Chapter Seven

EQUAL RIGHTS *VERSUS* FATHERS' RIGHTS: THE CHILD CUSTODY DEBATE IN AUSTRALIA

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INTRODUCTION

Throughout the 1970s and 1980s the rhetoric of equal rights for women has gained considerable currency in Australia. It manifests itself in a plethora of law reform measures, such as laws proscribing discrimination on the grounds of sex and marital status, and affirmative action programmes at the federal level and in some of the Australian states, designed to secure equal employment opportunity for women in the workplace (Ronalds, 1987). These laws address the 'public' world of the workplace and the market, but leave unregulated the 'private' sphere of home and family. During this same period, Australia's national family law has been transformed from a fault-based to a no-fault divorce regime. Major debates have taken place about issues such as the basis for allocating matrimonial property on divorce (e.g. Women's Electoral Lobby, 1981, 1985; and Australian Law Reform Commission (ALRC), 1987b), and about the appropriate mix of public and private support which should be accorded to the children living in one parent families (Cabinet Sub-Committee on Maintenance, 1986). Some of the arguments that have been employed in these family law debates have proceeded from the same assumptions about the need to secure formal legal equality between women and men as have informed the debates in the 'public' sphere.

More recently, the issue of child custody has been placed on the public agenda by a variety of different and contradictory interest groups. In particular, the advantages of joint custody have been increasingly extolled in Australia, presumably as a response to

moves in that direction in other jurisdictions, most notably in the USA. Much of the enthusiasm for joint custody appears to be grounded in rhetorical arguments about equality between women and men, in this case between mothers and fathers. Perceived as one of the few areas where historically the law has 'favoured' mothers, joint custody is now mooted as a 'script for equality' (Lehmann, 1983, p. 66).

This chapter will canvass the nascent debate about joint custody in Australia and examine its origins against the background of current laws relating to guardianship, custody, and access to children. The arguments of the proponents will be scrutinized with a view to discerning themes within this debate. In particular, the growing band of fathers' rights groups and their support for joint custody will be examined and it will be suggested that their use of 'equality' rhetoric and their resort to charges of 'discrimination' against them by the Family Court of Australia in custody cases represents a backlash against what these groups perceive to be advances made by women through, amongst other things, the enactment of anti-discrimination laws.

In fact, for all of these 'reforms', women in Australia have not been particularly well served by their achievement of 'equality' when one considers matters such as women's and men's relative wage rates and the increasing trend towards the 'feminization of poverty', as evident in Australia as it is in the US and elsewhere. In addition, at an ideological level, single parents (i.e. custodial mothers) have become the new 'undeserving poor',[1] as recent reforms to the social security system and the collection of child maintenance demonstrate.

I will start with a brief discussion of the Australian family law system. Current custody law, some of the reported decisions, and the (sparse) empirical data on custodial dispositions will then be canvassed. Next, the chapter will examine the arguments made in favour of 'joint custody', pointing out the range of disparate meanings attributable to this concept. It will be suggested that in the context of current Australian custody laws, 'joint custody' is a vague term, easy to invoke in rhetorical debate but difficult to define. It will be demonstrated that proponents use the concept in varying, and at times contradictory, ways, thereby rendering proper debate, analysis, and assessment difficult. Finally, a brief account of the 'poverty of equality' for women in Australia is

followed by discussion of some of the possible implications were joint custody to become the preferred custodial disposition in Australia.

It will be argued that debates about custody now taking place in Australia fail to locate this issue in the much broader context of women's economic and social disadvantage. By discussing the issue in isolation from the material situation of women and men, particularly the economic consequences of divorce, the debate has taken place largely in rhetorical terms only. This can be contrasted with the way other family law issues, such as matrimonial property law, have been approached in Australia. Unless and until the debate is broadened, and realistic account is taken both of women's financial position relative to men, and the unequal distribution of child care responsibilities, 'joint custody' will continue to develop particular ideological purchase in securing (or restoring) authority in the guise of 'equality' for men. In addition to providing a 'script for equality', 'joint custody' may also serve a further ideological function by constructing and reinforcing a notion of the 'eternal biological family' (Sevenhuijsen, 1986, p. 336) as the legitimate organizing structure of society. This operates with total disregard of significant changes in the way people choose to live their lives in the 1980s.

THE AUSTRALIAN FAMILY LAW CONTEXT

Under the Australian constitution, the national, or federal, parliament has only limited law making powers over family law, extending to laws about marriage and divorce, and laws which deal with the children of those marriages (Jessep and Chisholm, 1985). Issues involving family relationships not formalized by marriage, and those concerning ex-nuptial children, are left to the six states and two territories to regulate. This situation changed in 1988 after lengthy negotiations between the Commonwealth and state governments finally led a majority of the states to refer some of their powers over family matters to the Commonwealth (Guthrie and Kingshott, 1987). However, this unified system is only recently established and the case law referred to in this chapter was generated under the previous separate systems of federal and state family law.

The single most significant reforming event in Australian

family law was the enactment of the Family Law Act 1975 (Commonwealth) which overhauled laws governing divorce, maintenance of spouses and children, matrimonial property and custody, guardianship, and access to children. Under the Family Law Act, the single ground for divorce is irretrievable breakdown of marriage, evidenced by twelve months' separation (s.48). The Act's underlying philosophy is that marriage breakdown is an inevitable, if regrettable, fact of life, the consequences of which should be dealt with as painlessly as possible, without attribution of fault. To implement this, a national specialist court, the Family Court of Australia, was established. The legislative scheme is gender neutral. Women and men have equal access to divorce, maintenance is available equally to women and men, based on the criteria of need on the one hand and capacity to pay on the other, and an attempt has been made, in the provisions dealing with matrimonial property, to deal fairly with the different financial and non-financial contributions made by women and men to the acquisition of matrimonial assets (see, generally, Finlay, 1983; and Dickey, 1985). In this chapter, unless explicitly stated, the cases and statutory provisions discussed arise under the national family law system. It is, however, noteworthy that the reforms of the 1970s which replaced the previous and acrimonious fault-based system under the old Matrimonial Causes Act have to some extent filtered through to the states, at least in relation to issues of guardianship, custody, and access to ex-nuptial children (Guthrie and Kingshott, 1987).

Australian custody law and practice

The Family Law Act provides that, subject to any contrary orders, both parents are guardians of any child of the marriage and have joint custody (s. 63F(1)). Guardianship refers to the responsibility for the child's long-term welfare and gives a parent all the common law rights, powers, and duties, other than those involving daily care and control (s. 63E). It is the latter aspect which is encompassed by the notion of custody (sometimes called 'physical custody' in other jurisdictions and, prior to amendments to the Family Law Act in 1983, referred to in Australia as 'care and control')

Despite the clear statement in the Act that, in the absence of a

contrary order, both parents are guardians and have joint custody, the Family Court has not interpreted this as giving rise to any presumption in favour of joint guardianship or joint custody where disputed cases are taken to the court, and such orders are rarely made (Horwill and Bordow, 1983; Nygh, 1985; Family Law Council, 1987). Instead, in disputed cases of guardianship, custody, or access, the court is given broad powers to make orders, all of which are subject to the statutory requirement that 'the court shall regard the welfare of the child as the paramount consideration' (s. 60D).

In 1979 the High Court,[2] in a rare consideration of child custody principles, firmly rejected any official endorsement of the 'mother principle' or the 'tender years' doctrine as a determinant in custody cases, stating that a preference for mothers, especially in cases involving young female children

> is not, and never has been, a rule of law. It is, or was, a canon of common sense founded on human experience.... In earlier days, when there was no role for a father in the upbringing of children and in the running of the household, the care and the upbringing of children was left almost entirely to the mother who was able to devote the whole of her time and attention to that responsibility and to household affairs.

But the court went on to state, without citing any evidence for this, that

> there has come a radical change in the division of responsibilities between parents and in the ability of the mother to devote the whole of her time and attention to the household and to the family. As frequently as not, the mother works, thereby reducing the time which she can devote to her children. A corresponding development has been that the father gives more of his time to the household and to the family. (*Gronow* v. *Gronow*, 1979, p. 528, *per* Mason and Wilson JJ)

However, only three years earlier, a New South Wales Supreme Court judge had stated:

> I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers.... That knowledge includes an understanding of the

> strong natural bond which exists between mother and child. It includes an awareness that young children are best off with both parents, but if the parents have separated, they are better off with their mother. The bond between a child and a good mother...expresses itself in an unrelenting and self-sacrificing fondness which is greatly to the child's advantage. Fathers and stepmothers may seek to emulate it and on occasions do so with tolerable success. But the mother's attachment is biologically determined by deep genetic forces which can never apply to them. (*Epperson* v. *Dampney*, 1976, p. 241 *per* Glass JA)

This attitude, though not formally part of the legal framework of custody law, may well reflect community practices, as two recent research reports indicate. In 1983 the Australian Institute of Family Studies (AIFS) was commissioned to conduct a major empirical study of the economic consequences of marriage breakdown. This research included custodial outcomes in recognition of the financial implications for both parents, particularly the custodial parent (Australian Institute of Family Studies, 1986, p. 269). Although the Institute reported 'a relatively high percentage of younger men who had care and control of one or both of their children' (13 per cent continuously; 17 per cent after a change of parenting), it was still overwhelmingly women who looked after their children on a full-time basis (p. 268). They concluded:

> Despite the increasing emphasis in research and media reports on the growing participation of fathers in the parenting process, it is still unusual for fathers to have the custody of their children. It appears that society at large still sees the nurturing of children as being the primary responsibility of women. (p. 268)

The only other Australian study on the outcome of custody cases (Horwill and Bordow, 1983) found that fathers had a greater likelihood of being awarded custody in defended than in undefended cases. In that study, which looked at all orders made in 1980 in the Melbourne registry of the Family Court, 79 per cent of orders, including consent orders, vested sole custody (care and control) in the mother. Defended cases accounted for only 10 per cent of the total; of these, fathers obtained sole custody in 31 per

cent of cases. Added to this were 'split' decisions involving either separating children, or awarding joint custody; after these were taken into account, care and control (now 'custody') of at least one child of the family was awarded to the father in 44 per cent of cases (Horwill and Bordow, 1983, p. 30; see also Nygh, 1985). It should be noted that this study was expressly undertaken to respond to claims by fathers' rights groups (specifically, The Army of Men) that the court discriminated against them and in favour of women. They had claimed that men had a less than 2 per cent chance of gaining custody (Horwill and Bordow, 1983, p. 1).

A Family Court judge has suggested that the outcome of the 1983 study demonstrates

> that the mother preference is still alive and well in the general community, the fathers generally not contesting custody. The fact that fathers do appreciably better in contested cases does not mean, of course, that if only more fathers were encouraged to stand up for their rights, more would gain custody. The figures do not suggest how many successful fathers will personally undertake the caring responsibility and how many delegate that responsibility to relatives, *de factos*, new spouses or hired help. (Nygh, 1985, pp. 67–8)

While the mother preference may be 'alive and well', it would be misleading to assume that all mothers are similarly favoured. Lesbian mothers, for example, received short shrift from the Family Court in a number of early cases (see Anon, 1980; Harrison, 1980; Rights of Women Lesbian Custody Group, 1986, Chapter 16). While the current position of the Family Court is that lesbianism *per se* will not disentitle a woman from custody, in several cases a number of conditions have been placed on these mothers' custody awards (compare, e.g., *PC and PR*, 1979, and *In the Marriage of L*, 1983).

A woman's involvement in the paid workforce can sometimes raise questions about her fitness as a parent and lead to the father being awarded custody even though the father will delegate the children's day-to-day care to other women. In one such case (*Mathiesen and Mathiesen*, 1977) three older children were living with their father, while the youngest, a daughter aged 6, was with the mother and her *de facto* husband. The mother worked full time, and the child was cared for after school in another woman's

house until the mother returned from work. The judge awarded custody to the father. Amongst the other reasons for this, he expressed the view that this case was 'an illustration of role reversals in our community.... The husband...has tailored his life so as to act as mother and father to the three older children, running the home efficiently and well with assistance from the older daughter and his mother and sister' (p. 76, 221 *per* Fogarty J). In another recent state court decision concerning an ex-nuptial child the judge made clear his disapproval of the mother's

> tendency to allow herself to be so absorbed by her personal ambitions as to show a lack of maternal feeling towards the children and to be unconscious of and unsympathetic to their emotional needs (p. 297).... The defendant was and still is a working mother. Prior to and at the time of the previous hearing she was enthusiastically pursuing a career which placed a strain upon her ability to cope with the demands of her domestic life and her children. (*Harrington* v. *Hynes*, 1982, p. 302 *per* Holland J)[3]

In both of these two cases, the judges expressly suggested that the parties were equally situated as full-time workers who would need to accommodate their time to the care of the children. In both cases also, the judges referred extensively to the women who would care for the children if the fathers obtained custody (in the first the older daughter, the mother, and the sister, and in the second the new wife), yet in neither case did that detract from the judges' notion that the parties were under 'equal handicaps' in their ability to care for their children. When the relative re-partnering rates of men and women are taken into account (Australian Institute for Family Studies, 1986, pp. 58–9), it becomes clear that a full-time male worker is much more likely than his female counterpart to have a 'mother substitute' to care for the children, a matter that at least one Family Court judge has expressly acknowledged (Nygh, 1985, p. 68). In this way the 'equal handicap' of participation in the workforce may well result in men being awarded custody where there is little else to choose between the parents.

One particularly egregious example of this phenomenon received some public notoriety in 1987 when questions were raised about the case in Federal Parliament (see Australian Senate, 1987).

Two professional parents (both were medical practitioners) were in dispute over custody of their children (*Ward* v. *Ward*, 1987). The judge awarded the wife custody on a conditional basis; on 6 August she agreed to the wife having custody if, but only if, she resigned her job and was pregnant by her new husband by 7 October. In her judgment on 6 August, Murray J had stated 'The major question mark hanging over the wife...is whether she would be prepared to sacrifice her career for the sake of the children.' The wife had told the court that she wished to complete her specialist qualifying examinations and continue to work part-time. She had also stated that she planned to have another child with her new husband. The judge decided that the wife would not give up her job – 'she wants her cake and eat it too – unremarkable in these days of equality of opportunity' (p. 19). When they came back to the court on 7 October, and the wife had not become pregnant, she awarded custody to the father, despite the fact that she had earlier commented that the father, at 57, was more like a grandfather to the children, two young girls. There was, of course, no suggestion that the father give up his job in order to qualify as a suitable full-time parent, and it was made clear in the judgment that his new wife would undertake the day-to-day care of the children.[4]

It would be misleading to suggest that these cases described are clear evidence of a trend against working mothers and demonstrate the courts' favouring of fathers as custodial parents. The AIFS study and the Family Court's research (Horwill and Bordow, 1983) mentioned earlier demonstrate that disputes about custody are infrequently litigated, with most arrangements being made by agreement of the parties. Clear trends are not readily discernible from adjudicated cases and, far less, from the small number reported. And, as noted, in the absence of a court order, both parents remain guardians and have joint custody under the Family Law Act.

Reported case law does, however, demonstrate the Family Court's early position that joint custody (guardianship) orders were to be made only in exceptional cases. This has since been rejected by the Full Family Court (see *In the Marriage of Chapman and Palmer*, 1978; *In the Marriage of Cullen*, 1981). If any common theme emerges from the reported cases, it is that the Court is most likely to order joint guardianship where it believes that the parties

will be able to co-operate in matters concerning the child's welfare (Chisholm, 1987, p. 1,313).

Available Australian data indicates that joint guardianship orders are made in 21 per cent of defended disputes (Horwill and Bordow 1983, p. 31). However, joint physical custody is rarely, if ever, awarded by the Court. The Family Court's study further demonstrated that there was no significant difference between the recipients of care and control under joint or sole custody (guardianship) orders. But as more overseas jurisdictions amend legislation to require some form of joint custody, and as more advocates, particularly from influential bodies like the Australian Institute of Family Studies (Edgar, 1986) and the Family Law Council (1987), propose changes to custody laws in Australia, it is quite likely that their arguments for reform will gain significant support. Accordingly, it becomes necessary to scrutinize what 'joint custody', as a reform proposal, signifies.

THE POLITICS OF REFORM: THE MOVE TOWARDS JOINT CUSTODY

Elsewhere, a number of commentators have pointed out that 'joint custody' has a range of disparate meanings covering a variety of situations. Accordingly, there is no guarantee that a court order of joint legal custody will have any real effect on the day-to-day caretaking practices of parents. Schulman and Pitt (1982) note that most of the statutory joint custody regimes in the US, as well as the majority of court orders, expressly provide for joint legal custody independently of the day-to-day care and residence arrangements (p. 543), and they conclude that many advocates of joint custody are concerned more with legal rights than with physical custody, 'which is not even envisioned as part of the concept'. Fineman (1987) has also suggested that 'joint custody dispositions, in practice, continue to resemble sole maternal custody and father visitation' (p. 3).

The increasing popularity of the rhetorical notion of joint custody has a number of contradictory origins. Feminist concerns to transcend the stereotype of women's place as homemaker and child carer (e.g. Brophy, 1985; Fineman, 1987; cf. Bartlett and Stack, 1986) have combined in uneasy association with the ideology of equality to prompt moves in a number of overseas

jurisdictions throughout the 1970s and 1980s to enact 'joint custody' laws. Some proponents argue that with men and women now enjoying 'equal status', they should have 'equal rights' to their children after divorce. After all, haven't women complained that men have not taken sufficient responsibility for their children? Another argument for joint custody states that while divorce may separate the adults, there is no basis for ending the children's association with both their parents. Such an ongoing relationship with both parents is said to be in the children's best interests (e.g. Edgar, 1986; Mark, 1987). The social work literature has become saturated with articles with titles like 'Joint custody: affirming that parents and families are forever' (Elkin, 1987). Joint custody, like motherhood, is hard to argue against. However, before attempting to look more critically at the concept, some of the recent Australian manifestations of this world trend will be examined.

Who supports joint custody in Australia?

In Australia, there has been considerable agitation in recent times for the establishment of a 'joint custody' norm to be applied by the Family Court. However, just as Schulman and Pitt (1982), amongst others, have demonstrated the variety of possible legal and practical meanings of 'joint custody' in the US, the Australian debate has taken place in similarly loose fashion. It is accordingly difficult to discern the extent to which the proponents discussed here seek merely formal legal 'rights' (in the nature of the Family Law Act's notion of guardianship) or intend to alter day-to-day caretaking practices, i.e. they seek a presumption in favour of joint custody, akin to shared care and control. Despite the fact that it was earlier feminists who most clearly argued that men should share the care of their children, most of the recent agitation about custody in Australia has come from men. Some of it derives from reputable institutional sources such as the Institute of Family Studies (see Edgar, 1986) and the Family Law Council (1987), which in its recent report on access has also expressed a preference for a move towards joint custody, although it has done so without indicating precisely what is envisaged by this proposal.

In 1986 the Australian Law Reform Commission (ALRC) conducted public hearings as part of its work on the law of contempt.[5] These gave fathers' rights groups an unprecedented

forum in which to air their grievances about the current family law system. The majority of those who gave evidence did so in response to the contempt and family law aspect, though this was only one part of the total project. Of the seventy-one oral submissions made, forty-six were from fathers' rights groups such as Lone Fathers' Association, Men's Confraternity, Families Against Unnecessary Legal Trauma (in Divorce) (FAULT), Family Law Action Group, Parents Without Rights, Family Law Reform Association, Divorce Law Reform Association, Fathers Against Discrimination in Custody, or from individuals sympathetic to their position. These groups also made seven written submissions (see Australia Law Reform Commission, 1987a, pp. 605–9). By contrast to the disproportionate representation of these groups, single custodial mothers, or organizations representing them, were notably absent, even though their interests were directly affected since they are potentially subject to contempt action by the Family Court for defying access orders.[6]

Although it was made clear early in the course of the hearings that custody was clearly outside the terms of reference (Australian Law Reform Commission, 1986, p. 11), many of the men who gave evidence expressed their view that the law should require joint custody. California was cited as the example to follow, where, it was submitted, it was 'working fantastic' (Barry Williams, Lone Fathers Association, Australian Law Reform Commission, 1986, p. 11; see also Mr Weeden, Lone Fathers', p. 198; Mr Seare, p. 209; Mr Romeyko, p. 667).

These men's arguments in support of what they call joint custody are threefold. First they believe themselves to be the victims of discrimination by the Family Court, which is run, in their view, by 'radical feminists'. Thus, it was submitted, that '95% of cases [in the Family Court] are resolved in favour of mothers', indicating that 'Justice Evatt [the Chief Judge of the Family Court from 1976–88] and her fellow judges have decided that in 95% of Australian homes, the female of the species is the better parent' (Mr Foster, p. 547). It should be reiterated here that earlier similar claims by the Army of Men were taken up and refuted by the Family Court's research section in 1983 (see Horwill and Bordow, 1983, p. 1). Yet to read the transcripts of the 1986 public hearings, one would think that men were never awarded either sole or joint custody of their children.

A prolific campaigner for joint custody has been former legal academic Geoffrey Lehmann, who has pursued the 'discrimination' theme.

> If men can have their children confiscated from them irrespective of their own moral worth and effort, then they will be obliged to avoid marriage, vasectomize themselves, become narcissistic and use women as sexual objects. (Lehmann, 1983, p. 62)

> Sole custody is an anachronistic survival from fault divorce and an era when there was, in effect, a legal presumption against men to balance the discrimination against women elsewhere in society.
>
> Joint custody would appear to benefit children and parents. It is a script for equality. We are proud of our anti-discrimination laws, yet continue to discriminate against non-custodial mothers and fathers. We harass the latter for maintenance payments for children but deny them a normal parental relationship. (Lehmann, 1983, p. 66).

The second argument is that while divorce can end relationships between adult parties, the child–parent relationship is eternal and should not be broken. The Family Law Council's support for 'joint custody or joint parenting' on divorce flows from its view that 'it encourages people to consider more carefully their joint responsibilities towards their children which continue after divorce' (1987, para. 6.13). However, the Council qualified its proposal by acknowledging, realistically, that 'in practice, communication between the parents on a rational level is essential if the joint custody arrangements are to be successful' (para. 6.14).

Family Court judge Peter Nygh is more cautious in his advocacy, acknowledging Carol Smart's arguments that joint custody (guardianship) has the potential to preserve the authority of fathers over families, without their undertaking any of the disadvantages involved in actually caring for children (Nygh, 1985, p. 71, citing Smart, 1984, p. 139). Nevertheless, for him, 'this is not a reason for ceasing to pursue it' (Nygh, 1985, p. 72).

The third related, and at times overlapping argument, is based around the 'welfare of the child', which, it is suggested, is best served by an ongoing relationship with both mother and father. This notoriously loose concept (see Chapter 4) has considerable

rhetorical purchase, in Australia as elsewhere. However, it can readily be subsumed within the parents' own interests. Many of the men's groups who advocated joint custody, in reliance on the welfare of the child principle, appeared to do so in response to their dissatisfaction with access arrangements rather than because of perceived benefits to the child.

Despite the fact that maintenance and access are formally not related in the Family Law Act, the men who gave evidence to the ALRC overwhelmingly submitted that they were not willing to support their children financially without their access demands being met (see Australian Law Reform Commission, 1986, e.g. Mr Aitken, p. 309; Mr Stewart, p. 317; and, for a contrary view, Mr Bender, p. 573). In fact, recent Australian data indicates that less than 30 per cent of non-custodial parents pay periodic child maintenance (Cabinet Sub-Committee on Maintenance, 1986, p. 11).

Joint custody: some feminist concerns

As the material documented above demonstrates, joint custody, at least as a rhetorical notion, has been placed squarely on the Australian agenda and has become much more frequently discussed in the family law and social work literature, though critical consideration of the issue in Australia has been scarce. By contrast, overseas writers, particularly feminist writers in jurisdictions where joint custody has been enacted by legislatures, have increasingly questioned these developments. Although this experience in other jurisdictions may not be readily translatable to Australia, it is salutary to consider it, if only because of the reliance placed by Australian joint custody advocates on overseas developments, in particular those in California.

It has been suggested that advocacy of joint custody is associated with a backlash against the apparent successes of the women's movement through the 1970s and 1980s (see, e.g., Smart, 1986b; Sevenhuijsen, 1986). While it is certainly true that the law has shifted away from the nineteenth-century notion that fathers have 'absolute rights' over their (legitimate) children, as Brophy has pointed out, the backlash against women is misdirected. The law has not shifted so as to favour women; rather, the shift away from fathers' absolute rights has been associated with an increase in the

powers of courts who now have a broad discretion under the rubric of the 'welfare', or 'best interests of the child' principle (Brophy, 1985, p. 113). None the less, the ideology of equality has provided fuel for, in particular, fathers' rights groups, who argue that the shift away from their 'rights' must be redressed. For them, the issue is clear; if they do not 'win' a custody 'battle', there is discrimination and inequality.

In Australia, groups like the Men's Confraternity[7] have been established in response to concern

> about discrimination against men in pensions, law, welfare and education. Concerned about continual attacks on men, led by men-hating feminists, who have entrenched themselves in positions of power and influence, in government, media and education.
>
> Their aim is not to obtain equality but total domination of men at all levels.... We are concerned also at the continual attacks by feminists at the family unit, which have created a society of single parent families, made motherhood a dirty word, and also put the job of housewife as the lowest form of human endeavour, and put *de facto* relationships on the same level as married couples.... It is time for the majority of people, both male and female to take on the radical feminists and re-introduce sanity to our society. (Men's Confraternity, n.d.; *Sydney Morning Herald*, 16 October, 1987)[8]

Litigation instigated in various overseas jurisdictions aimed at establishing that custody awards to women are unlawful sex discrimination is consistent with these arguments[9] (Boyd, forthcoming; De Hondt and Holtrust, 1986b). Feminist critics have responded to the use of equality rhetoric in child custody debates by suggesting that there is a need to look beyond the rhetoric of equality which in this context has become, MacKinnon has suggested, 'equality with a vengeance' (MacKinnon, 1987, p. 72), to the reality of day-to-day caretaking practices (see Fineman, 1983, 1987; De Hondt and Holtrust, 1986b; Schulman and Pitt, 1982; Polikoff, 1982 and 1983; Uviller, 1978; Smart, 1986b). Whether we like it or not, it is still predominantly mothers who care for their children in our societies. But that reality, so clearly understood by feminists, is often ignored by legislators, courts, and policy makers in their zeal to implement 'equality'.

This commitment to the notion that formal legal equality has actually changed the way people live their lives has also led to what Polikoff has described as 'a corollary misconception' which applies to employed mothers, viz. 'that if both parents work outside the home, then the care of the children is evenly divided' (1983, p. 188). This was the view expressed by the Australian High Court in its leading custody decision (*Gronow*, 1979), described above. In another context,[10] an Australian state Supreme Court judge stated:

> Those incidentally who care to dabble in jurimetrics might care to consider what is to be made of this: of the seven wives of the seven judges of the Court of Appeal, three are in full-time professions or occupations, two are in part-time professions or occupations, one was in full-time employment before marriage, and the remaining one in part-time employment before marriage. I would think therefore that all of us have experience of what might be regarded as a more modern way of life, in which household tasks are shared. (Samuels, 1982, p. 311)

In fact, this rosy picture of domestic life, where housework and child care are shared, does not accord with any of the empirical evidence. Women who work outside the home carry a double burden as they are also primarily responsible for housework and child care (e.g. Game and Pringle, 1984; Russell, 1983; Bryson, 1985), but this reality can be easily ignored by courts if they eschew concern with hard data (Davis, 1987).

Feminist theorists have pointed out that the ideology of equality is based squarely within the liberal political tradition, the fundamental premise of which is that society is composed of (male) individual autonomous actors (e.g. Pateman, 1983; O'Donovan, 1985; Sevenhuijsen, 1986; Boyd, forthcoming). This has a number of important consequences for the debate. Translated into legal discourse, liberal ideas of equality in the 1980s have resulted in the widespread use of gender neutral language, despite the persistence of a highly gender specific world. And the most common way in which equality claims are channelled into legal discourse is through the language of 'rights'. Both the artifice of gender neutrality in the search for equality (e.g. Boyle, 1985; Olsen, 1986) and the relevance of 'rights' discourse as a strategy for women's claims (Olsen, 1984a; Kingdom, 1985; but

cf. Schneider, 1986) have been subjected to important feminist critiques which point out the problems in adapting these traditional legal labels and tools to deal with claims on behalf of women, a group historically oppressed by law.

Aside from its tendency to ignore the reality of child care responsibilities in the 1980s, gender neutrality can also be used to judge the fitness of mothers. A disturbing trend noted in the US, though not (yet) apparent in reported cases in Australia, is to take into account the relative economic positions of the parents, in order to assess what is in the child's best interests (see Chesler, 1986; Woods, Been, and Schulman, 1983; Polikoff, 1982; MacKinnon, 1987; New York Task Force on Women in the Courts, 1987). The slightest attention to wage rate statistics, and the disproportionately high percentage of single mothers whose only source of livelihood (at least in Australia) is welfare support, would make it only too clear that, were such a 'gender neutral' criterion to be given weight, women would lose their children almost as a matter of routine. MacKinnon (1987) has suggested that gender neutral rules like level of income make men look like 'better parents', because men both make more money and are more likely to 'initiate the building of family units', i.e. are more likely to re-partner.

> In effect, they get preferred because society advantages them before they get into court, and law is prohibited from taking that preference into account because that would mean taking gender into account. . . .So the fact that women will live their lives, as individuals, as members of the group women, with women's chances in a sex-discriminatory society, may not count, or else it is sex discrimination. (MacKinnon, 1987, p. 35)

Olsen argues (1984b) that a consequence of the shift to gender neutrality in custody laws has been to diffuse the political content of decisions over custody, turning them instead into individual disputes between individual men and women. In her analysis of the rise and fall of the 'tender years' doctrine, she demonstrates that its demise has had contradictory effects. It can be viewed as constituting both victories and defeats for women, at both practical and ideological levels. It becomes an ideological defeat in the sense that when women lose custody of their children, this is seen as a private, individual matter, thereby overlooking the fact

that 'custody decisions also reflect and shape society's attitudes towards women and motherhood'. She adds:

> Within this privatized perspective, women lose their group identity. Women no longer have a political definition as women and the custody of children ceases to be an issue of gender politics. The fall of the tender years doctrine thus depoliticizes the issue of custody and deprives individual mothers of their children, one at a time. (Olsen, 1984b, p. 17)

At a more specific level, it has been widely noted that an increased use of joint custody has the very real potential to expand the control of men over not only their children, but also over their former wives. According to Polikoff (1983, p. 192), 'overwhelmingly, children live with their mothers when there is joint legal custody, with the result that fathers get equal rights without incurring equal responsibility' (see also Smart, 1984; Brophy, 1985). Even though, as a number of commentators have noted, such arrangements in fact closely resemble sole maternal custody, with access to the father, there is arguably a significant difference. As a matter of law, disputes in either case would be determined by the court on the basis of the 'best interests', or 'welfare of the child', irrespective of the actual subsisting order. However, as a matter of practice, since such disputes rarely reach the courts, the symbolic force of a legal 'right' to custody, and therefore to decision making powers over a child, may give the father, already most likely to be the economically and physically stronger parent, a tactical advantage in a dispute between parties of unequal bargaining power. So, while not having the responsibility for the day-to-day care and nurture of children, fathers may none the less maintain the power to make decisions, often important decisions, and, in doing so, revive the very disagreements between the adult parties that led to the marriage breaking down. In particular, this is a problem in cases where the relationship was characterized by violence (see Schulman and Pitt, 1982; and Germane, Johnson, and Lemon, 1985).

Sevenhuijsen (1986) has pointed out that while feminist theories on motherhood have been concerned to unravel the threads of biology from notions of social relations, the concept of 'fatherhood', by contrast, still carries a monolithic unitary sense (see also Fineman and Opie, 1987, p. 155). In this way, it can be garnered by

fathers' rights activists and others, asserting 'rights' over their children based solely on biology without any need to justify those claims with evidence of actual involvement with their children or a social rather than biological relationship. This leads to her conclusion that the current notion of fatherhood, as a legal institution of rights over women and children, 'shows a remarkable continuity with 19th century patriarchal law' (Sevenhuijsen, 1986, p. 338).

Feminists in Australia have recently begun to express concerns about 'fatherhood' and 'masculinity'. Early in 1987, the 'Coming Out Show' (a weekly national radio programme produced by the Australian Women's Broadcasting Co-operative) ran a disturbing programme entitled 'Men as Fathers: Care or Control?' (Earle and Jacobs, 1987) in which they interviewed Phyllis Chesler about her work on custody in the US. They also interviewed Graeme Russell, author of *The Changing Role of Fathers* (1983), whose study demonstrated that while a small number of 'new-look dads' are sharing the caring, the vast majority were not actively involved in day-to-day child care. His research found that most men spend only about one hour per week alone with their children. Russell also pointed out that the failure of non-custodial parents to pay maintenance demonstrates the disjunction between their perception of themselves as primarily breadwinners during marriage, and their perceived role after divorce. The programme documented the rising profile of fathers' rights groups in Australia, and described the disturbing advertising campaigns run on television by Fathers Against Discrimination in Custody (FADIC) ('Sometimes the best mothers are fathers'), and in newspapers by Fathers of Australia ('Victim fathers: fight for rights', *Sydney Morning Herald*, 6 November 1986).[11]

Feminist historian Judith Allen has drawn a link between the resurgence of positive images about fatherhood, and the increase in family-based violence. She argues that the 'feminist "discovery" of domestic violence has stimulated many mainstream professional responses, often in the attempt to re-locate analysis of the problem in a gender neutral perspective without reference to the context of societal male supremacy' (Allen, 1985, p. 132). She draws a parallel between this trend and the shift in the early 1970s to no-fault divorce, and continues:

> If the feminist contribution to defining 'the family' as a dangerous place had initially favourable effects for women seeking child custody under the Family Law Act (1975) the honeymoon soon was over. While detailed work on the first ten years remains to be published, impressions abound. The negative picture of masculinity has been challenged in cultural production. A process of 'sentimentalising' the father-child bond is a striking feature of the last decade, nowhere more unctuously portrayed than in films such as *Kramer versus Kramer*, *Ordinary People*, and *Author, Author*, and in the plots of popular television soap operas. A more chilling note has been struck more recently in organised and violent masculinist attacks on the Family Law Court and its judges and their relatives. Meanwhile, although my information is verbal, welfare workers are reporting a disquieting tendency of judges to grant custody or else extraordinarily generous access conditions to violent husbands, even to those proven to have raped daughters - since these attacks on the Family Court. (Allen, 1985, p. 132)

No discussion of family law in Australia would be complete without a reference to the terrorist violence directed against the Family Court (see Green and Gurr, 1987). In 1980, a Family Court judge was shot dead on his front doorstep. Throughout 1983 and 1984 there were numerous bombings or bomb scares at both Family Court buildings and judges' homes and, in one related case, a church hall. These culminated in the bombing murder of Family Court counsellor (and wife of a Family Court judge) Pearl Watson in July 1984. A 1986 inquest into her death has not resulted in the laying of any charges.[12]

Not all the violence has been directed at the court itself. Bates (1986, p. 17) notes that, at least for 1985, 'Instead of terrorist attacks on judges of the Family Court of Australia and on legal practitioners, dissatisfied parties - invariably, thus far, fathers involved in custody disputes - have responded by killing the children in dispute and themselves.'[13] It is noteworthy that references to the pattern of violence, specifically to violence directed at the Family Court, are chillingly scattered throughout the transcripts of the Law Reform Commission's public hearings on contempt (Australian Law Reform Commission, 1986). While

none of the men who gave evidence expressly condoned these killings, there are frequent statements of understanding towards the perpetrator(s), and predictions that more violence will follow 'until discrimination against men' is ended (see, e.g., Mr Findon, p. 114A; Mr Spanger, p. 293; Mr Aitken, p. 300; Mr Stewart, p. 317; Mr Lee, pp. 327, 328; Mr Foster, p. 547; Mr Romeyko, p. 675; cf. Ms Egg, p. 427).[14]

WOMEN'S POVERTY: THE POVERTY OF 'EQUALITY' IN AUSTRALIA

Having demonstrated the way in which notions of equality have been relied upon by the proponents of joint custody in Australia, it is salutary to step back briefly from the ideological arena and consider to what extent, if any, 'equality' has been materially achieved by women in Australia. As noted earlier, this broader context has rarely, if ever, been acknowledged as relevant to the debate about child custody. In fact, while the guiding principle remains 'the welfare of the child', it is argued here that the economic position of single mothers is an essential matter to consider.

It is by now well documented that Australia has the most highly gender segmented workforce of any OECD country, with women's work falling within a narrow range of occupational types (see Ronalds, 1987, pp. 3–6). The woeful level of government support for child care (currently under increasing pressure) makes it structurally impossible for many women to work. As to wages, while the infamous *Harvester* decision (1907) which established the Australian version of a 'family wage' for a man, wife, and three dependent children is no longer formally a part of the industrial framework for wage setting, its ideology lives on, and women continue to earn considerably less than their male counterparts. Recently, the Conciliation and Arbitration Commission (the national wage-fixing body) refused to extend the equal pay ruling of the 1970s to equal pay for work of equal value, i.e. rejected the principle of comparable worth (Innes, 1986; Burton, 1987; Burton, Hag, and Thompson, 1987; O'Donnell and Golder, 1986; Johnson and Wajcman, 1986).

Laws such as anti-discrimination legislation, which create a limited right to formal legal equality (Ronalds, 1987), do not

touch relations within the family. There is no law which compels people to share their income within the household, or to share domestic work and child care responsibilities. While the Family Law Act spouse maintenance obligation (s. 72) technically applies both during marriage and after marriage breakdown, in practice orders are sought only after the marriage has broken down.

Social Security's 'cohabitation' rule, by which women who live in *de facto* marital relationships with men are denied state benefits altogether in the case of widow's pension[15] or supporting parent's benefit,[16] or, where they are eligible for other forms of assistance, are paid a rate which takes into account their *de jure* or *de facto* spouse's income, is clearly based on the assumption that women (both married women and those living in *de facto* relationships) are or should be supported by the men with whom they live (see Bryson, 1983; Shaver, 1983; Graycar, 1987a). In both cases, the state constructs these women as dependants, whether or not they actually are (see also Montague and Stephens, 1985).

In a country with particularly low labour force participation by single mothers (see Raymond, 1987), any move towards financial independence for women can only be achieved by specific government interventions, such as increasing child care spending and establishing training programmes to help women re-enter, or enter, the workforce. Yet concern about the poverty of women and children has increasingly moved governments to seek private solutions, for example, cracking down on recalcitrant non-custodial fathers, rather than formulating public policies around women's employment, child care, and related services. The choices remain only twofold: dependence on men or dependence on the state. This preference for private, rather than public, solutions resonates with the ideological position that issues relating to 'the family' are outside the purview of state responsibility. Feminists have directed considerable energy towards deconstructing this 'public:private' split (e.g. Pateman, 1983; O'Donovan, 1985) but it resurfaces constantly, as the recent debates about joint custody and child support (see below) demonstrate.

JOINT CUSTODY AND EQUALITY

Given this context, it remains to be seen what specific consequences for Australian women might follow a move towards a new

legal regime requiring courts to make orders of joint guardianship or, possibly, joint custody. A change in current custody laws and practices may well prove to be inconsistent with, and undermine, other recent reform moves.

The child support scheme: a private solution for a public problem

The federal government has recently introduced legislation which established a Child Support Agency in 1988, responsible for collecting child maintenance from non-custodial parents, through the taxation system. The central purpose of the scheme is to diminish the 'burden on the taxpayer' for the support of single parent families, though the government at the same time has stated its concern about the increasing poverty of those families (Cabinet Sub-Committee on Maintenance, 1986). Extremely stringent means tests will apply for social security pensions and benefits, greatly diminishing any potential benefit for recipients. This maintenance income test, which includes provision for imputing certain transfers of property to income, will be separate from the more generous work income test which operates for single parent recipients of state income support, where the 'free area' is more than double that for maintenance income. This is significant, since very few women on state benefits are in the labour force (Raymond, 1987).

Feminist groups have raised a number of concerns about this plan (Feminist Legal Issues Group, 1986; Earle and Graycar, 1987; Heron, 1987; Graycar, 1987b; Cox, 1987). One of these, of particular relevance here, is the extent to which the scheme will prompt demands for custody or access from non-custodial parents whose dormant interest in their children is revived by resort to the hip pocket nerve. After all, a father who successfully pursues a sole or joint custody order cannot be described as a non-custodial parent and will therefore not be subjected to the scheme. The effect of joint guardianship is unclear. The government is not unmindful of these concerns, and has strenuously stated, in response to the 'no access – no maintenance' lobby, which emerged so clearly at the contempt public hearings described above, that maintenance and access are not related and will remain that way (Howe, 1987, p. 1,370). This guarantee, whilst reassuring, seems hollow in the light of the evidence collected by the ALRC from the

fathers' rights groups in its 1986 public hearings on contempt. In its report, the ALRC concluded:

> if the arguments put to it in submissions and at public hearings truly represent the feelings of a large proportion of access parents in Australia, the strengthening of maintenance enforcement by government collection schemes will provoke considerable resentment unless *either* access enforcement is strengthened at the same time...*or* access denial is treated as a mitigating factor in maintenance enforcement, *or* both. (Australian Law Reform Commission, 1987a, para. 739)

Matrimonial property

The recent debate in Australia about matrimonial property demonstrates the difficulty of basing reform arguments around the concept of 'equality'. Some feminists in Australia have argued strenuously in favour of 'equal rights to marital assets' – specifically, the establishment of a community property regime (e.g. Women's Electoral Lobby, 1981, 1985; Scutt, 1983; Scutt and Graham, 1984). 'Equality' was the central plank of these reform proposals. It was argued that this could only be achieved by a full community of property regime that divided all marital assets on a 50:50 basis. Others, however, argued that a non-discretionary system of formal equal sharing of matrimonial property may rebound against women (see, for example, Cox, 1983 and 1985; O'Keefe, 1983; Shiff and MacIlhatton, 1985). Detailed empirical work in the US, where community property is increasingly the norm, has shown that this form of equality is 'illusive' (e.g. Fineman, 1983 and 1986; and Minow, 1986). Lenore Weitzman's work on the economic consequences of divorce for women and children in the US (1985), paralleled by recent research conducted by the Australian Institute of Family Studies (1986), indicates all too clearly that 'equal sharing' of marital assets can leave women, with their more limited access to the workforce and the disadvantages accrued through years of child bearing and rearing, much worse off financially than men. After divorce 78 per cent of women who had not re-partnered were significantly worse off than before their divorce and 35 per cent were living below the poverty line, according to the Australian study (see Australian Institute of

Family Studies, 1986, pp. 115–23, 311–12; Australian Law Reform Commission, 1987b, paras 163–7). Significantly, this research demonstrates that under the present discretionary system women overall (particularly those who are custodial parents) received a greater share of what the AIFS referred to as 'basic marital assets' (Australian Institute of Family Studies, 1986, Chapter 9; Australian Law Reform Commission, 1987b, paras 177–80). This led the ALRC in its 1987 report on matrimonial property, established in part to respond to some of this controversy, to eschew the rhetoric of equality in favour of a more realistic way of attempting to spread the economic disadvantages of divorce. The Commission concluded that a regime of equal sharing would leave women worse off than they already are (Australian Law Commission, 1987b, para. 273). It favoured 'practical, rather than formal equality', a distribution that would take account of and compensate women for their impaired capacity to achieve a reasonable standard of living and for the responsibility for the children, still overwhelmingly looked after in Australia by women (para. 350). In a society where men and women are not equal, the ALRC correctly recognized that 'equal sharing' could disadvantage women.

Empirical work undertaken by both the AIFS and the ALRC, including surveys of Family Court judges and registrars, demonstrated the significant effect of women's greater custodial responsibilities on the skewing of awards in their favour. Automatic joint guardianship orders, particularly if day-to-day custody is left to the parties to organize (and, therefore, overwhelmingly to the woman), might well lead courts in future to decide that there is no basis for taking women's custodial responsibilities into account in determining property distribution. If this were to happen, it would undermine the very careful approach of the ALRC in looking towards 'practical, rather than formal equality' (para. 273).

State support for single parents: possible implications for joint custody

Another matter of concern is in the area of statutory income support. Under the current legislative framework widow's pension and supporting parent's benefit can only be awarded to a parent

who has 'custody, care and control' which involves, for social security purposes, 'the right to have, and to make decisions concerning the daily care and control of the child' (Social Security Act 1947 (Commonwealth), s.3(2)). A recent case raises a disturbing possibility. There the unmarried parents were awarded joint custody of their only child by a state court. The father applied for and obtained a supporting parent's benefit. The mother subsequently applied for it and was rejected. She appealed to the Social Security Appeals Tribunal,[17] which concluded that the benefit could not be split and, since the father got in first, there was no basis upon which they could say that he was not entitled to it (Social Security Appeals Tribunal: NSW, Appeal no. 12,347/1987). Certainly, there is no statutory provision for splitting the benefit and such an exercise would be pointless as its purpose is to provide income support (rudimentary as that may be). However, it suggests a disturbing possibility for future cases if joint custody becomes a routine arrangement. This is especially problematic as the language of custody, care, and control in the Social Security Act is not consistent with the terminology used in the Family Law Act.

'EQUAL RIGHTS FOR PARENTS'

In spite of these very practical concerns, the current political climate appears to favour 'equal rights for parents'. Single parents in Australia (overwhelmingly mothers) are the new 'undeserving poor'.[18] By contrast, fathers' rights groups have achieved remarkable political acceptance – for example, the spokesperson for the Lone Fathers' Association (an organization with exclusively male membership, and 'associate member' status for women – see Australian Law Reform Commission, 1986, p. 4) has been made a member of the National Consultative Committee on Child Maintenance. Fineman has documented the extent to which fathers' rights groups in Wisconsin achieved disproportionate political legitimacy, while their far more numerous female counterparts remain unorganized and accordingly unheard (Fineman, 1986). The fathers' claims to custody, their refusal to pay maintenance without custody of, or access to, their children, and their deeply misogynist complaints about their ex-wives being favoured by the courts and supported by the government, all demonstrate a

concern that their control over their family, even after its dissolution, has been undermined. For these groups, patriarchal control should continue even after divorce, and perceived diminutions in that power have prompted loud and long complaints. Dissolution of their marriages has not stopped them from pursuing and asserting the existence of the 'eternal biological family'. Children have become pawns in this broad political battle and, to the extent that mothers' custody has been characterized as their acquisition of some modicum of power, it is likely that it will continue to be resisted. Related to this, the child support proposals, under which women dependent on social security will be required to seek maintenance orders or risk losing their income support, constitute a clear undermining of women's ability to get on with their lives and those of their children after divorce, unimpeded by unwanted, continuing dealings with reluctant, and possibly violent, non-custodial parents. They also demonstrate a clear rejection of women's 'right to choose' single parenthood (at least to the extent that women rely upon the state for income support). The focus upon private maintenance, as a pre-condition to public support, also asserts the primacy of the 'eternal biological family'.

AN AGENDA FOR A DEBATE?

This chapter has argued that the Australian debate about 'joint custody' has effectively occurred in a vacuum, with no clarity as to what is actually sought by the proponents, and little, if any, consideration of the impact such reforms may have on women or on related matters of family law and state policy. Elsewhere, feminist commentators have made alternative suggestions about the future direction of custody reforms. One commonly expressed concern is that responses to shifts away from preferring women as the automatic custodial parent should not facilitate any resuscitation of biologistic notions of the innateness of 'motherhood' which would reinforce outmoded views of women's rightful sphere - something feminists have struggled long and hard to destroy. A frequently proposed alternative for evaluating the ubiquitous 'welfare of the child' principle has been to focus attention on the caretaking practices during the subsisting marriage (e.g. Boyd, 1987, forthcoming; Polikoff, 1982; Fineman,

1987). A presumption in favour of awarding custodial 'rights' to the primary caretaker, while *prima facie* a gender neutral criterion, would hopefully not routinely serve to disadvantage women, unlike the purportedly gender neutral practice developing in the US of considering the relative economic positions of the parties.

But it is not the purpose of this chapter to construct an ideal custody law. My concern rather is with the terms of the debate to date and the failure not only of the fathers' rights groups, but also of the more reputable policy bodies such as the Family Law Council, both to specify what they are proposing and to think through the implications of their attraction to the ideal of 'joint custody'. It has been suggested that the arguments canvassed here rely heavily on the ideology of equality at the same time as they ignore the realities of matters such as the day-to-day caretaking practices of divorced mothers and fathers and the relative economic situations of women and men in Australia. Moreover, at a time when single mothers have become increasingly subjected to community opprobrium, the 'eternal biological family' has reasserted itself with considerable vigour.

Law reformers and policy makers must stand back from the heat of the current political attacks on single mothers. Just as the ALRC eschewed the rhetoric of equality in its carefully argued and extensively researched work on matrimonial property and sought instead to look at the underlying realities of women's post-divorce experiences, so also we can hope that law reformers who attempt to rethink current policies on custody might do likewise.

NOTES

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1 On 4 September 1987, paediatrician Dr David Fraser was named father of the year in the state of Queensland. In his acceptance speech he urged the government to stop channelling resources into supporting single parent families. He suggested that, instead, children in families

without fathers should be adopted out, presumably into 'real families'. Taking up his call, the then Queensland Welfare Minister, Mrs Chapman, suggested that there should be compulsory sterilization for women on welfare, after the first child (ABC Radio News, 4 September 1987 and *Courier Mail*, 5 September 1987).

2 The High Court is the apex of the judicial system in Australia, somewhat comparable to the House of Lords in Britain.

3 The state supreme courts, not being specialist family courts are more likely to make explicitly stereotyped comments on their perception of the parents than the Family Court, a specialist court with a developed body of doctrine around the concept of the 'welfare of the child' which at least in theory commits them to reject some of the more traditional assumptions about motherhood. That does not mean that Family Court judges may not share those assumptions, but simply that they are less likely to state them explicitly in their reasons for decisions. Arguably, this is one of the significant effects of having specialist family courts.

4 An expedited appeal against this decision was allowed by the Full Family Court in December 1987 (Appeal no. 221 of 1987) and the matter was settled prior to rehearing by the Family Court *Swaney* v. *Ward*, 1988.

5 The Commission had been asked by the federal government to review the law of contempt, both civil and criminal. It had published extensive research and discussion papers on a wide array of topics, including civil contempt, contempt and the media, and contempt and family law, before embarking upon public hearings around Australia as part of the consultation process.

6 Fineman, 1986, p. 788 has documented a similar phenomenon in Wisconsin. In Australia, the absence of women's groups at the ALRC contempt hearings was noted by a number of the fathers' groups; the convenor of Men's Confraternity stated: 'You do not see any female groups here tonight because they are quite happy and contented with the Family Court situation because it is going their way and they know it' (Australian Law Reform Commission, 1986, p. 378).

7 In his evidence to the ALRC contempt inquiry, the group's Mike Ward stated: 'the Family Court situation is organised by radical feminists. They control the welfare section, they control the counselling section. So when a man goes in the Family Court he is guilty until proven otherwise' (Australian Law Reform Commission, 1986, p. 378). He went on to suggest: 'Misogynist is, you know, a hater of women if you like. There is no such word in the English language for a hater of men. We call it Ryanism for obvious reasons' (p. 380). (Senator Susan Ryan was the federal minister responsible for women's affairs from 1983–8.)

8 This backlash against 'women's equality' is not solely confined to the custody area, as the following three items published in just one day in

a Sydney newspaper indicate. A group of male school teachers has been formed to fight against a government Equal Employment Opportunity programme which they say discriminates against men ('Male teachers rally to the flag on eve of battle of the sexes', *Sydney Morning Herald*, 24 October 1987). Meanwhile, advertising industry executives have described the announcement of a government study to be held into the portrayal of women in advertising as a 'sop to the Minister's mates in the feminist movement' and the 'Hawke Ministry pandering to the bleatings of the unrepresentative old feminist lobby' ('Sexism study "a sop to Minister's mates"', *Sydney Morning Herald*, 24 October 1987, p. 15). Finally, the editorial for that day repeats criticisms made by the Bar Association to proposals for changes in criminal law procedures in cases of violence and sexual assault against women and children. The editorial writer is not so persuaded as are the lawyers that these will necessarily reduce the protections available to the accused. S/he concludes:

> One criticism by lawyers of the proposed changes is that they have emanated from a women's lobby in the Premier's Department. But again, the profession will have to come up with stronger arguments than that. Otherwise, it risks the counter-accusation that it is fighting an irrelevant war of the sexes to preserve a male-constructed system at all costs. If there are to be arguments, they must be from reason, not prejudice. ('Law reform and war of the sexes', *Sydney Morning Herald*, editorial, 24 October 1987, p. 30)

9 Despite the resort to 'equality' and 'discrimination', these men's demands appear to go beyond a concern for egalitarianism based on simple equality between women and men. In a submission to the ALRC Inquiry into Matrimonial Property, this group argued that:

> Men should be given first consideration for custody of the children on the basis that they are more caring, better equipped for long term planning and hence able to provide a more stable life for the children. Women on the other hand tend to be emotive, superficial and self-centred. (Men's Confraternity, n.d. (1985?), para. 3.7)

10 This relates to research I undertook on compensation for women accident victims who suffer injuries impairing or destroying their capacity to undertake domestic work. In that context, it became abundantly clear that courts used the rhetoric of equality to assume that if both adults work outside the home, both participate equally at home; therefore the loss to a woman of her capacity to work in the home is less significant than it would be if she were 'a housewife' (Graycar, 1985a and 1985b).

11 The advertisement stated: 'All fathers who have been separated/divorced or married should join or donate money to help the struggle against sexual bias in Family Law.'

12 Popular media coverage of the Family Law Act and the Family Court

relies heavily on this pattern of violence. But it is not only the popular press who do so. In 1985 then Chief Justice of Australia, Sir Harry Gibbs, drew a nexus between the violence and what he perceived as inadequacies in the law. These unhelpful comments were of course widely reported and added to calls for a return to a fault-based system, more formality, and, in particular, the return of wigs and gowns (see Chisholm and Jessep, 1985; Green and Gurr, 1987).

13 For a recent example, see the reports of a murder-suicide in Western Australia by a recently separated father: *Sydney Morning Herald*, 4 and 5 November 1987.

14 These sentiments were echoed by the Men's Confraternity of Western Australia in a covering letter enclosing a submission to the ALRC Matrimonial Property Inquiry:

> There is a growing awareness in our state, that the men here are being discriminated against to an alarming degree. [A] quite seething rage is developing in our state, among the male populace, the consequences, we believe, will become obvious in the future.... The murders of family court judges over your side of the country, will happen here unless you do. We beg you not to be swayed by the feminist movement which will be making their own submissions. (Letter to ALRC, 17 September 1985, on file with ALRC)

15 The benefit is available only to women. The name is deceptive; the majority of 'widows' are actually divorced or deserted wives (see Department of Social Security, 1987, p. 157).

16 This benefit was introduced as a benefit for single or separated mothers in 1973; in 1977 it was extended to men and the name changed to reflect that change. By far the largest number (nearly 95 per cent) of recipients are women (see Department of Social Security, 1987, p. 159).

17 The Social Security Appeals Tribunal hears appeals against decisions made under the Social Security Act.

18 There is a prevailing and persistent myth in the community that women, and in particular young women, are choosing single parenthood as an easy way to live a 'life of luxury' on the meagre state benefits provided for single parents. So popular is this notion that it leads to periodic suggestions like those by the Queensland Welfare Minister (see note 1) that single parents be compulsorily sterilized or their 'fatherless' children be removed to 'real families'. Early in 1987, a leader writer in one of the national newspapers, referring to single motherhood, suggested that 'this phenomenon is increasing - both amongst unemployed girls and professional women - even though it rarely involves the lesbian "milk run in reverse", by which "anonymous input" is collected from a variety of lap-dog male donors' (Clark, 1987).

CASES

In the Marriage of Chapman and Palmer (1978) Family Law Cases 90-510.
In the Marriage of Cullen (1981) Family Law Cases 90-695.
Epperson v. *Dampney* (1976) 10 Australian Law Reports 227.
Gronow v. *Gronow* (1979) 144 Commonwealth Law Reports 513.
Harrington v. *Hynes* (1982) 8 Family Law Reports 295.
In the Marriage of L (1983) Family Law Cases 91-353.
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Swaney and Ward (1988) Family Law Cases 91-928.
Ward v. *Ward* No. AD 1039 of 1985, Family Court of Australia at Adelaide, 6 August, 7 October, 1987.