Mothers-in-Law: Lying Down for the Father Again

Introduction

This paper explores recent trends in family law and policy, both in Australia and in cognate jurisdictions overseas. It argues that the 'new' emphasis upon the essential role of the father, a role that, I would argue, becomes a moral and social imperative only following relationship breakdown, represents a twenty-first century iteration of Rousseau's idealised family and his conception of family roles.

In his seminal work on child development and education, Emile,1 Rousseau presents an idealised vision of the moral development of the (male) child. For Rousseau, children were naturally good and, if they were to remain so, must be led to discover what is right through their interaction with the natural world. At every stage, the tutor must foster the illusion that the child discovers what he must do independently of any human guidance, for only in this way can the child develop fully as an independent and rational being.2 As the child's rational powers develop through his experiences, he unlocks the secrets of nature and masters the world around him. Rousseau argues that the best tutor for the child is his mother — provided only that she is willing to follow the father's leadership and guidance in all matters.

The education of girls is very differently conceived. Girls must be socialised, not to freedom and obedience to self-given law, but to obedience, first to their parents and later to their husbands. Sophie, Rousseau's idealised woman, aka doormat, is taught from earliest infancy to be interrupted at her play, to come immediately when called, and to be ready to abandon every pleasure to answer the bidding, first of her parents, and later of her husband and children. For Sophie, the only 'natural' facts of importance relate to her reproductive role and an allegedly innate talent for self-adornment and domesticity.3 Rousseau emphasises that her education must be such that she display 'taste without study, talents without art, judgment without knowledge [and] a mind which is still vacant but has been trained to learn',4 awaiting the guidance of her husband as teacher to flourish. Hers is a critically important role, not only because she is the ideal nurse and teacher for the young child, but also because the wife 'forms a bond between father and child, she alone can win the father's love for his children'.5

While Rousseau wrote and lived in the second half of the eighteenth century, and the absolute idealisation of submissive motherhood and wifehood which he advocated did not begin to become a reality until the late nineteenth century, reaching its ideological peak in the 1950s, many of its central tenets remain a significant part of our cultural practices. If, in the twenty-first century, we no longer publicly require Sophie, as Everywoman, to be educated solely for man's pleasure and trained exclusively for her pre-ordained role as wife and mother, in many households the dynamics of family life suggest that this role and, more importantly, Rousseau's understanding of the mother's critical role in forming a bond between father and child, continues to resonate. Indeed, the following passage from Emile could easily be updated and would find favour among many of today's political figures:

on the good constitution of the mothers depends that of the children and the early education of men is in their hands. On women too depend the morals, the passions, the tastes, the pleasures, aye and the happiness of men. For this reason their education must be wholly directed to their relations with men. To give them pleasure, to be useful to them, to win their love and esteem, to train them in their childhood, to care for them when they grow up, to give them counsel and consolation, to make life sweet and agreeable for them: these are the tasks of women in all times for which they should be trained from childhood.6

Making men fathers

Modern feminist scholars including Nancy Dowd and Carol Smart, working from within very different understandings, are at one over the wife/mother's role in mediating family relationships, during marriage providing the 'emotional labour' needed to preserve relationships and bind men into family life — into, in short, their role as fathers.7 When Dowd argues in Redefining Fatherhood8 that a critical difference between male and female parenting styles is that men's parenting is typically limited to those children with whom they live, 'while women's parenting is better able to withstand separation without eroding significantly, she also emphasises the critical role played by the women with whom men live. According to Dowd:

Men are more likely to be 'serial fathers' parenting a succession of children as they enter and leave households. Mothers are more often 'linear mothers'. Men are more likely to nurture the children with whom they share a home ... [T]here is a strong
correlation between male nurturing and the strength and health of men's relationships with the women with whom they share children.\textsuperscript{9}

In that correlation lies the dilemma for twenty-first century social policy. As successive governments in Australia and elsewhere sought to bind fathers absolutely to their financial obligations to their biological children through centralised collection of child support payments, they faced increasing political pressure from men's organisations, many of which argued that it was unfair to compel fathers to support the children of former relationships if they were denied an equal role in parenting. This theme reappears in many different contexts. Edwards et al. note that in the UK, non-resident...fathers, particularly from the middle classes, often used financial metaphors in talking about their involvement with children, in terms of gaining a 'pay-off' in return for their 'investment'. The symbolic power of money could also be seen in the context of the biological fathers' financial contributions to children's upkeep, which could also be understood by themselves and resident mothers as implying some sort of right to a relationship with that child.\textsuperscript{10}

Unsurprisingly, a recurrent demand of fathers' rights organisations, in Australia and elsewhere, has been for a more equal division of parenting time. While their official rhetoric is typically couched in terms of equity and equal sharing, research into the motivations of the members of fathers' rights groups suggests a clear connection between the payment of support and an 'entitlement' to a relationship, and an assumption that more equal sharing of parenting time will reduce their support obligation, the time the children spend in their care being seen as 'costless'.\textsuperscript{11} There is evidence that pressure from fathers' rights organisations was a motivating factor behind the recent Australian inquiry into 'child custody arrangements'.\textsuperscript{12}

In contemporary family law regimes, against the background of substantial evidence that fathers frequently fail to maintain contact with children whose primary residence is with a former spouse, one significant cross-jurisdictional trend over the last decade at least has been to experiment with various forms of joint custody regimes.\textsuperscript{13} The rhetoric accompanying such experimentation privileges biological fatherhood, effectively erasing the importance of social parenthood and eliding a central question: whether 'children need (biological) parents or ... (social) families'.\textsuperscript{14} The structure of the child support regime reinforces this point. In Australia as in England, the child support regime undermines rather than reinforce(s) a set of social obligations by ignoring a step-parent's possible obligations towards any step-children when deciding on the support s/he must give to his/her biological children.\textsuperscript{15}

Therein lies the paradox. Over the last two decades, in most Western common law jurisdictions, the overriding policy emphasis has been upon ensuring that non-resident parents (primarily but not exclusively fathers) support their children financially. To this end, bureaucratic collection and distribution of child support payments have become commonplace.\textsuperscript{16} The message is clear — with biological (or legal) parenthood comes ongoing financial responsibility. While the rhetoric emphasises attaching fathers to families, the immediate practical emphasis is upon biological parenthood rather than social parenthood. The consequence is predictable. In Australia as in other jurisdictions, financially 'attached' fathers have become a potent lobby group and a powerful motivating force for legal change. In Australia their influence in the form taken by the 1995 amendments to the Family Law Act 1975\textsuperscript{17} and in persuading the government to launch the 1994 Parliamentary Inquiry into equal time shared parenting and associated matters is well known.\textsuperscript{18}

'Less well known, and wholly disregarded by governments, is a second, and intimately related consequence. As concepts such as equal time shared parenting, joint parental responsibility, and, in the latest iteration, equal parenting time gain popular and ultimately legal currency, mothers are no longer able to shed their ideologically determined responsibility for making men into fathers when their relationships with those men come to an end. These 'new' principles of family law compel, and are intended to compel, former wives to continue to live out the mother role as constructed by Rousseau. Former wives are not only responsible for most of the actual labour of caring for children as opposed to caring about them, but also, and far more controversially, for the emotional labour of sustaining the relationship between the father and his children. In this way, it is hoped, mothers will be persuaded to induce former husbands and partners to remain involved fathers, thus maximising the likelihood that fathers will remain attached to families. Ultimately, all familial power is vested in biological parenthood. Carol Smart argues that such principles have in fact introduced a new marriage contract by another name. This new marriage contract ends the possibility of
confuent love for mothers (although not necessarily for fathers) — by which I mean that it ends the possibility of divorce finishing a relationship with a person one no longer loves or cares for. 19

I would argue that these trends do far more than simply end the possibility of confluent love for mothers. In essence, these principles require women to mediate multiple sets of relationships. One woman may have children by a former partner living with her for substantial periods of time, be expected to parent children of a current partner when those children are visiting or living with their father, and parent her own children by her current partner. Unless the individuals involved are unusually harmonious and committed to maintaining sound working relationships, these are extremely demanding (and structurally conflicting) roles, irrespective of whether the demands are serial or concurrent. As biological and social parent of her children by a former partner, she is simultaneously empowered by the biological connection and disempowered through the location of her parenting within in a patriarchal household and social order. As biological and social parent of her children by a former partner, she is empowered by her biological position within the household while remaining bound to an external locus of patriarchal control through her legal obligation to ensure that the biological father of her children remains their social father. As step-parent to her current partner’s children, she is wholly disempowered. Both society as a whole and her partner are likely to expect that she will act as social parent — that she will assume primary responsibility for care work and for nurturing her step-children while they are in their father’s household. She is, however, devoid of legitimate authority vis-à-vis the children, and legally invisible. Law, it might be said, despite the family centred rhetoric, denies the complexity of family life and relationships by largely ignoring the notion that children need ‘families’ and that these families are social units created by living together and relating together in the everyday business of caring for children. 20

Indeed, in many respects, it appears that the legal discourse is seeking to shift people’s opinions in a particular direction, although this direction not only ignores the view that children need families, but requires biological parents to construct a social tie that most people feel is unworkable. 21

It is important to recognise that whilst proposals for joint custody and/or joint parental responsibility are invariably couched in gender-neutral terms, 22 unless patterns of parenting and behaviour change radically (something for which there is little
evidence beyond hopeful judicial assertions) children will typically continue to spend more time with their mothers than their fathers following relationship breakdown, and fathers will, on the whole, be able to insist upon their parental rights or disregard them as they see fit. While the Family Court has, upon occasion, mooted the possibility of sanctioning fathers who fail to fulfil contact obligations, it has typically been dismissed as counter-productive and impractical, 23 although some High Court judges have been notably sympathetic to the position of the mother in relocation cases, Justice Kirby saying in U v U:

The wife complained that the orders of the primary judge necessarily weighed heavily against her, as they would any woman in her position. They confined her, effectively, to living in a place and in circumstances for the convenience of the husband, who did not, for his part, offer to relocate his home and work to India but expected his life to go on uninterrupted whilst the wife continued to be hostage to his contact requirements. Effectively, this imposed on the wife not only the primary responsibilities of providing residence and most of the obligations of care for the child but also serious economic, personal and emotional burdens. 24

In Australia, a recent Parliamentary Joint Committee enquiry into equal time shared custody has, in its report Every Picture Tells a Story, 25 stopped just short of acceding to the demand of fathers’ rights groups for a rebuttal of the presumption of joint physical custody. While its ultimate recommendations were simply for a clear presumption of joint legal custody together with the introduction of ‘family friendly’ language such as ‘parenting time’ to replace the current official language of parental responsibility, residence, and contact, 26 the underlying message was clear. Publicly at least, joint physical custody was proclaimed as the ultimate norm, the ideal to which every separating couple should aspire. 27 Normative parenthood was, unequivocally, biological parenthood, social parenthood counted for nothing unless the social parent was also a biological or legal parent. Permission for relocation, or, more specifically, relocation by the parent with whom the child spent most time would become much more difficult to obtain, at least where the relocation involved moving interstate or overseas.

Yet the gendered implications of such shared custody arrangements have largely gone unacknowledged by the current government, and there is evidence that the 2003 Inquiry preferred anecdotal evidence to that based upon research. 28 Effectively,
regimes of custodial-sharing impose on divorced and separated women (and in some cases upon women who have never married or had any long term relationship with the father of one or more of their children) a substantial burden — that of servicing the relationship between potentially multiple fathers and their children. For women then, the message ought to be clear. Motherhood binds or ought to bind you for at least 18 years, not only to your children, but also to any man with whom you have had children. Your obligation to the fathers of your children does not end following separation and divorce. Rather, you will be expected to mediate the relationship between your children and their father or fathers just as you were expected to during marriage or cohabitation.

These arrangements are not about equal parenting by fathers, for if more equal and active parenting were being sought by fathers generally, men would be more actively engaged with their children during marriage or cohabitation and would not necessarily require women to mediate their relationships. They are about empowering fathers in their relationship with their biological and/or legal children. As Richard Collier notes:

The continuing assumption underlying the new fatherhood was that fathering was only revealed as problematic for law at the point of divorce or separation. They are, in essence, about allowing fathers to select the relationship they prefer with their children by a former partner — whether that relationship is active carework (which rarely if ever needs mediation), a bedtime kiss, or caring about their children rather than caring for them. A father who has re-partnered should be, it seems, able to rely upon the mediation of two (or more) women to sustain his relationship with his children — his former partner, his current partner, and perhaps his mother and/or sister. Contemporary studies of fatherhood confirm the essential nature of the mediating role, suggesting in effect that mothers ‘persuade’ men to engage fully as fathers.

The children’s biological/legal mother is expected to modify her preferred residential and (perhaps) employment/educational arrangements to ensure that the children are routinely available for shared parenting — often at times which suit the father’s employment. The children’s step-mother (if any) is likely to be actively engaged in the necessary carework — to a substantial extent if the children are relatively young, and to a lesser extent where the children are older. In this context, it is worth noting that courts routinely evaluate the new partners of both custodial and non-custodial fathers as surrogate mothers — that is, they ask: is this woman capable of providing the physical and emotional care normally provided by a mother, and is she capable of providing the ‘emotional work’ necessary to sustain the father’s bond to his children? The same obligation now extends to a former partner, to provide the necessary physical and emotional care of the children (for example, while their father is working) and to continue the work of relationship building — facilitating the emotional and physical relationship between the father and his children. A very different set of concerns arise where the mother has re-partnered, among them, importantly, whether her new partner will be encouraged/allowed to compete with or supplant the father in the affections of the children, something which rarely enters discussion when the father has re-partnered. Fatherhood is fragile, motherhood enduring, something Rousseau understood perfectly when he wrote Emile more than 200 years ago.

The ongoing obligation to engage in the emotional labour of relationship building is a singularly subversive component of the ‘new motherhood’. Irrespective of the nature of her relationship with the father (and possibly irrespective of the circumstances of conception) motherhood now carries with it a positive and ongoing obligation to engage in relationship building. This obligation is one, I would argue, of which young women at the point of bearing children and entering relationships are largely unaware. Being both an ongoing and unequal obligation it would be, if it were more widely understood and acknowledged, yet another incentive to avoid childbearing.

In this way, patterns of legal and social change, both existing and foreshadowed, both reinforce the quasi-Victorian archetype of the essential mother — that role without limits and without finite end — and extend it. To be a mother-in-law is to be compelled to lie down for the father yet again, to prioritise the father’s right to an ongoing (and convenient) relationship with his biological/legal children. These patterns are not, of course, about assisting all those men who actively parent the children with whom they live, some of whom may be their biological/legal children, others of whom are not. Rather, they are about providing a mechanism by which those fathers who might otherwise lose contact with their children are assisted to maintain their relationships, ostensibly because of the importance of those relationships for their children but, more realistically, because of the symbolic importance to the individual father and to understandings of fatherhood and of masculinity more generally. Conservative anti-feminist
commentator, Janet Albrechtsen, summed up what is at stake perfectly when she argued that:

There is another reason for restoring fatherhood. Every young boy needs to know that he is important and that society treats fathers with respect. If fatherhood matters, every young boy matters.31

Neither are these patterns about actively reconceptualising motherhood (or, indeed, fatherhood) and thinking about sustainable patterns of parenting for the twenty-first century, rather than the seventeenth century or the nineteenth century. They are based upon an artificial contrast between an idealised past in which relationships endured, mothers embodied the archetype and father breadwinners were an intrinsic part of the perfect ‘run Spot run’ family, and the terrifying post-modern chaos of fractured relationships, unstable permutations of motherhood — think working mothers, sole parents, lesbian mothers — and ‘disposable fathers’. While the rhetoric emerging from the Report is about the ‘rights’ of children, little of it is based upon actual evidence regarding arrangements that actually, rather than theoretically, are in the best interests of children. Likewise, children’s voices are largely absent, save for the self-selected voices of Every Picture Tells a Story.32 The voices of researchers are positively proscribed, and the Chair of the Committee made it plain that she had little interest in the research into children’s well-being in different post-separation configurations.33 I would argue that the rhetoric is less about prioritising the needs of children and their welfare than about assuaging what I have described in other recent work as a risk society panic over masculinity and, ultimately, over the status of fatherhood. Against the background of increasing neo-conservative diatribes attacking predictable targets — feminists, working mothers, malicious devouring mothers depriving devoted fathers of access to their children, gay and lesbian families (I note the recent ‘outrage’ over the presentation on an ABC children’s program of a child with two mothers on an outing) — what is being lost sight of is the degree to which patriarchy is resurgent. The pervasive contemporary validation of fatherhood, and the neo-conservative rhetoric of the essential father (a father who is, of course, also a breadwinner) is also a rhetoric about the ‘taming’ of unruly women — women who believe that they can ‘mother’ without the oversight and guidance of the father. The ‘essential mother’ is the facilitating mother, the mother who not only commits herself fully to her children, but also understands that commitment to involve an obligation to enhance and foster the father-child relationship. The ‘citizen mother’ of Federation Australia, an image in which motherhood was decisively isolated from wifehood and seen as akin to military service has been replaced by the ‘facilitating mother’, urged by the Treasurer to, in essence, have another baby for Australia, and thus, to lie down for the father yet again, and, equally significantly, compelled by the law to continue her ordained task, that of knitting together frayed human relationships.34

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Notes

1 Jean-Jacques Rousseau, Emile, trans. by Barbara Foxley, Melbourne, Everyman’s Lib., 1911.
2 Rousseau, Emile, p. 51.
3 Rousseau, Emile, pp. 137–141.
4 Rousseau, Emile, p. 324.
5 Rousseau, Emile, p. 153.
6 Rousseau, Emile, p. 135.
11 See the extended discussion of these issues in Carl Bertoia and Janice Drakich, The Fathers’ Rights Movement: Contradictions in Rhetoric and Practice, Journal of Family Issues, 14, 1993, p. 592 generally and note particularly p. 609 where the authors state: ‘All fathers’ rightsists recognize the difficulty in maintaining financial control, and many noncustodial fathers look to joint custody as a legal solution to their monetary concerns. They believe that joint custody will relieve them of their financial responsibility to the postdivorce family unit or decrease their support payments and/or allow them to maintain power over and control of their funds.’ Similar arguments can be found in Miranda Kaye and Julia Tolmie, ‘Discouraging Dads: The Rhetorical Devices of Fathers’ Rights Groups’, Melbourne University Law Review, 22, 1998, p. 162 and esp. pp. 179–180.
I use the term joint custody rather than the current Australian legal formula of joint parental responsibility and joint residence because of its international currency and because, as the recent Australian inquiry into 'child custody arrangements' made clear, the term continues to resonate within the community. See Every Picture Tells a Story, above n.12. The term is often used ambiguously, referring both to joint legal custody and to the various degrees of joint physical custody. Edwards et al., 1999, p. 81.

I have argued elsewhere that the shift to a bureaucratic formula for determining child support together with a centralised collection mechanism was far more about protecting the public purse and reinforcing notions of private responsibility than about improving outcomes for children. See Sandra Berns 'The Ties That (No Longer) Bind: Tension and Contradiction in Family Law', Adelaide Law Review, 21, 1999, p. 19 esp. at pp.21-22 which discusses these developments.

The circumstances surrounding the inquiry are discussed in Berns et al., 2003-4.


See 'B and B: Family Law Reform Act 1995', Family Law Review, 21, 1997, 676 at p.750 where the Court stated that it would be most unlikely that children's best interests would be served by requiring the contact parent to have contact which he or she did not wish to have.' Cf, the discussion of this case in Rae Kasipew, 'Equal Parenting or the Effacement of Mothers? B and B and the Family Law Reform Act 1995 (Cth)', Australian Journal of Family Law, 12, 1998, p. 69.

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This expectation was forcefully reiterated in Australian Government, A New Approach to the Family Law System: Implementation of Reforms, Discussion Paper, 10 November 2004, esp. pp.10-14 flagging a proposal to amend the legislation to require the Court to consider equal time shared parenting where both parents want half or more of the time with their child, that is, in the most bitterly contested cases.

Where there has been substantial feminist analysis of the implications of shared custody arrangements, these arguments and the research upon which they are based were largely ignored by the Inquiry and the subsequent report, Every Picture Tells a Story, above n.12. Several submissions to the Inquiry, including those of the Women's Legal Service, Brisbane, and the Families, Law and Social Policy Research Unit, Socio-Legal Research Centre, Griffith University contained such an analysis backed by extensive research. For a discussion of the attitudes expressed during the course of the Inquiry, see Berns et al., 2003-4. See also Official Committee Hansard, 29 August 2003, Launceston, at p.17 (Mrs Hull).

See, for example, Re Patrick (An Application Concerning Contact) [2002] FamCA 103.


See, for example, Brigitte Berger and Peter L Berger, The War Over the Family, Garden City, NY, Doubleday, 1983.