parent who had had primary responsibility for them before the separation — the mother.[26]

Further complications arise because cultural traditions that emphasise the privacy of the family and its partial immunity to law remain strong. The privacy involved is not Millian in character. It has nothing to do with space for self-development, autonomy and moral personality, at least as these values are conventionally understood. Instead, privacy is understood as a species of quasi-proprietary right emphasising exclusive possession and the right to exclude others, including the state. In its most extreme form, this understanding of privacy locates family relationships beyond the reach of the law and of state intervention.[27] One enduring consequence has been the state's reluctance to intervene, even when it is necessary to protect the victims of domestic violence and of the physical and sexual abuse of children.[28] While these traditions are gradually breaking down, they retain their potency with many in the community. In this context, it is important to note that the substantive rationale underlying the Family Law Council's recommendations in respect of post-separation parenting emphasised the proprietary images underlying traditional family law concepts such as custody.

> In a report to the Canadian Department of Justice on parental responsibilities legislation, Ryan (1989) notes that existing terminology describing relationships between separated parents and their children is drawn from criminal law and the law of property. This appears to be a universal problem in family law. In his submission, Professor H.A. Finlay described family law terminology as being derived from nineteenth century notions of the ownership of the family by the father. Nations which share the English legal tradition inherited both this perspective and English legal language.[29]

The conceptual link between privacy and property and its relationship with images of authority within the family and within the state is deeply embedded in our cultural and

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26 Nicholson, above n 4.

27 This is a generalisation. The extent to which it holds true depends upon the extent to which any given family complies with middle class norms. Families that do not comply with middle class norms, for example indigenous extended families, are routinely invaded. Likewise, single parent families and families headed by a same sex couple are open to scrutiny and invasion as are, increasingly, step-parent families.

28 The mounting hysteria in Australia concerning paedophilia (which is little more than thinly veiled homophobia) ought to be contrasted to the willingness of the legal system to turn a blind eye to the physical and sexual abuse of children where it occurs within an ostensibly intact family unit.

29 Family Law Council, above n 16, para 4.10.

legal traditions. Understanding this 'embeddedness' is essential to understanding the anger generated by the egalitarian and rights-oriented thrust of today's law. It is, therefore, to its roots in early social contract theory that we now turn.

AUTHORITY, REPRESENTATION AND FAMILY

Conventional cultural understandings of family privacy and autonomy incorporate assumptions of authority and of representation originating in early social contract theory.[30] Within this paradigm, women became wives by ceding their natural liberty and autonomy to their husbands, just as men became citizens by ceding their natural liberty and autonomy to the state. The family was, in effect, a limited state of nature. Relationships within the family remained outside the 'social contract',[31] but its male head of household represented each family within it.[32] His role bound the family to the state and he was answerable for the conduct of its members. These assumptions were not simply a reflection of the sexism of the day, but essential building blocks of the liberal project. By excluding family relationships from the 'social contract', liberal theory sought to exclude law and the state from family life, thereby ensuring a sphere of life in which other cultural and social traditions (including various religious traditions) might govern relationships.

The liberal project was conceptually simple. Justice was a matter of formally egalitarian relationships among adult male citizens. Intimate relationships lay outside this paradigm. Reason prevailed in the public sphere; affect was banished to the private. Much of this is conventional and widely understood. The relationship between the privacy of the home and the absolute authority of its male head is less well understood. The theoretical and legal justification for family privacy was a consequence of the authority of the head of the household. As head, he was both legally and financially responsible for the conduct of those under his control and was entitled to their obedience.

Modern liberals struggle to balance understandings of family autonomy and privacy derived from this paradigm with contemporary notions of equality. With its legal support structure eroded[33] the assumption of family privacy and autonomy has become anomalous.

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30 They also have important links with other religious and cultural traditions but for present purposes I am concerned with their origins in liberal traditions.

31 Such relationships were necessarily alien to the social contract paradigm. They were inegalitarian and hierarchical rather than egalitarian and based upon consensual relationships among equals. Grounded in status rather than contract, they were often described as an incompletely vanquished remnant of the *ancien regime.*

32 This tracked the prevailing legal position closely. The head of household was legally responsible for the conduct of all members of (his) household and had the authority to chastise members of his household to ensure their compliance. The modern doctrine of vicarious liability is a vestige of this authority.

33 It is easy enough to ring the changes: women now have full legal personality, suffrage, are entitled to equality of opportunity and to full participation in all levels of society. Our

Evidence that family privacy can conceal inegalitarian, violent and abusive relationships reminds us that no easy accommodation exists between privacy and equality.

That the tension between our public egalitarianism and the privatised family is not acknowledged more often owes much to contemporary understandings of the citizen and of citizenship. Contemporary liberal theorists, such as Ronald Dworkin[34] and John Rawls,[35] argue explicitly that their egalitarianism is political, a 'thin egalitarianism' that applies to citizens *qua* citizens rather than in any more comprehensive and meaningful sense. The principles of equality for which they argue are public principles. Rawls speaks of his project as 'political liberalism' and emphasises the ways in which this distinguishes it from the liberalisms of Kant and Mill.[36]

The restricted reading of liberalism favoured by contemporary theorists has a number of advantages. It enables them to deploy controversial understandings concerning human nature while arguing that these understandings are 'political' rather than ontological or metaphysical. The principles upon which political equality is premised are thus restricted to the public sphere, applying to citizens qua citizens rather than individual men and women. This allows them to argue that the ways in which individuals conduct themselves as citizens, as legal subjects, and as market actors need not resemble the ways in which they behave in their private lives.[37]

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legal system is premised upon the assumption that men and women are socially, politically, and economically equal.

34 Ronald Dworkin has set out his political philosophy in Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10 *Journal of Philosophy and Public Affairs* 283; 'What is Equality? Part 3: The Place of Liberty' (1987) 73 *Iowa Law Review* 1; 'What is Equality? Part 4: Political Equality' (1987) 22 *University of San Francisco Law Review* 1; and 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta Law Review* 324.

35 John Rawls, *Political Liberalism* (1993) elaborates upon this view and the reasons he believes that 'thin liberalism' is essential.

36 The liberalisms of Hobbes, Locke, Rousseau and Kant were 'thick liberalisms'. Their assumptions about the nature of the individual, the structure of society and the appropriate legal and political order were seamless. While all accepted the idea of a private sphere in which the rule of law did not run, this private sphere was ruled absolutely by the head of the household. It was because of this that public sphere principles had no application, not because they were merely political principles. The distinction is important. Because these understandings of authority and representation conflict profoundly with the egalitarian values of contemporary democracies and the recognition of women as equal citizens, another mechanism must be found to ensure a sphere of freedom. Without a sphere of private freedom, the overlapping consensus upon which Rawls' current theory depends is impossible of attainment.

37 Rawls suggests that values such as autonomy and independence are profoundly important public sphere values. They are not, however, grounded in any 'religious, metaphysical, or epistemological doctrine', being a political conception merely. It follows that, while government must respect the autonomy of its citizens, family members need not respect the potential autonomy of other family members: Rawls, above n 35, p144.

The model of choice and decision making upon which such theories rely is one borrowed from economic theory. It assumes that citizens, whether male or female, make choices and consent to changes out of self-interest and that they are uniquely able to determine their own interests.[38] Political consequences of the highest importance flow from these presumptions. The central principle is simple (even obvious). Whether their choices prove advantageous or disadvantageous, individuals are responsible for the choices they make and for their consequences.

It is worth pausing to think about what this model leaves out. Questions of context, of value, and of meaning are irrelevant. Individuals are unencumbered by relationships, by histories, and by values. All choices are equivalent and, unless coerced by force or fraud, are described as 'freely' made. Radical simplification of this kind is essential to a model that seeks to describe choices without reference to values and that aspires to a particular kind of neutrality. Other assumptions are made as well. For example, individuals are assumed to possess 'perfect knowledge'. This model of decision making encourages us to understand choice in particular ways. These assumptions have played an important role in the development of family law.

I want to sketch the implications of the liberal model of choice for family law and policy against the background of the distinction between the 'political liberalism' of contemporary writers and the 'thick liberalisms' of earlier theorists. First, this model assumes that conduct and decision making can be compartmentalised.[39] While it acknowledges that private sphere decisions and choices may influence public sphere decisions and choices, public sphere choices are to be understood 'as if' they were based on preferences in the sense described above. I believe that the combination of the liberal model of choice and 'thin liberalism' renders the attempt to develop a coherent and just family law regime untenable. This is a strong claim and I will substantiate it in the arguments that follow.

Contemporary egalitarian theory distinguishes sharply between inequalities that arise out of choices made by individuals and inequalities that are the product of natural disadvantages or of discrimination or prejudice. Because the former inequalities arise from individual preferences, they are irrelevant to political equality, whereas inequalities that flow from natural disadvantage or from prejudice undermine political equality. It is easy to see the attraction of this distinction. Ronald Dworkin offers the example of an

38 Ronald Dworkin, *A Matter of Principle* (1985) 191 describes the liberal conception of equality as one which 'supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.' Implicit in this statement is the view that the individual himself or herself is uniquely placed to make decisions regarding his or her own life, and to create a valuable life for herself or himself through the choices and decisions made.

39 Alastair MacIntyre put the point wonderfully well: 'The liberal self moves from sphere to sphere compartmentalising its attitudes': Alastair MacIntyre, *Whose Justice? Which Rationality?* (1988) 337.

individual who is without resources because of continual indulgence in a penchant for champagne and caviar,[40] while Rawls suggests that economic disadvantage arising from the consumption of much 'expensive leisure'[41] will not be compensable. It is difficult to take exception to either of these examples. They are appealing at both a commonsense and a theoretical level and highlight the difficulties in trying to deal with equality on a welfarist basis. Likewise, many people find it intuitively appropriate to acknowledge that disadvantages arising from prejudice or handicap (Rawls describes these as 'morally arbitrary') do affect political equality.[42] It is easy to extend the imagery further. Choices about relationships, about options, about individual goals, are, at a decontextualised level far more similar to preferences for caviar or leisure than they are to disadvantages arising from prejudice or handicap. It therefore seems intuitively appropriate to suggest that individuals have also chosen the consequences that attend choices of this kind.

LEARNING TO CHOOSE ECONOMIC DISADVANTAGE: GROWING UP FEMALE

As I have said, at the level of theory these simplifying assumptions seem obvious and intuitively appropriate. They do not become counterintuitive until an attempt is made to apply them to ordinary choices in ordinary circumstances. When we attempt to do so, the price we pay for decontextualisation becomes painfully obvious. Something else becomes obvious as well. Once we contextualise choice, the match between individual preference and ultimate choice is often obscured. The choice between one set of educational opportunities and another, between one career path and another, is often made for reasons that are peripheral to the object of choice. Even an apparent choice between work and leisure (using the economic definition of leisure[43]) may be made for reasons which have little to do with a preference for leisure as ordinary people might understand it. Thus, when it is argued (as it often is) that women have, in some sense, chosen 'disadvantage', it is important to be very careful about the choices they have actually made and the contexts in which they were made.

Undeniably, girls and women do in fact consent to many, perhaps most, of the transactions that disadvantage them economically. They continue to pursue occupations such as clerical work, teaching and nursing that either offer truncated career paths or remain poorly

40 Dworkin, 'What is Equality? Part 2: Equality of Resources', above n 34, 284–90, 304–8.

41 The understanding of 'leisure' deployed by Rawls is derived from economic theory. Rawls distinguishes leisure from work (defined as economic activity) and consumption and describes it as a useful activity which is neither directed towards economic gain nor consumption. Essentially, all work done within the home falls within this definition of leisure, a somewhat counter-intuitive result if one is a woman. See Rawls, above n 36, 181 fn9. See also the discussion in R A Musgrave, 'Maximin, Uncertainty, and the Leisure Trade-Off' (1974) 88 *Quarterly Journal of Economics* 625, to which Rawls refers.

42 To a limited extent, this assumption is build into existing legal regimes proscribing discrimination based on race, gender and disability.

43 See above, n 41.

remunerated. Very often, these choices are made because of the flexibility and multiple points of re-entry offered by these occupations, features that mean that they are easily combined with family responsibilities. Similarly, many women continue to subordinate their careers to those of their partners, abandoning or restricting their economic activity while their children are young or re-establishing their own careers after shifting to further a partner's career.

While these are undoubtedly choices, they are choices of a very particular kind. Our society encourages women to assume that they are primarily responsible for childcare and domestic labour.[44] It also encourages the belief that it is appropriate for women to follow their partner's careers. Existing educational, occupational and social structures incorporate these assumptions in their expectations. Choices such as these are made, not in the abstract market of the liberal model of choice, but against the background of existing public and private structures and the expectations they foster. These same forces shape men's choices, frequently making active participation in family life and parenting untenable.[45] In many ways, women are affectively advantaged and economically disadvantaged while men are affectively disadvantaged and economically advantaged.[46] We need to ask why these patterns persist despite several decades of equal opportunity legislation and why women persistently make choices that entrench economic inequality.

The disadvantageous character of women's choices and the fact that these choices are peculiar to women provide an awkward counterpoint to prevailing egalitarian rhetoric.[47]

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44 Levit notes the pervasiveness of the structures reinforcing these choices: Levit, above n 2, 118–22. She cites commercial and social barriers to parental leave for men and the corporate attitude that suggested that it was 'unreasonable' for men to take parenting leave. In the United States judicial approaches are more mixed. In *Schafer v Board of Public Education of the School District of Pittsburgh*, 903 F2d 243, 247–8 (3rd Cir, 1990) the Federal Court held that a refusal to allow a father to take a year's unpaid parenting leave was discriminatory.

45 Levit, above n 2, 118–19.

46 Perhaps we might suggest that women have a preference for intangible rewards rather than tangible rewards. Carol Rose characterises one aspect of this preference as a 'taste for cooperation': Carol Rose, 'Women and Property: Gaining and Losing Ground' (1992) 78 *Virginia Law Review* 421. As her discussion makes clear, a taste for cooperation is a liability rather than an asset, or, rather, being perceived as having a taste for cooperation is hazardous.

47 Patricia Voydanoff, *Work and Family: Changing Roles of Men and Women* (1984) notes at p 77 that 'working wives have higher levels of marital power than full-time homemakers.' Similarly, Commonwealth, Royal Commission on Human Relationships, *Final Report* (1977) vol 5 pt VI, 38–9 referred to the need of many married women for an independent income. Particularly disturbing were study results cited of 111 victims of domestic violence. Of these, 31 received no money during marriage and 6 no regular money. The implication is that over one third of the victims of domestic violence had no realistic access to funds for personal and household needs, and no practical experience in money management. Equally, the lack of funds meant that escape from an abusive relationship was profoundly difficult.

The dissonance between rhetoric and reality becomes particularly apparent in contemporary legal regimes governing the dissolution of marriage. These regimes frequently emphasise the obligation of 'spouses' to become financially independent after the dissolution of marriage.[48] Need is central in determining eligibility for support from a former spouse.[49] *In the Marriage of Woolley*[50] is typical of the early Australian approach to maintenance, both because the award took the form of a lump sum and because it was explicitly intended to enable the wife to become self-supporting.[51] A lump sum was awarded to cover the costs of a four-year retraining period following a marriage lasting twenty years. The wife, aged 43 at the time of proceedings, had not worked outside the home during her marriage and had been relatively unskilled prior to marriage. Despite this, the court explicitly rejected the idea that her former husband should support her for the remainder of her life.[52]

More recently, particularly in affluent families, the Family Court appears prepared to award some ongoing spousal maintenance as well as significant property settlements where the earning capacity of one party has been substantially diminished during the marriage. In *DJM v JLM*[53] the former wife received 80% of the parties' assets, maintenance of $150 per week and child support for the four children living with her in the amount of $470 following a marriage of some 16 years. The court clearly recognised that, despite being a trained teacher, it was unlikely that she could become self-supporting. Four children were still at home, the youngest child being only five at the time of the appeal. The wife had not

48 The gender neutral language conceals a gendered reality. Overwhelmingly, spouses are former wives and need arises either because a former wife has been largely occupied in caring for the children of the marriage or because the marriage was traditional in character. See *Family Law Act 1975* ss 72–77A.

49 Section 72 *Family Law Act 1975* provides a spousal maintenance only to the extent that one party is unable to support herself or himself adequately, having regard to the reasons spelled out in s 75. Section 81 expresses the policy of the legislation in seeking to conclusively determine the scope of the financial obligations of the parties. Similar provisions have been in force in other jurisdictions. Eg *Family Proceedings Act 1980* (NZ) s 64; *Family Law Reform Act*, 1978 (Ontario) s 15; *Uniform Marriage and Divorce Act* (US) s 308(a)(2). The emphasis is upon needs, and upon the obligation to become self-sufficient wherever possible. Some Canadian provisions have gone further, imposing a requirement of self-sufficiency. See eg *Family Maintenance Act*, 1978 (Manitoba) s 6 and *Family Relations Act*, RSBC 1979, s 57(2) (British Columbia).

50 (1981) 6 Fam LR 577.

51 See also *In the Marriage of JM and LJ Rouse* (1981) 7 Fam LR 780. While it was reasonable to postpone employment until the child of the marriage attended school, full time prospects for remarriage must be taken into account in fixing lump sum maintenance. In *In the Marriage of Gyopar, PG and Gyopar, J* [1986] FLC 75,606 a genuine effort to obtain employment was mandated.

52 *In the Marriage of Woolley* (1981) 6 Fam LR 577. Note the unreality of the assumption that someone with little prior work experience could become self-supporting in her late forties. While times were better when this case was decided in the early 1980s, prospects were still far from good.

53 (Unreported, Family Court, Full Court, 15 July 1988).

engaged in waged labour for more than twenty years, although she had some involvement in the husband's consultancy business. The appeal largely focussed upon whether, given that the husband had incurred an very substantial drop in income by abandoning his consultancy business and becoming an academic shortly after separation, a higher income ought to be imputed in calculating the level of periodic maintenance appropriate. The trial judge had deemed this appropriate but this was reversed on appeal. According to Baker, Kay and Morgan JJ:

> A judge might reasonably say that a parent should be working longer hours or in more lucrative employment to meet child support obligations. A spouse is only required to support the other spouse to the extent that he or she is reasonably able to do so. This requirement does not impute the same degree of compulsion about it that the child support and child maintenance tests express.[54]

Here, effectively, the substantial property settlement in favour of the wife and the ongoing maintenance awarded were intended as partial compensation for the opportunity costs incurred in a lengthy marriage. The case is interesting both for its extensive survey of United States case law and because of the clarity with which their Honours distinguished between the compulsion inherent in the child support and child maintenance tests and the lower level of obligation in the case of an estranged spouse.

The need to provide compensation for the opportunity costs that inevitably accompany a lengthy marriage is a strong theme in recent cases,[55] even where, as in *Waters and Jurek*, the parties both pursued professional careers. Fogarty J set out the issues with particular clarity:

> 55. In most marriages, there is a division of roles, duties and responsibilities between the parties. As part of their union, the parties choose to live in a way which will advance their interests — as individuals and as a partnership. The parties make different contributions to the marriage. ... Homemaker contributions are to be given as much weight as those of the primary breadwinner.
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> 56. On separation, the partnership, and the division of roles and responsibilities which it produced, come to an end. Individually, the parties are left largely in the personal situations that the marriage has assigned to them. However, the world outside the marriage does not

54 Ibid para 17.43.

55 See, for example, *In the matter of Brent Geoffrey Herbert Waters Appellant/Husband and Mary Bohumila Jurek Respondent/Wife* (Unreported, Family Court, 3 July 1995) and *In the matter of Norma Jill Mitchell Appellant/Wife and Anthony Lewis Mitchell Respondent/Husband* (Unreported, Family Court, 8–9 December 1994).

> recognize some of the activities that within the marriage used to be regarded as valuable contributions. Home-maker contributions, for example, are no longer financially equal to those of the breadwinner. Post-separation, the party who had assumed the less financially rewarded responsibilities of the marriage is at an immediate disadvantage. ...
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> 57. When the marriage ends ... one cannot separate the parties as individuals from the people they became in the context of the marriage relationship, and the allocation of roles, duties and responsibilities which it entailed. In some cases, an adjustment is called for because it would be unjust for the roles and activities of a party ... to suddenly count for little, while those of the other party ... to now have a far greater financial impact ... — in circumstances where it was the joint decision of the parties that that be the way in which they would conduct their affairs, and where that decision was made in the expectation of the relationship continuing.[56]

Nonetheless, relatively affluent families such as these represent a tiny minority. In the great majority of cases of family breakdown the available property is more likely to be consumed by litigation than used to compensate for the opportunity costs in a lengthy marriage. Where there is no real wealth, no equitable solution exists within existing familial, social and economic structures. It is irrational to expect former marital partners to provide ongoing support, particularly where they have assumed new responsibilities.[57] In a majority of families the only divisible asset of significant value is the family home (usually heavily mortgaged) and market activity is the only means of generating wealth. The capital sum available upon dissolution is likely to be relatively insignificant and property re-allocation insufficient to redress any existing economic imbalance.[58] Yet it is also improper to disregard the economic disadvantages confronted by those that have abandoned careers for domestic roles or subordinated career options to family relationships, particularly where these choices been encouraged both by convention and by government policies.[59]

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56 *Waters and Jurek* para 55, 56, 57.

57 The courts recognise this. They recognise as well that where maintenance and child support effectively reduce disposable income to the level available through unemployment benefits a percentage of individuals will find it rational to opt for the receipt of benefits.

58 For the majority of couples, it seems likely that resource limitations will effectively render s 81 *Family Law Act 1975* nugatory. Only in relatively affluent families is it likely that sufficient resources will be available for any maintenance order to be paid out as a lump sum. Where a lump sum is provided, however, future variation (either upwards or downwards) is unlikely. See *In the Marriage of Park (RAM and P)* (1978) 35 FLR 366 and *In the Marriage of JM and LJ Rouse* (1981) 7 Fam LR 780.

59 When *Woolley* was decided, laws requiring equal pay for equal work had been in place less than a decade. The public service bar on permanent status for married women had been abandoned only recently and superannuation for female employees was a recent innovation. Against that background, the assumptions driving the decision are remarkable.

Views differ as to whether compensation for foregone opportunities is appropriate. Eekelaar and Maclean argue that to provide compensation for foregone opportunities involved in child rearing 'is to equate a voluntary decision in favour of child rearing with a tortious injury'.[60] This argument mirrors the assumption underlying the liberal model of choice: individuals ought to be responsible for their choices and for the consequences that attend them. While they suggest compensation equates a voluntary decision in favour of child rearing to a tortious injury one might equally argue that the failure to compensate implicitly equates 'a decision in favour of child rearing' to the 'consumption of much expensive leisure'.

Ellman[61] adopts a different and more complex approach, identifying the 'marital relationship' as an entity to which benefits accrue.[62] He argues that a spouse is entitled to maintenance wherever an 'investment' in the marital relationship has adversely affected post-marital earning capability. He notes:

> [T]he traditional wife makes her marital investment early in the expectation of a deferred return: sharing in the fruits of her husband's eventual market success. The traditional husband realizes his gains from the marriage in its early years, in the form of increased earning capacity and the production of children; his contribution is deferred until the marriage's later years when he shares the fruits of his enhanced earning capacity with his wife. In any relationship in which the flow of payments and benefits to the parties is not symmetrical over time, there is a great temptation to cheat. The party who has already received a benefit has an incentive to terminate the relationship before the balance of payments shifts.[63]

The impact of age upon marriageability enhances the risk for the traditional wife. She has depleted what Ellman terms her 'capital assets' — 'the years in which her sexual appeal is highest, her fertility greatest, and her domestic services are most in demand'[64] — early in the expectation of a deferred return. While she cannot recover her investments in a failed

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It was not simply that the former wife had chosen not to work during her marriage: that choice was made within a legal and economic system that actively discouraged married women from seeking employment. The Australian Prime Minister announced on 4 August 1998 that among the tax incentives in the reform package accompanying a GST would be provision for income splitting between a breadwinner and a spouse and adult children who do not participate in waged labour, thus lifting the tax free threshold to $20 000. See 'Howard's $12bn Tax Return', *The Australian* (Canberra), 4 August 1998, 1. Such provisions operate as a profound disincentive to engage in waged labour.

60 John Eekelaar and Mavis Maclean, *Maintenance After Divorce* (1986) 49.

61 Ira Mark Ellman, 'The Theory of Alimony' (1989) 77 *California Law Review* 1.

62 He analogises the marital relationship to a commercial partnership.

63 Ellman, above n 61, 42–3.

64 Ibid 44.

marriage, her husband realises early gains and can often transport those gains into subsequent relationships.[65]

Despite their apparent opposition, both arguments share a number of common assumptions and represent different applications of the principle of rational choice.[66] Eekelaar and Maclean suggest that compensation for lost career options is less appropriate where children are involved because the wife has also benefited from producing and raising children. '[I]n childless cases, it may be more readily perceived that the husband has directly benefited from his wife's economic sacrifice.'[67] This is a familiar argument, suggesting that she has preferred bearing children and thus has chosen disadvantage. The decisions involved are particularised and focussed upon the preferences of the individuals involved, and the 'marital relationship' disappears from view.

Ellman, on the other hand, argues that maintenance should be seen as compensation for 'the 'residual' loss in earning capacity that arises from ... economically rational marital sharing behaviour'.[68] He suggests that a rational couple will allocate their efforts in a manner that will maximise the total wealth available to the family as an economic unit.[69]

Ellman's scenario is interesting, not least because a rational choice in terms of the marital partnership will almost invariably be an irrational choice for one of the parties, if they are seen strictly as individuals. The fact that one of the spouses, the wife, consistently gives the welfare of the marital partnership priority over her individual interests is striking, particularly since the husband is not called upon to do so. In this context, the work of Carol Rose on the idea of a taste for cooperation is highly suggestive. Rose suggests that, where the parties involved in bargaining differ in their taste for cooperation, the party who favours cooperative resolutions will be systematically disadvantaged once this 'taste' becomes known. The same pattern of systematic disadvantage will occur even where an individual is merely believed to have such a taste.[70] If we apply Carol Rose's remarks to

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65 His 'capital assets', it should be noted, increase with age, at least up to a point.

66 A rational choice is one which, given a particular goal, represents the most efficient means of reaching that goal. In the present context, if the goal is to maximise the resources available to the family as a whole, a rational choice is that option which appears most likely to achieve that goal. Given the existing disparity between male and female salaries, for example, in the majority of households it will be rational for career sacrifices to be made by the wife rather than by the husband where these sacrifices are necessary.

67 Eekelaar & Maclean, above n 60, 49.

68 Ellman, above n 61, 49.

69 I have difficulty with the description of these choices as rational on an individual level. Statistical evidence suggests, inter alia, that women are very much more likely than are men to end their lives in poverty. Given this, and given the current statistics on dissolution of marriage, an event that is also economically disadvantageous to women, it may be possible to question whether a choice made on this basis is 'rational'. I would suggest that decisions made on this basis are profoundly irrational and potentially self-destructive.

70 See Rose, above n 46. The work of Carol Rose suggests that equality of bargaining power is farcical.

the scenario developed by Ellman, it is easy to see how patterns of disadvantage arise. For the husband, the behaviour required both for individual economic maximisation and for maximisation of the resources available to the family unit is identical. His wife, on the other hand, needs to choose between an individually optimal outcome and an optimal family outcome. If she opts for the individually optimal outcome, given existing social and economic arrangements, the outcome is likely to be sub-optimal for the family.[71] If, instead, she opts for an optimal family outcome, and should death or dissolution intervene, the outcome is likely to be profoundly disadvantageous for her. These permutations emphasise that the discourse of rational choice is neutral with respect to the end chosen. Instead, it is simply concerned with whether the means chosen are more or less effective in reaching that end.

Ellman's logic is both simple and telling. If the strategy is to maximise total wealth, it is logical 'to shift economic sacrifices from the higher earning spouse to the lower earning spouse'. Given existing disparities between the average weekly earnings of men and women, this shift inevitably pushes the lower earning spouse towards 'the position of the wife in the traditional marriage'.[72] It will, therefore, be rational for the wife to reduce her economic activity as required to care for their children and for her more active partner. It will also be rational for her to take time off to care for sick children and older family members should this be necessary. This 'rational' strategy has significant long-term consequences in terms of the ability of the parties to amass human capital.[73]

Ellman's analysis is useful because it makes it clear that the reasons why marriage is economically disadvantageous for women are structural and institutional rather than individual. Perhaps there is an 'invisible hand' of a kind in operation here. Just as market choices are supposed to maximise utility across the community (although they also ensure that existing patterns of inequality reproduce themselves), family choices maximise utility across the family (while ensuring that existing patterns of inequality reproduce themselves).[74] The economic patterns Ellman's account reveals are strikingly parallel to

71 While Fogarty J in *Waters and Jurek* suggests at para 55 that these choices which lead to this outcome are both individually optimal and optimal for the family unit, I believe that conclusion can only be justified if one assumes that it is rational to disregard the possibility of divorce. Given that rather more than one in three marriages is currently likely to end in dissolution, and given the economic consequences of divorce for a majority of women, I would suggest that women are socially and culturally encouraged to gamble on marriage whereas men invest in marriage, striking an even balance between risk and gain.

72 Ellman, above n 61, 46. Ellman argues that striving for an equal division of market and domestic activity is likely to yield a net decrease in marital stability because the utility of marriage will be reduced for men, encouraging men to exit the marriage. Present arrangements encourage women to exit the marriage and this view is reinforced by the work of Durkheim in the 1950s.

73 That it also has such consequences in terms of opportunity costs should be obvious.

74 Arlie Hochschild suggests men routinely cite the demands of their jobs as the reason that they do not share 'the second shift'. Even where spousal incomes are essentially equal

Emile Durkheim's insistence that in 'core aspects, such as emotional satisfaction, respect and recognition of self, freedom and autonomy' marriage is significantly more advantageous for men than for women.[75] Durkheim's thesis, developed in the early 1950s, has been borne out by some recent research, the evidence suggesting that men are both more emotionally dependent on their partners and more likely to take their marriages for granted while women have higher expectations and are less willing to tolerate unsatisfactory relationships.[76]

The interaction between family decisions made to maximise collective outcomes and male and female attitudes yields a further source of disadvantage. Women's economic prospects typically deteriorate steadily during marriage. The human capital foregone is unlikely to be made up if the relationship ends. For the great majority of individuals today, whatever measure of economic stability and wealth they possess consists exclusively in their human capital, in the skills and benefits acquired, directly or indirectly, through market activity. Human capital takes many forms: security of tenure, benefits such as superannuation and disability benefits, contacts and connections (the old boys' network is a particularly advantageous form of human capital), and experience. It operates in many ways, from the last on–first off policy common in some workplaces to the way in which connections often smooth the way to partnerships and other senior positions in professional and managerial environments. Because of traditional gender role allocation, men tend to accumulate human capital and women either do not, or, if they maintain labour market participation, do so much more slowly. Despite the economic risk, however, women are both more likely to seek dissolution and less likely to re-partner than are men.[77] For this reason, public sphere egalitarianism is likely to have only limited impact upon gender inequality.

These persisting disparities also cast doubt upon the compatibility of existing regimes with the egalitarian suppositions underlying them. Women expect more from their relationships and, increasingly, are willing to abandon them if those expectations are not met, despite the economic detriment. More and more frequently, among those expectations are active participation in parenting and household work. When relationships end, the disadvantage is compounded because of significant long-term economic detriment, realised either upon dissolution or the death of a partner.[78] Men apparently derive greater psychosocial benefit

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many men are unwilling to alter this pattern. See Arlie Russell Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (1989).

75 Funder, above n 23, 237. Cf Ruth Weston, 'Money Isn't Everything' in McDonald, above n 23, 279–80 and Durkheim, above n 23, 275.

76 Weston, above n 75, 279–80. Also see n 26, above, and accompanying quotation.

77 Family Court statistics suggest that women initiate dissolution in approximately 70% of cases.

78 These outcomes are the norm rather than the exception. More than one third of all marriages end in dissolution. Current research suggests that this will rise to about 43%. Following dissolution, men are substantially more likely to re-partner than women. Even if dissolution is avoided or re-partnering occurs, because women enjoy substantially greater

from marriage and the father–child relationship provides an added bonus. The impact of dissolution is also gendered. Men experience significantly more dislocation and this is typically compounded by erosion of the paternal role. Their long-term economic detriment is negligible, however, and the likelihood of re-partnering is significant.

It is unrealistic to expect property and maintenance orders following divorce to redress this imbalance. If we wish to address the massive social and economic dislocations consequent upon dissolution of marriage, we must first eliminate the economic and social inequality of women and we cannot do that without altering the way we understand the family and the roles within it. The changes which are required represent our best option for strengthening relationships and binding families more closely together.

THEORY AND PRACTICE: A MISUNDERSTOOD RELATION

The characteristics that interact to produce inegalitarian outcomes have parallels in core assumptions of liberal theory. They are encapsulated in the view that:

> Marriage and family obligations today are seen less in terms of right and wrong and more in terms of personal choice and personal fulfilment.[79]

Both men and women increasingly perceive marriage in instrumental terms rather than in terms of obligations and responsibilities. It is seen, that is, as a source of particular sorts of satisfactions: intimacy, mutual support, a sense of being valued and children. Because of this, if, as appears to be the case, the benefits are unequally distributed, it is likely to become increasingly precarious. We have little reason to expect individuals to sustain their commitment unless their interests are served by it, unless they believe its future is theirs as well.[80] These understandings are built into contemporary family law. The elimination of fault and the shift to divorce at will mirror the emphasis upon choice and personal fulfilment and necessitate an attempt to finalise the financial relationships between the parties, the assumption being that this will enable them to seek other avenues for fulfilment.[81]

Family relationships are themselves understood instrumentally, in terms of rights in isolation from reciprocal obligations. The lingering beliefs that parents own their children

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life expectancy than do men, they are likely to outlive both their partners and the resources necessary for a comfortable old age.

79 Ellman, above n 61, 14.

80 See Dworkin, above n 38, 205–13, esp 212–13 for a structurally identical argument in respect of political community. People are unlikely to remain committed to an institution unless they believe their interests to be served by it.

81 See above n 24 and associated text. There are of course sound utilitarian reasons for a policy decision in favour of conclusive determination. This minimises ongoing litigation with the attendant economic and social costs.

and that family affairs ought to be wholly private exemplify this emphasis.[82] A particular, if extreme, manifestation of these beliefs may be found in the activities and the rhetoric of fathers' rights groups. Groups such as these are staking very particular sorts of claims following family breakdown, and some are prepared to use violence to prosecute those claims. While the rhetoric of fathers' rights groups is often extreme, the themes running through it highlight another of the ways in which the liberal project has failed. It has failed to ensure women and children have adequate resources following dissolution of marriage, it has failed to deliver anything resembling economic equality to women, and it has failed to provide a conceptual framework in which relationships and responsibilities can be understood other than in terms of conventional dichotomies.

> The research of Parkinson (1988) on children and divorce has lead [sic] her to conclude that 'legal labels matter'. Divorce mediators Folberg and Graham (1979) assert that many post separation disputes over children represent a search for parental status. ... Patrician (1984) ... supports this observation. Patrician asked a sample of non custodial fathers to respond to legal terms such as 'sole legal custody' and 'non-custodial parent'. ... The term 'custodial parent' was associated with being 'strong rather than weak, powerful rather than powerless, winning rather than losing, dominant rather than submissive, valuable rather than worthless, important rather than unimportant and valuable rather than useless'. These and other findings led Patrician to conclude that non-custodial fathers perceived their situations as inherently unfair. ... Roman and Haddad (1978) had earlier used the term 'disposable parent' to signal their understanding of this loss of status.[83]

What is at stake here, perhaps, is a response to the liberal paradigm within which family law is embedded. To the extent that family relationships are instrumentalised, that is, perceived as the sources of particular sorts of satisfactions, it is hardly surprising that the deprivation of one of the most potent of those satisfactions will cause substantial distress.[84] What needs to be understood, however, is that these perceptions are not simply a response to the terminology of family law statutes and decisions but flow from a particular

82 See 'Parents Stake Their Claim', *Time Australia* (Melbourne), 7 Aug 1989, 49: 'More than half of Australians recently surveyed believed that parents legally "own" their children; two-thirds said family affairs were nobody else's business'. The statistics were obtained as part of the Western Australia, Department for Community Services, *Child Value Project* (1987) vols 1–3, cited in Dwyer and Strang, above n 29, 6. Both these beliefs emphasise the classically liberal connections between rights and property, and, in particular, that between privacy and property.

83 Family Law Council, above n 16, para 4.15

84 Robert Cover reminds us that '[t]he judges deal pain and death.' See Robert Cover, 'Violence and the Word' in Martha Minow, Margaret Ryan and Austin Sarat (eds), *Narrative, Violence, and the Law* (1992) 203. Nowhere is this truer than in family law courts.

understanding of family relationships and roles. To the extent that terms such as 'non-custodial parent' and 'access' are associated with profound feelings of disempowerment it is in part because there is a real loss, a loss of the status and authority which even the 'absent father' enjoys within an intact family. If possessory understandings of relationships permeate our collective mind-set (and the 1987 study referred to earlier suggests that they do and that about a third of parents believe that they own their children) it is not surprising that deprivation of control is seen as a profound deprivation of status.

Rights and rights talk, when coupled with notions of family privacy and autonomy, provide an ideal climate for both inequality and for violence. I am not attacking conceptions of rights, human or political, rather I am arguing that the combination of rights and privacy is disastrous. Rights are a means of asserting individuation and demanding equal treatment. Rights talk requires a perception of self as autonomous, and as entitled to individual respect and recognition. They entail a concept of acting for oneself and being entitled to do so, even if there is significant cost to self and others.[85] Within the family rights talk remains problematic. When rights talk predominates in discourse concerning the family, and that discourse is predicated upon an assumption of family privacy, relationships of power and subordination are often concealed.

Family privacy operates in a way that suggests that it is akin to deregulation. When relationships between employer and employee are deregulated — delegalised — when marketplaces are deregulated, the strongest and most efficient prevail. Inefficient competitors are eliminated. Within the family, privacy also favours the strong, those individuals whose position enables them to assert and defend their rights and, equally, ardently defend the privacy of the family. Rights talk is most appropriate where people address one another as equals, not merely in situations of conflict, but as an ongoing form of social life. It is most effective under conditions of full publicity, where both conduct and its consequences are continually before the public gaze. Silence and privacy are antithetical to rights. Perhaps that is why a 'right to privacy' seems an oxymoron and why the contemporary faith in family privacy and autonomy is potentially disastrous.

These antithetical elements are united in contemporary regimes for the dissolution of marriage. Such regimes reflect an instrumental view of marriage, one consonant with the ideals of choice and personal fulfilment. The demand for privacy and autonomy characteristic of our cultural beliefs concerning family relationships is reflected in the no-

85 Cf Rebecca West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1, 42:

> I do not fear having my 'ends' frustrated; I fear having my ends 'displaced' before I even formulate them. I fear that I will be refused the right to be an 'I' who fears. I fear that my ends will not be my own. I fear that the phrase 'my ends' will prove to be (or already is) oxymoronic. I fear I will never feel the freedom, or have the space, to become an ends-making creature.

fault character of the regime and in the availability of divorce at will. The emphasis upon privacy and autonomy characteristic of the modern shapes the manner of its dissolution.

PUBLIC EQUALITY AND PRIVATE HIERARCHY: THE DEFEAT OF LAW

With the breakdown of traditional gender roles and the eradication of fault, family law has entrenched liberal equality as a structural replacement. In practice, the dichotomy between public equality and private inequality has been bridged by the use of discretions.[86] While these have often been criticised, they play a very important role. Where successful, they enable the courts to attempt to reconcile private inequality with public equality. That they do not more often succeed underscores the magnitude of the task. The problem is simple. Formal legal equality, sometimes called equality as sameness, legitimates practical inequality unless accompanied by structural reform. Where pervasive and ongoing structural inequality is the norm, legal preference is essential for an egalitarian outcome.[87]

Within contemporary Australian family law, it is hard to see how equity and predictability can be reconciled. The Australian regime begins from a particularised inquiry into contributions and needs.[88] The emphasis upon contributions and needs rather than entitlements signals a very particular way of dealing with the parties and their 'marital inputs'. This legal stance represents a 'welfarist' approach rather than a rights-based approach, although in practice judges appear to commence from an assumption of equal contributions and work backwards in specific areas. While critics allege that outcomes are fundamentally arbitrary and wholly unpredictable, the apparent arbitrariness is a necessary consequence of a welfarist approach. Both contributions and needs are necessarily particular. While background generalisations may be developed, these are pragmatic guides or benchmarks, not principles.[89]

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86 Professor John Dewar argues that recent legislative changes 'in the areas of children, property distribution and child support, offer evidence of a trend away from discretion towards a more rule-based family law.' See Dewar, above n 14, 309.

87 See Peter McDonald, Kathleen Funder, Margaret Harrison & Ruth Weston, 'Directions for Law Reform and Social Policy' in McDonald, above n 23, 308–23. The authors suggest that the marriage partnership be deemed liable for the long-term disadvantages suffered by women following the dissolution of marriage. They argue that compensation ought to be available where one party has forgone opportunities in a way that enhances the resources of the other party. As they comment, choices 'like decisions to invest in one partner's income-earning capacity at the expense of the other's income-earning capacity must be seen as issuing from the marriage partnership. The partnership must therefore compensate the party who has experienced the loss of opportunity.' See p 314. Also see Ellman, above n 61. While Ellman argues that the partnership analogy is inappropriate, his approach is similar. Effectively, equality is inappropriate because of structural inequalities both within the family and within the wider community.

88 *Mallet v Mallet* (1984) 156 CLR 605.

89 Margaret Harrison, 'Introduction' in McDonald, above n 23, 7–8.

Within the welfarist framework of Australian family law, debate continues on how best to evaluate the contributions of the parties. McDonald et al suggest that marriage ought to be viewed as a partnership between equals based upon a functional division of labour in which individuals retain an exclusive right to career assets. They argue that both parents are responsible according to their means for the support of children and emphasise state responsibility where resources are insufficient after marital breakdown. They argue that compensation is owed by the 'marital partnership' where child bearing and rearing has disadvantaged one individual or where career opportunities have been forgone for the good of the marital partnership.[90] Within the existing welfarist paradigm, this approach appears reasonable. Like the arguments canvassed earlier, however, because it ignores the structural inequalities that create the need for compensation, it does nothing to avert the cycle that generates the problem.

Its attractions are, however, obvious. Because it changes little in real terms, it is not threatening. Real change, particularly in family structures and in family roles, is profoundly threatening. This too is part of the modern face of privacy. Privacy protects individuals and relationships against surveillance by the state, and ensures that social relationships are not disrupted by the demands of principle. The conflict between the political realm, comprised of rational and formally indistinguishable legal persons, and the private realm of embodied men and women vanishes. Within the public realm, citizens are formally and legally equal. Within the private realm, relationships of inequality become invisible precisely because they are private. Liberal theorist Ronald Dworkin emphasises this distinction. According to Dworkin:

> our familiar convictions, which require government to treat people as equals in the scheme of property it designs but do not require people to treat others as equals in using whatever the scheme assigns them, assume a division of public and private responsibility.[91]

The division of public and private responsibility conceals the inequality of women from the political gaze. As 'liberal citizens' women are equals. As wives, mothers, waged workers in female ghettos, or workers struggling to gain a foothold in male dominated fields, legal equality may well be enforced, but 'private' inequality remains unchanged.[92]

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90 McDonald, Harrison, Funder and Weston, above n 87, 312. They argue that compensation for the economic detriment occasioned by child bearing and child rearing and for foregone opportunities ought be determined finally upon dissolution, although payment might take the form either of a lump sum or instalments. See p314. But see Ellman, above n 61, 33–40 for a comprehensive critique of the partnership model and for arguments that it is incompatible with the no-fault regimes currently in force.

91 See Ronald Dworkin, *Law's Empire* (1986) 299.

92 *Ekaterini Hatzeli Djokic v Lloyd Sinclair & Central Queensland Meat Export Company (Aust) Pty Ltd* (Unreported, Human Rights and Equal Opportunity Commission, Wilson (President), 24 August 1994) provides an example of a gender-segregated workplace.

REALITY AGAIN: CHOOSING TO BE POWERLESS

The structural impediments to equality are largely undiminished. To participate in the marketplace is to participate upon the terms offered by it and those terms are often predicated upon traditional gender roles. Negotiating new and different strategies, strategies predicated upon the equal commitment of men and women to parenting and to homemaking, and presuming sharing of public and private roles has gained little if any ground. Levit notes:

> At the end of the second millennium, men have greater social permission, and concomitantly greater obligations, to engage in child rearing, yet men do not have the freedom not to work outside the home. Although men say they want to take a more active role in their families' lives, corporate America has not caught up with this new reality. Jackie Church, a consultant at Work/Family Directions, says that 'the senior men and women at policy and decision-making levels in these companies don't understand. ... After all, they got to where they are by devoting themselves entirely to their career at the expense of family.'[93]

Women who attempt to reconcile occupational and familial roles are, increasingly, castigated for 'neglecting' husband and children while pursuing their own ambitions. Behaviour which is both commended and expected in the man, the willingness to work long hours, to subordinate family participation to career advancement and to be loyal to his corporate or bureaucratic family, is seen as abnormal and inappropriate for a woman, particularly one with children. In theory, his role as father is fulfilled by these activities, even when they enable him to escape all but the financial responsibilities of parenthood. These patterns are not accidental, but deeply embedded in legal, cultural and economic traditions.[94]

Culturally, we have paid a high price for the segregation of home and workplace. The isolation of home from workplace has created a radical division between the increasingly fragile fabric of human relationships and the equally human need for achievement and self-creation and definition.[95] The cultural division into public and private space, the tacit

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93 Levit, above n 2, 59.

94 See Hochschild, above n 74. Powerful legal and economic institutions reinforce these traditions. Nancy Levit details the forces that constrain male participation in parenting and other family roles. See generally, Levit, above n 2. The discussion at pp 57–63 is particularly useful.

95 In identifying these as human needs I am explicitly suggesting that both men and women have relational needs and achievement needs. To the extent that legal, economic and cultural forces encourage women to emphasise the relational and men to emphasise the competitive and achievement-oriented, they are contributing to the problem. Worth thinking about is a 1983 study by Huber and Spritze that found that 'for each daily household task that the husband performs at least half of the time, the wife is about three

connection between privacy and property, even the view of mature individuals as autonomous and able to stand apart from relationships and attachments, emphasise the chasm between public ideals and private persons. Within those cultural traditions, the family is simultaneously private and property, pre-political and the fundamental unit of society. It is both open to administrative/bureaucratic regulation and control and closed to direct regulation and legal intervention aimed at the protection of individuals. It has become the centre of our emotional lives, simultaneously the most intensely nurturing and caring social institution extant and, at times, one of the most brutal and violent. Psychological research by Gilligan and Pollak suggests a profound gender difference in people's perception of intimate relationships. Their study found that men characteristically associated

> danger with intimacy, expressing a fear of being caught in a smothering relationship or humiliated by rejection or deceit, while women perceived more danger in impersonal achievement than in personal affiliation and connected danger with ... isolation. Similarly, male fantasies of power have been found to associate power with domination, linking assertion to aggression. Conversely, women tend to perceive danger in impersonal achievement and join power with nurturance, connecting assertion with affiliation.[96]

The dichotomy between the psychological perceptions of men and women and empirical reality embodied in existing relationships seems almost unbridgeable. To the extent that women are physically and psychologically at risk, that risk is greatest within the family and yet women invest most heavily in intimate relationships and derive the core of their sense of self from them.[97] Kaplan comments that:

> men are [tacitly] given permission to expect gratification of individual needs and to use their dominant status to seek such gratification. ... Relationship itself becomes defined not as a mutual endeavour but rather as a unidirectional source of support for one's achievements. ... If men

per cent less likely to have thoughts of divorce'. See Commonwealth, Standing Committee on Legal and Constitutional Affairs, above n 23, 89. Other studies have supported these outcomes.

96 Carol Gilligan & Susan Pollak, 'The Vulnerable and Invulnerable Physician' in Carol Gilligan et al (eds), *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education* (1988) 245–6.

97 Swift cites a 1985 study of Protestant clergy by Alsdurf in which 'one-third of the respondents felt that the abuse would have to be severe in order to justify a Christian wife leaving her husband, while 21 percent felt that no amount of abuse would justify a separation. Twenty-six percent of the pastors agreed that a wife should submit to her husband and trust that God would honor her action by either stopping the abuse or giving her the strength to endure it.' C Swift, 'Surviving: Women's Strength through Connection' in MB Straus (ed), *Abuse and Victimisation Across the Life Span* (1988) 157.

> assume that others are there to meet the men's own needs at the expense of their own, and that men have the right to exercise their socially granted power to make this happen, then there are no built-in constraints against the use of force to effect these aims. ... There is little sense that their own well being and the well being of the other are an intrinsic whole; rather, they feel that their own well being should take precedence or be enhanced even at the expense of the other.[98]

CONCLUSION

We live today in a culture which prides itself upon its commitment to egalitarian ideals and which routinely prostitutes those same ideals. Evidence of this is all around us. It is painfully clear in our relationships with indigenous peoples and with minority ethnic, racial and religious groups. While the rise of economic rationalism and the pursuit of efficiency at any price exemplify it, it is most acute in the tension between the idealisation of the family and a gender ideology that ensures the continued subordination of women. As political and social pressures gather and 'family policies' proliferate, the tension between our facade of egalitarianism and our commitment to the privacy and autonomy of the family increases. The 'family' we idealise remains an intensely inegalitarian institution. Our understandings of masculinity are linked with the breadwinner role, and powerful legal and social forces are marshalled to sustain it. In Australia, as in the United States,

> corporations take a far more negative view of unpaid leaves for men than they do unpaid leaves for women. Almost two-thirds of total respondents did not consider it reasonable for men to take any parental leave whatsoever. ...
>
> Even among companies that currently offer unpaid leaves to men, many though it unreasonable for men to take them. Fully 41% of companies with unpaid leave policies for men did not sanction their using the policy.[99]

As Levit notes, to the extent that powerful institutions continue to adopt practices that assume that the need for flexible work practices and hours is exclusively female, by locking men into stereotypically masculine roles they simultaneously ensure that women are locked into parenting roles. One effect is that explored in this article, a set of practices that routinely undermine the egalitarian outcomes the legal framework mandates.

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98 AG Kaplan, 'How Normal is Normal Development? Some Connections Between Adult Development and the Roots of Abuse and Victimisation' in Straus, above n 97, 136.

99 Catalyst, *Report on A National Study Of Parental Leaves* (1986) pp65–6, reprinted in *The Parental and Medical Leave Act 1986: Joint Hearing on HR 4300 before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education & Labor*, 99 Cong, 2d Sess 151–228 (1986).

Despite the legal and social changes of the last 25 years, cultural assumptions about the structure of economic roles and caring roles remain firmly gendered. Entrenched standards for career progression, workplace norms concerning the indicia of commitment and productivity, reflect a particular understanding of masculinity. While, increasingly, these roles are available to both men and women and thus are not defined by biological sex, they remain firmly gendered and are roles that are often incompatible with active participation in caring work and household labour. Caring roles are equally gendered. For many men, to step outside conventional workplace norms and to actively participate in caring labour carries profound risks, both because of workplace assumptions about appropriate levels of commitment and dedication and because of social assumptions about appropriate masculine roles. Achievement and masculinity are linked, and both are profoundly valued, both in the market and in civil society. Both are, in very particular ways, an intrinsic part of our understanding of the liberal subject.

For both men and women the instrumentally rational relationships of the market place hold the key to status and to economic survival. Caring work is risky, and active participation in caring work often seems incompatible with status and economic survival. These assumptions structure gender relationships in very particular ways, ways which are, it seems to me, disadvantageous to both men and women and to the stability of the family. As increasing numbers of women participate in the waged labour market, whether by choice or from economic necessity, and as the rate of family breakdown continues to rise, perhaps the time has come to question these assumptions, despite their embeddedness.

The assumptions of which I speak lie well beyond the reach of equal opportunity legislation and formal policies. They structure conduct at a far deeper level, suggesting that it is 'inappropriate' for a professional man to take an extended period of parenting leave or embedding assumptions that male early childhood care workers are potential abusers and ought to be excluded from physical nurturing.[100] Similar assumptions suggest that, for it to be economically rational for a married woman with children to pursue a career, her after tax income must be sufficient to cover the cost of childcare and household help and still provide a meaningful supplement to what is euphemistically called the 'family income'. This represents the conventional wisdom and, as in the past, it is aimed at ensuring that women do not perceive it as economically rational to pursue career ambitions. Yet children have, it ought to be remembered, two parents. No rational reason exists for assuming, as conventional political wisdom would have it, that either childcare or the cost of substitute care are the exclusive responsibility of the mother. All individuals require a place to live and food to eat. Again, no rational reason exists to assume that any individual, male or female, does not have to maintain his or her accommodation and procure and prepare suitable food. We assume almost without question that the responsibility for providing for these essentials belongs to the wife. Even among

100 See Levit, above n 2, 60 where she notes that '[m]en gravitating toward caregiving occupations may be viewed not just as anomalies but as potential child molesters.'

professional women one hears remarks such as 'almost half of my income goes to the cost of childcare'. We fail to ask, why your income? Conventional gender roles, and their frequent surrogate, the 'traditional family', remain the unspoken norm around which discourse is constructed.

Against the background of a divorce rate that appears likely to reach 43%,[101] and evidence that women are far more likely to seek dissolution than are men, we have every reason to question the appropriateness of the social and economic institutions that contribute to this situation. Susan Moller Okin offers a perceptive description of these institutional structures and their consequences:

> [I]n crucial respects gender-structured marriage *involves women in a cycle of socially caused and distinctly asymmetric vulnerability*. The division of labor within marriage ... makes wives far more likely than husbands to be exploited both within the marital relationship and the world of work outside the home. To a great extent and in numerous ways, contemporary women in our society are *made* vulnerable by marriage itself. They are first set up for vulnerability during their developing years by their personal (and socially reinforced) expectation that they will be the primary caretakers of children, and that in fulfilling this role they will need to try to attract and to keep the economic support of a man, to whose work life they will be expected to give priority. They are rendered vulnerable by the actual division of labor within almost all current marriages. They are disadvantaged at work by the fact that the world of wage work, including the professions, is still largely structured around the assumption that 'workers' have wives at home. They are rendered far more vulnerable if they become the primary caretakers of children, and their vulnerability peaks if their marriages dissolve and they become single parents.[102]

She notes subsequently that the distribution of marital power and the ability to exercise 'voice' within the relationship is profoundly dependent upon access to resources valued in the outside world, such as income and work status.[103] Against the background of evidence that women are increasingly dissatisfied with marriage, although their commitment to their children has not wavered, perhaps it is time to begin to reimagine our institutional structures. Nancy Fraser suggests that it is essential to dismantle

> the gendered opposition between breadwinning and caregiving. [We need to] integrate activities that are currently separated from one another,

101 Commonwealth, Standing Committee on Legal and Constitutional Affairs, above n 23, 16. The divorce rate is about 50% in the United States and close to that in the United Kingdom.

102 Susan Moller Okin, *Justice, Gender and the Family* (1989) 138–9 (emphasis original).

103 Ibid 159.

> eliminate their gender-coding, and encourage men to perform them too. ... The construction of breadwinning and caregiving as separate roles, coded masculine and feminine respectively, is a principal undergirding of the current gender order.[104]

A key is to develop policies that discourage free-riding. Contra conservatives, the real free-riders in the current system are not poor solo mothers who shirk employment. Instead, they are men of all classes who shirk caring work and domestic labour, as well as corporations who free-ride. It seems to me that Okin and Fraser are right. Existing institutional arrangements are both self-defeating, that is, they ensure that the egalitarian impetus of many civil sphere initiatives will be continually frustrated, and encourage many of the behaviours which seemingly contribute to high rates of marital breakdown. So long as they remain entrenched, there is little hope that efforts to reform family law will be successful. While we cannot turn back the clock and replicate the legal structures and employment patterns of the 1950s, until progress is made in dismantling the social and economic constructs which reinforce the gendered character of family and market roles we will continue to reap their bitter harvest.

104 Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (1997) 61.