

IN REVIEW

In a recent monograph, *Wedlock and Wellbeing*, Barry Maley argues a case for bringing back the notion of fault in divorce law. His arguments are based on the premise that the institution of marriage is endangered and that its disintegration threatens the wellbeing of adults and children.

Ilene Wolcott and Kate Funder

Few people would disagree with Maley's contention that 'cultural and ideological' movements have influenced contemporary meanings of relationships, particularly that of marriage. Among such movements and developments are the availability of safe contraception which enabled women (and men) to control fertility and thus choose if and when they would have children, and the opening up of access to higher education for women and its sequel of increased participation in paid work, with wages increasingly approximating those of men.

In addition, technological and industrial changes in the nature of both paid and domestic work have furthered a trend for men and women to become economically independent, and for marriages to become more egalitarian. None of these trends, however, can be said to emanate from the Family Law Act or the Family Court of Australia; the origins of these changes predate the latter institution by decades.

As an illustration of changes in expectations of marriage, we can look to an eighteenth century legal commentator. Blackstone, speaking of marriage in English Common Law, states: 'By marriage, the husband and wife are one person in law; this is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs everything. . . . The husband is bound to provide his wife with necessaries by law, as much as himself. . . . These are the chief legal effects of marriage during the coverture; upon which we observe that even the disabilities under which the wife lies under, are for the most part intended for her protection and benefit.'

We have no problem with the idea that Blackstone's marriage and modern marriage depict an enduring social institution. Yet Blackstone's view of that institution is hardly likely to match the expectations of men and women marrying in the last decades of the twentieth century. Concepts of how marriage should be

conducted are now much changed because the society has changed in the ways Maley describes. Even though the abiding *raison d'être* for marriage remains – and we agree with Maley that long-term committed relationships are beneficial to the wellbeing of adults and children – marriage, like any other social institution, adapts to circumstances as they change over time.

Two interpretations

There is also no disagreement that the accelerated changes of the past decades create ambiguity, pose dilemmas, and may give rise to stress. In intimate relationships and marriage, these reactions to change are perhaps particularly pronounced. Rapid social change also increases diversity of attitudes and values within the community. With regards to marriage, that diversity embraces attitudes which span from Blackstone to the underpinnings of the Family Law Act (1995).

Moving from a legal to a more interpersonal perspective, Christopher Clulow, Director of the Tavistock Marital Studies Institute in London, comments on the need to understand what is happening to marriage. 'Any audit of marriage must take account of different perspectives, different realities and different levels of meaning' (Clulow 1995: 5). The different realities people have about marriage come from personal history and their perceptions of the social world.

Maley clearly identifies with the values and attitudes he recalls from an earlier era – perhaps the 1950s. He implies that recent trends have undermined the legal institution of marriage and that changes in Family Law can halt this destabilisation. He also asserts that a more punitive application of family law may restore marriage to a stability which existed in a previous 'golden age' when there was, according to Maley, 'a family wage for men and women did not need to seek workforce wages'. It is the economic dependency of women and their assumption of the 'production of domestic goods and services from which husbands benefit' that forms the crux of the stable marital relationship Maley seems to desire. He argues that the

law be used to constrain people from leaving their marital obligations.

There is another interpretation of the social trends Maley describes. Such an interpretation also accepts that there are dilemmas arising from gender neutral access to economic independence. Nevertheless, this currently is a plank in our social policy and hence in modern marriage. Given the social and economic realities and the obvious stresses on modern marriage, it can be argued that remedies should be sought in the broader world of work and social structures, rather than in constraining people to remain in relationships that have become intolerable.

The alternative route to reducing some of the structural tensions in modern marriage may lie in paying attention to the underlying issues (causes) Maley identifies – providing income support for families, subsidising housing loans for families with young children and helping male and female parents to balance paid work and family life. It may equally be argued from Maley's evidence that these strategies would be the more powerful in ensuring that long-term commitments are attractive, attainable and sustainable. They are not, however, cheap options.

Although the institution of marriage has endured, the surface characteristics change. Marriages were often informal in the past although, as a social institution, marriages, whether de jure and de facto, were and are marriages. Recently de facto relationships have regained greater currency. Thus de facto unions may function as marriages.

Marriages of all sorts may serve somewhat changed functions, however. For example, the state has taken over large parts of the education of children, and marriage is not the only place for legal sexual intimacy, nor is it the only pathway to adult social status. In 1950 people lived at home with parents until they married, they married younger, they had more children. Fewer years were spent in education, especially for girls, and jobs were available to almost all as a matter of course. Education, jobs, housing, sexual behaviour have changed in conjunction with marriage. As marriage is no longer essential to leaving home, becoming sexually active, or having a steady job for life, it is difficult to look for the same bases for stability as sufficed in the past. In particular, the use of law to constrain entrance into intimate relationships has been discarded; it is difficult to see how law can be resurrected to constrain the leaving of marriage.

The law as a solution

Having fault as a disincentive to leaving a marriage and as a moral statement about relationship breakdowns is not new. The law was tried and found wanting. It was seen as unworkable, open to gross abuse and demeaning to the people it publicly humiliated. The Family Law Act (1975) was a response to such dissatisfactions. The alternative view is that more legal intervention in intimate relationships is tolerable

and that the degree of deregulation of marriage found in the Family Law Act is too great.

Root causes and solutions

We are more inclined to follow the American sociologist Andrew Cherlin who observed that: '[T]here are stringent limits on what public policy can do to support marriage. Much of the decrease in marriage is due to the aforementioned declines in the cultural imperative to marry and in the economic need to marry. The home-and-family-centred values of the 1950s were produced mainly by the hardships of the depression and the war, the small birth cohorts of the 1930s, and the post-war economic boom – not government policies. In order to create a truly pro-marriage policy, the government would have to make men and women dependent on each other by constraining behaviour in ways few people would accept. For instance, a law that restricted women's employment opportunities probably would increase marital stability' (Cherlin 1992: 130–134).

Shades of this argument can be seen in the pronouncements of leaders in countries confronting the inevitable impact of modernisation. The former Prime Minister of Singapore, Mr Lee Kuan Yew, was quoted as saying that he regretted his policy of attracting more women to universities as 'it was later shown to have had a harmful impact on the development of traditional culture and family values' (Wilcox 1994).

If Maley were successful in his plan to use family law to create economic disincentives to leaving unhappy marriages, we are left wondering whether the resulting relationships would sustain the qualities of family life he extols as promoting wellbeing in adults. More seriously, the potential for exacerbated conflict over long periods when fault would be debated cannot benefit children, whose interests must be a first concern.

To quote James Garbarino, a researcher mapping the conditions of wellbeing in childhood: 'An element in family success is creating a situation in which adults can live with self-respect and some measure of personal fulfilment. It does no good to talk about successful families in terms of child development if meeting those goals destroys the adults who must bear and care for those children' (Garbarino 1995: 52–53).

In the final analysis, Mr Maley must demonstrate how his proposal to change the Family Law Act would be in the best interests of children in conflicted families. His arguments seem to lead equally well to solutions which target family support while accepting the rights of women and men to develop both parallel and complementary roles. We would wholeheartedly support initiatives which enable parents to manage work and family to the benefit of all.

This point is particularly important given the research cited by Maley comparing children who live with married parents with

those in divorced families. Maley tends to interpret these differences as large. However, other commentators reach more cautious conclusions, although none denies that economic deprivation in these circumstances has been clearly demonstrated.

For example, the editor of *Family Relationships*, comments on Cherlin, et. al's (1992) meta-analysis of American and British cohort studies and concludes: 'My reading of this article is that many of the (small) differences between children growing up in a divorced home and children growing up in first-marriage families are also present before the divorce. Thus, a number of other factors (such as family processes and parenting practices) besides divorce per se account for the adjustment differences' (Fine 1996).

A conclusion to be drawn from these arguments is that we need policies that are flexible and community resources adequate to sustain all these children. The provision of a range of accessible and appropriate informational, educational preventative and remedial services such as relationship education and skills programs in schools and community, family and couple counselling and mediation services can assist many people to strengthen family relationships.

Support for family life cannot, however, be considered in isolation from the functioning of men and women as full participants in society at the same time as they are partners and parents. As parents they must have access to practical and financial supports – jobs, housing, health care and adequate income, together with community resources such as child care and elder care. Whatever is done with family law, it is a weak instrument in the prevention of family breakdown and dysfunction.

References

- Cherlin, A. (1992), *Marriage, Divorce, Remarriage*, Harvard University Press, Cambridge.
- Cherlin, A. J, Furstenberg, F. F, Chase-Lansdale, P. L, Kiernan, K. E.,
- Robins, P. K., Morrison, D. R, & Teitler, J. O. (1991), 'Longitudinal studies of effects of divorce on children in Great Britain and the United States', *Science*, vol. 252, pp. 1386–1389.
- Clulow, C. (ed) (1995), *Women, Men and Marriage: Talks from the Tavistock Marital Studies Institute*, Sheldon Press, London.
- Garbarino, J. (1995), *Raising Children in a Socially Toxic Environment*, Jossey Bass, San Francisco.
- Fine, M. (1995), FAMILYSCI Discussion Group, 15 December.
- Wilcox, I. (1994), 'Equality in Singapore a culture error: ex-PM', *The Age*, April.

Ilene Wolcott is a Senior Research Fellow with the Australian Institute of Family Studies.

Kate Funder is a Principal Research Fellow with the Australian Institute of Family Studies.

Wedlock and Wellbeing: What Marriage Means for Adults and Children, by Barry Maley, Policy Monograph 33, Centre for Independent Studies, Sydney, 1996.