Divorce in England 1950-2000: A Moral Tale

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INTRODUCTION

The fifty years analytically reviewed in this paper constitute a period of considerable change to the law and practice of divorce in England and Wales. Rates of divorce have increased considerably between 1950 and 2000, although this trend had started rising before 1950. Marriage rates also reached a peak in the 1960s but subsequently declined in the 1990s. Statistics also show that across this half century there have been rises in the numbers of lone parent families, in step-families, in second divorces, in teenage pregnancies and in cohabitation. Indeed, it has become almost impossible to talk about family life in late modern societies without reference to a vast array of tables and charts which show trends and changes (Morgan, 1999) - all of which apparently attest to the ubiquitous notion that family life is in crisis and that things used to be much better 50 years ago:

> "[T]he late twentieth century family appears to be more than creaking. It is falling off its hinges! Increasingly, those activities that the family traditionally co-ordinated take place outside it, and even when it survives as a legal or formal entity, the family appears incapable of providing acceptable levels of care and support...In none of the nation's soap operas is there a single well-established, functioning nuclear family" (Humphries, 1999: 516).

It is of course impossible to counter these arguments by reference to statistics collected in the half century prior to 1950 because they were either too limited in scope, or were of such a dubious nature, that they would be quite unreliable as a basis for comparison. In any case, in the field of divorce, comparisons between the pre-war and post-war situation are hardly helpful because before the advent of legal aid in 1949 few could afford to divorce legally even if they could meet the stringent conditions of fault-based divorce at that time.

But arguments about the decline of the family, particularly as a consequence of divorce, are not - and have never been - generated *simply* as a result of these statistical trends. Rather the statistics that are collected and analysed have been, and continue to be, generated within a pre-existing politico-moral framework of despair and depression about the declining quality of modern family life. These contemporary statistics provide a modern 'scientific' gloss to what is already a long-standing national obsession with the declining quality of family life in England and Wales. It was asserted, long before there were statistics which might lend credence to it, that family life was on a slippery slope towards indifference, selfishness, lack of discipline, abrogation of duty,

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immorality, sexual laxity and so on. Indeed, it was on this very note that the history of divorce and family policy in the last half of the twentieth century can be said to have begun:

> "The large number of marriages which each year are ending in the divorce court is a matter of grave concern (1)...This disturbing situation is attributable to a variety of factors ...In the first place, marriages today are at risk to a greater extent than formerly. The complexity of modern life multiplies the potential causes of disagreement and the possibilities of friction between husband and wife...It must also be recognised that greater demands are now made of marriage, consequent on the spread of education, higher standards of living and the social and economic emancipation of women...Old restraints, such as social penalties on sexual relations outside marriage, have been weakened...[and there is] a tendency to regard the assertion of one's own individuality as a right, and to pursue one's personal satisfaction, reckless of the consequences to others...There is a tendency to take the duties and responsibilities of marriage less seriously than formerly" (Royal Commission on Marriage and Divorce, 1956: 7-8)

This perspective on the declining quality of family life which has been reiterated throughout the second half of the century has, as a consequence, come to exercise a firm grip on the national imagination. In the 1980s and 1990s this preoccupation became condensed into one indicative and highly symbolic word: *stability* (2). Above all else it became important in debates and official utterances on marriage and parenthood for the family to be stable, for policies to increase the stability of the family, and for this stability to ensure the wider stability of society.

Throughout the second half of the twentieth century politicians and pundits have never tired of stating that the family is the cornerstone of society and that, without stable families, there cannot be prosperous and stable societies:

> "We cannot say we want a strong and secure society when we ignore its very foundation: family life. This is not about preaching to individuals about their private lives. It is addressing a huge social problem...[T]his is a modern crisis. Nearly 100,000 teenage pregnancies every year, elderly parents with whom families cannot cope; children growing up without role models they can respect and learn from, more and deeper poverty; more crime, more truancy..." (Prime Minister's speech, *The Guardian* 1.10.97: 8).

The core element of this desired stability is the monogamous, married couple. Although the Labour Government at the end of the twentieth century did not condemned alternative forms of family life, it - like the Conservative Governments before it - plainly stated that marriage is the best foundation for stable families (Home Office, 1998:4). Within this conceptual framework, it would seem to follow that divorce is not only destabilising to families but also to society. Divorce is the core of the 'modern crisis' identified by Tony Blair in the late 1990s, just as it had been for the post-war society unfolding before the Royal Commission in the early 1950s. Divorce (and sometimes teenage pregnancy) had become the unit of measurement of failure in modern society by the 1960s.

The problem for governments and policy makers is that, in stressing the centrality of divorce though the emphasis on stability, there inevitably arises a desire to reduce the divorce rate and to

stabilise the unstable. Yet, in the UK, family life is regarded as both private and personal, and the idea of too much government intervention directly into routine family practices is widely resisted (regardless of whether such interventions might 'work' or not). Family structures, unlike other social institutions such as schools, hospitals and factories, constitute both a (local) cultural space and set of relationships which are still largely beyond effective direct government regulation. Thus families, especially the idea of unstable families as measured by divorce statistics, are a perpetual problem for government. The statistics routinely give rise to the idea that there is a problem and that this problem, like other measurable social problems, should be amenable to 'cure' once it has been measured. As Rose (1999: 221) has argued:

> "To problematize drunkenness, idleness or insanity requires it to be counted. Reciprocally, what is counted ... is what is problematized. To count a problem is to define it and make it amenable to government. To govern a problem requires that it be counted".

Divorce statistics were collected throughout the twentieth century and, because the success of good liberal democracies was increasingly measured in terms of their ability to cure problems calibrated through precisely such statistical techniques, the imperative to find a solution to the problems they had become so adept at defining grew.

I shall return to this issue of how government may now be redefining the cure for family instability, but first I shall explore the recent history of how democratic government has sought to regulate the apparently increasingly unruly family in the last fifty years of the century.

THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE 1951-5

I have argued, following Rose (1999), that the inexorable rise of statistical measurement during the twentieth century (although starting in the nineteenth century) created a new aspect to government based on liberal democratic principles. The ability to collect statistics on marriage following Lord Hardwicke's Marriage Act of 1753, followed by the creation of secular divorce in 1857 (Gibson, 1994), laid the foundation for the collection of statistics based on clearly established legal statuses. Of course, informal unions and informal separations could not be counted although illegitimate births could be. All children born to married women were, however, presumed to be legitimate, regardless of their actual paternity, and so even these apparently straight-forward statistics concealed certain social practices. The Royal Commission therefore had available to it statistics on marriage and divorce covering almost a century. What was most alarming to the Commission was the sudden escalation in the rate of divorce immediately after the second world war.

The Royal Commission had been set up in 1951 as a response to pressure both within and outside Parliament for a change to the laws on divorce which, following the implementation of the Matrimonial Causes Act of 1937, permitted divorce only on the grounds of matrimonial fault evidenced by adultery, cruelty and desertion for 3 or more years. The disruptions and social change generated by the second world war, combined with changing attitudes toward the nature of marriage in which it was seen increasingly as a companionate union rather than a binding legal duty, led to the demand that marriages should be terminated if relationships 'broke down' rather than as the consequence of a matrimonial offence (Smart, 1984). Eirene White MP was the champion of the cause of a new kind of divorce which would better reflect the modern notion of

marriage as being a relationship based on love and affection (Smart, 1997). She advocated that couples be allowed to divorce after having lived apart for 7 years and where there was no chance of a reconciliation.

In response to this pressure the Government set up a Royal Commission to enquire into whether the law should be changed in such a radical way. The Royal Commission (chaired by Lord Morton of Henryton) had a very wide remit which included not only the issue of the grounds for divorce, but also preparation for marriage, marriage saving, matrimonial proceedings and matrimonial property and finances. In the end the Commission was hopelessly divided on what should be done, except that all the Commissioners bar one, insisted on retaining fault as the basis of divorce. This consensus was an important indicator of how marriage was perceived and also how a liberal democratic government - which accepted the recommendations for no change - sought to enforce family stability. Embracing fault meant that the Commission and the Government adhered to the definition of marriage as a contract between spouses and the state, rather than simply between spouses. Marriage was therefore an institution, not a relationship. In this context adultery, for example, was an offence against the institution which harmed the moral and social fabric of society. The response of the state was to 'punish' the wrongdoer and reward the innocent spouse.

The Commission's recommendations for no change, and the government's acceptance of these recommendations, revealed the extent to which the quality of individual marriages was immaterial. Indeed the Commission made it clear that their concern was with the greater good and that the unhappiness of individuals could not weigh against the benefits that accrued to society of maintaining the state's firm grip on the rate and level of divorce. The Commission actually considered the merits of abolishing divorce altogether and although they did not recommend this, they felt that it should be a matter for serious consideration if the divorce rate continued to climb.

With the exception of the continuous emphasis on stability, the frame of reference of the Royal Commission in the 1950s could not be more different to the way in which marriage (and divorce) was conceptualised at the end of the 1990s and I propose to analyse the process of transition between the two. But first we need to give further consideration to the social context within which the Commission produced its report.

The Commission relied on high principles and orthodox moral guidelines to formulate its recommendations. It has been much criticised for failing to resort to scientific or empirical findings and McGregor (1957) who mounted a polemical attack on the Commission saw this as a choice in favour of ignorance and prejudice, over a choice in favour of rationality and objective facts. From the perspective of the late 1990s McGregor's optimism about the value and possibility of achieving objective facts to guide policy seems naive (Cretney, 1998) but by his own admission his attack on the Commission was a polemic rather than a sociological analysis. The debate about whether the Commissioners were prejudiced or ignorant about the lives of ordinary people is important, but need not be rehearsed again here. Rather I want to give consideration to the form of governance they were seeking to sustain and how this needs to be understood in the context of the 1950s.

The Royal Commission expressed - albeit implicitly - a strong sense of homogeneous nationhood within which only one form of family life could be seen as morally appropriate. Such an expression of nationhood could only really be possible in the triumphant post-war moment when,

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in addition, Britain still had an empire, or at least colonies. This idea of the (white) British Nation was, of course, expressed in the Beveridge Report (1942) and was part of the post-war reconstruction of family, nation and the British race. It was strongly supported by the Church of England which offered a very clear set of prescriptions about the moral boundaries of proper family life. For such an approach, empirical studies on how ordinary families operated or on ordinary people's attitudes to public morality were an irrelevance. The approach of the Commission was not intended to be populist or representative, nor did it mean to follow current trends. Its aim was to set standards and to reiterate the moral rules outlined in the law of divorce. The Royal Commission presumed (rightly or wrongly) that it was addressing an homogeneous society, albeit one which appeared to have started down a slippery slope of moral decline in family matters. The signs were identified in respect of the growing demand for personal fulfilment in relationships, rather than satisfaction with the virtuous reward of doing one's duty. This development, which contemporary sociologists now refer to as individualisation (Beck, 1992; Giddens, 1992), was seen in terms of a weakening moral fibre. Although the Commission did not use contemporary terminology, it is clear that the members saw signs of a potential shift away from the status of marriage as an institution, towards marriage as a relationship which could - as a consequence - be terminated at will rather than after full judicial enquiry and with the permission of the state. They saw this however with a sense of dread and foreboding. Not only did this future seem morally unattractive, it seemed likely to undermine the post-war reconstruction of British society. Divorce seemed to be a carry over of war-time (im)morality and what the Commission wished to regenerate was pre-war decorum and duty:

> "We are convinced that the real remedy for the present situation lies in other directions [i.e. not easier divorce]: in fostering in the individual the will to do his duty by the community; in strengthening his resolution to make marriage a union for life; in inculcating a proper sense of his responsibility towards his children" (1956:14).

The regulation of marriage was clearly seen as a moral issue and what was required was a form of moral rearmament in which individuals would become bound securely again to the (supposed) values of the pre-war era. This morality was, however, that espoused by the Church of England at that time. This was not a reflexive or negotiated form of morality which could tolerate ambiguity. Rather it was based on a clear set of doctrinal statements derived from the New Testament in which there was little room for doubt and where teachings could be unambiguous (Gibson, 1994: 102). The Morton Commission and the Church of England in the 1950s were fearful of the consequences of freeing people from the old constraints of Christian marriage. At that time they could not envisage alternative forms of regulation of family life and the pre-war methods of imposing restraint through legislative and religious measures which simply banned and punished incorrect behaviour, were still attractive and potentially feasible.

Bauman (1995) has discussed the demise of this sort of moral absolutism at length and his analysis is peculiarly fitted to this moment in the 1950s when legislators reached for traditional methods of regulation, unaware that society was becoming increasingly post-traditional. He has argued that there is a tradition in philosophical thinking, especially that arising from Christianity, which equates obedience with 'being good' and free will and choice with 'being morally corrupt'. The Commissioners were not alone therefore in seeing the rise of the 'individual' who asserted his/her free will and desire to choose as symbolising moral decline. He argues:

> "This is why modern legislators and modern thinkers alike felt that morality, rather than being a 'natural trait' of human life, is something that needs to be designed and

injected into human conduct; and this is why they tried to compose and impose an all-comprehensive, unitary ethics - that is, a cohesive code of moral rules which people could be taught and forced to obey" (Bauman, 1995: 6).

Bauman acknowledges that by the middle of the twentieth century this cohesive code of moral rules might no longer take the form of unmodified religious dogma but, whilst, I suggest, it remained informed by this tradition, it did seem increasingly to take the form of rational teaching based on reason. This is indeed what the Commission recommended:

> "We consider that the removal of this major source of marital unrest [the tendency to take the duties and responsibilities of marriage less seriously] can be achieved only by the development of a *carefully graded system of education* for young people as they grow up, in order *to fit* them for marriage and family living, and by the provision of specific instruction for those about to enter marriage" (emphasis added, 1956: 93).

Of course, what the Commission could not see, although McGregor was perhaps unwittingly quite sensitive to it, was that this form of regulation which was a combination of traditional modes of banning behaviour, combined with more modern methods of instruction to ensure obedience, would not simply be unattractive in post-war Britain, but actually irrelevant. What McGregor could identify was the extent to which people's lives were changing in relation to structural changes, not simply as a result of moral laxity. And, although the Commissioners could also identify some of these changes, they still thought it possible to hold fast to a form of marriage which had been consolidated in the nineteenth century. Again, as Bauman (1995: 6) so aptly puts it:

> "It is because modern developments forced men and women into the condition of individuals, who found their lives fragmented, split into many loosely related aims and functions, each to be pursued in a different context and according to a different pragmatics - that an 'all-encompassing' idea promoting a unitary vision of the world was unlikely to serve their tasks well and thus capture their imagination".

As has been well documented elsewhere (Gibson, 1994; Smart, 1984), the recommendations of the Royal Commission captured no one's imagination. Rather change was stalled and for a further decade and a half, married couples sought to evade the strictures of the divorce law, giving rise to a situation in which the law was seen as thoroughly hypocritical and the stance of the Church was seen as harsh and unyielding. Increasingly the position of the state was itself seen as immoral as an inversion of 'traditional' values occurred, and those who sought to force people to stay together in miserable marriages (empty shells as they were called) were seen as the ones without compassion and understanding (Smart, 1996).

SHIFTING FORMS OF GOVERNANCE: THE 1969 DIVORCE REFORM ACT

If the Government had hoped that the recommendations of the Royal Commission would end the social pressure for reform they were mistaken. In the 1960s there was a growing sense of the injustice of the system which was tempered to some extent by increasingly liberal interpretations of the legislation by judges such as the then Master of the Rolls, Lord Justice Denning (Denning, 1980). The position of women, for example, was slightly improved by the introduction of the idea of the 'deserted wives' equity' which allowed wives to keep a portion of the matrimonial

property they had helped to generate through their work as housewives and mothers, if they husbands were guilty of desertion. More crucially, however, the Church of England also began to change. In Bauman's terms it began to move away from the idea that freedom of choice was an invitation to licentiousness, towards the idea that each individual could be trusted to make the right moral decisions without slavishly following rules, but by applying principles in different ways in different circumstances. There was an important shift away from a focus simply on status towards a recognition of the individual occupying the status. In this context it became the quality of a relationship that became the yardstick of its moral worth, not simply the marital status of the parties. A core element in this shift is now recognised to be the scandalous (at the time) book *Honest to God* (1963) written by the Bishop of Woolwich, John Robinson. What Robinson argued was that to tie Christianity to a set of moral dogmas lodged within a pre-scientific age would simply discredit the faith. He called for a 'new morality' which would be more relativistic and which would be guided by 'love'. Robinson promoted a new moral code in which the only intrinsic evil was a lack of love. He argued that love provided an internal moral compass that prevented people from harming others and doing evil. Thus, he suggested that people would still not commit adultery or engage in extra-marital sex, but that they would refrain out of a personal sense of obligation based on love, not because they were blindly obedient to a set of rules imposed on them from outside.

Although *Honest to God* caused a huge controversy in the early 1960s, by 1966 the Established Church had withdrawn its support for matrimonial fault as the sole basis for secular divorce and had embraced the idea of irretrievable breakdown (Archbishop of Canterbury's Group, 1966). This was a hugely significant shift. It signified that the Church acknowledged that the process of individualisation was not necessarily or automatically synonymous with moral decline and that moral relativism was acceptable in a context where the internal quality of relationships - rather than the external structure - was the key to assessing their moral worthiness. The Anglican Church ceased to be an obstacle to divorce reform from this moment and therefore left the state to its own devices to contemplate how to regulate familial relationships. Although the idea of the quality of relationships had began to take centre stage in debates about marriage and divorce, nonetheless, the state was left with what had become defined as the problem of (in)stability. From the perspective of governments at this time, individual cases of divorce might have become more morally acceptable, but divorce rates still presented political and practical problems. In particular rising rates gave rise to increasingly visible problems of financial support (especially for women), housing and accommodation problems, and potentially disturbed and delinquent children.

In 1969 the Labour Government did pass the Divorce Reform Act. This Act allowed for divorce on the sole ground of 'irretrievable breakdown' although breakdown was still evidenced by the old matrimonial faults of adultery, desertion and cruelty (renamed the behaviour ground). In addition divorce was permitted by mutual consent if the parties had lived apart for 2 or more years. Arguably, this legislation marked a shift away from the traditional method of controlling family life through restriction and limitation on movement and change, towards regulating it by providing directions for this movement and change. The direction in which individuals were invited to go was away from an unsatisfactory marriage towards a second more satisfactory one. Quite simply, the solution to the divorce problem was seen as (re)marriage. Rose (1999) argues that essence of governance (as opposed to domination) is that the former works with social forces and 'instrumentalize[s] them in order to shape actions, processes and outcomes in desired directions. ... To govern humans is not to crush their capacity to act, but to acknowledge it and to utilize it for one's own objectives' (1999:4).

To a large extent this is what the 1969 Divorce Reform Act achieved - although it is not obvious that the Government had a clear set of objectives in mind at the time. Rather, with the benefits of hindsight, we can see that what occurred was the passage of 'permissive' legislation which allowed many more people to divorce with less stigma and pain, but which did so on the clear assumption that people divorced as a step towards re-marriage. At that time divorce was - in symbolic terms - the tune according to which the deckchairs on the Titanic could be reassembled, it was not seen as the iceberg that might sink the whole thing. In the debates in the House of Commons, MPs spoke of divorce as the process by which individuals could leave miserable relationships in order to start new, legitimate, fulfilling ones. Moreover, although there was concern over the effects of divorce on children at this time, this concern was also submerged by the faith in the stabilising power of the re-constituted family. It should of course be remembered that marriage was at this time remarkably popular. As the sociologist Ronald Fletcher (1966: 143) argued:

> "The institution of marriage remains firm and stable for the great majority of people, and, what ever the condition of modern marriage may be, more and more people appear to desire it".

This view was echoed in an article in New Society in 1968 when Kenneth Johnson wrote:

> "Marriage as an institution is not in danger. Unsuccessful marriages could be replaced by successful ones" (1968: 379).

The desire for more permissive divorce laws in the 1960s therefore occurred in the context of very high rates of marriage. This is of course very different to the 1990s when high rates of divorce co-existed with declining rates of marriage, and increases in cohabitation and in single occupancy households. But this meant that, in the 1960s at least, divorce was discursively constructed in the popular media, and in much political rhetoric, as a kind of rite of passage towards a more satisfactory state of family affairs.

The only fly in the ointment at that time (besides the traditionalists who held fast to the more orthodox ecclesiastical position) was perceived to be the problem of older women. The solution of re-marriage was less obviously going to be a solution for wives of 40 or 50+ years who were raising teenage children. The plight of these women became the cause of women MPs and Peers who identified the new legislation as highly gendered in it likely effects; benefiting men who could remarry much younger women, rather than older wives who could lose their homes, income and pensions. Sympathy for these older women did produce some protections for them - albeit more in theory than in practice. But what sympathy there was, quickly evaporated a decade later when they were redefined as alimony drones and as women who were too idle to work. The more powerful argument became the one in favour of the 'clean break' which would allow the divorced to move unfettered from one failed relationship into another. It was generally held that the new relationship (which was by definition the more important in the drive to achieve renewed stability) stood a better chance of survival if the old one was properly buried. The clean break principle was profoundly rooted in the belief that the new marriage was a solution not only to the problems of the first marriage, but to the problems that might otherwise be associated with divorce. Not only did re-marriage obviate the need for anyone (husbands and state alike) to pay support to ex-wives, it provided children with fathers at a time when it seems it was thought that any father would do in the process of providing much needed stability.

Of course, in this modern desire to re-marry the adults, the children were trapped in a kind of Victorian time warp in which they were constituted still as mere property. The emphasis was on the parents' happiness, because it was felt that this provided what children needed, i.e. stability. But the moral shift that had occurred which allowed the quality of adult relationships to become the guiding principle, was not at that time applied similarly to children. The quality of their relationships was of no real concern, they were not constituted as part of the moral cast of players and so they got what others thought was best for them. In this process we can see the partial democratisation of the family (Giddens, 1992). Although men and women were clearly not equal partners in marriage in the 1970s (at least economically speaking), more readily available divorce began to turn marriage into a process of negotiation. If one partner failed to co-operate or persisted with unreasonable behaviour then divorce was increasingly 'thinkable'. Intimate relationships between men and women could be run on very different grounds which were increasingly akin to democratic relationships (Giddens, 1992; Beck and Beck Gernsheim, 1995; Jamieson, 1998):

> "There is only one story to tell about the family today, and that is of democracy. The family is becoming democratized, in ways which track processes of public democracy; and such democratization suggests how family life might combine individual choice and social solidarity" (Giddens, 1998:93)

But divorce only created a partial democracy because children were excluded from this process. They had no rights of participation at all (Holt, 1975) and their 'right' to participate or at the least to be consulted was still a matter of debate in the late 1990s (Smart, Neale and Wade 1999).

The idea of the clean break was also modelled on an adult's perspective on future happiness rather than a child's. It gave supremacy to the conjugal pair bond over the triadic parental relationship because it was assumed that children's welfare would be attended to once their parents were decently separated and happily remarried. Of course, what began to emerge was the realisation that re-marriage and step-parenting was not quite as easy as first time marriage and parenting (Burgoyne and Clark, 1984). In addition, the state began to realise that for many women with children, re-marriage was unlikely, unattractive or even financially irresponsible. The practice of allowing Social Security to support first wives (Maclean, 1994) which had evolved during the 1970s as a way of facilitating (virtual) clean breaks began to become very costly because divorced women did not always re-marry or, if they did, it became apparent that re-marriages were actually less likely to last than first marriages.

By the 1980s there appeared to be yet another crisis surrounding family policy and divorce. The optimism of the 1970s had evaporated. The control of family life through a punitive divorce mechanism had been largely abandoned, but there was no preparation (nor could there be) for what was to follow these reforms. The optimistic scenario in which families happily re-constituted themselves did not materialise. Rather new patterns emerged and meshed with other cultural and social transformations. Not only did the machinery of statistical production continue its relentless task of (apparently) measuring all aspects of family breakdown, but cultural shifts occurred in which the meanings of motherhood and fatherhood began to change, working practices and patterns of employment were modified, transitions from childhood to adulthood altered, gender relations began to take on new meanings, and parenthood started to become more significant than marital status in matters of policy, employment and the benefit system.

GOVERNMENT VERSUS GOVERNANCE: THE STRUGGLE OVER THE FAMILY LAW ACT

As I have argued, in the early 1960s there was a conflict between the traditional moralists as exemplified by the Church of England and the 'new' moralists, as exemplified by radicals such as the Bishop of Woolwich. The former stressed the importance of status and duty, the latter stressed the importance of the inherent qualities of relationships and 'love'. The former stressed the acceptance of the weight of history, the latter had faith in the individual as an independent moral agent who could be free of tradition. Throughout the 1950s and most of the 1960s it was the traditional moralist position that prevailed as far as divorce law was concerned. I have suggested that this conflict dissipated in the late 1960s as the government and, in particular, the Church of England, moved towards a position of governance rather than government. By this I mean that the English Establishment ceased to think it should control and punish and began to favour guidance, encouragement and education. In Britain in the 1990s this old conflict surprisingly resurfaced, albeit with different advocates. Those adopting the position equivalent to the established Church in the 1950s were the pro-family right and rhetoricians such as Patricia Morgan (1995) and Melanie Phillips (1999). These writers looked to a more authoritarian approach to family life and decried what they saw as the permissiveness and laxity of moral values of contemporary families. Those positioned as the moral liberals were, in the 1990s, the Bishops of the Church of England.

It was the Conservative Government's proposals for reform to the divorce law embodied in *Looking to the Future: Mediation and the ground for divorce* (Lord Chancellor's Department, 1995) and the subsequent Family Law Bill that provided the catalyst for this renewed intense conflict. As with the debates some decades earlier, the main point of contention in the 1990s was over the best method(s) for the state to deploy in order to facilitate/ensure supportive, stable and responsible family relationships. One group, led by Baroness Young in the House of Lords, stressed the importance of marriage as the basis of proper family life as well as the need to patrol the boundaries of married life through the imposition of external rules of conduct and state sanctioned forms of punishment. This group wanted to retain, and indeed enhance, the significance of matrimonial fault in divorce proceedings. The opposing group, led mainly by the Bishops in the House of Lords but also by the Lord Chancellor who introduced the Bill, emphasised that family life was a process of negotiated morality in which blunt notions of matrimonial fault imposed from without by the legal system had no place.

The Family Law Bill proposed to abolish all remnants of matrimonial fault from the divorce process in England and Wales. But this proposal was also intended to be part of a new package in which there would be an emphasis on a period of reflection before proceedings could be started where objective, factual 'information' would be available (as opposed to hostile fault finding and emotional blame) and mediation in which reasonable plans for the future could be discussed and put in place (rather than a battle which would leave combatants and their children scarred and unprepared for a new life which would still require co-operation). The core elements of the Bill, namely the information meetings, the period of reflection, and the preference for mediation over litigation, all constituted a prime example of the practice of governance as opposed to government. The theme of the legislation was based on the idea that people need knowledge about divorce and the financial problems it brings, the difficulties it creates for children and the need to plan such things as resuming work and pension provision. The period of reflection was proposed as a form of 'time out' in which emotions could settle down in order to allow the divorcing couple to become more rational and more competent citizens, equipped

either to manage the transition to divorce, or to change their minds and stay married. Mediation was intended as a way of helping to plan and to resolve any outstanding differences and problems mutually. The modern citizen envisaged by the Family Law Bill was the fact-gathering, rational, caring parent who would make decisions on the basis of knowledge. This citizen could be compared (unfavourably) with the divorced spouse of the former fault-based system who was encouraged to look backwards and cherish resentments and blame, who seized upon children as weapons in the battle, and who - in their emotional haze - failed to make proper financial provision either for themselves or for their former partners and children. The aim of governance would be to produce the former citizen. The aim of government in the latter scenario would be to adjudicate on who should be rewarded and who punished, while admonishing the most guilty for their failure.

The conflict which enveloped the passage of the Family Law Bill was therefore, I suggest, about how the modern state should regulate families (e.g. government versus governance) rather than about morality per se. It was however played out in the rhetoric of morality and fault such that it appeared to be a re-run of some of the 1969 Divorce Reform Bill debates. It is telling to compare the arguments of the main opponents.
Baroness Young led the attack on the Bill:

> "It is the no fault provisions that I find to be the least acceptable part of the Bill…The removal of fault undermines individual responsibility. By removing it, the state is actively discouraging any concept of lifelong commitment in marriage, to standards of behaviour, to self-sacrifice, to duty, to any thought for members of the family" (Hansard, 30 November 1995, col 733).

Baroness Young's position was that it is clear that someone is at fault when a marriage breaks down and that the innocent partner should be vindicated and the guilty partner acknowledged as such. She called upon common-sense and the experience of 'wronged' husbands and wives who had been badly treated by callous or immoral spouses in order to present a powerful case for continuing to shame the guilty party. Her argument was not indifferent to children, but it was her case that the retention of fault caused people to hesitate before divorcing and that this meant that more children were spared the trauma of their parents' divorce. Hers was an argument in favour of deterrence, punishment and shame as ways to control family life and to instil commitment.

The opposing argument was put mainly by the Bishops of the Church of England including the Bishops of Oxford, Worcester, Birmingham and Lord Habgood, the former Archbishop of York. Their argument was that marriage was indeed intended as a lifelong commitment, and that it was clear that some spouses were at fault in marriages, but they maintained that the law of divorce was not the proper instrument to prevent bad behaviour in marriages, nor was it the thing which could make marriages work. They argued that the divorce law should be the process by which the state assists couples to move from one circumstance to another without imposing artificial difficulties which make the transition and its aftermath traumatic for all concerned. As the Lord Bishop of Oxford stated:

> "My Lords, to state the obvious quickly and get it out of the way, I believe marriage is for life and I find the present high level of divorce dismaying…Sadly , marriages fail, but we do not strengthen the institution of marriage by an unsatisfactory divorce law, which the present law is widely recognised to be. Let us concentrate on the present proposals for their own sake, recognising that marriages break down and that

when they do we need the least damaging and most effective procedure possible. Strengthening the institution of marriage is a separate issue…In supporting the Bill, neither I nor my fellow bishops in any way imply that fault is not involved in the breakdown of a marriage…But anyone who knows anything about relationships knows how difficult it is to attribute blame fairly. If we are to have a divorce Bill, let it be one that is *humane and effective*" (Hansard, 30 November 1995, col 734-6, emphasis added).

To put it briefly, Baroness Young wanted clear rules and deterrence to sustain lifelong marriage, the Bishops wanted education to promote marriage, objective information and reflection to provide the transition out of failed marriages. Both sides claimed to speak from a moral position and thus marriage and divorce was quintessentially reconstructed as a moral matter in these debates. But the issue of morality, which featured most vividly in the tabloid press in the mid 1990s, could really be seen as a subtext to the main issue of how a modern government should regulate family life at the end of the twentieth century.

As with the 1969 Divorce Reform Act, the fierce struggle over the Family Law Bill resulted in compromises. The core of the Bill which would have removed fault and introduced information meetings and expanded mediation was passed but not enacted. The reason for this was that it was deemed necessary to pilot the information meetings to see how effective they would be, before moving to a completely new system. However, the Labour Government in 1999 announced that it would not implement Part 2 of the Act, thus leaving divorce reform in limbo at the start of the new millennium.

FAULT AND CHILDREN

The political debate about fault, which was so intense in 1995, continued outside parliament. Rowthorn (1999), for example, argued in favour of the (proper) reintroduction of fault and its attendant punishments as it would increase the amount of trust that spouses could place in one another because there would be external pressures on marriage partners to keep their vows. This, he argued, would improve the quality of marriage because women would not feel that they had to 'hedge their bets' by staying in the labour market in case their marriages fail. Mothers would feel safe enough to stay out of employment and raise their children secure in the knowledge that if their husbands strayed, they would receive punitive damages as well as the 'custody' (3) of the children. It is part of Rowthorn's argument that it is a mistake to prioritise the welfare of children over and above the issue of justice between spouses. He argued that the children should be 'awarded' to the innocent spouse and not, for example, to a guilty spouse just because the latter might have been the primary carer or because the children might prefer to live with the 'guilty' parent. He argued that the welfare of children-in-general is better served by a system of fault because marriage-in-general will become more stable for all children. That individual children might suffer should not, in his argument, outweigh the public policy interest of securing stable marriages. In an almost identical vein, Phillips (1999: 347-8) argues:

"The unjust disposal (4) of children and assets after divorce, not to mention the imposition of child support upon the victims of such breach of trust, can only be remedied if conduct is returned to centre stage in all divorce settlements...Only if conduct is re-established in divorce can the custody of children be resolved in their best interests and in the interests of justice".

Both Phillips and Rowthorn identify the shifting emphasis in family law towards the welfare of children as a kind of Trojan horse in the battle to keep the family stable. From their perspective, the child should be returned to the virtual status of a marital asset which is awarded to the innocent spouse. This is an interesting argument because, although the main element of the debate they have re-vitalised has focused on the matrimonial misdemeanours of parents and ways of curbing these behaviours through state enforced punishments, their argument rests substantially on the exclusion of children from civil society and/or a form of citizenship within the family. Whilst family policy (combined with social and cultural change) has gradually given rise to more democratic relationships within the family which are on the brink of including children in this newly founded form of private citizenship, Phillips' and Rowthorn's arguments seek discursively to reconstruct children as silent appendages who will concede to (and apparently thrive under) the authority of the innocent parent without the right to utter the slightest objection or preference. In this sense, the return of fault-based divorce would be dependent upon returning children to the sort of status they enjoyed in the first half of the twentieth century. Fault-based divorce would not simply require married couples to submit themselves and the minutiae of their intimate behaviour to the imperfect scrutiny of judicial inquisition for it to be decided who was guilty and who was innocent, it would also render their children as trophies in the adversarial system.

The question is whether the mode of regulation of married life subscribed to by Phillips and Rowthorn (namely authoritarian and rule bound) is in tune with the way in which the state in late twentieth century Britain has adopted governmentality which emphasises the ways in which individuals might govern themselves in tune with favoured, 'modern' modes of thinking and conduct. The former approach would lay down clear rules and penalties and would rely on people's sense of self-interest to keep their behaviour within certain fixed boundaries. The latter seeks to persuade people that if their behaviour is changing, they will need to attend to and internalise certain ethical criteria in order that they remain responsible citizens. The essence of this approach is captured in Tony Blair's speech cited above. In this speech he also stated:

> "This is not about preaching to individuals about their private lives. It is addressing a huge social problem. Attitudes have changed. The world has changed, but I am a modern man leading a modern country and this is a modern crisis" (Prime Minister's speech, *The Guardian* 1.10.97: 8).

Although the meaning of Blair's speech is somewhat opaque, it does capture the flavour of Government policy on family life at the end of the twentieth century if it is read in combination with the Consultation Document *Supporting Families* published by the Home Office in 1998. In that document it states:

> "Families do not want to be lectured about their behaviour or what kind of relationship they are in. They do not what to be nannied themselves or to be nagged about how they raise their children. But they do want support: advice on relationships; help with overcoming difficulties; support with parenting; and, should the couple's relationship breakdown irretrievably, a system of divorce which avoids aggravating conflict within the family" (1998: 30).

This heavy emphasis on support and advice, along with the creation of a National Family and Parenting Institute, was prefigured in the Morton Commission of the 1950s, and even the Denning Committee (1946) of the mid 1940s. However, the renewed emphasis on it in the 1990s

carries a different significance because of the extent to which the divorce laws have changed and the increased normalisation of divorce itself. Although high rates of divorce are regretted in the Green Paper (5), the emphasis is on supporting marriage when people opt for it, but also on 'normalising' other forms of family arrangement:

> "It is not for the state to decide whether people marry or stay together. There are strong and mutually supportive families and relationships outside marriage and many unmarried couples remain together throughout their children's upbringing and raise their children every bit as successfully as married parents" (Supporting Families, 1998:30).

It is particularly interesting that the Green Paper should state that 'it is not for the state to decide whether people marry or stay together' because this was seen as very much the province of the state in the middle of the twentieth century. But by the end of that century the state appears to have relinquished its responsibility for regulating the movement into and exit from the institution of marriage. Marriage is defined as significant only in as much as it appears (from the statistics) to create a more stable form of parenting. It is therefore parenthood that seems to have become the focus of government policy at the end of the twentieth century rather than marriage and divorce.

This shift in emphasis reflects trends in divorce laws and judicial pronouncements in England and Wales since the reforms in 1969, which have moved much closer to an emphasis on contextual ethics and a diminishing emphasis on contractual status. As Dame Brenda Hale (1998) has argued, family law has moved away from equating the family with marriage and is therefore less pre-occupied with regulating spousal relationships. The growing emphasis on the welfare of children has instead, given further impetus to the shift, initially apparent in the 1970s, towards a greater attention to the quality of relationships, including parental relationships. This shift has given rise to new mechanisms of governmentality which are constructed around an intensified interest in children rather than spouses.

CONCLUSION: FOR THE SAKE OF THE CHILDREN

Throughout the second half of the twentieth century divorce has been equated with harming children (Smart and Sevenhuijsen, 1989). However, this concern reached a crescendo in the late 1980s and 1990s as social scientific evidence appeared to give weight to the idea that divorce harmed children in a range of ways including their health, educational achievement and marriage prospects (6). We can think of the concept of 'harming the children' as a discursive device which has been used in different ways at different times. For example, the idea of staying together for the sake of the children was a powerful rhetorical device in the 1950s and 60s. However, it gave way (partially) to the idea that children were harmed by conflict more than by divorce - at least if the divorce resolved the conflict within the family. As divorce lost its moral stigma, the guilt associated with matrimonial fault and failure gave way to a new guilt over the harm caused to children. This, in turn, gave way to a different focus on new forms of parental obligation (Maclean and Eekelaar, 1997) generated in part by the ethos embrace by the Children Act 1989. This new ethos was based on the idea that divorce might sever spousal relationships, but that it did not and should not impede parental relationships and obligations. A new form of parental conduct began to be formulated which envisaged shared parenting across households or, at the very least, a more substantial role for fathers in post-divorce parenting than had seemed desirable or feasible in the 1970s and 1980s. While mothers had been the focus of the divorce debates in

the 1950s and 1960s, in the 1970s and 1980s attention shifted to fathers, firstly as economic providers and latterly as potential carers. This focus on shared parenting, or the new conduct of post-divorce parenthood, was also embedded in the idea that (nuclear) families were no longer restricted to co-residence or shared domicile. Divorce no longer had to mean family breakdown, it could simply mean marital breakdown because the family could continue to survive (even thrive) across households.

The rise of mediation, the demise of emphasis on fault, and the proposed information meetings outlined in the 1996 Family Law Act (7) all produced a mode of governance of marriage based on the reduction of conflict and the maximisation of information and (desirable) options for the organisation of post-divorce family life. Whereas in the 1950s adulterous wives were demonised, and in the 1980s deadbeat dads were vilified, by the end of the century the main villain became conflict. Divorce was being transformed into a process designed to minimise conflict - for the sake of the children.

Perhaps one of the most significant differences between the management of divorce in the 1950s and at the end of the twentieth century is the centrality of a new set of ideas about childhood and parent-child relationships. We can trace how notions of the welfare of the child have changed in content over this 50 years but, more importantly, by the end of the 1990s the child emerges as a social actor whose wishes and feelings should be ascertained not simply as a minor whose welfare is safeguarded by his/her elders and betters (Sawyer, 2000; Smart and Neale, 2000).

From the standpoint of governmentality, the child becomes the key to encouraging certain forms of parental behaviour which are more socially acceptable. The vile hostilities and hypocrisies of fault-based divorce, the wildly optimistic ideals of the 'clean break', and the very idea of awarding the 'custody' of children to one parent, all seem to be practices which are only possible in a legal culture based on the centrality of marriage and adult relationships rather than reciprocal, caring relationships within diverse family forms.

In this context, the private law provisions of the Children Act (1989) are a good example of the shift towards governmentality away from domination and restraint. This Act promoted clear notions of 'good' post-divorce parenting by presenting the positive ideal of shared parenting while also relying on the already created impetus towards fathers' participation generated by the fathers' rights movement and rhetoric. It also harnessed the naissant idea of the voice of the child to give validity to the idea of the importance of continued shared parenting, while also pointing to the damage caused to children by parental conflict. The legislation sought to find ways of reducing conflict in order that its positive principles could start to flourish and change the ethos of post-divorce family life. The Children Act was perhaps the first legislative measure to address itself to the idea that there could be a family after divorce and that this family could be subject to (indirect) regulation just as the married or re-married family could be. The very advent of the term 'post-divorce' family - ugly as it may be - is indicative of a shifting conception of the relationship between family, marriage and divorce at the start of the new millennium. It also indicates the existence of a new site for legislative, social or cultural intervention, as well as recognition of a new set of relationships which can give rise to new forms of social agency and cultural practices. Thus, for example, divorced couples may start to opt to live near each other; step-parents may cease to be parents at all, becoming family friends instead; children may inhabit several households and networks of relationships; children may even start to chose which parent they co-reside with. These practices may in turn have effects on employment practices, on

housing provision, on mobility patterns, on re-marriage, and on relationships across the generations.

The twentieth century obsession with the institution of marriage has not evaporated with the arrival of the twenty first century however. The Green Paper *Supporting Families* (1998) is a clear example of how family policy in England and Wales attempts to look backwards and forwards at the same time. In this document marriage is celebrated as the best basis for family life, yet other forms of families are recognised as legitimate (as long as they are stable). Schools are instructed to teach children the value of heterosexual marriage as the basis of family life, yet the ban on representing to schoolchildren the idea that homosexual relationships can constitute proper families is lifted (*The Guardian* 28.1.00). These are clearly contradictory policies and they reveal the extent to which the state can no longer presume that it addresses and/or regulates an homogeneous national culture. This must surely be one of the most significant transformations to have taken place since the 1950s. There are now several moral constituencies for the state to govern, each of which seems to demand different modes of governmentality (8). Those who cleave to marriage form a strong constituency which cannot be ignored, yet equally those who practice diversity are equally significant and may even be in the ascendant. A middle ground seems inconceivable and so family policy embraces two different forms of regulation. It will of course be of considerable sociological interest to see how these competing tendencies unfold in the twenty first century.

ACKNOWLEDGEMENT

FOOTNOTES

(1) Between 1951 and 1955 the average annual number of divorces was 29,500. These numbers had declined from the peak of 40,000 immediately following the war from 1946-50, but were considerably higher than the pre-war figures which were 5,097 between 1931-40. In 1997 there were 147,000 divorces. This is a decline from the peak of 176,000 in 1993. (Sources: Gibson, 1994: 133; ONS, 1999, *Social Trends* 29: 49).

(2) See for example Melanie Phillips' refrain on stability in *The Sex-Change Society* (1999).

(3) It is interesting that those who argue in favour of fault-based divorce such as Phillips and Rowthorn, still use the terminology of 'custody' and 'access' when referring to children rather than the current terms of residence and contact. It seems that this reflects a particular view of the place of the children of a marriage.

(4) This terminology gives the impression that the 'just disposal of children' would be acceptable to Ms Phillips. Her argument is not against the disposal of children per se (as if they were inanimate objects) but simply that they are wrongly disposed of if the guilty spouse has 'custody'.

(5) This is evidenced by the heavy praise heaped on marriage and the stated desire to strength marriage.

(6) See Burghes (1994) for a full appraisal of research in this field.

(7) In fact Section II of the Act was not implemented and so the idea of information meetings was dropped. Nonetheless, they were an indication of the commitment of government at the end of the twentieth century to give people the knowledge on which they could base decisions about how to organise their families/marriages. They may have been an imperfect idea, but they were an indication of the shifting mode of governmentality during this period.

(8) The most extreme example of parallel universes of governmentality seems to be demonstrated in the Louisiana experiment which is discussed in Rowthorn (1999). In this US State there co-exist two different forms of marriage, each with different rules governing divorce. Covenant marriage only allows divorce on the basis of matrimonial fault, whilst ordinary marriage allows for divorce by consent. Moral traditionalists may opt for the former, and moral relativists for the latter.

REFERENCES

Archbishop of Canterbury's Group, (1966) *Putting Asunder: A Divorce Law for Contemporary Society*, London: SPCK.

Bauman, Z. (1995) *Postmodern Ethics*, Oxford: Blackwell.

Beck, U. & Beck Gernsheim, E. (1995) *The Normal Chaos of Love,* Cambridge: Polity.

Beveridge, W. (1942) *Social Insurance and Allied Services*, Cmnd 6404, London: HMSO.

Burghes, L. (1994) *Lone Parenthood and Family Disruption,* London: Family Policy Studies Centre.

Burgoyne, J. & Clark, D. (1984) *Making a Go of It*, London: Routledge & Kegan Paul.

Denning Mr J. (1946) *Second Interim Report of the Committee on Procedure in Matrimonial Causes*, Cd 6945, London: HMSO.

Denning, Lord. (1980) *The Due Process of Law*, London: Butterworth.

Fletcher, R. (1966) *The Family and Marriage in Britain*, Harmondsworth: Penguin.

Gibson, C. (1994) *Dissolving Wedlock*, London: Routledge.

Giddens, A. (1992) *The Transformation of Intimacy*, Cambridge: Polity Press.

Giddens, A. (1998) *The Third Way: The Renewal of Social Democracy*, Cambridge: Polity Press.

Griffiths, M. (1995) *Feminisms and the Self: The Web of Identity*, London: Routledge..

Hale, B (1998) 'Private lives and public duties: what is family law for?' The 8th ESRC Annual Lecture 1997, *Jnl of Social Welfare and Family Law* 20(2): 125-36.

Holt, J. (1975) *Escape from Childhood*, Harmondsworth: Penguin.

Home Office (1998) *Supporting Families: A Consultation Document,* London: The Stationery Office.

Humphries, J. (1999) 'Special Issue on the family: introduction', *Cambridge Journal of Economics*, Vol 23: 515-517.

Jamieson, L (1998) *Intimacy*, Cambridge: Polity Press.

Johnson, K. (1968) 'Divorce: The financial facts', *New Society*, 14 March: 498.

Lord Chancellor's Department (1995) *Looking to the Future: Mediation and the ground for divorce. The Government's Proposals*, London: HMSO, Cm 2799.

Maclean, M. (1994) 'The Making of the Child Support Act of 1991: Policy Making at the Intersection of Law and Social Policy', *Jnl of Law and Society*, Vol. 21(4): 505-519.

Maclean, M. and Eekelaar, J. (1997) *The Parental Obligation*, Oxford: Hart.

Morgan, D. (1999) 'Risk and Family Practices: Accounting for Change and Fluidity in Family Life', in E. B. Silva and C. Smart (eds) *The New Family?* London: Sage.

Morgan, D. (1996) *Family Connections*, Cambridge: Polity Press.

Morgan, P. (1995) *Farewell to the Family?*, London: Institute of Economic Affairs.

Office of National Statistics (1999) Social *Trends 29*, London: The Stationery Office.

Phillips, M. (1999) *The Sex-Change Society*, London: The Social Market Foundation.

Robinson, J.A.T. (1963) *Honest to God*, London: SCM Press.

Rose, N. (1999) *Powers of Freedom*, Cambridge: Cambridge University Press.

Rowthorn, R (1999) 'Marriage and Trust: some lessons from economics' *Cambridge Journal of Economics,* Vol 23(5): 661-691.

Sawyer, C. (2000) 'Ascertaining the Child's Wishes and Feelings', *Family Law*, Vol 30: 170-4.

Sevenhuijsen, S. (1998) *Citizenship and the Ethics of Care: Feminist Considerations about Justice, Morality and Politics*, London: Routledge.

Smart, C. (1984) *The Ties That Bind*, London: Routledge.

Smart, C. and Sevenhuijsen, S. (1989) (eds) *Child Custody and the Politics of Gender*, London: Routledge.

Smart, C. (1996) 'Good Wives and Moral Lives: Family and Divorce 1937-51' in C. Gledhill and G. Swanson (eds) *Nationalising Femininity*, Manchester: MUP, pp 91-105.

Smart, C. (1997) 'Wishful Thinking and Harmful Tinkering? Sociological Reflection on Family Policy', *Jnl of Social Policy,* Vol 26 (3): 1-21.

Smart, C., Neale, B and Wade, E. (1999) 'Objects of Concern?: Children and Divorce', *Child and Family Law Quarterly*, Vol 11 (4): 1-12.

Smart, C. and Neale, B. (2000) '"It's my life too" - Children's Perspectives on Post-divorce Parenting', *Family Law*, Vol 30: 163-69.

Tronto, J. C. (1993) *Moral Boundaries*, London: Routledge.

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