

Marriage and divorce in the liberal imagination

Colin Hart

FAMILY EDUCATION TRUST and COALITION FOR MARRIAGE

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Family Education Trust

The Atrium
31 Church Road
Ashford
Middlesex
TW15 2UD

www.familyeducationtrust.org.uk

and

Coalition for Marriage
8 Marshalsea Road
London
SE1 1HL

www.c4m.org.uk

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INTRODUCTION

What is marriage?

It's a short question, but a fundamental one, and it can be approached in a number of different ways.

For example, the online Oxford English Dictionary defines marriage as: 'the legally or formally recognised union of two people as partners in a personal relationship'.¹

That is quite clinical, as a dictionary definition tends to be, but a more romantic definition might run as follows: 'Marriage is a celebration of love and should be open to everyone.'²

That comes courtesy of the former Equalities Minister Lynne Featherstone, when she introduced the consultation on same-sex marriage. Although such a definition does not seem to put any limit on the number of people involved, at least it is positive about marriage.

According to Julie Bindel, founder of the feminist campaigning group Justice for Women: 'Marriage is an outmoded institution built on patriarchal inequality that has no place in modern society.'³

The question 'What is marriage?' can be, and indeed has been, answered in a variety of different ways, but a summary of the Western legal definition was given by Lord Penzance in the case of *Hyde v Hyde and Woodmansee* over 150 years ago:

'I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.'⁴

Lord Penzance was not inventing marriage here, but rather he was describing it. His definition recognised what was already true and set

1 Definition of 'marriage' on Lexico.com, a new collaboration between Dictionary.com and Oxford University Press. <https://www.lexico.com/en/definition/marriage> (accessed 3 September 2019)

2 Lynne Featherstone, Home Office press release, 'Same-sex marriage a step closer', 15 March 2012. <https://www.gov.uk/government/news/same-sex-marriage-a-step-closer--2> (accessed 3 September 2019)

3 Julie Bindel, 'Marriage should be abolished. The civil partnership debate proves that', *Guardian*, 29 June 2018. <https://www.theguardian.com/commentisfree/2018/jun/29/marriage-abolished-civil-partnerships-inequality> (accessed 3 September 2019)

4 *Hyde v Hyde and Woodmansee* [1866] LR 1 P & D 130.

out what the law had always assumed: Marriage is ‘the voluntary union for life of one man and one woman, to the exclusion of all others’.

Since marriage predates both the state and the church, it does not belong to them, and they are in no position to redefine it.

There are four essential elements in Lord Penzance’s definition of marriage:

a) Marriage is a voluntary union

The free consent to marry is a prerequisite of marriage. A forced marriage is not a true marriage.

b) Marriage is a union for life

A marriage is not embarked upon for a temporary period or for a fixed term – it is for life. Easy divorce laws have undermined this profoundly.

c) Marriage is the union of one man and one woman

Marriage is monogamous. It involves one man and one woman. Unions between two men or two women are not marriage, no matter what Lynne Featherstone, David Cameron or even Parliament says.

The word ‘marriage’ appears over 3,000 times in UK law. In every case the framers of the legislation were in no doubt that marriage was the union of a man and a woman. But the Marriage (Same Sex Couples) Act 2013 changed all this. It drove a coach and horses through seven centuries of legislation.

Changing the definition of marriage is as absurd as Parliament passing a law saying henceforth it shall not rain in summer. Marriage is rooted in the order of nature itself.

d) Marriage is an exclusive union

It is ‘to the exclusion of all others’. This final element again underscores the importance of monogamy. Marriage demands a commitment to faithfulness and sexual exclusivity. Easy divorce laws create a whole culture of serial monogamy – one marriage after another. This hollows out the definition of marriage.

What is society's interest in marriage?

The benefits of marriage are well established. Those who are married are normally happier and tend to live longer, and have fewer heart attacks, a lower risk of depression, and better survival rates for cancer and major operations.¹

Marriage is also the best environment in which to raise children. Ninety per cent of parents who stay together until their children reach 15 are married.² Children of married parents are more likely to go to university, more likely to get married themselves, and less likely to receive government benefits.³ They have higher self-esteem⁴ and better mental health.⁵

The corresponding problems of divorce for the parties are similarly well established. Divorce and separation are associated with increased risk of earlier mortality.⁶ Divorced men also have higher rates of

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- 1 ONS, *Personal and economic well-being: what matters most to our life satisfaction?* 15 May 2019. <https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/articles/personalandeconomicwellbeingintheuk/whاتمattersmosttoourlifesatisfaction> (accessed 3 September 2019); Robert H Shmerling, 'The health advantages of marriage', Harvard Health Publishing, 30 November 2016. <https://www.health.harvard.edu/blog/the-health-advantages-of-marriage-2016113010667> (accessed 3 September 2019); Kay Hymowitz, Jason S Carroll, W Bradford Wilcox, Kelleen Kaye, *Knot Yet: The benefits and costs of delayed marriage in America*, National Marriage Project, 2013. <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf> (accessed 3 September 2019)
 - 2 Marriage Foundation, <http://marriagefoundation.org.uk/research/> (accessed 3 September 2019)
 - 3 Harry Benson, 'The Long-Term Benefits of Marriage: Evidence from the UK', Institute for Family Studies, 30 January 2018. <https://ifstudies.org/blog/the-long-term-benefits-of-marriage-evidence-from-the-uk> (accessed 3 September 2019)
 - 4 Harry Benson, Spencer James, 'Marriage boosts self-esteem for teenage boys and girls', Marriage Foundation, May 2016. <http://marriagefoundation.org.uk/wp-content/uploads/2016/06/pdf-01.pdf> (accessed 3 September 2019)
 - 5 Harry Benson, Stephen McKay, 'Family breakdown and teenage mental health', November 2017. <http://marriagefoundation.org.uk/wp-content/uploads/2017/11/MF-paper-Family-breakdown-and-teenage-mental-health-FINAL.pdf> (accessed 3 September 2019)
 - 6 K J Bourassa, J M Ruiz, D A Sbarra, 'Smoking and Physical Activity Explain the Increased Mortality Risk Following Marital Separation and Divorce: Evidence From the English Longitudinal Study of Ageing', *Annals of Behavioral Medicine*, Vol 53, Issue 3, March 2019, pp.255–266. <https://doi.org/10.1093/abm/kay038> (accessed 3 September 2019)

substance abuse, depression, and lack of social support.⁷ Divorced people are at greater risk of death from coronary heart disease and stroke.⁸

Research shows that young people who experience family breakdown are more than twice as likely to become homeless and twice as likely to get in trouble with the police.⁹ Such children are also more likely to develop emotional and behavioural problems.¹⁰

At the societal level, the cost to the taxpayer of family breakdown has been estimated at around £51 billion a year.¹¹

A recent comment piece correctly described marriage as ‘societal glue’.¹² Marriage is not just about private relationships. It is about serving the public good by contributing to a stable society by providing a secure stable environment in which to raise children.

That is the key reason why the state is involved in marriage. Governments are not – or should not be – interested in the highs and lows of people’s emotional and romantic relationships. However, the stability that marriage provides for both adults and children is very much in the public interest. Such stability is best secured when a child is brought up by his or her own married mother and father.

7 D S Felix, W D Robinson, K J Jarzynka, ‘The Influence of Divorce on Men’s Health’, *Journal of Men’s Health*, 10(1), March 2013, pp.3-7.

8 C W Wong, C S Kwok, A Narain *et al*, ‘Marital status and risk of cardiovascular diseases: a systematic review and meta-analysis’, *Heart*, 2018, Table 3.

9 Centre for Social Justice, *Why Family Matters: A comprehensive analysis of the consequences of family breakdown*, March 2019. <https://www.centreforsocialjustice.org.uk/library/why-family-matters-comprehensive-analysis-of-the-consequences-of-family-breakdown> (accessed 3 September 2019)

10 Emla Fitzsimons, Aase Villadsen, ‘Father departure and children’s mental health: How does timing matter?’ *Social Science & Medicine*, Vol 222, February 2019, pp.349-358. <https://doi.org/10.1016/j.socscimed.2018.11.008> (accessed 3 September 2019)

11 The Relationships Foundation, ‘Cost of family failure 2018 update’, 29 January 2018. <https://relationshipsfoundation.org/publications/pressreleases/cost-family-failure-2018-update/> (accessed 3 September 2019)

12 Lucy Denyer, ‘Marriage is societal glue – but it’s become just another middle-class institution’, *The Daily Telegraph*, 14 May 2019.

Supporting marriages

Since marriage is good and divorce is normally bad – it is in the interest of us all to support marriage. There are many factors that keep marriages together.

a) The public promises that the couple make on their wedding day

Marriage is not a private arrangement, but a public act. From two families a new family is created with the potential to benefit the wider society.

b) The complementarity of men and women

That is what makes marriage work; it goes with the grain of the way we are made. Marriage is a natural institution of co-operation, a union of the sexes, a school for character that restrains our selfish instincts.

c) The structure of marriage

A marriage does not depend for its existence solely on the strength of the couple's feelings from day to day. The commitment that lies at the heart of the structure of marriage means that the marriage continues even when feelings ebb and flow, as they inevitably do.

d) The support of family and friends

The relatives and friends who are usually present at the marriage ceremony as witnesses and wedding guests serve as the future support team.

There *should* be many other factors which support marriage. In the past social conventions, customs, the law, churches, educational institutions, and the media, all contributed to supporting marriage. Sadly, many of these have now become vehicles for attacking marriage.

Marriage has always needed structural support through the law and public policy. This was the case even when marriage rates were at

their highest and divorce was rare. However, many of these structural supports for marriage have been either eliminated or undermined. To make divorce even easier than it is already would amount to a further attack on the few remaining props which continue to support marriage.

Marriage in the liberal imagination

We began with three socially liberal definitions of marriage. In defining marriage as ‘the legally or formally recognised union of two people as partners in a personal relationship’, the online Oxford English Dictionary definition focuses on the legal recognition of a personal relationship between two people of either sex.

The other two definitions – from Lynne Featherstone and Julie Bindel respectively - reflect the romantic view of marriage and the Marxist-feminist view of marriage that have led us to a situation in which marriage has become a plastic institution. We shall consider each in turn.

a) The romantic view of marriage

In the romantic view, marriage is dumbed down into being a ‘celebration of love’. There is a fairy-tale ending in which the couple live happily ever after. It is the stuff that Hollywood films used to be made of. In fact, it was a Hollywood actor, Ronald Reagan, then governor of California, who first introduced no-fault divorce in the West, though according to his adopted son, Reagan later regretted this.¹

The abandonment of the element within Lord Penzance’s definition which insists that marriage is the union of ‘one man and one woman’ is entirely consistent with the view of marriage set forth by Hollywood. If marriage is merely a celebration of love between two adults, why do those adults have to be male and female?

For decades we have seen the erosion of the understanding that marriage is ‘for life’, and that erosion continues apace. Again, why not? If your marriage does not live up to the romantic ideal of Hollywood, surely it’s your right – even your duty to yourself – to move on and seek fulfilment elsewhere? Your real soulmate is still out there, waiting

to be found. Yet the tragedy is that the expectation of living in a perpetual bubble of romantic bliss invariably creates dissatisfaction, because it will always collide with reality.

The expectation that marriage is ‘to the exclusion of all others’ has survived in that bigamy remains a criminal offence and most people think that adultery is wrong. However, sexual infidelity is not taken as seriously as it once was. A generation or two ago, an organisation to help people ‘find discreet relationships of all kinds’, whether currently single or attached, would have been unthinkable. Yet the Ashley Madison website bears the strapline, ‘Life is short. Have an affair.’ The legal definition of marriage expounded by Lord Penzance is being whittled away bit by bit.

The requirement that marriage is to be a voluntary union remains. Verbal consent has to be given during the wedding ceremony, the doors must be open, and advance notice must be given through the reading of the banns in church (if the ceremony is to be held in an Anglican church),² or a public display of a notice of marriage at a Registry Office. All these checks and balances are necessary.

Yet we are now seeing the principle of consent being turned on its head. The importance of marriage as a consensual relationship is being deployed against life-long marriage in that it is being claimed that holding a couple to their vows is like a forced marriage.³ It is argued that as soon as someone no longer wants to be married, he or she should be allowed to leave it unilaterally on demand. This very attitude lies at the heart of the government’s no-fault divorce plans. Under the proposals, public policy will be firmly on the side of the

2 The tradition of reading the banns of marriage dates from the Fourth Lateran Council in 1215.

3 Steve Doughty, ‘Divorce on demand’ reforms will scrap the need to blame either husband or wife for marriage split and allow couples to cite ‘irretrievable breakdown’ instead in biggest legal shake-up in 50 years’, *Daily Mail*, 9 April 2019. <https://www.dailymail.co.uk/news/article-6900691/Divorce-demand-reforms-scrap-need-blame-husband-wife-marriage-split.html> (accessed 3 September 2019)

party that wants a divorce. There will be no opportunity for a spouse to contest it.

So where does this leave us? What is the prevailing definition of marriage? Quite simply it amounts to: 'Any two unrelated adults with a government marriage licence'.

Perhaps we should be thankful for small mercies. At least marriage is still limited to two people, and at least they have to be unrelated and both unmarried. Quite how long this will remain is a discussion for another day.

But you can see a clear difference between the romantic view of marriage and marriage as it has been understood historically and defined in law. If the state creates marriage, rather than recognises it, then marriage becomes the property of the state, and the state is empowered to redefine it at will. This is precisely what has happened.

Marriage is increasingly being viewed as a *relationship* rather than as an institution – a relationship that can be terminated at any time by either party. This leads to marriage becoming brittle, performance-based, and immature. The relationship has no protecting structure, which inevitably introduces considerable insecurity. The only thing holding the marriage together is the desire of both people at any given moment to be part of the marriage.

Husbands and wives are left constantly wondering if their efforts are enough to maintain romantic feelings. But romantic love or physical attraction simply cannot bear the weight of a marriage. As one author has observed: 'Such unions are often the most tyrannical of bonds because they depend entirely upon the partners keeping emotionally all the time up to scratch.'⁴

Where this view of marriage prevails, when the romance wanes, or when the performance of a spouse drops below the optimum and there are better opportunities elsewhere, why stick with the marriage? Why not trade up for a new model? Within the romantic view, there is no restraint on selfishness. If your feelings are disappointed, then you can file for divorce.

If marriage is merely a romantic relationship then each spouse

knows that the other could leave without cause or warning. This is bound to affect what they are prepared to put into the marriage. Why invest in the marriage, if it could all be so easily ended? It naturally reduces commitment, undermining the marriage at its very core.

This results in a negative spiral whereby reducing commitment in turn leads to more instability and so less commitment and so the downward trajectory continues. Such a model of marriage is never going to serve as a societal glue.

b) The Marxist-feminist view of marriage

Although there are differences in their beliefs, both Marxists and feminists see marriage as the patriarchal exploitation of women. Under communism, Soviet Russia was unremittingly hostile towards marriage and the family.

Nikolai Bukharin, editor of the Communist Party newspaper, wrote in 1921 that ‘in a Communist society, when private property and oppression of women finally come to an end, so, too, will prostitution and family’.⁵

Early communist Russia aggressively promoted cohabitation and equated it with marriage. The 1918 *Family Code* ‘severed the concept of marriage from that of the family’.⁶ Marriage was no longer to be a life-long commitment and so in came no-fault-divorce.⁷

Alexander Goikhbarg, a key author of the 1918 Code, boasted: ‘Marriage in Soviet legislation has ceased to be a prison..., a union lifelong in principle, concluded for a whole lifetime, indissoluble.’⁸

Lenin was appalled at the consequences of his regime’s policies. One catchphrase at the time was that sex should be treated like drinking a glass of water. Lenin said this was bad for the revolution,

5 N I Bukharin: *Historical Materialism: A System of Sociology*, 1921.

<https://www.marxists.org/archive/bukharin/works/1921/histmat/6.htm> (accessed 3 September 2019)

6 Wendy Z Goldman, *Women, the State and Revolution: Soviet Family Policy and Social Life, 1917-1936*, Cambridge University Press, 1993, p.51. (Only civil marriages had legal status, divorce was readily available and all children were entitled to parental support.)

7 C Curtis, ‘The Way People Live,’ in H E Salisbury (Ed), *The Soviet Union: The Fifty Years*, New York Times Books, 1967, p.57; M Hindus, *Humanity Uprooted*, Cape and Ballou, 1929, p.114.

8 Cited by Harold J Berman, ‘Soviet Family Law in the Light of Russian History and Marxist Theory’, *Yale Law Journal*, Vol 56, Issue 1, 1946. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4473&context=yjlj> (accessed 3 September 2019)

calling it ‘completely unmarxist and, moreover, anti-social’.⁹

However, after Lenin’s death, the attack on marriage continued. The 1926 *Family Code* gave further rights to cohabitantes and speeded up divorce to just three days.¹⁰ Between 1926 and 1927 an already high divorce rate rose by nearly 70 per cent.¹¹ There was universal sex education in schools.¹²

In his 1929 title, *Humanity Uprooted*, the pro-Soviet author Maurice Hindus wrote: ‘We have in Russia, if not a condition, certainly a spirit of free love’.¹³

Marriage was undermined using quick no-fault divorce, and it was more effective in doing so than the Communists ever dreamed of. In fact it was too effective in that the ensuing destruction of family life began to destroy Russian society itself.

Hindus wrote that the ‘social bonds of family life’ were ‘in process of dissolution’.¹⁴ Immense problems were posed by divorce, alimony, family instability and homeless waifs wandering the streets (‘besprizornost’).¹⁵ Estimates of how many such children there were vary considerably: some suggest 300,000 by the mid-1920s, and attribute it mainly to family breakdown.¹⁶ However, others have suggested that the number of homeless children was as high as seven million in 1921,¹⁷ though the devastation wrought by revolution and war was a major factor in the displacement of children, with the reordering of the family compounding the problem.

Russia’s leaders eventually had to do something. In 1936 the deputy chairman of the Supreme Court remarked: ‘It is necessary to put an

9 S Webb, B Webb, *Soviet Communism: A New Civilisation*, 3rd edition, Longmans, 1944, p.847.

10 C Curtis, *op. cit.*, p.57; M Hindus, *op. cit.*, p.114.

11 W Z Goldman, *op. cit.*, p.297.

12 L Lawton, *The Russian Revolution (1917-1926)*, Macmillan and Co, 1927, p.227.

13 M Hindus, *op. cit.*, p.114.

14 M Hindus, *op. cit.*, p.117.

15 W Z Goldman, *op. cit.*, p.296.

16 A Woman Resident in Russia, ‘The Russian Effort to Abolish Marriage’, *The Atlantic*, July 1926. <https://www.theatlantic.com/magazine/archive/1926/07/the-russian-effort-to-abolish-marriage/306295/> (accessed 3 September 2019)

17 W Goldman, ‘Freedom and its Consequences: The Debate on the Soviet Family Code of 1926’, *Russian History*, Vol 11, Issue 4 (Winter 1984), pp.362-388; Jennie A Stevens, ‘Children of the Revolution: Soviet Russia’s Homeless Children (Besprizorniki) in the 1920s’, *Russian History* Vol 9, Issue 1, 1982, pp. 242-264 <https://doi.org/10.1163/187633182X00155> (accessed 3 September 2019)

end to the anarchist view of marriage and childbirth as an exclusively private affair.¹⁸

Modern-day feminist Wendy Goldman noted: ‘In 1936, jurists repudiated many of their earlier ideas, and in a clear ideological shift, demanded the strengthening and stabilisation of the family.’¹⁹ By 1944 Stalin’s *Family Edict* had returned divorce proceedings to the courts and cohabitation was no longer treated as equivalent to marriage.²⁰ In 1959 ‘solemn ceremonies’ were created to establish marriages.²¹

18 ‘Rabotniki Iustitsii Aktivno Uchastvuite v Obsuzhdenii Zakonoproekta,’ *Sotsialisticheskaia iustitsiia*, 18 (1936), p.3, cited by W Z Goldman, *op cit*, p.296.

19 *Ibid.*, p.296.

20 *Ibid.*, p.340.

21 C Curtis, *op. cit.*, p.54.

Three cardinal myths

In the 21st century Western world, the nature of marriage is not properly understood. And that means that divorce is not understood either. Divorce is far more serious than society has been led to believe by our cultural elites. Opinion formers, the social policy intelligentsia, family lawyers and the media have been heavily influenced by wrong views of marriage. These elites propagate three cardinal myths.

Myth #1: YOU ARE BETTER OFF AFTER DIVORCE

This is contradicted by the facts. Couples who persevere through periods of unhappiness in their marriage are likely to be glad they did so later. Research has found that seven in ten parents who were unhappy at the time of the birth of their first child stay together. Of these, around two-thirds were happy ten years later.¹

Myth #2: THE LAW DOES NOT INFLUENCE BEHAVIOUR

According to this view divorce can be made easier and quicker without actually encouraging anyone to divorce. It is assumed that people are going to get divorced anyway and that streamlining the process will merely make the dissolution of a marriage more humane.

There is a striking parallel with the arguments used by cigarette manufacturers when they argued against an advertising ban. They claimed that the purpose of advertising was to persuade smokers to switch brands, not to encourage non-smokers to start smoking. However, very few people agreed. It is a simple fact that advertising tobacco products promotes smoking.

Similarly, liberalising the divorce law promotes divorce. This is borne out by the figures for divorces in England and Wales when major liberalisations took place.

The Divorce Law Reform Act 1969 had the effect of doubling the number of divorces in the space of just two years (1971-72) after the Act came into force in 1971 (See Figure 1).

1 Harry Benson, Steve McKay, 'Couples on the Brink', Marriage Foundation, February 2017. <https://marriagefoundation.org.uk/wp-content/uploads/2017/02/MF-paper-Couples-on-the-brink-FINAL-1.pdf> (accessed 3 September 2019)

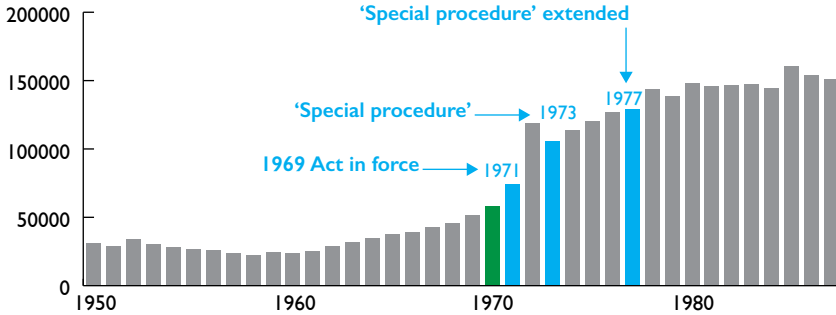


Figure 1: Number of divorces per year, 1950-1987

Administrative changes intended for exceptional cases subsequently made a bad situation worse. In 1973 a ‘special procedure’ was introduced to allow uncontested divorces through the post when couples had been separated for two years and there were no children. This was further extended to all uncontested divorces in 1977. In both cases, the liberalising measures led to a further rise in the number of divorces (See Figure 1).

In the space of a single decade successive changes to the process of divorce saw divorces rocket by a multiple of two and a half from 58,239 in 1970 to 148,301 in 1980 (See Table 1).² Over the same period, the divorce rate increased from 4.7 to 12 divorces per thousand married population.

² The Divorce Law Reform Act 1969 came into force on 1 January 1971. In the five years before (1966-70) there were 237,503 divorces, but in the five years after (1972-76) there were 585,744. In the ten years before the liberalisation of the law on divorce (1961-70) there were 396,537 divorces, rising to 1,291,184 in the ten years after (1972-81). These post-1971 periods also include the introduction of the ‘special procedure’ (1973-77).

Table 1: Numbers of divorces per year (England and Wales), 1969-1980

1969	51,310	
1970	58,239	
1971	74,437	<i>Divorce Law Reform Act 1969 came into force on 1 Jan 1971.</i>
1972	119,025	
1973	106,003	<i>'Special procedure' for uncontested divorces for childless couples after two years' separation</i>
1974	113,500	
1975	120,522	
1976	126,694	
1977	129,053	<i>'Special procedure' extended to all divorces</i>
1978	143,667	
1979	138,706	
1980	148,301	

The number of divorces per year is currently falling, but not for good reasons. You can only divorce if you are married in the first place. Since the pool of married people is getting smaller and smaller this inevitably reduces the number of divorces.

Figure 2 shows how the decline in marriages tracks the reduction in divorces.

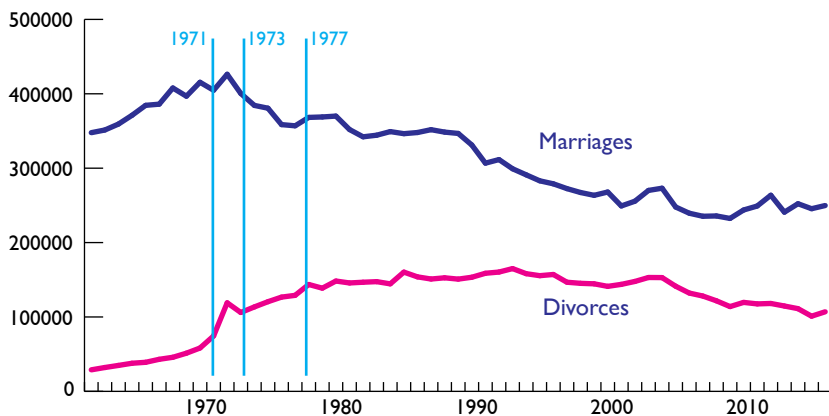


Figure 2: Number of marriages and divorces per year, 1962-2017

This trend is even more marked in relation to first marriages (See Figure 3).

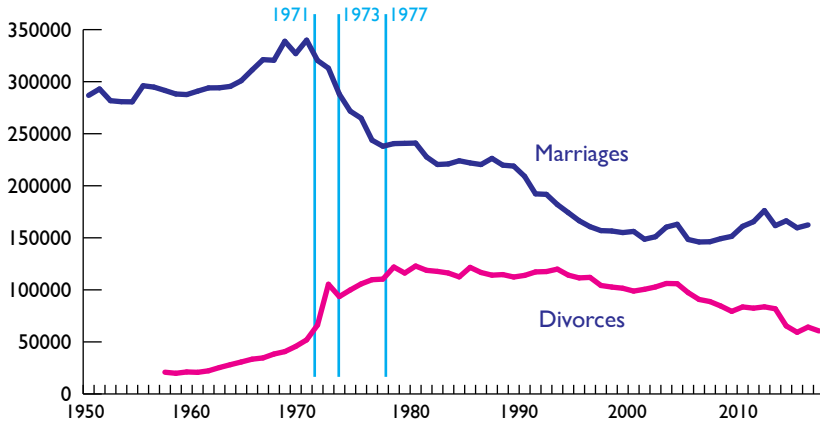


Figure 3: Number of first marriages and first divorces per year, 1962-2017

Myth #3: THE LAW CANNOT BE USED TO RESTRICT DIVORCE

It is argued that if people want to divorce they should be allowed to do so. It is just about a private relationship, and nothing to do with anybody else. However, that is a description of cohabitation, not a description of marriage. A marriage is brought into being by solemn public declarations. In order to be married a husband and wife have to intend to stay together for life, at least at the point of marriage. Marriage is an institution, not merely a private relationship.

What is wrong with the law? A pro-family perspective

Technically speaking, under the present law, a divorce is granted on the sole ground of the irretrievable breakdown of marriage. This is proved by one of five facts:

- of fault (adultery, desertion or unreasonable behaviour), or
- of separation (two years with consent, five years without consent).

We therefore have a mixed fault and separation system of divorce. For understandable reasons people often slip into using the term ‘grounds’ when they are talking about one of these five ‘facts’. For example, they may refer to ‘divorce on the ground of adultery’, when in reality adultery is not technically a ‘ground’ for divorce, but rather one of the five ‘facts’ that can establish the irretrievable breakdown of a marriage.

There are currently around 100,000 divorces a year in England and Wales, compared to around 250,000 marriages. In 2017, there were 8.4 divorces per 1,000 married men and women. Around 40 per cent of marriages end in divorce – though there is evidence that this is falling.

What is wrong with our system? Why is the divorce rate so high?

There is no attempt at reconciliation

The 1973 Matrimonial Causes Act contains some token wording on reconciliation. The legislation requires a solicitor to certify whether or not he has discussed with the petitioner the possibility of reconciliation,¹ but he is under no obligation to do so. The provision has no teeth and so has proved pointless for decades.

Supporters of no-fault divorce generally believe that by the time either or both spouses have decided to end the marriage it is too late to consider reconciliation. However, the evidence suggests otherwise.

The government last attempted to introduce no-fault divorce during the mid-1990s. Under the proposals there was a mediation option as an alternative to using lawyers. Those of us who were campaigning against it managed to secure amendments to offer marriage counselling as a third option. In the pilot schemes run after the passage of the 1996 Act, all three options were put before divorcing couples and counselling proved twice as popular as mediation.² The use of mediation to resolve questions about children, money and property was at the heart of the legislation, yet because the uptake of mediation was so low the pilots were deemed a failure. The outcome was that the legislation was never implemented and the 1969 Act was retained.

A huge difference could be made if more emphasis were placed on encouraging married couples to seek support, particularly when their marriage first runs into difficulty.

Creeping no-fault

The way the fault-based ‘facts’ are applied in practice has become so trivial that in many cases it looks like no-fault divorce already.

Typically around 40 per cent of divorces are currently granted on the basis of separation. Adultery accounts for about 10 per cent of the total, and desertion only 0.5 per cent. The remainder of divorces are granted on the basis of unreasonable behaviour.

In terms of numbers, unreasonable behaviour is the most significant fault-based ‘fact’ for divorce. In 2017 it accounted for more than 45 per cent of all divorces. ‘Unreasonable behaviour’ is a summary phrase. To use this ground, a divorce petitioner must prove that their spouse has behaved in such a way that they cannot reasonably be expected to live with them.

² J Walker, *Information Meetings and Associated Provisions within the Family Law Act 1996: Key Findings from the Research*, Lord Chancellor’s Department, 2001, p.3.

So what kind of behaviour qualifies?

Conduct held to be ‘unreasonable’ has included:

- a DIY enthusiast husband who removed the door of the toilet and took eight months to repair it;
- a husband whose submissive character and refusal to argue infuriated his wife;
- a dispute over poor map-reading skills.

Here are some divorce lawyers’ views on the threshold:

- ‘Almost all spouses can in practice rely upon unreasonable behaviour as a ground for divorce.’³
- ‘Unreasonable behaviour is by far the most common fact used in divorce. This can be almost anything...’⁴
- ‘...in virtually every marriage incidents occur that, if taken together, can amount to unreasonable behaviour.’⁵

In 1988 the Law Commission acknowledged that ‘virtually any spouse can assemble a list of events which, taken out of context, can be presented as unreasonable behaviour sufficient to found a divorce petition’. It is to be feared that the system would be even more open to trivial examples three decades on.

In the recent *Owens* case, Lord Wilson confirmed that the law: ‘nowadays sets at a low level the bar for the grant of a decree’.⁶ Nevertheless in this particular case the Supreme Court Justices dismissed Mrs Owens’ appeal and her legal team came in for some sharp criticism.

The ruling came as a gift to advocates of divorce law reform and has raised the profile of their cause and given it considerable momentum. Some may even suggest that some members of the judiciary saw the case as an opportunity to do just that – a rare chance to expose, as they see it, the unsatisfactory nature of the current legislation.

3 Terry & Co Solicitors, ‘Unreasonable behaviour as a ground of divorce’, <http://terry.uk/unreasonable-behaviour-2/> (accessed 3 September 2019)

4 Katie Butler, ‘How to divorce on the grounds of unreasonable behaviour’, Woolley & Co Solicitors, 1 August 2019. <https://www.family-lawfirm.co.uk/blog/how-to-divorce-on-the-grounds-of-unreasonable-behaviour/> (accessed 3 September 2019)

5 Stowe Family Law, ‘What exactly is “unreasonable behaviour”?’, 15 November 2016. <https://www.stowefamilylaw.co.uk/blog/2016/11/15/what-exactly-is-unreasonable-behaviour/> (accessed 3 September 2019)

6 *Owens v Owens*, UKSC 41, 25 July 2018, para 17. <https://www.supremecourt.uk/cases/docs/uksc-2017-0077-judgment.pdf> (accessed 3 September 2019)

Why social liberals want to change the law

In response to persistent lobbying by lawyers, David Gauke, the then Justice Secretary, consulted on plans to sweep away the current law on divorce during 2018. Legislative proposals were announced in April 2019 and the Divorce, Dissolution and Separation Bill 2017-19 was published two months later. It fell at the General Election, but was reintroduced in identical form in January 2020.

The Bill makes provision for the five ‘facts’ that currently establish the irretrievable breakdown of a marriage to be replaced by automatic no-fault divorce after a waiting period of six months. Under the proposals the need for a period of separation or for an allegation of fault will be swept away, and it will become impossible to contest a divorce.

So why are the advocates pushing for no-fault divorce so strongly?

a) Fault leads to acrimony

The principal argument used in support of the reform is that allegations of fault produce acrimony. It is contended that citing fault generates unnecessary friction between divorcing spouses which sours relationships going forward and adversely affects future arrangements regarding any children.

However, this argument is an exercise in employing smoke and mirrors. While our attention is fixed on one hand, the other hand is up to its tricks. The proposals are even more sweeping than they appear at first glance. While seeking to justify the abolition of fault, the government is quietly proposing to abolish the requirement of separation for two or five years that applies where there is no allegation of fault.

As we have seen, around 40 per cent of divorces are granted on the basis of separation, without any reference to fault. In 2017, 27,000 divorces were granted following a two-year separation period with consent, and 15,000 divorces were granted after a five year period of separation without consent. But under the current proposals, in future no period of separation will be required, just a wait of six months.

The outcome of such legislative reforms would be a considerable speeding up of 42,000 divorces: 27,000 would be made at least 18 months quicker, and 15,000 at least four and a half years quicker.

With regard to the 58,000 fault-based divorces in 2017, the first thing to note is that allegations of fault are not slogged out in open court. As lawyers know, that virtually never happens. Out of 100,000 divorces only an estimated 17 people had the money to pursue a contested hearing in 2016.¹

Allegations of fault are made through the post using legal forms. As we have seen, those allegations do not have to be particularly serious – a failure to do DIY, a refusal to argue and poor map-reading skills have all been cited successfully as a basis for establishing the irretrievable breakdown of a marriage.

Many people think it is necessary to make serious allegations of fault to obtain a divorce. They are swayed by the argument that having to cite fault will result in unnecessary acrimony. This is a complete misunderstanding.

But what about cases where there are serious allegations? What happens where a husband or a wife commits adultery? Or if there is domestic violence? Under the present proposals, it will not be possible to cite such conduct in divorce proceedings. Only a sanitised standard no-fault petition will be permitted.

Such an outcome would make many aggrieved spouses feel that they had been unjustly treated. The proposed new system would create an acrimony of its own. As one commentator has put it:

[M]arriage will become the one contract you can sign up to, invest all your life and love in, and then see it unilaterally broken, without even any

¹ *Owens v Owens*, UKSC 41, 25 July 2018, para 15.

<https://www.supremecourt.uk/cases/docs/uksc-2017-0077-judgment.pdf> (accessed 3 September 2019)

acknowledgement that harm and wrong have been done. The anger and resentment created by this cannot simply be magicked away.²

But what about the argument that allegations of fault have a negative impact on children? The truth is that it is the fact of divorce that harms children, not the process.

More than 20 years ago, *The Exeter Family Study* found that divorce does not usually reduce conflict for the children. In fact the opposite is generally the case:

[T]he experience of most children whose parents divorce is of increased conflict over an extended period, with the child involved to an extent that may not have been the case while the marriage lasted.³

After divorce, children are often at the heart of disputes in a way they never were before.

It is not good when parents have a row, but at least both parents can equally love their children who are on the sidelines. But after divorce children find themselves at the very centre of conflict between ex-spouses.

The Exeter study also compared the effects of family disruption on children in re-ordered families with the effects of conflict on children living in intact families. It found that the poorest outcomes for children were associated with the re-ordering of the family rather than the presence of serious conflict.⁴ In other words, divorce is generally worse for children than serious conflict in an intact family.

b) No-fault has no impact on the divorce rate

In its impact assessment, the government stated that it is assuming no increase in divorce as a result of its legislative proposals. However, it has no basis for this assumption, and every reason to conclude the opposite. It stands to reason that if you make something quicker and easier, you will increase the number of people who do it, and the

2 Belinda Brown, 'Breaking up should not be easy to do', Mercatornet, 2 May 2019. https://www.mercatornet.com/family_edge/view/breaking-up-should-not-be-easy-to-do/22422 (accessed 3 September 2019)

3 M Cockett, J Tripp, *The Exeter Family Study: Family breakdown and its impact on children*, University of Exeter Press, 1996, p.58.

4 *Ibid.*, p.55.

general principle is borne out by the countries that have instituted no-fault divorce.

A 1998 study of the impact of no-fault divorce in the United States concluded that it was responsible for 17 per cent of the rise in divorce rates between 1968 and 1988.⁵

A separate study in the same year, also in the United States, confirmed that 'no-fault divorce laws are associated with higher divorce levels'.⁶

A more recent study focusing on Europe found that divorce law reform was responsible for about 20 per cent of the increase in divorce rates in Europe between 1960 and 2002.⁷

c) Divorce is too slow

Divorces currently take an average of little more than 12 months to complete,⁸ but under the government's proposals it will be possible to cut that time in half and complete a divorce in only six months.

Bear in mind that the 12 months that it generally takes to complete a divorce relates to the divorce *process*; it does not include the two- or five-year period of separation currently required in cases where there is no allegation of fault.

The radio and television presenter Nick Ferrari, himself divorced, described six months as 'way too soon'. He added: '[D]ivorce will be a done deal just as one party perhaps realises the error of their ways... This needed a middle ground and a two-year delay would have been far more appropriate.'⁹

The government has made little comment on the speed at which a

5 Leora Friedberg, 'Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data', *The American Economic Review*, Vol 88, Issue 3, June 1998, pp.608-627.

6 Margaret F Brinig & F H Buckley, 'No-Fault Laws and At-Fault People', *International Review of Law and Economics*, Vol 18, 1998, pp.325-340. https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1708&context=law_faculty_scholarship (accessed 3 September 2019)

7 Libertad González, Tarja K Viitanen, 'The effect of divorce laws on divorce rates in Europe', *European Economic Review*, Vol 53, Issue 2, February 2009, pp.127-138. <https://doi.org/10.1016/j.eurocorev.2008.05.005> (accessed 3 September 2019)

8 In 2018 the average time to secure a divorce from petition to decree absolute was 54 weeks. Ministry of Justice, *Family Court Statistics Quarterly, England and Wales, Annual 2018 including October to December*, p.8. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789792/FCSQ_October_to_December_2018_-_final.pdf (accessed 3 September 2019)

9 *Sunday Express*, 14 April 2019.

divorce may be obtained, but the proposed legislative reforms strongly suggest that ministers believe that the divorce process is currently too slow. As we shall see, behind the scenes the government has been conducting speed trials to grant divorces online in a matter of weeks.

b) Divorce needs to go digital

The legal establishment wants to make divorce quick, easy, cheap and digital.

Sir James Munby, former President of the Family Division of the High Court, believes that we should celebrate the end of the nuclear family and ‘welcome and applaud’ the ‘almost infinite variety’ of forms families now take.¹⁰ It sounds as though Sir James would have liked to live in Soviet Russia!

Sir James also backs calls for the entire divorce process to go online.¹¹ During his tenure the government commissioned the Co-op to conduct an online pilot scheme.

In a widely-reported press release announcing the results of the pilot scheme, Co-op Legal Services boasted that they could bring down the average divorce time to just eight weeks.¹² However, they have subsequently amended their website to read twelve weeks rather than eight. Whether it is eight weeks or twelve, as the adverts used to say, ‘It’s all at the Co-op now’!

If marriages can be terminated in a matter of weeks, it leaves couples with no time to think again. They will be divorced before they know it. Perhaps the logical outcome of going digital is that one day getting a divorce will be as simple as unfriending your spouse on Facebook.

10 Sir James Munby, ‘What is family law? Securing justice for children and young people’, Eleanor Rathbone Social Justice Public Lecture, University of Liverpool, 30 May 2018. <https://www.judiciary.uk/wp-content/uploads/2018/05/speech-by-pfd-what-is-family-law.pdf> (accessed 3 September 2019)

11 Gabriella Swerling, ‘Computers should handle divorces instead of solicitors who make “slapdash” errors, former Family Court president says’, *Daily Telegraph*, 18 April 2019. <https://www.telegraph.co.uk/news/2019/04/18/computers-should-handle-divorces-instead-solicitors-make-slapdash/> (accessed 3 September 2019)

12 Jen Banks, ‘Government pilot scheme sees Co-op Legal Services speed up divorce process’, *Co-operative News*, 21 November 2018. <https://www.thenews.coop/133892/topic/legal/government-pilot-scheme-sees-co-op-legal-services-speed-divorce-process/> (accessed 3 September 2019)

What can we do?

In the light of current trends and developments, what action can we take?

1) We must promote the true understanding of marriage wherever we can

Changing government policy and seeing a change in the legal establishment is a very tall order. But it is much easier to promote marriage in our own families, churches and wider networks.

Most young people want to marry. A poll published in 2018 found that 78 per cent of 14-17 year-olds want to get married. Only four per cent ruled it out.¹ That is a good starting place for teaching our children and grandchildren the importance of marriage.

We must fight the government's no-fault divorce reforms.

Divorce remains at epidemic levels, but formalising no-fault divorce would make things far worse.

The general public takes divorce far more seriously than the legal establishment is inclined to. Although some people are willing to sign legal statements for divorce that are untrue, many are not. And many people are unaware of how easy it can be to obtain a divorce.

All these factors currently restrain the divorce rate, but the government's proposed reforms would take these restraints away.

To formalise no-fault divorce in law would be far worse than the creeping no-fault divorce that we currently have.

1 Centre for Social Justice, 'New Polling: three-quarters of young people want Relationship Education in school to help them understand how to build long term lasting relationships as an adult', 14 February 2018. <https://www.centreforsocialjustice.org.uk/csblog/new-polling-three-quarters-young-people-want-relationship-education-school-help-understand-build-long-term-lasting-relationships-adult> (accessed 3 September 2019); Family Stability Network and The Centre For Social Justice, *Relationships and Sex Education - A Submission from the Family Stability Network and The Centre For Social Justice*, January 2018. https://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2018/02/Survation_Report_Web.pdf (accessed 3 September 2019)

2) We must fight to help couples whose marriages are in difficulty.

One way we can do this is by seeking to increase the waiting period before divorce to at least a year should the government proceed with its Divorce, Dissolution and Separation Bill.

The requirement on solicitors to state whether or not they have discussed the possibility of reconciliation with petitioners for divorce has become a dead letter and needs to be strengthened.

3) We must support organisations like the Family Education Trust and the Coalition for Marriage.

For almost 50 years, Family Education Trust has been supporting the family based on marriage between one man and one woman by appealing to the research evidence.

In 2012, the Trust teamed up with other pro-family organisations to form the Coalition for Marriage (C4M) – an umbrella group of individuals and organisations in the UK that support the historic legal definition of marriage as the lifelong union of one man and one woman to the exclusion of all others.

Since the redefinition of marriage in 2013, C4M has worked to protect freedom of conscience on marriage and resist attempts by the government and lobby groups to coerce people into supporting same-sex marriage against their conscience.

