

'No-fault' divorce: the new divorce proposals for changing the law relating to marriage and other domestic relationships

By Patricia Morgan

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Where do these proposals come from? What are the justifications and possible implications?

A House of Commons consultation paper, *No-fault Divorce* (October 2018¹), and the Ministry of Justice's *Reducing Family Conflict* (September 2018)², propose that after a year of marriage, the union, along with the household created by it, may be dissolved on demand under a 'no-fault notification system' by one or both parties without reason given or penalty to the leaving party. One -or potentially both – parties would make an application stating that the marriage had irretrievably broken down for a provisional decree of divorce to be followed, six months later, by the decree absolute.

The Government reasons that if one spouse has concluded that the marriage is over, then the legal process should respect that decision and should not place impediments in the way of a spouse who wants to bring the marriage to a legal end.

This includes removing “*the ability of a spouse, as a general rule, to contest the divorce*”. This promises to be: “*A clearer and more honest approach, that would also be fairer, more child centred and cost effective.*”³ At present, to demonstrate irretrievable breakdown as the only ground for divorce, the petitioner presents the court with one or more of five facts, three of which are fault based (adultery, behaviour, desertion). Otherwise, the facts relate to periods of separation – two years if both spouses agree to the divorce, and five years without mutual consent. Three in five cases cite behaviour.

Under 'no fault' divorce, marriage would essentially be the only contract that can be broken unilaterally without citing any fault by the other party and with no adverse consequences for anyone 'wanting out'.

Various add-ons which are also being proposed have implications for marriage.

1. In the interests of equality, it is suggested that heterosexuals have civil unions to match those available to same-sex couples.
2. To 'address the losses' flowing from other relationships, cohabitees must have rights to any remaining marriage benefits like inheritance and pensions. The judgment of the Supreme Court that a cohabitating woman can receive a widow's pension or her late boyfriend/partner's occupational pension would be a universal entitlement to pensions and inheritance for cohabitees on the same footing as married couples. On the back of an emotive case in February 2017, co-habitants were given rights to pensions; the claims were that their human rights were being unjustifiably denied under Article 14 [ECHR]. Seven million cohabitees may benefit in schemes for public sector workers, like nurses, teachers, police, etc. Under existing regulations, unmarried partners receive a survivor's pension if the pension scheme member nominates their partner for payments and a declaration is signed by both parties. This gives the same rights as married partners.

This paper will concentrate on the implications of the proposals for 'no fault' divorce.

There are roughly three reasons for 'no-fault' divorce, which are inescapably interconnected

1. The overriding – and continually cited – objective is to reduce family conflict by removing the ability to allege fault. This draws on the belief that what is bad or harmful about divorce is conflict. Therefore, reasoning goes, were divorce freely accessible, without reason or cause cited, acrimony would be substantially reduced or annulled, and people could not be hurt. The government's objective is to make the legal process of divorce as painless as possible and bring the divorce process more in line with the wider approach in family law and with the reality of marital breakdown. No fault. No argument. No conflict. Unavoidably under these conditions, marriage is no longer a permanent agreement or bond for life or committed relationship. It rather reflects how people 'change all the time' and, if they become discontented, should be able to leave without impediment and get on with a new life.
2. No-fault divorce would correct a 'common misunderstanding' where people fail to grasp that, while the law prohibits divorce to be granted if the court is dissatisfied that the marriage has irretrievably broken down, responsibility for breakdown is little examined. According to the Nuffield Foundation, public opinion considers that "... *having to assert fault for marital breakdown may help people think through whether divorce is really the right thing to do.*" This myth needs to be dispelled.⁴ To correct the mismatch, law must be explicitly brought in line with practice. Otherwise, according to Sir James Munby, the law is based on "*hypocrisy and lack of intellectual honesty*".⁵
3. There are wider justifications in terms of simply needing to comply with the 'forces of change', 'modernity' or 'going with the 21st century'. Trends are independent historical movements, somehow external to human choices, which cannot or should not be resisted: people must rather adapt to these and respond accordingly. Thus, the present law should be changed because it "*does not serve the needs of a modern society*".⁶

The government's consultation paper and other supportive documents pay little or no attention to any possible effects on the institution of marriage itself and the way marriage is used and viewed in society. There is a general indifference. Sir Paul Coleridge, founder and chairman of the Marriage Foundation is an exception to the rule. His Marriage Foundation emphatically states:

- Will the removal of no-fault make divorce too easy? *No.*
- Will it undermine marriage? *No.*
- Will it prevent saveable marriages from being saved? *No.*⁷

Before these aspects or leading justifications for the proposals are examined in more detail, there are questions to ask about using special incidences or anecdotes to drive policy; something strongly evident in this campaign for no-fault divorce (and co-habitants rights). In particular: why has this been allowed to happen for this issue, and should a specific instance or anecdotal evidence be a driver for significant policy (and, unavoidably, social) change, here or elsewhere?

The use of anecdotes

The House of Commons briefing paper “*No-Fault Divorce*”, and the Ministry of Justice’s *Reducing Family Conflict*, both lead with the case of Tini Owens as seemingly sufficient reason and evidence for significant legal changes regarding a foundational social institution and the futures of millions of people. *The Times* newspaper has repeatedly run her story as one of a tragic victim of outmoded law.

Although Mrs. Owens (65) was purportedly ‘locked’ in a ‘loveless’ marriage, a judge in the Central Family Court refused to grant this petitioner a decree nisi of divorce, even though he accepted that the marriage had broken down. The judge found that she had failed to prove, within the meaning of the law, that her husband – who defended the divorce – had behaved in such a way that she could not reasonably be expected to live with him. The husband (78) had also refused to divorce his adulterous wife under a two-year separation agreement, as he believed their minor rows were part of married life and that the pair should stay together in old age. The Court of Appeal (2017) and the Supreme Court (2018) both dismissed the petitioner’s appeal. The estranged wife had her own resources but was having to wait under the unilateral five years rule. Judges in both courts said that it was for Parliament to change the law.

As the judges ostensibly demonstrated the absurdities of the law by meticulously following its letter, this show case received maximum publicity and spearheaded the recent surge of judicial pressure to overturn present legislation. The paper from the Ministry of Justice outlines how the court is supposed to inquire – in so far as it reasonably can – into the facts alleged by the petitioner of a divorce. With the volume of divorces and few respondents contesting them, the court usually adjudicates the petition at face value. If the divorce is one of the few that are contested, the respondent files an answer and there could ultimately be a final hearing at which evidence is heard from both parties. Most are settled beforehand.

Sir James Munby, when President of the Family Division, mentioned that there were 113,996 petitions for divorce between January 2016 to 2017, with an intention to defend in 2,600 acknowledgements (2.28% of all petitions). Actual answers filed were about 760 (0.67% of all petitions). Something in the order of 0.015% of respondents take their opposition through to a contested hearing.⁸ But if 0.015% is deemed sufficient to

demonstrate the irrelevance of the fault-based provision, is 0.015% sufficient to justify a wholesale overhaul of the law; or does one highly untypical case or demonstration merit drastic legal reconstruction? (This is aside from the issue of the more general disconnection between legal *de jure* precepts and *de facto* practice.)

It has become increasingly commonplace to use suffering scripts, emotive or tear-jerking instances to advance all manner of causes. For example, euthanasia campaigners use meticulously crafted cases involving handicapped or seriously ill people to push for the 'right to die'. This has been described in terms of how: "*The nervous system... becomes the main organ of political activity. It is as feeling creatures that we become susceptible to contagions of sentiment, and not as intellectuals, critics, scientists or even as citizens.*"⁹ Where sentiment comes to influence policy making, this can easily have unforeseen, and potentially harmful and costly, implications.

One (maybe unusual or rare) incidence does not in itself describe day to day or general reality, nor does it provide evidence or proof for any development, trend or cause. An anecdote can be used to illustrate something that has been established by more evidential, objective means but, in itself, it proves nothing. *Hard cases* are always going to be with us and, as once maintained, *make bad law*. The use of the Owens case, or any other, should not constitute justification for the proposed changes. These need proper arguments and reasoned debate which should have precedence over instinct and emotion.

Who is pushing for no-fault?

The present move towards no-fault divorce was initiated in July 2018 by the former President of the Family Division, Baroness Butler-Sloss. She introduced a new private members' bill into the House of Lords: The Divorce (etc.) Law Review Bill was initiated to push the Lord Chancellor into reviewing divorce law in order to move it to a no-fault system. She also wanted to reduce the time the petitioner needs to wait to confirm their application to three months.

The Ministry of Justice's paper (*Reducing Family Conflict*) claims that there "*have been wide calls to reform the law to address these concerns, framed in terms of the existence of a 'broad consensus' to remove the concept of 'fault'*". While the government might have committed itself to the measures, there is little or no evidence of any widespread or popular movement to radically change the law in the manner proposed. The demands are overwhelmingly supported by sections of the judiciary (from where the government has almost exclusively solicited opinion), the judiciary-supported Marriage Foundation (including Baroness Butler-Sloss), and the press (or *The Times*). There is also Sir James Munby (retired President of the Family Division of the High Court of England and Wales); Baroness Hale (President of the Supreme Court), along with the Family Mediation Taskforce;

Resolution (an organisation of 6,500 family lawyers) along with the Nuffield Foundation (which has appointed Sir James Munby as Chair of its Family Justice Observatory).

A debate organized by *The Times* and The Marriage Foundation in August 2018 featured an audience of around 100 lawyers, along with Chairman Sir James Munby and four panellists, including a government minister, all of whom wished to liberalise the laws. In its report, *The Times* made no mention of anything from either of the only two dissenters – Rod Liddle and Baroness Deech.

While this move for no-fault divorce might seemingly have emerged somewhat unexpectedly, it is the latest in a series of moves over the years to achieve the same objective. In 1988, the Law Commission, in its document *Facing the Future*, argued that fault should be finally eliminated as a ground for divorce, claiming that this would contain the hardships involved. Think tanks like Demos have taken up the theme with proposals for time-limited and same-sex marriages (1997).¹⁰ All might be seen as attempts to remedy what is envisaged to have gone wrong with the 1969 major divorce reform. This set up ‘irretrievable breakdown’ as the sole ground for divorce and ended up restoring some fault requirements (see below) as other provisions were found unworkable at the time.

The present proposals are much of a re-run of the enthusiastically supported legislation guided by Lord Chancellor James Mackay under John Major’s government in 1996. This Family Law Act removed the ability to make allegations of fault or conduct to make divorce automatic one year after an application. This originated in the feminist directed Law Commission, which saw no more reason to support marriage than “*any other living arrangement*” (although the enthusiasts made little or no reference to it).

Ostensibly, this “*aimed at reducing the bitterness, hostility and sense of injustice which so often surrounds divorce*” together with the “*damaging impact on all involved*”. MacKay put his faith in mediation and counselling as the first step in initiating a divorce. Therapists would guide couples to a harmonious conclusion, with all their financial and child arrangements sorted, in a curative therapeutic intervention that would annul conflict and avoid awkward matters of right and wrong, judgments and so forth.

Five years on, Mackay’s ‘no fault’ measures were killed off as “*unworkable*”. Pilot schemes – involving six models tested over a two-year period – indicated that, far from eliminating ‘conflict’, mediation counselling heightened animosity and dispute. Indeed “*... for most people, the meetings came too late to save marriages and tended to incline that who were uncertain about separation towards divorce.*” In “*the great majority of cases, only the person petitioning for divorce attended the meeting.*” Yet, “*counselling, conciliatory divorce and mediation depend for success on the willing involvement of both parties.*”¹¹ The absence of evidence for counselling or mediation’s curative properties appears to have little effect on the persistence of beliefs in some kind of therapeutic balm for separation problems.

1.i. No fault, No conflict?

Given how conflict avoidance is the foremost justification offered for current plans, David Gaulk, MP, Lord Chancellor and Secretary of State for Justice, explains how a fault requirement

“...serves no public interest. It needlessly rakes up the past to justify the legal ending of a relationship that is no longer a beneficial and functioning one. At worst, these allegations can pit one parent against the other. I am deeply concerned that this can be especially damaging for children.”¹²

He sees it building on the previous (abandoned) legislation spearheaded by Lord Mackay of Clashfern, who *“led the way for Parliament [in 1996] to accept the principle that people should be able to divorce without any requirement to justify the decision, except to themselves.”* In contrast, the current law sets requirements which *“introduce or aggravate conflict”* and militate against parents continuing to *“work together in their children’s best interests.”* MPs must get behind no fault divorce if they are serious about reducing conflict, says the Resolution Foundation.¹³

However, if divorce is freely accessible, without reason or cause cited, the question is: could acrimony really be annulled? Will people, freed from their ‘mistakes’, float along in a harmonious haze, unconsciously coupling and uncoupling, unhindered by nasty relics like rules, standards and judgements of right and wrong – or not? If anyone can opt out of marriage without even giving a reason, it is unclear how animosity can be avoided and might even be inflamed. People like to know why something is happening, particularly when dramatic changes of fortune are involved. If, for example, a representative walks away from a conference table without giving a reason, what are others to make of this, except as a passive-aggressive instance of rejection or ill intent?

Conflict has many dimensions or aspects (acrimony, rage, anger, accusation, hostility, disagreement, struggle, violence, fight, etc.). Argument and dispute are hardly escapable or removable from the human condition (parliaments and justice depend on these). It is doubtful whether there is any Utopian solution that can remove conflict from human affairs, whatever arrangements are in place, although some procedures might exacerbate or mitigate this more than others.

However, the argument is that as the *“current process allows for divorce on the basis of allegations about conduct..., [it] incentivises this by not requiring couples to be separated for any prior period.”* But would this not apply to divorce for any or no reason? The matter of a separation period between applying for and receiving a divorce often crops up – and may be a good idea for some - but where one or other party is supposed to live in the meantime is not addressed.¹⁴ Others want the period between application and finality shortened. What also seems not to have been taken into account is how conflict may arise or persist after a divorce is granted.

Allegations state that controlling and abusive people contest divorces as a “*means of exercising coercive control or of deliberately seeking to cause conflict*” resulting in “*costly and emotionally draining*” experiences. Is this suggesting that ‘no fault’ divorce means no controlling spouses, when this could be as much (or more) used for exploitation, especially of people in a vulnerable position? For example; “*I am not looking after you now that you are ill/infirm etc., pay me my share of the assets... to start again while I have the chance*”. Where divorce can be unilaterally initiated, the weaker party might be most at risk because they might have more to lose. The removal of ‘fault’ would completely remove any ability of even a much-wronged spouse to assert the other’s bad behaviour where there was significant abuse, addiction and so forth. Those who have been wronged may not want the transgressor to be able to just walk away, because it would be a denial of justice. That there was a drop in the use of fault-based petitions in Scotland when the waiting period for mutual divorce was lowered is hardly a justification for abolishing *any* fault-based grounds, which people are still using.¹⁵

With completely ‘no-fault’ divorce, the weaker party will have more to lose if the other decides to exit and may be put at risk of bullying and coerced agreements. While the commitment made by marriage partners enables them to specialise in certain skills or tasks, or support the other to do so, this might be too risky if it becomes more likely that they could be left at any time without reason or recourse.

While it could be true that allegations that the fault cited in many divorce petitions may bear little resemblance to the actual reasons why the marriage has failed, the signal that is sent by removing ‘fault’ is that there is no available recourse for the party being deserted, abused or betrayed.¹⁶ *Finding Fault* authors purportedly sampled 135 behaviour petitions; 42.2% of which alleged some form of abuse that would meet the cross-government definition of abuse. Such findings are quoted for removing fault-based law - when these might as much or more support retaining it.

The proposals often have patronising undertones, which somewhat infantilise those they claim must be shielded from acrimony or dispute by benign over-seers. There is the argument that, at present, if “*allegations of domestic abuse are made, the divorce petition does not itself trigger arrangements to keep victims and children safe*” .¹⁷ But, should a divorce process “*trigger arrangements*” without the petitioner’s consent or involvement? Moreover, there are safeguards already available; including injunctions, together with child protection services. These may be inadequate or inefficient, but these are problems to be solved for these services.

The need to avoid conflict is particularly emphasised when it comes to the welfare of children. Allegations are that there is a disjunction between blame-based divorce law and attempts to limit the impact of parental conflict on children, where the practitioners are

meant to focus on conduct and blame and then change tack by trying to promote cooperation over child arrangements. It is a problem the Law Commission described in 1988:

The more stressful the divorce process is for the parents the less time and ability they will have to provide emotional support for the children. If there is conflict between the parents, the children may be encouraged to take sides, which may be very distressing for them particularly if arrangements for the future are in issue. Contested custody proceedings increase uncertainty and increase the insecurity felt by many children following marital breakdown... Parents who have been further alienated from each other by the divorce process will be less likely to be able to exercise their parental responsibilities jointly...¹⁸

Apparently, “a legal process that does not introduce or aggravate conflict will better support adults to take responsibility for the own futures and, most importantly, for their children’s futures”. In contrast, the “current law on obtaining a divorce...is not designed with children in mind”. However, if divorce law were “designed with children in mind”, might reasons for separation be restricted to their neglect, ill-treatment or prospects?

It is further objected that any need to make allegations about conduct in order to divorce without a prior separation period “can introduce or increase conflict and polarise children’s views of, and affection for, the respondent parents.”¹⁹ Again, how is accommodation going to be provided or conflict to be avoided – not least over who moves out? Why assume that conflict is introduced or increased because there is no prior separation period, rather than that it was already present or may arise later? What happens when one party has flounced out and/or caused conflict and attempts are then made to establish connection with the children? Some procedures might be more positive or successful than others, but are any guaranteed to go smoothly? Whether or not any do depends upon the previous and subsequent behaviour and circumstances of the adults’ involved. The supportive papers for the ‘no fault’ proposals little discuss other sources or pretexts for conflict, even where these involve child (or financial) arrangements.

Evidence from cohort studies suggests that children may be more adversely affected when their parents smoothly uncouple, with the break-up of a low conflict family more detrimental than that of a high conflict one. As least when there is misbehaviour and/or conflict, the reason is clear, and separation might be an understandable relief. In contrast, children who are not exposed to conflict are more likely to blame themselves when their parents separate or assume that you cannot depend on relationships if these disintegrate for no apparent reason.²⁰ Divorce under these circumstances might represent a major change in what may otherwise have been a secure and (from a child’s perspective) seemingly well-functioning family.

The researchers’ second study considered how parents in low-conflict marriages that end in divorce might differ from other parents before divorce. Findings showed that low-conflict

parents who divorced had fewer impediments and more favourable attitudes toward divorce (and were less likely to have experienced their parents' divorce) and more predisposed to engage in risky behaviour.²¹

Instead of how lower levels of conflict at separation must mean less adverse effects on children – as the opinions of elites have it – a recent European study of 93,000 people rather suggests how low-conflict divorces will mean worsening prospects for children. Here, the adverse effects on children of experiencing parental separation were stronger, not weaker, in more recent birth cohorts where divorce was more common. As divorce became easier and more acceptable, it seems that more couples separate at lower levels of conflict compared to when only those affected by more severe problems split-up. Consequently, the average effect of breakup becomes more negative.²² Should couples start believing that they must separate early to save their children from exposure to conflict, *the “unforeseen consequence of generating more low conflict divorces will be more, not less, net harm for children”*.²³

The importance attached to conflict in this divorce debate is confined to that occurring at marital break-up. This ignores how cohabitations break-up at far higher rates and are not immune to conflict – rather the reverse. Cohabitations are four times as likely to break-up as marriages (around three times more likely by the time a child is five and with a four to six-fold difference by 16 years), accounting for around a fifth of couples with dependent children, but a half of family breakups. As significant and growing numbers of children now live in cohabitations, this makes a strong contribution to how around a half of 15 year-olds have experienced parental separation.

How would no fault divorce, even in the unlikely event that it removed or reduced conflict for marital breakups, deal with its far higher prevalence in the growing numbers of cohabitations, or lone parents' relationships, domestic or otherwise? Conflict in informal, casual and temporary relationships, is far more likely to merge into the abuse of women and children.

It might be imagined that men can 'parent' their offspring without being resident spouses or in any relationship with their children's mother(s). What does not appear to have been considered is what happens when the father drops in on his child's household where the mother has a new live-in 'partner'. Might this also be a recipe for conflict? There are also the secondary considerations of conflict for neighbourhoods, and society generally, if boys are without resident, permanent fathers and men lack settled family responsibilities. These are reasons why societies have assigned men to particular children through marriage.

There is no recognition from the advocates of no-fault divorce that the breakdown of parental relationships, or the leaving or absence of one parent can be detrimental to children's development in numerous ways. More separation means more children facing a

whole range of adversities; irrespective of conflict. If ‘no-fault’ legislation beings about a decrease in marriage rates or a rise in divorce levels (see below) – however much both may be denied - problems will be enhanced, not reduced.

2.i. No fault, no rules?

At first sight, the proposed ‘no fault’ divorce resembles the Muslim custom of ‘triple Talaq’, which gives divorce to the man who says, ‘I divorce thee’ three times. This has been found in breach of human rights by courts in India. Present proposals here are more egalitarian, where ‘I divorce thee’ or ‘I want out’ is registered once, not three times and by either sex.

“We believe that making sense of the cause of marital breakdown is not a legal question for the court but a personal matter only for the people involved to reflect on” says Reducing Family Conflict. This is at odds with another assertion that: “Marriage is a solemn commitment, and the process of divorce should reflect the seriousness of the decision to end a marriage.”

Similarly, the Marriage Foundation talks of how:

“...the secrets of making marriage work lie in commitment to one another, in men talking responsibility for the well-being of their marriage, and the way we treat one another with kindness and forgiveness. Do that and we can reduce family breakdown significantly.”²⁴

It is at odds because a commitment is a binding agreement involving obligations which restrict freedom of action or personal ‘choice’ and not something that can be discarded at will or whim or just *“a personal matter for the people involved to reflect on”*. This prescribes altruistic duties of care and loyalty and cannot, by its very nature, be reducible to a *“personal matter for the people involved”* and their current feelings or circumstances. Social beings create institutions to embody and carry on systems of meaning, which exist independently of individual consciousness to provide authoritative reference points; often involving a public pledge or demonstration made in the presence of significant others. Not least, it is through marriage that fatherhood ties a man's position in the wider society to the performance of family duties.

A couple commit themselves not only to “each other, but to the wider society; to continuity with the past through the joining of two families; and to responsibility for the future in the form of their children.”²⁵

The similarity between the rationales for no-fault divorce and the precepts of prominent intellectuals like Anthony Giddens (advisor to Tony Blair; in the House of Lords for Labour and with over 15 honorary degrees) and Jeffrey Weeks is striking. They have promoted the ‘Third Way’, where commitment and belonging are relinquished in exchange for a world of

diverse, fluid and changeable 'pure relationships', which are unconstrained by dependencies or anything beyond the 'project of self'. Completely unregulated by rules or external standards, these last only so long as the parties feel they are getting the right levels of satisfaction in 'families of choice' where living arrangements are open to innovation and experimentation.²⁶ People choose or create their own forms of associations, unbiased by any social or economic pressure to conform to any particular pattern or social convention, with all responsibilities freely entered and freely relinquished. Any roots of male and parental power are cut in exchange for an 'equalised interpersonal domain'.

How children are meant to fit in here is little considered, apart from suggestions that parents - two, three, four or more - could make contracts and negotiate parental authority with the child. Presumably, if the 'parent' or child can terminate a contract, would this be on agreed or imposed terms, or a matter of unilateral choice – like no-fault divorce? What tends to happen with the retreat of marriage is that more responsibility devolves to officialdom which, often with increasing bureaucratic complexity, oversees child rearing or creates substitutes for familial care. Where parenthood is not produced by marriage, it has to be separately recognised in legal and administrative terms, or fragmented into various aspects that are allocated or distributed among 'parents', guardians, 'carers' or 'care-managers'.

While increasing divorce might seem inseparable to the personal choice model, this is countered by those from the Marriage Foundation who insist that freeing people to divorce unilaterally will strengthen marriage. However, the presentations for 'no fault' divorce fail to explain what a "*solemn commitment*" in marriage is really a commitment to. If matters like adultery, desertion and bad behaviour are removed as reasons for divorce, then sexual faithfulness, mutual care, co-existence and consideration are hardly required for marriage any more or less than any other criteria. It certainly looks as if people are released from responsibility and any vows they might have made – should these still exist. Is the presumption *really* that everybody will or can just make up their own rules as they go along or behave as their inclinations take them? Will marriage be automatically, for example, construed as 'open' to concurrent sexual relationships if this is the personal preference of a partner, where the other can walk away if they object that this isn't their scene?

In turn, if divorce should reflect "*the seriousness of the decision to end a marriage*", how is the seriousness of that decision present in being able to opt out without giving any reason? There is no "*solemn commitment*" present if the "*law should respect people's autonomy in decision-making at the end of a marriage as much as at its beginning*",²⁷ 'Right' simply becomes whatever I do, and whatever I do is right – an oxymoron from start to finish.

As the only basis for marriage becomes personal inclination, and where everyone can exit at any time and with no guidelines or requirements, this can look like a recipe – not only for conflict – but for chaos and insecurity. Can removing rules for living make people happier, rather than increasing apprehension about relationships that could turn to aversion and

avoidance? Promises of greater 'choice' may entail people living from day to day with considerable ambiguity about the nature of their relationships and greater possibilities of abandonment. Rather than freedom bringing more control, in the absence of obligations and constraints this intensifies the sense of estrangement and powerlessness. All societies have restrained selfish behaviour in various spheres in one way or another because it really does not work to any good, personally or communally. A distinction between marriage and cohabitation – which helps to explain why cohabitations break down more often and more quickly compared to marriages – relates to how cohabitation has no forward trajectory compared to marriage, where there is a conscious step over the line into commitment.

There is said to be no intention of imposing the 'responsibilities of marriage' onto unmarried couples. Instead, the intention appears to be to remove responsibilities from marriage itself, which, as it become one with cohabitation, ceases to exist. If anything is marriage, nothing is. The ability to exit if happiness is not forthcoming and the possibility of improved chances with a new partner means anyone can keep a foot out the door ready to jump if another opportunity comes along, or run in the event of an untoward burden or difficulty. There is no trial run for commitment but, in its absence, relationships lack pointers to the future and structures to hold them together in difficult times.

With no pressure to work at the relationship, it may seem easier to withdraw and start afresh rather than to repair what is already there and perhaps address difficult issues, with exponents of 'no-fault' appearing to agree. The grass often looks greener in the next field. Against this are the regrets of those who wished they had made more effort to sustain or repair their relationship. This is more likely to happen in the presence of restraints, not the removal of impediments. Perseverance through marital problems is predicated on marriage being permanent, and even in the midst of troubles, it is worth keeping.

A wider question arises of whether an individualism which sets itself against the family by relinquishing commitment ends up producing atomised and alienated people unable to accept responsibility for their own lives because they easily acquit themselves of responsibilities for others? Interestingly, feminists have raised the alleged 'sex recession' among young people, because sex killed love, *"and now we are asking what killed sex, when quite clearly it has died because of the absence of love on which it thrives."* The result is *"the unwilling celibacy of the modern age, which seems to include pornography and onanism, a sexual relationship of one"*. This is seen as *"... the logical outcome of the modern religion of self, blared from every advertisement and taught in schools..."* or the 'project of self' where, as people treat each other as objects for their own fulfilment, they do not like it when they are treated the same way; consequently, there is an anxious avoidance of relationships.²⁸ This does not predict well for marriage rates.

What is not covered in the proposals is if, unlike cohabittees, the married will still have a legal duty to support each other financially, and cannot be forced to be a witness for the

prosecution if their spouse is involved in criminal charges (except in cases of domestic violence or abuse of under-16s)?

2.ii. A misunderstanding?

A further aim of 'no fault' divorce policy is to bring law into line with practice. This proposes to remedy the disjunction traceable to the watershed legislation of 1969. Initially, the belief here was that marriages simply died and 'experts' in marital mortality would identify the 'hollow shells'. Officialdom could only be responsive; operating a tidying up process rather than setting standards or upholding norms - which were a primitive irrelevance now that morality was being seen off by what passed for science. There was widespread optimism for a therapeutic view, which was also present elsewhere, as with 'treating' criminality. It was soon realized that the 'experts' did not exist or could not be found. In the event, the notion of an 'irretrievable breakdown' was identified by resurrecting old conduct reasons for marital dissolution - adultery, desertion and unreasonable behaviour – with the addition of two or five years for mutual or unilateral separation.

The end results might be seen as a mishmash of non-judgmental, determinist pseudo-science, where marriages 'naturally' died, with behaviour criteria rescued from the old moral order to act as causes. It was the turning point in the fortunes of the family. Marriage became terminable without much official intervention and conduct was only deemed relevant or examined in extreme cases. This gives rise to the accusations of hypocrisy and duplicity, as most contested cases are settled out of court, rather than decided by a judge. According to the paper for the Nuffield Foundation: *"The court's willingness to accept the results of some deals appeared intellectually dishonest, even if it did bring an end to a damaging dispute."*²⁹ This might also be read as a description of how legal practice had found a way of reconciling the presence of marital rules with the alleviation of conflict.

It was famously said (La Rochefoucauld) that *"hypocrisy is a tribute vice pays to virtue."* The hypocrite who says one thing but does another, says it because he knows it is right and recognizes virtue as the preferred option. The crucial matter here is that the law, hollow or not, sends out messages. Many laws are not strictly enforced, awkward to apply or easily broken but, rather than removed, they still tacitly provide people with rules or indicators for what is unacceptable to do. The law signals or conveys what marriage entails and what breaks it. Across human societies, important human ties, like those required for mutual support and generational continuity, require publicly validated or avowed obligations, or commitment, loyalty and responsibility – otherwise there are no guidelines or directions to abide by, no road-maps for life.

The parliamentary paper *'Finding Fault'* records that majority public opinion considers that *"... having to assert fault for marital breakdown may help people think through whether divorce is really the right thing to do"*. Indeed, in the only national opinion survey carried out

for the Nuffield Foundation, 71% thought that fault should remain part of the law. This finding is dismissed as the product of the public's ignorance, since they are *"unlikely to be aware that the current law does not in fact seek to make a definitive allocation of blame or of the very limited scrutiny that the court can undertake [of petitions] in practice."*³⁰ Once rid of their misconceptions, people would presumably then support what others insist that they really wanted all along. Claims about the *"broad consensus"* for no-fault are somewhat at odds with others about a public who need disabusing of their beliefs about the law taking matters of matrimonial misconduct seriously.

There is the possibility that the general public might actually think that something as important as the binding commitment of marriage should not be discarded or meddled with in such a fundamental way. However much the public may be dismissed as misconceived, this is what people see as necessary and valid, even if they might be construed as trading off the inherited capital of previous generations (something that is bound to diminish as more children are reared in homes with no or sequential relationships).

The *Finding Fault* paper goes on to say that any *"concern that 'no-fault' divorce would weaken the public's perception of the status of marriage is not borne out"*. This is apparently because studies show that marriage is highly valued by the public as an institution. This is followed by the claim that there was no evidence *"... that finding fault was protecting marriage"* when they had just quoted the public's (potentially erroneous belief) that fault was being taken seriously. Moreover, what people perceive today is not what will be tomorrow when the law has expressly dropped all mention or notion of fault and, presumably, has ensured that the public fully get it! The level of reasoning here is shocking.

If people are misinformed when they believe the law is serious about basic rules of marital behaviour, not least through the existence of the fault principle, then this is as much -or more – an argument to bring practice more in line with common expectations rather than the reverse. The problem that *is* often cited by those involved in divorce is unfairness or injustice – or the lack of proper application of the fault principle, not its existence. The betrayer or transgressor is not disadvantaged or punished, but may benefit, not least from the division of assets. Why are those who insist on believing in serious grounds for divorce the ones to be disabused of their assumptions, rather than those who want to be rid of any justifications?

If the idea of marriage still haunts many people's moral understanding as a special contract or tie not to be repudiated without just cause or profound consideration, yet it is one that the law has seemed disinclined to enforce, then perhaps it is the law that should be – in Sir James Munby's words – *"disabused of its unsound perception"*. That legal proceedings do not have the time to examine divorce claims in detail is a separate matter, and does not constitute an argument to ditch the need to cite no grounds in the first place. There are the words of the 1956 Royal Commission on Marriage and Divorce – this was a response to

attempts to extend the grounds for divorce and morality's last stand in this field: *"people have good and bad impulses and we conceive it to be the function of the law to strengthen the good and control the bad"*.

3.i. The right side of history?

It is frequently insisted that we have to 'go with the 21st century' or 'modernity' as when Michael Fabricant MP insisted the Church of England *"fully embrace the 21st century"* or *"get with the times or get out"*.³¹ No-fault divorce is a part of this obligatory process. Sir James Munby, president of the Family Division of the High Court, finds the pace of change *"maddeningly slow"* when it comes to law adapting *"to the new realities"* of family trends, when he considers how no-fault divorce and giving marriage's remaining benefits to cohabitantes are *"inevitable"*. Nearly three decades back, Polly Toynbee was similarly declaring how:

*"...women and children will suffer needlessly until the State faces up to the reality of its inability to do anything about the revolution in national morals, what it can do is shape a society that makes a place for women and children as family units, self-sufficient and independent, protecting children as effectively as possible for the worst effects of divorce."*³²

The decline in two parent, married families is frequently cited as indicative of a moribund institution whose collapse must be welcomed, not least because the 21st century is now telling us to bin it. Along with forecasts of its inevitable demise, stereotyped accounts of the two-parent family's unrepresentativeness have been repeated *ad nauseum* in social science and policy documents, by politicians and media. Nick Clegg (Deputy Prime Minister) spoke of the 'open society' (19.12. 2011) as one where:

"The institutions of our society are constantly evolving. ... We should not take a particular version of the family institution, such as the 1950s model of suit-wearing, bread-winning dad and aproned, homemaking mother - and try and preserve it in aspic."

There are the roll calls of the clichés:

"There never was a golden age of the family [who said there was?]."

Lone parents and unmarried couples raise their children every bit as successfully as married parents.

What we need to acknowledge is family structure has become more complicated... without trying to turn the clock back..."

(Supporting Families: A Consultation Document of 1998 London Home Office.)

This goes back to how Edmund Leach (1967) described the 'cereal packet image of the family' or an imposed "*socially constructed model laden with assumptions ...of what a family should look like...*" compared with authentic unmarried, lone or same-sex parents. This has featured over the decades in A level Sociology courses.

In 1984, comment is that: "*We continue to hold as an ideal the parent family, even though fewer and fewer families actually conform to the ideal of mother, father and biological offspring.*"³³ Where are these non-parent families and at a time when family dissolution and unwed birth rates were a fraction of today's?

Forward to 1991 and there is the declaration that:

*"... the emerging pattern indicates that the old family standard of father, mother and children living under one roof is a social trend of the past. Last year only a quarter of households consisted of a married or cohabiting couple with dependent children."*³⁴

Are there supposed to be no older post-child-rearing or pre-childbearing people around in modern societies with their long life expectancy and low birth rates? The plurality ratcheted up to eclipse the conjugal family might be stages in the life cycle or where anyone happens to be at any point in life. Alternative 'families' include those 'living apart together' (LATs) and what would have once been described as boy and girl friends or courting couples.

In 1999, there are the researchers from the Economic and Social Research Council jubilant that:

*"There are more opportunities and more choices: marriage and re-marriage, cohabitation prior to or instead of marrying, lone parenting, non-heterosexual couples and families, young people and the elderly living alone."*³⁵

By 2017, Tabitha Freeman at the Centre for Family Research at Cambridge University is claiming how: "*elective co-parenting has been more prevalent among gay men and lesbian women*" and with a recent "*increase in co-parenting arrangements among heterosexual men and women*" so de-coupling romance and marriage from having children was a positive or "*modern way to create a family*" which was now in its planning stages.

In his address at Liverpool University in early 2018, Sir James Munby saw the conjugal family being replaced by an "*infinite variety of forms*" or multifarious living and somewhat random breeding arrangements that purportedly reflect the will of the times – Anthony Giddens world come true:

“People live together as couples, married or not, and with partners who may not always be of the other sex. Children live in households where their parents may be married or unmarried. They may be brought up by a single parent, by two parents or even by three parents. Their parents may or may not be their natural parents. They may be children of parents with very different religious, ethnic or national backgrounds. They may be the children of polygamous marriages. Their siblings may be only half-siblings or step-siblings. Some children are brought up by two parents of the same sex. Some children are conceived by artificial donor insemination. Some are the result of surrogacy arrangements. The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what, until comparatively recently, would have been recognised as the typical nuclear family. This, I stress, is not merely the reality; it is, I believe, a reality which we should welcome and applaud.”³⁶

What might illustrate Munby’s opinions is Birmingham’s Centenary Square’s receipt of Gillian Wearing’s statue of A Real Birmingham Family in 2014. Two women, one pregnant, hold hands with two boys. A plaque *“celebrates... what counts as a family...”*, wearing wanted *“to show a ‘real’ family to people, rather than an abstract notion foisted upon them”*.

Equality is not at issue here, but the selection of a particular ‘family form’ for derogation. Nor are Munby and other jurists alone when, for decades now, the conjugal family has been mocked and dismissed as unrepresentative, ridiculous and outmoded. Only increasing trends qualify for approval and encouragement, irrespective of the proportion or representativeness of their participants in the overall population, or their respective social benefits or deficits. Yet, while proportions may have fallen, just over 50% of children are still born to married couples. Whether or not some see these as participating in *“an abstract notion foisted upon them”*, there are far more than those living in Munby’s threesomes with ‘partners’ of any sexual mix, or whose offspring who are the results of donor insemination or surrogacy.

Should something merit applauding and promoting simply because it is increasing, and similarly for hastening the end of something that is declining, independently of whether it be socially or otherwise beneficial? If knife crime, murder or road accidents are increasing, does this create duties to welcome and/or advance these as aspects of ‘modernity’? If cannibalism was appearing as a ‘practice in society’, would it be necessary to underwrite it as a social standard? In the 1930s, should everyone have gone with ‘Great Spirit Fascism’? If not, why is it necessary or obligatory to go with some developments and not others? Or choose to tackle anything, like climate change – for instance? Clearly, there is selection, not compulsion, going on when some movements are meant to be reversed and others cheered on.

There are no movements or forces out there which oblige anyone to obey. The ‘21st century’ (or any other) label, relates to ways humans calculate the passage of years. There have been

those like Karl Marx and others who espoused teleological theories about societies going through predetermined and irreversible stages. The overthrow of capitalism and the advent of the proletarian revolution was, for example, 'inevitable' and, therefore, something inherently worthy that must be complied with and helped on its way. The more scientific rather see a multitude of independent actions, influenced by the surrounding conditions.

The flippant uses of expressions or clichés like 'going with the times' or 'modernity' are usually short-hand ways to endorse developments which avoid the need to engage with proper explanations or justifications. That something is happening should not automatically command obedience. That something is declining does not signify that it is superfluous or negative, or cannot be resisted or reversed, and it may be an evasion of responsibility to claim otherwise.

On the reckoning that notions of 'fault' must be dumped as 'out of date' or 'antiquated', does it not follow that all judgement and consequences for conduct should be relinquished? If it is 'completely out of date' to decide whether behaviour is 'unreasonable', or to believe that promises have meaning, this denies any normative basis such as might be necessary to direct and circumscribe human choices. Calls to follow the trend might themselves reflect how accountability and responsibility for actions are presently at an all-time low. Even if this is the case the answer is not to ratchet up the effects: authority has a responsibility to implement laws and policies for the common good, not to collude with harmful social trends.³⁷

3.ii. Is Law Powerless?

Given the pretext that law cannot affect people's behaviour, but only reflect it, the government's consultation paper paid no attention to how its proposed moves might influence attitudes to the institution of marriage and affect its social reputation or status, the take-up rates or possible future levels of breakdown. As *Reducing Family Conflict* maintains:

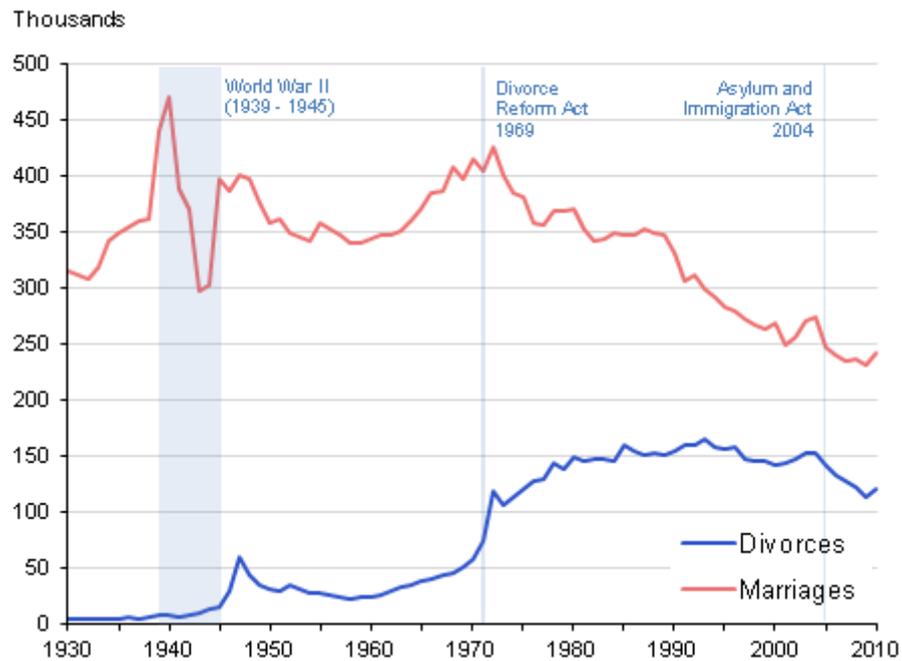
"We have seen no evidence that the decision to divorce is taken lightly. At the point of petitioning or instructing a solicitor, most people's minds appear to be made up. We do not think that the requirements of the law deter people from divorce, only that they make it an unnecessary confrontational process. It appears that most people do not know what the law requires until they go through divorce themselves. There is no evidence that the decision to divorce is attributable to the requirements of the law."

In words reminiscent of the debate leading up to the legislation of 1969-70:

"When a marriage has broken down irretrievably, it has become a marriage in name only. It does no service to the institution of marriage to impose requirements which

frustrate the dissolution of this empty shell [sic] and which can aggravate family conflict beyond the completion of legal proceedings.”³⁸

Following the 1969 reform, there was a surge in divorce which – whether for good or ill – is difficult to separate from how it had been made much easier.



The change had been furthered by claims that burying the ‘dead marriages’ would cause a marriage resurgence and all would proceed healthier than before. Clearly, the opposite ensued, with a precipitous and persistent drop in marriage rates after the peak of 1971, accompanied by more single parenthood and cohabitation, as people increasingly resorted to informal unions of convenience. Might it be that reform changed marriage for everyone, not just the ‘hollow-shells’, shrinking its status and guarantee?

This does not deny that factors other than the fall in marriage’s solidity and reputation might be instrumental. Not least, it progressively became an economic liability; especially for those at lower income levels. It is significant that, with the 1969 reform and the following divorce surge, welfare policy shifted towards providing for lone parents rather than two parent families. The Finer Committee on One Parent Families was set up in the late 1960s to decide how lone parents might be supported after marital breakup. It observed that, as courts, churchmen and governments no longer seemed prepared to uphold moral standards as restrictions on the freedom to divorce were being significantly eased, so it was also irrelevant that provision for single parents needed to avoid undermining marriage. Not many men could support multiple sets of children, and to expect those involved to meet the conditions of the bill to *“impose a stricter standard of familial conduct and sexual morality upon the poor than it demands from others”* seemed unreasonable. Since this was intolerably inegalitarian, dependencies *“must fall upon public funds”*.³⁹ The state moved to

meet the housing and financial support of lone parents – first, as ‘casualties’ of marital breakdown and then as single mothers.

Advocates of ‘no-fault’ adamantly insist that divorce rates *did not increase* following the passing of easier divorce provisions in the UK or after no-fault legislation anywhere else. Paul Coleridge claims that the 1969 upheaval had “*absolutely nothing to do with the subsequent exponential rise in divorces over the following decades*”.⁴⁰ *Finding Fault?* dismisses ‘early’ studies from the US and Europe which suggested:

“... that divorce law reform, especially no fault and unilateral divorce, might raise divorce rates...[as] there are now multiple studies, especially more recent studies, finding no effects or only temporary effects. Indeed, those earlier studies have been subject to serious methodological criticisms on three main counts.”

This has not avoided criticism that the more recent studies have been misrepresented or played down to justify easier divorce. These tend to show a sharp upward movement in divorce when this is made easier, which can be considerable when it is combined with procedures that reduce the duration of the divorce process.⁴¹ Divorce levels may then stabilise or reduce somewhat over a decade, but any falls may be illusory when marriage rates are dropping and reducing the population at risk of divorce.

When the ‘no effects’ model cannot be sustained, fault adherents have dealt with this by belittling the consequences or resorting to an “*only temporary effects*” interpretation where “*society can tolerate a short-term spike in divorce rates*”.⁴² The Marriage Foundation speaks of “*clearing the backlog*” which is “*compelling evidence that reducing the no-fault waiting time ... will have no effect on divorce rates,*”⁴³ when it clearly did have an effect. This is in reference to the upward spike in divorces in Scotland when the law changed in 2006 to lower the waiting time from two years to one where both parties agreed. After the surge, the rate then trailed back to long-term levels.

To be considered is how people experiencing difficulties may be more likely to bail out if speedy options are suddenly available, instead of trying to make marriages work. Children will experience their parents’ divorce when they might not have done in the absence of a change in the law.

The downplaying of the effects looks irresponsible when, given how divorce rates remain high, introducing public policy measures to make divorce even easier will either do nothing to stem the flow or could encourage higher levels, even if just over the first ten years. Moreover, what the Marriage Foundation regards as the insignificant aftermath of lowering the mutual waiting period in Scotland cannot translate into the prospective impact of completely ‘no-fault’ unilateral divorce when this is not yet available.

Substantial declines in marriage rates are recorded everywhere following easier divorce.⁴⁴ Nowhere are there “*good reasons why this is actually supportive of marriage*”, as the Marriage Foundation also insists will be the result of no-fault divorce. Ironically, this organisation has repeatedly spoken of a crisis of family disintegration.⁴⁵ This is apart from the contradiction between the propaganda that marriage will be reinvigorated by easier divorce and claims that divorce levels are totally unrelated to divorce laws – and wider assumptions that marital and familial patterns are immune to external influence. If there is going to be a move in any direction, it is almost inconceivable that ‘no fault’ divorce can do anything other than weaken or essentially abolish the institution of marriage by making it a temporary or non-binding agreement which can be ended whenever anyone wishes.

The rise in non-marriage is likely related to how insecurity undermines inter-dependence and mutual support.⁴⁶ If little is invested, there is less to lose. Most of the worse-off families do not get married. Marriage has been largely extinguished from the lower income reaches of society. The Family Resources Survey (between 1994 and 2013) shows that, for mothers with children under five, 87% in the highest income deciles are married compared to 24% in the bottom two. Since the mid-1990s these proportions have remained largely unchanged.

The influence of divorce may be one of the factors driving up the age of first marriage, which people are now more likely to enter with great caution and good self-provision later in life. Divorce rates have fallen somewhat in recent years in the UK, even if they remain generally high, as marriage tends more and more to be a prerogative of higher income and educated older people. Interestingly, there has been no suggestion to refrain from meddling with divorce legislation if divorce rates are already falling.

Family disintegration: consequences and responses

4.i. The real problem?

Almost half of all births in England and Wales are now to unmarried mothers compared with 12% in 1980 and 6% in 1960 and, as the size of married families’ contract (as more couples have only one child), those of single parents expand (with more children born in sequential relationships). There is an increase in the proportions of women having a child outside of any ‘co-residential partnership’ as much as within cohabitations.⁴⁷ At present, around a quarter of children live with a lone parent in Britain. Another result is how nearly half of all today’s teenagers (13 to 15) are not living with both natural parents and a child born today may, on current trends, have less than a 50/50 chance of continually living with their original parents.

Britain is at the bottom of the developed world league table for family stability, almost entirely due to the decline in marriage or formal commitment. By the time a child reaches 12 years, around two-thirds born to unmarried cohabiting parents will have experienced

parental transitions, whether in or out of a relationship. By five years of age, 48% of children in low-income households are not living with both parents, compared to 16% in middle to higher income households. Across Europe, couples who don't marry are far more likely to split up than those who do, even after controls for age, education, religion, partner and parental divorce, and the presence of children. Even the poorest 20% of married couples are more stable than all but the richest 20% of cohabiting couples.⁴⁸

Deteriorating home circumstances are reflected in the rising care population and those considered to be 'at risk', on child-protection registers or the subject of protection plans. Most children who enter the care system come from lone parent homes, and a significant proportion of young prisoners, teenage parents, addicts and prostitutes come out of the care system.

Over the decades, what has become a mountain of research shows how it is best for a child to be raised by its married parents, who rear healthier, happier and more successful offspring in all measurable aspects. Such overwhelmingly mono-directional and constantly repeated findings are truly rare in social research. These show how children born or adopted and raised in an intact marriage are not only more apt to avoid the care system and the risk register, but criminal behaviour, psychiatric problems, drug abuse and expulsions or suspensions from school. They are likely to achieve more educationally, become gainfully employed, avoid young parenthood, and rear the next generation in stable families.⁴⁹ The poorer relationships quality of cohabitations affects the next generation's dating behaviour, marital quality, odds of marital dissolution, levels of psychological stress and educational attainment for the worse.⁵⁰

This applies across the world and includes countries like Sweden which have strived the most to make lone parenthood fully functional (boys with lone parents are five times more likely to die from drug or alcohol abuse and more than four times from violence).⁵¹ Most adverse outcomes usually have roughly double or treble the prevalence among children not with original married parents. There are exceptions, like abuse and homelessness where the rates are considerably increased. Babies and children are disproportionately killed or abused by stepfathers and – even more – by mothers' boyfriends. A classic study found that pre-schoolers in step-parent homes had an estimated fortyfold risk of being abuse victims than same aged children with two natural parents.⁵²

Where there are less involved parents, children are more likely to have inadequate supervision, fewer adult role models, and less intergenerational relationships. This is not just because the lack of one parent puts far greater burdens upon the remaining one to perform all family tasks. The one parent may also be distracted by their dating and searching for relationships, which will often be with men who have no ties to the children of the household. Father absence can mean the presence of a stressful or conflicted childhood environment and, combined with the presence of unrelated men, girls are more likely to

experience early puberty and sexual involvement, along with higher rates of coercion.⁵³ Because they lack the control and example of older males, father-free boys are more likely to be aggressive, risk-taking and to enter the world of gangs, drugs, knives and courts. Gangs offer the immediate social connections and protection that families, schools or welfare departments cannot provide.⁵⁴

Conflict and abuse are at their worst in homes with 'multi-partnered fertility' where mothers have offspring with a sequence of uncommitted men. Despite all the propaganda that marriage is a licence for abuse, married women's victimisation rates are far lower than those of cohabiting or single women. Boyfriends and cohabiters may be more violent than husbands not least because, along with uncertainty over paternity, they have less to lose or invested in the relationship.

There are benefits for married adults in terms of lower all-cause mortality, compared to the single, separated or divorced, with better physical and mental health and less addiction.⁵⁵ This applies to all ages and both sexes, even if there may be a greater effect for men and is seen throughout the economic and ethnic spectrum. Controlling for personality and health risk behaviours reduces but does not eliminate the impact of marital status on health. Again, despite Sweden's reputation as a welfare and equality pioneer, their lone mothers' health is similar to Britain's, with rates of limiting long-standing illnesses 50% to 60% higher than those for 'couple mothers'; something which increases over time and declines for poor 'couple mothers'.⁵⁶

Beyond the home, there are problems of social cohesion and control where more men are not formerly bound to families as responsible husbands and fathers. The biggest factor in reducing recidivism or criminals' reoffending rates, or the largest reformatory, is marriage (followed by work and military service). As the longest running studies of criminality show, this transforms predators into protectors and providers.⁵⁷ That criminals are taking longer to withdraw from crime as they age is probably due to the absence of marriage in the communities to which they return after imprisonment.

Disengagement or detachment from work and marriage are leading causes of the disintegration of neighbourhoods. Unattached men are more likely to be a threat and a burden, or to leech and prey upon communities rather than uphold standards.

Married families have been heavily disadvantaged by the tax and benefit system but are still far more likely to better their lot than lone adults or those in transient, informal relationships. While policy makers are focusing more on inequality, the advantages of marriage here are quite disregarded.

4.ii. Family stability; encouraged or discouraged?

If something resembling the disastrous aftermath of prolific family break-up was due to other forces governments might have hastened to address the source of the problems. The claims on the public purse alone were estimated as nearly £48billion (2016) in terms of benefits (principally for lone parents), housing, educational services, civil and criminal justice, health and social care, with a bill for the tax payer of around £1,820 per year. Also to consider are the foregone productivity and tax receipts and a host of other costs, which mean less money for other areas. The whole of society is affected when the marriage contract is weakened or voided.⁵⁸

To better secure the well-being of future generations would mean more durable marriages, along with less cohabitation and out-of-wedlock births. Evidence is hardly lacking where, if policy makers had the least respect for facts, they would address the matter of how best to encourage a greater percentage of people to get married before they have children and stay married while raising them. Anybody seeking solutions to present-day social problems – even to reduce the nation’s financial burdens – should support marriage. The proposed reforms discussed here focus on avoiding strife over divorce fault allegations; completely disregarding its far higher rate for cohabitations.

It is not as if the refusal to act is because it has been proven impossible to address the causes or attempts have failed – it is that there have been none. It has been usual for those in positions of responsibility to flatly deny the evidence about the differing outcomes for different ‘family forms’. As Harriet Harman (Labour’s former deputy leader) claimed:

*“There is little evidence to support the assertion (increasingly common of late) that lone parenthood – or lone motherhood – is itself a direct cause of under-achievement of children, juvenile delinquency, crime or general social disintegration.”*⁵⁹

Harman later insisted:

*“I’d ban them [politicians] from going on about how important marriage is and how damaging divorce is. I’d ban sneering at lone mothers too. The mean message it sends to their children is, “There’s something wrong with your family and therefore something wrong with you.”*⁶⁰

Despite the evidence for the outcomes of various family forms being so one-directional and repetitive, political and academic elites have found one reason after another to deny that the advantages for children reared by two married parents have anything to do with family structure. For a long time, differences in outcomes have been attributed to income differences, although research invariably controls for these.

Family structure may also be held to be irrelevant compared with ‘parenting’; seen as something separable that can be of the same quality or standard irrespective of household

arrangements or transitions. The Green Paper *Every Child Matters* (2003) and the Children Act (2004), promised to support the ‘needs’ of all youngsters with services provided by the state as any connection was denied between adult relationships and child well-being. As Minister of State for Children, Young People and Families (2005 to 2009), Beverly Hughes declared: *“What children need is not marriage”;* rather, they need *“love, stability, financial well-being and positive parenting.”* Alan Johnson, Tony Blair’s Secretary of State for Education and then Health, opined (2007) that the *“focus should not be on whether people marry or not, it should be on the welfare of the child and the quality of the upbringing”* – but this ignores how both may be helped or hindered by the household composition.⁶¹

The *Families in Britain: an evidence paper* (2008) claimed that the *“quality of relationships and families circumstances have a greater effect on outcomes than the legal structure of the family”* where *“all types of family can, in the right circumstances, look after their family members...and, for their children have high hopes and the wherewithal to put them on the path to success.”* What are these *“right circumstances”* and how are they produced? And if *“it is not being a lone parent itself that is problematic but rather the relationship problems that led to breakdown,”* might not one be more closely related to the other than if there had been a public commitment made?⁶² If boats with holes sink, what would be made of claims that this has nothing to do with their hulls, but the extent to which they took on water?⁶³ Recently, the explanation has it that the benefits of a married family stem from the kind of people who marry. In the absence of marriage, and therefore knowledge thereof, would it need a particular personality to make it up from scratch? Longitudinal research suggests that, for example, the lower levels of mental well-being that characterised cohabiters are not due to the types of people who choose to cohabit rather than marry, but the high relationship instability of cohabitations.⁶⁴

The refusal to recognise marriage has meant the systematic removal of support over more or less four decades, with discrimination against two parent families in the tax/benefit system. With antagonism towards mutual support and inter-dependence as patriarchal and oppressive, the only acceptable arrangement has been for both partners to be in work and children in subsidised child-care.

At the average OECD wage level the tax burden on one-earner married couples with two children is 30% higher than the OECD average in 2017, but lower for single people with no family responsibilities.⁶⁵ The one earner married couple with two children pays 85% more income tax than the French family; more than twice as much as the US family and eleven times as much as the German family. The higher rate income tax threshold has also fallen lower in real terms since the 1990s, and many families, particularly one-earner families, who would have paid only basic rate tax in 1990, pay higher rate tax now.

The threshold is so low that a family with three or more children may be paying higher rate tax, even with a disposable income below the level regarded by the Joseph Rowntree

Foundation as an acceptable minimum needed to achieve an adequate standard of living. For a one-earner couple with two children, the higher rate threshold is only 15% above this Minimum Income Standard (MIS). At the same time singles and two earner families on the same income remain very much in the top half of the income distribution.

At the same time, moves to remove Child Benefit (the substitute for what once was a child tax allowance, plus the cash family Allowance) from 'rich' parents is pushing some one-earner couples into the lower half of the income distribution.

What was once the married couple's tax allowance was reduced in value until finally abolished by Gordon Brown in 1999. This was after a continuous barrage of pressure that this was 'unjustifiable' and, if 'targeted' on needy mothers, could virtually eliminate child poverty. The replacement proposed back in 1986 of a right to transfer unused tax allowances between spouses failed to be implemented what with the Lord Chancellor's Department adamant that marriage could not, and must not, be saved and a transferable tax allowance "*might acknowledge dependency in marriage.*" The withdrawal of reliefs once given in acknowledgment of the support of dependents left family providers taxed as single, childless people. Very recently, couples can apply to transfer a small percentage or 10% of their unused tax allowance to a spouse who is only liable for tax at the basic rate. This amounted to £230 a year in 2017-18!

Tax breaks for married couples are opposed not just because alliances between the sexes are patriarchal or demeaning, but how the state should not use the tax system to encourage a particular family form. However, over the years, special concessions for lone parents meant an extra (lone parent) child benefit plus entitlement to the equivalent of the Married Couple's Allowance, plus higher earnings disregards than couples for all benefits. Under the poll tax, two parent households had to pay double local taxation compared to singles and, with the council tax replacement, there is an additional charge for a second adult.

The majority of poor households have been low-paid two parent families. Far from different 'family forms' receiving equal consideration, and despite how poverty statistics are based on the numbers dependent on a household income, there has been no recognition in the benefit system for the support of a second adult. The expansion of means tested or 'targeted' welfare has meant that further and further up the income distribution, the state outbids husbands and fathers; transforming them into liabilities.⁶⁶ A Child Support Agency set up to make non-resident fathers pay towards the upkeep of their offspring has been closed. The contributions of absent fathers or boyfriends are not counted against lone parents' benefits, unlike the incomes of resident fathers. This has encouraged people to live apart or pretend to do so (which involves around a quarter of purportedly lone parent households).

Antipathy from the political left and, at best, a studied indifference on the centre right, meant that a lack of protection exposed couple families to raids for meeting other demands on public

finances. In good times or bad, sanctimonious ministers could never afford to bolster their fortunes, or even restore the equity lost, while responding to pressure group demands.

The new Universal Credit instigated by Ian Duncan Smith - which amalgamates many existing means-tested benefits – finally offers some reduction of the couple penalty. A single claimant gets £317.82 per month and joint claimants £498.89. At the same time, a major change is that a single parent can claim help with childcare costs if they are working for *any* hours' rather than the 16 a week as under tax credits. For one hour or more, there is 85% of childcare costs and the possibility of up to £646 a month for one child or £1,108 for two or more.

Assertion may have it that nobody is going to get or stay married because of a bribe of a few hundred or even thousand pounds a year, but poorer people have to make hard decisions about their interests. Suggestions that financial incentives and disincentives make no difference to people's behaviour or not when it comes to relationships, is at odds with how, in the days of a marriage tax allowance, it was common even for couples to schedule their weddings for the point in the tax year when they would gain most advantage from this.

On the face of it, what is difficult to avoid is how the sudden enormous increase in single mothers coincided with changes in the social welfare structure which rewarded that group preferentially over married couples. As such, it would have contributed to how many children have and are growing up without resident, reliable fathers, since these have been made superfluous by government policy. It is not an issue that governments have been inclined to examine more closely, if at all.

In line with previous studies, an investigation using the British Household Panel Study found couples to be highly responsive to changes in economic circumstances when it came to deciding whether or not to continue their partnership.⁶⁷ The introduction in 1993 of mandated child support measures for cases entitled to welfare benefits, likely reduced separation risks for couples with dependent children by over 20% who, surprised by the prospects, changed their separation behaviour accordingly. By raising the financial obligation on the non-resident partner, child support raises the cost of separation. It was predicted that later reforms which essentially abandoned the official pursuit of payments from fathers after protests from rights groups, would increase the hazard of separation by around 10%. Others have found a significant and negative effect of child support enforcement on divorce rates.⁶⁸

The rejection of the conjugal family has extended beyond matters of economics. The Fertilisation and Embryology Act removed the 'need for a father' from legislation (where the welfare of the potential child was taken into consideration) in return for the 'need for a family' – which could be any combination of people. Lord Darzi, the health minister, considered it “... *unnecessary, inappropriate and out of step with practice in society*” to take

account of the child's need for a father as the government sought to update the law to be *"both effective and also reflective of modern society"*. Liberal Democrat MP Evan Harris said: *"It [the need for a father] was unjustifiable, discriminatory and vindictive."* It was unsustainable in human rights and equality terms as an *"unjustifiable discrimination against gay people and single women"*; *"Abolition was an essential measure in ensuring that the child came first."* Given how: *"The evidence suggests children do very well brought up by lesbian couples and solo parents, so good riddance [to fathers]."*

Marriage makes men fathers, but as this was declaring them to be essentially superfluous, its *raison d'être* was further whittled away. That it might be judgmental and insulting to men trying or desiring to be good fathers to be told they were irrelevant and similarly for the impact of such dismissive contempt on young men when it comes to accepting responsibility for the children they sire.

Demotion of the conjugal family is frequently excused as necessary to avoid offending those in alternative forms of relationships or households. As already seen, there has been no aversion to offending those in married families. No other relationships have received anything approaching the degree of vilification and mockery that it has been routine to send its way for decades, where the tide of contempt that spills forth to this day. This is inseparable from that constant belittlement, where it has been customary to downgrade the proportion in the population by using extraordinary tight – or downright ludicrous – definitions of what constitutes the 'nuclear' family. When Tony Blair's ministers sought to remove the word 'marriage' from official records and even registry office signs, in early 2007, Alan Johnson declared that: *"We have to recognise that the modern family is not always a married family"*. Referring to this purportedly encouraged prejudice against single parents, as other members of his party spoke of how this offended divorced or cohabiting parents.⁶⁹ Contrary to their self-appointed defenders, most single mothers are unlikely to be offended by recognitions of marriage. Where a judge established a precedent by awarding widows' pensions to all cohabitees, the couple clearly knew the rules (marry or opt-in and nominate your partner) but ignored them for 10 years. The judge clearly did not want to mention the marriage option if they wanted its benefits. Instead, despite all the immense complexities and cost this would unleash, he did not hesitate to insist that the pension fund pay out.

5.i. The Sum of Abolition

How the conjugal family has been ruthlessly disassembled piece by piece is uncannily in line with the proposals made in 1984 by a feminist academic specialising in family studies (sic). She spoke of how the idea of abolishing marriage might sound as unpopular and unrealistic as the classical communist call to abolish the family, but:

"It would be far more effective to undermine the social and legal need and support for the marriage contract. This could be achieved by withdrawing the privileges which are

currently extended to the married heterosexual couple. Such a move would not entail any punitive sanctions but would simply extend legal recognition to different types of households and relationships [done, there is same-sex marriage and civil unions], and would end such privileges as the unjustified married tax allowance [done]. Illegitimacy would be abolished by realizing the right of all women, whether married or single, to give legitimacy to their children [done]. Welfare benefits and tax allowances would also need to be assessed on the basis of individual need or contribution [not done, there is no allowance for the second adult who must also pay more local tax], and not the basis of the family unit.”⁷⁰

The pervasive anti-marriage, anti-family reflexive ethos is shared by political, academic and judicial elites. What is impossible to avoid is how leading supporters of the ‘no-fault’ proposals are loud abolitionists. As mentioned, in that address at Liverpool University earlier in 2018, Munby spoke of welcoming the demise of the traditional married family. He opines that it does not matter if marriage is ‘platonic’ or couples have separate homes and children with foreign surrogates. Marriage is no longer the basis for reproduction or parenthood or involves living together and, like same-sex unions, consummation should not apply.

Siding with Munby is Baroness Hale (or barrister Brenda Hoggett) who maintains that as *“family law no longer makes any attempt to buttress the stability of marriage,”* so therefore *“we should be considering whether the legal institution of marriage continues to serve any useful purposes.”*

Proposals to gut marriage of commitment, along with giving cohabitees the remaining rights of marriage to pensions and inheritances, will make them one and the same. Marriage is essentially (and finally) abolished, which has been the aim all along. Whatever the expectation of a vibrant liberal future of diverse relationships, it is not promising when it comes to children’s welfare, adult fortunes or the nation’s coffers, rather the reverse.

Whether the demise of the conjugal family has been overtly sought and engineered or nonchalantly accepted and ignored, there has been the all too convenient pretext that marital or family behaviour cannot be influenced by policy, or incentives and disincentives, laws, surrounding norms, rules or suggestions. All along the voices have maintained how demographic movements are a matter of happenstance where, conveniently and coincidentally, the population is abandoning those things that progressive elites target as fit only for demolition and, absolved from responsibility, policy makers and politicians just go with the flow. This reflects the prevalence of the determinism mentioned above, where social behaviour is controlled by the zeitgeist or ‘modernity’. Anyone uncomfortable with the direction of events has excuses for not interfering or trying to save something which, they might have been led to believe -perhaps to some relief – they can do nothing about, just as the resulting decline reinforces the confidence of the abolitionists that they are doing history’s work.

As the conjugal family has been dismantled piece by piece, any apprehension has been paid off with the line that the particular measure at hand will not make any difference. The change simply seeks to iron out an anomaly, or help a minority, but otherwise everything will stay the same as before. And so it is with the present proposals of a damage limitation exercise in conflict control. Speculations that conflict will be annulled by removing fault from divorce law are just that – speculations with no coherent justification. This might just as much increase conflict as they offer nothing to address the other (and perhaps more prolific) sources of conflict in unmarried relationships.

The subsidiary argument for ‘no-fault’ divorce that it will somehow enhance marriage or marriage rates are pathetically thin and, if present at all, are difficult to see as other than disingenuously so. It is inconceivable that prominent supporters like Sir James Munby and other senior members of the judiciary enthusiastically support the proposed changes because they think these will strengthen marriage (or lower divorce rates), when they are clearly implacably opposed to this in the first place.

The present proposals need to be seen for the wrecking ball they are. What must be abandoned are notions that change must be beneficial and necessarily involves the rejection of traditional codes and values. ‘Fault’ serves important functions in society and the possible effects of removing it have not been adequately considered in either the government’s consultation paper or any supporting documents. In this absence, appealing to forces of the age is vacuous, rhetorical nonsense. Whatever the cliché, sound bite or buzzword, their deployment indicates a lack of argument or evidence or reason as something is just plucked out of the air to justify a position. If anything is obvious, it is that a total ‘no fault’ system will inevitably diminish the status of marriage even more in the eyes of the public and, consequently, worsen conditions in society and for children as the family implodes.

It is often far from unquestionable that change can only be good. Given the precarious position that marriage and family are presently in, if there is any doubt about the effects of prospective changes, these should not be pursued. The present divorce law may be far from perfect, but it is unlikely to be a loner in the legal field for all its contradictions and ambiguities. Until there is an alternative available that is unambiguously shown to be committed to protecting and preserving marriage with demonstrably positive repercussions, change is unwarranted. No viable replacements are being offered here for what it is proposed to eliminate.

5.ii. A Better Way Forward

Given the high levels of relationship breakdown in this country, the priority should be to strengthen and stabilise families. Anybody seeking solutions to present-day social problems – even just to reduce the nation’s financial burdens – should support marriage. This would start by ending the belittling and disparagement of the conjugal family in exchange for a more dignified recognition. There might be claims that many people now see no distinction

between marriage and cohabitation. However, this is not an excuse to make this the law, given how legal and other developments have made marriage not just easy to exit, but perhaps pointless to enter into in the first place. To reduce the confusion already created by anti-marriage policy-makers, the difference needs to be enhanced, not abandoned and explained – particularly to youngsters. Inter-dependence and mutual support need to be cherished and supported for the goods these and fidelity represent. The conjugal family should stop being an economic liability, which particularly affects those in the lower to middle reaches of the income distribution. In place of the discrimination in the tax and welfare, there would be proper recognition for interdependence in taxation at all income levels and for two-parent families in the welfare system. Offering economic incentives or at least removing disincentives might help to persuade more people to make a stake in a family future.

Questions for the add-ons

Cohabitees' pensions and inheritance

Giving rights like pensions and inheritance to cohabitees raises matters of choice. What happens when someone chooses not to marry because they do not want their 'partner' inheriting their assets? They may have children from previous relationships, siblings or nephews and nieces who they want to inherit, not the person who they are living with who may also have kin.

How long will people have to be living together for benefits to be awarded? If Munby sees those living apart as another vibrant, new family form, do they have to live together at all? What about other house-sharing? If the 'modern' relationship does not involve reproduction or parenthood, or indeed living together, does this also not need to involve any sexual component or consummation? Apparently not. This is already the case with same sex relations like civil unions and marriage, so what if two or three men share a home – do they share their pensions?

What happens where there are a sequence of cohabitations and competing claims? When someone dies having had a number of co-habiting relationships, will the rule favour the most recent rather than an earlier one which may have been of longer duration? Will pension providers pay out to all?

This mess is avoided when unmarried partners only receive pensions if they are compliant with the "opt-in" requirement, which gives them the same entitlement as married partners. Should not choice be maintained? Couples can either get married, which means recognising a set of legal rights and obligations which bind your finances together; or co-habit, which allows someone to keep their property and finances separate so they can go their own way

much more easily if you decide to leave? The 2017 court ruling, and present proposals, are taking away their choices.

Clearly, the practical implications of the proposed changes are immense and an absolute treasure trove for lawyers.

Pre-nuptial contracts?

Giving these the backing and force of statute is being pushed as the answer to conflict or bitterness and, in future, lack of rules for marriage expressed in law. But how are problems avoided by giving pre-nuptial contracts the backing and force of statute? People's circumstances change. A highly paid female signing the pre-nuptial contract may, years hence, be a low or non-paid mother.

Homemade contracts?

It might also look attractive to make your own private contracts. But who draws these up? The couple, or some or any institution or other body? How many people are included? Can the authorities be called upon to enforce the conditions – any conditions?

Easy exit, quick sale?

It is noticeable that same sex unions in Scandinavia often serve immigration purposes: particularly for men. In Sweden, 45% of male partnerships included a non-citizen and 43% in Norway,⁷¹ where over 20% of marriages generally involve a spouse with an immigrant background.⁷² The probability of marrying spouses from outside the European Union has generally doubled for native Swedish women and quadrupled for men in less than 20 years.

Same sex unions with a foreign partner are particularly likely to dissolve and nearly a half rapidly fold up. This suggests unions of convenience (bought and sold) for residence rights and citizenship; made easy by how nothing in law says you have to be homosexual to marry another man or woman, consummation cannot apply and divorce is simple.

This also applies to grants of citizenship following claims for asylum on grounds of sexual orientation. Immigrants may then go on to marry others into their country of settlement for a fee. (Figures obtained by the LGBT lobby Kaleidoscope Trust from the UK Home Office show approximately 3,535 claims for asylum on grounds of sexual orientation from July 2015 to end of March 2016.)⁷³ Unions for migration purposes may be more conflicted, with people under pressure for payment in unfamiliar environments.

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