

Marriage and trust: some lessons from economics

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This paper examines the role of marriage as an institution for providing couples with the confidence to make long-term investments in their relationship. No-fault divorce has undermined the notion of marriage as a contract, thereby reducing the security offered by marriage and promoting opportunism by men. This has weakened the bargaining power of wives, both within marriage and when divorce occurs. Current legal reforms will improve the economic position of all divorced wives, including those who are primarily responsible for the breakdown of their marriage. The latter feature will encourage opportunism by women and make men less prepared to invest in their marriage. The paper argues that the only way to achieve parity between men and women, and deter opportunism by either sex, is to return to fault-based divorce. Both divorce settlements and the custody of children should depend on preceding marital conduct.

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This paper is an application of modern economic ideas to the institution of marriage. Some people may reject the notion that economics can throw any light on an area which involves such intimate personal relationships, but this would be a mistake for several reasons. Although it has an important sentimental dimension, the institution of marriage has always had a significant material aspect. Even in a country like England, which has a centuries-old tradition of romantic love, economic factors have often played a major role in the choice of marriage partners and in the outcome of marriages.¹ Moreover, many features of Western marriage are similar to those of a modern business partnership, and the economic theory used to analyse business relationships can throw an interesting light on marriage. Like a business, marriage is nowadays a type of voluntary contract between

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¹ See MacFarlane (1986).

free individuals pursuing their own objectives.¹ While in practice they may be influenced by the wishes of parents and other kin, children above a certain age are legally entitled to marry whom they wish or not to marry at all, and subject to certain conditions they can terminate the relationship if they desire. And, like a business, a marriage can only work if the individuals concerned commit themselves seriously to their joint enterprise.

This raises the issue of trust. Individuals who commit themselves in a serious way to a marriage or business venture may suffer grievously if the enterprise fails because others do not keep to the bargain, or terminate the relationship when new opportunities arise elsewhere or because their preferences have altered. Fear of such an outcome may either prevent individuals entering a marriage or business venture, or lead them to behave in a half-hearted fashion which reduces their mutual gain and increases the risk of failure. In the absence of trust, individuals may play safe, keeping their options open and avoiding actions which expose them to exploitation by others. Over the past 30 years or so, economists have become increasingly concerned with the issue of trust, and many institutions whose purpose was previously obscure are now seen as mechanisms for creating trust between actual or potential partners.

The term 'trust' has a variety of meanings.² Following conventional practice among economists, I shall use the term to denote an expectation that *for whatever reason* we can rely on others to do what they implicitly or explicitly promise. Their motivation for doing so may include financial gain, fear of punishment or loss of reputation, a sense of duty, love or benevolence. Trust in this broad sense is virtually synonymous with confidence. Such a usage differs from that of many philosophers for whom 'trust' is seen as a gift, which we bestow on others who have the power to harm us, but over whom no external sanction is available (see Baier, 1994).³ This is an important distinction, which raises interesting issues, such as the extent to which incentives based on self-interest undermine or reinforce moral and altruistic behaviour. However, it is beyond the scope of the present article to explore such issues in depth, although various remarks will indicate my views on the subject.

The basic theme of this paper is that marriage should be seen as an institution for creating trust between individuals in the sphere of family life, and that legal and social policy should be fashioned so as to allow this function to be effectively performed. Many of the legal and social reforms which have been implemented in modern times have undermined the ability of marriage to perform its basic role as a trust-creating institution.

¹ According to MacFarlane (1986) this has normally been the case for centuries in England, although not in many other countries where arranged marriage was the practice until recently—and still is in some of them. Note that marriage is both a contract and a status. As Bromley (1992, pp. 20–1) puts it, 'marriage is an agreement by which a man and a woman enter into a certain legal relationship with each other and which creates mutual rights and duties ... Looked at from this point of view, marriage is clearly a contract ... The second aspect of marriage is [that] it creates a status, "the condition of belonging to a particular class of persons [i.e. married persons] to whom the law assigns certain particular legal capacities and incapacities".'

² The meaning of trust is explored at length in the set of essays edited by Gambetta (1988); of particular interest in the present context are the essays by Dasgupta and Hart. Frank (1988), Coleman (1990), Williamson (1993) and Hollis (1998) have also written extensively on this issue. For interesting discussions of the different mechanisms for establishing trust in economic life, see Deakin and Wilkinson (1995) and Burchell and Wilkinson (1997).

³ The following example illustrates the distinction. An intrinsically dishonest salesman might sell me a radio with a guarantee to replace it if necessary. An economist would say that, even though the man is dishonest, I can trust such a promise if fear of an external sanction, such as a fine or loss of business, will induce him to keep his word. Many philosophers would say that the term 'trust' is inappropriate in this situation, and would apply only if I believed that the seller would voluntarily honour the guarantee without the threat of external sanction.

To get married is no longer such a major commitment and no longer offers the degree of security which it once did, since divorce is now relatively easy and the responsibilities and rights of the married and the unmarried are increasingly similar. These developments are often presented as an advance in human freedom since they allow individuals to exit unilaterally from unhappy relationships at minimum cost to themselves and with minimum delay. However, this is a one-sided view, since it ignores the benefits and freedoms associated with trust and security. The fact that individuals can now exit easily, and unilaterally, from a relationship makes it difficult for couples to make credible commitments to each other. They can promise anything they want, but most of these promises are no longer legally enforceable, and many are undermined by social policies which reward those who break their promises. By eroding the ability of couples to make credible commitments to each other, modern reforms have deprived them of an important facility which, for all its defects, the old system provided.

In *Man and Superman*, George Bernard Shaw wrote: 'Nothing is more certain that in both [America and England] the progressive modification of the marriage contract will be continued until it is no more onerous nor irrevocable than any ordinary commercial deed of partnership' (quoted in Gallagher, 1996, p. 150). He was wrong. The marriage contract has been diluted to the point that it is now much less binding than the average business deal. While employment law has increased job security and protection for workers, legal security in the family has been weakened and in many Western countries the marriage contract can now be terminated at will virtually without penalty.¹ Marriage is now one of the few contracts where the law and government policy frequently protect the defaulting party at the expense of his or her partner.

It would be an exaggeration to say, as one American author has, that marriage has been abolished, since marriage still retains in vestigial form some of the features which formerly gave to it such a privileged status (see Gallagher, 1996). Even so, the institution has been gravely weakened, and the result has been greater instability in family life and a growing perception that marriage is irrelevant. The reforms which have undermined marriage were motivated by the existence of genuine misery and inequality, but they have had many unintended consequences and have failed to achieve some of their own objectives. The result has been harmful to many of the adults and children directly involved, and also to the wider population which has been forced to bear many of the economic and social costs of family instability. The aim should not be simply to reverse modern reforms, but to modify and complement them so as to deal with their negative consequences while preserving as far as possible their undoubted benefits. This is easier said than done.

The structure of the paper is as follows. The first section examines the role of trust in economic life and the institutions which sustain trust. The next section explains why trust is important in family life and explores how some of the ideas of modern economics can be applied to this area. This is followed by a discussion of the modern trend towards no-fault divorce and the implications of this trend. Next, there is a section on the subject of child custody following divorce which, although an issue of great importance, does not fit easily into the contractual framework which underlies this paper. The paper then considers some of the most common objections to the view that fault should play a major role in divorce law. The paper concludes with a discussion of how the law might be modified in order to increase trust in family life without reverting to the harsh and often unfair practices of the past. It suggests that we might follow the example of Louisiana which now

¹ On these issues, see Glendon (1981); also Honoré (1982) and Epstein (1984).

offers couples a choice between two kinds of marriage. One is the normal type which allows speedy, unilateral, no-fault divorce; the other is 'covenant' marriage, which is harder to terminate and for which speedy divorce is only available in the case of fault and at the request of the injured party.

Note that the discussion in this paper is concerned entirely with heterosexual couples, but many of the observations would also apply to homosexual marriage, or even polygamy. There is also no discussion of cohabitation which, although an important issue, is beyond the scope of this paper to consider.

1. Trust in economic life

Most economic transactions require some degree of information about the other parties involved and trust in their intentions. Many items we purchase are difficult to inspect at the time, and we are forced to accept them in the hope that they will function properly, or that some remedy, such as compensation or replacement, will be available if they fail to live up to their promise. If we hire someone, take a job or collaborate in a business venture, we are interested in the abilities and intentions of the other parties. Intentions alone are not sufficient, since our partners may be willing and honest, but mistaken about their abilities.

These issues are of particular importance in the case of *relationship-specific investment*, in which an individual commits time, energy or resources to a project from which it is costly or difficult to withdraw. The return on such an investment frequently depends on the behaviour of other business partners, in which case an investor may be vulnerable to *opportunism* on their part. Opportunism is described in one leading textbook as 'self-interest with guile, unconstrained by moral considerations' (Milgrom and Roberts, 1992). It may take several forms. At the time when a business deal is made, one party may deliberately mislead the other, by promising or implying that they will behave in a certain way in the future, when it is never their intention to do so. Or they may begin with good intentions, but later change their mind as new opportunities arise or their preferences alter. Even in the absence of opportunism, individuals who invest in a project may suffer because their partners are unable to fulfil commitments which they made in good faith but with an over-optimistic perception of their own abilities or circumstances.

Note that the term 'investment' in this context covers a wide range of items.¹ For example, a woman may incur certain costs in taking up a particular job, such as the expense of moving house or acquiring new skills. If she is sacked or leaves because the firm treats her badly, it may be difficult to find suitable employment in the new locality, and she may lose much of what she invested in the original job. She is therefore vulnerable to opportunism on the part of her employer. Firms may also be vulnerable to opportunism on the part of workers or other firms. For example, a firm may invest heavily in the training of employees only to find them leaving once their training is complete. Or the firm may invest in highly specialised equipment to supply components to another firm; if the order is cancelled, the supplier may be unable to find a market for its output, so making its equipment almost worthless. These are only some of the numerous possibilities.

The problem of trust is two-sided. In many business arrangements, every potential partner depends on the good performance of others and will not take part without some assurance that this will be forthcoming. Thus, each party must have an assurance about

¹ The classic book on this topic is Williamson (1985).

the behaviour of other parties, but at the same time must provide an assurance about its own behaviour and abilities. This is the problem of credible commitments, which has been studied intensively by economists in recent years. To obtain cooperation from others, it is not sufficient merely to make promises, but to ensure that these promises are believed. If there is too little trust, partners will behave defensively by avoiding actions which expose them to the opportunistic behaviour or incompetence of others. Thus, a worker may refuse to sell his house and move because he does not trust the firm which is seeking to recruit him. A firm may refuse to train workers who promise to remain with it because it does not believe them. A subcontractor may refuse to invest in specialised equipment because it does not trust its partner. In each case, the result may be harmful to all sides, and all may benefit if some way can be found to reassure others concerning their future behaviour. In the absence of trust, rational behaviour by individuals may produce an inefficient outcome, so that opportunities for mutually beneficial cooperation are not exploited.

The above examples are all concerned with a type of investment which makes them highly dependent on the behaviour of others, and thus potentially vulnerable to opportunism. Such investment is of vital importance in economic life, and without it the whole network of cooperation which underlies modern production would collapse. In the course of time, a multiplicity of institutions has developed whose effect is to reduce the scope for opportunism and to foster trust between potential partners.¹ Although they mostly concern voluntary relationships between private individuals, these institutions serve a public purpose. They encourage efficiency and wealth creation by establishing the conditions under which individuals can make credible commitments and hence engage in durable cooperation.

Despite their great variety, most trust-creating institutions operate on the same principle. They restrict the ability of individuals to break promises, either by compelling them to keep these promises or by imposing some penalty if they do not. By limiting freedom of action in one direction, such restrictions may enhance freedom in another direction, because they encourage people to trust each other and allow them to engage in joint projects which would otherwise be too risky. Some of these restrictions may be self-imposed, as in the case of a firm which seeks to reassure its workforce about future plans by investing heavily in buildings and equipment with little resale value. Other restrictions may be externally imposed, as when the law forbids the dismissal of workers without due cause or when such behaviour is prevented by a trade union. Even where restrictions are externally imposed, they may be to the advantage of those whose freedom is curtailed. For example, a firm may promise workers that their jobs are safe, but it may have great difficulty in convincing them that this is really the case, and it is only the existence of an external enforcement agency such as the state or a trade union that makes the firm's promise credible. To be free to act as one chooses may be a grave disadvantage to anyone who needs the confidence of others, and constraints which limit freedom of action in one direction may enhance it in another. Paradoxically, the market order, which is so much identified with individual economic liberty, could not exist without the numerous constraints imposed by a network of trust-creating institutions.

The following is a list of some of the main items which are of relevance to the issue of trust in economic life and are also of relevance to the question of marriage.

¹ The term 'institution' has a variety of meanings in economics. It may refer to an organisation, such as a firm, trade union or the state; to a social routine, practice or moral norm; or to a social entity such as the law. In the present article, the term is used in all these ways.

Signalling. Credible signals are hard to fake. To demonstrate good character or intentions may require a substantial expenditure of time, energy or resources.

Exit. To reassure potential business partners, it may be desirable to inhibit exit from an economic relationship or impose a penalty on unilateral exit without just cause. The acceptance of such conditions is a signal of good faith, and provides an incentive for other parties to invest in the relationship.

Delay. To allow time for reflection and to permit the acquisition of further information, there may be a delay before a contract becomes fully operational or before it is finally terminated. Such a delay may serve the interests all parties to the contract and is sometimes imposed by law.

Reputation. Loss of reputation can be very costly, and the fear of this loss can be a powerful deterrent to opportunistic behaviour. For such a mechanism to work, information about the past behaviour of individuals must be widely available.

Law and the state. The state may adjudicate and enforce private contracts. It may also limit or prescribe what is contained in such contracts. The possibility of recourse to law influences bargaining and shapes the private mechanisms for resolving disputes.

Fault. A contract is an explicit or tacit agreement between various parties to behave in a certain way. If some of the parties voluntarily renege on the agreement, but the other parties keep to it, the former are said to be 'at fault'.

Justice. The notion of contract implies a particular notion of justice. If one party has reneged on an explicit or implicit contract, justice occurs when the party at fault is compelled either to keep their side of the bargain or to compensate the other parties for their loss.

Compensation. This is an important mechanism for creating confidence. The need to pay compensation helps to deter opportunism, while receipt of compensation helps to offset the damage suffered by an injured party.

Static efficiency. A breach of contract is statically efficient if the gainers from this breach could compensate the losers and still be better off. If this condition is satisfied, but compensation is not actually paid, the breach is statically efficient but unjust. Thus, there is no necessary connection between static efficiency and justice.

Dynamic efficiency. If a contract can be breached without paying compensation and without punishment, this will increase both the risk of a breach and the extent of damage to the other parties. Being aware of this danger, the other parties may reduce their exposure to risk by investing less in the economic relationship. Some of the potential gains from cooperation will thereby be lost. Thus, fear of injustice may lead to dynamic inefficiency.

Fairness. Convention plays an important role in the implementation of many contracts. Where a contingency arises which is unspecified in the formal contract, the outcome is often decided by reference to social conventions of fairness.

Morality. A modern economy could not function without a popular sense of morality with regard to issues like honesty and keeping promises. The less widespread is this morality, the more need is there for legal sanctions or for private enforcement and reassurance mechanisms. Moreover, the law may perform an educational role because it embodies and symbolises certain moral values.

Foresight. In a liberal economy, individuals enjoy great freedom of action, and the only way for such an economy to function is to hold individuals to a significant degree responsible for their actions. This implies that individuals must learn to foresee the consequences of what they do. Hence individual foresight is a personal virtue of great importance in a liberal economy.

Most of the above items are well understood by modern economists and are familiar to those who participate in economic life. Let us now see how these ideas can be applied to family life, in particular, to the question of marriage.

2. Marriage

The nature of marriage varies from one society to another and through the course of time. It has been condemned by some feminists as a patriarchal institution which enshrines the domination of men over women. This was certainly true at one time, although in practice the *de facto* power of husbands was often much less than would appear from their legal status, and the domination of men over women is clearly not intrinsic to marriage.¹ In most Western countries marriage can no longer be accurately portrayed as a patriarchal institution, although it remains true that women often suffer disproportionately when marriages end.

Like many other institutions, marriage is capable of change yet has valuable features which should be preserved. These features are associated with the role of marriage as an institution for establishing trust between two partners wishing to collaborate in a joint enterprise, whose success requires a huge investment of time and resources. If the enterprise goes wrong, either one or both of them may suffer grievously. Each of the partners is vulnerable to opportunism or misrepresentation by the other partner, since the investment they make in their relationship may lose most of its value if the partnership collapses. In this respect, despite its more intimate character, family life is similar to economic life. Success depends on the whole-hearted commitment of both partners, and such commitment may not be forthcoming if either partner fears that the other partner will let them down.

The role of marriage as a trust-creating institution is illustrated by the common remark, 'I got married because I wanted security'. This security derives partly from the solemn vows which the couple make to each other regarding their future behaviour. For example, in the traditional Church of England marriage service husband and wife vow 'to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and health, to love and to cherish, till death us do part'. Similar promises are made in most Western marriage ceremonies, be they religious or secular. As divorce becomes more widespread, the credibility of such vows is declining, but they still carry some moral force even today.² The security provided by marriage also derives from certain legal rights and responsibilities which are specifically associated with this institution, and from the various practical considerations which make it difficult or costly to exit from a marriage.

The need for trust arises from the nature of the joint project to which the individuals are committing themselves when they get married. The modern trend among heterosexuals is to stress the upbringing of children, while those campaigning for homosexual marriage stress its role as a public expression of love. But equally important are the insurance objectives of providing care in times of sickness, infirmity and old age. Couples may also wish to specialise so that one performs predominately household activities and the other works mainly outside the home. There are also the economic benefits which derive from pooling resources and sharing such assets as a house or car. Another important, but rarely articulated, aspect concerns kinship networks. Although nowadays a voluntary act by the

¹ For the situation in English working-class families at the turn of the century, see Roberts (1984), whose empirical work casts serious doubt on the domination thesis.

² The importance of ritual and vows is explored at length in Wilkinson (1997).

individuals concerned, marriage creates a whole range of new ties to the kin of the other spouse and between the kinship networks of both spouses.

This list of objectives makes clear the loss which may occur if a relationship breaks down, and also the scale of investment of time and resources which are required to make such an enterprise work. It is this combination which makes the issue of trust so important. In the absence of trust, each partner may be frightened of the harm they will suffer if the other partner lets them down. This will make them reluctant to invest in the relationship up to the optimum scale and will encourage them to play safe by keeping their options open. They will put less into the relationship than would otherwise be the case, and the result may be a mutual antagonism which undermines or even destroys this relationship. As a result, neither may achieve the outcome they originally desired. This is the context which gives marriage its potential as a trust-creating institution. Taking our lead from the preceding discussion of trust in economic life, let us examine how marriage can perform such a role. This will allow us to understand how modern trends in law and social policy have helped to undermine the trust-creating function of marriage, thereby reducing the ability of individuals to make the mutually credible commitments which they both need and desire.

Signal and guarantee

Marriage may function as both a signal and a guarantee. To function as a credible signal of intention, marriage should involve costs or commitments which are more onerous than those of other alternatives, such as cohabitation. For example, the marriage ceremony may be expensive, or else marriage may involve legal obligations towards spouse and children which are not applicable in the case of unmarried couples, or the marriage contract may impose enforceable restrictions or costs on future exit from the partnership or on certain types of behaviour within this partnership. If marriage involves such burdens or restrictions, it is rational for a potential partner to demand marriage as a sign of good intention. In addition to its function as a signal, marriage may also serve as a guarantee. If misconduct or unilateral exit are penalised, they are less likely to occur; and if the divorce settlement favours the innocent or abandoned partner, this will help to offset the harm suffered.

Modern trends in law and social policy have mostly served to undermine the ability of marriage to function as a signal and guarantee. In many jurisdictions, the legal responsibilities of a father towards a child are derived primarily from the biological fact of paternity rather than any prior agreement with the mother. The responsibilities which married fathers voluntarily assume through the act of marriage are thus imposed on unmarried fathers by the state. In some jurisdictions, unmarried fathers also have extensive rights with regard to their biological children. Such fathers have few legal rights in Britain, but there is currently a move to give them more rights. In some jurisdictions, couples who have been cohabiting for a certain period of time, maybe as short as one year, have virtually the same legal rights and responsibilities towards each other as married couples. Even where this is not the case, there is a widespread tendency by governments to regulate cohabitation and to impose new rights and responsibilities on cohabiting couples.¹

By eroding the legal distinction between marriage and non-marriage these developments undermine the ability of couples to make special, binding commitments to each other by getting married. They also infringe the freedom of couples who wish to live

¹ One important exception to this trend has been Germany which has preserved a clear distinction between marriage and cohabitation (see Glendon, 1989, ch. 6).

together without binding commitments (see Deech, 1980). In some countries, welfare policy undermines the credibility of women's marital vows by indiscriminately supporting all mothers who leave their husbands, irrespective of the cause of separation. Thus, a mother may be entitled to support if she leaves a dutiful husband simply because she is bored or is in love with someone else. Although not its intention, such 'non-judgmental' welfare policy facilitates opportunism by women and reduces the credibility of any commitments they make to their partners. Most of these legal and welfare innovations have occurred in response to genuine social problems, but they have been designed and implemented with scant regard for their long-term influence on behaviour, or their negative impact on the institution of marriage.

Justice

Marriage may offer financial protection to partners by giving them rights over assets such as the matrimonial home, or each other's future earnings and pensions, in the event of divorce. The principles for allocating assets and related claims over future income vary from country to country, or even within different parts of the same country. In England and Wales the tendency has been to extend the range of assets and income covered, so that former spouses now have a claim over, for example, each other's pensions. To determine what the appropriate allocation should be, it is increasingly common to regard marriage as a contractual partnership which creates assets that yield a stream of future benefits continuing into the indefinite future. This implies that, on divorce, the allocation of matrimonial assets between the partners should depend on what they have invested in the marriage and the benefits which they have already derived from their investment. In addition, the allocation should reflect the ongoing responsibilities the parties have for childcare.¹

Consider the case of a university graduate who interrupts her career to marry a doctor and stays at home to look after the children. Suppose the marriage breaks down after a few years. Having spent these years as a housewife, the woman has damaged her career prospects so that her post-divorce earnings and pension entitlements may be significantly reduced. She may also find it difficult to get remarried because she is older and she still has children to look after.² Her husband, in contrast, has been able to devote himself full time to his career and has become very successful. His earning capacity has been enhanced by his marriage, while the earning capacity of his wife has been reduced. Justice implies that the woman is entitled to a share in her former husband's earnings and associated pension. This is in addition to any award she might receive for childcare if she has custody of the children.

Such a principle of allocation is efficient because it treats the partnership as a joint enterprise to which both husband and wife have contributed. By giving each of them a claim on the future income generated by their partnership, it provides a safeguard against exploitation by the other spouse. The fact that such protection exists may give individuals, especially women, the confidence to make commitments which would otherwise be too risky. Suppose the woman in the above example has no claim over the man's future income and pension should the marriage end. Given current divorce rates, she may feel it too risky to give up her job or to reduce her hours of work, although that is what she would prefer. As an insurance against marital breakdown, she therefore may continue to work

¹ See Chapter 2 of Trebilcock (1993) for a discussion of this issue.

² For a discussion of the remarriage issue for women, see Cohen (1987).

full-time, even when the children are young. This may be an arrangement which neither she nor her husband, nor their children, are happy with, and the resulting stress may eventually destroy the marriage. Thus, quite apart from the issue of moral entitlement, it may be desirable to give spouses a claim over each other's future income, since this will reduce the risk of opportunism and thereby encourage more efficient behaviour.

Fault

As it stands, the above argument is incomplete because it ignores the issue of who is responsible for the breakdown of the marriage. In most Western countries nowadays, the financial settlement following divorce is largely independent of marital conduct and is the same whoever is responsible for destroying the marriage. Such a practice is inconsistent with the idea of marriage as a contractual partnership. If a relationship is dissolved by mutual consent, or if the partners are equally to blame, then the normal principles of contract imply that the assets and liabilities arising from this relationship be divided in proportion to the contribution of each partner. However, suppose a relationship breaks down because one partner behaves badly, or unilaterally decides to exit without just cause. Such a partner is 'at fault' and the normal principles of contract imply that the other partner should be entitled to damages. In the case of divorce, this implies that, where feasible, the financial settlement should take into account the reasons for marital breakdown and not merely the past contributions of each partner. Moreover, as we shall argue below, these reasons should also be taken into account in the custody arrangements for any children.

It is impossible to put an accurate figure on the suffering caused by serious abuse or persistent adultery during a marriage, or on the loss of companionship and care in sickness or old age if one partner abandons the other, but this does not mean that damages are inappropriate. The courts sometimes award damages for psychological stress caused by racial or sexual harassment at work. There is also a standard schedule of redundancy payments for workers who are given notice by their firms. If such awards are appropriate in the case of employment, there is an argument for including them in the case of divorce. Someone wishing to end a marriage unilaterally, without evidence of serious misconduct by the other party, might be required to pay compensation according to a predetermined schedule based on such factors as their income and wealth, how long the couple have been married, age of the deserted spouse, and so on. The payment might be significantly greater in the case of someone guilty of gross misconduct, which is analogous to racial or sexual harassment at work.

One objection to the idea of a standardised compensation system is that this would undermine the sense of moral responsibility of spouses towards each other. It might encourage people to abandon their partners with a clear conscience and without regard to the feelings of those who are hurt by their actions. It could also be argued that such a system would, in effect, turn marriage into a form of prostitution in which emotional ties are replaced by the cash nexus. Some rejected partners might feel insulted to be paid off in this way, although others might think it better to have a cash pay-off than nothing at all—especially if they are getting on in years and could use the money to replace some of the comforts and care they would otherwise have received from their spouse.

Some may consider it unfair that a person should be penalised for seeking happiness by leaving a marriage which no longer satisfies them. It may be that nothing can save the marriage if one partner really wants to leave, but why should this partner gain all the benefits of dissolving the marriage, while all the costs are paid by the other partner who

wishes to continue? A monetary payment to the injured party may not fully compensate for the loss, but it does provide partial redress. Moreover, the existence of such a penalty would make partners think twice before abandoning a marriage which could be saved. It could be particularly useful in the case of older men who quite often abandon their wives for younger women, only to regret it later.

There are several reasons for the award of damages in the case of divorce. There is the moral argument that a person, whose freely chosen actions harm someone else, should compensate the injured party. This is widely recognised in other areas of life such as employment, and there is no reason why the same principle should not apply here. There is also the issue of trust to consider. In economic life, the prospect of compensation for damages increases confidence by reducing the risk facing individuals who commit themselves to collaborative projects with others. It discourages both mistreatment of business partners and unilateral exit, while also reducing the ultimate cost of such behaviour to those affected. The same would apply in the case of divorce.¹

To sum up. If we treat marriage as a contractual partnership, the principles of justice have the following implications for the divorce settlement:

- (1) Any assets and future income arising from a marriage should be allocated to the parties according to their contribution to this partnership.
- (2) Compensation should be paid by a spouse who unilaterally wishes to exit from a marriage without due cause, or whose gross misconduct is responsible for the breakdown of the marriage. Thus, the divorce settlement should take fault into account.

The first principle is gaining increasing acceptance in Britain, which is a welcome and deserved benefit for many women whose earning power and pension rights have been undermined by marriage.² However, the second principle has been largely ignored. As a result, there is now the potential for significant injustice, since the first principle may result in generous divorce settlements for women even when they have been primarily responsible for the break-up of their marriage. If there are children involved, the injustice will be compounded, since women are most likely to receive custody following divorce, and the former husband may find himself deprived of his family home and paying a large part of his income to support a family from which he has been effectively expelled. If cases like this multiply, men will become increasingly mistrustful as the risk and cost of being exploited by women increases. Any system which makes generous, unconditional awards following divorce is inviting abuse. Some feminists may welcome this reversal, but the ideal is surely for neither sex to exploit the other.

3. No-fault divorce

The history of divorce in Western society is complex and both the pace and extent of change have varied greatly from country to country.³ Even so, the following general pattern can be observed. At one time, divorce was either banned or available only if one

¹ A similar point is made by Ott (1995). Dnes (1998) examines at length the principles on which damages should be awarded to an innocent spouse in the case of divorce. He concludes that damages should be such as to restore an innocent spouse to the level of well-being he or she would have reasonably expected to enjoy had the other partner not broken the marital contract. These are known in the literature as 'perfect expectation damages' (see Cooter and Ulen, 1996, ch. 7, for a general discussion of this concept).

² The claims of divorced wives over family assets have been progressively extended by such cases as *Wachtel v. Wachtel* [1973] Fam. 72, and *Gojkovic v. Gojkovic* [1990] 1 FLR 140, CA. The principle of pension splitting is included in the Family Law Act 1996, but the details have not yet been settled.

³ For a comprehensive account of the long history of divorce in Western society, see Phillips (1988).

party had committed a serious marital offence. The spouse who committed such an offence was said to be 'at fault' or 'guilty', while the injured spouse was 'innocent'. Where divorce was allowed, the terms of the divorce settlement depended on who was guilty of the offence. An innocent wife who divorced her husband would normally receive both alimony and custody of the children. Conversely, a guilty wife divorced by her husband might lose her children, home and means of support. This was a much harsher punishment than a guilty husband would face because he would normally retain much of his income and wealth following divorce.

During the nineteenth century, both legal statutes and court judgements gradually became more liberal and the criteria for what counted as a divorceable offence were widened. This trend has continued during the present century, and in addition there have been a number of innovations. Almost all Western countries now effectively allow divorce by mutual consent, and most also allow unilateral divorce without the need to prove a marital offence. In each case, there is usually a prescribed waiting period, which is sometimes much longer for unilateral divorce than divorce by consent. A number of jurisdictions have gone even further and abolished the notion of marital offence altogether, and thus allow unilateral divorce for any reason and without penalty of any kind. In these jurisdictions, responsibility for the break-up of the marriage has no effect on either the financial settlement or the custody of children following divorce. The waiting period for divorce is now the same no matter what the cause and the delay is typically very short. This is the situation in many American states and some European countries.

The term 'no-fault' is conventionally used as a blanket expression to cover all the major trends in Western divorce law. This practice can be misleading since it conceals an important legal distinction. Under a pure no-fault regime, marital conduct has no effect on the availability of divorce or on the subsequent divorce settlement, and there is also no penalty for unilaterally divorcing an innocent spouse. However, the term 'no-fault' is often applied to laws which deviate significantly from this ideal. For example, all American states now allow unilateral exit from a marriage without the need to establish fault, and for this reason alone their divorce laws are normally described, even by professional scholars, as 'no-fault'. Yet a majority of these states continue to penalise misconduct in some way—by awarding a more generous financial settlement to the innocent partner or giving such a partner preference in the case of child custody (see Brinig and Buckley, 1998). The same is true with regard to financial settlements in European countries such as France or Germany (see Glendon, 1989, ch. 5). Under the new 'no-fault' law in England and Wales, the granting of a divorce will no longer make reference to marital conduct, but there is still a provision for conduct to influence the financial settlement, so that a seriously injured party can in theory be awarded damages. Given the past record of British courts in this area, there is some doubt about how vigorously this provision will be implemented in practice, but its presence does indicate that the new law has retained some notion of fault.¹

¹ The Matrimonial Causes Act 1973 required the courts to take account of 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. This power has occasionally been used by the courts to penalise 'gross and obvious' cases of misconduct, such as seeking to kill the other partner, and even more for lesser misconduct such as simple desertion (see Hayes and Williams, 1995, pp. 506–11). Following representations to the Lord Chancellor, the new Family Law Act was amended 'to emphasise that conduct of whatever nature, should it be inequitable for the court to disregard it, has been taken into account' (Mr Jonathan Evans for the government, cited in Bond *et al.*, 1996, p. 72). However, informed commentators doubt that this amendment will make much difference in practice (Bond *et al.*, 1996, p. 72).

Impact of no-fault on divorce settlements

The elimination of fault in divorce shifts the distribution of bargaining power towards the partner who is responsible for the breakdown of the marriage, since such a partner no longer has to pay a financial or other penalty. This harms the other partner who may suffer a substantial loss of income and wealth, and may also lose the children because the courts will no longer take fault into account when awarding custody.

Under the old, fault-based system an innocent partner seeking divorce might be awarded damages by the courts. Even where this was not the case, the old system gave an innocent partner significant bargaining power both in the marriage itself and in the event of its break-up. For example, a man wanting a speedy divorce from his innocent wife could only do so by persuading her either to agree to a divorce by consent, where this was allowed, or to sue him for divorce on the grounds of misconduct (adultery, desertion, cruelty, unreasonable behaviour etc.). Without her consent, divorce was obtainable only after a long delay or not at all, and to obtain this consent a husband might have to offer a large financial inducement. Thus, under the fault-based system, men who left or wrecked their marriages might be forced to compensate their wives, thereby helping to safeguard the financial situation of women following divorce.

It is widely, although not universally, agreed that the introduction of no-fault divorce in the United States has significantly reduced the financial settlement received by women after divorce.¹ Weitzman (1985) estimated that, in the new no-fault environment, the average divorced woman and her dependent children experienced a 73% decline in their standard of living in the first year after divorce. Hoffman and Duncan (1988) put the figure at 30%, while Peterson (1996) estimates it to be 27%. It can be argued that these figures exaggerate the impact of the switch to no-fault divorce, since they ignore the fact that even under the old, fault-based regime divorced women experienced some decline in their economic status following divorce. To obtain an accurate picture we should compare the situation of women under the no-fault regime with their situation under the fault-based regime. This was done for the United States by Peters, who compared financial settlements in states with no-fault divorce with those in states where fault was still a criterion. Using an econometric model to control for other variables, she estimated that, in 1979, the effect of no-fault divorce was to reduce alimony by \$185 a year and child support by \$462 (Peters, 1986). These figures are equivalent to 36.6% and 31.3% respectively of the average settlement in states with fault divorce.

There is also evidence that no-fault divorce has shifted bargaining power within marriage and hence affected the behaviour of spouses. In an econometric study of American states, Brinig and Crafton found that the abolition of fault led to a significant increase in domestic violence, presumably because the perpetrators felt less constrained by the threat of divorce and the victims less able to leave the marriage (Brinig and Crafton, 1994). Using data from the *Time Use Longitudinal Panel Study, 1975–8*, Parkman showed that no-fault divorce has led to an increase in the combined hours of paid work and domestic labour performed by married women in the United States (Parkman, 1998). There has been no significant effect on the total hours of men. Parkman's explanation for this disparity is that women are working more outside the home partly as an insurance against the increased cost of marital breakdown under the new, no-fault regime. As economic theory would predict, this effect is strongest among educated women, who risk the greatest loss by withdrawing from the labour market in order to raise children. The

¹ For a thorough survey of this evidence and other aspects of no-fault divorce in the United States, see Parkman (1992B).

need for women to purchase insurance by working more hours, while their husbands do no additional work, reflects the increased bargaining power of men under the new, no-fault regime.

Impact on divorce numbers: theory

In his *Treatise on the Family*, Becker makes the following argument:

A husband and wife would both consent to a divorce if, and only if, both expected to be better off divorced. Although divorce might seem more difficult when mutual consent is required than when either alone can divorce at will, *the frequency of and incidence of divorce should be similar with these and other rules, if couples contemplating divorce can bargain easily with each other.* (Becker, 1991, p. 331; my italics)

Becker's argument is an application of the Coase Theorem concerning the relationship between property rights and efficiency. The theorem implies that, when bargaining is easy, a contract will be breached if, and only if, it is efficient to do so. Becker interprets this result to mean that, when bargaining is easy, the allocation of property rights has no influence on the decision to breach a contract. In the case of marriage, he infers that a shift to no-fault (unilateral, at will) divorce has little effect on the divorce rate, although it may significantly alter the distribution of gains and losses following divorce. It may also affect the distribution of bargaining power within marriage. Becker's conclusion regarding the neutral impact of legal reforms on the divorce rate has been quite influential, but, as Clark (1998) has recently shown, this conclusion is incorrect and rests upon a misinterpretation of the Coase Theorem.

Becker's argument may be summarised as follows. Under the old fault system, a speedy divorce by mutual consent was sometimes allowed, but more often it was either officially banned or was available only after a long delay. In practice, such restrictions could easily be circumvented, since a couple seeking a speedy divorce could agree to fabricate a marital offence, for example, adultery, and thereby obtain a fault-based dissolution. Thus, a partner wishing to end a marriage speedily could do so with the cooperation of the other partner. To win this cooperation might require a substantial bribe. If the benefit of leaving exceeded the required bribe, then divorce would be efficient and the marriage would end. If the benefit of leaving was less than the required bribe, then divorce would be inefficient and the marriage would continue.

Under the no-fault system, a partner wishing to leave no longer has to win the cooperation of the other partner. However, there is still scope for bargaining because the reluctant partner may offer to bribe the initiating partner to remain in the marriage. If this offer is acceptable to the latter, then divorce would be inefficient, since it would make both partners worse off than they would be if the marriage were to continue and the bribe were paid. In contrast, the amount required to keep the initiating partner in the marriage may be more than the other partner is willing to pay. In this case, divorce is efficient and the marriage will end.

The argument so far has two implications. First, the shift to no-fault divorce alters the relative bargaining power of the marital partners. Whether or not the marriage ends, the initiating partner is better off under the no-fault system, and the reluctant partner is worse off. Second, under both fault and no-fault laws, a divorce will occur if and only if it is efficient, and hence if there is no bargaining outcome which could make both partners as well off within the marriage as they would be after divorce. These conclusions are consistent with the Coase Theorem.

Up to this point Becker's argument is correct, but he then makes a crucial error. From the fact that divorce occurs only when it is efficient, he concludes that the legal rules governing the termination of marriage do not affect the incidence of divorce. This conclusion is unwarranted. It assumes that the efficiency of an action, in this case the breaching of a contract, is independent of legal rules and related property rights, which is not in general true. With one set of property rights it may be efficient to breach a particular contract, but with another set of property rights it may be efficient to stick by this contract. In the case of marriage, Clark (1998) demonstrates that, with one set of legal rules it may be efficient to divorce, but with a different set of rules it may be efficient to remain married.¹ Even when bargaining is easy, there will be marriages which would survive under one set of legal rules but be dissolved under different rules.

Thus, even in its own terms, Becker's argument concerning the impact of legal reform on divorce rates is flawed. His argument is subject to an equally damaging criticism arising from the fact that divorce laws influence the expectations, and hence the behaviour, of individuals.² The abolition of fault means that in the event of divorce an abandoned or injured partner will get a worse deal than under the old, fault-based system. This increases both the likelihood of opportunism and the danger that an innocent person's investment in a marriage will be expropriated or made worthless by their partner. As people become aware of these implications, their expectations and behaviour will change. Partners will start to behave defensively by investing less in their marriages: spending more time at work and outside activities, and less time on their home, their children and each other. For example, studies by Peters (1986) and Parkman (1992A) have found that no-fault divorce in the United States has increased female labour-force participation by a substantial amount.³ These are dynamic inefficiencies which eventually make the average marriage more unstable and push up the divorce rate. Moreover, by reducing the incentive for marital investment, no-fault divorce reduces the gains from marriage and the predictability of outcomes, making marriage a less attractive institution so that fewer people get married.⁴

It is conceivable that the switch to no-fault divorce has very large effects on both marriage and divorce rates, but such effects may be slow to manifest themselves. The public may take a long time to appreciate fully what the no-fault law involves, in particular the extent to which it exposes individuals to the risk of expropriation by opportunistic partners. Moreover, the corrosive effect of no-fault law on marital stability is gradual since

¹ The conclusion of Becker depends on the fact that the husband-wife 'utility possibility frontier' associated with marriage lies either uniformly inside or outside the utility frontier associated with divorce. In this case, the efficiency of divorce can be evaluated without reference to legal rules and related property rights. However, if the two frontiers cross, then the efficiency of divorce depends on the legal rules currently in operation. With one set of rules, divorce may be efficient, but with another set of rules divorce may be inefficient. This is a simple but extremely powerful point, as can be seen from Clark's thought-provoking examples.

² The following discussion has similarities with the trenchant criticisms which Allen (1992) makes of Becker for neglecting the importance of bargaining and other transaction costs associated with marriage.

³ The work of Parkman is particularly interesting because he finds that, as predicted by economic theory, the impact of no-fault law on labour-force participation has been greatest for educated women. These studies use data for 1979, by which time many of the states concerned had been operating a no-fault system for some years. Using data for 1972, Johnson and Skinner (1986) find that the overall divorce rate has a substantial effect on female labour-force participation, but they also find that female participation is not significantly affected by no-fault laws. The latter conclusion is suspect, because most of the no-fault laws in operation in 1972 had only just been introduced, and one would not expect to see a significant effect on labour-force behaviour within such a short time span.

⁴ Becker recognises that reduced investment in marriage increases the likelihood of divorce, but he ignores the possibility that legal reforms may discourage such investment.

it works by discouraging investment in marriage, and many years of under-investment may be required before a marriage eventually collapses.

The impact on numbers: evidence

Many scholars believe that, in practice, changes in divorce law have had little permanent effect on the divorce rate. The relentless upward rise in the divorce rate in Western countries is ascribed almost entirely to other factors, such as new employment prospects for women, welfare benefits and changing social attitudes. It is conceded that immediately following a relaxation in the divorce law there is an upward surge in the number of divorces, but this is seen as a temporary phenomenon caused by a backlog of unmet demand. Once this backlog has been exhausted, the number of divorces supposedly returns to its former trend. This view is especially common among historians and sociologists, for many of whom it is apparently an article of faith. Richards, for example, speaks of a 'consensus' on this issue (Richards, 1996, p. 152), and a similar claim is made by Goode (1993, p. 322).

Such blanket claims are not consistent with recent evidence. Before considering this evidence, some observations are in order.

First, there is the style of argument. It is sometimes conceded that law reform leads to more divorces, but this is dismissed as a superficial explanation, since law reform itself is merely a response to wider societal forces, such as changing attitudes towards commitment and personal fulfilment. Hence the 'real' cause of more divorce is to be found in the factors which are responsible for legal reform. Although valid in its own terms, this type of argument is of limited relevance to those concerned with policy assessment or formulation. Their primary objective is not to understand why legal innovations occur, but to evaluate what the effect of a particular legal change was in the past or might be in the future.

Second, it is often difficult in practice to evaluate the impact of law on the divorce rate. Statistical analyses typically focus on the effect of clearly identifiable changes in legal statutes. This assumes that the law becomes more liberal in discontinuous jumps each time a legal statute is revised. If the researcher cannot find a clear statistical association between alterations in official statutes and subsequent changes in the divorce rate, the conclusion is drawn that legal developments have had no effect. However, this ignores the fact that laws are interpreted by judges, and that legal practice may change dramatically without any significant alteration in official statutes. For example, what is meant by violence, cruelty or unreasonable behaviour has changed enormously over the past century, and judges in most countries have become progressively more liberal in their interpretation of these grounds for divorce. It is likely that the increasingly liberal interpretation of existing law has been a major factor behind rising divorce rates. To quantify the impact of such a trend in judicial practice would be a formidable undertaking which has not, to my knowledge, been attempted. Another difficulty is that some changes in divorce law may take decades to achieve their full effect. This is most obviously the case for changes which reduce the incentive for individuals to invest in their marriage, since many years of under-investment may be required before a marriage eventually collapses. Such effects may be too diffuse to capture numerically.

Another difficulty arises from the contagion effect. Divorce rates are affected by social attitudes and expectations, which in turn may be affected by what happens in other jurisdictions. For example, if legal changes cause divorce rates to rise in one group of American states, this may lead to a nationwide shift in attitudes and expectations, thereby encouraging divorce even in states which retain the old laws. If such contagion effects are

important, existing statistical studies may significantly underestimate the impact of legal reforms on the divorce rate.

With these observations in mind, let us survey the evidence briefly. The most systematic investigation of the impact of legal changes on the divorce rate has focused on the effect of no-fault divorce in the United States. The nation's first no-fault divorce law was enacted in Oklahoma in 1953. Prior to then, divorce, property division, alimony, child support and child custody had been based on fault grounds. After some delay, the example of Oklahoma was eventually followed in other parts of the country, and by 1987 every state in the Union had provision for no-fault divorce. A number of articles on this topic have been published, but many are of limited use because they rely on impressionistic comparisons, inadequate data, or refer only to individual states over relatively short periods of time. One of the first major studies covering the United States as a whole was by Peters (1986). She compared the experience of two groups of states: those states which by 1978 had already introduced unilateral divorce without penalty, and those states which had not done so. After controlling for other variables, she concluded that the shift to no-fault divorce did not have a significant effect on the divorce rate. Johnson and Skinner (1986) reached the same conclusion in their study of this topic which was published simultaneously in the same journal.

Peters has been criticised for including in her statistical analysis 'dummy' variables which conceal the true impact of no-fault divorce, and for her incorrect classification of states. Allen has shown that when supposed errors are corrected, no-fault divorce laws increased the probability of divorce by approximately a quarter.¹ The results of Johnson and Skinner have been questioned because their data refer to 1972, when only a few states had recently implemented no-fault laws, and the effects of these laws were not yet fully evident. All other major studies, to my knowledge, find that no-fault laws had a significant impact on divorce rates in the United States. Weiss and Willis (1989) estimate that such laws increased the divorce rate by between 30% and 40%, while Marvell (1989) puts the increase in the range of 20%–25%. Similar results are obtained by Zelder (1993A),² Nakonezny and his colleagues (1995), and in very recent studies by Friedberg (1998) and Brinig and Buckley (1998). The paper by Brinig and Buckley is noteworthy because it explores the issue of fault in greater depth than is normal in empirical investigation in this area. Some American states allow unilateral divorce by either spouse, but penalise certain types of marital behaviour, such as adultery, by awarding the guilty party a reduced financial settlement. The authors show that, controlling for other variables, such states have lower divorce rates than states which impose no penalty. It is interesting to note that Brinig and Crafton (1994) have found that divorce reforms have also caused a significant decline in the marriage rate in the United States. North of the border, Allen (1998) has shown that legal changes have caused a substantial increase in the Canadian divorce rate. His paper is not concerned merely with the overall divorce rate. It also distinguishes between 'efficient' and 'inefficient' divorces, finding that legal reform led to a substantial increase in both types of dissolution.

In the case of Britain, there have been several attempts to quantify the impact of legal changes on divorce rates. Leete (1979) documents the rise in divorce, while articles by

¹ According to Table 4 of Allen (1992), the effect of no-fault divorce was to increase the annual probability of divorce by 1.37 percentage points. The average divorce rate at the time was 5.82%. For Peters' reply, see Peters, 1992.

² Zelder's papers are interesting because they are concerned with divorce in families with children. His theoretical model is somewhat dubious, but his empirical results seem quite robust.

Haskey (1986, 1996) present interesting data but do not evaluate in a systematic way the long-run impact of legal innovations. The first systematic study is by Ermisch (1991), who uses an econometric model and a large micro-sample to estimate the impact of legal changes on divorce in England and Wales. After controlling for factors such as female wage rates, job experience and welfare benefits, he concludes that the Divorce Reform Act of 1969 probably did have a substantial impact on the total number of divorces (*ibid.*, pp. 66, 167). This conclusion is challenged by Smith (1997), who finds no evidence that divorce reforms have permanently affected the divorce rate.¹ Thus, in the British case, the evidence is mixed.

Summary

For theoretical reasons we should expect the partial or full introduction of no-fault divorce to increase the danger of opportunism and discourage marriage-specific investment. No-fault weakens the bargaining power of dutiful partners who wish their marriage to continue or who wish to end their marriage because of serious mistreatment by the other partner. Thus, any shift in the direction of no-fault divorce rewards those who break their marital vows or wish to leave their marriage without due cause. This should result in a worse economic position for injured or abandoned partners following divorce, a higher divorce rate, and a lower marriage rate. Empirical evidence from North America supports all of these predictions. In particular, almost every major study finds that the shift to no-fault law has caused a significant increase in the divorce rate. Evidence from Britain is less conclusive, and the two main studies in this area come to opposing conclusions.

It can be argued that all these empirical studies underestimate the impact of legal innovations on the divorce rate. In some American states, by the time new laws were on the statute books the courts had anticipated many of their provisions, and no-fault divorce was already obtainable in all but name. The same was true of legal reforms in Britain. To estimate the true impact of legal innovations it would be necessary to study the evolution of court practice over a long period of time prior to the alteration of official statutes. It would also be necessary to take account of the fact that legal innovations may take several decades to achieve their full effect.² In addition, there is the contagion effect to consider. Legal reforms in some jurisdictions may stimulate a change in expectations and attitudes which spill over to other jurisdictions where the law has not yet been altered. This possibility is ignored in the statistical studies reported above.

4. Children first?

In the sphere of marriage, no subject is more contentious and fraught with emotion than that of child custody and access following divorce. Until quite recently in Western countries, legal decisions with regard to custody were often based on the principle of fault, with the children going to the innocent party. Thus, if a divorce was granted to a spouse on grounds of adultery, the man or woman concerned would be frequently awarded custody of the children.³ This practice served as a punishment for breaching the contract

¹ The econometric methodology used in Smith's paper has been recently criticised by Binner and Dnes (1998).

² This is recognised by Smith when he comments: 'The lack of permanent legal effects on the number of divorces may arise because they are too diffuse to capture or because they are dominated by labour market developments' (Smith, 1997, p. 540).

³ This principle became widespread in the course of the last century. In many countries children were previously regarded as the property of their fathers, who normally had the automatic right to custody irrespective of the cause of divorce or separation. (For the case of England, see Stone, 1990).

represented by marriage, and as compensation to the innocent party for the injury suffered. It was also the logical outcome of a perspective which took the family, rather than the individual, as its starting point. Divorce was granted to one spouse because the other was behaving in a fashion which threatened the existence of the family unit. By awarding custody of children to the innocent spouse, the guilty partner would be excluded from the family unit, which was thereby preserved, albeit in truncated form. Quite apart from its implications for the parents, this procedure was seen as beneficial to the children, since it would help to ensure continuity by keeping them within the family unit and insulate them from the corrupting influence of living with the guilty parent (see Thèry, 1989). Thus, justice for adults and the interests of the children were assumed to be coterminous.

Over the past century, this assumption has been increasingly questioned, and in many Western countries the issue of marital conduct has now been effectively eliminated as a criterion for deciding the fate of children. In England and Wales, under the Children Act 1989, the interests of the individual child are to be considered 'paramount' when courts adjudicate between rival claims over custody and access.¹ Moreover, the 'best interests' of the child are defined without reference to marital conduct, justice for parents or overt recognition of parental interests. To many people this appears perfectly reasonable. Why should the innocent child suffer in order to satisfy the demands of embittered or selfish parents? What humane person could object to the principle of putting children first? In fact, there are many reasons for objecting to this principle.

Meaning

Apart from extreme cases, such as serious physical or sexual abuse, there is no agreement even among experts about what is in the best interests of the child. Views differ widely between countries and change through time as fashions come and go. Indeed, the political scientist Jon Elster (1987) has argued at length that, apart from serious abuse, there are no objective criteria at all upon which to decide what is in the best interests of the child, and that judgements by social workers on this issue reflect either current fashions or their own predilections. In Britain, it is assumed that it is normally best for young children to live with their mother. This was confirmed in a recent judgement by the House of Lords.² For older children each case is considered 'on its merits', although what this means in practice depends on the values and judgement of the welfare professionals and the court concerned. Some experts support joint residence, under which children live alternately with each biological parent. The current fashion in the England and Wales is to encourage co-parenting under slogans such as 'marriages end but parenting goes on forever'; a child normally resides with one parent, but the aim is to maintain and foster close links with the other parent.

¹ Since the Children Act came into force, the terms 'custody' and 'access' have dropped out of legal discourse, to be replaced by terms such as 'parental responsibility', 'residence' and 'contact'. In this article the old terminology is employed because it is still widely used in popular language in Britain and in legal discourse in many other English-speaking countries. Whatever their significance in other respects, the linguistic innovations in the Children Act do not alter the basic facts. In case of disagreement between divorcing or divorced parents, the courts can and do decide where the children reside, who can make the major decisions about their upbringing, and what kind of contact a non-residential parent is allowed.

² The award of custody of a four-year-old girl to her mother was justified by Lord Jauncey as follows: 'Nature has endowed men and women with different attributes and it so happens that mothers are generally better fitted than fathers to provide for very young children. This is no more discriminatory than the fact that only women can give birth ... in normal circumstances, and I stress the word normal, a mother is better able than a father to fulfil the needs of a very young child' (*Brixey v. Lynas*, House of Lords (Scotland), 4 July 1996).

In some countries, preference is given to the spouse who has been primarily responsible for the upbringing of the child. This primary carer is normally, but not always, the mother. Certain feminists have argued for the primary carer model, but without access for the other parent because of the aggravation this may involve for the custodial parent and resulting damage to the children.¹ Some people would argue that the welfare of the child is best served if it resides with the innocent parent who has honoured their marriage vows, rather than with a parent who has betrayed a solemn promise. What matters from this perspective is not simply the love and warmth of the child's home environment, but also the moral character of those who inhabit this environment, for it is these people who will play a crucial role in shaping the child's own moral values. Such a perspective is unfashionable among legal and welfare professionals, but in my view it has real merit.

Scope

Under the Children Act 1989, the 'best interests' principle for deciding custody arrangements in England and Wales applies only when such arrangements are contested. If the divorcing parties agree, they can choose almost any custody arrangements they like without reference to the court. This marks a step backwards from the old system. Prior to 1989, every petitioner was required to attend the court and provide evidence about the welfare of children following divorce. This provision in the pre-1989 legislation was removed following the recommendation of the Law Commission, on the grounds that the courts merely acted as a rubber stamp, and that to include this provision 'could be seen as singling out parents who divorce as necessarily more irresponsible than others' (cited in Hall, 1990, p. 209). As one critic comments acidly, 'but is this really so? ... all [the law] is saying is that if you wish to be released from a legal obligation which you freely entered into for life you must first give the court some assurance that you are endeavouring to minimise the inevitable disruption of your children's lives' (*ibid.*). If the object of the Children Act is really to promote the best interests of the children, it is difficult to understand why this provision was removed.

Parents

Why should the interests of children be 'paramount'? Why should they override the interests of adults to such a degree? No parents treat their own children in this way. Being a good parent does not mean subordinating one's interests entirely to those of the children, but means striking a balance between the interests of all family members. The same principle should apply when deciding custody and support arrangements after divorce. While the children's interests should not be ignored, they should be weighed against other legitimate concerns, such as the interests of parents and their right to justice. Indeed, the 'best interests of the child' principle is misleading, since official interpretations of what this means are themselves influenced by the activities of pressure groups whose demands reflect parental interests. It is the current fashion in policy to assume that children benefit from continuing contact with both biological parents and that children have a 'right' to this contact. Whatever its intrinsic merits, an important influence behind this trend has been agitation for greater access by organisations of aggrieved fathers, whose interests have been smuggled into a policy which purports to be exclusively for the good of the child.² Personally, I see nothing wrong in principle with shaping custody

¹ See the collection of essays in Smart and Sevenhuisen (1989). Of particular interest is the essay by Sandberg in this volume.

² For the US case, see Fineman (1991).

policy to take account of parental interests, but this should be done explicitly and not covertly as at present.

Although parental interests may be covertly taken into account when deciding custody arrangements, what is striking in many jurisdictions is the complete absence of justice as a criterion. Some feminists have argued that the primary carer deserves custody because that parent has made the greatest investment into the direct upbringing of the child (see Smart, 1991). This is a one-sided view because it ignores the indirect contribution of the other parent, whose labours in the outside world to earn money contribute indirectly to the child's upbringing and are just as worthy of recognition as those of the primary carer. It also ignores the contractual nature of marriage and the claims of justice deriving from the failure of one spouse to honour this contract, or the unilateral desire of one spouse to repudiate it. Even so, these feminists are right to emphasise the importance of justice and to argue that custody arrangements should take justice into account. They are also right in pointing to the coercive implications of the present stress on the 'best interests of the child' and on mediation and conflict resolution rather than justice.

The dangers of coercion are illustrated in the following quotation from Martin Richards, an influential figure in British family research, in which he suggests what he calls the 'Solomon Principle' for custody.¹ It is important, he argues, that children should maintain contact with both of their biological parents and, to facilitate this,

the children should reside with whichever parent is able to convince the court that they are the parent most likely to foster and maintain the children's links with the other parent and the wider family. Such a criterion ... should ensure that attention is focused on the welfare of the children rather than the supposed moral worth of each parent. (Richards, 1994, pp. 259–60)

It is not hard to see what the effect of such a principle might be in practice. It is bad enough to be neutral between the contending parties when one of them has genuinely suffered a serious injustice, but this rule could actually penalise the innocent. Consider the following example of a couple who marry and have children. After some years, the husband meets a young woman whom he finds more attractive and exciting than his current wife. They fall in love and she agrees to take in his children, provided he divorces his wife and marries her. He is feeling optimistic about the future and is quite willing to allow his wife access to the children provided they reside with him. The situation is quite different for his wife. She has been faithful to him and he has abandoned her for a younger woman. Her prospects of finding an acceptable man may be poor, and even if she does succeed she may be getting too old to have another set of children. For good reason, she feels bitter and angry, and the last thing she wants to do is spend the next few years sharing 'her' children with her former husband. In fact, her feelings may be so strong that, no matter how hard she seeks to hide them, she is unable to convince public officials that she will facilitate contact between her former husband and the children. Her husband, in contrast, may appear reasonable and cooperative. Under the Solomon Principle, he will get custody, and she will get only access rights. Thus, not only will the wife lose her husband through no fault of her own, but she will also suffer the insult and pain of exclusion from the family unit.

That such a principle could be seriously proposed indicates the poverty of a purely therapeutic approach to family disputes. The clue is to be found in the adjective 'supposed' which is inserted before the term 'moral worth' in the above quotation.

¹ The Solomon Principle was earlier proposed by Elster (1987).

Underlying the purely therapeutic approach is an indifference towards issues of justice and morality. The term 'injustice' is frequently used by the advocates of this approach, but not with regard to actual conduct, only with regard to feelings. It is irrelevant whether an injustice has actually occurred. What matters is whether parents *feel* they have suffered an injustice, because such feelings make it difficult to achieve an agreed divorce settlement and obstruct the smooth functioning of post-divorce arrangements for childcare. The role of mediation is to deal with such feelings and calm parents down so they can negotiate a deal which is in the 'best interests of the child'. This may involve persuading a genuinely wronged parent that the law provides no redress and that further obstruction will only damage the children and perhaps the parent concerned.

This is the perspective which informs recent divorce reform in England and Wales. The official summary of the White Paper on divorce reform closed with the exhortation that parents should 'look to how best they can meet their parental responsibilities in the future, rather than dwelling upon the unhappiness and unfairness of the past' (The Law Commission, 1996). From a psychological standpoint, this may or may not be good advice, depending on the circumstances. But the passage contains more than mere advice. It contains an implied threat. Anyone who ignores this advice could be classified by officialdom as 'obsessed', 'emotional' or 'irrational', and may eventually be classified as an unfit parent for the child, who will then be assigned to the other parent. Thus, while theoretically neutral between the parties, the therapeutic approach embodied in the White Paper may in practice be biased against the innocent partner.

Public interest

The theme of this paper is that family life must be built on trust, and that there is a public interest in establishing conditions which foster trust. Observance of the marriage contract is not, therefore, simply a private matter for the individuals concerned. If a spouse can unilaterally breach or repudiate this contract with impunity, the result is to undermine the trust-enhancing function of marriage as an institution. In family matters, as in other areas of life, it is in the public interest that people keep promises and honour contracts, and that compensation is provided, where feasible, for any damage caused by unilateral action. The public interest also requires that the child custody decision should take into account the marital conduct of parents and their reasons for seeking a divorce. Apart from exceptional cases, it is not in the public interest to award the custody of children to someone who behaves abominably to their spouse, or who terminates the marriage because they are bored or have found a better partner. This is to reward behaviour which undermines marriage as an institution and thereby corrodes the social fabric of trust. In most cases, it is not possible to locate responsibility in any simple fashion and the custody decision must be based on other criteria, such as the primary carer principle, the maternal presumption, joint residence or simply tossing a coin. However, there are cases where the main responsibility for the break-up can be clearly identified, and in such cases it is appropriate to take this into account in deciding custody.

Many people find it repugnant to suggest that the 'best interests' of an innocent child should be subordinated to the public interest or other private interests. This is an unduly emotional reaction. In numerous areas of law the interests of children play only a secondary role or are ignored altogether, and it is difficult to see why their interests should be accorded such a unique status in the case of contested custody. For example, British courts rarely take into account the interests of children when deciding whether to grant

their parents a divorce; and where divorcing parents agree they can normally choose whatever custody arrangements they like for their children. These children may be eventually forced against their wishes to live in a stepfamily or to accept a series of transient lovers in the family home. In exceptional circumstances, the courts can delay a divorce in the interests of the children or veto certain custody arrangements, but such provisions are intended only for extreme cases. Where custody is uncontested, it is the interests and desires of adults, not children, which are normally paramount.

In international abduction cases the 'best interests' criterion is not applied, and the child is normally returned to its country of origin. Under the Hague Convention, the only exception occurs when 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation' (Article 13(b), cited in Hayes and Williams, 1995, p. 261).

The courts have been extremely reluctant to use this provision because by doing so they could rapidly undermine the whole purpose of the Convention, which is to establish a clear framework of law for international cooperation in the sphere of abduction. By upholding the Convention, the courts are defending the interests of children in general at the expense of the individual child. Returning a child to its country of origin may be against the personal welfare of the child, but except in extreme circumstances the courts give priority to the public interest of preserving the Convention.

There are numerous other examples in the sphere of civil and criminal law where the interests of individual children are overridden. For example, if I fall seriously behind on the mortgage payments on my house, I shall eventually be forced to move out and my assets may be seized by bailiffs. The result may be a catastrophe for my family, perhaps causing my marriage to collapse and great misery for my children. Why does the law allow such an outcome? The answer is because I have made a contract and there is a public interest that contracts should normally be honoured. The alternative would be to introduce a law compelling finance companies to allow families to continue in occupation indefinitely if they could not pay. This would provide relief for families currently in debt, but its long-term effects on future house purchasers would be extremely harmful. Finance companies would be reluctant to lend to families with children, and such families would find it impossible to buy a house. While the enforcement of financial obligations may harm individual children in particular cases, it serves the wider interest of children in general.

What these examples all show is that the law often subordinates the welfare of individual children to some wider public interest, such as respect for international treaties, the observance of contracts or protection of property. Some may decry this, but it is the only way to preserve an orderly and civilised society, which is to the ultimate benefit of children in general. By making the welfare of the child 'paramount' in custody cases, the Children Act is saying that the courts should ignore the fact that there may be a public interest in the observance of marital vows. This is at odds with existing practice in certain other jurisdictions, where marital conduct is still taken into account in deciding custody and preference is given to the innocent parent. It is also at odds with the practice in other areas of English law where the public interest is routinely given priority over the welfare of the individual child, which is frequently ignored altogether. Such an extreme position may be inappropriate in the case of divorce, but it surely wrong to go to the other extreme and make the supposed welfare of the child virtually the only consideration. What is actually best for children is, after all, a highly debatable issue.

5. Objections to the notion of fault

It is beyond the scope of this paper to discuss in detail the multitude of reasons put forward to justify why fault has been abolished, but a few deserve special mention.¹

Responsibility. Sociologists and psychologists have for long argued,

that such activities as adultery, cruelty and desertion were merely symptoms, not causes, of marital failure ... that fault itself was out of place in divorce, and that marriages broke up in a context of conflicts in attitude, personality, or other difficulty on both sides, rather than as a result of fault by one spouse and innocence by the other. (Homer Clark Jr., cited in Phillips, 1988, p. 566)

Applying the above logic, we should conclude that domestic violence and marital rape should not be punished because they are 'merely symptoms ... of marital failure ... in a context of conflicts in attitude, personality, or other difficulty on both sides, rather than as a result of fault by one spouse and innocence by the other'. Yet both violence and rape are legal offences and public attitudes have become less tolerant of them in the course of time. Mental cruelty, adultery or abandonment can also be very damaging to a partner, and it is difficult to understand why such actions, when clearly established, should be totally excused and not even merit a reprimand.

Hypocrisy. In most countries that have abolished fault-based divorce, one of the main reasons given has been that petitions for divorce were often based on spurious grounds concocted by the two partners acting in concert. Such behaviour was motivated by the fact that divorce by mutual consent was either not allowed, or was available only after a long delay. The only way a consenting couple could obtain a speedy divorce was for one partner to accuse the other falsely of some serious matrimonial offence such as adultery or cruelty. The accused partner would then plead guilty and, if necessary, concocted evidence would be provided to back up the charge. Many divorce professionals thought that such hypocrisy brought the system into disrepute. It also meant that there were so many cases of alleged misconduct that the courts were overwhelmed and became nothing more than a rubber stamp.

These are valid criticisms, but they are not a reason for abolishing fault entirely. There are many other ways of dealing with the problem of fraudulent petitions. One answer might be to impose a fine on the guilty party. Another might be to forbid the guilty party from remarrying for a number of years, while allowing the innocent party to remarry immediately or after only a short delay. This was the system used in many countries up to the end of the last century (Phillips, 1988). The simplest way to eliminate hypocrisy is to allow divorce by consent, and to make the waiting period the same as in the case of fault. There would then be no incentive for a couple wanting a divorce by consent to accelerate proceedings by fabricating evidence to establish fault. A person getting a divorce on the grounds that their spouse had committed adultery would have to wait just as long as a couple divorcing by mutual consent. This is the current situation in France.

Practicality. The British White Paper on Divorce rejected fault as a ground for divorce in the following words:

[T]he law is not subtle enough to allocate moral blame worthiness accurately in every case, for there are always two sides to the story and different people assess them in different ways. Nor do most couples want the law to make the attempt; but many would like to avoid the sometimes (although obviously not invariably) inaccurate allocation of blame which takes place at present. (The Law Commission, 1996)

¹ For general surveys of this area, see Phillips (1988) and Parkman (1992B).

This is a remarkable passage. By the logic of the first sentence, the entire legal justice system should be abolished altogether. In no area of civil or criminal law are the courts infallible, and in almost every case there are ‘two sides to the story and different people assess them in different ways’. Indeed, it is the function of courts to assess the evidence and choose between rival stories. In the case of divorce, the issue is not whether mistakes are sometimes made, but how frequent are these mistakes, and in what particular areas of marital misconduct are mistakes most likely? It is often difficult or impossible to assign blame to one particular partner, but there are also cases in which misconduct is both gross and obvious, and the risk of a mistake is relatively small. The above passage also says that most couples do not want the law to make the attempt of assigning blame. This is not an argument for abolishing fault, but for allowing divorce by mutual consent as an option for those couples who desire it.

Legal opinion in Britain is mostly against fault-based divorce on the grounds that it is impractical, because evidence is difficult to obtain and the number of cases would be too great. However, this has not deterred the State of Louisiana which has recently introduced a twin-track system allowing couples to choose what kind of marriage they want. One is the normal type which allows speedy, unilateral, no-fault divorce; the other is ‘covenant’ marriage, which is harder to terminate and for which speedy divorce is only available in the case of fault at the request of the injured party. The definition of fault is narrowly drawn to avoid abuse by overly liberal judges. Couples wishing to convert from normal to covenant marriage can do so, but the reverse transition is not allowed. Lawyers responsible for framing the new law see no practical objection to its implementation, and believe that the courts should be able assign fault with reasonable accuracy.¹

It is interesting to note that in France almost 50,000 divorces a year, or about 45% of the total, are based on fault (Mazeaud *et al.*, 1995, p. 691). These are genuine cases, since speedy divorce by consent is readily available in France, and couples wanting such a divorce have no need to collude in fabricating evidence. If French judges can process so many fault cases with apparent competence, it is difficult to understand why their British counterparts think the task is so impractical.

Reputation. In its highly influential 1966 Report on divorce reform, *Putting Asunder*, the Archbishop of Canterbury’s research group criticised the notion of matrimonial offence on the grounds that the ‘guilty’ party is stigmatised as responsible for the breakdown in the marriage.

[T]he notion has persisted that the ‘guilty party’ to a divorce ought to be treated differently from the ‘innocent party’ ... This kind of prejudice, though much weaker than it used to be, has not altogether disappeared. In 1965, an opinion poll on popular views of divorce showed that, in spite of ninety-percent support for divorce on the petition of either party after seven years’ separation, a majority yet had ‘a poor opinion’ of the ‘guilty’ in divorce for a matrimonial offence. (Church of England, 1966, p. 31)

This is fair comment in a situation where a matrimonial offence is merely the culmination of a degenerative interaction for which both parties are about equally responsible. But the above passage was intended to apply to all divorces, even those where one party behaves outrageously and is uniquely responsible for the breakdown of the marriage. Even the Archbishop’s Report recognised that such cases do occur.

¹ Personal communication from Professor Katherine Spaht of the University of Louisiana Law School at Baton Rouge.

Similar views were expressed during the recent debate on divorce reform in Britain. It is difficult to understand their justification. If a marriage ends because of gross misconduct by one partner, a statement by a court of law to this effect could be of obvious benefit. Such a statement would help to safeguard the reputation of the innocent partner and damage the reputation of the guilty partner, thereby providing useful information for anyone thinking of marrying or having a relationship with one of these partners in the future. Fear that re-marriage prospects might be damaged by loss of reputation might also help to induce better behaviour within existing marriages. For fault to operate in this way the declaration of fault must, of course, be credible. Under the old system, partners wanting a speedy divorce frequently manufactured spurious grounds for divorce, and the assignment of fault by the courts lost much of its significance because nobody could be sure who, if anyone, was genuinely at fault.

6. Reversing the tide

This paper has argued that the idea of fault is central to the notion of marriage as a commitment. By restricting unilateral exit from marriage without just cause, or by making the terms of dissolution depend on marital conduct, fault-based divorce penalises those who break their marital vows and helps to protect those who fulfil their obligations. It applies the principles of contractual justice to marriage, thereby discouraging opportunism and protecting individuals against opportunistic behaviour by their partners. By giving legal backing to the vows which couples make to each other, the fault-based system provides a public affirmation of the moral principle that individuals should keep their promises. The fault-based system increases the degree of trust between individuals, thereby encouraging them to invest in their marriages. This is advantageous both to the individuals concerned, to their dependants and to society in general.

The idea of returning to fault-based divorce, or strengthening the fault component of existing divorce law, raises an important question. Should any change be applied universally, so that divorce would be available on exactly the same terms to all married couples? This has been the usual practice in previous divorce reforms.¹ When no-fault divorce has been introduced in Western countries, it has normally been imposed retroactively, without choice, on all couples who were married under the previous fault-based system. This sometimes caused severe hardship to individuals, especially women, who had lived their entire married lives with one set of expectations only to find their marital contract arbitrarily rewritten to their disadvantage by the state.² Moreover, couples wishing to get married in the future had to use the new, no-fault system, even when they preferred the old, fault-based one.

This is a dubious precedent to follow. Some people are quite happy with their existing marriage and divorce arrangements and have no desire to shift to a more strongly fault-

¹ There have been exceptions to this practice. For example, in a number of European countries civil divorce was at one time available to non-Catholics but was forbidden to Catholics (Phillips, 1988).

² Judge Richard Neeley (1979) comments on the unfairness of this as follows: 'Although an energetic man tied to a woman he married when he was young may find himself bored, fenced in, and unhappy, his wife may be perfectly content with the lifestyle she was encouraged as a child to consider her destiny. Under the liberal grounds for divorce which are becoming acceptable in most states, a man in these circumstances is capable of starting out again with a minimum of either alimony or child support liability. While the woman who had relied to her detriment on society's promise of stable family life can easily find herself in desperate emotional and financial circumstances.'

based system. Their wishes should be respected. On the other hand, it would be a mistake to let every couple write their own personal marriage contract. This would cause enormous confusion and encourage a calculating and selfish approach to marriage. In addition, it might lead to exaggerated commitments which were later overturned by the courts, thereby discrediting the very notion of marriage as a legal contract.¹ A more practical alternative would be to follow the example of Louisiana which has recently introduced a twin-track system allowing couples to choose between two types of marriage, either normal or covenant (see above). To offer only two standard forms of marriage might seem inadequate to some, but it would provide sufficient choice to meet the requirements of most couples while remaining simple and transparent. There would also remain the possibility of cohabiting without being married.

The key features of the new Louisiana law are as follows. For an ordinary marriage, divorce can be obtained virtually on demand and is automatically granted on the petition of either spouse following a brief period of separation. In the case of covenant marriage, exit is more difficult and couples must undergo counselling prior to their marriage and also later on should they experience marital difficulties. The speed with which a covenant marriage can be dissolved depends on the ground for divorce. An immediate divorce is granted if the other spouse is proved guilty of adultery, physical or sexual abuse or of a felony for which the sentence is death or hard labour. Following a period of legal separation, a divorce is also available on account of habitual drunkenness, cruel treatment, or other 'outrages' which render their living together insupportable.² Finally, if a spouse has been deserted, a divorce can be obtained one year after the departure of the other spouse. The preceding list refers to cases where one spouse is guilty of misconduct and the divorce petition is brought by the innocent spouse. Louisiana covenant marriage also allows for divorce simply on the ground of *de facto* separation. Either spouse can petition for a divorce after the parties 'have been living separate and apart continuously without reconciliation for a period of two years'.

Although an imaginative initiative, the new covenant law does have an important weakness, which is the problem of fraudulent petitions. Under this law, divorce by mutual consent is only legally available after two years of *de facto* separation. However, a divorce can be obtained immediately for adultery, or after only one year of desertion. Experience suggests that these provisions will be abused by couples who would like a divorce by consent, but do not wish to wait for the required two years. To speed things up, such a couple might go for a fault-based divorce in which one commits a fictitious marital offence and they both connive to fabricate the evidence. If this were to happen on a large scale, the notion of fault could become discredited and the Louisiana system open to the charge of hypocrisy.

The obvious remedy is to stipulate that all types of divorce must be preceded by a significant period of notice or legal separation, and to make this period the same for divorce by consent and divorce for a marital offence. This would remove the incentive for couples to fabricate charges so as to accelerate their divorce. The reason for a significant delay even in the case of fault is to allow time for forgiveness and reconciliation once tempers have cooled. This is why some countries stipulate a minimum period for reflection, no

¹ Barry (1988) argues that couples should be free to write any marriage contract they like, but later retreats from this position in his 1997 paper. For a general discussion of the limits to freedom of contract, see Trebilcock (1993).

² The period of legal separation is 12 months when there are no dependent children and 18 months if there are such children.

matter what the reason for divorce.¹ Under the new law for England and Wales the waiting period is one year, which is arguably too short.²

In addition to the terms under which divorce is allowed, there are also the so-called ancillaries to consider. Even where fault does not affect the legal availability of divorce, it may still be important in deciding how income and wealth are divided and what arrangements are made for the children following dissolution. For example, under the new Family Law Act in England and Wales, marital conduct has no bearing on the availability of divorce, but the courts can still penalise misconduct by awarding a better financial settlement to the injured party. Moreover, the wording of the new Act is deliberately vague and, if they were so minded, the courts could also use it to penalise someone who is unilaterally seeking to divorce an innocent spouse. The English courts had such powers in the past but they were rarely invoked and inconsistently applied. With a more vigorous and consistent application of these powers in the future, fault could be given a major role in divorce without any revision of the existing statutes.

There is also room for judicial discretion with regard to child custody. Under current English law, when there is disagreement between the parents over custody, the courts are supposed to decide exclusively in the best interests of the child. With a little ingenuity, this provision could be used to smuggle fault into the custody decision. For example, the courts could decide that it is not generally to the moral benefit of a child to reside with a parent who has seriously breached his or her marital vows, or who is unilaterally divorcing an innocent spouse. Given recent judicial practice, such a development is extremely unlikely at present, although attitudes might eventually change. I only mention it to indicate what is theoretically possible. To the extent that fault plays a greater role in British divorce in the near future, this is more likely to be in the area of financial settlements than child custody.

In the American context, the Louisiana reform may seem quite radical, but in fact divorce under the new covenant law is no more difficult, and fault plays no more role, than in some European countries today. However, this is not the central issue. At the present juncture in history, what really matters is that the Louisiana legislature has recognised the harm done by the tide of no-fault divorce, and by a large majority has voted to begin the process of reversing this tide. At the time of writing, 13 other American states are contemplating whether to follow Louisiana's example. Meanwhile, in much of Europe the no-fault tide is still flowing, divorce is becoming easier and the concept of fault is still under attack. This may be just another example of Europe's failure to learn from American experience. Having been to the brink with marital instability, Americans are now starting to address the basic legal framework which has helped to undermine the institution of marriage. Britain and other European countries could follow this example, rather than waiting until things become as bad as they are in America.

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¹ The case for a significant waiting period in all types of divorce is laid out clearly in Scott (1990).

² This waiting period consists of three months prior to making an official statement of marital breakdown plus a further nine months for 'reflection and consideration'.

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