

HAVE YOU EATEN? HAVE YOU DIVORCED?
DEBATING THE MEANING OF FREEDOM IN MARRIAGE IN CHINA

by

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A great deal of discussion about freedom in the People's Republic of China has proceeded on certain assumptions about the role of the state and about law's place in helping define it. At the heart of these assumptions is the idea that the cause of freedom in China will best be advanced through the state's retrenchment and a concomitant ceding of power to non-state actors, particularly with respect to economic and social matters. This notion is perhaps most obvious in calls for the promotion of greater economic freedom via both the "privatization" of state owned enterprise and an increasing reliance on market forces, but it also informs the view that such measures are or soon will be leading to a marked growth in political freedom. And it undergirds the conviction of most observers that what is termed the rise of civil society will perforce enhance personal freedom in China. As the noted Chinese scholar Liu Junning observed in a recent essay extolling Hayek, "almost all of those who shape public opinion in China are liberals [as] classical liberalism now dominates China's intellectual landscape."¹

Law occupies a prominent position in this vision, being increasingly seen in both academic and policy circles as critical to the attainment for Chinese of fuller economic, political, and social freedoms. In part, the prominence accorded law is attributable to its perceived potential, however imperfectly realized to date in the PRC, to facilitate the above described transfer of power from state to society by limiting the spheres of life over which the former has authority and providing constraints as to the manner in which such authority is to be exercised. No less importantly, law is extolled for the vital role it has to play, once the state has receded, in establishing the proverbial "level playing field" on which a new society is to be grounded.² In contrast to the avowedly political and highly particularistic manner in which the Chinese state historically reached into citizens' lives,³ law is commended for being facilitative, rather than determinative, providing a neutral framework through which citizens, each endowed with the same rights and each entitled to invoke the uniform procedural protection that formal adjudication is intended to provide, may work things out for themselves.⁴

There are, to be sure, highly compelling reasons why one might so approach the study of contemporary China. At the most obvious level, the horrors of the period immediately following the Great Leap Forward (in which perhaps as many as 20 to 30 million people died) or of the Great Proletarian Cultural Revolution (in which untold millions suffered) — not to mention on-going abuses of basic human rights — provide powerful support for the notion of a sharply circumscribed state. But the rationale for such an approach transcends the fifty-year history of the PRC. The manner, for example, in which the Chinese state, over thousands of years, has distinguished among

individuals on the basis of characteristics (such as gender, age, familial relationship, and class background) beyond their control enhances the attractiveness of seemingly clear-cut rules that in aspiring to apply uniformly to all, by definition, limit the state's capacity to distinguish among citizens. And the broader temper of the era in which we live, especially since the collapse of Communism as an ideology, would seem to buttress the claims of those inclined to believe that the "end of history" is or should be bringing with it the deserved withering away of a state that as a matter of course would intervene in the lives of its citizens.⁵

Compelling though the rationale for a drastically circumscribed role for the Chinese state may be, they do not provide us with a sufficiently nuanced metric for thinking about freedom in the PRC. Without slighting the values to which this vision speaks, we need soberly to confront difficult questions regarding our definition of freedom, the place of even a scaled-back state in ensuring basic freedoms, the interplay between different types of freedom, trade-offs between freedom and other fundamental values, and the ways in which even the most seemingly neutral of rules intended to do no more than structure autonomous decision-making, may shape outcomes and have an impact on freedom. This chapter uses debates leading up to the revision of China's Marriage Law on April 28, 2001 to examine the complexity of freedom in the PRC; a comparable inquiry might well be conducted regarding the role of the state and place of law in constructing a market economy or in establishing civil society.⁶

The debates surrounding the revision of China's Marriage Law provide an intriguing vehicle through which to examine the "making of modern freedom" in China for a number of reasons. Most significantly, in addressing such issues as the ease with which divorce is to be granted and the legal foundation for outlawing extramarital relations, they raise vexing questions of a very fundamental nature about the meaning of freedom. How, for instance, are we to assess the impact on freedom of a tightening of divorce requirements that are intended to protect the interests of some of the weakest actors in Chinese society (women, especially from the countryside, of limited economic means and often minimal literacy or less)⁷ but that by definition limit the choices of others while increasing the involvement of the state in the most intimate of relations? Is individual freedom better enhanced through a conception of marriage principally as a bond between two individuals or as situated in a broader societal setting — and how germane to such deliberations is either the manner in which marriage was thought of historically or the profound social dislocation and the thorough-going recasting of the state's role in the provision of basic social services that mark the PRC today? What are the implications for freedom of the growing tendency to anchor citizen participation and avenues of redress in a rhetoric of individual rights and formal legal processes, rather than group interests and

administrative solutions as articulated through quasi-governmental bodies such as the All China Women's Federation? And how, in weighing any of these alternatives, is one fully to account for the staggering corruption, monetary and otherwise, that seemingly pervades all PRC institutions?⁸

Beyond their significance with respect to the marital context, the foregoing questions raise yet broader themes pertinent to our consideration of freedom in China more generally. They push us, for example, to think about matters such as tensions between state paternalism and individual choice (and with it the value of participation, however inexperienced), the interplay between community (however defined) and individual autonomy in the realization of freedom, the relationship between the generality to which "modern" law is said to aspire and particularity (of the type guanxi is said to embody), and the implications of a society such as China, with thousands of years of history, experiencing in less than a generation industrialization and associated changes that took a century in Europe.

That issues surrounding marriage illuminate yet larger systemic inquiries regarding China is fitting when one considers the central role that family has long played in Chinese life. It was, as the Confucian Analects recognized, not only the prime social institution itself, but also both the principal nexus through which individuals might define and cultivate their own virtue at the micro level and the foundation of and organizing metaphor for the world at the macro level. This centrality was mirrored in the li the ethical precepts/rules intended to structure life as well as in imperial law (from at least the Han dynasty onward) with its intense focus on reinforcing family both internally and vis-à-vis others through a variety of differential penalties and privileges. And it has been well appreciated by those who, in more recent times, have sought to transform China more generally, as evidenced by the ways in which the leaders of the Taiping Tianguo⁹, the May Fourth Movement¹⁰, and the early Chinese Communist Party¹¹ all saw a reconception of family as interwoven with the broader political changes they sought. Indeed, it was not coincidental that the first major law promulgated by the PRC was the Marriage Law of 1950¹² and that many of the PRC's most epochal undertakings of its first half century (of which it has had more than its share) — such as land reform, communization, the one child policy, the Cultural Revolution and Dengist rural economic reform — have demonstrated the centrality of family to politics and vice versa.

The debates regarding revision of the Marriage Law also warrant our attention for a seeming paradox they present. At one level, they represent the most open and extensive public conversation in the history of the PRC, engaging citizens across the nation who had in most instances not previously been involved in deliberations concerning freedom. And yet, as vigorous and candid as these debates have been, the platforms from which the chief protagonists spoke and the range of

alternatives envisioned in them suggest the ways in which constraints on fundamental political freedoms continue to limit the ways in which other forms of freedom are considered.

This chapter has four sections. Part I briefly sketches profound changes underway in Chinese society from the conclusion of the Cultural Revolution in order to provide the background from which the debates commencing in the mid 1990s regarding revision of the Marriage Law emerged. The next section turns to the debates themselves, tracing both the more sweeping concerns they have evoked and the more seemingly technical legal issues on which attention has principally been centered. Part III offers an overview of changes enacted in the Law by the Standing Committee of the National People's Congress (NPC) on April 28, 2001 while the concluding section seeks to illuminate lessons that these debates may suggest about freedom in modern China and law's role therein.

I

The Context

No institution has experienced the vicissitudes of the political, economic, and social changes that have marked the PRC's first half century more sharply than the family. This may have been most dramatically obvious with respect to the direct challenges posed to "traditional" family life at the time of the foundation of a "new China" on October 1, 1949, in the aftermath of which millions of rural marriages were dissolved, often at the initiative of women.¹³ The communization movement of the 1950s strove to recast the role of rural families while the Cultural Revolution of the late 1960s and early 1970s tore asunder many an urban household. And although the transformations that China has been undergoing since the downfall of the Gang of Four in the mid 1970s have been focused principally on economic development, international engagement and other areas seemingly at a remove from the family, their impact on that institution has in its own way been no less consequential.

At the heart of these changes has been the accelerating breakdown in the face of the market-oriented liberalization of the past two decades of the so-called danwei suoyouzhì (unit based system) in China's cities and of its rough rural counterpart, the commune system, in the countryside. Although never as uniformly administered as ideology or mystique would have it, the danwei system not only functioned as the "basic organisational form of State-run modern industry" throughout much of the early history of the PRC, but as well "is like one's parents and one's family," wrote one Chinese observer in 1996, in that "it fulfills a range of responsibilities such as arranging work, food,

accommodation, entertainment, political study, pensions [leaving Chinese dependent on it] even in death.”¹⁴ As such, during its heyday, it gave considerable definition to marriage and other dimensions of family life literally from their inception onward through, for example, circumscribing the social (and, to some degree, physical) space within which one was likely to find a spouse and subsequently reside, ensuring that the quality of one’s marriage and any extramarital involvements were likely to be known to those with whom work and residence were shared, limiting exposure to heterodox or even particularly novel ideas (be they regarding gender, pornography, or politics more broadly), and providing the means through which any marital or other familial disputes might be addressed.

The changes ensuing from or associated with the on-going demise of the danwei system are so many and variegated as to defy more than summary treatment here. In some respects, they would appear to pull in distinct, if not contradictory, directions, on the one hand facilitating a re-assertion of practices with pre Communist historical roots while on the other fostering an embrace of what might be described as market oriented modernity (for lack of a better term) -- even as each of these trends shapes the other. So, for example, as communes were dissolved and collective enterprises have faded in importance, the family (albeit chiefly in nuclear form) has re-emerged as the principal unit of economic organization in the countryside, even as the allure of economic opportunity in China’s cities and newly emergent industrial zones has drawn over 100 million Chinese from their rural homes, often leaving behind other family members.¹⁵

The impact of such changes on the family, as well as on the status of women both within and beyond it, has been considerable. At least in aggregated national terms, the reform era’s prosperity has eased economic burdens, facilitated an increase in life expectancy, and promoted literacy and educational opportunity more generally, even if many such gains have been realized by men and women in differing measure.¹⁶ Together with heightened mobility and substantially greater access to new ideas (regarding, inter alia, gender),¹⁷ these gains have led to what some studies suggest is a greater degree of choice in marital partners (and, to a much lesser extent, in the very decision as to whether or not to enter into the institution of marriage)¹⁸ and what all observers agree has been a growing incidence of divorce.¹⁹

At the same time, the past quarter century has also witnessed a marked increase in social problems having serious consequences for family and a particularly deleterious impact on women. So it is, for instance, that with a loosening of formerly tight societal strictures and the growing commodification of society, such phenomena as the abduction and sale of women (both for forced marriages and into prostitution), the taking of mistresses, and the coarser side of what Mayfair Yang

terms “consumer sexuality”²⁰ have, once again,²¹ become significant dilemmas, as acknowledged through arrest statistics, legislative efforts, and growing public discussion.²² This increase in social problems is also tragically evident in what many suggest is a high and perhaps escalating incidence of spousal abuse and family violence²³ and in the PRC’s extraordinary suicide rates, which are not only “about three times the global average” but also mark China as “the only country in the world that reports higher rates of suicide in women than in men” (*italics in the original*) and are especially prevalent among rural women.²⁴

Many women and families have also suffered in other ways. Empowered by economic reform to undertake more of their own personnel decisions, many employers have responded by discriminating against women, often quite explicitly and in open contravention of the law. Government agencies have been among the most notorious offenders, with, for example, 27 of the 42 ministries under the State Council in 1996 indicating that they would not entertain applications for various positions from women, although academic institutions have not been without shortcomings of their own.²⁵ Wages and promotion for women have typically lagged those of men, who have generally been allowed to work longer and receive more extensive retirement benefits than their female colleagues.²⁶ Women typically have been among the first laid off as state-owned enterprises have contracted and have often been the ones evicted from company owned housing in the event of divorce, irrespective of who initiated it.²⁷ Juvenile delinquency seems especially pronounced among broken families.²⁸ And, at least in some parts of rural China, women who married outside their local villages have to a startling degree found themselves dispossessed upon divorce, with the families into which they married reclaiming the land on which they had been working and living, even in instances where the husband is the one to have sought termination of the marriage.²⁹

II

The Debates

The social problems ensuing from these changes have been the subject of substantial and growing concern on the part of official, quasi-official, and other parties, although the solutions proposed — and, indeed, the very definitions of what is problematic and of root causes thereof — have, not surprisingly, varied radically. National leaders have delivered much publicized addresses; the State Council has launched a master plan regarding the development of the PRC’s female citizenry; relatively “traditional” political campaigns have been launched against prostitution, trafficking, and spiritual pollution; international agreements have been ratified and foreign assistance

garnered; and experimentation has been conducted as to ways in which programs with potentially deleterious effects might be altered,³⁰ even as the state has continued to embrace developmental and other policies that arguably have contributed to the very difficulties at issue. And throughout a small but vibrant collection of scholars and activists have endeavored to make their voices (and alternative perspectives) heard.³¹

Law, typically operating in conjunction with campaigns, has come increasingly to be seen by many in and beyond official circles as a promising instrument through which to address these concerns, although, as will be discussed below, it too, arguably, is not without considerable infirmities. At the national level, the most prominent measures following the passage of the 1980 Marriage Law included the affirmation of the equality of men and women in the 1982 Constitution; the articulation in the 1986 General Principles of the Civil Law of the importance of marital autonomy; the passage in 1992 of the Law on the Protection of Women's Rights and Interests³²; the promulgation of an inheritance law intended to protect the interests of women³³; and the issuance of an array of laws, regulations, circulars, decisions, and other formal administrative pronouncements focused on the registration of marriages, abductions, and, to a lesser degree, sexual violence.³⁴ These have spawned complementary measures at the sub-national level, including the enactment of some twenty provincial and municipal provisions regarding domestic violence, in addition to making their impact felt in laojiao (re-education through labor) and other informal administrative practices that have continued to play a role in China's definition and handling of deviance.³⁵

Notwithstanding these steps, however, by the mid 1990s a number of actors, prominent and otherwise, had come to believe that much of the energy therein expended had been directed toward behaviors that, though important, were more symptomatic than causative. It was necessary, they suggested, to confront the institution of marriage itself more directly. And doing so, in turn, it was further contended, could be accomplished only by undertaking thoroughly to revise the Marriage Law of 1980. The debate that ensued was one as much about the broader questions implicated — the meaning of freedom in the marital union, the balancing of state and individual interest in that relationship, and the relative domains of law and morality — as it was about the specific legal issues around which discussion coalesced, namely, the appropriate standard for divorce and the legal foundation for punishing third parties and securing financial redress.

For Wu Changzhen,³⁶ one of the principal figures in the debate and a professor of law at the China University of Politics and Law long known as an advocate for the interests of women and children, and for many other critics³⁷ of the Marriage Law of 1980, the tale of the reform era was as much about burgeoning social turmoil as about material development. For all the obvious benefits of

prosperity, it was accompanied by a sharp rise in divorce, spousal abuse, child neglect, and an array of other social problems. Without being overly simplistic about causation, at the heart of these problems, wrote Wu, was a failure of Chinese society properly to understand the meaning of freedom in the marital relationship, if not more generally -- which failure was both mirrored in and perpetuated by the 1980 Law.

Both society and the Law misunderstood freedom, argued another critic, Wu Hong,³⁸ viewing it principally in absolute terms as a matter of individual preference, as evidenced by the ease with which one spouse might unilaterally obtain a divorce. Freedom ought instead to be seen in more relative terms, given the implications of a decision to terminate a marriage both for weaker parties (typically women and children) and for social stability more generally. The fact, wrote Wu Changzhen, that women accounted for some 70 percent of suicides in China and that among these one half could be tied to problems associated with marriage was chilling both in and of itself and for what it suggested about the condition of Chinese society. The vulnerability of children, suggested Professor Tong Man of the People's University, provided a powerful example that freedom was relative and needed to be weighed against responsibility.³⁹ And beyond the family itself, the laxity that had been allowed to creep into marital matters was contributing to the broader decline of social order, some suggested, referring to the fact that officials, particularly in Guangdong, had turned to corruption to support mistresses and second households.⁴⁰ It was, therefore, critical that the terms in the 1980 Law pursuant to which divorce might be granted be revised so that law could do its part in promoting the basic dignity, fundamental morality, and social order upon which freedom and civilization itself rested.

Others also expressed concerns about the tenor and implications of the Marriage Law, even if they did not counsel revisions of the law explicitly intended to constrict party autonomy in matters such as divorce. Chinese intellectuals since the May 4th Movement, wrote Professor Zhu Suli of Beijing University's law faculty, have mistakenly assumed, based on a stereotypic understanding of the West, that the more freedom a society allows in the decision to marry or divorce, the more progressive it is and the more it can be understood as promoting happiness.⁴¹ Actually, argued Zhu, who had spent almost a decade in the United States, western history is a good deal more complicated, by no means suggesting so clear a correlation. The real question for China, instead, is one of how to use freedom responsibly, particularly in view of the likelihood that the profound changes China has been undergoing as it moves from a socialist to a more market oriented nation has left women more vulnerable to exploitation. In such a context, the possibility of divorce becoming more difficult to obtain could, suggested Zhu, have the salutary effect of making those

contemplating marriage more serious about the step they were considering and those already wed more committed to their union. Although less reflective than Zhu, others in the law world mirrored such concerns in contending that society had changed so during the reform era that the 1980 Law no longer was sufficient for the challenges presented by contemporary China.

The efforts of Wu Changzhen and others to advance a conception of the law that they thought protective of the interests of women and of society more broadly did not, however, find universal acclaim. It is simply wrong, argued one group of activists, to situate considerations of freedom with regard to matters such as divorce within a broader societal context. Indeed, in their mind, the 1980 Law really was more one on family than marriage as such, given the inclusion in it of provisions regarding adoption, the child policy, support for elderly parents, and other topics going well beyond the marital unit itself. Law, some argued, ought to be used to protect the rights of individuals, rather than to sublimate them to maintain social stability. It was the discovery and nurturing of the individual, after all, that was responsible for so much of the progress that the west has enjoyed, compared to China, since medieval times.⁴² To constrict freedom through steps such as making divorce harder would be to turn back the wheel of history (kai lishi daoche).⁴³

Others echoed this opposition to the position advanced by Wu Changzhen and her colleagues. Professor He Weifang of Beijing University's law faculty chided Wu's concern with "third parties" (de san zhe) interfering with marriages by asking rhetorically whether China would be better off if the third party interposing itself between a husband and wife were the government?⁴⁴ "Restricting freedom of divorce," observed Chen Xinxin of the Chinese Academy of Social Science, "not only violates one's right of freedom of marriage, but also sends the wrong message for people will not know whether marriage is meant to be one's private matter or 'a matter of consequence for the state'" (guojia dashi). At a time when economy and society were moving in the direction of greater self-reliance, how could such "protection," asked Chen rhetorically, be beneficial for the liberation and development of women? Women (and, for that matter, even men) would be better served if the law instead encouraged people to take responsibility for their own affairs.⁴⁵ Moreover, continued Chen, while law undoubtedly possesses the capacity to make divorce harder, was there any reason to believe that it can bring happiness to those stuck within an unhappy marriage? Is there not, wrote Professor Deng Weizhi of Shanghai, a danger in overemphasizing the problems some have in marriage and so altering the law in ways that would produce difficulties for many more?⁴⁶

Still others took a more sociological focus. Li Yinhe, a prominent US-trained sociologist heading the Marriage and Family Research Office at the Chinese Academy of Social Science, argued that far from always being something to be dreaded, divorce might in some situations be desirable,

not only freeing unhappy individuals from an unfortunate union but sparing their children the prospect of growing up in acrimonious households.⁴⁷ Others suggested that, contrary to the fears expressed by Wu Changzhen and company, China was not, in fact, experiencing a wave of divorce that was aberrant on an international standard, but was simply responding as had other societies as they underwent industrialization and urbanization.⁴⁸ Yet others took issue even with the basic link between familial and social stability, suggesting that whatever problems China might be facing in the latter regard had yet additional rationale. And, although less caught up in reform of the marriage law itself, still others used the occasion of these debates to raise even more fundamental questions about the capacity of a state so set, consciously or otherwise, in patriarchal values and practices to produce and sustain marital or other social institutions — or even conceptions of gender — that could foster genuine respect and a rich and full sense of equality.⁴⁹

Beyond these general considerations, the debate centered around a number of more concrete issues. Two of the more noteworthy concerned the question of the legal foundation of marriage itself and the appropriate standard for divorce.⁵⁰

Controversy over the legal foundation of marriage came into particular focus with respect to the question of the basis for punishing extramarital relationships and for providing compensation for abandoned spouses. To advocates of revision, the need for action in this area was starkly apparent. Not only was the nation's divorce rate growing, but increasingly, extramarital involvement, which could take the form of so-called “second wives” (ba_o er nai) or more casual relations, was implicated as a prime cause.⁵¹ An extensive study by Beijing University's Research Center for Women and Law concluded that extramarital affairs were responsible for at least one in ten of all divorces, while less academically oriented surveys suggested that adultery might be a factor in as many as one half of all divorces.⁵² Along with this, there was evidence of husbands simply refusing to reach appropriate pecuniary settlements with abandoned spouses, particularly in instances where the wife had remained in the family's rural home while the husband had achieved some measure of financial success elsewhere or taken on an entire new family or in situations where the husband had taken a new wife to avail himself of a loophole in the one child policy (which permitted someone remarrying to have a second child).⁵³

Monogamy had, for the most part, been a core principle for the Chinese Communist Party from the first laws promulgated in the revolutionary base areas well prior to the foundation of the PRC onward, and one might, therefore, reasonably have assumed that this principle would have precluded polygamous relations of all types.⁵⁴ The Marriage Law of 1980, however, unlike its predecessor (and earlier relevant laws) did not state an explicit bar on concubinage (naiqie) or

bigamy — perhaps because by 1980, unlike 1950, concubinage had supposedly been eradicated, while more conventional bigamy was forbidden under the criminal law. By the 1990s, some observers found this omission problematic in view of the social phenomena described above and what they thought to be the excessively narrow parameters of the criminal law (which provided that bigamy would only obtain if the relationship with the third party were registered as an official marriage).⁵⁵ Accordingly, they thought it critical that the Marriage Law be amended regarding both bigamy and marital rights and duties more generally. In the former regard, they urged that the Marriage Law contain an expansive definition of bigamy that would include married individuals engaged in on-going sexual relations with someone other than their spouse, even if the second relationship was not officially registered.⁵⁶ In the latter, they argued that the Marriage Law should be amended to provide a sharp direct statement of spousal rights and duties that all could understand.

“Morality,” argued Ma Jijun of Beijing University, “in our current society no longer adequately restrains behavior,” with the result that reliance on it alone may have the ironic result of “actually encouraging bad conduct and a neglect of the harm that victims are suffering.”⁵⁷ Law is needed, suggested Wu Changzhen, to buttress morality, as well as complement administrative sanctions and Communist Party discipline.⁵⁸ Law may not be able to infuse a marriage with genuine affection, but law certainly had the capacity to foster “sincerity in the husband-wife relationship” by establishing minimum requirements of “equality and mutual respect” and by explicitly outlawing “infidelity.”⁵⁹ Toward that end, Wu Changzhen, Yang Dawen, and others of like mind produced a 157-article draft revised law.⁶⁰

Revising the 1980 Law along these lines, suggested advocates, would provide dual benefits. In a positive vein, it would crystallize the rights and duties spouses owed one another, thereby exerting what Wu Changzhen terms a “directional influence” in the sense of promoting sounder behavior and serving as a deterrent to those who might otherwise easily be swayed.⁶¹ And for those not so amenable to the high road, it would provide a strong legal foundation for injured parties seeking compensation from those whose actions caused harm, ending in divorce which would be in keeping with the tenor of China’s broader economic reforms in its emphasis on individual economic responsibility.⁶² After all, if the civil law could call on parties entering contracts to act in “good faith,” noted Professor Long Yifei of the People’s University, why not include a right to and duty of “faithfulness” in the marriage law.⁶³ Or as Lu Chunhua put it rather more succinctly, “if we can have laws dealing with things like garbage disposal and traffic violations,” surely it is not unreasonable to have rules that would deal with extramarital affairs and the devastating impact they have on families.⁶⁴

Li Yinhe and others greeted these proposals with something close to derision, offering both philosophical and more practical arguments. In the former vein, the sociologist Qiu Renzhong argued that “law is not a tool to promote particular moral standards. Legal scholars and legislators who want to use the law to punish extramarital relations have fundamentally blurred two distinct spheres — law and morality — and so created [what might be called] legal moralism.” “Legal moralists,” Qiu continued, “do not understand how important the existence of private space is to a modern society. Creativity requires the state to be less involved.”

Indeed, further contended Zhou Xiaozheng, “law is not capable of regulating and therefore should not regulate people’s thoughts and feelings [including] love and sex. Fidelity, extramarital affairs, and the like are issues of one’s belief system and should be resolved by those norms. We should not make a fetish of law, misuse the rule of law, or try to use laws to regulate a domain law is incapable of regulating and so should not regulate!”⁶⁵ The case could even be made, suggested Zhou and Wang Jianxun, that sexuality was so fundamental a human freedom that it ought not necessarily to be abridged even by the institution of marriage itself.⁶⁶

The effort to draw the state into the regulation of personal life through the outlawing of extramarital affairs and the establishment of a right of compensation also would not work at a practical level, argued Li Yinhe. This, after all, was not exactly something new in Chinese life. Chinese authorities had, for instance, involved themselves in a range of intimate matters during the Cultural Revolution with dreadful results. At present, adultery and associated activities were so prevalent that it was simply not realistic to assume that law could restrain them, she further contended, quoting a Chinese proverb to the effect that law can not punish if too many people are involved (fa bu ze zhong). Moreover, even if such a law could be enforced, it might well have a number of unintended undesirable consequences. One, for example, might be to make people more reluctant to get married in the first place, given the heavy legal responsibilities marriage would carry. A second might be to increase the anxiety levels of people once married by encouraging the collection of “evidence” about possible misbehavior (much as lawyers might build a case). A third might be, ironically, to accentuate China’s growing inequality and commercialization in the sense that an obligation to pay compensation would be far less daunting to the wealthy than to others. And a fourth might be to divert attention from genuine problems in Chinese society, while leaving China yet further behind the modern world.⁶⁷

Relative to the drama surrounding questions of second wives and the relative spheres of morality and law, the issue of the appropriate legal standards for divorce might seem a rather technical one, of interest primarily to lawyers, but as with so many matters that arose during these

debates, it, too, was infused with far broader political and social import. To appreciate this, it is necessary first briefly to review the treatment of this issue over the PRC's first four decades.

The PRC's original Marriage Law, a mere twenty odd articles cast in the most general of terms, did not specify a substantive standard for determining whether a divorce should (or should not) be granted. Instead, it only provided a procedural requirement that mediation precede any application for divorce — which had the practical effect of either requiring both parties to agree to the marriage's termination or, if they did not agree, of leaving it to the state (whether through local political authorities or, less often, the local judiciary⁶⁸) to determine at its discretion whether the marriage should continue. The state, in turn, freely exercised this discretion, first encouraging divorce in what all major observers have termed an extraordinary break with the past and then seeking sharply to discourage it “in the wake of the 1953 marriage law reform campaign,”⁶⁹ with the result that although there were more than one million divorces that year, it would prove to be “a number that we would not see again until 1997.”⁷⁰ But whether seeking to promote or to constrain divorce, the state was driven by the imperatives of building a new Chinese state, concerned in the former instance with uprooting traditional hierarchies and freeing women from oppressive marriages (generally not formed of free will) and in the latter with halting what came to be seen (correctly or not) as an undue erosion of social stability.

The sharp turns in the state's early policy toward divorce prompted an energetic debate among Chinese experts over the course of the 1950s, culminating during the One Hundred Flowers Movement and subsequent Anti-Rightist Movement, as to the degree to which the basis for divorce (and, indeed, marriage itself) should be understood in material, rather than more personal, terms. Some experts, such as the scholar Han Youtong, acknowledged the importance of broader structural concerns such as the elimination of vestigial feudalism, but also argued that emotions mattered and that it should therefore be possible for parties to secure a divorce in the event of a mutual alienation of affection.⁷¹ Others, such as Liu Yunxiang, countered that taking affection into account only served to accentuate lingering bourgeois tendencies and urged that in a Marxist state divorce should only be granted on material grounds if, for example, “one party...seriously violates communist ethics...or commits other crimes”⁷² This tension is poignantly portrayed in the novel Waiting in which the protagonist, the army doctor Lin Kong, returns to his native village annually over an eighteen year period in the hope of securing an end to his arranged marriage to Shuyu so that he might marry a nurse with whom he had fallen in love, only to be rebuffed by the local authorities who tell him “you are a revolutionary officer [who] should be a model. What kind of model have you become? A man who doesn't care for his family and loves the new and loathes the old... Do you deserve your green

uniform and the red star on your cap?”⁷³

The frustrations engendered by the materialist approach, together with the baleful impact of the Cultural Revolution on marriage,⁷⁴ spurred efforts in the late 1970s to revise the Marriage Law in a manner that might take fuller account of matters of the heart in divorce. One major consequence was the elimination of the requirement that mediation precede divorce and its replacement in the 1980 Law with Article 25 which provided that the courts “should” (yinggai) grant a divorce upon finding that a marriage had “broken down emotionally” (ganqing que yi polie). This was designed both to establish a new substantive standard for divorce and, as a procedural matter, to empower either party to assert that the marriage no longer was tenable.

The 1980 Law was, indeed, followed by a marked increase in divorce, although so much has been in flux in Chinese life generally since that time that there may be some artificiality in attributing this upward spiral principally to this Law. The very vagueness of the standard contained in the Law, however, soon proved troubling to some members of the judiciary, many of whom had assumed their posts during Beijing’s rapid expansion of the legal system with little formal legal training and no experience in dealing with contentious family matters. What, after all, constituted a breakdown of emotions, especially if the two parties disagreed as to the condition of and prospects for their marriage? To resolve such questions, the Supreme People’s Court exercised its authority to issue judicial interpretations, promulgating a number of rulings, including, most notably, a 1989 “opinion” (yijian) identifying fourteen different situations in which a breakdown of emotion might be said to have occurred.⁷⁵

These efforts did not, however, resolve lingering questions regarding the standard for divorce embodied in the 1980 Law. Concerned observers argued that the focus on “emotion” encouraged too casual an attitude toward marriage, accentuating, as it did, the feelings of the husband and, less often, the wife, to the neglect of broader familial and societal responsibilities, from which some concluded that divorce on the grounds of unilateral intentional alienation of affection should be strictly restricted.⁷⁶ In the words of the moral philosopher Ding Qiong, “divorce should be the last resort in handling bad marriages instead of a sorry escape from marital responsibility.”⁷⁷ Some further contended that “the breakdown of emotion” constituted an oddly inappropriate standard by which to determine whether to terminate a marriage, given the relative unimportance of emotional considerations in the decisions of many Chinese to marry. And some, such as Professor Yang Dawen of the People’s University law faculty, one of the few men to have long worked on questions of marriage law, took a more formally legalistic bent, suggesting that whatever the independent merits of Article 25 as originally drafted and of the Supreme Court’s subsequent efforts at clarification, the

two were simply incompatible, as many of the fourteen illustrations cited by the court in its 1989 opinion, such as “physical inability to consummate the marriage” and the prolonged, unexplained absence of one’s spouse, dealt chiefly with concerns other than the emotional. In the end, Yang and many others in law circles argued, China would be better served were the standard converted from that of the “breakdown of emotion” to one of the “breakdown of the marital relationship (hunyin guanxi polie).”⁷⁸

The reaction against this proposal was strong. Perhaps as few as three out of every ten Chinese marriages, conceded Xia Zhen of the Shanxi People’s Congress Standing Committee, were love unions (aiqing hunyin), but it was for that very reason that Article 25 of the 1980 Law had been adopted.⁷⁹ The “breakdown of emotion” standard, Xia suggested, provided women who had been coerced into unfree, loveless marriage with a legitimate rationale for escape and affirmed freedom of marriage, as well as of divorce. And whatever difficulties law professors might say they had with the standard, the laobaixing, argued Li Zhongfang and others, clearly had come over the twenty years since its adoption to understand and accept it.⁸⁰ Indeed, some observers said, rumors that the standard might be toughened were responsible for generating a modest upsurge in divorces, for fear that the opportunity to end a marriage might subsequently be narrowed.⁸¹

Others suggested what they saw as powerful additional reasons to retain the standard set forth in the 1980 Law. The re-emergence during the 1990s of such “feudal” practices as the buying of brides made it all the more imperative to re-affirm the place of the free will represented in the idea of emotion.⁸² Moreover, even if undertaken principally to clarify the Law, detailed criteria of the type represented in the Supreme Court’s fourteen point opinion of 1989 had the effect of re-introducing ideas of fault into divorce decisions and so, unwittingly or otherwise, shifting the balance of decision making power away from citizens and toward the state. This not only represented a diminution of freedom, but ran contrary to the lessons of world history, whether one’s principal focus was the west or the former Soviet Union. In the words of Li Yinhe, it was simply “regressive.”

III

The Law

The events culminating in the revision of the 1980 Marriage Law illustrate well the difficulty of efforts to characterize the law-making process in the PRC as one largely driven by society or as one predominantly dictated by the state. Given the depth and breadth of feeling that discussion of possible revisions of the Law evoked and given the way in which that passion helped move the

Marriage Law to the fore notwithstanding its initial placement in the second tier of proposals in the NPC's 1998-2003 five year legislative plan,⁸³ it would be misleading to see the particular Law that did finally emerge as pre-ordained by China's leadership. At the same time, however, given the central role played in framing these issues by intellectuals affiliated with the Party-state⁸⁴ and by the All China Women's Federation, the officially authorized vehicle for matters concerning women,⁸⁵ and given the ways in which the state apparatus did eventually come legislatively to cabin the energies unleashed by this debate, it would also be erroneous to treat the Marriage Law as a pure expression of civil society. In the end, as with so much else in Chinese law making, this Law bears the imprint of a complex interplay of the Party-state, governmentally organized non-governmental organizations, a state-sanctioned elite speaking on behalf of society, and society itself more broadly working through institutions that bear some, but by no means all, of the key indicia of legislative processes of liberal democratic states.⁸⁶

If China's senior leadership was initially relatively inattentive to possible revision of the Marriage Law, by virtue of being focused upon more avowedly political and economic concerns (and, one suspects, because it may have been inclined to see the topic as principally concerning women's issues), that was to change as controversies of the type discussed here grew in national prominence during the late 1990s. The political leadership, which had not previously displayed any particular concern about the Law's revision, ultimately sought to play a role in the shaping of the All China Women's Federation's final position, facilitated, it was suggested by a Federation activist who had hoped for a law more protective of women's interests, by the fact that Peng Peiyun,⁸⁷ head of the Federation and herself a long-term high-level cadre, was married to Wang Hanbin, who had previously been deputy head of the NPC's Standing Committee and who remains important in Party circles.⁸⁸ And so it was that Li Peng, head of the NPC and former premier, chose personally to preside over Standing Committee discussions of proposed amendments to the Law which included an unusual joint convening of six panels of NPC members who were not on the Standing Committee but had potentially relevant expertise and an invitation to the general public to express its views that resulted in some 4,000 letters regarding the draft legislation.⁸⁹

Perhaps not surprisingly, given the controversy that marked the foregoing debates and that also found expression in its own deliberations, the Standing Committee endeavored to effect compromise or leave issues open where possible. Further commending this posture was the Committee's awareness that the Supreme People's Court, through the vehicle of judicial interpretations, and the National People's Congress, through its on-going work on an overall civil code, might in the future be able to fill in any gaps that compromise might leave. So it was that a

revised law, adopted by a vote of 127 to one with some seven abstentions, emerged⁹⁰

With respect to the marital relationship, the Committee turned aside the 157-article draft prepared by Wu and her colleagues that would have vested spouses with a detailed panoply of rights even as it moved to amend the law more substantially than was desired by Li Yinhe and others concerned about encroachments on individual autonomy. The result is a mixture of general, almost hortatory language regarding the marital relationship with a more modest number of legal actionable measures, not all of which are fully spelt out. So, for example, as urged by Wu and others, the Law added the specific requirement that “husband and wife shall be faithful to and respect each other” but fails to indicate whether less dramatic though widespread behavior short of bigamy and the like (such as extended or serial adultery) might suffice as grounds for divorce (save for whatever implication one might read into the drafters’ decision to reject the proposal that such adultery be equated with bigamy).⁹¹

Similarly, the revised Law stakes out new ground in becoming the first piece of national legislation to address domestic violence, going so far as to provide a right for its victims to seek compensation. It does not, however, define critical terms such as “domestic violence,” “cohabitation,” or “bad habits.”⁹² Additionally, it seems to suggest that a person being abused should first request that her neighborhood committee or work unit seek to dissuade the abuser or conduct mediation with him and should only turn to public security organs in the event of “ongoing domestic violence.”⁹³

Or, to take another example, the revised Law goes well beyond its predecessors in identifying property and associated rights but states these in quite general terms. It calls, for example, for a recognition of the rights of both spouses in “household-based lands,”⁹⁴ and indicates that the “greater duties that [a spouse] has fulfilled in the past in bringing up children, waiting on elders, and assisting the work of the other party” may result in a right to compensation.⁹⁵ And it speaks of the possibility of a variety of other payments between divorcing parties — including “appropriate assistance if one party meets difficulties in life,” alimony, support, and compensation for losses occasioned by desertion, among other actions,⁹⁶ but provides no real guidance as to the particular circumstances in which different types of payments might be required.

The treatment of the issue of the standard for divorce also reflects the Committee’s desire to find a middle ground. Divorce, indicates Article 19, “shall be granted if it is both the man and the woman’s own free will [to do so].” Indeed, the importance of free will is underscored, no doubt because of the resurgence in the countryside of involuntary wedlock (objectionable to those sides of the debates recounted in this chapter), with new measures that spare the need in such situation even

to reach the issue of divorce by providing treating such marriages as “invalid from the very beginning.” Yet to the disappointment of Wu Changzhen, Yang Dawen, and others, the Committee chose to retain the much criticized “breakdown of emotion” (ganqing polie) standard, rejecting the opportunity to embrace the more concrete “breakdown of marriage” standard. As if addressing those concerned that the former standard was so vague and subjective as to pose a threat to marital stability, the Committee simultaneously sought to identify, without limiting, prime instances of what might constitute a breakdown of emotion. Thus, in the same Article (32) reiterating the ganqing polie standard, the Committee incorporated four of the thirteen illustrations of such a breakdown that the Supreme People’s Court had identified in its 1989 interpretation of this term while also leaving open the possibility that there might be “other circumstances.”⁹⁷

IV

The Implications

It is too soon to know to what extent the positions advanced in the debates leading up to the Marriage Law’s revision will be vindicated. Early commentary from involved individuals such as Wu Changzhen has been cautious, acknowledging both victories won and areas in which progress remains to be made, but counseling that firm conclusions are not yet in order.⁹⁸ The NPC continues to debate the contents of what would be the PRC’s first civil code.⁹⁹ And the Supreme People’s Court has issued an interpretation that helps flesh out elements of the revised Law – by giving some content to the term “domestic violence,” indicating that cohabitation is not to be equated with the criminal offense of bigamy, providing that compensation may be warranted for both material and emotional harm, and underscoring the importance of registering marriages.¹⁰⁰

Lower level courts have accepted a growing number of cases -- including some that are wonderfully dramatic.¹⁰¹ In one much publicized early case, an urban businesswoman was ordered to provide compensation to the husband she was divorcing. In another, the court sentenced a man to six months in jail for cohabitation in violation of the marriage law without explaining how imprisonment was possible under a civil statute, while in yet another, the court rebuffed a wife’s attempts to introduce her husband’s pet parrot’s utterance as evidence of his infidelity.¹⁰² There does not yet, however, appear to be a clear pattern to cases brought or judgments rendered and, even if such emerges, Chinese courts are, of course, not formally obligated to follow precedent. That it is as yet premature to know the full implications of the amendments made to the PRC’s Marriage Law in late April of 2001, however, ought not to deter us from considering larger lessons regarding the

meaning of freedom suggested by the debates that led up to those revisions.

Consider, for instance, the question of the role of the state. As suggested in the introduction to this chapter, the idea that the ceding by the state of power to non-state actors in the economic and social spheres in itself advances freedom in China undergirds much pertinent scholarship, both Chinese and western. The controversies surrounding revision of the 1980 Marriage Law usefully expand the horizons of those discussions by highlighting tensions that may exist between various forms or conceptions of freedom and between freedom and other values, such as equality and dignity, that are not only important themselves, but are also arguably crucial to the attainment of freedom itself. For example, few would dispute that China has made substantial strides over the past twenty years toward greater economic, social, and (even to a modest degree) political freedom, at least in a classically liberal sense. The argument could, however, be made that these gains have had significant attendant costs in terms of the more societally-oriented definition of freedom advanced by persons such as Wu Changzhen or, if one were to eschew Wu's definition, in terms of the degree of more conventionally understood freedoms enjoyed by many citizens, including, in particular, women and children. But even if one were here loathe to employ the language of freedom to describe the cost side of the equation (for fear of using the term so capaciously as to diminish its utility), fairness dictates that we take account of the baleful, as well as the positive, consequences of the reform era, again especially as concerns the more vulnerable members of society.

This is not to deny that there is an appeal to the arguments by Li Yinhe and her allies. Their profound distrust of a patriarchal Party-state that long exercised a heavy, if not brutal, shaping hand in procreative and other vital decisions is hard to gainsay, especially for those of us who have not had to live with such constraints. We would do well, however, to heed the concerns that other Chinese feminists have raised, directly or otherwise, about assumptions of society's benevolence and from this, to be mindful of the perhaps singular capacity of the state to curb private abuses of power and structure an environment in which freedom might be widely enjoyed. This point may be relatively readily apparent when one considers practices such as trafficking in human beings or, less dramatically, widespread gender discrimination that not only have re-emerged but, imbued with the rampant commercialism of the age, have gathered considerable force and for which Chinese society, at least so far, has yet to generate any answers.¹⁰³ It also, however, has analogues beyond marriage, family, and gender. There is, for instance, little evidence that the rampantly corrupt doling out of state assets will be stemmed or that the economic freedoms of the vast majority of the Chinese people (including labor which is not free to organize in any meaningful way) will be advanced through reliance on the market and civil society alone, as these are now structured in China

There has been a tendency on the part of many, particularly in the West, to see law as offering a way around such dilemmas for China — in the sense of providing rules through which citizens might bind both the state and society — with the more pronounced proponents of such views going so far as to argue that legal reform is now the lynchpin to the realization of fuller political and economic freedom.¹⁰⁴ At one level, the debates around which this chapter revolves would seem to offer confirmation for propositions regarding law's potential — why, otherwise, would intelligent people have waged so intense a struggle over possible revision of the marriage law. And yet the same debates are also suggestive of how the very nature of law poses serious questions about its capacity to fill the full role that many would have it play in China's transformation.

Those who advocated significantly amending the Marriage Law, for example, appear not to have appreciated fully the tension between their larger objectives and the methods they sought to deploy to attain those ends. Their call, when addressing the issue of the appropriate standard for divorce, for a shift in emphasis from marriage as primarily a matter for two people, either as individuals or as a unit, toward a fuller consideration of its broader societal ramifications, seems difficult to reconcile with their campaign sharply to remake marriage in terms of legal rights and duties. After all, even if intended chiefly to serve broader societal ends, the articulation of rights — particularly to the detailed degree stressed by Wu Changzhen — tends to accentuate the individual as rights holder, rather than the collective.

The emphasis on formal rights also seems likely to feed into the PRC government's more general efforts to emphasize the official legal system and in particular, courts, at the expense of quasi-official or even less formal means for redressing problems (such as those employed by the All China Women's Federation).¹⁰⁵ Lawyers, particularly outside large cities, have not been much involved in divorce litigation.¹⁰⁶ Nor does it seem likely that they soon will be, especially for cases involving poorer people in the countryside. Indeed, even if they were inclined to take such cases, it is hard to imagine country practitioners (of whom there are not many, given the concentration of China's legal profession in the cities) bringing successful actions against husbands resident in China's cities (given the strong element of local protectionism in Chinese courts and the difficulty of securing enforcement of judgments by courts from other jurisdictions). In the meantime, there is a risk that the Federation — for all its limitations, being poised between state and society, and lacking major political clout and large numbers of highly trained professionals — may find its role as a readily available and highly familiar outlet for both the collective and individual problems of rural women diminished by virtue of this new emphasis on formal rights. To be sure, the Federation has responded to this shift in direction by moving to build up its legal advice section. Considering,

however, that these fledgling efforts do not compare with the way in which the Federation has, in its more traditional social service role, blanketed the country and considering also the sharp limits on American style impact litigation in China, there seems little prospect of the Federation through more formal legal means being able to reach the numbers it now serves as an informal advocate. And even should women gain greater access to the formal legal process, be it via the Federation or otherwise, there is the need to be cognizant of the ways in which the language of rights has the potential to be captured by the powerful, particularly when the political and judicial institutions that will be administering those rights suffer from problems of the very type that the law is meant to address (as would appear to be the case in China, where the vast majority of judges who will be applying it are men, few of whom have any special training with respect to these issues). None of this is to argue for enshrining the institutions of the status quo, but rather simply to caution against abandoning them without thinking through the consequences thereof and of the proposed alternatives.

The views of those opposed to revising the Marriage Law are not without their own seeming inconsistencies that also are informative about the role law more generally might play. Their oft voiced argument — that law and morality are and should remain distinct — seems at best disingenuous and at worst to reflect a naïveté about the character of law and legal institutions that remains fairly widespread in the PRC (occasioned in part, one fears, by the suggestion both of the PRC government and of foreign legal advisors that the “rule of law” is neutral and transcends particular political choices).¹⁰⁷ The 1980 Law itself represents a very clear set of state sanctioned choices about the nature of the marital relationship — embedding it, for example, in a set of rules concerning one’s responsibilities regarding parents, children, family planning, and the state that make it seem more a set of state policies regarding the family and the role of women than simply a law concerning marriage. The faith in the substantive law’s neutrality that seems to inform those opposing revision also appears to slight both the ways in which run of the mill procedural requirements necessary for citizens to avail themselves of legal protection may, in fact, be biased, consciously or otherwise, against those with limited education or financial means (who are disproportionately women) and the ways in which the morality of those charged with administering the law shapes its application, even in states with a rather longer and deeper commitment to the rule of law than the PRC. Indeed, in their opposition to efforts to recast the many vague general provisions of the 1980 Law in more precise terms, Li and other opponents of revision seem largely oblivious to the possibility of the Law’s opacity leaving considerable discretion in the hands of officialdom that might one day once again be utilized to limit the very freedom in marital matters they extol.

To highlight the tensions that mark the major positions staked out in this debate is not to deride the principal protagonists in a national controversy of near epic proportions for their lack of theoretical elegance. Rather, it is to use the debates to underscore the interdependence of different forms of freedom in contemporary China. As one PRC commentator on the marriage law debates noted, “in the 50 years since the founding of the New China, there has not been any law that has caused such a widespread concern from ordinary people.”¹⁰⁸ And yet the constraints that continue to shape political discourse within China also took their toll here, limiting who played a role in these debates, their analysis of the problems at hand, and the solutions potentially available to them.

The debates surrounding revision of China’s Marriage Law were, indeed, widespread and candid. Over their course, national media devoted considerable attention to them, by all appearances engaging the citizenry and, in particular, a segment thereof — women — whose views on public affairs have not typically been regularly solicited.¹⁰⁹ Somewhat unusually, a draft of the Law was published. And some of the criticisms voiced by leading players were as sharply critical as any that have been expressed in a sustained fashion at the national level during the post Cultural Revolution. Think, for instance, of Wu Changzhen’s depiction of a China in decline, failing its families (and especially their most vulnerable members) or Li Yinhe’s attack upon state meddling into private affairs as grossly harming the citizenry while being responsible for China lagging far behind the West.

The state’s indifference, if not condescension, toward women helps explain how these debates were able to achieve such public prominence and take on the character they did. Notwithstanding the significance of family and marital issues historically, central authorities did not initially view the matter of the revision of the marriage law as politically sensitive (at least in the sense of posing a challenge to the Party’s exercise of power) or even as particularly important, as evidenced by the decision to accord it a second tier status on the NPC’s agenda. Hence, with the regime’s attention focused principally on issues more seemingly directly political or economic, these debates were able to take on something of a life of their own — further fueled, it would seem, by what might be described as the tendency of female cadres to have a greater appreciation than their male counterparts of the gap between the state’s stated ideals and its performance. To be fair, by the late 1990s, the regime had come to have a keener sense of the implications of marriage law reform, as illustrated by the high-level attention accorded during the revision’s final stages and by its acceptance, in the amended law of the provisions concerning domestic violence and of the financial responsibility of the wealthier party to a divorce to support the less well off party (which was, no doubt, appealing to a government confronting a massive social welfare burden). Nonetheless, it is,

we would suggest, revealing that the authorities assigned the task of publicizing and promoting implementation of the revised Law to the All China Women's Federation, as if it were essentially a woman's issue, rather than enlisting the joint efforts of the Party, the State Council, the NPC, the Supreme People's Court, and other major agencies, as has been the case with some other major measures.¹¹⁰

As much of a landmark of openness as the Marriage Law debates may have been in PRC history, we can still see in them the constraints imposed by the circumscribed nature of political discourse there. Wu and Li are sincere and articulate figures — they succeeded, after all, in goading the NPC to focus more readily than it had intended to on marriage law reform — but the fact is that they are a part of a highly urbanized state approved elite and, most likely, would have been unable to retain the national public forum from which they spoke had they not been. Stated differently, it is hard to imagine poor rural women being represented by spokespersons appreciably closer to their own profile, given the degree to which the Party-state continues both to exert its influence in all manner of social organizations and to determine centrally who will speak nationally for whom on major issues.¹¹¹ It should, therefore, not come as a surprise that for all of Wu's heart-felt concern for those left behind by economic reform and mass internal migration and for all of Li's interest in women's autonomy, neither side seemed as attuned as it might have been to the implications of the legal positions it advocated for tens of millions of their fellow citizens, especially in the countryside.¹¹²

These constraints also show up, albeit more subtly, in the extent to the proposed solutions to the problems afflicting Chinese women identified in the debates centered on law. Most observers tend to take the emphasis on law as a solution to these and other societal problems in China as a sign of progress, and yet, one can not help but wonder whether Wu and others have placed so much weight on legal change either because so many other avenues remain closed off. Baldly stated, it simply is not possible to advocate structural political change in the sense of arguing for the establishment of multiple political parties able to compete equally with the Communist Party for the vote of women or for direct elections through which senior officials might be held accountable at the ballot box for policies that consistently subordinated the interests of women to economic development. Nor is it possible to articulate solutions anchored in a rich conception of civil society, calling, *inter alia*, for more genuinely autonomous women's groups or labor unions, or for a media consistently able to publish whatever it wants. Indeed, it remains enormously difficult even for those proposing use of the law as a prime vehicle for reform to speak frankly about the limitations that the Communist Party's intimate on-going involvement in the judiciary poses for these very proposals.

More open and democratic political institutions in themselves are no guarantee of effective answers to the problems of spousal abandonment, domestic violence, and social disintegration – any more than law as such is a panacea. The history of marriage in the United States as insightfully sketched by the historian Nancy Cott,¹¹³ the political theorist Michael Sandel,¹¹⁴ and the legal philosopher Martha Minow clearly illustrates that such problems are too complex and the interests at play too variegated to be so readily soluble.¹¹⁵ Nonetheless, given the forces unleashed in China by the changes described in this chapter, one hopes that that nation's citizenry will soon have before it the institutions that would enable it to have even fuller discussions both of the many possible meanings of freedom in the familial context and of the daunting task of reconciling different conceptions of freedom and their interplay with other core values.

ENDNOTES

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1. Liu Junning, "Classical Liberalism Catches on in China," Journal of Democracy 11 (July 2000): 48-59. To be sure, Liu is speaking here most fundamentally of economic liberalism. For a sampling of work by American observers viewing China through a comparable prism, see James Dorn, China in the New Millennium: Market Reforms and Social Development (Washington, D.C., 1998). One of the fuller expositions of ideas of freedom in China is David Kelly and Anthony Reid, eds., Asian Freedoms: The Idea of Freedom in East and Southeast Asia (Cambridge, 1998).

2. See, for example, the essays by Pei Minxin and David Zweig in Elizabeth J. Perry and Mark Selden, eds., Chinese Society: Change, Conflict and Resistance (London, 2000).

3. At first blush, the suggestion that the first three decades of the PRC may have been marked by particularism may seem odd, given the state's efforts during that period at fostering uniformity (in remuneration, culture, attire, etc). What is meant here is the state's according of differential treatment to citizens on the basis of their class background, so that the manner in which two individuals having divergent pedigrees might vary sharply -- as distinct from the notion that all citizens are equal under law. See Jerome A. Cohen, The Criminal Process in the People's Republic of China 1949-1963: An Introduction. (Cambridge, MA, 1968). Particularism, of course, was a prominent feature of imperial Chinese law. See William C. Jones, Introduction, The Great Qing Code. (Oxford, 1994).

4. As I depict elsewhere, this vision of law exerts a powerful influence in the approach that the World Bank, the Ford Foundation, the United States government, and a range of other actors have taken toward development in China. See William P. Alford, "The More Law, the More...? Measuring Legal Reform in the People's Republic of China," published at the website of the Stanford University Center for Research on Economic Development and Policy Reform (2000) and William P. Alford, "Exporting the 'Pursuit of Happiness'," Harvard Law Review 113 (May 2000): 1677-1713.

5. On the influence, at least in the legal arena, of the idea that we have reached an "end of history," see Alford, "Exporting the 'Pursuit of Happiness'."

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6. The revised Law was promulgated via a Decision of the Standing Committee on the National People's Congress. "Quanguo Renmin Daibiao Dahui Changweihui Guanyu Xiugai (Zhonghua Renmin Gongheguo Hunyin Fa) de Jueding" ["The Decision of the Standing Committee of the National People's Congress Regarding the Amendment (of the Marriage Law of the People's Republic of China)"]. This Decision is reprinted in Peng Peiyun ed., Zhonghua Renmin Gongheguo Hunyinfa Shijie [An Explanation of the Marriage Law of the People's Republic of China] (Beijing, 2001), 245-51.
7. One recent report suggests that there are 128 million illiterate women in China, 110 million of whom reside in the countryside. Xinhua [New China News Agency], "China Helps Women Escape Illiteracy, Emerging Markets Datafile," May 14, 1999.
8. The National Audit Bureau of the PRC estimated that more than the equivalent of \$15 billion US in public funds was lost to corruption in 1999, although some would place the estimate many times higher. The noted economist Hu Angang, for instance, estimates that during the decade of the 1990's, China lost between 13.2 and 16.8 percent of its GDP (or roughly 150 billion dollars) to various forms of malfeasance and misfeasance. Hu Angang, Zhongguo: Tiaozhan Fubai [China Fighting Against Corruption]. (Hangzhou, 2000), 34-66. See also Anthony Kuhn, "Corrupt Officials' 'Escape Route' Alarms China," Los Angeles Times, Apr 22, 2001; James Kynge, "Banker's Fall Throws Spotlight on China's Missing Billions," Financial Times, Jan. 16, 2002, at 4.
9. The Taiping Heavenly Kingdom, at least as a theoretical matter, advocated a breaking down of traditional Chinese practices that subordinated women.
10. Reformers associated with the May Fourth Movement saw an elevation of the status of women as a critical step in the broader recasting of Chinese society for which they called. See Chow Tse-tung, The May Fourth Movement: Intellectual Revolution in Modern China. (Cambridge, MA., 1960).
11. Neil J. Diamant, "Re-examining the Impact of the 1950 Marriage Law: State Improvisation, Local Initiative, and Rural Family Change," China Quarterly 171 (2000): 171-98.
12. This law may rightly be seen as one of history's more momentous efforts at social engineering — designed, as it was, to address the residue of legal and other constraints on the freedom of women with respect to the marital relationship and beyond. See Diamant, "Re-examining the Impact."
13. See Diamant, "Re-examining the Impact."
14. Lu Feng, "The Work Unit: A Unique Form of Social Organisation," in 1 Chinese Social Sciences 71 (1989), translated in Michael Dutton, Streetlife China. (New York, 1996), 55-60.
15. The size and nature of the floating population are treated in Dorothy Solinger, Contesting Citizenship in Urban China: Peasants, Migrants, the State and the Logic of the Market. (Berkeley, 1999).
16. Such data are recorded in the United Nations Development Programme, The China Human Development Report. (New York, 1999). For a thoughtful account of gains during this period, see Heather Xiaoquan Zhang, "Understanding Changes in Women's Status in the Context of Recent Rural Reform," in Jackie West, et al. eds., Women of China: Economic and Social Transformation. (New York, 1999).
17. The state of women's studies in the PRC is the topic of Wang Zheng, "Research on Women in Contemporary China," in Gail Hershat, Emily Honig, Susan Mann and Lisa Rofel, Guide to Women's Studies in China. (Berkeley, 1998).
18. See, for example, Kate Xiao Zhou. "Market Development and the Rural Women's Revolution in Contemporary China," in Dorn, China in the New Millennium.
19. There is, to be sure, very substantial disagreement among Chinese scholars as to what constitutes a high divorce rate,

what the most significant causes of divorce are, or even how to calculate divorce rates (that is, whether one should look to the number of divorces relative to new marriages or relative to the population as a whole), although all agree that the incidence of divorce has been increasing steadily since the 1970s, with approximately 178,000 divorces recorded in 1978, 850,000 in 1992, 1,050,000 in 1995 and 1,200,000 in 2000. So it is, for instance, that advocates of greater restrictions on divorce contend that divorce is a serious problem in China by pointing out that between 1990 and 2000, divorces increased by 51 percent and marriages fell by 10.8 percent (Xinhua [New China News Agency], “PRC Marriage Law Amendment Said to Reflect Democracy,” May 11, 2001) while their opponents say that at least relative to the United States and Western Europe, divorce is not common in China. Complicating efforts to make sense of these arguments is the inherent unreliability of many of the statistics upon which they are based. As suggested elsewhere in this paper, the ease with which divorce has been granted has varied enormously during the history of the PRC, with, for instance, the state encouraging divorce between 1950 and 1953 in an effort to free women from what were viewed as oppressive relationships, but by the mid 1950s, believing that this problem had been addressed, discouraging further divorces for fear of their impact on social stability. There also appears to be considerable geographic variation at any given time as to the ease of divorce. Major cities such as Beijing and Shanghai are seen as places in which one could relatively readily secure a divorce compared to rural areas in which social stigma, cadre and familial pressure, the low educational and economic status of women (vis-à-vis their urban counterparts), and the fact that not all marriages may have initially been formally registered with the state as is required by law may have made their impact felt. Compounding all this further is the sheer difficulty now for rural officials (some of whom may have relatively little training in such matters) of tracking the status of marriages at a time when millions of families are divided by China’s vast internal migration and in a situation in which regionalization is growing problem in the courts and public administration (meaning that data is not always effectively shared across political boundaries).

Useful treatments of divorce rates include Xu Anqi, “Zhongguo Lihun Xianzhuang, Tedian Ji Qi Qushi” [The Current Situation, Characteristics and Trends of Divorce in China], Shanghai Shehui Kexue Yuan Xueshi Zazhi [The Scholarly Journal of the Shanghai Academy of Social Science] No. 2 (1994): 156-65; Xu Anqi and Ye Wenzhen, Zhongguo Hunyin Zhiliang Yanjiu [Studies on Chinese Marital Quality], (Beijing 1999); Huang Lingbao, “Lihun Xianxiang yu Lifa” (“The Phenomenon and Legislation of Divorce”) in Yang Dawen and Wu Changzhen, eds., Zouxiang Ershiyi Shiji de Zhongguo Hunyin Jiating [Toward the Twenty-first Century for Chinese Marriage and Family] (Changchun, 1995), 82-94; Tian Lan, “Wo Guo Gaige Dachao Zhong zhi Lihunli Shangsheng” (“The Increasing Divorce Rate in Our Reform”) in *id.*, 94-204; Wang Xingjuan, “Hunyin ‘Chongji Bo’” (“A ‘Lashing Wave’ at Marriage”), Hunyin yu Jiating [Marriage and Family] No. 1 1997, pp. 46-47; and Xiao Yongge, “Jiuli Nian: Lihun Dageming” (“1996: Divorce Revolution”), Xingwei Kexue [Behavioral Science] No. 2, 1996: 2-4; and Ming Tsui, “Divorce, Women’s Status, and the Communist State in China,” Asian Thought and Society (May 2001): 103-25.

20. Mayfair Mei-hui Yang, “From Gender Erasure to Gender Difference: State Feminism, Consumer Sexuality, and Women’s Public Sphere in China,” in Mayfair Mei-hui Yang, ed., Spaces of Their Own: Women’s Public Sphere in Transitional China (Minneapolis, 1999).

21. The resurgence of prostitution is discussed in Peter Goodman, “Sex Trade Thrives in China: Localities Exploiting A Growing Business,” Washington Post Jan. 4, 2003, at A1. The earlier history of prostitution is the subject of Gail Hershtatter, Dangerous Pleasures: Prostitution and Modernity in Twentieth Century Shanghai. (Stanford, 1997).

22. Human Rights in China, Asia Monitor Resource Centre, China Labour Bulletin, and Hong Kong Christian Industrial Committee, Report on the Implementation of CEDAW in the People’s Republic of China. (New York, 1998); Harriet Evans, Women and Sexuality in China: Female Sexuality and Gender since 1949. (New York, 1997).

23. Human Rights in China, China Labour. A much-cited survey conducted by the All China Women’s Federation suggests that domestic violence occurs in some 30 percent of Chinese families. Xinhua [New China News Agency] English Language Service, “PRC Lawmaker: Items Against ‘Family Violence’ Urged in Marriage Law Amendment,” Apr. 26, 2001. The problem of spousal violence involves persons with “high and low educational attainment and professionals as well as workers.” Helen Zia, “China: The Other Half of the Sky” (Global Frontlines: China. www.fvpf.org/global/gf_china.html, 1999).

24. Sing Lee and Arthur Kleinman, “Suicide as Resistance in Chinese Society,” in Perry and Selden, Chinese Society, 224.

25. Guojia Jiguan, Nuxing Nan Jin, Zhongguo Funu Bao [China Women's News], Jan. 8, 1996: 1. Indeed, even well-known national law schools have been among those discriminating against women. See Wang Zhenmin, "Zhao Sheng Zige yu Fazhi Shuiping" ("Qualifications for the Recruitment of Students and the Standards of the Rule of Law"), Fazhi Ribao [The Legal System Daily] Oct. 28, 1997: 7. Efforts by a center affiliated with another leading law school to address such issues are considered in The Centre for Women's Law Studies and Legal Services of Peking University, Theory and Practice of Protection of Women's rights and Interests in Contemporary China – Investigation and Study on the Enforcement of the UN Convention on the Elimination of All Forms of Discrimination Against Women in China. (Beijing, 2001).

26. Margaret Y. K. Woo, "Chinese Women Workers: The Delicate Balance Between Protection and Equality," in Christine K. Gilmartin, et al., eds., Engendering China: Women, Culture and the State. (Cambridge, MA, 1994).

27. "Xia Gang dui Nanu Liangxing de Butong Yingxiang" ("The Loss of One's Job is a Different Phenomena for Men and Women"), Zhongguo Funu Bao [China Women's News] May 28, 1998: 3. Zhou Jian, "Xia Gangle, Jia zai Fengyu Zhong" ("The Loss of One's Job, The Trials and Tribulations in the Family"), Zhongguo Funu Bao [China Women's News] Jan. 5, 1997: 1.

Some have noted that women are fairly active in initiating divorce. See Tsui, "Divorce." These suggestions warrant careful scrutiny, in part because of the overall difficulties described earlier with respect to statistics in this area and in part because even the best available data does not indicate how many women may be initiating divorce in response to domestic violence or spousal abandonment. At least one author has intimated that some women wishing to divorce have been deterred by a fear that they would lose their housing. "Evolution of the Marriage Law," Beijing Review, Mar. 2001.

28. Zhou, "Xia Gangle."

29. Miao Xiuqiu, "Funu Weiquan Renzhong Daoyuan" ("Women Have to Shoulder a Heavy Burden to Preserve Their Rights"), Zhongguo Funu Bao [China Women's News] July 22, 1996: 2. Data from Heilongjiang province suggests that, during the mid 1990s, after divorce up to 80 percent of rural women were losing the land on which they had been living and working.

30. Some of the efforts of Chinese authorities are chronicled in a 1994 white paper. See Information Office, State Council of the People's Republic of China, "The Situation of Women," reported by Xinhua, Beijing, June 3, 1994. English version available at British Broadcasting Company, June 11, 1994.

31. See, for instance, the writings of Li Xiaojiang such as Tiaozhan yu Huiying: Xin Shiqi Funu Yanjiu Jiangxue Lu [Challenge and Response: A Record of Lecturers on Women's Studies for a New Era] (Zhengzhou 1996).

32. "Zhonghua Renmin Gongheguo Funu Quanyi Baozhang Fa" ("The Law of the People's Republic of China for the Protection of the Rights and Interests of Women") published in Renmin Ribao [The People's Daily] Apr. 10, 1992: 3.

33. For an intriguing study of Chinese inheritance law see Frances H. Foster, "Linking Support and Inheritance: A New Model from China," Wisconsin Law Review 1999: 1199-1258.

34. Thoughtful discussions of such measures include Michael Palmer, "The Re-emergence of Family Law in Post-Mao China: Marriage, Divorce and Reproduction," China Quarterly 145 (March 1995): 110; Ronald C. Keith, "Legislating Women's and Children's 'Rights and Interests' in the PRC," China Quarterly 149 (March 1997): 29-55; and Margaret Y. K. Woo, "Law and the Gendered Citizen" (1999 draft).

To be sure, the argument might be made that however well-intentioned, some of these measures may not have advanced the interests of women. Labor law measures, for instance, that were meant to be protective of women (in the sense of sheltering them from dangerous employment) may have unwittingly worked to reinforce limitations on women securing certain high wage jobs, while there are serious questions about the impact of measures such as the 1994 Mother and Infants Health Law (Muying Baojian Fa), which some observers suggest is essentially a eugenics statute.

³⁵. Re-education through labor is an administrative sanction to be applied by the public security apparatus without reference to the courts whereby an individual may be subject to up to three years of detention in a labor camp (which term may be extended).

36. Wu Changzhen is also a member of the Executive Committee of the All China Women's Federation and Vice Chair of the Beijing Women's Federation.

For a good example of her writing, see Wu Changzhen, "Guangdong Sheng Chonghun, Naqie, Pinju, Hunwailian Xianxiang Diaocha" ("An Investigative Report on the Phenomena of Bigamy, Concubinage, Illicit Cohabitation, and Other Extramarital Affairs in Guangdong Province"), Minzhu yu Fazhi [Democracy and Law] No. 17, (1997): 32-33.

37. See, for example, Wu Hong, "Dui Lihun Buneng Meiyou Xianzhi" ("With Regard to Divorce, You Can Not Eschew Restrictions") in Li Yinhe and Ma Yinan, eds., Hunyin Fa Xiugai Lunzheng [Debates Over Revision of the Marriage Law]. (Beijing, 1999), 113-14; Zhou Dongqing, "Yingdang Jiaqiang Lihun Xianzhi" ("It is Necessary to Strengthen the Restriction on Divorce") in *id.*, 118-19; Ge Chenhong, "Lun Lihun Ziyou de Xiangduixing" ("On the Relativity of the Freedom of Divorce") Funu Yanjiu Luncong [Collection of Women's Studies] No. 4 (1998):10-11; Chen Mingxia and Xue Ninglan, "Guanyu Lihun Ziyou yu Wo Guo Caipan Lihun Biaozhun de Jidian Sikao" ("Some Thoughts on the Freedom of Divorce and Our Nation's Statutory Standard for Divorce"), Funu Yanjiu Luncong [Collection of Women's Studies] No. 4 (1998): 18-20.

38. Wu Hong, "Dui Lihun."

39. "Divorce: Freedom and Costs," Women of China 2001-02.

40. One member of the National People's Congress went so far as to suggest that 95 percent of officials in Guangdong found to have committed economic crimes had mistresses. Xinhua [New China News Agency], "PRC Marriage Law Amendments Attract High Level Attention," Oct. 28, 2000.

41. Zhu Suli, "Lengyan Kan Hunyin" ("Looking at Marriage with a Cold Eye") in Li and Ma, Hunyin 48. For an example of the type of sentiment against which Zhu was reacting see the remarks of Lu Heng in Hu Qihua, "'Til Death Us Do Part' - Not Any More," China Daily. Oct. 28, 2000 ("The increase in the divorce rate reflects the social progress made in China.").

42. Xiao Xuehui, "Hunyinfa de Xiugai Yingyu Xiandai Wenming Fazhan Fangxiang Tongbu" ("The Revision of the Marriage Law Should be Consistent with the Developing Trends of Modern Civilization"), Funu Yanjiu Luncong [Collection of Women's Studies] No. 2 (1998): 8.

43. Li Yinhe, "Xiugai Hunyinfa Shi Yao Jingti Daotui" (Be Vigilant against Regression in the Revision of the Marriage Law), Funu Yanjiu Luncong [Collection of Women's Studies] No. 2 (1998): 4-5; Chen Xinxin, "Fandui Lihun Xianzhi" [Oppose Restrictions on Divorce] in Li & Ma, Hunyin, 176.

44. "He Weifang Zhuanfang" ("An Exclusive Interview with He Weifang"), Sanlian Shenghuo Zhoukan [Sanlian Life Weekly], Mar. 28, 2001 at www.sina.com.

45. Chen, "Fandui Lihun," 180-181.

46. Zhang Kun, "Opinions Split on Marriage Law," China Daily, Sept. 12, 2001.

47. Li Yinhe, "Xiugai Hunyingfa," 5.

48. Xu Anqi, "Baohu Lihun Ziyou" ("Protect the Freedom of Divorce"), Nanfang Zhoumo [Southern Weekend] Sept. 21, 2000, 2.

49. Li, "Tiaozhan."

50 Other issues of note included the treatment of so-called de facto marriages (i.e., those that had not been officially registered, particularly prior to the introduction in 1994 of revised rules for the registration of marriages), the idea of invalid marriages (such as those that might be the product of coercion rather than free will), and the treatment of marital property in the situation of debts to third parties.

51. Wang Xingjuan, “Hunyin ‘Chongji Bo’,” 46-47.

52. The Beijing University study is discussed at Xiao, “Hunyinfa.” The latter figure, based on a study conducted in Wuxi, is reported in Zhongguo Funu Bao [Chinese Women’s News], Sept. 23, 1996, 1.

53. This loophole appears to have been especially utilized by men whose first child was a daughter. This is an area in which comprehensive statistical data does not appear to be available. In one study, based on fieldwork done in Guangzhou and eleven neighboring cities, Wu Changzhen reports some 358 children born from 508 cases of bigamy between 1990 and 1992. Wu Changzhen, “Guangdong Sheng Chonghun.” A more recent report from Nanhai in Hainan indicates that 188 children were born from 391 cases of bigamy between 1992 and 1995 and that many of these children had difficulty in securing education and other societal benefits as they lacked a hukou. Zhongguo Funu Bao [Chinese Women’s News], Dec. 2, 1999, 2.

54. To be sure, Mao Zedong took a somewhat more open stance on this issue in the initial version of his famed 1927 report on the Hunan peasantry and, as his former physician observed, in his personal life.

55. The narrowness of this definition may explain how, for instance, the number of criminal actions regarding bigamy has dropped in recent years even as the phenomenon of extramarital liaisons has grown. Zhongguo Funu Bao [Chinese Women’s News], Dec. 3, 1999.

56. To be sure, advocates of this position expressed a range of views as to what might constitute constructive, as distinct from formal, bigamy. So it was, for instance, that some in the All China Women’s Federation argued that bigamy should include married individuals who in another relationship also held themselves out as wed or who lived for more than six months with someone to whom they are not married. Nanfang Zhoumo [Southern Weekend] Sept. 21, 2000, 2, while others involved in these debates were willing to construe a shorter period of adultery as amounting to bigamy. In the alternative, it was rumored that the Guangdong All China Women’s Federation advocated use of the administrative sanction re-education through labor for persons committing adultery not treated as constituting the crime of bigamy.

57. Ma Jijun, “Shilun Jianli Lihun zhi Sunhai Peichang Zhidu” (“On the Establishment of the Divorce Compensation System”), Funu Yanjiu Luncong [Collection of Women’s Studies] No. 4 (1997): 7.

58. “An Insider Talks about the Key Issues,” Beijing Review, Mar. 2001

59. Ma Yinan reporting the views of the 1999 Annual Conference of China’s Association of Marriage Law Studies Minzhu yu Fazhi [Democracy and Legal System] No. 1(2000): 13.

60. This draft is reproduced in Wang Shengming and Sun Lihai, eds., Zhonghua Renmin Gongheguo Hunyinfa Xiugai Lifa Ziliao Xuan [A Selection of Materials from the Drafting of the Amendments to the Marriage Law of the People’s Republic of China]. (Beijing, 2001), 433-58.

61. “An Insider Talks.”

62. Chen Wei, “Jianli Wo Guo Lihun Sunhai Peichang Zhidu Yanjiu” (“Studies on the Establishment of the Divorce Compensation System”), Xiandai Faxue [Modern Jurisprudence] No. 6 (1998): 6-9; Jiang Yue, “Fuqi You Xianghu Zhongshi de Yiwu” (“Spouses Should Have a Duty to be Faithful to Each Other”) in Li and Ma, eds., Hunyin, 271-75; Wang Geya, “Lun Lihun Sunhai Peichang Zhidu” (“On the Divorce Compensation System”) in *id.*, 237; and Li Mingsheng, “Wo Kan Lihun Zhong de Sunhai Peichang Wenti” (“My Views on the Issue of Divorce Compensation”) in *id.*, 241-44.

It also would provide a basis for pre-nuptial agreements in a new, more property conscious China. In the words of NPC

delegate Wu Shuqing, “A contract that specifies the property before marriage will not only maintain purity of love, but also reduce the possibility of fighting over money when a marriage ends.” Meng Yan, “Extramarital Affairs under Spotlight,” China Daily, Dec. 26, 2000.

63. Based on an interview with Professor Long Yifei in Beijing July 2000.

64. Lu Chunhua, “Lifa Chengfa ‘disanzhe’ shizaibixing” (“It is Imperative to Use Law to Punish the ‘Third Party’”) in Li and Ma, Hunyin, 282-83.

65. Zhou Xiaozheng, “‘Peiouquan’ Duanxiang” (Conclusive Thoughts on a “Rights to Compensation”) in Li and Ma, Hunyin, 289-90.

66. *Id.* Also see, Wang Jianxun, “Falu Daode Zhuyi Lifa Guan Pipan” (“A Criticism of the Legal Moralistic Approach to Legislation”) in Li and Ma, Hunyin, 24. Interestingly, Wang draws on the famed Oxford legal philosopher H.L.A. Hart’s celebrated response to Lord Devlin to buttress her claim that if society took too stringent an approach toward the regulation of sexuality, freedom more generally would be impaired.

67. Wu Xiaofang, “Hunyin Jiating fa: Caoan Chutaiqian de Yichi Taolun” (“A Discussion of the Drafting of the Law on Marriage and Family”), Zhongguo Lushi [Chinese Lawyer] No. 10, (1998):10-11; Chen Xinxin, “Du Hunwailian de Renshi Yinggai Quanmian, Keguan” (“For an All Sided and Objective Understanding of Extramarital Affairs”) in Li and Ma, Hunyin, 300; and Xiao Xuehui, “Lifa Buyingdang Chengfa ‘Disanzhe’” (“Legislation Should Not Punish the ‘Third Party’”) in *id.*, 302; Li Dun, “Yingdang Chengren Gonglingyu he Silingyu de Huafeng” (“Recognizing the Differences Between the Public and Private Spheres”), in *id.*, 80; and Pan Suiming, “Du Xiugai Hunyinfu de Wuge Yiwen” (“Five Questions for Revising the Marriage Law”) in *id.*, 104.

68. To make this distinction is not to suggest that the PRC’s judiciary, then or, for that matter, now, should be understood as non-political. It should be noted that judicial action was not then (and is not now) required for a divorce (which may be granted administratively).

69. Kay Ann Johnson, Women, the Family and Peasant Revolution in China. (Chicago, 1983), 213.

70. Tsui, “Divorce,” 110.

71. *Id.* at 110.

72. Ha Jin, Waiting. (New York, 1999).

73. *Id.* at 12.

74. Among these effects were the termination of otherwise viable marriages on political grounds (*i.e.*, divorces design to spare one spouse suffering on account of the “bad” political background of the other) and the formation of marriages between urbanites sent down to the countryside and peasants that in some instances at the end of the Cultural Revolution came to be seen as preventing the former from returning to the cities from which they had come.

75. Yang Dawen, “Guanyu Wanshan Hunyin Jiating Lifa de Jianyi he Shexiang” (“Opinions and Suggestions on Completing Legislation on Marriage and the Family”) in Wu and Yang, eds., Zhouxiang Ershiyi Shiji, 16-17.

76. See, for example, Li Cheng and Wang Hongcai, “Lihun Lifa Xintan” (“A New Inquiry into Divorce Law Legislation”), in Wu and Yang, Zhouxiang Ershiyi Shiji, 72-78; and the following, all of which are in Li and Ma, eds., Hunyin Fa Xiugai: Zhang Xianyu, “Hunyin Polie Yuanze Ying Chengwei Lihunde Fading Liyong” (“The Principle of the Breakdown of the Marriage Should Be the Statutory Reason for Divorce”), 131-36; Cao Shiquan, “Caipan Lihun Biaozhun de Pingjia yu Xuanze” (“The Evaluation and Selection of a Standard in Judging Divorce”), 144-46; Deng Hongbi, “‘Hunyin Guanxi Polie’ Zuowei Zhunyu Lihun de Fading Tiaojian” (“‘Breakdown of the Marital Relationship’ as the Statutory Condition for Divorce”), 148; Tong Man, “Ganqing Polie Yuanze Zhiyi” (“Questioning the Principle of the Breakdown of Emotion”), 149-54; and Chen Mingxia and Xue Ninglan, “Guanyu Lihun Ziyong yu Wo Guo Caipan

Lihun Biaozhun de Jidian Sikao” (“Some Thoughts on the Freedom of Divorce and Our Nation’s Statutory Standard for Divorce”), Funu Yanjiu Luncong [Collection of Women’s Studies] No. 4 (1998): 20-23.

77. Xinhua English Language Service, “Expert Says More Chinese Concerned About Quality of Marriage,” Mar. 9, 2001.

78. Yang Dawen, “Guanyu Wanshan Hunyin Lifa.”

79. Xia Zhen, “‘Ganqing polie’ Zhuowei Panjue Lihun de Liyou Burong Zhiyi” (“‘Breakdown of Emotion’ as Reason for Court’s Decision Allows of No Doubts”) in Li and Ma, eds., Hunyinfaxiugai, 162-67.

80. Li Zhongfang, “Jianchi Lihun Liyou de ‘Ganqing Shou’” (“Adhere to the ‘Emotion Test’ as a Reason for Divorce”) in Li and Ma, eds., Hunyinfaxiugai, 168-71. Indeed, a survey conducted of 4,000 adults of both Genders by the ACWF found that more than 73 percent wished to retain the “breakdown of emotion” Standard. Cited in Feng Xiaoqing, “A Review of the Development of Marriage Law in the People’s Republic of China” University of Detroit Mercy Law Review 79 (Spring 2002) 331-98.

81. In fairness, it should be noted, however, that other observers expressed the view that some women were putting off possible divorces, “waiting for the formal promulgation of the Draft Revision of the Marriage Law with an eye to getting more compensation.” Lu Pipi, “New Marriage Law Sparks Concern,” Beijing Review Mar. 2001.

82. Xia, “‘Ganqing Polie’.”

83. In the NPC’s legislative plan, laws placed in the first tier are definitely to be taken up whereas those placed in the second tier will be, if time permits.

84. We use the term Party-state advisedly, recognizing that in today’s China, the two are not as fully synonymous as was the case in earlier years and that, indeed, even the party itself now should not be understood as a monolith, at least prior to the formation of a party line (as the very debates that are the subject of this paper illustrate). Nonetheless, to ignore, as many American scholars are wont to, the hovering omnipresence of the party in major state decisions, manifested in part through the nomenklatura system that limits candidates for important official positions to persons in the party or blessed by it, seems wishful at best.

85. There is, of course, something quite patronizing in the assumption that women are to voice their concerns chiefly through the All China Women’s Federation, given the great impact on women’s lives and society more broadly of economic, political and other matters that might not be seen as “women’s issues” (and so, are the responsibility of agencies not likely to be especially responsive to the Federation). It should be noted that opinion as to the issues addressed in this chapter was not necessarily uniform across the different levels of the Federation (particularly prior to the articulation of the Federation’s final official position).

86. For a further discussion of the PRC legislative process, see William P. Alford and Benjamin L. Liebman, “Clean Air, Clear Processes? The Struggle Over Air Pollution Law in the People’s Republic of China,” Hastings Law Journal 52 (2001): 703-48.

87. Peng Peiyun’s previous positions included heading up China’s family planning authority.

88. Given that the National People’s Congress only convenes in plenary session once a year for approximately two weeks, the principal body for the promulgation of new legislation is the NPC’s Standing Committee. Comprised of approximately 160 members, the Standing Committee meets regularly throughout the year.

89. Xinhua [New China News Agency], “Li Peng Chairs NPC Discussion of Marriage Law Amendments,” Dec. 25, 2000.

90. It is interesting that the NPC leadership decided against having the NPC plenary session approve a new Marriage Law and instead had the Standing Committee incorporate the changes ultimately made in the 1980 Marriage Law in a

decision (jueding) amending the earlier Law. The PRC's Constitution specifies that "basic" laws are to be promulgated by the full NPC, even as it authorizes the Standing Committee to issue and amend laws (with the distinction between basic and other laws not being spelled out in the Constitution, but presumably having to do with the former being laws of fundamental importance). Some prior amendments of basic laws, such as the criminal and criminal procedure laws, were promulgated by the NPC's plenary session. The decision to route the Marriage Law revisions through the Standing Committee, rather than treat it as a new law, may have been intended as a way of suggesting that although some 33 changes were made, the fundamental character of the earlier Law has been retained.

91. Some during the Standing Committee's debates expressed the view that treating anything short of officially registered second marriages as constituting bigamy might run into particular difficulties in minority areas, some of which were marked by a high prevalence of unregistered "common law" marriages and less of a commitment to monogamy.

92. Indeed, few key terms in this Law are defined, whether because of the political difficulty of reaching agreement on their meaning, a desire to allow those applying the law more room for local variation, a concern about keeping the law simple and so, accessible to the masses, or the quality of the drafting process. See note 99 below.

93. The revised Marriage Law at Article 45 does authorize victims to commence private prosecutions and the procuracy to initiate public prosecutions against persons committing the "crimes of bigamy, domestic violence [which, as indicated at.... is not specifically identified as a crime in the criminal law] or family maltreatment, and abandonment of family members."

It should be noted that although there was broader agreement regarding domestic violence than the standard for divorce, here, too, some divergence was expressed concerning, for example, such issues as whether provisions regarding such abuse were better suited to the criminal law, as opposed to the marriage law, and whether it should encompass marital rape.

94. Article 39

95. Article 40

96. See Articles 37, 39, 40, 41, 42, and 46.

97. The four incorporated in the Law are bigamy and cohabitation; domestic violence or maltreatment, leading to abandonment; incorrigible "bad habits" such as gambling and the taking of drugs; and a two year separation because of marital disharmony. This list is also appreciably shorter than those in the "experts'" draft of a revised law and in the January 2001 draft law circulated by the Standing Committee — each of which included adultery.

98. Wu, "Revision of the Marriage Law."

99. Xinhua [New China News Agency], "Li Peng Chairs NPC's Session on Draft Civil Code," Dec. 23, 2002.

100. On December 25, 2001, the Supreme People's Court issued its first interpretation of the revised Marriage Law. That interpretation, inter alia, provides further definition of terms such as domestic violence and cohabitation (which it indicates is not to be equated with bigamy), specifies that Article 46 is intended to make possible compensation for both material and emotional harm, and offers further detail as to the registration of marriages. Guanyu Shiyong Zhonghua Renmin Gongheguo Hunyingfa Ruogan Wenti de Jieshi [An Interpretation of Certain Questions with respect to the Application of the Marriage Law of the People's Republic of China]. Posted at chinalawinfo.com/new law. Dec. 27, 2001.

101. In China, the publicity accorded a case often can be quite revealing, at least as to points that the authorities would like to see emphasized. This holds true for official publications, such as the Gazette of the Supreme People's Court which may publish lower level cases it thinks might provide useful models or which underscore messages that the political authorities wish to accentuate, and even for the popular media which, though freer than twenty years ago, both continue to receive guidance as to acceptable areas of coverage and may be rebuked for going too far (as was the Nanfang Zhoumo, a number of key staffers of which were recently discharged for this very reason).

102. The parrot purportedly mimicked the husband's warm words to his lover – and did so with a good Sichuan accent to boot. Gethin Chamberlain, "Who's Not a Clever Boy Then," Scottish Daily Record, June 21, 2001.

103. In making this point, we are aware of the arguments of Richard Epstein and others who contend that the market may offer better solutions to problems of employment discrimination than state action. Richard A. Epstein, Simple Rules for a Complex World, (Cambridge, MA, 1995). This has yet to occur in China, whether because of the distorting impact of corporatism on the Chinese market or limitations in the argument more generally.

104. These arguments are considered in William P. Alford, "The More Laws, the More...Taking the Measure of Law Reform in China," (Stanford Institute for Economic Policy Research Working Paper No. 59, 2000) and William P. Alford, "Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China," East Asian Law and Development: Universal Norms and Local Culture, Arthur Rosett, et al., eds., (London, 2002).

105. The state's general emphasis on formal processes did not, however, carry over to the newly addressed area of domestic violence with respect to which the amended Law pushes persons believing themselves victimized first to utilize relevant neighborhood, village or workplace committees before invoking public protection. Notwithstanding the limitations in official processes pointed out in this paper, the distancing of women from the police does not seem advantageous from the viewpoint of cutting down domestic violence.

106. The frequency of counsel in different kinds of cases is recorded in the judicial administration yearbooks. I discuss such data in William P. Alford, "Lawyers in China," (unpublished manuscript 1998).

107. In fairness, part of the appeal of this argument lies in the extent to which Chinese life was previously politicized. See Alford, "The More Laws."

108. Xiao Ming, "Should the Law Punish Extramarital Love," Forum on Women, Jan. 2001 (quoting Ding Lu of the All China Women's Federation).

109. For an excellent study of the role that women may yet have to play in political and societal transformation in China, see Robert P. Weller, Alternative Civilities: Democracy and Culture in China and Taiwan (Boulder, CO, 1999).

110. Looked at positively, the assignment of this responsibility to the Federation may yet help it adapt itself to these new circumstances.

111. For instance, approximately one half of the Standing Committee's members are said to represent particular parts of the country while the remainder have an interest group constituency based portfolio, but all were, essentially, appointed centrally and the large majority (60 to 80 percent by some counts) are said to reside permanently in Beijing. Alford and Liebman, "Clean Air," 742.

112. This echoes the more general, yawning divide between prosperous urban regions and the Chinese interior discussed by scholars such as Wang Shaoguang. See, for example, Wang Shaoguang, "Openness and Inequality: Can China Compensate the Losers of its WTO Deal" (unpublished paper, August 2001).

113. Nancy Cott, Public Vows: A History of Marriage and the Nation (Cambridge, 2002).

114. Michael Sandel, Democracy's Discontents: America's Search for a Public Philosophy (Cambridge, 1996).

115. Martha Minow, "Forming Underneath Everything That Grows: Toward a History of Family Law," Wisconsin Law Review 1985 (No. 4):819-898.