

**British Conservatism and the Legal Regulation  
of Intimate Adult Relationships, 1983-2013**

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Doctor of Philosophy

## **DECLARATION**

I, Andrew Norman Gilbert confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Signed

Dated

## **ACKNOWLEDGEMENTS**

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## **ABSTRACT**

This thesis is a critical legal study of family lawmaking. Drawing on an understanding of conservatism based principally on the work of Edmund Burke and Michael Oakeshott, this work examines the two (apparent?) tensions of liberty and authority in the context of British conservatism and the legal regulation of intimate adult relationships since the 1980s.

The dissertation divides into two parts. The first part reviews the literature on theoretical approaches to family law, before going on to construct a conservative disposition towards the legal regulation of intimate adult relationships. The second part comprises an interpretive analysis of the discourse around the genesis and development of four family law statutes, namely the Matrimonial and Family Proceedings Act 1984, the Family Law Act 1996, the Civil Partnership Act 2004, and the Marriage (Same Sex Couples) Act 2013. Taken as a whole, the statutes examined in part two constitute a case study in one discrete area of lawmaking against which to consider a conservative approach to family law, all located within the broader debate around the functions of family law.

The final chapter concludes that, while I have uncovered examples of consistency and divergence between conservatism and the Conservative Party position on the legal regulation of intimate adult relationships, the core challenge for British conservatism remains how to manage change. For various reasons it might be unwise to predict the Party's demise any time soon. However, unless modern conservatism deploys less onerous hurdles to reforming the law, I am less sanguine about the future of conservatism as a political idea which has any practical significance for lawmakers.

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## LIST OF ABBREVIATIONS

CA 1989	Children Act 1989
CFPG	Cabinet-level Family Policy Group
CLS	Critical legal studies
CLT	Critical legal theory
CPA 2004	Civil Partnership Act 2004
CRD	Conservative Research Department
CSA 1991	Child Support Act 1991
DHSS	Department of Health and Social Security
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FLA 1996	Family Law Act 1996
HFEA 1990	Human Fertilisation and Embryology Act 1990
HRA 1998	Human Rights Act 1998
ICA	Invalid Care Allowance
IHT	Inheritance tax
LGA 1988	Local Government Act 1988
LGBT	Lesbian, gay, bisexual, and transgender
MCA 1973	Matrimonial Causes Act 1973
MFPA 1984	Matrimonial and Family Proceedings Act 1984
MSSCA 2013	Marriage (Same Sex Couples) Act 2013
MSSC Bill	Marriage (Same Sex Couples) Bill
PACS	Pacte civil de solidarité
PFPG	Party-level Family Policy Group
WEU	Women and Equality Unit

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# CHAPTER 1

## INTRODUCTION

To make a government requires no great prudence. Settle the seat of power; teach obedience: and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a *free government*; that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought, deep reflection, a sagacious, powerful, and combining mind.<sup>1</sup>

I suggest that Edmund Burke is right: it is not hard for a government to control; it is easy for it grant freedom. The former requires the exertion of force (of which it usually has a monopoly), the latter a mere passive disposition. However, the outworking of each approach in isolation from the other would entail either a crushing and unbearable tyranny or wild anarchy; each in its own way unthinkable and unacceptable to the capitalist, liberal mindset. What is needed is a *free government*, one which holds together these two (apparent?) tensions of liberty and authority in a way which maximises social order and human happiness. Perhaps with the exception of what is considered to be the criminal law, nowhere is this tension more obvious, and this balancing more tricky, than in the law regulating relations within families. And that, in the context of British conservatism since the 1980s, is what, in essence, this thesis is about.

The inspiration for this study was found in a particular five words uttered by Margaret Thatcher in her 1977 party conference speech: 'Conservatives are a family party'.<sup>2</sup> Thirty years later David Cameron continued the theme: 'the family matters more to me than anything else'.<sup>3</sup> Although the meaning of both statements is open to widely varying interpretations, understood as an expression of support for an enduring human institution they are consistent with a conservative attitude

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<sup>1</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 374 (original author's emphasis).

<sup>2</sup> Margaret Thatcher, 'Speech to Conservative Party Conference' (Conservative Party Conference, Blackpool, 14 October 1977).

<sup>3</sup> Dylan Jones, *Cameron on Cameron* (Fourth Estate 2008) 167.

stretching back to Burke and beyond. Taken at face value both statements are unremarkable in the sense that no modern mainstream British political party would take up an overtly anti-family position. But the contention here is that they should *not* be taken at face value and that their claims should be scrutinised in the light of conservative political philosophy and the Conservative Party's approach to the law dealing with marriage and civil partnership since the 1980s. By drawing principally on a critical reading of around two million words of Hansard covering the parliamentary passage of four important family law Bills, this work seeks to contribute to the area of scholarship examining the relationship between politics, law and families.

This thesis rests on the premise that, generally, 'law is politics, all the way down'<sup>4</sup> and that, particularly, '[f]amily law is, in short, inescapably political'.<sup>5</sup> Despite these claims, too much of the work on family law does seem to escape detailed politico-legal analysis and this thesis aims, in part, to make a contribution to addressing this deficiency. As such it is inspired by a critical approach to law, in the sense that it seeks to locate lawmaking in its social, historical and political context as a way to better understand the forces at work in its development and final form.

## JUSTIFICATION FOR THIS RESEARCH

Family law has sometimes suffered from being seen as a poor relative in the legal academy: lacking intellectual rigour; a bit touchy-feely; a bastard child of mixed socio-/psycho-/politico-legal parentage.<sup>6</sup> Carl Schneider<sup>7</sup> and Michael Freeman<sup>8</sup> have been critical of family law scholarship and contend that it has rarely attempted to go beyond the specific, by which they mean that there have been few attempts at a family law meta-narrative. Whilst this appears to have been true back in 1985, it is not the case today. In the decades following the Schneider and Freeman articles

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<sup>4</sup> Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515, 1526.

<sup>5</sup> Richard Collier, *Masculinity, Law and the Family* (Routledge 1995) 49.

<sup>6</sup> Stephen Parker and Peter Drahos, 'Closer to a Critical Theory of Family Law' (1990) 4 *Australian Journal of Family Law* 159; Wolfram Müller-Freienfels, 'The Emergence of *Droit de Famille* and *Familienrecht* in Continental Europe and the Introduction of Family Law in England' (2003) 28 *Journal of Family History* 31; Rebecca Probert, "'Family law' – a Modern Concept?" [2004] *Family Law* 901.

<sup>7</sup> Carl Schneider, 'The Next Step: Definition, Generalization, and Theory in American Family Law' (1985) 18 *University of Michigan Journal of Law Reform* 1039, 1041.

<sup>8</sup> Michael Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 *Current Legal Problems* 153, 156.



there have been numerous contributions to the literature on the foundations, form and function of family law. Family law is now better theorised than at any point in its relatively short history as a discrete subject in the legal academy.

The majority of contributions to the literature in this field have come from the United States, where scholars have tended to draw more on higher order theory.<sup>9</sup> British and Australian academics have often started from a lower level of abstraction and have – in my view – engaged with the American literature in a rather limited fashion.<sup>10</sup> It is fair to say that particularly those scholars from the critical legal and socio-legal schools have gone deeper in their analyses.<sup>11</sup>

This work also draws on critical and socio-legal theory in moving beyond the traditionally formalist and positivist environment of the legal academy with its emphasis on pure doctrinal research, and attempts to synthesise perspectives developed in political science and law to better understand the relationship between politics and lawmaking in the context of family law. In keeping with the critical legal and socio-legal traditions I approach the study of law from without, rather than from within, the law. My approach is also as much about the process as it is about the end result; as Mavis Maclean writes, ‘The most important aspect of the law-making process may well be not the law itself but the debate that surrounds it’.<sup>12</sup>

Family law is arguably always ideologically motivated in the sense that it necessarily embodies a particular perspective on the nature of the family and its relationship to

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<sup>9</sup> For example: Frances Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1983) 96 *Harvard Law Review* 1497; David Chambers, ‘The “Legalization” of the Family: Toward a Policy of Supportive Neutrality’ (1985) 18 *University of Michigan Journal of Law Reform* 805; Mary Ann Glendon, *The Transformation of Family Law* (The University of Chicago Press 1989); Carl Schneider, ‘The Channelling Function in Family Law’ (1992) 20 *Hofstra Law Review* 495; Martha Minow and Mary Lyndon Shanley, ‘Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law’ (1996) 11 *Hypatia* 4; Marsha Garrison, ‘Towards a Contractarian Account of Family Governance’ (1998) *Utah Law Review* 241.

<sup>10</sup> For example: Chris Barton and Gillian Douglas, *Law and Parenthood* (Butterworths 1995); John Dewar, ‘Family, Law and Theory’ (1996) 16 *Oxford Journal of Legal Studies* 725; Brenda Hale, *From the Test Tube to the Coffin: Choice and Regulation in Private Life* (Sweet & Maxwell 1996); John Dewar, ‘The Normal Chaos of Family Law’ (1998) 61 *MLR* 467.

<sup>11</sup> For example: Michael Freeman, ‘Towards a Critical Theory of Family Law’ (1985) 38 *Current Legal Problems* 153; Katherine O’Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985); Katherine O’Donovan, *Family Law Matters* (Pluto Press 1993); Richard Collier, *Masculinity, Law and the Family* (Routledge 1995); Alison Diduck, *Law’s Families* (LexisNexis 2003); Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003).

<sup>12</sup> Mavis Maclean and Jacek Kurczewski, *Making Family Law* (Hart 2011) 112.

society and the state.<sup>13</sup> Law is not produced in a sterile, value-free environment but it is the outcome of a keenly contested process in which diverse interest groups compete for their agendas to be adopted by the political actors who will ultimately vote a final bill into legislative existence. Furthermore, the agency of political actors themselves is situated within a complex web of traditions, beliefs and practices, chief of which is their political party. So, if family law and policy are politicised as claimed, therein lies a justification for a study of the party political and philosophical forces at work in its formation.

Conservatism has been discussed in numerous studies in family law, but it is usually incidental to the primary focus which is on some other central theme or issue. In much writing about British conservatism and social policy, legislators are usually grouped into two camps: social liberals and social conservatives. Put crudely, it appears to me that Conservatives who embrace social change are often categorised as social liberals, and those opposing change are labelled social conservatives. I do not accept this simplistic dichotomy, and argue below for a more sophisticated understanding of what conservatism means in the context of social policymaking.

There are studies which have synthesised family law and the Conservative Party,<sup>14</sup> but I am not aware of any which have sought to situate them against a backdrop of the political philosophy of conservatism (although work has been done in relation to housing policy,<sup>15</sup> and the concept of same sex marriage<sup>16</sup>), and it is this lacuna which this thesis attempts to fill. In doing so, it also aims to contribute to a dearth of academic interest in conservatism and law in general. In 1995 Paddy Ireland wrote, '[T]here remains remarkably little in the way of systematic academic analysis of conservatism, nor of its importance to our understanding of law'.<sup>17</sup> A search of Google Scholar reveals that Ireland's article has been cited just ten times, and only once in regard to family law (by me). So whilst there are some excellent analyses of

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<sup>13</sup> Eg Katherine O'Donovan, 'Family Law and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (Blackwell 1986); Lorraine Fox Harding, *Family, State and Social Policy* (Macmillan 1996).

<sup>14</sup> Gillian Douglas, 'Family Law under the Thatcher Government' (1990) 17 *Journal of Law and Society* 411.

<sup>15</sup> Peter King, 'Was Conservative Housing Policy Really Conservative?' (2001) 18 *Housing, Theory and Society* 98.

<sup>16</sup> Amy Wax, 'The Conservative's Dilemma: Traditional Institutions, Social Change and Same-Sex Marriage' (2005) 42 *San Diego Law Review* 1059.

<sup>17</sup> Paddy Ireland, 'Reflections on a Rampage Through the Barriers of Shame: Law, Community, and the New Conservatism' (1995) 22 *Journal of Law and Society* 189, 190.

the relationship between family law and the political process, it is submitted that this remains a relatively underexplored and undertheorised relationship in the context of British conservatism.

## **BOUNDARIES OF THE THESIS AND RESEARCH QUESTIONS**

Many writers have acknowledged the trickiness of defining ‘family law’, and all definitions involve value judgements on the part of the definer.<sup>18</sup> Some have argued convincingly that ‘family law’ might be better entitled ‘the law of domestic relations’ because that is the focus of family law textbooks and university syllabi.<sup>19</sup> As Rose writes ‘[F]amily law is a creation of textbook writers and legal pedagogy’.<sup>20</sup> He goes on to argue that if family law is narrowly construed it risks overlooking key areas of policy and law such as taxation and welfare.<sup>21</sup> Even construing family law narrowly, it is nevertheless a substantial field of law encompassing marriage and civil partnership (and their dissolution), cohabitation, children, and domestic violence – far too much to traverse here. My work, particularly the chapters on civil partnership and same-sex marriage, also supports Probert’s claim that ‘the boundaries of family law are no more static than those of the family’.<sup>22</sup>

I have been conscious of the need to carry out research which does not sacrifice depth of analysis, for breadth of coverage. I decided, therefore, to focus on the law as it relates to the regulation of intimate adult relationships, and I explain what I mean by this term below. There are two further reasons for just considering intimate adult relationships: first, it is as good an area as any other in family law to study the nexus of legal and political forces; and second, because it is a dynamic area which has undergone significant development over the period in question. Conscious though of the risk Rose identifies above, I have attempted throughout the thesis to contextualise my analysis by incorporating relevant insights from contemporaneous

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<sup>18</sup> Eg Katherine O’Donovan, *Family Law Matters* (Pluto Press 1993) chapter 2; Alison Diduck, ‘Family Law and Family Responsibility’ in Jo Bridgeman, Heather Keating and Craig Lind (eds), *Responsibility, Law and the Family* (Ashgate 2008) 258-259; Rob George, *Ideas and Debates in Family Law* (Hart 2012) 6-8.

<sup>19</sup> Rebecca Probert, ‘“Family law” – a Modern Concept?’ [2004] *Family Law* 901.

<sup>20</sup> Nikolas Rose, ‘Beyond the Public/Private Division: Law, Power and the Family’ (1987) 14 *Journal of Law and Society* 61, 66.

<sup>21</sup> *Ibid* 67.

<sup>22</sup> Probert (n 19) 903.

developments in housing policy, welfare provision, taxation, human rights and demography.

The themes in the thesis title require explanation. I take 'British conservatism' to be an amalgam comprising the British manifestation of the political philosophy of conservatism and the political activity of the Conservative Party. Although they could be considered to be close siblings, they are certainly not identical twins. As I will show, the Conservative Party is not simply a conduit through which the pure ideological waters of conservatism flow. This distinction between conservative theory and Conservative practice pervades this thesis.

The term 'legal regulation' incorporates an understanding that the power of law operates diffusely, including in highly coercive forms and via subtle message-sending, and through formal and informal means. While my focus is on the four statutes considered in chapters four, six, seven and eight - and they are chiefly the 'legal regulation' I have in mind – I do not adopt a legal formalist approach. On the contrary, my methodology, as I discuss elsewhere in this chapter, is founded on a critical legal approach, understanding 'legal regulation' in the broadest terms, and 'abstract[ing] from legal materials the underlying premises that combine to form a distinct way of looking at the world'.<sup>23</sup>

The third theme in the title concerns the legal regulation of 'intimate adult relationships'. What do I mean by 'intimate adult relationships'? What type of relationships does that refer to? Clearly, all kinds of relationships are subject to the law's regulation: international treaty obligations between states; parties to commercial contracts; doctor and patient; university and student; parent and child, and so on. What I am concerned with specifically is familial relationships. Rob George sees intimate adult relationships as a hierarchy, based on law's treatment of those relationships. His hierarchy runs from 'forbidden relationships' (such as incestuous relationships), to 'non-recognised relationships' (such as polygamous marriages), to 'accepted relationships' (such as unmarried cohabitants), to 'privileged relationships' (such as marriage and civil partnership).<sup>24</sup>

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<sup>23</sup> Allan Hutchinson and Patrick Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199, 217.

<sup>24</sup> Rob George, *Ideas and Debates in Family Law* (Hart 2012) 55-59.

So, intimate adult relationships are familial relationships which are primarily affective in nature. The affective requirement is here stated in general terms and there may be exceptions (eg some may marry or engage in sexual relations for financial reward alone), but it is essential as a means of distinguishing intimate adult relationships from those of a primarily commercial or contractual nature. Moreover, this thesis uses the term 'intimate adult relationships' as a shorthand for marriage (opposite-sex and same-sex), civil partnership and unmarried cohabitation, although my focus is on the dissolution of opposite-sex marriage (in chapters four and six) and the advent of civil partnership and same-sex marriage (in chapters seven and eight). Unmarried cohabitation (opposite-sex or same-sex) is discussed at various points where relevant, mostly by way of contrast with the law's treatment of those in the 'privileged relationships' of marriage and civil partnerships. Space does not permit a fuller treatment of British conservatism and unmarried cohabitation, although it is accepted that this would be a valid and illuminating area for further study. I have also not expressly considered those in familial cohabiting relationships of an intimate, albeit not sexual, nature (such as unmarried siblings), although this is discussed in the context of the Civil Partnership Act 2004 in chapter seven.

The other point about 'intimate adult relationships' is that it covers adults inter se and does not extend to adult-child relationships. Again, it is accepted that an examination of the relationship between British conservatism and what is often classified as 'child law' would be valid and illuminating. There is a substantial volume of literature examining the intersection of parents, children and the state since the 1980s; indeed it was really in the 1980s that a distinct jurisprudence of the child in law began to develop in earnest. However, as with cohabitation, space does not here permit a more detailed engagement with that literature (that would require an entire thesis of its own). That said, I recognise that to ignore the child in law and policy during the period under consideration would constitute a significant flaw in this thesis and undermine its credibility as a piece of critical legal scholarship. I have, therefore, taken care throughout my work to make the child visible, so to speak, where to fail to do so would be a significant omission.

Finally, I chose to study the period from 1983 to 2013 for a number of reasons. First, it is a sufficiently long period to enable me to observe shifts in attitudes towards the legal regulation of intimate adult relationships. Second, I wanted to observe the Conservative Party in the context of four statutes, each of which was enacted in a distinct period of the Party's recent history; ie the Matrimonial and Family

Proceedings Act 1984 was passed when the Party had a large parliamentary majority and was in the ascendancy, the Family Law Act 1996 became law when the Party had virtually no House of Commons majority and was in decline, the Civil Partnership Act 2004 was when the Conservatives were in the doldrums of opposition, and the Marriage (Same Sex Couples) Act 2013 became law when the Party was in coalition government with the Liberal Democrats. However, to provide important historical context to the development of the various statutes, my work takes into account relevant events prior to 1983. And third, the period is significant because it saw families change beyond recognition, and I wanted to examine how British conservatism responded to those changes.

I now turn to consider the research questions which my work aims to address:

1. What are the core elements of a conservative disposition towards family law, particularly regarding the regulation of intimate adult relationships?
2. To what extent has the substance of the law under discussion here been determined by Conservative Party politicians? (As this question suggests, by concentrating on the (party) political forces at work during the period I am not seeking necessarily to argue that these forces were the most significant ones in shaping the development of family law at that time. I am interested in the possibility that, despite the apparent importance that many Conservative politicians attribute to family law matters, much of the law has in fact emerged from external sources such as the Law Commission.)
3. Has the Conservative Party's attitude to the legal regulation of intimate adult relationships changed over the period under consideration?
4. What does the modern Conservative Party think family law is *for*, at least in so far as it relates to the regulation of intimate adult relationships?
5. To what extent is the Conservative Party's approach to the legal regulation of intimate adult relationships consistent with the core elements outlined in response to question one above?

In summary, this thesis aims to illuminate the relationship between conservatism, the Conservative Party and the law relating to the regulation of intimate adult relationships.

## METHODOLOGY

My work explores how the law concerning intimate adult relationships takes on meaning within British C/conservative discourse. As such, it is oriented towards a constructivist approach of *becoming* rather than a positivist one of *being*, focussing on law's role in society as 'constitutive', rather than merely 'regulative', ie law does not merely reflect social attitudes, it also shapes those attitudes and influences personal behaviour.<sup>25</sup> Traditional positivist approaches to interpreting legal texts which developed from the analogous exegetical techniques of theologians would not be suited to my critical approach here,<sup>26</sup> so instead I draw on interpretive theories from political science, as well as law, in the development of my methodology. I have relied heavily on political science in grounding my methodology because I wanted thereby to strengthen the interdisciplinary character of my thesis. If 'law is politics', as Tushnet claims,<sup>27</sup> then our understanding of law will be enhanced through engagement with the politics and political science behind it. Although I have found it challenging to work across disciplines, I believe my efforts have resulted in a nuanced and richly textured analysis. It is important to point out that my work does not take a normative stance on the issues under consideration in later chapters. By this I mean, for example, that when discussing the law around the clean break on divorce I do not attempt to set out what the law *ought* to be.

The research method used in this thesis is that of discourse analysis. Discourse analysis is not the preserve of any one philosophical tradition and there are moderate and radical ways to approach the role of language in the formulation of law and policy.<sup>28</sup> But whichever way discourse analysis is approached, the elements

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<sup>25</sup> Milton Regan, *Family Law and the Pursuit of Intimacy* (New York University Press 1993) 176-184; see also, James Boyd White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) 52 *University of Chicago Law Review* 684, especially 690-692.

<sup>26</sup> Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005) 134.

<sup>27</sup> Tushnet (n 4).

<sup>28</sup> Peter John, *Analysing Public Policy* (Continuum 1998) 157.

of Brian Paltridge's general introduction below demonstrate why it is so well suited to my study:

Discourse analysis...considers the ways that the use of language presents different views of the world and different understandings. It examines how the use of language is influenced by relationships between participants as well as the effects the use of language has upon social identities and relations. It also considers how views of the world, and identities, are constructed through the use of discourse.<sup>29</sup>

What is 'discourse'? I adopt Vivien Schmidt's definition which draws on the work of Jurgen Habermas: 'Discourse...encompasses not only the substantive content of ideas but also the interactive processes by which ideas are conveyed',<sup>30</sup> and '[it] is not only what you say, however; it includes to whom you say it, how, why, and where in the process of policy construction and political communication in the "public sphere"'.<sup>31</sup> To this I would add – drawing on insights from critical discourse analysis – that discourse also includes what is *not* said, ie what could have been, but is not, present in the text.<sup>32</sup>

The terms 'discourse' and 'discourse analysis' are now, of course, ubiquitous in postmodernism and poststructuralism but their use is by no means confined to those paradigms. It is possible to understand 'discourse' free of such interpretations, as a more generic term covering the substantive content of ideas as well as the interactive processes by which ideas are conveyed. It is all about text and context, structure and agency.<sup>33</sup>

In political science, discourse analysis is a form of interpretivism. An interpretive approach studies beliefs, ideas and discourses.<sup>34</sup> Interpretivism is particularly suited to the task of analysing political discourse (and ideology as manifested in discourse) because it is based on two premises: first, that because people act on beliefs and

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<sup>29</sup> Brian Paltridge, *Discourse Analysis: An Introduction* (Continuum 2006) 2.

<sup>30</sup> Vivien Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse' (2008) 11 *Annual Review of Political Science* 303, 305.

<sup>31</sup> *Ibid* 310.

<sup>32</sup> Norman Fairclough, *Critical Discourse Analysis* (2<sup>nd</sup> edn, Longman 2010).

<sup>33</sup> Schmidt (n 30) 305.

<sup>34</sup> Mark Bevir and Rod Rhodes, 'Interpretive Theory' in David Marsh and Gerry Stoker (eds), *Theories and Methods in Political Science* (2<sup>nd</sup> edn, Palgrave Macmillan 2002) 131.



preferences, their actions can be explained by reference to those beliefs and preferences; and, second, that people's beliefs and preferences cannot be inferred simply from objective facts about them such as class or race.<sup>35</sup> Mark Bevir and Rod Rhodes locate their theory of interpretivism between hermeneutics (with its subjective and rational associations – very popular in the legal academy<sup>36</sup>) and poststructuralism:

We agree with the poststructuralists and postmodernists that subjects experience the world in ways that necessarily depend on the influence of social structures on them. Nonetheless, we must still allow that the subject has the ability to select particular beliefs and actions, including novel ones, which might transform the relevant social structure. This view of agency suggests that we see social structures not as epistemes, languages or discourses, but as traditions.<sup>37</sup>

They then go on to develop their core notion of 'tradition' and define it as 'a set of theories or narratives, and associated practices, which people inherit that form the background against which they reach beliefs and perform actions'.<sup>38</sup> This is similar to Schmidt's understanding of 'institutions' which she regards simultaneously as a given (the context within which agents think, speak and act) and as contingent (the result of agents' thoughts, words and actions).<sup>39</sup> She goes on, 'These institutions are therefore internal to the actors, serving both as structures that constrain actors and as constructs created and changed by those actors'.<sup>40</sup> So whilst institutions often exert significant influence on actors (and thereby pose a limited challenge to their agency), actors may still think outside the confines of the institution's influence, even to the point of bringing about change in the institution itself. Institutions which feature frequently throughout this thesis include family, marriage and the Conservative Party. All of these institutions exist, in some sense, external to the actors who play a role in the lawmaking process, and yet (many of) those actors also constitute families, marriages and the Conservative Party membership. Bevir and Rhodes' interpretivism and Schmidt's discursive institutionalism both share

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<sup>35</sup> Ibid 133-4.

<sup>36</sup> Costas Douzinas, 'Law and Justice in Postmodernism' in Steven Connor (ed), *The Cambridge Companion to Postmodernism* (CUP 2004).

<sup>37</sup> Bevir and Rhodes (n 34) 140.

<sup>38</sup> Ibid.

<sup>39</sup> Schmidt (n 30) 314.

<sup>40</sup> Ibid.

similar views on structure and agency. Both provide a context (the 'tradition' or 'institution') for the actor to act within, but in ways which allow for the actor's continuing agency, although not autonomy, ie a notion of *situated agency*. This understanding of situated agency forms an important part of the ontological basis of this thesis.

Having established the importance of 'tradition', Bevir goes on to posit the concept of 'dilemma' as a way of exploring agency and change. For him, 'A dilemma arises for individuals whenever they adopt a new belief that stands in opposition to their existing ones and so forces a reconsideration of the latter'.<sup>41</sup> Bevir employs 'dilemma' as the means through which individuals change traditions. This tradition change may go on to bring about change in the individual, which may lead to further dilemmas and changes to tradition, and so on.<sup>42</sup> Dilemmas may arise externally (from experiences of the world) or internally (from an individual's reflection on their existing beliefs). He argues that the way an individual may respond to a dilemma is open-ended and thus prevents efforts to simply correlate people's beliefs and actions from our perspective of their situation or interests. In my work, dilemmas are encountered from various quarters such as demographic change, macroeconomics, decline in the influence of religious institutions, developments in reproductive technology, and greater acceptance of diverse family forms. In summary, taken together, these ideas of tradition and dilemma, provide means to analyse shifts in family law and policy, particularly in attempting to uncover the location of power, discover the motives and beliefs of lawmakers, and generally to understand what is really going on.

If Bevir and Rhodes contend that all we have is discourse then where does that leave objectivity or truth? They hold to the postmodern view that as knowledge cannot be unmediated (and therefore we have no access to pure facts), it is not possible to adjudge any given narrative or discourse as true or false. But they then part company with the postmodernists and poststructuralists with an appeal to objectivity, not in an absolute sense but by way of comparison. In other words, they hold on to the idea of objectivity by allowing for criteria such as accuracy, comprehensiveness and consistency to be applied so that one narrative can be judged better than another. The 'best' interpretation will then gradually emerge

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<sup>41</sup> Mark Bevir, 'Governance and Interpretation: What are the Implications of Postfoundationalism?' (2004) 82 (3) Public Administration 605, 619.

<sup>42</sup> Ibid.

through a process of comparison.<sup>43</sup> In adopting this methodology, it follows logically that there could be alternative readings of the discourse analysed in this thesis. What I seek to defend, however, is that my reading offers the best interpretation of that specific corpus of data currently available.

To summarise, the value of an interpretive approach is that it is based, first, on a philosophical analysis of meaning in action ('we can grasp actions properly only by examining the beliefs embodied in them')<sup>44</sup> and, second, on the holistic nature of meanings ('we can grasp beliefs properly only as part of the wider webs of which they are part').<sup>45</sup> The reflexive relationship between law, politics and society is immeasurably complex, and no one methodology can explain it sufficiently. However, different methodologies can provide different insights, and I contend that the approach I employ herein is well suited to a synthesis of the theory and practice of British conservatism in the context of family law.

So having set out my methodology, what is my approach in practice? There is no one 'right' way of performing a discourse analysis.<sup>46</sup> Whilst methods may differ, the aim is always to locate sources of power and uncover motivations and assumptions. I adopt a method similar to that used by Bettina Lange in her study of EU environmental legislation.<sup>47</sup> The first step is to assemble the data – or corpus – to be analysed and to justify what is included and what is excluded. I selected texts generated in central institutional sites (such as Bills, parliamentary debates and committee minutes from Hansard, government consultation papers, ministerial statements, party manifestoes), as well as those in more peripheral locations (such as relevant popular and academic comment). Having assembled the corpus, first, I read through the data for gist in order to identify themes (and absent themes), whilst being sensitive to the possible presence of variations; second, I coded the data into larger groups, so as to retain a sense of the discourse as a whole; third, I formulated general propositions which were considered in the light of the discussion in chapter

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<sup>43</sup> Bevir and Rhodes (n 34) 142.

<sup>44</sup> Mark Bevir and Rod Rhodes, 'Interpretation and its Others' (2005) 40 *Australian Journal of Political Science* 169, 173.

<sup>45</sup> *Ibid.*

<sup>46</sup> Bevir and Rhodes (n 44) 178; David Howarth, *Discourse* (Open University Press 2000) 131.

<sup>47</sup> Bettina Lange, 'Researching Discourse and Behaviour as Elements of Law in Action' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart 2005).

two of this thesis, and then evaluated alongside my conclusions in chapter three (see below).

## **SYNOPSIS OF CHAPTERS**

The thesis divides into two parts. The first part reviews the literature on theoretical approaches to family law (chapter two), and then outlines a conservative disposition to the legal regulation of intimate adult relationships (chapter three). The second part comprises five chapters examining some legislative changes affecting intimate adult relationships during the period, and a final chapter which synthesises the findings of part one and chapters four to eight and draws out answers to the research questions. Taken as a whole, the statutes examined in part two constitute a case study in one discrete area of lawmaking against which to consider a conservative approach to family law, all located within the broader debate around the functions of family law. The chapter synopses are as follows:

**Chapter 1 Introduction:** An outline of the thesis, justification for this research, boundaries of the thesis and research questions, methodology, synopsis of chapters.

**Chapter 2 Thinking About Family Law:** A literature review of scholarship which considers various theoretical approaches to understanding family law. It will include liberal, Marxist, communitarian, critical legal, and feminist perspectives. It will draw on contributions from, for example, Dewar, Diduck, Eekelaar, Freeman and Hale from the English perspective; and Chambers, Garrison, Glendon, Minow, Olsen, Schneider, and Scott from the US academy. Particular emphasis will be on what each worldview identifies as the function of family law (what is family law *for*?). Chapter two will provide an interpretative matrix with which to analyse the UK politico-legal developments in chapters four to eight.

**Chapter 3 Conservatism and Family Law:** A detailed discussion of what conservatism is, including an exploration of why conservatives believe what they do about the family. Reference will be made to,

inter alia, Burke,<sup>48</sup> Oakeshott,<sup>49</sup> O'Hara,<sup>50</sup> and Scruton.<sup>51</sup> This chapter will provide a framework with which to analyse the practical politics of the Conservative Party from 1983 to 2013.

- Chapter 4 Marriage and Divorce in Transition - The Matrimonial and Family Proceedings Act 1984:** The 1980s were a time of seismic change in British society. Under the Thatcher governments a number of important, and sometimes controversial, family law statutes were enacted. This chapter will focus on the 1984 Act, particularly its reduction in the minimum time limit for divorce from three years to one year and the important changes to ancillary relief and their implications for women especially.
- Chapter 5 Major Change? – Family Law and Policy in the Decade Following the Matrimonial and Family Proceedings Act 1984:** This chapter aims to provide a broad narrative of some notable developments in family law from the mid-eighties to the mid-nineties, thereby linking the detailed consideration of the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996 in the chapters immediately before and after it.
- Chapter 6 Divorcing Rhetoric From Reality - The Family Law Act 1996:** The ultimately abortive Part II of the Family Law Act 1996 was an overt attempt to save individual marriages and to shore up marriage as an institution. The story of the Act is richly illustrative of the Conservative Party's views on intimate adult relationships and the law. The shipwreck of Part II of the Family Law Act 1996 stands as a warning to future legislators who might seek to sail against the prevailing societal tide.
- Chapter 7 'Commitment Rewarded' - The Civil Partnership Act 2004:** This chapter takes its title from an editorial in *The Times* and considers the Conservative Party's attitude to the legal regulation of same-sex

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<sup>48</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004).

<sup>49</sup> Michael Oakeshott, *Rationalism in Politics and Other Essays* (2<sup>nd</sup> edn, Liberty Fund 1991).

<sup>50</sup> Kieron O'Hara, *Conservatism* (Reaktion Books 2011).

<sup>51</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001).

relationships. Equality, particularly regarding homosexual and transgender rights, was a pervasive theme of New Labour's family law reforms at the turn of the millennium. While the Bill enjoyed official support from the Conservative Party, it experienced a rough parliamentary passage and was opposed to the last by a majority of Conservative peers.

**Chapter 8 An Unnatural Union? – British Conservatism and the Marriage (Same Sex Couples) Act 2013:** Chapter eight considers the genesis and parliamentary passage of the Marriage (Same Sex Couples) Act 2013. It is an insightful case study of how British conservatism approaches the challenge of change, and how the Party went from the 'pretended family relationship' of section 28 of the Local Government Act 1988 to championing same-sex marriage.

**Chapter 9 Conclusion:** The concluding chapter will synthesise the theoretical frameworks in part one with the qualitative research from the case studies in part two, with the aim of answering my research questions set out above. This chapter, and the extended discussion it is drawn from, will stand as my contribution to the corpus of literature surveyed in chapter two.

## A FINAL NOTE

At the start of this work it is right that I should declare an interest. Whilst this interest is undoubtedly personal it is less clear to what extent it is prejudicial. I was a member of the Conservative Party from 2005 to 2012, a Conservative district councillor from 2006 to 2010, and stood as a parliamentary candidate in the 2010 general election. All writers approach their subjects with a complex bag of beliefs, opinions and biases (their ontology), some of which may well exist on a subconscious level. Martha Minow rightly questions whether it is possible to explore history without doing so from a particular viewpoint.<sup>52</sup> I agree with her that it is not, so in researching my thesis I have endeavoured to be aware of potential personal

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<sup>52</sup> Martha Minow, "Forming Underneath Everything that Grows:" Towards a History of Family Law' [1985] *Wisconsin Law Review* 819, 894.

cognitive bias and to approach my subject with what I hope is due academic detachment.

Throughout this thesis the spelling of 'Conservative Party' shall follow convention by both the 'C' and the 'P' beginning with upper case letters. Conservative with a capital 'C' denotes someone whom I identify as a member of the Conservative Party or supportive of it, or something pertaining to the Party but which I have chosen not to describe as 'conservative'. Conservative with a small 'c' shall mean the political ideology of conservatism, or someone whose political beliefs are consistent with the meaning of conservatism set out in chapter three. This allows for a more nuanced understanding of political belief and affiliation. As Kieron O'Hara observes, it helps us to make sense of a world where 'not all Conservatives are conservatives, and not all conservatives are Conservatives',<sup>53</sup> although there is clearly overlap between the two. However, when quoting from other writers I will leave their particular usage unchanged. Finally, I only explicitly state the party affiliation of Members of Parliament and Members of the House of Lords if they are not members of the Conservative Party. If no party affiliation is stated, then it can be assumed that the individual is a Conservative.

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<sup>53</sup> Kieron O'Hara, *Conservatism* (Reaktion Books 2011) 14.

## CHAPTER 2

### THINKING ABOUT FAMILY LAW

#### INTRODUCTION

This chapter explores five politico-legal theories through which the relationship between the individual, the family and the state can be conceptualised and understood. The discussion of each theory focusses on its construction of the function of law in general and of family law in particular. Due to its central place in this thesis, a sixth theory<sup>1</sup> – conservatism - will be considered separately in the following chapter. Justification for this approach can be found in Carl Schneider's view that:

[W]hat views of human nature inform family law? This is surely a question of the utmost interest and importance. A family law that fears that people are naturally depraved must differ from one that hopes they are naturally virtuous. Yet this fascinating and crucial question seems never to have been addressed.<sup>2</sup>

However, a substantial amount of work has been since published which does address this crucial question, although almost none of it from the perspective of conservatism. Schneider appears to advocate looking first at family law for evidence of the ontologies which shape its development. In this chapter I start from the opposite end and look at the ontologies themselves to draw out first principles to apply to family lawmaking. Having taken this approach in this chapter and the following one, chapters four to eight will revert to Schneider's ordering and examine the family lawmaking process with the aim of identifying 'what views of human nature inform family law'.

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<sup>1</sup> I use the word 'theory' here in its broadest sense, recognising that it is arguably more appropriate to understand conservatism as a 'disposition' instead. This matter is considered further in the next chapter.

<sup>2</sup> Carl Schneider, 'The Next Step: Definition, Generalization, and Theory in American Family Law' (1985) 18 *University of Michigan Journal of Law Reform* 1039, 1057.



The purpose of this chapter is to review the literature relating to key paradigmatic approaches to family law and to locate the many individual scholarly contributions under the five areas. This discussion (and the one in chapter three) will then provide a discursive framework for the later 'fieldwork' chapters examining the development of aspects of family law from 1983 to 2013. What will become clear (if it was not already) is that the British state has never adopted a pure ideological approach to its formulation of family law. That is to say, it has not drawn upon, for example, purely classical liberal doctrine when determining the direction of law relating to families. And in common with all liberal democracies, where power is necessarily dispersed and where diverse interest groups can, and do, influence the policymaking process, it is possible to see multiple worldviews informing legislative outcomes. That said, the extent to which such worldviews are 'seen' has largely depended upon scholars 'turning the stone' to make explicit the often implicit assumptions of legislators and policymakers.<sup>3</sup>

One of the challenges of theorising family law is that it can be approached from a variety of extra-legal angles, such as from sociological, political science, and psychological perspectives. Its very nature is interdisciplinary and this inevitably makes it difficult for scholars to work expertly across two or more disciplines at an appropriately deep level of abstraction. It is therefore hardly surprising that family law scholars have struggled to obtain a bird's eye view of their discipline. Schneider sums up the challenge thus:

Once again, however, the diversity of family law's requirements – for theories about what people need from families, about how people behave within families, about how abnormal people normally behave, about when and how law influences people's behaviour in families, about how bureaucracies function – means at least that no single discipline is a suitable source of systematic family-law theory.<sup>4</sup>

He goes on to identify other obstacles to developing theories of family law: family law concerns a whole area of life rather than a single, discrete problem; it derives

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<sup>3</sup> See, for example, Carol Smart, *The Ties That Bind* (Routledge & Kegan Paul 1984); Martha Minow, "'Forming Underneath Everything that Grows:" Towards a History of Family Law' [1985] *Wisconsin Law Review* 819; Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985); Richard Collier, *Masculinity, Law and the Family* (Routledge 1995); Alison Diduck, *Law's Families* (LexisNexis 2003).

<sup>4</sup> Schneider (n 2) 1046.

from a diverse range of sources; it is influenced by a broad constituency of interest groups; and it is historically contingent and can change rapidly as society alters. He concludes his jeremiad as follows:

It is hard to produce a systematic view of an unsystematic subject, and perhaps family law must always be ad hoc, responsive to local conditions, sensitive to the day's sensibilities, and willing to compromise irreconcilable differences.<sup>5</sup>

These themes of family law being unsystematic and ad hoc were later taken up and developed by John Dewar, who argues that family law is quintessentially chaotic because it simply reflects the impulsive, irrational and complex nature of love itself.<sup>6</sup> Along similar lines Gilbert Steiner has expressed scepticism about whether it is possible to develop a sufficiently coherent package of measures which justify the title 'family policy'.<sup>7</sup>

The majority of contributions to the literature in this field have come from the United States, where scholars have tended to draw more on higher order theory.<sup>8</sup> British and Australian academics have often started from a lower level of abstraction and have – in my view – engaged with the American literature in a rather limited fashion.<sup>9</sup> Although it is fair to say that particularly those scholars from the critical legal school have gone deeper in their analyses.<sup>10</sup> It is observed that some

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<sup>5</sup> Ibid 1048.

<sup>6</sup> John Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467, drawing on the work of Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press 1995).

<sup>7</sup> Gilbert Steiner, *The Futility of Family Policy* (The Brookings Institution 1981).

<sup>8</sup> For example: Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 Harvard Law Review 1497; David Chambers, 'The "Legalization" of the Family: Toward a Policy of Supportive Neutrality' (1985) 18 University of Michigan Journal of Law Reform 805; Mary Ann Glendon, *The Transformation of Family Law* (The University of Chicago Press 1989); Carl Schneider, 'The Channelling Function in Family Law' (1992) 20 Hofstra Law Review 495; Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 Hypatia 4; Marsha Garrison, 'Towards a Contractarian Account of Family Governance' (1998) Utah Law Review 241.

<sup>9</sup> For example: Chris Barton and Gillian Douglas, *Law and Parenthood* (Butterworths 1995); John Dewar, 'Family, Law and Theory' (1996) 16 Oxford Journal of Legal Studies 725; Brenda Hale, *From the Test Tube to the Coffin: Choice and Regulation in Private Life* (Sweet & Maxwell 1996); John Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467.

<sup>10</sup> For example: Michael Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 Current Legal Problems 153; Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985); Katherine O'Donovan, *Family Law Matters* (Pluto Press 1993); Richard Collier, *Masculinity, Law and the Family* (Routledge 1995); Alison Diduck, *Law's Families* (LexisNexis 2003); Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003).

American works are, understandably, US-centric in their application but there is much that is pitched in sufficiently general terms such that it is easily translatable into discussions about other jurisdictions. I turn now to the first, and, regarding the development of family law, most influential, of the politico-legal theories: liberalism.

## **LIBERALISM**

Liberalism is the dominant paradigm not just in family law, but in western polity and society in general.<sup>11</sup> It is a progeny of the Enlightenment and it has endured principally because it provides a conceptual framework for states to maintain a critical degree of unity while accommodating a plurality of worldviews among its populace. However, providing a brief, essential synopsis of it for the purpose of this thesis presents a significant challenge due to the pervasiveness of liberalism, the vastness of its canon, and the contested nature of its content. I shall therefore attempt only to set out what I consider to be the elements of political liberalism as it operates in the United Kingdom in the period under consideration here and which have particular relevance to family law and policy.

I hold to the view that there is no single, definitive core of liberalism,<sup>12</sup> and like all the theories discussed in this chapter it is more accurate to understand them in the plural rather than the singular, heterogeneously rather than homogeneously (eg liberalisms, feminisms, etc). That said, there is a central claim which is constitutive of political liberal theory, namely that each human being is to be accorded equal status and treatment within a broadly drawn moral and political framework. With this claim in mind, Alan Ryan attempts a brief definition, '[T]he belief that the freedom of the individual is the highest political value, and that institutions and practices are to be judged by their success in promoting it'.<sup>13</sup> This privileging of human beings is founded on an understanding of the moral value of the species qua a species, although there are differing views (religious, humanist etc) as to the basis of this moral claim. What then of political liberalism's understanding of the state's place in this schema? For an answer we turn to the well-worn words of John Stuart Mill:

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<sup>11</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) 182.

<sup>12</sup> Paul Kelly, *Liberalism* (Polity Press 2005) 2.

<sup>13</sup> Alan Ryan, 'Liberalism' in Robert Goodin and Philip Pettit (eds), *Contemporary Political Philosophy: An Anthology* (2<sup>nd</sup> edn, Blackwell 2006) 362.

[T]he only purpose for which power can be rightfully exercised over any member of the civilized community, against his will, is to prevent harm to others. His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right...The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>14</sup>

Mill's statement demarcates the boundary between state power and the individual, and thereby exposes the root of the public/private dichotomy which forms the central part of liberalism's much assaulted edifice. The argument runs that if the state may only intervene to prevent harm to others then in the absence of any evidence of third-party harm the state keeps its distance, and in so doing it inevitably confines such behaviour to a protected private sphere of personal conduct. It does not necessarily follow that liberalism is amoral, but the state refrains from passing judgement on much personal moral behaviour by confining it to the private sphere in the interests of a harmonious and pluralistic society and in deference to individual autonomy. One practical outworking of this is that individuals have 'a right to do wrong',<sup>15</sup> in the sense that there are many behaviours considered by some (even a majority) to be morally reprehensible which will not be subject to state sanction.<sup>16</sup> It must also be pointed out – particularly as this is so apposite to family law – that the point at which the state will intervene to 'prevent harm' is contested, contingent and changeable over time. So while liberalism is not necessarily amoral, it is a procedural theory which does not contain any normative moral components: its moral content will be determined by the society in which it operates.<sup>17</sup> All of this of course forms the jurisprudential foundation for modern human rights instruments such as the European Convention on Human Rights (ECHR). The influence of the ECHR on the British legal and political culture grew

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<sup>14</sup> John Stuart Mill, *On Liberty and Other Essays* (first published 1859, Oxford University Press 1991) 14.

<sup>15</sup> Jeremy Waldron, *Liberal Rights* (Cambridge University Press 1993) 63-87.

<sup>16</sup> The renowned Hart and Devlin debate explored these issues, see Herbert Hart, *Law, Liberty, and Morality* (Stanford University Press 1963) and Patrick Devlin, *The Enforcement of Morals* (OUP 1965).

<sup>17</sup> Ryan (n 13) 375.

throughout the period under consideration in this thesis, and markedly following the entry into force in October 2000 of the Human Rights Act 1998. I attempt to trace this influence in later chapters.

Modern political liberal theory has also been much influenced by the work of John Rawls, whose *A Theory of Justice* draws on the social contractual theory of Hobbes, Locke and Kant.<sup>18</sup> This contractualist reformulation of liberalism can be summed up as follows:

[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.<sup>19</sup>

Central to Rawls' theory is the idea of the 'original position of equality' from which actors determine their society's organising principles.<sup>20</sup> In the original position actors are aware of general matters affecting their choice of principles, but their own individual characteristics and circumstances are hidden behind a 'veil of ignorance' so as to maximise the likelihood of fair and just outcomes.<sup>21</sup> Varieties of contractarian methodology have been employed in attempts to formulate a theory of family governance,<sup>22</sup> but Rawls' work is not without its critics.<sup>23</sup>

Different emphases on the various core characteristics of any political theory will give rise to different expressions of it; so for example, an emphasis on economic liberalism and social conservatism characterised the New Right movement of the 1980s.<sup>24</sup> Paul Kelly highlights the 'equality' and 'liberty' pillars of liberalism, and states that a liberalism which majors on the former is representative of leftist political parties, whereas emphasis on the liberty or freedom aspect is emblematic of right-wing parties.<sup>25</sup> Indeed, to emphasise liberty yet further and, as a corollary, to argue for a reduction in state activity is characteristic of libertarianism.<sup>26</sup>

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<sup>18</sup> John Rawls, *A Theory of Justice* (Oxford University Press 1999).

<sup>19</sup> *Ibid* 60.

<sup>20</sup> *Ibid* 11.

<sup>21</sup> *Ibid* 11.

<sup>22</sup> Marsha Garrison, 'Towards a Contractarian Account of Family Governance' (1998) *Utah Law Review* 241.

<sup>23</sup> Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989).

<sup>24</sup> The New Right is discussed further in chapter four.

<sup>25</sup> Paul Kelly, *Liberalism* (Polity Press 2005) 51-52.

<sup>26</sup> Libertarianism is considered further in chapter three.

So, in liberal political philosophy the state is the chief source of power, 'a purely instrumental association for the protection of life, liberty and property',<sup>27</sup> and the state's power is exercised primarily through law (positivism). At the core of liberalism is the autonomous individual who is free to pursue his or her idea of the good life subject to certain limitations on this freedom. These principles will be explored in more depth below as we consider how other ideologies have challenged them.

### **Liberalism and the primacy of the individual in family law**

The liberal view of the family will be explored in detail in the section below on feminism, because it is feminists who have expounded it most in the process of deconstructing its gendered nature. However, in essence the liberal family is seen as '[a] natural and therefore a "private" association, consisting of a male, a female, and their biological children'.<sup>28</sup> The male is constructed as the economic provider for the family and the one who exercises authority over its members. The female is responsible for managing the household and for raising any children, essentially a nurturing and caregiving function. The woman/wife/mother and children operate in a protected, private sphere which was often considered to be beyond the rightful reach of law, while the man/husband/father moved freely between this private realm and the public realm of the market which was seen as the law's domain.<sup>29</sup> The private, family realm is characterised by 'soft' values of altruism, care and trust, while the public sphere is governed by juristic principles such as contract and rights. The public sphere is political, the private one is not.

An obvious impact of liberalism on family law is the move towards the primacy of the individual, 'Everything in modern society conspires to buttress the primacy of the individual, and his or her wants, desires, aspirations, and habits'.<sup>30</sup> Lawrence Friedman goes on to describe this trend as one which has led to the 'enthronement

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<sup>27</sup> Richard Krouse, 'Patriarchal Liberalism and Beyond: From John Stuart Mill to Harriet Taylor' in Jean Elshtain (ed), *The Family in Political Thought* (The Harvester Press 1982) 148.

<sup>28</sup> Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 *Hypatia* 4, 6-7.

<sup>29</sup> Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497.

<sup>30</sup> Lawrence Friedman, *Private Lives: Families, Individuals, and the Law* (Harvard University Press 2004) 5.

of the individual, and individual choice'.<sup>31</sup> The revolution which has taken place in family law is characterised by an emphasis on the rights of individual family members, while the legal significance of the family as a group has waned.<sup>32</sup> Along with this emphasis on the liberal pillars of autonomy and equality, has come a shift in family law from status to contract, particularly in the field of divorce law.<sup>33</sup>

A corollary of the focus on individualism is what Friedman calls a 'regime of choice': 'In a regime of choice, one person's choice may collide with, interfere with, or contradict another person's choice. Modern divorce law resolves the conflict by giving higher priority to the spouse who wants to go.'<sup>34</sup> Liberalism gives rise to contract-based and rights-based views of family life and family law.<sup>35</sup> Examples of these can be found in all of the statutes under consideration in the later chapters: the Matrimonial and Family Proceedings Act 1984 (the clean break principle enables divorcing couples to move on with their lives and prioritises obligations to the 'new' family over the 'old' one); the Family Law Act 1996 (could be seen to be promoting equality in divorce through its removal of fault-based divorce); and the Civil Partnership Act 2004 and Marriage (Same Sex Couples) Act 2013 both promote the autonomy and equal treatment of same-sex couples by allowing them to enter into legally recognised relationship forms.

### **The functions of a liberal family law**

Much of the scholarship on the function of family law is located within a liberal paradigm because it draws on observations from law in action in western societies, societies which liberalism pervades. So in this section I have included insights from scholars who have written about the function of family law in a predominantly liberal polity even though those scholars might not self-define as liberals in whole or part. Moreover, when considering the literature it is not always clear if the authors are asking the 'what is family law for?' question descriptively or prescriptively, ie

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<sup>31</sup> Ibid 10. This is also the central thesis of Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press 1995).

<sup>32</sup> Elizabeth Scott, 'Rehabilitating Liberalism in Modern Divorce Law' [1994] *Utah Law Review* 687, 687.

<sup>33</sup> See, for example, Jane Lewis, *The End of Marriage? Individualism and Intimate Relations* (Edward Elgar 2001) chapter 5.

<sup>34</sup> Friedman (n 30) 78.

<sup>35</sup> Eg Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 *Hypatia* 4.

whether they are seeking to argue what family law is *actually* for or what it *should* be for. It is sometimes a mix of both; Brenda Hale, for example, observes that family law has been instrumental in promoting equality and autonomy and goes on to call for it to 'promote a responsible approach to family life'.<sup>36</sup> Of course, all of this presupposes that the question is valid and that there is a discernible coherent purpose (or purposes) to family law - something which is not accepted by Dewar.<sup>37</sup> His thesis draws on the work of Ulrich Beck and Elisabeth Beck-Gernsheim<sup>38</sup> and claims that family law is chaotic, antinomic, postmodern. Even though Dewar uses the term 'postmodern', it seems he is not a postmodernist per se, but deploys a classical liberal analysis. He argues that law should just respond to the reality of people's lives and not restrict their freedoms: if their love lives are chaotic then law should just reflect that chaos and facilitate their choices. He does not appear to be saying that law should be value-free but that it should reflect the values of the society it operates on.<sup>39</sup> Alison Diduck attempts to reconcile the positions of Hale and Dewar by demonstrating that what Dewar sees as 'chaos' is in fact shifting discourses around notions of responsibility in intra-family and family-state relations.<sup>40</sup>

### **Chambers and 'supportive neutrality'**

David Chambers sees the family in a similar way to Ferdinand Mount as a 'buffer from the state, a refuge, a sanctuary'.<sup>41</sup> He takes a classical liberal view of the role of family law but, at first glance, he could be mistaken for being libertarian: 'In my scheme of things, legislatures would largely get out of the business of deciding which adults can live with each other inside or outside of marriage'.<sup>42</sup> His argument here extends not just to the state's involvement on entry into relationships, but also

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<sup>36</sup> Brenda Hale, 'Private Lives and Public Duties: What is Family Law for?' (1998) 20 *Journal of Social Welfare and Family Law* 125, 135.

<sup>37</sup> John Dewar, 'Family, Law and Theory' (1996) 16 *Oxford Journal of Legal Studies* 725; John Dewar, 'The Normal Chaos of Family Law' (1998) 61 *MLR* 467.

<sup>38</sup> Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press 1995).

<sup>39</sup> See also Carl Schneider, 'The Next Step: Definition, Generalization, and Theory in American Family Law' (1985) 18 *University of Michigan Journal of Law Reform* 1039, 1048.

<sup>40</sup> Alison Diduck, 'What is Family Law For?' (2011) 64 *Current Legal Problems* 287.

<sup>41</sup> David Chambers, 'The "Legalization" of the Family: Toward a Policy of Supportive Neutrality' (1985) 18 *University of Michigan Journal of Law Reform* 805, 817. See also Ferdinand Mount, *The Subversive Family: An Alternative History of Love and Marriage* (The Free Press 1992).

<sup>42</sup> *Ibid* 813.



regulation during relationships and exit from them. Drawing on Mill, his guiding principles for the state in all of this are that:

[I]t would not directly prohibit or coerce (or make adverse decisions based on judgments about) any form of family conduct, unless it could point to specific and substantial secular harms caused by the conduct...Two additional requirements should be demanded of any particular proposed regulation: first, the values that can accrue from ameliorating the harm must be weighed, in some rough way, against the costs to individuals of intruding on their private lives and, second, alternative regulations that intrude less on family decisions must be used whenever they can be as effective or nearly as effective.<sup>43</sup>

Subject to these principles he contends that the default position of government towards the family should be one of 'supportive neutrality'.<sup>44</sup> He admits the oxymoronic ring to the idea but writes that it captures well the principle that the state ought to be supportive of family life in general while remaining neutral as to the various forms such families may take. This was a much more radical call when it was written in the mid-eighties, but with hindsight it can be seen as describing, albeit imperfectly, the trend of English family law in the succeeding decades.

### **The 'expressive' and 'channelling' functions of family law**

The claim that law sends messages beyond its prima facie manifestation is not peculiar to any particular theory discussed in this chapter, although it sits uncomfortably with positivist accounts of law.<sup>45</sup> In addition to its protective, facilitative, and dispute resolution functions, Schneider thinks that family law plays two further influential roles: an expressive function and a channelling function.<sup>46</sup> Again, these functions could be linked to most of the theories in this chapter (an exception might be libertarianism), but I have chosen to locate them within my discussion of liberalism because of that theory's pre-eminence in the period under

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<sup>43</sup> Ibid 814.

<sup>44</sup> Ibid 814.

<sup>45</sup> James Boyd White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) 52 University of Chicago Law Review 684.

<sup>46</sup> Carl Schneider, 'The Channelling Function in Family Law' (1992) 20 Hofstra Law Review 495, 497-498.

consideration here. The expressive function 'provides a voice in which citizens may speak, and, second, to alter the behaviour of people the law addresses'.<sup>47</sup> The expressive function of family law was discussed earlier by Carol Weisbrod and it captures the idea of law as discourse, which both shapes, and is shaped by, culture.<sup>48</sup> She recognises that there are two aspects to this: examining law to see what values and messages it expresses, and the extent to which law *should* be used by lawmakers to express values.<sup>49</sup> There are some obvious problems with the expressive function, eg what message is sent and is it the same as the message received, and much depends on where we look for answers: 'While emphasis on rule and decision making gets us to clarification and simplification, emphasis on rhetoric gets us to complexity and contradiction'<sup>50</sup>; and Rebecca Probert writes that myths sometimes emerge.<sup>51</sup>

However, the channelling function views law as creating or supporting socially desirable institutions such as marriage and parenthood.<sup>52</sup> To my mind the expressive and channelling functions appear to be closely related and even overlapping to some extent; the difference between them being that the former is essentially passive while the latter actively deploys secondary measures to attempt to change the behaviour of its subjects. That is to say, the expressive function is primarily about the transmission of messages through verbal media, whereas channelling involves the use of incentives and disincentives to direct participation in favoured institutions.<sup>53</sup>

The use of law to channel behaviour is controversial and perhaps sometimes now impossible.<sup>54</sup> Moreover, Helen Reece thinks individuals might sometimes be better

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<sup>47</sup> Ibid 498.

<sup>48</sup> Carol Weisbrod, 'On the Expressive Functions of Family Law' (1989) 22 U.C. Davis L. Rev. 991.

<sup>49</sup> Ibid 994.

<sup>50</sup> Ibid 1007.

<sup>51</sup> Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (CUP 2012) 214-217.

<sup>52</sup> Schneider (n 46) 498.

<sup>53</sup> Schneider (n 46) 503-4. An obvious example of a channelling measure is state-subsidised child care which might encourage both childbearing and ongoing workplace participation of parents.

<sup>54</sup> John Eekelaar, 'Family Law: Keeping Us "On Message"' (1999) 11 CFLQ 387; June Carbone, 'Out of the Channel and Into the Swamp: How Family Law Fails in a New Era of Class Division' (2011) 39 Hofstra Law Review 859. Carbone questions if shared meanings remain possible in the increased moral pluralism in the US since Schneider's 1992 article. Eekelaar makes a similar point in the context of the Family Law Act 1996.

off ignoring law's messages.<sup>55</sup> Although controversial, channelling does not necessarily offend against liberal values, but it could do if it results in the state breaking from its morally-neutral moorings. Some would see law's channelling function as being consistent with post-liberal, communitarian principles, and have observed it at work particularly in the Family Law Act 1996,<sup>56</sup> while I would argue that it is certainly consistent with conservatism and its love of institutions. It forms part of the methodology of this thesis that law, as discourse, communicates more than what simply appears on the surface, and each statute considered in chapters four to eight will be examined for its extraformal signals.

### **Family law and responsibility**

It has been noted above that liberalism's neutrality as to the moral content of the good life is not to say that it is amoral nor that it is ambivalent towards the place of responsibility in a familial context.<sup>57</sup> The whole area of a parent's responsibility for the care of dependent children, for example, fits squarely within a liberal legal framework concerning matters such as physical protection, emotional development, and financial provision.

In Hale's view, family law should aim to strike a balance between giving effect to the wishes of individuals regarding how they order their private lives in relationship with others (the autonomy strand) and the need particularly to ensure that certain responsibilities are enforced on behalf of the weaker and more vulnerable family members (the paternalist strand).<sup>58</sup> In the Hamlyn lectures though she is rather coy about how far the law should actually extend to more or less equalise the legal rights and responsibilities of those in married, cohabiting, and homosexual relationships. Beyond the (commonly accepted) areas of caring for children and protecting against domestic violence she is rather non-committal (perhaps as a

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<sup>55</sup> Helen Reece, 'Leaping without Looking' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014).

<sup>56</sup> Ezra Hasson, 'Setting a Standard or Reflecting Reality? The Role of Divorce Law, and the Case of the Family Law Act 1996' (2003) 17 *International Journal of Law, Policy and the Family* 338; Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003).

<sup>57</sup> Jo Bridgeman and Heather Keating, 'Introduction: Conceptualising Family Responsibility' in Jo Bridgeman, Heather Keating and Craig Lind (eds), *Responsibility, Law and the Family* (Ashgate 2008) 3-6.

<sup>58</sup> Brenda Hale, *From the Test Tube to the Coffin: Choice and Regulation in Private Life* (Sweet & Maxwell 1996); Brenda Hale, 'Equality and Autonomy in Family Law' (2011) 33 *Journal of Social Welfare and Family Law* 3.

result of being, then, a High Court judge). She continues this emphasis on responsibility in a later lecture, '[W]e need a system of private law which will promote a responsible approach to family life',<sup>59</sup> and this is consonant with her view of the family as 'its own little social security system'.<sup>60</sup>

Diduck's answer to the question 'what is family law for?' focusses on 'its role as shaper of responsibility for care'.<sup>61</sup> She sets out her view in her inaugural lecture:

Family law determines the responsibilities of individuals to each other and by extension, the responsibilities of families and the state and the community to each other. Whether it is about money, care of children, employment, income support, or housing, the purpose of family law is to allocate and enforce responsibility for those responsibilities.<sup>62</sup>

This role seems innocuous when set out in such abstract terms, but I observe in the chapters on the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996 that attempts to allocate familial responsibility inevitably resulted in legislators making controversial value judgements.

### **The post-liberal turn**

Much has been written about the state of modern liberalism. Some have argued that, while the intellectual substructure of the Enlightenment has crumbled away, liberal theory soldiers on as if the world has not changed.<sup>63</sup> Be that as it may, post-liberal theory emerged as a reaction to liberalism's actual or perceived shortcomings. It was born into a more complicated and pluralistic world than its forebear, and is concerned with the more challenging task of bringing about an accommodation with non-liberal cultures and working within the anti-universalist

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<sup>59</sup> Brenda Hale, 'Private Lives and Public Duties: What is Family Law for?' (1998) 20 *Journal of Social Welfare and Family Law* 125, 135.

<sup>60</sup> Hale, *ibid* 2011, 4.

<sup>61</sup> Alison Diduck, 'Family Law and Family Responsibility' in Jo Bridgeman, Heather Keating and Craig Lind (eds), *Responsibility, Law and the Family* (Ashgate 2008) 265; see also Alison Diduck, 'Shifting Familiarity' (2005) 58 *Current Legal Problems* 235, 253.

<sup>62</sup> Alison Diduck, 'What is Family Law For?' (2011) 64 *Current Legal Problems* 287, 292.

<sup>63</sup> John Gray, *Liberalism* (2<sup>nd</sup> edn, University of Minnesota Press 1995) 85.

environment of postmodernism.<sup>64</sup> What this might look like in practice has been discussed at length by Helen Reece in her insightful work on Part II of the Family Law Act 1996, which will be considered in detail in chapter six,<sup>65</sup> but before doing so I examine below one particular manifestation of post-liberal theory, namely communitarianism.

The remainder of the chapter will consider four further politico-legal theories: Marxism, communitarianism, critical legal theory, and feminism. They stand alone as theoretical approaches to law and society in varying degrees, but they all also provide important critiques of liberalism, and through those critiques bring liberalism and its approach to family law into sharper focus.

## **MARXISM**

### **Marxism and the family**

Marxism criticises liberalism on two fronts: its impoverished, amoral (as Marxism would see it) vision of society which centres on the state providing a protected space for the exercise of selfish, individual interests; and the fundamental tension at the heart of liberalism whereby it loudly proclaims that all are equal before the law whilst permitting the perpetuation of systemic economic and social inequality.<sup>66</sup>

Evelyn Reed explains the Marxist position in her introduction to Engels' *The Origin of the Family, Private Property and the State*.<sup>67</sup> She identifies the emergence of the state as a response to the development of a more productive division of labour between the sexes, which arose as wealth generation increased beyond merely meeting the needs of consumption to the production of economic surplus.<sup>68</sup> As wealth grew, so did the development of a law of property to protect ownership and enjoyment of that wealth. Marxists interpret this as the state sanctioning the rule of the rich (ie the bourgeoisie - those who own the means of production) over the poor

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<sup>64</sup> Ibid 96.

<sup>65</sup> Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003).

<sup>66</sup> Richard Krouse, 'Patriarchal Liberalism and Beyond: From John Stuart Mill to Harriet Taylor' in Jean Elshtain (ed), *The Family in Political Thought* (The Harvester Press 1982) 149.

<sup>67</sup> Friedrich Engels, *The Origin of the Family, Private Property and the State* (first published 1884, Pathfinder Press 1972).

<sup>68</sup> Ibid 18.

(ie the proletariat - those who sell their labour to the bourgeoisie in exchange for a wage). Alongside the emergence of the capitalist state Marxists observe the development of a family form which is both coercive and patriarchal:

The patriarchal family arose to control and subjugate women in the very same process whereby the state arose to subjugate and control laboring men. As Engels demonstrates, class exploitation and sexual oppression of women were born together to serve the interests of the private-property system. And they work together for the same ends to the present day.<sup>69</sup>

It can be seen therefore that Marxists view the power relationships within the family as analogous to those in operation in society at large.<sup>70</sup> The position is summed up when Engels quoted Marx:

The modern family contains in embryo not only slavery (servitus) but serfdom also, since from the very beginning it is connected with agricultural services. It contains within itself in miniature all the antagonisms which later develop on a wide scale within society and its state.<sup>71</sup>

On the monogamous family form Engels wrote, 'It is based on the supremacy of the man; its express aim is the begetting of children of undisputed paternity, this paternity being required in order that these children may in due time inherit their father's wealth as his natural heirs'.<sup>72</sup> Again, unsurprisingly the focus is on the preservation and transmission of rights in property.<sup>73</sup> Interestingly there remains an expression of this (although its genesis is not Marxist) in English family law in the form of the rebuttable common law presumption that a husband is the father of any children born to his wife. Engels went on to deny that monogamy arose as a result of individual sex love, but that it was based chiefly on economic considerations – 'the subjection of one sex by the other'.<sup>74</sup> With this diagnosis in mind, it is not hard to see how some scholars – such as Reed - have harnessed Engel's work to the

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<sup>69</sup> Ibid 19.

<sup>70</sup> Michele Barrett and Mary McIntosh, *The Anti-Social Family* (2<sup>nd</sup> edn, Verso 1991) 86.

<sup>71</sup> Engels (n 67) 91.

<sup>72</sup> Ibid 95.

<sup>73</sup> Donzelot also makes this observation, Jacques Donzelot, *The Policing of Families* (Pantheon Books 1979) xx.

<sup>74</sup> Engels (n 67) 99.

cause of modern feminism. Reed, as a Marxist and a feminist, understands the oppression of women through a purely Marxist paradigm, ie such oppression arose for the same reasons as the emergence of the notions of class and property, even going as far to say that '[the oppression of women] did not exist before that'.<sup>75</sup> She is indeed consistent with Engels in this view, for he said, 'The first class antagonism which appears in history coincides with the development of the antagonism between man and woman in monogamous marriage, and the first class oppression with that of the female sex by the male'.<sup>76</sup> Marxist feminists see much of family law as a perpetuation of that oppression.<sup>77</sup>

In Engels' analysis the proletarian marriage is privileged. He argued that if marriage is to be founded on sex love then this is only possible among the proletariat who, being without property, are freed from the compulsion of male domination and female oppression in the pursuit of safeguarding property interests.<sup>78</sup> He saw women's engagement in the labour market as a key to this happiness and in a passage which was written in the 1890s (but which would not have sounded out of place in the latter part of the twentieth century) he stated:

Moreover, since large-scale industry has transferred the woman from the house to the labor market and the factory, and makes her, often enough, the breadwinner of the family, the last remnants of male domination in the proletarian home have lost all foundation – except, perhaps, for some of that brutality toward women which became firmly rooted with the establishment of monogamy.<sup>79</sup>

Again, in a passage which surely sounded ahead of its time when it was written, he went on to consider the role of law in the regulation of marriage:

Modern civilized systems of law are recognizing more and more, first, that, in order to be effective, marriage must be an agreement voluntarily entered into by both parties; and second, that during marriage, too, both parties must be on an equal footing in respect to

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<sup>75</sup> Ibid 28.

<sup>76</sup> Ibid 99.

<sup>77</sup> Elizabeth Kingdom, 'Legal Recognition of a Woman's Right to Choose' in Julia Brophy and Carol Smart (eds), *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul 1985).

<sup>78</sup> Engels (n 67) 105.

<sup>79</sup> Ibid 105.

rights and obligations. If, however, these two demands were consistently carried into effect, women would have all they could ask for.<sup>80</sup>

This last statement is intriguing. Did Engels mean that women could have ‘all they could ask for’ from this limited field of matrimonial law, or did he mean ‘all they could ask for’ from family law and policy generally? If it is the latter then this ignores the impact on a woman’s status which is caused by economic inequalities and other systemic factors which militate against equality between spouses.<sup>81</sup> He went on to distinguish between the formal requirements of the law and what goes on in the family ‘behind the legal curtains’<sup>82</sup> and made his position clear when he explained:

The modern individual family is based on the open or disguised domestic enslavement of the woman; and modern society is a mass composed solely of individual families as its molecules. Today, in the great majority of cases, the man has to be the earner, the breadwinner of the family, at least among the propertied classes, and this gives him a dominating position which requires no special legal privileges. In the family, he is the bourgeois; the wife represents the proletariat.<sup>83</sup>

### **How would Marxists solve these problems?**

Engels started with this, ‘[T]he first premise for the emancipation of women is the reintroduction of the entire female sex into public industry’.<sup>84</sup> This simplistic prescription, *without more*, is clearly not one which is accepted by many feminist scholars of recent decades.

Engels went on to contend that the economic imperatives upon which monogamy (with all its repressive connotations towards women) is founded will fall away once

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<sup>80</sup> Ibid 106.

<sup>81</sup> Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989) 16.

<sup>82</sup> Engels (n 67) 106.

<sup>83</sup> Friedrich Engels, *The Origin of the Family, Private Property and the State* (first published 1884, Pathfinder Press 1972) 108.

<sup>84</sup> Ibid 108.



the social revolution comes to pass.<sup>85</sup> The revolution, so his argument runs, will cause a shift in the ownership of the means of the production from private to social property, thereby removing the concern over inheritance of family wealth through the paternal line and fatally undermining monogamy's principal *raison d'être*. He did not, however, envision the end of monogamy, but the emergence of a redeemed monogamy based on true equality and mutual affection, with housekeeping and the care of children becoming a public and socialised concern. (Interestingly he also predicted that this would lead to the end of prostitution as men became monogamous in both word and deed.)<sup>86</sup>

Twentieth-century Marxists such as Reed see the patriarchal family as a creation of the private, propertied interests who used it as form of mini welfare state in which women and children were dependent upon the male head for support.<sup>87</sup> For her the solution lies in nothing short of revolution, 'To achieve a new family institution – or none at all - requires first of all revolutionary social changes that will abolish the private-property system and all its oppressive institutions'.<sup>88</sup> She goes on to say that Engels deliberately refrained from trying to predict what family form(s) would emerge following any such revolution, trusting instead that in that new society families will develop in ways consistent with the egalitarian values of the revolution.

Two other late twentieth-century Marxist feminists, Michele Barrett and Mary McIntosh, argue for two principles to guide family law and policymaking:

1. Seek changes that bring about increased choice so that realistic alternatives to existing family patterns are made available.
2. Transfer areas of domestic behaviour (such as housework, preparing meals and caring for children and the elderly) from the privacy of the individualistic family model to collectivist provision.<sup>89</sup>

What are the implications of this for family law? They believe that marriage is an oppressive institution and should be avoided by socialists and feminists.<sup>90</sup> Just as

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<sup>85</sup> Ibid 109.

<sup>86</sup> Ibid 110.

<sup>87</sup> Ibid 26; see also Jane Humphries, 'The Working-Class Family: A Marxist Perspective' in Jean Elshtain (ed), *The Family in Political Thought* (The Harvester Press 1982).

<sup>88</sup> Engels (n 83) 27.

<sup>89</sup> Michele Barrett and Mary McIntosh, *The Anti-Social Family* (2<sup>nd</sup> edn, Verso 1991) 134.

radically they argue that all policies which privilege the family at the expense of other lifestyle choices should be changed.<sup>91</sup> This is not to seek the abolition of the family, but 'to make the family less necessary, by building up all sorts of other ways of meeting people's needs'.<sup>92</sup> As I explore further in chapter four, Barrett and McIntosh specifically express their support for the clean break principle upon divorce and consider that the law should facilitate divorce and the formation of new post-divorce households. Recognising that a clean break could easily result in financial hardship for women, they think it is right for courts to make 'protective settlements' in appropriate cases.<sup>93</sup>

## Critique

Engels' work has been criticised on a number of fronts: his reliance upon dubious anthropological evidence; a meta-theory of the family based solely on economic factors; an idealistic and romanticised view of the (post-revolution) proletarian family which seemed to overlook the presence of domestic violence (he claimed a woman was free to leave a violent proletarian marriage, but this denied the reality of many women's experiences); his failure to specify who (ie which sex) would carry out the socialised housekeeping and child care tasks; and his lack of rigour in challenging workplace (eg wage) inequalities between the sexes.<sup>94</sup> However, of all these criticisms, the main limitation of Marxism, as Valerie Bryson identifies, is that it views the family through a narrow class-based paradigm which minimises the influence of important non-economic factors.<sup>95</sup> Furthermore, the key concepts of Marxism are not gender-neutral but are based on a male view of history and the development of political and social relations.

A final problem with a Marxist analysis of the family is that it sees the various intra-familial and inter-societal relationships as a zero sum game: if one interest gains then the other must necessarily lose, and one group's happiness is another's misery. This paradigm has an easy simplicity to it, but it lacks the nuances and complexities of family law and policy through time.

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<sup>90</sup> Ibid 143.

<sup>91</sup> Ibid 148.

<sup>92</sup> Ibid 159.

<sup>93</sup> Ibid 155.

<sup>94</sup> Valerie Bryson, *Feminist Political Theory: An Introduction* (2<sup>nd</sup> edn, Palgrave Macmillan 2003) 61-63.

<sup>95</sup> Ibid 63.

## COMMUNITARIANISM

As Marxism's influence declined towards the end of the twentieth century, so communitarianism came to take its place as the loudest critical voice of the prevailing liberal orthodoxy. However, unlike Marxism, communitarianism was aimed more at amending liberalism rather than posing an existential challenge to it,<sup>96</sup> and as such, is largely defined in opposition to, or as an erratum of, liberalism. In practical politics communitarianism was often associated with the 'third way' between the individualistic neo-liberalism of the New Right and the collectivist social democratic model of old Labour,<sup>97</sup> and proponents saw it as a corrective to the ravaging effects on community of eighteen years of Conservative government.<sup>98</sup>

Wherever liberals appear on the left-right spectrum, they coalesce around the idea that the state remains neutral as to prescriptions of what form and substance the good life should take. Rawls' social or welfare liberalism arguably added a communitarian flavour to his exposition, but to those at the forefront of the liberal-communitarian debates of the 1980s, such as Michael Sandel, this still did not go far enough. It was not that liberalism denied the value of community - an individual is free to decide for herself that her outworking of the good life will be in close community with others - but that it remained agnostic as to the value of community in individual flourishing. The fundamental problem with liberalism was that its conception of self was unsituated and acontextual.<sup>99</sup> Sandel summarises the crux of the liberal-communitarian disagreement thus:

[W]e cannot be wholly unencumbered subjects of possession, individuated in advance and given prior to our ends, but must be subjects constituted in part by our central aspirations and attachments, always open, indeed vulnerable, to growth and transformation in the light of revised self-understandings. And in so far as our constitutive self-understandings comprehend a wider subject than the individual alone, whether a family or tribe or city or

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<sup>96</sup> Philip Selznick, 'The Jurisprudence of Communitarian Liberalism' in Paul Van Seters (ed), *Communitarianism in Law and Society* (Rowman and Littlefield 2006) 20.

<sup>97</sup> Anthony Giddens, *The Third Way* (Polity Press 1998).

<sup>98</sup> Anne Barlow and Simon Duncan, 'Supporting Families? New Labour's Communitarianism and the "Rationality Mistake": Part I' (2000) 22 *Journal of Social Welfare and Family Law* 23, 26.

<sup>99</sup> Milton Regan, *Family Law and the Pursuit of Intimacy* (New York University Press 1993) 2.

class or nation or people, to this extent they define a community in the constitutive sense.<sup>100</sup>

So, communitarianism's belief in the self, connected to, and shaped by, things external to it, poses a challenge to the ontological bedrock of liberal theory and, as such, this might be seen as going beyond Philip Selznick's claim that this was about mere amendments. Selznick argues that the communitarian notion of selfhood is '*enlarged*' as a result of social experience; and also that selfhood requires '*rootedness*'.<sup>101</sup> Importantly, he notes a further point of departure when he claims that communitarianism displays a more idealistic ethos 'as it looks to the *flourishing* of the personality and community rather than only to baseline standards of equality and justice'.<sup>102</sup> It can be seen, therefore, that it contains a normative element which sees community as an essential part of an outworking of the good life. This moral tone is evident in Amitai Etzioni's work when he talks about the moral order being 'hollowed out or weakened' through a decline in commitment to others and an increase in individualism.<sup>103</sup> It is this normative element, with its concomitant moral claims and implications for pluralism, that has aroused particular concern in some quarters.<sup>104</sup>

### **Communitarianism and family law**

As communitarianism constructs individuals as contextualised, linked in community, so it follows that communitarian jurisprudence sees law as socially located and driven by moral concerns.<sup>105</sup> It rejects the narrow conception of law found in legal positivism and holds to the claim that 'law is more just when it springs from the character and condition of the people, and when it is administered with due regard

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<sup>100</sup> Michael Sandel, *Liberalism and the Limits of Justice* (2<sup>nd</sup> edn, Cambridge University Press 1998) 172.

<sup>101</sup> Philip Selznick, 'The Jurisprudence of Communitarian Liberalism' in Paul Van Seters (ed), *Communitarianism in Law and Society* (Rowman and Littlefield 2006) 20 (original author's emphasis).

<sup>102</sup> Ibid 21 (original author's emphasis).

<sup>103</sup> Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (Profile Books 1997) 65. Etzioni is a leading light in the communitarian movement.

<sup>104</sup> Eg Martha Minow and Mary Lyndon Shanley, 'Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law' (1996) 11 *Hypatia* 4; John Eekelaar, 'Family Law: The Communitarian Message' (2001) 21 *Oxford Journal of Legal Studies* 181.

<sup>105</sup> Selznick (n 101) 23.

to the integrity of institutions and the vitality of civil society'.<sup>106</sup> If, put at its simplest, a 'family' is a group of connected individuals, a microcosmic community, then it would appear that the base values of communitarianism are consonant with a conventional understanding of 'family'. However, arguably, it is because we have the intrinsically communitarian notion of family operating within an intrinsically individualised liberal legal paradigm that tensions arise: is there inevitably a discord between the values of commitment and responsibility, which are held by many in familial relationships, and the relative absence of those values from a liberal family law?

Is there a way of resolving this problem? Elizabeth Scott thinks so: the solution lies in 'rehabilitating' liberalism to incorporate communitarian values, rather than in any fundamental reimagining of liberalism.<sup>107</sup> She accepts as valid communitarian concerns about the drift of family law (increasing individualisation; an emphasis on the autonomy and equality of its members etc), but argues that this is a distorted expression of liberalism in action and a correct understanding can provide an answer to the communitarians' criticisms. She also expresses concerns that communitarian family law offers no protection for women and children of a resurgence in the traditional patriarchal family and its implications for their wellbeing.<sup>108</sup> Instead, her prescription relies on contract theory (with its emphasis on choice) and a reconsideration of Mill's harm principle. In contrast, Milton Regan, who has written extensively on family law from a communitarian perspective, argues that the status of individuals needs to play a greater role in how legislators develop family law and policy:

Family law should also promote a substantive moral vision of commitment and responsibility...Neither status nor contract should be dominant, because individuals possess dimensions of both solitude and connection that require attention. Rather, my aim is to promote a restoration of balance by providing a contemporary justification for the continuing relevance of status.<sup>109</sup>

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<sup>106</sup> Ibid 29.

<sup>107</sup> Elizabeth Scott, 'Rehabilitating Liberalism in Modern Divorce Law' [1994] *Utah Law Review* 687.

<sup>108</sup> Ibid 737.

<sup>109</sup> Milton Regan, *Family Law and the Pursuit of Intimacy* (New York University Press 1993) 4.

One of Regan's core concepts is that of 'role identification', which defines the self in relational terms, eg husband, wife, father, mother.<sup>110</sup> In contrast, he believes that modern life is identified by 'role distance' which is 'the view that self-realization occurs in opposition to the demands of social role, and thus places a premium on private ordering of family life'.<sup>111</sup> The Victorian era was characterised by individuals being woven into the wider culture through identification with role and the self-restraint which that brought about. The modern self, by contrast, is subjective, so identification with role is based on the individual's wishes and feelings.<sup>112</sup> Regan's thesis is that we should return to/retain the Victorian notion of the relational self, although reinterpreted in a way which reflects modern values respecting gender, class, and race.<sup>113</sup> Whether this is possible, or desirable, in a paradigmatically liberal state such as the UK is open to question. John Eekelaar, for one, expresses doubt that the communitarian vision for family law can be pursued in a state which is committed to a liberal concern for moral neutrality. To what extent should a community's moral voice be given expression against those unwilling to heed its call, he asks validly.<sup>114</sup> And, it might be added, concern must also be expressed about those weaker, vulnerable individuals and sub-groups who are *unable* to resist the tyranny of the majority.

Regan goes on to state, uncontroversially, that family law is most likely to succeed when it is consonant with practices in family life.<sup>115</sup> For example, low levels of child support payments might be because this model does not fit with the model of fathers' involvement in the intact nuclear family. So, rather than implementing ever more punitive and coercive child support regimes, it might be better for family law and policy to engender a greater sense of partnership and participation for men in raising children (perhaps through paternity leave, equal parental responsibility, etc). This is part of what he sees as a constitutive role for law in bringing about in men a sense of fatherhood being something they *are* rather than something they *do*.<sup>116</sup> This all rests precariously on the assumption that individuals act rationally in response to law and its messages. The assumption that individuals behave as the

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<sup>110</sup> Ibid 5.

<sup>111</sup> Ibid 5.

<sup>112</sup> Ibid 44.

<sup>113</sup> Ibid 6.

<sup>114</sup> John Eekelaar, 'Family Law: The Communitarian Message' (2001) 21 *Oxford Journal of Legal Studies* 181, 190.

<sup>115</sup> Milton Regan, *Family Law and the Pursuit of Intimacy* (New York University Press 1993) 188; see also Mary Ann Glendon, *The Transformation of Family Law* (The University of Chicago Press 1989) 312.

<sup>116</sup> Regan (n 115) 188.

rational economic (wo)man or rational legal subject underpins much law and policy formation in the UK. But when it comes to matters concerning familial relationships and the household economy, Anne Barlow and Simon Duncan have shown that people are often led by their hearts rather than their heads. Barlow and Duncan's research examined the strongly communitarian family policy under the New Labour governments and concluded that they had made the 'rationality mistake' by failing to take into account the many and varied ways people make decisions about their moral economies.<sup>117</sup> I will return to this issue in chapters four, five and six.

## CRITICAL LEGAL THEORY

The critical legal studies (CLS) movement was formally founded in 1977 by a small group of American scholars.<sup>118</sup> It gained ground through the 1980s, its membership having grown to around 350 in the seven ideologically fertile years after its formation. While it started out as 'a strikingly American movement',<sup>119</sup> it has since been interpreted and applied in European and other contexts,<sup>120</sup> with Michael Freeman situating its formal UK emergence in 1984 upon the formation of the Critical Legal Conference.<sup>121</sup> CLS and critical legal theory (CLT) started out with the grand ambition to mount 'a full frontal assault on the edifice of modern jurisprudence'.<sup>122</sup> That edifice has principally been built on the four corners of the formalistic foundation of liberal legalism which Hunt identifies as:

1. The separation of law from other varieties of social control.
2. The existence of law in the form of rules which both define the proper sphere of their own application, and

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<sup>117</sup> Anne Barlow and Simon Duncan, 'Supporting Families? New Labour's Communitarianism and the "Rationality Mistake": Part II' (2000) 22 *Journal of Social Welfare and Family Law* 129, 141.

<sup>118</sup> Allan Hutchinson and Patrick Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199, 200; Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515, 1523.

<sup>119</sup> Martin Krygier, 'Critical Legal Studies and Social Theory – A Response to Alan Hunt' (1987) 7 *Oxford Journal of Legal Studies* 26, 31.

<sup>120</sup> Eg Michael Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 *Current Legal Problems* 153; Stephen Parker and Peter Drahos, 'Closer to a Critical Theory of Family Law' (1990) 4 *Australian Journal of Family Law* 159; Maria Marella, 'Critical Family Law' [2011] *American University Journal of Gender, Social Policy and the Law* 721.

<sup>121</sup> Michael Freeman, *Lloyd's Introduction to Jurisprudence* (8<sup>th</sup> edn, Sweet & Maxwell 2008) 1209.

<sup>122</sup> Hutchinson and Monahan (n 118) 199.

3. Which are presented as the objective and legitimate normative mechanism whilst other normative types are partial or subjective, and
4. Yield determinant and predictable results in their application in the juridical process.<sup>123</sup>

The principal basis then for CLT is as a politically left-of-centre critique of liberal legalism.<sup>124</sup> CLT's core complaint is that the influence of liberal legalism has been so pervasive that it has effectively colonised the exploration and understanding of law, society and the state. The liberal doctrine behaves like the alpha male of the legal academy, dominating thought and methodology and permitting no challengers to its apparently omniscient and omnipotent paradigm. Hunt goes so far as to call this domination 'oppressive'.<sup>125</sup>

In perceiving a need to attack the established legal order CLT was hardly blazing a trail: feminists, amongst others, were already out in front. (As I show below, feminism sits comfortably under the CLT banner and many 'crits' are feminists and vice versa. However, as feminism pre-dates the formal emergence of CLS, and because it comprises such a significant and extensive body of scholarship in family law in its own right, it deserves to be dealt with in a separate section below.) So, while feminists seek to challenge the construction and privileging of gender in society, CLS has its intellectual roots in the legal realist movement of the 1920s and 1930s. It took on its own distinct identity as CLT scholars were influenced by the socio-political events of the 1960s in particular. As Hutchinson and Monahan write:

All the Critical scholars unite in denying the rational determinacy of legal reasoning. Their basic credo is that no distinctive mode of legal reasoning exists to be contrasted with political dialogue. Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.<sup>126</sup>

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<sup>123</sup> Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6 *Oxford Journal of Legal Studies* 1, 4.

<sup>124</sup> *Ibid* 6.

<sup>125</sup> *Ibid* 4.

<sup>126</sup> Allan Hutchinson and Patrick Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199, 206.



They go on:

Whereas the Realists exposed indeterminacy in legal doctrine, the Critical scholars abstract from legal materials the underlying premises that combine to form a distinct way of looking at the world. By demonstrating that social life is much less structured and much more complex, much less impartial and much more irrational, than the legal process suggests, the interests served by legal doctrine and theory will surface.<sup>127</sup>

While critical legal theorists are united in their criticism of liberal legalism (in highlighting its contradictions and incoherence), they are not so united in their prescriptions for how it might be transcended. Some have proposed their own meta-theories, such as the 'superliberalism' of Roberto Unger,<sup>128</sup> whereas others posit a more partial reimagining of society. Hunt observed in 1986 that CLT tended to major in adopting and adapting theories, rather than constructing new ones.<sup>129</sup> I submit that in the three decades which have followed this remains so. This absence notwithstanding, Hunt is still of the view that, 'The emergence of critical legal studies is the most important intellectual development in the field of legal studies since the rise of Realism'.<sup>130</sup> And while Realism's chief concern was with advancing towards a better understanding of law in action, CLT has a more political motivation.

To summarise, the critical approach is concerned with 'law' being the 'problem', a *cause*, indeed, of subordination and inequality. It seeks to move beyond these oppressive lowlands and onto the wide open plains of human emancipation – 'Critical Legal Studies aims to be transformative. Its objective is to change the world, to realize a set of values...'<sup>131</sup>

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<sup>127</sup> Ibid 217.

<sup>128</sup> Roberto Unger, 'The Critical Legal Studies Movement' [1982] Harvard Law Review 561.

<sup>129</sup> Hunt (n 123) 7.

<sup>130</sup> Ibid 43.

<sup>131</sup> Martin Krygier, 'Critical Legal Studies and Social Theory – A Response to Alan Hunt' (1987) 7 Oxford Journal of Legal Studies 26, 28.

## Critique

Martin Krygier, being largely unsympathetic towards the CLT movement, provides a succinct and incisive critique of Hunt's exposition.<sup>132</sup> He argues that much of the energy of the critical legal movement is directed at exposing the claimed inconsistencies, antinomies and all-round incoherence of liberalism. In discussing Hunt, Krygier wonders whether such incoherence is in fact a problem at all. He observes that it is a feature of the nature of law as a *tradition* that it lacks systemic coherence and inconsistencies are ever-present (this is perhaps true in family law more than in any other field of law).<sup>133</sup> In a richly metaphoric passage on tradition he writes:

Current law is full of elements caught in and transmitted by legal traditions over generations. Dig into this diachronic quarry at any particular time, to discover what the law *is* and the 'present' will be a revealing mixture of fossils, innovations of the long gone, provisional answers to different problems which stick because nothing better can be found or because participants in the tradition take *this* answer, once embedded, as satisfactory, or because they do not think of any alternative but think *through* this answer.<sup>134</sup>

Krygier argues that it is not inconsistency within a theory which is the problem per se, but knowing when that inconsistency becomes a 'crisis' which then demands a response.<sup>135</sup>

Another criticism, this time levelled at CLT by Hutchinson and Monahan, is that it is legally – but not politically - doctrinally nihilistic.<sup>136</sup> Indeed at the heart of the CLS project are political values centring on human equality and actualisation. So whilst this allegation of legal nihilism holds water, CLT's political agenda is focused on setting individuals free to re-imagine and refashion the society in which they live. It does not provide in itself a coherent, substantive political manifesto for a New Jerusalem, which has led to the charge that it is 'impotent' as a political theory

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid 35; Denise Meyerson, 'Fundamental Contradictions in Critical Legal Studies' (1991) 11 Oxford Journal of Legal Studies 439, 439 also makes this point, as does Dewar *ibid*.

<sup>134</sup> Krygier (n 131) 35 (original author's emphasis).

<sup>135</sup> Ibid 36.

<sup>136</sup> Allan Hutchinson and Patrick Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 Stanford Law Review 199, 213.

simpliciter.<sup>137</sup> In fact, is there not a problem here: CLT challenges the ossification of institutions, structures and societies by emphasising their contingent nature; would not any attempt to define a grand theory of society contradict that? CLSers suffer from the same charge often levelled at postmodernists: namely, to assert the subjective and contingent nature of all things (including truth) is to make a statement based on an absolutist premise which must necessarily stand outside the state of affairs it has just defined.<sup>138</sup> By taking an ideological stance against liberalism and Marxism, CLS itself becomes an ideology. By claiming to be able to transcend the liberal and Marxist paradigms CLSers effectively 'claim to have access to a nonsocietally conditioned and therefore absolute truth'.<sup>139</sup>

### **A critical theory of family law?**

Notwithstanding the above criticisms, elements of CLS theory and practice have taken root in family law scholarship. It is CLT's claim that it seeks to break the surface of the apparent social reality to expose 'what is going on'<sup>140</sup> (ie. to uncover the political motivations behind law) that makes it particularly suited to the study of family law. Today's family law academy contains a broad pluralistic grouping of critical scholars, encompassing, inter alia, feminists (eg Diduck, Fineman, O'Donovan), poststructuralists (eg Rose, Wallbank), and queer theorists (eg Barker, Stychin).

The first major contribution to an English approach to critical family law was by Freeman in 1985.<sup>141</sup> He used the occasion of his inaugural lecture to call for a critical theory of family law because:

[L]aw needs to be socially located and that family law cannot be understood if it is assumed to operate neutrally, ahistorically or cocooned from the indices of power. Just as existing theory is designed to shore up the status quo, so critical theory has, I believe,

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<sup>137</sup> Ibid 229.

<sup>138</sup> Meyerson (n 133) 448.

<sup>139</sup> Hutchinson and Monahan (n 136) 235.

<sup>140</sup> Alan Freeman, 'Truth and Mystification in Legal Scholarship' (1981) Yale Law Journal 1229.

<sup>141</sup> Michael Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 Current Legal Problems 153.

a particular goal as well. Critical family law is an integral part of a struggle to create a more socially just society.<sup>142</sup>

The rest of his lecture though is limited to a discussion of the public/private dichotomy and his belief that it must be transcended if real reform is to result. To be fair to him, there simply was not time in that one lecture to set out anything approaching a critical theory of family law, and this is tacitly acknowledged in the wording of the lecture's title. Nevertheless, this particular contribution does fall prey to Hunt's criticism above that critical legal theorists have felt more comfortable adapting existing theories rather than crafting new ones.

Nikolas Rose argues that the function of CLT in the context of family law and policy is to 'expose the ideological nature of the [public/private] dichotomy; critical family politics must transcend it in practice'.<sup>143</sup> He identifies the aim of critique as being 'to penetrate the façade of privacy and free choice, to reveal the hidden mechanisms of control and to expose the interests served'.<sup>144</sup> Rose's work draws on the writings of Michel Foucault<sup>145</sup> and Jacques Donzelot.<sup>146</sup> Foucault's work is difficult to categorise as it straddles conventional discipline boundaries, although his ontology/ontologies tend/s to be located within the poststructural school of philosophy. He decentred power from its traditional locations in, for example, state, law and class, and instead 'view[ed] power as present in all forms of social relations, as something that is "at work" in every situation; for Foucault power is everywhere'.<sup>147</sup> This idea lies at the heart of his notions of governmentality and 'policing', which are understood as the manifold tactics used 'for developing the quality of the population and the strength of the nation'.<sup>148</sup> Donzelot explores 'policing' at length in his study of the family in France from the nineteenth century;<sup>149</sup> Smart has deployed elements of Foucauldian thought in reappraising the relationship between feminism and law;<sup>150</sup> and Wallbank also draws on Foucault in her reading of discourses around motherhood in late

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<sup>142</sup> Ibid 154-155.

<sup>143</sup> Nikolas Rose, 'Beyond the Public/Private Division: Law, Power and the Family' (1987) 14 *Journal of Law and Society* 61, 66.

<sup>144</sup> Ibid 72.

<sup>145</sup> For an insightful introduction to how Foucault's work might be understood as a sociology of law as governance, see Alan Hunt and Gary Wickham, *Foucault and Law* (Pluto Press 1994).

<sup>146</sup> Jacques Donzelot, *The Policing of Families* (Pantheon Books 1979).

<sup>147</sup> Hunt and Wickham (n 145) 15.

<sup>148</sup> Donzelot (n 146) 6-7.

<sup>149</sup> Ibid.

<sup>150</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989), although, unlike Foucault, she holds to law's enduring importance in the study of power.

modern Britain.<sup>151</sup> I will revisit these ideas in chapter six when discussing the Family Law Act 1996.

Returning to Freeman's inaugural lecture, Stephen Parker and Peter Drahos attempt to move the discussion on from where he ended up, hence the title of their paper.<sup>152</sup> They distance their work (and Freeman's) from the main US-based CLS movement and see 'critical' family law scholarship more generally as set out in Freeman's quote above.<sup>153</sup> They argue for some kind of 'bridging theory' which brings together understanding of the law in practice and ideology, theories of the state, or other higher order theories.<sup>154</sup>

Writing about two decades after the formal beginnings of CLS, Collier is unable to discern any larger movement which can justifiably bear the label 'critical family law'.<sup>155</sup> He does, however, pinpoint the following recurring theme which, in my view, serves as an accurate summary of the place of CLT in English family law today:

[I]t appears to be the perceived need to address and transcend the limitations of doctrinal legal method and to seek to make sense of developments in matrimonial policy and politics (that is, to address the law in practice as well as the law in books). To this end, and in keeping with the need to simultaneously take the power of legal doctrine seriously, critical texts on law and the family have sought to integrate questions of policy and socio-economic context within a broadly interdisciplinary and contextual understanding of the substantive law.<sup>156</sup>

### **Enduring contribution**

What is the place of CLT in the legal academy today? Despite CLS's grand ambitions, one of its founder members was already substantially revising down its

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<sup>151</sup> Julie Wallbank, *Challenging Motherhood(s)* (Prentice Hall 2001).

<sup>152</sup> Stephen Parker and Peter Drahos, 'Closer to a Critical Theory of Family Law' (1990) 4 *Australian Journal of Family Law* 159.

<sup>153</sup> *Ibid* 166.

<sup>154</sup> *Ibid* 169.

<sup>155</sup> Richard Collier, *Masculinity, Law and the Family* (Routledge 1995).

<sup>156</sup> *Ibid* 49.

aims as early as 1991.<sup>157</sup> Indeed, significantly, in that article Tushnet defined CLS as a 'political location',<sup>158</sup> a term which denotes stasis, rather than the intrinsically dynamic label 'movement'. And Freeman, rather wittingly and with the benefit of hindsight, called it 'more a ferment than a movement'.<sup>159</sup> So, while the profile of CLT has declined to some extent in recent decades, its influence on legal scholarship undoubtedly endures.<sup>160</sup> As a discrete movement, though, it seems that CLS breathed its last sometime in the 1990s, which is consistent with Tushnet's prophecy that the geopolitical events of 1989-91 led to a lack of 'new constituents' to inhabit the 'political location'.<sup>161</sup> The mere effluxion of time determines that CLS's founding scholars, who were radicalized in the 1960s, are now reaching retirement and the legal academy is increasingly staffed by those whose formative years were in the closing decades of the twentieth century.

Overall, CLT has advanced legal scholarship through demonstrating that legal theory should be integrated within social theory, or more specifically identifying 'the role played by law and legal reasoning in the processes through which a particular social order comes to be seen as legitimate and inevitable'.<sup>162</sup> It has also left a legacy of critique characterised by a plurality of approaches in place of the former monochromatic Law and Society paradigm.<sup>163</sup>

Three decades have passed since Hutchinson and Monahan emphasised the imperative for CLS to 'translate their theories into some attainable dimensions of human experience' if its ideas are to endure.<sup>164</sup> While I do not comment on whether this has been achieved in other parts of the legal academy, it is certainly the case that CLT has taken root in mainstream family law scholarship.<sup>165</sup> But if the aim of CLT is indeed revolution, rather than reform, then this has not been realised in the

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<sup>157</sup> Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515.

<sup>158</sup> *Ibid* 1515.

<sup>159</sup> Michael Freeman, *Lloyd's Introduction to Jurisprudence* (8<sup>th</sup> edn, Sweet & Maxwell 2008) 1209.

<sup>160</sup> Tushnet (n 157) 1519.

<sup>161</sup> Christopher Tomlins, 'What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon's "Critical Legal Histories"' (2012) 37 *Law and Social Inquiry* 155, 156; Tushnet (n 157) 1537.

<sup>162</sup> Michael Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 *Current Legal Problems* 153, 160-161.

<sup>163</sup> Tushnet (n 157) 1543; Tomlins (n 161) 157.

<sup>164</sup> Allan Hutchinson and Patrick Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199, 227.

<sup>165</sup> Eg Katherine O'Donovan, *Family Law Matters* (Pluto Press 1993); Richard Collier, *Masculinity, Law and the Family* (Routledge 1995); Alison Diduck, *Law's Families* (LexisNexis 2003).

UK. Perhaps 'crits' have settled for incremental, evolutionary reform rather than revolutionary refashioning. That said, it appears that CLT has been used to bring about a more self-aware, less monolithic liberal theory of family law. But for some, such as the feminist scholar Frances Olsen,<sup>166</sup> that is simply not going far enough.

## FEMINISM

Feminist scholarship has probably made the most significant contribution to the development of family law and policy in recent decades. With the slogan 'The personal is political' it has stormed the gates of the liberal public/private dichotomy in an attempt to expose what is really going on in the relationship between the state, the family and the individuals within it.<sup>167</sup> As Rose puts it, 'Feminism exploded the boundary lines of traditional socialist politics, and re-inserted questions of family, sexuality, children and domestic life into the heart of progressive political discourse'.<sup>168</sup> This has not been met without resistance, however. During the 1980s feminism was characterised as both cause and cure of the family's ills: a movement which led to the weakening of familial ties and thereby undermined a key component of the capitalist polity, and/or a vital critique of the New Right's 'pro-family' rhetoric which advocated a return to a 'natural' family form of male breadwinner and female caregiver.<sup>169</sup>

Like the other approaches explored in this chapter, feminism is not monolithic. It is more appropriate to speak of feminisms rather than feminism ('[f]eminism means different things to different people'<sup>170</sup>), so much so that each of the other theories mentioned here could also be applied from a feminist perspective.<sup>171</sup> That said, feminism has a common core and Joanne Conaghan identifies three elements to it:

1. To highlight and expose gender elements in law.

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<sup>166</sup> Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 Harvard Law Review 1497.

<sup>167</sup> Eg Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989) 124.

<sup>168</sup> Nikolas Rose, 'Beyond the Public/Private Division: Law, Power and the Family' (1987) 14 Journal of Law and Society 61, 61.

<sup>169</sup> These matters are discussed further in chapter four.

<sup>170</sup> Diduck (n 165) viii.

<sup>171</sup> For a useful overview see Hilaire Barnett, *Sourcebook on Feminist Jurisprudence* (Cavendish Publishing 1997); *Introduction to Feminist Jurisprudence* (Cavendish Publishing 1998).

2. Being part of a wider interdisciplinary project to challenge the existing order by placing the 'woman question' at the heart of scholarship.
3. To show law's complicity in women's disadvantage and to seek to bring about political and social change.<sup>172</sup>

If the leitmotif of liberalism is the *individual*, and of Marxism *class*, then it is the recurring themes of *gender* and *patriarchy* which are the hallmarks of feminist thinking. But feminism's concern is specifically with 'gender' as opposed to 'sex'. For if sex is understood as a characteristic which is biologically determined, gender is socially constructed. As Susan Moller Okin explains, '[gender is] the deeply entrenched institutionalization of sexual difference'.<sup>173</sup> The heart, then, of the feminist project is its search for justice and equality through a rejection of biologically determined ('natural') sex roles and its exposure of the socially constructed meaning of gender. While feminists have been active across a wide range of disciplines, it is easy to see why they have had much to say about the field of family law and policy, which is steeped in issues of gender, many of which are driven by decades (if not centuries) of historical, political and social inertia. As a result, it is now seen that much of social policy which appeared to be based on sex difference (this is 'just how it is') was in fact resting on assumptions of gender roles, the actual core of which was the subordination of women and the patriarchal domination of the 'public' realm of the market.

### **Equality and justice**

Since feminism's 'first wave' and, for example, its influence in the advent of the Married Women's Property Acts in the nineteenth century, the movement has been associated with the notion of equality. Equality, though, does not always mean justice, and vice versa. Simply treating two parties the same will not necessarily ensure justice is done. So, there is an important distinction to be made between formal *legal* equality and *substantive* equality.<sup>174</sup> Feminists have long observed that women's equality before the law in such statutes as the Equal Pay Act 1970 and the

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<sup>172</sup> Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Law and Society* 351, 359.

<sup>173</sup> Okin (n 167) 6.

<sup>174</sup> Julia Brophy and Carol Smart (eds), *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul 1985) 15; Elizabeth Kingdom, 'Legal Recognition of a Woman's Right to Choose' in Julia Brophy and Carol Smart (eds), *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul 1985) 145-7.



Sex Discrimination Act 1975 has not resulted, even after all these years, in women being in a de facto position of equality with men in the workplace. So whilst feminists have always understood the need to engage in the legal sphere, most are sceptical that transferring women's struggles to the legal arena alone will result in wholesale substantive sex equality.<sup>175</sup>

Arguably though, feminism is driven by a higher principle: justice. Okin built on Rawls' *Theory of Justice* in developing her thesis on justice and the family. Okin's argument is that unless and until there is justice in the domain of the family, women will be unable to achieve equality in politics or any other sphere of social life.<sup>176</sup> She argues that one area where injustice arises is by the law's treatment of divorcing couples as equals. She points out that if one party starts out from a position of substantial inequality then unless this imbalance is actively addressed, it is merely perpetuated (a similar argument for equality of *outcome* rather than just equality of *treatment* is made by Fineman<sup>177</sup>). Its perpetuation, however, would be easily obscured by the law's ostensible normative claim to 'equality' were it not for the feminist exposé of the pre-existing underlying engendered inequality. This argument is evident in the debates around the Matrimonial and Family Proceedings Act 1984 (see chapter four below).

Okin does not just concern herself with the more immediate economic and social implications of a lack of intrafamilial justice, she also believes that families possess an important educative function. Her premise (her 'school of justice') is that children are unlikely to develop into adults with a strong guiding sense of justice unless they first see it modelled within the families in which they grow up. Family justice also therefore serves a vital role in the intergenerational transmission of such values.<sup>178</sup> This view could be criticised for importing into the family, with its 'soft' altruistic values, a harder juristic narrative of rights more appropriate to the courtroom rather than the living room. But I think this is to unnecessarily dichotomise these approaches: there is no logical reason why core elements of justice (such as reciprocity and fairness) cannot, or should not, be successfully applied into a family context. As Okin writes:

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<sup>175</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989); Vanessa Munro, 'Legal Feminism and Foucault – A Critique of the Expulsion of Law' (2001) 28 *Journal of Law and Society* 546.

<sup>176</sup> Okin (n 167) 4.

<sup>177</sup> Martha Fineman, *The Illusion of Equality* (The University of Chicago Press 1991).

<sup>178</sup> Okin (n 167) 17-23.

It is essential that children who are to develop into adults with a strong sense of justice and commitment to just institutions spend their earliest and most formative years in an environment in which they are loved and nurtured, *and* in which principles of justice are abided by and respected.<sup>179</sup>

### **Feminism and the public/private dichotomy**

Okin identifies that the family is often conspicuous by its absence in many works of political and legal theory dealing with themes of justice (including Rawls). As it is axiomatic that the family in its many forms is the core organising structure of our social life, this omission can only be explained – so she argues – by the demarcation of the family as non-political and its consequent relegation to the private realm.<sup>180</sup> This view is shared by O'Donovan who reasons that labelling the family as 'natural' has led to its exclusion from most works of political theory.<sup>181</sup> This, then, is the central feminist critique of the liberal view of family law: the notion of the public/private dichotomy.

Morton Horwitz observes that the public/private distinction began to take on form during the sixteenth and seventeenth centuries, although Rose charts its origins to at least as far back as Aristotle and his bifurcation of society into *polis* and *oikos*.<sup>182</sup> While the genesis of the public and private realms can each be traced to separate historical developments, the crystallisation of each one necessarily gave shape to the other and brought it into sharper focus. Horwitz attributes the origins of the public space to the rise of the nation state and ideas of parliamentary (or, prior to that, monarchical) sovereignty, while he sees one of the Enlightenment's most enduring progeny – natural rights theories – as being particularly instrumental in carving out the private space in legal and political theory.<sup>183</sup> However, it was not until the nineteenth century that we see a clear separation in law between public (encompassing, *inter alia*, constitutional and criminal law) and private (eg contract,

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<sup>179</sup> Ibid 22 (original author's emphasis).

<sup>180</sup> Ibid 8-10.

<sup>181</sup> Katherine O'Donovan, *Family Law Matters* (Pluto Press 1993) 109.

<sup>182</sup> Morton Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423, 1423; Nikolas Rose, 'Beyond the Public/Private Division: Law, Power and the Family' (1987) 14 *Journal of Law and Society* 61, 64.

<sup>183</sup> Horwitz *ibid*.

property, tort, and mercantile law) in response to the ascendancy of the market as the central organising mechanism in British and American societies.<sup>184</sup>

In Olsen's important paper on the market and the family she argues that the market structures our productive lives, and the family our affective lives, which means that the market and the family are suffused with contrasting moralities: in the market it is the morality of individualism; in the family it is the morality of altruism<sup>185</sup>. She observes similarities between the justification for non-intervention by the state in the market on the one hand, and in the family on the other, and notes that laissez-faire theory of the market is based on an understanding of the market as 'natural' and 'autonomous'.<sup>186</sup> That being so, it is considered that the state should maintain a position of neutrality vis-à-vis the market, and it would therefore be beyond the role of the state to correct economic and social inequalities which arise as a result of the market's operation. She contends that the arguments for the free market and the private family rest on similar foundations, but that the idea of state neutrality towards the family is more problematic.<sup>187</sup> This is because the state sees neutrality towards the market as 'treating the participants in economic life as juridical equals', whereas when it comes to the family, being neutral means the state 'ratifies the pre-existing social roles within the family'. This then leads to the proposition that the effect of a state's family law and policy can never be neutral.<sup>188</sup> The term 'state interference' cannot therefore be understood as a simple descriptive device, but rather as a value-laden label which exposes the belief system of its user. Indeed one of the key contributions of feminism to family jurisprudence has been to expose the notion of neutrality as a smokescreen for the perpetuation of patriarchal relations within the family.<sup>189</sup> As Olsen goes on to say elsewhere the terms 'intervention' and 'non-intervention' are harmful and largely meaningless.<sup>190</sup> They are incapable of accurately describing any particular policy and 'obscure rather than clarify the policy

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<sup>184</sup> Ibid 1424.

<sup>185</sup> Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 Harvard Law Review 1497, 1498, 1505.

<sup>186</sup> Ibid 1502.

<sup>187</sup> Ibid 1504.

<sup>188</sup> See also, eg Lorraine Fox Harding, *Family, State and Social Policy* (Macmillan 1996); Julia Brophy and Carol Smart (eds), *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul 1985) 17.

<sup>189</sup> Eg Carol Smart, *The Ties That Bind* (Routledge & Kegan Paul 1984); Michele Barrett and Mary McIntosh, *The Anti-Social Family* (2<sup>nd</sup> edn, Verso 1991); Susan Boyd, 'Can Law Challenge the Public/Private Divide? Women, Work and Family' (1996) 15 Windsor Yearbook of Access to Justice 161.

<sup>190</sup> Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 University of Michigan Journal of Law Reform 835, 835.

choices that society makes'.<sup>191</sup> Because actors determine a policy as interventionist or non-interventionist according to their beliefs about the proper relationship between the state and the family, there is no rational and objective means of assessing what the terms mean. This significant insight will prove valuable in the discourse analysis in chapters four to eight.

A pertinent example from the Thatcher era was the case of *Gillick v West Norfolk and Wisbech Area Health Authority*,<sup>192</sup> which concerned whether doctors could provide contraceptive advice and assistance to adolescent children without their parents' knowledge or consent.<sup>193</sup> For some, for the state to permit this was seen as an unacceptable 'interference' in the parent/child relationship. This is contrasted with the other prevailing dominant narrative which centred on the state upholding a competent child's right to self-determination. If the policy stood then this meant the state effectively maintaining the child's right to sexual autonomy over the wishes of the parent; whereas if the policy fell away then the state handed power to the parent to veto (or at least be consulted on) the advice of the child's physician. Either way, it can be seen that notions of neutrality are misplaced and misleading. Olsen concludes with a thought that is central to this thesis: 'State intervention in the family is an ideological, not an analytic concept'.<sup>194</sup>

## **TOWARDS *THE* THEORY OF FAMILY LAW?**

It should go without saying that there can never be one theory of family law and of the proper relationship between the individual, the family and the state because these understandings are founded upon diverse and irreconcilable ontological assumptions. Theories of family law are no different from other grand theories concerning the nature of the state and the citizens' role within it and, as such, this will ever be something about which scholars have to agree to disagree.<sup>195</sup>

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<sup>191</sup> Ibid 837.

<sup>192</sup> [1986] 1 AC 112.

<sup>193</sup> Jane Lewis and Fenella Cannell, 'The Politics of Motherhood in the 1980s: Warnock, Gillick and Feminists' (1986) 13 *Journal of Law and Society* 321.

<sup>194</sup> Olsen (n 190) 863; see also Nikolas Rose, 'Beyond the Public/Private Division: Law, Power and the Family' (1987) 14 *Journal of Law and Society* 61, 63.

<sup>195</sup> 'To ask questions about the functions of family law is to uncover a hornet's nest', from Michael Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 *Current Legal Problems* 153, 155.

Is thinking about family law therefore merely a vainglorious pursuit of free thinking academics? Certainly not. One only has to consider the impact of feminist thought on the positive development of family law in recent decades to see the effect of laying bare the hitherto implicit (inequitable) assumptions of family law and policy can have on its evolution. What is also clear is that each intellectual camp has had some observable influence on the direction of family law during its history. In the same way that each ingredient in a recipe will influence the flavour and texture of the dish (though some more subtly than others and some imperceptibly), so the worldviews considered above have all left their mark on family law. In chapters four to eight I examine how each of them is evident in the discourse around four family law statutes, but before doing so the next chapter will explore one further politico-legal theory, namely conservatism.

## CHAPTER 3

### CONSERVATISM AND FAMILY LAW

#### INTRODUCTION

Historians of the British Conservative Party agree on at least one thing: that its genesis is unclear. Even the year of its birth is the subject of dispute, caused in part by the lack of certainty provided by the relative informality surrounding the legal constitution of political parties.<sup>1</sup> Disagreements arise because it depends through which ancestral line one attempts to trace the Party's heritage, whether through the Whig one or the Tory.<sup>2</sup> It also depends on what one understands by the word 'party'. If it is understood in the modern sense of a body which is organised around fighting and winning elections, then such a Conservative Party began to emerge around the 1870s.<sup>3</sup> But if one adopts Edmund Burke's definition of party ('a body of men [sic] united, for promoting by their joint endeavours the national interest, upon some particular principle on which they are all agreed')<sup>4</sup> then something recognisable as the British Conservative Party existed in the 1830s. Both Robert Blake and John Ramsden agree, however, that the word 'Conservative', used in its modern sense, first appeared in print in the *Quarterly Review* in 1830. (Blake is unclear about the identity of the article's author, but Ramsden's more recent researches credit the lawyer John Miller with its deployment.)<sup>5</sup> As Ramsden summarises, 'Since the 1830s, then, the Conservative Party has had a recognizably continuous history'.<sup>6</sup>

No political party is merely the instrument of its defining ideology, and it will certainly not be if that party ever finds itself dealing with the vicissitudes of government. This is especially true of the Conservative Party, whose ideology is rather light on utopian vision, and which found itself in government for the majority of the twentieth century. So while the Party has had a continuous history spanning three centuries, its standpoint on macro matters such as managing the economy, Britain's place in

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<sup>1</sup> Robert Blake, *The Conservative Party from Peel to Major* (Arrow Books 1998) 1.

<sup>2</sup> For a discussion of the distinction between Whigs and Tories see Robin Harris, *The Conservatives: A History* (Bantam Press 2011) 10-29.

<sup>3</sup> John Ramsden, *An Appetite for Power: A History of the Conservative Party since 1830* (HarperCollins 1999) 14.

<sup>4</sup> Quoted in Ramsden, *ibid.*

<sup>5</sup> Blake (n 1) 6; Ramsden, *ibid.* 48.

<sup>6</sup> Ramsden, *ibid.* 15.

the world, and the welfare state has shifted over time. A central question for this thesis is to what extent is the Conservative Party's approach to the legal regulation of intimate adult relationships consistent with a conservative approach to family law? To begin to answer this question we need to understand what is conservatism and what does it have to say about the relationship between the state, law and the family.

One way to approach this chapter might be to attempt to construct an overarching conservative theory of family law which would provide guidance on topics such as marriage (eg Who may marry? Who may not?), divorce (eg When should it be permitted? How 'easy' should it be to obtain?), financial provision on divorce (eg How should the law balance competing claims from first and second families? To what extent should a man be responsible for maintaining his ex-wife?), and children (eg Should the state subsidise child care through parental leave, nursery funding and so on?). However, not only would such an attempt be an immensely challenging, if not impossible, task involving skilful and creative interpretation of seminal works of conservatism (many of which were written in altogether different socio-political contexts), but it would also be to fundamentally misunderstand the nature of conservatism.<sup>7</sup> As any such theory would necessarily be acontextual it would, for reasons explained below, be invalid. So instead this chapter seeks to go as far as possible in discerning what can be more accurately termed a conservative *disposition* towards matters of state, law and family. 'Disposition' (the word 'imagination' is synonymous in this context,<sup>8</sup> as is 'attitude') captures the idea that conservatism is more an attitude to governing rather than an organised system of thought. Moreover, this disposition is more procedural than substantive, which gives it a temporal and spatial flexibility, ensuring that it can be usefully deployed in my discussion of specific family law statutes in chapters four to eight.

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<sup>7</sup> Anthony Quinton, *Politics of Imperfection* (Faber & Faber 1978) 12; Michael Freeman, *Edmund Burke and the Critique of Political Radicalism* (Blackwell 1980) 3; Iain Hampsher-Monk, *The Political Philosophy of Edmund Burke* (Longman 1987) 29; Roger Scruton (ed), *Conservative Thinkers: Essays from The Salisbury Review* (The Clarendon Press 1988) 7; James Conniff, *The Useful Cobbler: Edmund Burke and the Politics of Progress* (State University of New York Press, 1994) 15; Jerry Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press 1997) 14; Russell Kirk, *The Conservative Mind* (BN Publishing 2008) 7.

<sup>8</sup> Gertrude Himmelfarb, 'The Conservative Imagination: Michael Oakeshott' (1975) 44 *The American Scholar* 405.

It will be seen that the conservatism outlined herein is a classical conservatism in the manner of Burke and Oakeshott.<sup>9</sup> This poses some methodological issues. As Burke was not a systematic political thinker,<sup>10</sup> but one who developed his ideas very much in response to the prevailing socio-political events of his time, to what extent is it possible, and indeed appropriate, to apply his eighteenth century conservatism to events two hundred years later?<sup>11</sup> Similarly, Michael Oakeshott's important essay, *Rationalism in Politics*, was written in light of the postwar collectivist turn in British politics and the entrenching of communism across the Soviet Union.<sup>12</sup>

Burke's notion of tradition is perhaps also problematic for it presupposes clarity over what that tradition is – but what if there is plurality or disagreement? What is central to the tradition and what is marginal or peripheral? Even if these points can be settled, then, as Donald Herzog points out, people could 'still disagree on what the tradition dictates in the current context'.<sup>13</sup> And maybe the tradition really is open on an issue and there is nothing conclusive which can be drawn from its manifold readings. Situations may also arise in which an anomalous event may challenge the taxonomy of the tradition itself, resulting in creative extension of the tradition or a substantive departure from it.<sup>14</sup> None of no-fault divorce, the clean break, or same-sex marriage was in the purview of Burke, and perhaps only to a limited extent of Oakeshott; but the key to convincing a conservative that they are consistent with a conservative disposition is they have 'to be recognizable as a continuation'.<sup>15</sup> So, whilst these writers need first to be understood within their own context before being interpreted for more recent times,<sup>16</sup> it is contended that it is valid to draw transhistorical inspiration from them.<sup>17</sup> Not only is transhistorical *inspiration* possible, but there is also scholarly precedent for a systematic reading of Burke's (unsystematic) general conservative theory of revolution.<sup>18</sup> Michael Freeman

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<sup>9</sup> Dogancan Ozsel, 'Challenging the Conservative Exceptionalism: Theme of Change in the Conservative Canon' (PhD thesis, University of Manchester 2011) 11.

<sup>10</sup> He admits this himself, 'I beg leave to throw out my thoughts, and express my feelings, just as they arise in my mind, with very little attention to formal method.' Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 92.

<sup>11</sup> Donald Herzog, 'Puzzling through Burke' (1991) 19 *Political Theory* 336, 346.

<sup>12</sup> Michael Oakeshott, *Rationalism in Politics and Other Essays* (2<sup>nd</sup> edn, Liberty Fund 1991).

<sup>13</sup> Herzog (n 11) 348.

<sup>14</sup> *Ibid* 350.

<sup>15</sup> *Ibid*. Kirk expresses a similar thought in describing the essence of social conservatism as the 'preservation of the ancient moral traditions of humanity' (Kirk (n 7) 7).

<sup>16</sup> For a helpful introduction to the socio-political context of Burke's writing see Iain Hampsher-Monk, *The Political Philosophy of Edmund Burke* (Longman 1987).

<sup>17</sup> See Michael Freeman, *Edmund Burke and the Critique of Political Radicalism* (Blackwell 1980) 5-14 for a discussion of some of these methodological challenges.

<sup>18</sup> Eg Freeman (n 17).



surveys Burke's oeuvre and attempts to construct a Burkean narrative of such topics as 'The Nature of Things', 'Man and Morality' and 'The Sociology of Conservatism'.<sup>19</sup> And while I will not seek to replicate Freeman's approach in full, I will look principally to Burke for a conservative understanding of how to manage societal change. That said, I believe that Burke's conservatism requires each generation to think for itself when determining how to tackle contemporary policy dilemmas, although this thinking should not be de novo but rather extruded from the stuff of history and tradition.<sup>20</sup> Whilst I have tried to be sensitive to relevant history and tradition in outlining the disposition below, I am acutely aware that in carrying out this novel synthesis I am – or might be – altering the very thing I am examining, ie conservatism. This methodological challenge – a form of observation bias – cannot be overcome, but by being cognisant of its implications I can at least attempt to defend my approach.

One final important methodological point, by drawing on Burke et al in the construction of my understanding of conservatism, I am not suggesting that Conservative politicians are necessarily influenced by these thinkers. Even when there is consistency between conservative thought and Conservative practice, again, it is not necessarily the case that there is a causative link between the two.<sup>21</sup> This point will be explored extensively in chapters four to eight, and its implications summarised in the concluding chapter.

## **WHAT IS CONSERVATISM?**

Alan Finlayson considers that conservatism is 'one of the hardest [political theories] to describe philosophically' and 'to seek a singular essence of conservatism would be to misunderstand it from the start'.<sup>22</sup> This definitional uncertainty is partly a result of some conservatives eschewing the task of drawing verbal boundaries around their political beliefs.<sup>23</sup> To define conservatism would be to risk it being seen as an

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<sup>19</sup> These are Freeman's chapters two, three and four respectively. This is a different Michael Freeman to the emeritus professor in the Faculty of Laws at University College London.

<sup>20</sup> Burke (n 10) 247.

<sup>21</sup> Rebecca Probert makes this observation in her review of *Divorcing Responsibly*; see Rebecca Probert, 'Review: *Divorcing Responsibly*' (2005) 19 *International Journal of Law, Policy and the Family* 126.

<sup>22</sup> Alan Finlayson, 'Conservatism' in Alan Finlayson (ed), *Contemporary Political Thought: A Reader and Guide* (Edinburgh University Press 2003) 155.

<sup>23</sup> Anthony Quinton, *Politics of Imperfection* (Faber & Faber 1978) 12.

ideology, with all the baggage the term 'ideology' carries with it of grand visions of society and utopian social planning. But it is also because conservative thought has often been articulated against a prevailing political and social context, meaning that it 'must be mined from the particular and historical ore'.<sup>24</sup> This perspective is well summarised by Oakeshott, who was 'among the most powerful conservative minds in postwar Britain'<sup>25</sup> and the 'intellectual descendant' of Burke.<sup>26</sup> For Oakeshott, politics 'is not the science of setting up a permanently impregnable society, it is the art of knowing where to go next in the exploration of an already existing traditional kind of society'.<sup>27</sup> So, while I am not going to fall into the trap that Finlayson rightly identifies, I believe it must be possible – for conservatism *is* a social artefact – for some defining characteristics to be identified.<sup>28</sup>

Notwithstanding the reluctance of some conservatives to positively self-define, Edmund Burke is often credited with being first to articulate British conservatism as a coherent body of principles.<sup>29</sup> The genesis of those principles predates Burke but it was he who first synthesised them in such a way.<sup>30</sup> Not only is Burke considered the first, but he is also regarded by many to be preeminent in influence and importance among conservative thinkers.<sup>31</sup> Burke published his famous *Reflections on the Revolution in France* in 1790 in response to the violent socio-political upheavals taking place across the English Channel. It is often considered to be his magnum opus, both in the sense of it being his most influential work and as an

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<sup>24</sup> Jerry Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press 1997) xiv, 22-23.

<sup>25</sup> Ibid 290.

<sup>26</sup> Robert Grant, 'Edmund Burke' in Roger Scruton (ed), *Conservative Thinkers: Essays from The Salisbury Review* (The Clarendon Press 1988) 79. Oakeshott was Professor of Political Science at LSE from 1951 to 1968; he died in 1990.

<sup>27</sup> Quoted in Robert Eccleshall, *Political Ideologies: An Introduction*, (3<sup>rd</sup> edn, Routledge 2003) 52.

<sup>28</sup> Huntington agrees; see Samuel Huntington, 'Conservatism as an Ideology' (1957) 51 *The American Political Science Review* 454, 469.

<sup>29</sup> Samuel Huntington, 'Conservatism as an Ideology' (1957) 51 *The American Political Science Review* 454, 456; Michael Freeman, *Edmund Burke and the Critique of Political Radicalism* (Blackwell 1980) 4; Frank O'Gorman, *British Conservatism: Conservative Thought from Burke to Thatcher* (Longman 1986) 1, 12; Iain Hampsher-Monk, *The Political Philosophy of Edmund Burke* (Longman 1987) 28; Roger Scruton (ed), *Conservative Thinkers: Essays from The Salisbury Review* (The Clarendon Press 1988) 7; Jerry Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press 1997) 78; Russell Kirk, *The Conservative Mind* (BN Publishing 2008) 5-6, 21; Robin Harris, *The Conservatives: A History* (Bantam Press 2011) 20; Jesse Norman, *Edmund Burke: The First Conservative* (Basic Books 2015) 282.

<sup>30</sup> For a prehistory of Burke's ideas see Anthony Quinton, *Politics of Imperfection* (Faber & Faber 1978).

<sup>31</sup> Eg Quinton, *ibid* 56.

exposition of his life's political writing.<sup>32</sup> *Reflections* reads primarily as an extended, impassioned exercise in political rhetoric; a warning against all those (in Britain) who might wish to tear down centuries of tradition in the name of abstract Enlightenment notions such as liberty, equality and brotherhood. Frank O'Gorman identifies four recurring themes in Burke's work: a pessimistic belief in the inherent evil of humankind; an organic theory of society (which rejects universal theories about the organisation of government and society, and which points to a pragmatic form of governance that goes with the grain of societal development); the importance of historical tradition, of continuity and stability of key institutions (monarchy, church, parliament, family etc); and conservation of the existing structures and power relationships within society.<sup>33</sup> It was to these key institutions that citizens owed their loyalty, not to individuals or to abstract ideologies. These four themes form the essence of classical conservatism and will be explored further below.

Burke's thesis could be accurately summed up in the words of Scruton: 'conservatism is not about freedom, but about authority',<sup>34</sup> which leads on to a fundamental point of departure between conservatism and liberalism, and one which is important in the context of family law. Conservatism has no problem with liberal values of freedom, equality and fairness per se, but those values are not privileged in any way in the conservative ontology. An individual's pursuit of the good life is always subject to the overriding authority of the state: no one must be ungovernable, as this threatens social coherence. This view has implications for a conservative understanding of human rights. Again, the conservative would have no problem accepting that many of the values expressed in universal rights' declarations (such as the European Convention on Human Rights) are important for human flourishing, but they would argue for the community interest to weigh more heavily in the human rights calculus and would argue against the Millian claim that an individual's rights can ever ultimately trump a state's authority.

Although the word 'disposition' is often preferred to 'theory' when it comes to defining the conservative essence, it is possible to make sense of the notion of an anti-theoretical theory through an appreciation that it is *abstract* theory to which

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<sup>32</sup> Dennis O'Keeffe, *Edmund Burke* (Continuum 2010) 53.

<sup>33</sup> O'Gorman (n 29) 1-2.

<sup>34</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) vii; Norman agrees, but expresses it thus: 'Liberalism sees freedom as the absence of impediment to the will; Burke sees freedom as ordered liberty.' Jesse Norman, *Edmund Burke: The First Conservative* (Basic Books 2015) 282.

conservatism objects. The theory underlying the rejection of abstraction is empirically founded, and thereby consistent with a conservative ontology.<sup>35</sup> Conservatives see all ideologies as crude abridgements of centuries of human experience in society, and flawed because of their necessary brevity and loss of temporal and spatial specificity.<sup>36</sup> That said, the conservative and the radical could conceivably end up at the same point on some matter or other, but they would not have journeyed together: the conservative concern with the process of change is what distinguishes it from radicalism, not its purpose and direction.<sup>37</sup> Indeed, throughout his life Burke was known for his support of a number of far-reaching reforms, notably regarding the governance of America, Ireland and India, but it was wholesale change (as happened in France) he opposed.<sup>38</sup>

Conservatism, then, is unusual as a political philosophy in that it is not defined by its ends.<sup>39</sup> Liberalism is concerned with the freedom of the individual to pursue the good life, socialism is directed towards equality in socio-economic relations, but conservatism has no end in mind and 'may be defined without identifying it with the policies of any party'.<sup>40</sup> Importantly, the reading of conservatism utilised in this thesis is a procedural one and, with no foundational substantive content, it subscribes to no particular beliefs about the world and human conduct.<sup>41</sup> Confusion might arise at this point, as the objection could be raised that conservatism appears to encapsulate a raft of substantive beliefs relating to monarchy, law and order, and the family, for example. However, this is incorrectly to conflate conservative principles with the nature of the society those principles have coincided with, and therefore sought to conserve, over time. As Burke's work influenced eighteenth-century British polity, so it was the character of that polity it strived to maintain. (In that sense, it is possible to read Burkean conservatism to incorporate a substantive vision of society, although that is not the reading I adopt in my work.) However, conservatism is not opposed to change per se but is concerned with the effective *management* of change. Probably the most quoted sentence of Burke's *Reflections*

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<sup>35</sup> Anthony Quinton, *Politics of Imperfection* (Faber & Faber 1978) 12-13.

<sup>36</sup> *Ibid* 93.

<sup>37</sup> Samuel Huntington, 'Conservatism as an Ideology' (1957) 51 *The American Political Science Review* 454, 458.

<sup>38</sup> A useful summary of Burke's stance on these matters of colonial politics can be found in Hampsher-Monk (n 29) 20-27.

<sup>39</sup> Samuel Huntington, 'Conservatism as an Ideology' (1957) 51 *The American Political Science Review* 454, 457; Geoffrey Brennan and Alan Hamlin, 'Analytic Conservatism' (2004) 34 *British Journal of Political Science* 675, 677.

<sup>40</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) 4.

<sup>41</sup> Michael Oakeshott, *Rationalism in Politics and Other Essays* (2<sup>nd</sup> edn, Liberty Fund 1991) 423.

reads: 'A state without the means of some change is without the means of its conservation.'<sup>42</sup> For a Burkean conservative, incremental, or evolutionary, change is a way to avoid a build-up of social pressure which could result in a calamitous release of revolutionary energy. This distinctly conservative approach to change is explored further below.

In contrast to Burke, Oakeshott's conservatism is unquestionably procedural, principally with regard to his theory of change, but it is also distinctly epistemological.<sup>43</sup> This procedural reading encapsulates a limited style of politics, with statecraft being a government's *raison d'être*, as Oakeshott put it:

Men sail a boundless and bottomless sea; there is neither harbour for shelter nor floor for anchorage, neither starting-place nor appointed destination. The enterprise is to keep afloat on an even keel; the sea is both friend and enemy; and the seamanship consists in using the resources of a traditional manner of behaviour in order to make a friend of every hostile occasion.<sup>44</sup>

Consequently, conservative political traditions vary by geographical and historical locations. Thus, for example, it is possible for Noel O'Sullivan to write of distinct French, German and British conservative traditions.<sup>45</sup> Liberalism, socialism, feminism and so on are also, of course, not monolithic but there is less variation in their core ideas across time and space than in conservatism. Conservatism's teleological agnosticism also means that there are substantial differences between 'conservative' politicians; for example, a US Republican and a German Christian Democrat are likely to disagree over the extent to which the state may justifiably intervene in the market, and it is hard to imagine, at the time of writing, the Republican Party championing the cause of same-sex marriage as the Conservative Party leadership did in the UK.

Despite the temporal and spatial variations of conservatism, there have been a number of attempts to elucidate its core principles, and while there is some

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<sup>42</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 106.

<sup>43</sup> Muller (n 29) 292; Quinton (n 35) 92. Oakeshott's discussion of technical and practical knowledge is considered in chapter four below.

<sup>44</sup> Oakeshott (n 41) 60.

<sup>45</sup> Noel O'Sullivan, *Conservatism* (Dent 1976).

disagreement over the characteristics of the conservative gene, there is also a degree of consensus.<sup>46</sup> Anthony Quinton identifies three principles: traditionalism, organicism and political scepticism.<sup>47</sup> O'Sullivan's understanding has some overlaps with Quinton: 'Conservative ideology...may be defined as a philosophy of imperfection, committed to the idea of limits, and directed towards the defence of a limited style of politics'.<sup>48</sup> Philip Norton reduces the heart of British conservatism further, to two basic dispositions: scepticism as to the power of man's reason (thus a distrust of abstract ideas, of experts and intellectuals, of ideologies, of things untested by experience, and a general scepticism towards what a government can achieve); and second, a concern for, and in essence an adherence to, society as it currently exists (this is part of a belief in the importance of institutions, their stabilising and normalising effect).<sup>49</sup> Kieron O'Hara basically agrees with Norton but styles his two core principles the *knowledge* principle and the *change* principle,<sup>50</sup> and it is around these two principles that the following part of the chapter is organised. Importantly, common to all explanations is what underlies them, namely a defence – though not at all costs - of the established order.<sup>51</sup>

## KNOWLEDGE PRINCIPLE

Conservatism approaches the world with an epistemological modesty and scepticism.<sup>52</sup> It sees human society as so complex and dynamic that our understanding of it must necessarily be limited, and it sees human beings as fallible and unpredictable. This leads conservatives to be suspicious of grand utopian theories, universal principles (such as liberty and equality), and sweeping prescriptions for the curing of society's ills. As Burke wrote:

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<sup>46</sup> Eg Friedrich Hayek, *The Constitution of Liberty* (first published 1960, Routledge 1999); Frank O'Gorman, *British Conservatism: Conservative Thought from Burke to Thatcher* (Longman 1986); Philip Norton, 'The Principles of Conservatism' in Philip Norton (ed), *The Conservative Party* (Prentice Hall – Harvester Wheatsheaf 1996); Alan Finlayson, 'Conservatism' in Alan Finlayson (ed), *Contemporary Political Thought: A Reader and Guide* (Edinburgh University Press 2003); Anthony Quinton, 'Conservatism' in Robert Goodin and Philip Pettit (eds), *Contemporary Political Philosophy: An Anthology* (2<sup>nd</sup> edn, Blackwell 2006).

<sup>47</sup> Anthony Quinton, *Politics of Imperfection* (Faber & Faber 1978) 16-17.

<sup>48</sup> O'Sullivan (n 45) 11.

<sup>49</sup> Norton (n 46) 69-70.

<sup>50</sup> Kieron O'Hara, *Conservatism* (Reaktion Books 2011) 23-90.

<sup>51</sup> Samuel Huntington, 'Conservatism as an Ideology' (1957) 51 *The American Political Science Review* 454, 457.

<sup>52</sup> See generally Michael Oakeshott's important essay 'Rationalism in Politics' in Michael Oakeshott, *Rationalism in Politics and Other Essays* (2<sup>nd</sup> edn, Liberty Fund 1991) 5; Muller (n 29) 10.

I cannot stand forward, and give praise or blame to any thing which relates to human actions, and human concerns, on a simple view of the object, as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction...The circumstances are what render every civil and political scheme beneficial or noxious to mankind.<sup>53</sup>

It was not that Burke was opposed to metaphysics in toto, but only where divorced of context and circumstance. This empirical strand to Burke's approach has led to him being labelled 'a less philosophically rigorous Hume'.<sup>54</sup> Unlike Hume, however, Burke was a religious man, grounded in Christian metaphysics and its claim to a universal moral truth.<sup>55</sup> But, for Burke, 'the politically right is not unequivocally determined by the morally right'.<sup>56</sup> In matters of practical politics Burke rejected appeals to universality in both the temporal and spatial planes,<sup>57</sup> which is clear advice against attempting to develop a conservative theory of family law, or of anything else for that matter. Conservatives reject appeals to the superiority of universal rights because they are based on abstractions of human beings and human societies. If history has not led to the recognition of such rights then this should be accepted. But this approach does not account adequately – or at all - for the role of *power* in bringing about and maintaining that state of affairs, and I will return to this important point later in the thesis.

So, what mattered to Burke was not acontextual concepts such as rights and liberty but the experience of history: what works? The conservative respect for institutions flows from this. Institutions have developed over time; they endure because they work, and because they work they demand our respect and protection: 'For the conservative, the historical survival of an institution or practice – be it marriage, monarchy, or the market – creates a prima facie case that it has served some human need'.<sup>58</sup> It is not of central importance why the institution endures or indeed

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<sup>53</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 89.

<sup>54</sup> Hampsher-Monk (n 29) 34; Grant also considers Burke an empiricist, Robert Grant, 'Edmund Burke' in Roger Scruton (ed), *Conservative Thinkers: Essays from The Salisbury Review* (The Clarendon Press 1988) 78.

<sup>55</sup> Eg Burke (n 53) 186-190.

<sup>56</sup> Anthony Quinton, *Politics of Imperfection* (Faber & Faber 1978) 61.

<sup>57</sup> 'Nothing universal can be rationally affirmed about any moral or any political subject', quoted in Quinton, *ibid* 12.

<sup>58</sup> Jerry Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press 1997) 7.

whether those reasons are known at all, as the conservative interprets its survival as being due to it embodying valuable social knowledge.<sup>59</sup> An issue flowing from this, which did not concern Burke but which exercises the minds of some modern C/conservatives, is *who* is an institution working for, in the sense of who benefits from it operating in its current form?<sup>60</sup> The institution of marriage is a good case in point. A conservative may say that marriage should be preserved in its current form because it has been shown to 'work', but marriage has come under sustained and extensive feminist critique in recent decades because it does not work in the interests of women and children to the same extent as it works in the interests of men (see chapter two). Also, before the advent of same-sex marriage, it was obviously the case that marriage did not 'work' for gay men and lesbians. So a critical approach to conservative claims of the value of institutions entails scrutiny of whose interests are best served, and whose least, by the institution as it currently stands; and this approach is followed throughout this thesis.

In contrast to liberals, conservatives are more concerned with institutions than with individuals:

The individual depends for his freedom and his happiness on the institutions which form and protect him, and because institutions are more easily formed than created, the conservative remains hostile to the liberal attempt to put every institution, and every authority, in question, for the sake of a freedom whose form and limits are never defined.<sup>61</sup>

Institutions such as the family and the church have a valuable role to play in the moral training of citizens. Yet, they are not just instrumentally important, but are also 'constitutive of the social identity of men'.<sup>62</sup> Institutions represent 'a historically accumulated deposit from the past life and particular circumstances of that

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<sup>59</sup> Quinton (n 56) 17, 60; Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) 30-36.

<sup>60</sup> Burke was a contemporary of Adam Smith and largely agreed with Smith's work. In Burke's *Thoughts and Details on Scarcity* (1795) he set out that, while charity to the poor is a Christian duty, it is not for the state to provide welfare or to disturb the operation of market forces in the setting of wage levels (see Hampsher-Monk (n 29) 269-280). This is consistent with his general view of the natural order of society. People are not born equal, and it is not the role of the state to try to remedy this 'natural' inequality.

<sup>61</sup> Roger Scruton (ed), *Conservative Thinkers: Essays from The Salisbury Review* (The Clarendon Press 1988) 9.

<sup>62</sup> Anthony Quinton, *Politics of Imperfection* (Faber & Faber 1978) 16.



society'.<sup>63</sup> And, 'We procure reverence to our civil institutions on the principle upon which nature teaches us to revere individual men; on account of their age; and on account of those from whom they are descended.'<sup>64</sup> The conservative is content in the present and sets out to enjoy it, seeing it as incarnating the accumulated wisdom and experience of the past.

The imperfection of human nature is also an important ingredient in the classical conservative epistemology. This imperfection is seen as both moral and intellectual, but conservatism has been shaped more by the implications of the intellectual defect than the moral one, as the above discussion on the role of institutions as intergenerational conduits for social learning bears witness.<sup>65</sup> The moral aspect does not necessarily rest on religious foundations (such as the biblical doctrine of original sin), although for some, such as Burke, it may do. Even so, Burke was able to separate morality from politics, and his religion was not an operative part of his political arguments: expediency, pragmatism, and a sort of utilitarianism triumphed over universal moral prescriptions.<sup>66</sup>

This epistemology leads to a pragmatism at conservatism's core, which has been elegantly described by Oakeshott thus:

To be conservative...is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss.<sup>67</sup>

The ultimate purpose in politics is ensuring the continuation of a particular way of life, not the realisation of utopian ends such as equality, poverty eradication or a pacific world order; the ruler is 'umpire' or 'chairman', administering affairs according to known rules.<sup>68</sup> At the heart of Oakeshott's critique of rationalism is his distinction

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<sup>63</sup> Ibid 59.

<sup>64</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 121.

<sup>65</sup> Quinton (n 62) 13.

<sup>66</sup> Ibid 61.

<sup>67</sup> Michael Oakeshott, *Rationalism in Politics and Other Essays* (2<sup>nd</sup> edn, Liberty Fund 1991) 408.

<sup>68</sup> Ibid 427.

between *technical* and *practical* knowledge of politics.<sup>69</sup> The social engineer (or Rationalist – always with a capital ‘R’ – as Oakeshott styles him) regards technical knowledge alone as valid, but the only one of value to the politician is practical knowledge. I explore the application of this distinction further in the next chapter.

The knowledge principle, and conservatism’s teleological agnosticism, result in the state being centrally concerned to protect the whole political system as citizens each pursue their vision of the good life within that system.<sup>70</sup> In this sense, it is of one accord with liberalism, yet without being disposed to privilege the individual over a collective interest. To conclude, O’Hara distils his understanding of this aspect of conservatism thus:

Knowledge principle: because society and its mediating institutions are highly complex and dynamic with natures that are constantly evolving as they are co-constituted with the individuals who are their members, both data and theories about society are highly uncertain.<sup>71</sup>

## **CHANGE PRINCIPLE**

Change is an empirical fact. Therefore, as conservatism claims to be amongst the most realistic of political theories, it would be untenable for it to be opposed to change. Any presumption that conservatism holds to a kind of timeless moral order slips into the error of orthodoxy identified below. The conservative understanding of society as an organism means that what is living and growing inevitably changes.<sup>72</sup> Change, though, is a problem for the conservative. It represents a ‘threat to identity, and every change is an emblem of extinction’.<sup>73</sup> So for change to be acceptable it must also represent continuity: maintaining the social ecology, rather than rending

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<sup>69</sup> Ibid 12. I consider these further in chapter four. Oakeshott also saw levelling as a creature of rationalist thought, singling out, inter alia, ‘the Beveridge Report’ and ‘Votes for Women’ for particular mention (ibid 11).

<sup>70</sup> John Kekes, *A Case for Conservatism* (Cornell University Press 1998) 24.

<sup>71</sup> Kieron O’Hara, *Conservatism* (Reaktion Books 2011) 49-50.

<sup>72</sup> O’Hara (n 71) 20.

<sup>73</sup> Oakeshott (n 67) 410.

its delicate fabric,<sup>74</sup> or as Wax puts it, 'The periphery might be altered, but the core should remain intact'.<sup>75</sup>

Not only are conservatives not opposed to change but there are times when it will be seen as the best way forward. In Burke's famous words, 'A state without the means of some change is without the means of its conservation'.<sup>76</sup> Burke advocates here the use of change as a sort of socio-political pressure release valve. He interprets events in France as being the destruction of an ancient society and its many organising institutions through an explosive release of popular energy. His prescription for Britain is to avoid such a catastrophe through evolutionary change which would bleed off stirrings of revolutionary zeal. Conservatism is concerned with the *management* of change and how change can be reconciled with established societal structures.<sup>77</sup> And the conservative's cautious disposition towards change is a necessary corollary of her scepticism towards human understanding of the operation of society.

Conservatism as an ideology, then, is characterized, in the first instance, by opposition to the idea of total or radical change, and not by the absurd idea of opposition to change as such, or by any commitment to preserving all existing institutions.<sup>78</sup>

A crucial distinction is drawn between organic and artificial change. Organic change is bottom-up, demand-driven; whereas artificial change is top-down and supply-driven. From a conservative viewpoint, benefits are more likely to come from the former model because it emerges naturally from the infinitudinal interactions of a complex society, rather than the a priori assumptions of decision-makers. Conservatives who oppose, or seek to reverse, organic change act in a way which is 'futile, wrong-headed and ultimately counterproductive'.<sup>79</sup> As much societal change happens almost imperceptibly slowly, the challenge for the conservative is to know when to cease opposition and to embrace the change. The early

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<sup>74</sup> Russell Kirk, *The Conservative Mind* (BN Publishing 2008) 40; and generally, Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001).

<sup>75</sup> Amy Wax, 'The Conservative's Dilemma: Traditional Institutions, Social Change and Same-Sex Marriage' (2005) 42 *San Diego Law Review* 1059, 1071.

<sup>76</sup> Burke (n 64) 106.

<sup>77</sup> Stefan Andreasson, 'Conservatism' in Vincent Geoghegan and Rick Wilford (eds), *Political Ideologies: An Introduction* (4<sup>th</sup> edn, Routledge 2014).

<sup>78</sup> Noel O'Sullivan, *Conservatism* (Dent 1976) 9. Hayek says something similar: Friedrich Hayek, *The Constitution of Liberty* (first published 1960, Routledge 1999) 397.

<sup>79</sup> O'Hara (n 71) 97.

manifestations of change will often be resisted because, at this stage, it is not known if continued opposition may be effective in killing off the embryonic development. It might transpire that the seed of change will not take root, evidencing its apparent societal rejection. But identifying the point - the 'threshold'<sup>80</sup> - when a conservative should support a change and go with the grain of human nature is a perennial puzzle for those of a conservative disposition. Moreover, it is not just a puzzle, but a point of antinomy; for *to resist apparent organic change to an institution (such as marriage and the family) requires a conservative to take a normative stance contrary to the knowledge principle's respect for institutions and traditions as repositories and transmitters of valuable social knowledge*. To reiterate, this antinomy is central to my critical analysis of British conservatism and the legal regulation of intimate adult relationships. So how can it be determined which change is desirable and which should be resisted? A reading of conservatism's most influential thinkers elicits the following guiding principles.

First, the burden of proof is on the innovator to show that the benefits of the change outweigh its costs.<sup>81</sup> This is founded on the pessimistic assumption that change is more likely to result in bad consequences than good. In practical terms this burden poses two significant, perhaps insurmountable, problems for conservatives. The first is that liberalism, as the dominant paradigm, gets to decide who has the burden of any proof, and indeed, whether any such proof is required. Protest all it likes, conservatism simply does not have the standing in British polity to insist that its opponents shoulder the burden of proof. What it could insist on, however is that fellow conservatives who advocate change discharge this evidential standard. But this still leaves open the possibility that not all Conservatives are conservatives, and this expectation might not be respected. The second problem is that for most, if not all, changes, the effects are necessarily prospective. Amy Wax sums up this point thus, 'The consequences of unprecedented shifts in law, custom, or practice have, by definition, not yet been realized'.<sup>82</sup> If a change has already taken place in another country (as was the case with same-sex marriage) then evidence might be tendered of its impact there, but such evidence would be treated with circumspection by conservatives and non-conservatives alike due to locally specific factors which might not translate commensurately across cultures. The effect of this principle is that conservatives will often find themselves fighting battles they are destined to

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<sup>80</sup> Ibid 58.

<sup>81</sup> Oakeshott (n 67) 411; O'Hara, *ibid* 87.

<sup>82</sup> Amy Wax, 'The Conservative's Dilemma: Traditional Institutions, Social Change and Same-Sex Marriage' (2005) 42 *San Diego Law Review* 1059, 1083.

lose and that, at best, their creed might act as ‘a politics of delay’,<sup>83</sup> and as a challenge to liberalism to think carefully about the impact of change before proceeding.

Second, the change must be in response to a felt need, rather than in pursuit of a utopian vision.<sup>84</sup> It is not for the conservative to indulge in blue-sky thinking; in steering the ship of state he has no particular destination in mind and is concerned only with keeping the vessel afloat. Change must be demand driven, not emerging from above and imposed on an unwilling society:

[M]odification of the rules should always *reflect*, and never *impose*, a change in the activities and beliefs of those who are subject to them, and should never on any occasion be so great as to destroy the ensemble.<sup>85</sup>

What weight to attribute to this principle is a problem for the conservative, because to give it too much weight would place the conservative entirely at the mercy of societal shifts. Jerry Muller says that the dilemma here for the conservative is ‘when to declare the battle for a particular institution definitively lost’.<sup>86</sup> To go on fighting in the face of defeat is characteristic of reactionary conservatism<sup>87</sup> – the defence of lost causes, prevalent in the work of Scruton.<sup>88</sup>

Third, in terms of the scale and rate of change, the change should be incremental and evolutionary.<sup>89</sup> O’Hara observes, without criticism, that ‘cluelessness is a standard state for governments’.<sup>90</sup> Conservatism is at ease with this cluelessness and sees it as a reality which should result in politics making changes slowly and steadily. Any change should not occur at such a speed and scale that the socially

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<sup>83</sup> Roger Scruton, *A Political Philosophy* (Continuum 2006) ix; see also Friedrich Hayek, *The Constitution of Liberty* (first published 1960, Routledge 1999) 398.

<sup>84</sup> Burke (n 64) 152; Kirk (n 74) 40; Oakeshott (n 67) 412.

<sup>85</sup> Oakeshott (n 67) 431 (emphasis added).

<sup>86</sup> Jerry Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press 1997) 423.

<sup>87</sup> Samuel Huntington, ‘Conservatism as an Ideology’ (1957) 51 *The American Political Science Review* 454, 460. This degree of reactionism is not compatible with the classical conservatism outlined in this chapter.

<sup>88</sup> Eg Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001); Roger Scruton, *A Political Philosophy* (Continuum 2006); Roger Scruton and Phillip Blond, *Marriage: Union for the Future or Contract for the Present* (ResPublica 2013).

<sup>89</sup> Burke (n 64) 117, 119, 120, 121, 193, 247, 375; Kirk (n 74) 41; Oakeshott (n 67) 410, 412, 431.

<sup>90</sup> O’Hara (n 71) 25.

valuable qualities in the object of change are lost. Burke's notion of evolutionary change is analogous to what Darwin was later to propose in the field of biology: natural selection leads to an accentuation of advantageous characteristics and a diminution or elimination of disadvantageous ones. Burke captured a similar idea in *Reflections*:

Our political system is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body composed of transitory parts; wherein, by the disposition of a stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time, is never old, or middle-aged, or young, but in a condition of unchangeable constancy, moves on through the varied tenour of perpetual decay, fall, renovation, and progression. Thus, by preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete.<sup>91</sup>

He continued this theme throughout his work, concluding with his statement that he 'would make the reparation as nearly as possible in the style of the building'.<sup>92</sup> Scruton's idea that for change to be acceptable it must represent continuity also conveys an organic view of society.<sup>93</sup>

Fourth, the change should be rigorously evaluated before the next incremental step. Support for this is found in Oakeshott,<sup>94</sup> O'Hara<sup>95</sup> and Burke: 'By a slow but well-sustained progress, the effect of each step is watched; the good or ill success of the first, gives light to us in the second'.<sup>96</sup> In evaluating a proposal to allow same-sex marriage, for example, a British conservative might examine the impact on families of legislation such as the Adoption and Children Act 2002 (permitting adoption of children by same-sex couples), the Civil Partnership Act 2004, and the Human Fertilisation and Embryology Act 2008 (enhancing the legal status of same-sex

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<sup>91</sup> Burke, *ibid* 120.

<sup>92</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 375.

<sup>93</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) 11.

<sup>94</sup> Michael Oakeshott, *Rationalism in Politics and Other Essays* (2<sup>nd</sup> edn, Liberty Fund 1991) 412.

<sup>95</sup> Kieron O'Hara, *Conservatism* (Reaktion Books 2011) 88-89.

<sup>96</sup> Burke (n 92) 281.

couples who conceive children through artificial reproduction services). A conservative in favour of the change must show at least that institutional harm has not resulted, although they would be faced with perhaps insurmountable empirical challenges in doing so.

And fifth, change should be reversible where possible.<sup>97</sup> This is a development of the previous principle. If, on evaluation, it transpires that the change has been a mistake then ideally there should be a way to return to the status quo ante. The reality is, of course, that in a liberal society once a freedom has been granted it is difficult to reverse. It is inconceivable that the permissive legislation of the 1960s relating to abortion, divorce and homosexuality could be repealed in an attempt to return to an earlier moral settlement. Once released, the genie could not be put back in the bottle.

## **CONSERVATISM AND THE FAMILY**

The family became a problem only if it botched the job of providing for systems maintenance, for consensus and stability. It failed to perform its functions smoothly, if it spawned individual 'deviants', to borrow the sociological term or, more ominously, if an identifiable class or group within the society consistently socialized children in a manner deemed incompatible with the requirements of an upwardly mobile, democratic society.<sup>98</sup>

Jean Elshtain identifies the reason why the family has been the subject of law and policymaking over time and her words are particularly apposite to the postwar social democratic settlement in the UK. She was writing during the New Right ascendancy on both sides of the Atlantic, in which narratives of deviancy featured in a climate of social authoritarianism.<sup>99</sup> Whilst the tone and content of the narratives may have changed, and although Elshtain was not referring expressly to conservatism, her words capture well the functional, instrumental approach ('job', 'functions') Conservative politicians have taken towards family law and policy. But it is not just that the traditional family form is seen to provide useful social services and a context

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<sup>97</sup> Burke (n 92) 172; Oakeshott (n 94) 431; O'Hara (n 95) 88.

<sup>98</sup> Jean Elshtain (ed), *The Family in Political Thought* (The Harvester Press 1982) 2.

<sup>99</sup> Eg Norman Dennis and George Erdos, *Families Without Fatherhood* (2<sup>nd</sup> edn, IEA Health and Welfare Unit 1993).

for the socialisation of children,<sup>100</sup> Burke also saw the family as a nursery for the development of patriotic affections (an idea which Aristotle had before him):

We begin our public affections in our families. No cold relation is a zealous citizen. We pass on to our neighbourhoods, and our habitual provincial connections. These are inns and resting-places. Such divisions of our country as have been formed by habit, and not by a sudden jerk of authority, were so many little images of the great country in which the heart found something which it could fill. The love to the whole is not extinguished by this subordinate partiality.<sup>101</sup>

Freeman summarises this point thus, 'As politics is morality enlarged, so the state is the family enlarged'.<sup>102</sup> Burke would not, of course, have conceptualised the family as a miniature welfare *state* because the mass provision of welfare was not a responsibility assumed by the state in the late eighteenth century, although he did recognise that if a family could not support itself then others would be burdened with its sustenance.<sup>103</sup> The family was also significant to Burke for the role it played in fostering love and respect for community and country. If individuals were not bound together in such manner then their atomisation created the conditions for revolution and posed an existential threat to the constitution. As Bryson and Heppell put it, 'Any threat to family values is also a threat to social cohesion'.<sup>104</sup>

Unsurprisingly for someone defending the status quo, Burke also held that the family plays an important role in the retention and transmission of wealth across generations, 'The power of perpetuating our property in our families is one of the most valuable and interesting circumstances belonging to it, and that which tends the most to the perpetuation of society itself'.<sup>105</sup> Unlike his previous argument about patriotic affections – which has universal application – this one is clearly limited to the minority of the population at the time who possessed anything worth passing on. Of more general relevance was his view on the function of marriage. In a

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<sup>100</sup> Chris Barton and Gillian Douglas, *Law and Parenthood* (Butterworths 1995) 11-15.

<sup>101</sup> Burke (n 92) 315.

<sup>102</sup> Michael Freeman, *Edmund Burke and the Critique of Political Radicalism* (Blackwell 1980) 61.

<sup>103</sup> Edmund Burke, 'Speech on a Bill for the Repeal of the Marriage Act' (Westminster, 15 June 1781) <[http://www.gutenberg.org/files/16292/16292-h/16292-h.htm#BILL\\_FOR\\_THE\\_REPEAL\\_OF\\_THE\\_MARRIAGE\\_ACT](http://www.gutenberg.org/files/16292/16292-h/16292-h.htm#BILL_FOR_THE_REPEAL_OF_THE_MARRIAGE_ACT)> accessed 9 August 2015.

<sup>104</sup> Valerie Bryson and Timothy Heppell, 'Conservatism and Feminism: The Case of the British Conservative Party' (2010) 15 *Journal of Political Ideologies* 31, 33.

<sup>105</sup> Burke (n 92) 140.



parliamentary speech on a family law Bill which would have lowered the age of marrying without parental consent to 21 and required that all marriages should be conducted publicly, he emphasised the functions of marriage beyond mere reproduction:

Matrimony is instituted not only for the propagation of men, but for their nutrition, their education, their establishment, and for the answering of all the purposes of a rational and moral being; and it is not the duty of the community to consider alone of how many, but how useful citizens it shall be composed.<sup>106</sup>

Contemporary conservatism, in both theory and practice, is often associated with a defence of the family, usually the married, heterosexual family. However, I would argue that the Conservative focus on family form over function is a departure from the root of the conservative commitment to the family which is because 'it is the vehicle for the transmission of values and civilities which make it possible for us to get along together in society'.<sup>107</sup> David Willetts is here updating Burke for the twentieth century – he does not fear revolution, but families remain important for social harmony. O'Hara agrees that it is a 'misperception that conservatives must favour traditional family structures over newly emerging forms'.<sup>108</sup>

When encountering structural change in the family, the heterogeneity of society means that the scope for radical political action is small without risking rupturing that society's cohesion. Even if strong views about the rightness of particular ways of life are held by a conservative then, as O'Hara argues, these are not to be forced upon individuals.<sup>109</sup> It is better to persuade than to compel; and any persuasion should always be with a view to the individual retaining personal responsibility for their situation. To do otherwise is to foster a culture of dependence on the state with its resultant moral, social and economic hazards. The conservative's caution towards change means that:

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<sup>106</sup> Edmund Burke, 'Speech on a Bill for the Repeal of the Marriage Act' (Westminster, 15 June 1781) <[http://www.gutenberg.org/files/16292/16292-h/16292-h.htm#BILL\\_FOR\\_THE\\_REPEAL\\_OF\\_THE\\_MARRIAGE\\_ACT](http://www.gutenberg.org/files/16292/16292-h/16292-h.htm#BILL_FOR_THE_REPEAL_OF_THE_MARRIAGE_ACT)> accessed 9 August 2015.

<sup>107</sup> David Willetts MP quoted in Chris Barton and Gillian Douglas, *Law and Parenthood* (Butterworths 1995) 237.

<sup>108</sup> O'Hara (n 95) 172.

<sup>109</sup> Ibid 149.

[n]ecessary change and modernisation must be engrafted on to solidly established foundations. Conservatism therefore offers a solidly institutional framework within which change, adaptation and reform may be rendered acceptable.<sup>110</sup>

This is all very well, but what happens when it is the very framework (such as the family) which undergoes change, and how do conservatism and Conservatives respond when the change is beyond the apparent control of politicians? It is with these questions that this thesis engages in the following chapters.

The remainder of this chapter anticipates three issues in family lawmaking which are considered in depth in chapters four to eight, and it attempts to elucidate some principles, based on the above discussion, which might point towards a conservative treatment of those issues. As I cautioned above, the methodological challenges inherent in defining a conservative disposition towards any substantive matter, mean that the principles below are offered tentatively. The three issues are:

- To what extent should the law support marriage and facilitate divorce?
- What should be a conservative disposition towards the clean break on divorce, in particular what is to be the balance between support provided to families by individuals and by the state, and how to determine obligations towards the interests of the first and any subsequent families?
- Should the state provide legal recognition of same-sex relationships, whether in the form of civil partnership or marriage?

### **To what extent should the law support marriage and facilitate divorce?**

Two main areas of contention arose in my reading of the parliamentary debates on the legislation: the matter of a time bar on presenting a divorce petition in the Matrimonial and Family Proceedings Bill (see chapter four), and the issue of no fault divorce in the Family Law Bill (see chapter six). Both of these matters are often considered in debates around how 'easy' or 'hard' should the law make it to obtain a

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<sup>110</sup> Frank O'Gorman, *British Conservatism: Conservative Thought from Burke to Thatcher* (Longman 1986) 7.

divorce. The implicit assumption is that denying couples access to divorce might somehow cause them to reconsider dissolution and to persevere with their marriage. This assumption is based on a prior assumption that individuals denied access to divorce are living with their spouse, when the reality is often that they have already formed another relationship or are separated. This being so, perhaps a third assumption is also at work here: that families reconstituted post-divorce are somehow not as good as the original married unit.<sup>111</sup>

Conservatives attach great importance to marriage. For many years it was the only legitimate context for sexual relations and reproduction, and served a vital function in the perpetuation of the fortunes of the landed elites, as well as developing into an emblem of respectable middle class Victorian domesticity. More recently, despite the rise of cohabitation, it remains the dominant relationship form and those who choose it tend to be wealthier and healthier than those who do not.<sup>112</sup> Marriage is an archetypal intermediate institution<sup>113</sup> which conservatives should instinctively defend.

Of all conservative thinkers Scruton has written most on marriage. For him:

Marriage does not merely protect and nurture children; it is a shield against sexual jealousy, and a unique form of social and economic co-operation, with a mutually supportive division of roles that more than doubles the effectiveness of each partner in their shared bid for security.<sup>114</sup>

Obviously drawing on Burke,<sup>115</sup> he goes on, 'Society has a profound interest in marriage, and changes to that institution may alter not merely relations among the

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<sup>111</sup> None of these assumptions is new, of course, and they have always been present in debates around divorce law reform as confirmed by Oliver McGregor, *Divorce in England* (Heinemann 1957); Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (CUP 1988); Lawrence Stone, *Road to Divorce: England 1530-1987* (OUP 1990); and Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003).

<sup>112</sup> Office for National Statistics, *Population Estimates by Marital Status and Living Arrangements – England and Wales, 2002 to 2014* (Office for National Statistics 2015).

<sup>113</sup> I use the term 'intermediate institution' here to mean an institution which stands between the individual and the state; it is more than the former but less than the latter. Other examples might be churches and trades unions.

<sup>114</sup> Roger Scruton, *A Political Philosophy* (Continuum 2006) 83.

<sup>115</sup> Burke's idea of a social contract was of 'a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.' *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 194-195.

living, but also the expectations of those unborn and the legacy of those who predecease them.<sup>116</sup> He sees the purpose of marriage to be 'social reproduction, the socializing of children and the passing on of social capital. Without marriage it is doubtful that those processes would occur'.<sup>117</sup> Apart from his plea to the essential, sacramental character of marriage, he does not explain what gives rise to his doubt that such processes could not occur in other family forms. Scruton writes disapprovingly of the state's liberalization of marriage which has led to 'easy divorce' and permitting civil partnerships, all of which are constitutive of a move away from a conjugal view of marriage towards a contractual one, effectively dissolvable at will.<sup>118</sup>

The provision of a law of divorce is an issue of liberty, based on moral realism. Where divorce is permitted, it is usually as a reluctant concession; and this is so in secular and religious law.<sup>119</sup> Burke liked liberty, but it also worried him:

The effect of liberty to individuals is, that they may do what they please: We ought to see what it will please them to do, before we risque congratulations, which may be soon turned into complaints.<sup>120</sup>

But what is liberty without wisdom, and without virtue? It is the greatest of all possible evils; for it is folly, vice, and madness, without tuition or restraint. Those who know what virtuous liberty is, cannot bear to see it disgraced by incapable heads, on account of their having high-sounding words in their mouths. Grand, swelling sentiments of liberty, I am sure I do not despise.<sup>121</sup>

He liked liberty because it is a central component in human flourishing, but it worried him because of mankind's moral imperfection. It is evident from the discourse around divorce law reform in the 1980s and 1990s that this dilemma still troubled Conservative legislators when pondering where to draw the line between freedom and authority in modern divorce law. This dilemma highlights that conservatism has

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<sup>116</sup> Scruton (n 114) 83.

<sup>117</sup> Ibid 95.

<sup>118</sup> Ibid.

<sup>119</sup> For a useful, although possibly now outdated, summary of Christian marriage, see Oliver McGregor, *Divorce in England* (Heinemann 1957) chapter iv.

<sup>120</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 91.

<sup>121</sup> Ibid 373.

points of tension or even antinomy. The antimony here is how to reconcile a commitment to upholding the institution of marriage with an organic view of society. If forces in society are resulting in less stable marriages then is it right for conservatives to oppose such forces? The conservative is not an immobilist, yet to what extent should she go with the grain of human nature? Abstract answers are to be resisted, but it is anticipated that the parliamentary case studies will shed some light on these matters. Drawing on the discussion in this chapter, I think what can be broadly expressed, though, is: (1) that it is appropriate for conservatives to legislate and apply state resources to support the institution of marriage; and (2) that divorce on demand, either unilaterally or with the agreement of both spouses, without proof of irretrievable breakdown and with the minimum of formality, represents too great a commitment to liberty because of its emphasis on a contractual view of marriage at the expense of marriage valued for its wider institutional significance.

Scruton sums it up:

[C]hanges in the law which are calculated to loosen or abolish the obligations of family life, or which in other ways facilitate the channelling of libidinal impulse away from that particular form of union, will be accepted by conservatives only under the pressure of necessity.<sup>122</sup>

**What should be a conservative disposition towards the clean break on divorce, in particular what is to be the balance between support provided to families by individuals and the state, and how to determine obligations towards the interests of the first and any subsequent families?**

No attempt has been made in the literature to address such questions, and the insistence on contextualising conservatism's policy prescriptions militates against it espousing a universal theory. The question of financial obligations between ex-spouses raises concerns around conservative attitudes towards property, equality and responsibility. There are significant tensions here.

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<sup>122</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) 129.

Conservatism and liberalism agree that notions of property and inequality are inextricably bound together, 'The characteristic essence of property, formed out of the combined principles of its acquisition and conservation, is to be *unequal*'.<sup>123</sup> Burke believed people were equal in an ultimate moral sense, as made in the image of God, but in all other senses a Burkean sociology would see it as natural that human relations tend towards inequality (in talent, health, wealth, etc.); it does not follow that inequality is therefore good or just, but a conservative would be cautiously disinclined to take action to remedy structural inequalities.<sup>124</sup> For the wealthy and powerful this ambivalence serves to reinforce their hegemony. On the implications of this for the poor and marginalised, Burke's response was that 'they must be taught their consolation in the final proportions of eternal justice'.<sup>125</sup> Such fatalistic appeals to Judeo-Christian metaphysics do not play well in post-Beveridge Britain, yet Scruton holds to something similar, 'The purpose of the welfare state is not to abolish the distinction between rich and poor, but to encourage people to accept it'.<sup>126</sup> Burke also argued against policies of redistribution on practical grounds, ie that 'the plunder of the few would indeed give but a share inconceivably small in the distribution to the many'.<sup>127</sup> But this claim also falls away in a modern social democratic state, in which wealth redistribution can provide universal welfare at subsistence levels. In summary, according to Freeman, there is a direct inverse relationship between property and equality: the more the state goes against nature in reducing inequality, the more the institution of property is weakened.<sup>128</sup> (This is, of course, true if property is here understood as private ownership, rather than a concept of communal possession.)

It is not easy to establish what might be seen as a conservative understanding of property. Scruton dismisses the idea that conservatism must be logically identified

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<sup>123</sup> Burke (n 120) 140 (original author's emphasis).

<sup>124</sup> Michael Freeman, *Edmund Burke and the Critique of Political Radicalism* (Blackwell 1980) 21-23.

<sup>125</sup> Burke (n 120) 372.

<sup>126</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) 172. Scruton and Marx are of one mind on this point: see Jane Humphries, 'The Working-Class Family: A Marxist Perspective' in Jean Elshtain (ed), *The Family in Political Thought* (The Harvester Press 1982).

<sup>127</sup> Burke, *ibid* 140; see also Burke's memorandum to William Pitt, *Thoughts and Details on Scarcity* (1795) in Iain Hampsher-Monk, *The Political Philosophy of Edmund Burke* (Longman 1987) 269-280. Burke's commitment to free markets is summed up on page 276: 'The moment that government appears at market, all the principles of market will be subverted.'

<sup>128</sup> Michael Freeman, *Edmund Burke and the Critique of Political Radicalism* (Blackwell 1980) 67.

with capitalism,<sup>129</sup> although Burke wrote approvingly of Adam Smith's work, and the praxis of Conservatives in recent decades has been firmly in line with it. Scruton has argued that there is an inextricable link between family and property:

Home is the place where private property accumulates, and so overreaches itself, becoming transformed into something shared...Here everything important is 'ours'...It is for some such reason that conservatives have seen the family and private property as institutions which stand or fall together. The family has its life in the home, and the home demands property for its establishment.<sup>130</sup>

Scruton's views highlight the point made in chapter one of this thesis that what is included within 'family law' is contestable. On the basis of the above quote perhaps it could be argued that Right to Buy under the Housing Act 1980 was the most important piece of 'family law' enacted in the 1980s. But how would conservatism approach the intersection of property and divorce, the situation in which the 'something shared' needs to be divided between the separating parties?

The law relating to the court's powers to divide finances and property upon divorce (formerly known as 'ancillary relief', now 'financial provision') is found in the Matrimonial Causes Act 1973 (MCA 1973). The English system is largely based on judicial discretion guided by some skeletal provisions in the MCA 1973 and their subsequent interpretation through case law. This stands in stark contrast to a variety of community of property regimes in force across continental Europe. While in recent years England has seen guidance emerge from the higher courts regarding the recognition of non-marital property,<sup>131</sup> in general the English system views all property held by the spouses as subject to the court's adjustive powers under the MCA 1973.

The clean break on divorce was introduced as part of the Matrimonial and Family Proceedings Act 1984, and is so-called because the court order formally severs all financial obligations between the parties. (Obligations to pay child support are established under statute and cannot be the subject of a clean break order.) The clean break is consistent with a view of the individual who is free and independent

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<sup>129</sup> Scruton (n 126) 87.

<sup>130</sup> Ibid 94.

<sup>131</sup> For a summary see Jonathan Herring, *Family Law* (7<sup>th</sup> edn, Pearson 2015) 248-254.

and able to trade their labour unencumbered in a free market system.<sup>132</sup> Herein lies a tension at the heart of the New Right ideology which characterised Conservative governments in the 1980s and early 1990s.<sup>133</sup> The essence of the New Right was that it was economically (neo)liberal but socially authoritarian, which meant that women were often caught in the middle, loaded with expectations of caregiving and yet expected to function as autonomous individuals in the marketplace. The clean break promotes a superficial equality of *opportunity*, presenting both parties to a marriage with an opportunity to move on with their lives, yet without addressing broader structural issues obstructing the realisation of equality of *outcomes* for many divorced women. My reading of the parliamentary debates in the next chapter revealed that much of the C/conservative discourse around the introduction of the clean break in the Matrimonial and Family Proceedings Act 1984 seemed blind to concerns over equality of outcomes.

Probably the majority of financial provision cases result in an unequal division of the assets because this is what 'fairness' requires under section 25 of the MCA 1973 and its subsequent judicial interpretation, notably following the case of *White v White*.<sup>134</sup> Take, for example, an average case with, say, a three-bedroom mortgaged home, two children, and husband and wife on mean incomes. The wife will often have forgone opportunities to develop her career in order to care for the children and is likely to remain the primary carer after divorce. If feasible in all the circumstances, the wife and children are likely to stay in the family home and will thereby receive, at least during the children's minority, a greater - unequal - share of the assets. We have seen that conservatism upholds inequality as an inevitable consequence of the social ecology, so it might seem that conservatism is congruent with the approach of the MCA 1973 in the above common example. This is not so, however, because conservatism believes in a different sort of inequality. The inequality which conservatism defends (conserves) is that which arises through dominance, when the strong prevail over the weak, such dominance arising either through immanent or structural advantage. The inequality which results from an application of section 25 in the above scenario operates as a corrective in a situation where equal division of the family wealth would not result in fairness because of the structural disadvantage caused by the requirements of caregiving.

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<sup>132</sup> Valerie Bryson and Timothy Heppell, 'Conservatism and Feminism: The Case of the British Conservative Party' (2010) 15 *Journal of Political Ideologies* 31, 35.

<sup>133</sup> For more on the New Right, conservatism and the Conservative Party see my next chapter.

<sup>134</sup> [2001] AC 596 (HL).



However, conservatism also clearly emphasises the importance of *personal responsibility* for family members by those who have assumed such responsibility; and how this sense of responsibility can be weakened and undermined by state welfare provision. The following words of Burke have chimed with generations of Conservative politicians:

[F]or a man that breeds a family without competent means of maintenance incumbers other men with his children, and disables them so far from maintaining their own. The improvident marriage of one man becomes a tax upon the orderly and regular marriage of all the rest.<sup>135</sup>

We are left with an apparent dilemma: in the event of a conflict between upholding familial obligations (such as spousal support and provision for dependents) – whether for first or subsequent families - and a general conservative indifference towards correcting inequality of outcomes, which prevails? O'Hara argues that one justification for intervention in the family is to prevent injustice to children but only if it can be shown to be efficacious intervention.<sup>136</sup> This could be interpreted as support for the family trumping concerns over not wanting to correct structural economic disadvantage.<sup>137</sup> Scruton's arguments around taxation can perhaps be extended to cover the court's adjustive jurisdiction. He argues that natural justice 'suggests that each should be taxed according to his means';<sup>138</sup> and '[t]he optimal point of taxation would be that where the marginal disincentive to earn balances the marginal benefit of confiscation'.<sup>139</sup> A difficulty here in attempting to extrapolate Scruton's views to ancillary relief is that when considering taxation he sets up the discussion as being between family and state, not between family members. However, if taxation should be according to means, then surely the division of matrimonial wealth should be likewise, even if it results in an unequal distribution. So, it is possible that the conservative and the egalitarian end up at the same destination (eg with an unequal distribution of family assets post-divorce as in the above example), but the conservative will have travelled there via the route of

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<sup>135</sup> Edmund Burke, 'Speech on a Bill for the Repeal of the Marriage Act' (Westminster, 15 June 1781) <[http://www.gutenberg.org/files/16292/16292-h/16292-h.htm#BILL\\_FOR\\_THE\\_REPEAL\\_OF\\_THE\\_MARRIAGE\\_ACT](http://www.gutenberg.org/files/16292/16292-h/16292-h.htm#BILL_FOR_THE_REPEAL_OF_THE_MARRIAGE_ACT)> accessed 9 August 2015.

<sup>136</sup> Kieron O'Hara, *Conservatism* (Reaktion Books 2011) 172-3.

<sup>137</sup> I am mindful, of course, that the state also has an economic interest in shifting family maintenance onto the individuals concerned.

<sup>138</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) 100.

<sup>139</sup> *Ibid* 101.

personal responsibility, whereas the egalitarian might also emphasise responsibility or they might rely upon notions of equality.

What can be said in conclusion? The knowledge principle suggests that conservatives are realistic about the shortcomings of human beings, so a degree of pragmatism might therefore be evident in a conservative approach to matters such as the clean break and post-divorce obligations. Support for the family in conservative thought is unequivocal, although there is disagreement over whether this extends to all family forms or just some. In contrast, support for equality is not ruled out, but contextualised. So in the event of a conflict, I would argue that support for the family should prevail over concerns about inequality. Where there is responsibility for more than one family then it might be argued that the approach should be to prioritise the responsibilities which were assumed first in time, ie to the first family. But again, a realistic view of the human condition could point to a more nuanced balancing of duties between family units in law and policy. The answers to the questions posed at the start of this section are admittedly rather broad-brush, but I think they are as specific as a conservative episteme permits at this point. What is clearer now is the conservative attitude towards property, equality and responsibility, and this attitude will become clearer still when examined in the context of specific legal developments in later chapters.

### **Should the state provide legal recognition of same-sex relationships, whether in the form of civil partnership or marriage?**

Conservatism – broadly defined - is often connected with contrarian arguments around same-sex marriage, chief among which are the ‘New Natural Law’ theory of John Finnis, Patrick Lee and Robert George, and the Hegelian offensive of Roger Scruton.<sup>140</sup> On the other side of the debate, most ‘conservative’ arguments in favour seem to be either conservative/libertarian or are only partially theorised. The conservative/libertarian position rests on a classical liberal reading of Mill’s harm

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<sup>140</sup> Roger Scruton, *Sexual Desire* (Weidenfeld and Nicolson, 1986); John Finnis, ‘Law, Morality, and “Sexual Orientation”’ (1993) 69 *Notre Dame Law Review* 1049; John Finnis, ‘The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations’ (1997) 42 *American Journal of Jurisprudence* 97; Patrick Lee and Robert George, ‘What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union’ (1997) 42 *American Journal of Jurisprudence* 135; Roger Scruton, *A Political Philosophy* (Continuum, 2006); Roger Scruton and Phillip Blond, *Marriage: Union for the Future or Contract for the Present* (ResPublica, 2013).

principle, and is one of the most common and compelling arguments for same-sex marriage. It is not, however, a *conservative* argument as I and others would see it,<sup>141</sup> and I set out below the reasons why. The other strand of conservative support for same-sex marriage tends to construct gay *men* in particular as the problem which can be fixed through assimilation into, and civilisation through, the institution of marriage, which in turn strengthens marriage.<sup>142</sup> This emphasises conservative family values such as commitment and stability. It has been an influential argument, but its success is in part due to its minimising of a conservative conceptualisation of change. This prompted me to attempt a synthesis of the conservative assimilationist position in favour of same-sex marriage, with a Burkean/Oakeshottian notion of change, and this is developed further below. In order to distinguish between these two approaches, I have called the latter a ‘classical conservative argument’. Before I develop that argument, I will consider the three other approaches mentioned above and attempt to explain how they differ from a classical conservative position.

### **The objection to same-sex marriage from natural law theory**

Natural law theory is encountered in political, moral, ethical and legal thought. It is the universalist theory that law derives from nature, although it varies in the extent to which appeal is made to a divine source for such law. It is associated with the likes of Aristotle, Aquinas (especially), Hobbes, Locke and – more recently – with the ‘New Natural Law theorists’ Finnis, George and the Catholic philosopher Germain Grisez. As the latter three have written particularly on contemporary sexual ethics, their work will inform my discussion here.

Finnis draws on Grisez’s work in moral theology when outlining his objection to homosexuality. In his work he sets out why homosexuality is wrong and why marriage alone is good and the only place in which sexual activity is acceptable. He writes that, regardless of whether the marriage is fertile or sterile ‘the communion, companionship, *societas* and *amicitia* of the spouses – their being married – *is* the very good of marriage, and is an intrinsic, basic human good, not merely

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<sup>141</sup> Eg George Carey (ed), *Freedom and Virtue: The Conservative/Libertarian Debate* (Intercollegiate Studies Institute 1998).

<sup>142</sup> Andrew Sullivan, ‘Here Comes the Groom: A Conservative Case for Gay Marriage’ (1989) 201 (9) *The New Republic* 20; Andrew Sullivan, *Virtually Normal* (Picador, 1995); Jonathan Rauch, ‘For Better or Worse?’ (1996) 214 (19) *The New Republic* 18; Jonathan Rauch, *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America* (Henry Holt 2004).

instrumental to any other good'.<sup>143</sup> He then goes on to consider extra-marital sex (hetero- or homosexual) and argues that because it is not an experience of the 'marital good...it can do no more than provide each partner with an individual gratification'.<sup>144</sup> This leads him climactically to his controversial conclusion that 'there is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it'.<sup>145</sup> Finnis condemns the actor in these scenarios for using his/her body as an instrument, which leads to a dis-integration of the self. Lee and George join Finnis in explaining why, for them, this dis-integration is so problematic: 'The integration of the various aspects of the self in action or in the self-awareness is a basic human good, an intrinsic aspect of fulfilment, the lack of which is a privation'.<sup>146</sup> Only in marital intercourse is there full integration. Being gay is therefore rejected as an acceptable expression of the good life and the state is charged with 'doing whatever it properly can...to discourage such conduct'.<sup>147</sup>

It is more appropriate, then, to label the new natural law theory as *orthodox* rather than conservative. Orthodoxy defends institutions because of 'a belief in their correspondence to some ultimate truth',<sup>148</sup> which may rest on religious or secular foundations but either way it transcends merely historical or contingent justifications. By contrast, it is such justifications which are the hallmark of conservatism proper: institutions (eg monarchy, church, family) are defended because they have proved themselves over time and too great a risk is posed by their diminution or destruction. Arguing that conservatism is actually a creature of the Enlightenment, Muller writes:

What makes social and political arguments *conservative* as opposed to *orthodox* is that the critique of liberal or progressive arguments takes place on the enlightened grounds of the search for human happiness, based on the use of reason.<sup>149</sup>

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<sup>143</sup> John Finnis, 'Law, Morality, and "Sexual Orientation"' (1993) 69 Notre Dame Law Review 1049, 1064.

<sup>144</sup> Finnis (n 143) 1066 (original author's emphasis).

<sup>145</sup> Ibid 1067.

<sup>146</sup> Patrick Lee and Robert George, 'What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union' (1997) 42 American Journal of Jurisprudence 135, 141 (emphasis added).

<sup>147</sup> Finnis (n 143) 1070 (original author's emphasis).

<sup>148</sup> Jerry Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press 1997) 4.

<sup>149</sup> Ibid 5 (original author's emphasis).

It is apparent that orthodoxy looms large in much Conservative argument over same-sex marriage. In chapter eight I classify as orthodox (and not therefore conservative) those arguments from Conservative legislators which argue against same-sex marriage based on a metaphysical appeal to the inviolability of the heteronormativity of marriage, without more.

### **The conservative/libertarian view**

Political parties which are usually considered to be conservative parties (such as the US Republican Party or the British Conservative Party) are also known for having a significant libertarian grouping within their ranks (especially in America), yet it is questionable to what extent conservatism and libertarianism are compatible. At its simplest libertarianism is a political philosophy which espouses liberty as the ultimate political end. Libertarianism is akin to classical liberalism in that they both claim Mill's harm principle as their 'golden rule', but the former is often seen as an extreme form of the latter. Assuming for a moment that such a view is valid, conservative libertarianism would emphasise, and seek to balance, freedom and individual liberty with a respect for virtue, tradition and order. However, thus expressed it is easy to see how Russell Kirk concludes it is inconceivable that there could be a coalition between conservatives and libertarians.<sup>150</sup> The terrain of this schism is mapped out by Robert Nisbet as follows:

On balance, I would hazard the guess that for libertarians individual freedom, in almost every conceivable domain, is the *highest of all social values* – irrespective of what forms and levels of moral, aesthetic, and spiritual debasement may prove to be the unintended consequences of such freedom. For the conservative, on the other hand, freedom, while important, is but *one of several necessary values* in the good or just society, and not only may but should be restricted when such freedom shows signs of weakening or

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<sup>150</sup> Russell Kirk, 'A Dispassionate Assessment of Libertarians' in George Carey (ed), *Freedom and Virtue: The Conservative/Libertarian Debate* (Intercollegiate Studies Institute 1998) 172; see also John Hospers, 'Differences of Theory and Strategy' in George Carey (ed), *Freedom and Virtue: The Conservative/Libertarian Debate* (Intercollegiate Studies Institute 1998) 163.

endangering national security, of doing violence to the moral order and the social fabric.<sup>151</sup>

It is the libertarian's acontextual privileging of liberty, and the concern it raises that libertarianism is only a small step from libertinism, that are so objectionable to conservatives. For the conservative, freedom is never abstract (freedom to do what?) and must be located within the restraints of social and moral authority. So, while I reject the claim that libertarianism is compatible with conservatism as I understand it, it is still important to state the libertarian argument in favour of the legal recognition of homosexual relationships because it is one which has featured in the parliamentary discourse. Put simply, the libertarian/classical liberal argument holds that civil partnership and same-sex marriage should not be forbidden absent proof that they would cause harm to others.

### **The conservative assimilationist argument**

One of the most prominent discursive strategies in England's journey towards civil partnership and same-sex marriage has been to describe same-sex and opposite-sex domestic relationships as functionally similar. They are thus characterised by a core of mutual love, out of which flows care, support, and a general sharing of lives. This is evident in cases such as *Fitzpatrick v Sterling Housing Association*<sup>152</sup> and *Ghaidan v Mendoza*,<sup>153</sup> and in media and parliamentary discourse around the Acts. Both former Conservative Party insiders, Danny Finkelstein thinks same-sex marriage is a 'profoundly conservative idea',<sup>154</sup> and Tim Montgomerie, citing the influence of Andrew Sullivan, sees marriage as 'conservatising' and 'so beneficial an institution it should be enlarged rather than fossilised'.<sup>155</sup> The success of this strategy has resulted from its emphasis on the essential sameness of gay and

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<sup>151</sup> Robert Nisbet, 'Uneasy Cousins' in George Carey (ed), *Freedom and Virtue: The Conservative/Libertarian Debate* (Intercollegiate Studies Institute 1998) 50 (original author's emphasis).

<sup>152</sup> [1999] 4 All ER 705 (HL). For discussions of the case see Lisa Glennon, 'Fitzpatrick v Sterling Housing Association Ltd – An Endorsement of the Functional Family?' (2000) 14 *International Journal of Law, Policy and the Family* 226 and Alison Diduck, 'A Family by Any Other Name...or Starbucks Comes to England' (2001) 28 *Journal of Law and Society* 290.

<sup>153</sup> [2004] 3 All ER 411 (HL).

<sup>154</sup> Danny Finkelstein, 'Gay Marriage – Such a Conservative Idea' *The Times* (London, 16 February 2011) 19.

<sup>155</sup> Tim Montgomerie, 'A Conservative Case for Gay Marriage' (*ConservativeHome*, 6 February 2012) <[www.conservativehome.com/thetorydiary/2012/02/a-conservative-case-for-gay-marriage.html](http://www.conservativehome.com/thetorydiary/2012/02/a-conservative-case-for-gay-marriage.html)> accessed 8 January 2014.

straight relationships; the homosexual 'other' being assimilated within the dominant heterosex paradigm.

The conservative assimilationist argument for same-sex marriage is often associated with Eskridge,<sup>156</sup> Rauch and Sullivan. As conservatism is (perceived to be?) most commonly deployed to refute same-sex marriage claims, the advancement of an affirmatory conservative case prompted Sullivan to call it 'one of the earliest twists' in the short history of agitation for same-sex marriage.<sup>157</sup> The argument comprises the following elements: marriage will civilise gay men; it would support the institution of marriage by an extension of 'family values' through society; and it is preferable to marriage-like (or –lite) reforms such as civil partnership, which might serve to undermine marriage. These are all explored further below.

The fundamental premise of the 'civilising' argument is not new: it has long been understood that one of marriage's functions has been as a means of socialising tendentially anti-social young males. Some conservatives, contrariwise, argue that same-sex marriage would pollute the virtuous heterosexual model, ie that causes arising in same-sex marriage result in effects in straight marriage. Sullivan and Rauch reject this supposition. Rather the conservative response should be to incentivise gay people, through a more inclusive notion of marriage, to conduct their relationships with monogamy and fidelity. The commitment required in marriage will act to stabilise and settle the otherwise flighty lifestyles of gay libertines and bring with it improvements in the health and general welfare of homosexual people. But these are untested assumptions,<sup>158</sup> or, one might say, they were untested at the time they were written. (Following the legal recognition of gay and lesbian relationships in many states, it might now be possible to test whether this hypothesis is valid.) It is worth noting that the civilising argument is predicated on a gay male subject, lesbians tend not to be conceived of as problematic, and are largely invisible in the discourse.<sup>159</sup>

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<sup>156</sup> William Eskridge, *The Case for Same-Sex Marriage* (The Free Press 1996).

<sup>157</sup> Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004) 146.

<sup>158</sup> James Wilson, 'Against Homosexual Marriage' in Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004) 160.

<sup>159</sup> Lesbians are certainly not invisible, however, in debates around legislation regulating parenthood, eg the Human Fertilisation and Embryology Acts of 1990 and 2008. For an insightful discussion of the 1990 Act and Conservative politics, see Davina Cooper and Didi Herman, 'Getting "The Family Right": Legislating for Heterosexuality in Britain, 1986-1991' (1991) 10 *Canadian Journal of Family Law* 411.

Secondly, same-sex marriage would lead to the diffusion of family values throughout society, thereby further accentuating the benefits of marriage as an institution. Not only does Sullivan believe that the traditional family can serve as a model for homosexual family life but that there can be beneficial counterflows too:

If constructed carefully as a conservative social ideology, the notion of stable same-sex relationships might even serve to buttress the ethic of heterosexual marriage, by showing how even those excluded from it can wish to model themselves on its shape and structure.<sup>160</sup>

It would also provide reliable caregivers, especially in old age, which would be particularly useful for same-sex couples who are less likely to have had children.<sup>161</sup>

Turning to the third point, Rauch also argues that it is better for the institution of marriage to permit same-sex marriage rather than provide a marriage-like alternative such as civil partnership. His logic is simple: legal forms which compete with marriage can only undermine marriage; the best way to support marriage as an institution is to preserve its exclusive status as the only legally recognised and socially privileged relationship form. Moreover, rather than establishing quasi-marriage institutions, some argue that if conservatives really believe that marriage is all they claim it is then they should go further and insist on same-sex marriage for those who claim to love and be committed to each other.<sup>162</sup>

One of the limitations of the conservative functionalist, assimilationist argument is that it has not yet been developed at a particularly high level of abstraction of conservative political thought. Rauch does briefly discuss Hayek<sup>163</sup> and Burke, particularly the conservative caution around radical revision of existing institutions, and he rightly points out that there is a direct relationship between the good that might be produced by a change and the risks associated with that change. For example, it might be argued that as same-sex marriage would remedy a substantial

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<sup>160</sup> Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004) 155.

<sup>161</sup> Amy Wax, 'The Conservative's Dilemma: Traditional Institutions, Social Change and Same-Sex Marriage' (2005) 42 *San Diego Law Review* 1059, 1101.

<sup>162</sup> David Brooks, 'The Power of Marriage' in Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004) 196.

<sup>163</sup> Hayek was a contemporary of Oakeshott and is well known for his work on classical liberal economic theory. Although he protested that he was not a conservative in his 1960 book *The Constitution of Liberty*, his thinking profoundly influenced the economic policy of the Thatcher governments in the 1980s.



injustice it is worth taking the risk that reform might harm the existing institution.<sup>164</sup> He also accepts the Burkean/Oakeshottian maxim that the burden of proof falls on him as the advocate of change, while observing that predictions of social catastrophe following earlier homosexual law reforms have not materialised. However, his discussion of the conservative problem of change from a Hayekian perspective is limiting. As Wax argues, Hayek is less apposite here because there is nothing he says which Burke and Oakeshott do not cover more fully and with a broader socio-economic vista.<sup>165</sup> What is needed, I contend, is a more deeply theorised discussion around same-sex marriage – particularly regarding the issue of change – grounded in conservative thought, and it is to this I now turn.

### **Going further - a classical conservative argument**

I have argued above that if it is being true to its ontological roots, conservatism does not value family for any normative reasons but because of its importance as an institution. A classical conservative argument for civil partnership and same-sex marriage would not be driven by naked appeals to universal principles of equality and fairness, but viewing the family primarily from a functional perspective, would state that if a family headed by a same-sex couple functions like a family headed by a heterosexual one then it should be given equal recognition. In this respect, the classical conservative position is not only consonant with the conservative argument outlined above, they are the same. I would argue where they differ, however, is in the former's principled treatment of change.

I have considered above how conservatism is concerned with the *management* of change and how change can be reconciled with established societal structures.<sup>166</sup> It might be argued, therefore, that same-sex marriage is consonant with this principle: same-sex couples were permitted to adopt children following the Adoption and Children Act 2002; civil partnerships were introduced in 2005; the Human Fertilisation and Embryology Act 2008 significantly enhanced the status of same-

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<sup>164</sup> Jonathan Rauch, 'For Better or Worse?' (1996) 214 (19) *The New Republic* 18; Jonathan Rauch, *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America* (Henry Holt 2004) chapter 9.

<sup>165</sup> Wax (n 161) 1065.

<sup>166</sup> Stefan Andreasson, 'Conservatism' in Vincent Geoghegan and Rick Wilford (eds), *Political Ideologies: An Introduction* (4<sup>th</sup> edn, Routledge 2014).

sex couples using artificial reproduction services; so could same-sex marriage be seen as the next incremental step?

How a conservative perceives a proposed change affects the likelihood that he or she will support and promote it. Does same-sex marriage *change* the concept of opposite-sex marriage, or do they just exist alongside each other, with each one catering for the needs of a different constituency? I would argue that where on a revolutionary-evolutionary scale of change a Conservative legislator perceives the legalisation of same-sex marriage affects how willing they are to support a change in the law. In the debates on the Marriage (Same Sex Couples) Bill, MPs who constructed same-sex marriage as a radical change – a redefinition of marriage – tended to oppose it, whereas others who saw it as merely extending the marriage franchise to same-sex couples approached it as an evolutionary change which could be accommodated within their conservative mindset.

So, how might insights from the knowledge and change principles inform a classical conservative argument in favour of same-sex marriage? In summary the argument might run something like this:

We value marriage because of its functional benefits and not for metaphysical reasons. We therefore have no objection on normative grounds to same-sex marriage and we recognise that in order to conserve the institution of marriage it might be necessary for it to change. But any change carries risks that marriage and society may be, somehow, damaged. In arguing for this change therefore we need to show that institutional and societal damage will not ensue, or at least that the risks of any damage are outweighed by the potential benefits of the change. And should unforeseen damage ensue, then it ought to be possible to reverse the change.<sup>167</sup>

In analysing the discourse in the parliamentary debates in chapter eight, I have looked for evidence that Conservative legislators have used this argument, or at least elements of it, in their speeches.

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<sup>167</sup> An earlier version of this argument appears in Andrew Gilbert, 'An Unnatural Union? – British Conservatism and the Marriage (Same Sex Couples) Act 2013' in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill 2015) 496-497.

## CONCLUDING REMARKS

In this chapter I have attempted to define and defend a particular type of conservatism, one which embodies an epistemological scepticism and a preoccupation with the effective management of change. As such, whilst not striving towards a particular vision of society, it does result in ascribing normative force to the status quo. When societal norms ossify into immutable dogma, I have argued that this stance becomes an orthodox, rather than a conservative, one.

The relationship between British conservatism and the legal regulation of intimate adult relationships sits at the intersection of these issues of tradition, orthodoxy and the challenges of change, which makes that relationship a fascinating and justifiable object of study. I accept that there are other readings of conservatism, but I contend that the one set out above is the one which most deserves to be considered 'British conservatism' because it emerged and developed closest to the root of the Conservative Party itself. It is therefore the reading which we *might* expect to have had most influence on the praxis of the Party.

Finally, just to be clear, in setting out this expression of conservatism I am not seeking to credit it with normative force, ie I am not arguing that it is necessarily the right way to govern society. My purpose is to use the theoretical framework in this chapter to analyse and critique the development of the law in the case study chapters which follow. The next chapter comprises the first case study and it considers the Matrimonial and Family Proceedings Act 1984.

## CHAPTER 4

### MARRIAGE AND DIVORCE IN TRANSITION – THE MATRIMONIAL AND FAMILY PROCEEDINGS ACT 1984

#### INTRODUCTION

The 1980s were a time of seismic change in British society. Under the Thatcher governments a number of important, and sometimes highly controversial, family law statutes were enacted, including the Matrimonial and Family Proceedings Act 1984, the Surrogacy Arrangements Act 1985, the Local Government Act 1988, the Children Act 1989, the Human Fertilisation and Embryology Act 1990 and (after Thatcher left office) the Child Support Act 1991. This chapter will focus on the Matrimonial and Family Proceedings Act 1984 (MFPA 1984), particularly its reduction in the minimum time limit for divorce from three years to one year and the introduction of the clean break principle (replacing the minimal loss principle) in ancillary relief. This chapter is enriched by insights into the law and policymaking process drawn from primary source material in the Conservative Party archive at the Bodleian Library in Oxford; the Thatcher Papers at Churchill College, Cambridge (with large amounts of online material); and at the National Archives at Kew (also with some online material). During the course of my doctoral research, official files have been released incrementally under the 30-year rule, and then under the 20-year rule from 2013, I have endeavoured to view relevant documents and to incorporate findings into my work.

There are two reasons why I chose to consider the MFPA 1984 over any of the other statutes listed above. First, the MFPA 1984 was the first major change in divorce law since 1970 and one which, unlike much divorce law before it, was government sponsored. The Law Commission recognised that the Bill emerged during a time of transition in the law's conception of marriage and divorce, from a view of marriage as a lifelong union with commitments that endured beyond divorce, to a more individualistic, contractual view of marriage consonant with the unilateral

divorce process initiated by the Divorce Reform Act 1969.<sup>1</sup> A wider shift, of which the transition in the nature of the marital bond is part, is identified by Jane Lewis, who sees it as a particular challenge for legislators: 'The fundamental dilemma for government at the end of the twentieth century has become how far it can or should treat adult family members as independent individuals'.<sup>2</sup> This chapter explores whether the MFPA 1984 reflected and reinforced that paradigm shift towards a more individualised understanding of marriage.

Second, the Act is 'a modest reform with the most profound implications'.<sup>3</sup> The non-prescriptive nature of English common law means that institutions such as marriage are more fully understood pathologically, ie we better understand law's expectations of married persons through a study of how law regulates the dissolution of the marriage bond, or as Freeman puts it, 'Divorce brings into perspective some of the main characteristics of marriage'.<sup>4</sup> In its paper on the financial consequences of divorce, the Law Commission expressed the view that we need first to work out what we think marriage is for before we begin to develop principles of ancillary relief.<sup>5</sup> But Pamela Symes, writing from a feminist and critical legal perspective, goes further and thinks that a study of divorce law has more to teach us: 'Divorce in fact takes the lid off marriage, exposes the issue of female dependency and reveals just how much has been taken for granted as appropriate family activity'.<sup>6</sup> She is right in that many of the law's positive obligations in marriage are never articulated and only become apparent as corollaries of law's negatives; for example, there is no express legal provision requiring sexual fidelity between married couples, but this is understood to be a normative expectation of marriage because section 1(2)(a) of the Matrimonial Causes Act 1973 provides that a divorce petition may be presented on the basis of the respondent's adultery. Similarly, there is nowhere in English law a requirement that a married couple must live together, but it is clear that it is

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<sup>1</sup> Law Commission, *The Financial Consequences of Divorce: The Basic Policy, A Discussion Paper* (Law Com No 103, 1980) para 92. Also of relevance here are the sociological works of Giddens and Beck and Beck-Gernsheim which set out their theses on changes in relationships in late modernity; see Anthony Giddens, *The Transformation of Intimacy* (Polity 1993) and Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press 1995).

<sup>2</sup> Jane Lewis, 'Family Policy in the Postwar Period' in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (OUP 2000) 82.

<sup>3</sup> Pamela Symes, 'Indissolubility and the Clean Break' [1985] 48 MLR 44, 46.

<sup>4</sup> Michael Freeman, 'When Marriage Fails – Some Legal Responses to Marriage Breakdown' (1978) 31 (1) CLP 109, 139.

<sup>5</sup> Law Commission (n 1).

<sup>6</sup> Symes (n 3) 55.

expected they will do so because section 1(2)(c) allows a petitioner to seek a divorce upon the respondent's desertion. So the MFPA 1984 is worthy of study because of what it reveals about Conservative attitudes towards marriage and the treatment of family members upon divorce. However, before examining the MFPA 1984's genesis and evolution, this chapter will first locate the Act in its political context.

## THE POLITICAL CONTEXT - THE NEW RIGHT

It is necessary first to understand the New Right in order to understand the nature of the Thatcherite project – for Thatcherism drew its ideological water from the well of New Right thinking. Ruth Levitas notes that there is little consensus about the meaning of the New Right.<sup>7</sup> In the volume she edited, it is taken to represent a number of perspectives encompassing a neo-liberal, laissez-faire economism, coupled with authoritarian conservatism with elements of, what she calls, 'repressive puritanism'.<sup>8</sup> It is this presence of both neo-liberal and neo-conservative strands in New Right thinking (with their potential for paradox and contradiction) that gives rise to differing interpretations. It is contended here, however, that the New Right contains a fairly solid core of meaning which is discernible in the writing of a broad range of commentators.

The New Right held social democracy responsible for the toxic mix of high inflation and taxation, relative economic decline, a bloated and complacent public sector, and high welfare spending and dependency, which was steadily poisoning Britain. In light of this analysis, Andrew Gamble identifies what he believes to be at the heart of the New Right: 'The key doctrine of the New Right and the political project it inspired is therefore the doctrine of the free economy and the strong state'.<sup>9</sup> He goes on to perceive that this dichotomy involves a paradox: the state is simultaneously being rolled back (mostly in the economic sphere) and rolled forward (mostly in the social and moral sphere).<sup>10</sup> In some areas the state will be non-interventionist, even laissez-faire, while in others it will be authoritarian, even moralising. And although there are trends and consistencies in the state's approach, there are also areas of incoherence and, occasionally, antinomy (notably, I would

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<sup>7</sup> Ruth Levitas (ed), *The Ideology of the New Right* (Polity Press 1986) 1.

<sup>8</sup> Ibid 2.

<sup>9</sup> Andrew Gamble, *The Free Economy and the Strong State* (2<sup>nd</sup> edn, Macmillan 1994) 35.

<sup>10</sup> Ibid 36.

argue, in the area of family law and policy). Dennis Kavanagh also identifies the key tension in the New Right as existing between liberalism on economic issues and authoritarianism on social issues.<sup>11</sup> Both find expression in Thatcherism's commitment to the free market and to socially authoritarian 'Victorian values'. The neo-liberals prioritised the free market and individualism, while the neo-conservatives emphasised the value of community and social order. Andrew Belsey sees neo-liberalism as consisting of: (1) the individual, (2) freedom of choice, (3) market society, (4) laissez-faire, (5) minimal government; whereas neo-conservatism values: (1) strong government, (2) social authoritarianism, (3) disciplined society, (4) hierarchy and subordination, (5) the nation.<sup>12</sup> It is easy to see how these principles may conflict; for example, the effects of free market individualism may induce a weakening of social cohesion. And Lewis' observation above about individualisation within the family chimes with this intrinsic tension in New Right theory and practice.

What were the intellectual foundations of the New Right movement? O'Gorman traces the intellectual inspiration for the New Right to Hayek's *Road to Serfdom* which was published in 1944.<sup>13</sup> Hayek's work emerged at a time when the prevailing political and economic winds in Britain were blowing very much in the opposite direction. Yet the postwar Conservative Party accepted the collectivist turn in British polity, economy and society so much so that it is conventional to talk of 'the postwar consensus'. While for many Conservatives this acceptance was simply the latest manifestation of the pragmatic and organic nature of conservatism, going with the grain of a less deferential and more egalitarian society, others – such as Keith Joseph – warned against the 'ratchet effect' of socialism,<sup>14</sup> and to some – such as Enoch Powell – socialism was always an anathema which should never have been accommodated by a British Conservative Party.<sup>15</sup> Hayek's critique of socialism focussed on what would become the New Right's core belief: that collectivism was a fundamental attack on personal freedom, and competitive capitalism is the environment in which individual liberty and democracy can find their fullest

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<sup>11</sup> Dennis Kavanagh, *Thatcherism and British Politics: The End of Consensus?* (2<sup>nd</sup> edn, OUP 1990) 106.

<sup>12</sup> Andrew Belsey, 'The New Right, Social Order and Civil Liberties' in Ruth Levitas (ed), *The Ideology of the New Right* (Polity Press 1986) 173.

<sup>13</sup> Frank O'Gorman, *British Conservatism: Conservative Thought from Burke to Thatcher* (Longman 1986) 52.

<sup>14</sup> Richard Vinen, *Thatcher's Britain* (Simon & Schuster 2010) 46.

<sup>15</sup> Robert Blake, *The Conservative Party from Peel to Major* (Arrow Books 1998) 308.

expression.<sup>16</sup> The New Right also drew support from the writings of American monetarist economist Milton Friedman, who argued that government intervention in the market suffocated the very entrepreneurial activity which alone can create wealth and lead to sustained economic growth. Furthermore, high government spending and generous welfare payments deaden initiative and lead to higher taxes and inflationary pressure.

The election of Margaret Thatcher as Party leader in 1975 and the publication in 1976 of *The Right Approach*,<sup>17</sup> with its marriage of neo-liberal emphasis on free markets and a neo-conservative call for a return to traditional values and common sense, signalled a clean break with the Heathite halfway house of trying to reinvigorate the British economy without fundamental revision of the collectivist apparatus and spending levels put in place since 1945. The two Conservative historians Blake and Ramsden agree that, when it comes to understanding Thatcher's electoral success, the confluence of New Right ideas and the political events of 1970s Britain is crucial: '[I]t is clear that the ideological tide was carrying the Conservatives forward throughout the years between Mrs Thatcher's ascent to the leadership and the election of 1983'.<sup>18</sup> I turn next to consider that particular expression of New Right polity which came to be known as Thatcherism.

## Thatcherism

Most works on Thatcher and Thatcherism seem somewhere to contain a reference to a particular unique contribution of hers, namely the conjunction of her surname with the suffix -ism.<sup>19</sup> While others may have had their names converted into adjectives (Churchillian, Blairite), only hers has become a noun. Her legacy remains a controversial one, but it is accepted on all sides of the political spectrum that her contribution was significant in so far as it brought about lasting structural change in the United Kingdom. Whilst this chapter acknowledges, and to some extent explores, Thatcher's profound personal impact on British society, it rejects the 'one

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<sup>16</sup> Frank O'Gorman (n 13) 52.

<sup>17</sup> Conservative Party, *The Right Approach: A Statement of Conservative Aims* (Conservative Central Office, 1976).

<sup>18</sup> Blake (n 15) 342; see also John Ramsden, *An Appetite for Power: A History of the Conservative Party since 1830* (HarperCollins 1999) chapter 16.

<sup>19</sup> Peter Taylor, 'Changing Political Relations' in Paul Cloke (ed), *Policy and Change in Thatcher's Britain* (Pergamon Press 1992) 33; Andrew Gamble, *The Free Economy and the Strong State* (2<sup>nd</sup> edn, Macmillan 1994) 3.



great [wo]man of history' approach and instead seeks to understand the Thatcherite project more broadly, albeit within the specific context of family law and policy. By all accounts Thatcher was a forceful personality who knew how to get her way, nevertheless she functioned within a political cabinet, located within a parliamentary party, situated within a parliamentary system of participative democracy, and her contribution should be understood within such a nexus.<sup>20</sup>

There is no single, uncontested meaning of 'Thatcherism'.<sup>21</sup> In seeking to understand it, Marsh has warned that a uni-dimensional approach to its analysis produces lop-sided accounts which overemphasise certain elements, eg the influence of New Right ideology or the push for political hegemony.<sup>22</sup> It cannot also be reduced to being just about Thatcher as a political personality because it was not just created and sustained by her and was more than just about leadership style and political presentation. Thatcherism was not 'whatever Margaret Thatcher herself at any time did or said'.<sup>23</sup>

I agree with Vinen that '[i]f Thatcherism meant anything, it meant power'.<sup>24</sup> He also argues that Thatcherism makes more sense if it is studied largely through the words and deeds of ministers, and this discursive location is something I concentrate on in my analysis of the legislation below; for it was they who played a crucial role in the conversion of ideas (from the Law Commission, think tanks etc.) into policy and law. In the words of one such minister, Thatcherism was '[a] mixture of free markets, financial discipline, firm control over public expenditure, tax cuts, nationalism, "Victorian Values" (of the Samuel Smiles self-help variety), privatization and a dash of populism'.<sup>25</sup> It was also an English, rather than a British, phenomenon as it never commanded much electoral support in the other nations of the United Kingdom.<sup>26</sup> As Thatcher herself put it, 'There was no Tartan Thatcherite revolution.'<sup>27</sup> This point

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<sup>20</sup> This is an example of situated agency, which I discuss in my methodology section in chapter one.

<sup>21</sup> Gamble (n 19) 3.

<sup>22</sup> David Marsh, 'Explaining Thatcherism: Beyond Uni-Dimensional Explanation' in Patrick Dunleavy and Jeffrey Stanyer (eds), *Contemporary Political Studies* (Political Studies Association of the United Kingdom 1994).

<sup>23</sup> Nigel Lawson quoted in Richard Vinen, *Thatcher's Britain* (Simon & Schuster 2010) 180.

<sup>24</sup> *Ibid* 57.

<sup>25</sup> Nigel Lawson's definition quoted in Vinen, *ibid* 274.

<sup>26</sup> At its highest following the 1983 General Election, the Conservative Party held 397 (of 650) seats, of which only 21 were in Scotland, 14 in Wales and none in Northern Ireland (David Butler and Gareth Butler, *Twentieth-Century British Political Facts 1900-2000* (8<sup>th</sup> edn, Macmillan 2000) 240-241).

<sup>27</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 618.

is apposite because the relevant sections of the MFPA 1984 only apply to England and Wales.

Gamble identifies three overriding objectives of Thatcherism: to restore the Conservative Party's political fortunes; to revive market liberalism as the dominant public philosophy; and to enable a free economy by limiting the scope of the state while restoring its authority and competence to act.<sup>28</sup> He rightly rejects any claim that Thatcherism was a coherent policy programme in 1979. Such a prescriptive approach would never work in British politics (regardless of which party was behind it) and it would also be profoundly un-conservative. But it did have a sense of longer term, strategic direction and a pragmatism that provided flexibility and adaptability within that strategic framework. Vinen is not surprised that Thatcherism lacked coherence when Thatcher herself did not value such a quality as an end in itself: 'For all her apparent dogmatism, she was, at least at crucial moments in her career, a pragmatist who avoided fights that could not be won and who recognized the importance of tactical flexibility'.<sup>29</sup> The Thatcherite apologist Shirley Letwin devoted much energy to arguing that Thatcherism was a pragmatic, non-ideological expression of governing within the conservative tradition: 'Thatcherism is in essence a practical response to a historical state of affairs...And that response falls into three distinct parts, relating respectively to individuals, families and the state'.<sup>30</sup> So it clearly mattered to some that a case could be made for Thatcherism being a contemporary manifestation of conservatism, but was it?

### **The New Right, Thatcherism and the conservative tradition**

To what extent were the New Right and Thatcherism compatible with the political philosophy of conservatism? The short answer is that they were more compatible with some aspects of it than with others. O'Gorman finds consistencies in their emphases on thrift, efficiency, competition and individualism, all in the context of freedom from an interfering government.<sup>31</sup> Contrariwise, 'the almost biblical commitment to monetarism'<sup>32</sup> and the rational economic man at its core seem to

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<sup>28</sup> Andrew Gamble, *The Free Economy and the Strong State* (2<sup>nd</sup> edn, Macmillan 1994) 4.

<sup>29</sup> Vinen (n 23) 290.

<sup>30</sup> Shirley Robin Letwin, *The Anatomy of Thatcherism* (Fontana 1992) 31.

<sup>31</sup> Frank O'Gorman, *British Conservatism: Conservative Thought from Burke to Thatcher* (Longman 1986) 57-58.

<sup>32</sup> *Ibid* 58.

depart from a tradition of scepticism towards grand theories of society and a belief in the imperfection of mankind explored in the previous chapter.

O’Gorman also considers that the Party’s emphasis on market forces as the cure for so many ills is at variance with a more diverse approach in the past. He questions the assumption that market forces are naturally accompanied by political liberty and political and social stability, and points to a time when traditional conservative values have been most evident as coinciding with a period of state intervention to stabilise and moderate market forces.<sup>33</sup> In many ways the New Right embodied the essential tension at the heart of the Conservative Party in the last century, namely that between free enterprise and state control; a tension which also pervaded its approach to the legal regulation of marriage and divorce. Arguably though, to the extent that Thatcherism acted as a corrective to a contemporary problem, its uncharacteristically doctrinaire approach can be seen as of its time and for its time: the pragmatic Conservative Party again doing what was necessary to ensure its political success.

However, it is clear that Thatcherism and the New Right diverge from the conservative disposition outlined in the previous chapter. Eccleshall observes that ‘[Thatcherism’s] radical zeal certainly put an end to the assumption that conservatism consists in a Burkean reverence for tradition and a distaste for political upheaval’.<sup>34</sup> And in February 1985 Edward Heath opined, ‘I don’t believe that what we’ve got now is true Conservatism. It’s 1860 Laissez-Faire Liberalism that never was’.<sup>35</sup> There were, though, points of alliance between Thatcherism and classical conservatism and these emerge in the discussion which follows, namely the importance of authority, a respect for institutions (specifically family and marriage), and a cautious disposition towards reliance on experts. Yet while these parallels are strong, I have not found it possible to say whether, and if so to what extent, Conservatives from that period *consciously* referenced those, such as Burke, whose work defines the conservative essence. It has also been beyond the scope of my study to examine in detail any possible linkages between the family law and policy discussed below and similar law and policy in other jurisdictions.<sup>36</sup> That said, there

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<sup>33</sup> Ibid.

<sup>34</sup> Robert Eccleshall, *Political Ideologies: An Introduction* (3<sup>rd</sup> edn, Routledge 2003) 62.

<sup>35</sup> Quoted in O’Gorman (n 31) 58.

<sup>36</sup> For a useful introduction to the study of policy transfer, see David Dolowitz and David Marsh, ‘Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making’ (2000) 13 *Governance* 5.

is little reference in the primary material cited below to practices in other states, but I have endeavoured to note any references where necessary. Before considering the MFPA 1984 in detail, the next section attempts to chronicle the development of family policy in the Conservative Party from the mid-1970s.

## **THE CONSERVATIVE PARTY AND FAMILY POLICY PRIOR TO THE MFPA 1984**

I argue that the Conservative Party began to think seriously about the notion of family policy (as defined in chapter one above) in the mid to late 1970s, although its development was often at the peripheries of the Party until the early 1980s when it then assumed a more central location in Party deliberations. There is no evidence that family policy expressly formed part of the agenda of any Shadow Cabinet meetings during the years Thatcher was Leader of the Opposition from February 1975 to May 1979.<sup>37</sup> During that period a statement of Party doctrine, *The Right Approach*,<sup>38</sup> was endorsed at the 1976 party conference. It contained standard catachismal references to encouraging family life<sup>39</sup> and ‘a sound family life lies at the heart of a healthy society’,<sup>40</sup> but nothing by way of family policy per se. Some of this thinking was developed further in *The Right Approach to the Economy*.<sup>41</sup> Significant work was also done on its counterpart *The Right Approach to Social Policy*, with a first draft prepared by the Conservative Research Department (CRD) Home Affairs Section and sent to Keith Joseph for comment on 16 May 1978,<sup>42</sup> but this was never published because of sharp disagreement between senior shadow cabinet members over tax credits.<sup>43</sup> The draft contained an uncritical appraisal of the Conservative Party’s record on family policy to date: ‘The importance of family life is paramount and Conservatives have adopted those policies on housing,

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<sup>37</sup> See the following documents in the Conservative Party Archive: LCC 1/3/5; LCC 1/3/6; LCC 1/3/7; LCC 1/3/8; LCC 1/3/9; LCC 1/3/10; LCC 1/3/11; LCC 1/3/12; LCC 1/3/13; LCC 1/3/14; LCC 1/3/15; LCC 1/3/16/1; LCC 1/3/16/2.

<sup>38</sup> Conservative Party, *The Right Approach: A Statement of Conservative Aims* (Conservative Central Office, 1976).

<sup>39</sup> *Ibid* 8.

<sup>40</sup> *Ibid* 57.

<sup>41</sup> Conservative Party, *The Right Approach to the Economy* (Conservative Central Office 1977).

<sup>42</sup> Letter from John Houston to Keith Joseph, CRD 4/7/71, 16 May 1978; Conservative Research Department, ‘The Right Approach to Social Policy’ (CRD 4/7/71, 1978).

<sup>43</sup> Florence Sutcliffe-Braithwaite, ‘Neo-Liberalism and Morality in the Making of Thatcherite Social Policy’ (2012) 55 *The Historical Journal* 497, 507.

education, taxation and social services which will do most to strengthen it'.<sup>44</sup> It argued, however, that this sectional approach was inadequate and what was needed was for all government legislation to carry a 'Family Impact Statement, assessing the consequences for family life'.<sup>45</sup> Arguments around Family Impact Statements abounded in the late 1970s, but it was not until October 2014 that the idea crystallised into hard policy.<sup>46</sup> It also bemoaned the UK's low level of child benefit and claimed that it 'produced a number of undesirable consequences', including '[m]any mothers with young children have been forced by financial circumstances, against their will, to neglect their children and find paid work'.<sup>47</sup> 'Fathers' were largely invisible in the Party discourse of the time: much of the emerging Conservative 'family policy' was actually 'mother policy' or 'women policy'.

In September 1977 a report emerged from the CRD headed 'Family Policy'.<sup>48</sup> It began by noting the 'recent revival of interest in family policy among Conservatives',<sup>49</sup> but then doubted whether it would be possible to formulate a family policy as many obstacles lie in the way of securing agreement on its objectives.<sup>50</sup> The report listed fourteen possible objectives, including ensuring tax neutrality between working mothers and mothers at home, and strengthening the institution of marriage.<sup>51</sup> It closed with a call for more information on public attitudes to family policy, which resulted in the Party commissioning the Opinion Research Centre Survey on Family Policy.<sup>52</sup> The research surveyed a representative sample of 1001 electors during March 1978. Surprisingly perhaps, it revealed that the concept of family policy was largely connected with education and welfare benefits in the mind of the average elector. Most electors did not tend to locate divorce, ancillary relief and the taxation of married couples within the notion of 'family policy',<sup>53</sup> and the authors thought that there might be a problem communicating 'family policy' to voters.<sup>54</sup> The percentage of respondents who thought government

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<sup>44</sup> Conservative Research Department, 'The Right Approach to Social Policy' (CRD 4/7/71, 1978) 2.

<sup>45</sup> Conservative Research Department (n 44) 3.

<sup>46</sup> Department for Work and Pensions, *The Family Test: Guidance for Government Departments* (DWP 2014); see also Lorraine Fox Harding, *Family, State and Social Policy* (Macmillan 1996) 219.

<sup>47</sup> Conservative Research Department (n 44) 8.

<sup>48</sup> Conservative Research Department, 'Family Policy' (CCO 170/5/19, 1977).

<sup>49</sup> *Ibid* 1.

<sup>50</sup> *Ibid* 4.

<sup>51</sup> *Ibid* 5.

<sup>52</sup> Opinion Research Centre Survey on Family Policy (CCO 180/9/5/3, 1978).

<sup>53</sup> *Ibid* ii.

<sup>54</sup> *Ibid* 1.

should pay most attention to ‘marriage and divorce laws’ (from the family policy issues list) was so small it failed to register.<sup>55</sup> A majority of respondents also thought it was ‘a bad thing’ for mothers of young children to work (59%), with just 12% regarding it as ‘a good thing’.<sup>56</sup>

The Party considered further data from an advertising agency (McCann-Erickson) survey of 800 young people aged between 10-25 in September 1977. The survey data are valuable for what they reveal about the attitudes of young people who grew up in the more liberal climate of the 1960s and 1970s, and for what that might mean for policymakers not just in the late 1970s, but also in the decades which followed. 59% of respondents thought divorce was ‘right’, and 60% thought it was something which might happen to them;<sup>57</sup> 35% of men thought that ‘a woman’s place is in the home’, with 18% of women being of that view.<sup>58</sup> Concerning homosexuality, 34% thought it was ‘right’, leading the authors to reflect, ‘While Gay Liberation still has a considerable way to go, these findings indicate a high level of tolerance’.<sup>59</sup>

The programme for the 1977 party conference contained a first for the Party – the first debate dedicated to ‘The Family and Conservative Policy’; although its potential impact was surely overstated by Christopher Mockler (CRD policy advisor) in a note to Lady Janet Young: ‘If [the debate is] handled successfully then the development of family policy within the party will be made very much easier and *the direction of Conservative social policy altered in a highly significant fashion*’.<sup>60</sup> However, the debate was clearly not a token effort, being the longest session of the entire conference at 110 minutes. Janet Young opened the debate. She was to be a vocal advocate of the traditional family in the Conservative Party for the next two decades. Described as ‘a force of nature’, she was the first female Leader of the House of Lords and was the only woman appointed to the cabinet by Thatcher.<sup>61</sup> Her speech contained a fairly inclusive definition of the family (one which would become less

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<sup>55</sup> Ibid 2.

<sup>56</sup> Ibid 10.

<sup>57</sup> McCann-Erickson Report (CCO 170/5/19, 1977) 14.

<sup>58</sup> Ibid 15.

<sup>59</sup> Ibid 39.

<sup>60</sup> Letter from Christopher Mockler to Janet Young, CCO 170/5/19, 21 September 1977 (emphasis added). Baroness Young was the only woman appointed to cabinet by Margaret Thatcher. She was a fervent advocate of traditional family values throughout the 1980s and 1990s.

<sup>61</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 221.

inclusive in future years),<sup>62</sup> encompassing ‘one parent families’, and advanced the themes of encouraging self-reliance and less state control of the family.<sup>63</sup> She hoped the Party would develop ‘a policy for the family’ which directed wider policy-making in accordance with the theme ‘More power to the family’.<sup>64</sup>

These ideas gained some traction at the highest level of the Party because the 1979 manifesto set out the following, under ‘Helping the Family’, as the Party’s ‘task’ number four:

To support family life, by helping people to become home-owners, raising the standards of their children's education, and concentrating welfare services on the effective support of the old, the sick, the disabled and those who are in real need.<sup>65</sup>

Regardless of whether these proposals were really about supporting family life or more to do with creating opportunities for fiscal reform and cutting welfare provision (or a combination thereof), a sufficient number of the electorate bought the Conservative argument for change, and on 3 May 1979 the Party won the general election with a majority of 44 seats.

### **The family policy groups**

Evidence that the Party was taking family policy more seriously can be seen in that, during that first term, two ‘Family Policy Groups’ were established, one at senior Party level and the other an informal group at cabinet level. The Party-level group ran from around July 1980, and the cabinet-level one from May 1982.<sup>66</sup>

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<sup>62</sup> Janet Young, ‘Standing Up for the Family’ (Centre for Policy Studies Lecture at the Conservative Party Conference, Bournemouth, 4 October 2000) – ‘I mean by a family a couple, consisting of a husband and a wife, with or without children, living together throughout their lives. I include, too, the extended family, that is grandparents and other relatives.’

<sup>63</sup> Janet Young, ‘Speech to the Conservative Party Conference on “The Family and Conservative Policy”’ (CCO 170/5/19, 12 October 1977) 3.

<sup>64</sup> Young (n 63) 4.

<sup>65</sup> Conservative Party, *1979 General Election Manifesto* (Conservative Party 1979).

<sup>66</sup> At the time of writing (October 2015) it is not possible to say when these groups were wound up because the files of their activities are still being released on a rolling basis under the 20-year rule.

The Party-level Family Policy Group (PFPG) seemed to come about through the force of personality of the triumvirate of Ladies Howe, Trumpington and Young.<sup>67</sup> The PFPG's terms of reference encompassed a broad sweep of examining employment opportunities for women, the treatment of married women in the tax system, and progress in pre-school provision (evidence again of 'women policy'). But also specifically:

To consider the measures already taken to strengthen the family; and what more (including strengthening parental and juvenile responsibility for crime, truancy and other misbehaviour) might be done to that end, particularly in a society in which unemployment remains high.<sup>68</sup>

And further, illustrating the 'fundamental dilemma' identified by Lewis above:

The Policy Group has therefore based its proposals on two themes: first support for the family, and second and equally important freedom of choice for its members...The family is an independent unit, separate from, though influenced by the state. It stands for stability, continuity and self help. Its support for the individuals within it encourages self sufficiency and makes it our greatest national asset. When it fails, the cost both to the individuals concerned and to the state is immense...The role of women has been radically transformed. There has been a very large increase in the number of married women in employment. This change is here to stay; women should have the freedom of choice to work outside the home as well as within it.<sup>69</sup>

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<sup>67</sup> Letter from Chris Mockler to Alan Howarth, CRD 4/23/3, 21 December 1979; letter from Baroness Trumpington to Peter Thorneycroft, CRD 4/23/3, 11 March 1980; letter from Peter Thorneycroft to Alan Howarth, CRD 4/23/3, 14 March 1980?; letter from Elspeth Howe to Peter Thorneycroft, CRD 4/23/3, 24 March 1980; letter from Alan Howarth to Baroness Trumpington, CRD 4/23/3, 24 March 1980; letter from Alan Howarth to Janet Young, CRD 4/23/3, 14 July 1980. Elspeth Howe was then a lady by virtue of being the wife of then Chancellor of the Exchequer Sir Geoffrey Howe; Baroness Trumpington (Jean Barker) is a life peer, as was Baroness Young. Janet Young chaired the PFPG and was also a member of the CFPG.

<sup>68</sup> Report of the Family Policy Group, THCR 2/7/3/9 f65, 1 March 1983, unnumbered preface.

<sup>69</sup> Ibid 1.



The PFFG took the view that the Government was already doing much to help the family in its introduction of the Tenants Charter and Parents Charter, as well as its encouragement of home ownership. However, it did propose that the tax system should be neutral as to whether a woman should work or not and that personal allowances should be transferable between spouses.<sup>70</sup> They also wanted to see the growth of schemes which facilitated women's employment: part-time and shared working, as well as better provision for pre-school children. They also stated:

Positive measures should be taken to try and help marriage, as the basis of family life, to survive. We support the conciliation services where these exist, and believe they should be extended.<sup>71</sup>

Two main themes emerged: that the family should be encouraged and supported, and that freedom of choice should be extended to its members (by which it clearly meant *women* members).<sup>72</sup> And on the relationship between the state and the family generally the PFFG made the following highly illuminating statement:

Reinforced by the findings of the poll, the Group believes that it is not the Government's job to persuade women to work or not to work. Indeed, in this respect it is not the Government's job, except in national emergencies such as war, to tell families and individuals what to do.<sup>73</sup>

They found the increase in the divorce rate and the consequent numbers of children affected 'alarming'; and '[t]he effects of divorce not only on the families themselves but on the general stability of the community are immense'.<sup>74</sup> But despite this alarm, the PFFG had nothing to prescribe for this social ill other than increased use of conciliation.

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<sup>70</sup> Ibid 2. It seems likely that the Group wanted tax allowances to be transferable between spouses only, although there is some ambiguity in their discussion which makes it possible that they would also have wished to include unmarried cohabiting parents. It took until 1997 for there to be a manifesto commitment to implement transferable personal allowances between spouses (Conservative Party, *You Can Only Be Sure With the Conservatives, 1997 General Election Manifesto* (Conservative Party 1997)).

<sup>71</sup> Ibid 3.

<sup>72</sup> Ibid 1.

<sup>73</sup> Ibid 3.

<sup>74</sup> Ibid 10.

The Cabinet-level Family Policy Group (CFPG)<sup>75</sup> emerged from a paper written for Thatcher in May 1982 by the head of the Number 10 Policy Unit, Ferdinand Mount, entitled 'Renewing the Values of Society'.<sup>76</sup> Mount had published that same year his book *The Subversive Family*,<sup>77</sup> with its historical defence of the nuclear family which aligned Mount 'with the liberal individualist strand within the New Right',<sup>78</sup> yet his relaxed, pragmatic attitude to divorce was clearly in a more libertarian mould.<sup>79</sup> His paper did not centre on the family as such, but on matters concerning children and schools. It contained an eclectic mix of ideas, ranging from teaching pupils guitar during the summer holidays, setting up a 'Children's Broadcasting Corporation',<sup>80</sup> and rent-based mortgages, but there is evidence of the New Right values (it is these which they were seeking to 'renew') of authority, personal responsibility and the minimal state bringing unity to this diverse discussion. In any event, Thatcher scribbled her approval on the document: 'I am very pleased with these ideas'.<sup>81</sup> The paper was then 'tidied up' and circulated to certain ministers, this time opening with a quotation from the 1979 manifesto: 'We want to work with the grain of human nature, helping people to help themselves – and others'. This emollient tone actually runs counter to many of the authoritarian prescriptions in the paper, but it does help to explain why the paper contains no proposals to try to reverse the liberal trends in family law since the 1960s. At the Prime Minister's request the group became known as the 'Family Policy Group' in July 1982, although it is not obvious that 'family' is an apt umbrella term for the issues under consideration. 'Social Policy

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<sup>75</sup> The membership of the group comprised Margaret Thatcher (Prime Minister), William Whitelaw (Home Secretary), Geoffrey Howe (Chancellor of the Exchequer), Keith Joseph (Secretary of State for Education and Science), Michael Heseltine (Secretary of State for the Environment), Patrick Jenkin (Secretary of State for Industry), David Howell (Secretary of State for Transport), Norman Fowler (Secretary of State for Social Services), Janet Young (Lord Privy Seal), Norman Tebbit (Secretary of State for Employment), Cecil Parkinson (Chancellor of the Duchy of Lancaster), Home Office Minister (Tim Raison), Sir Robert Armstrong (Cabinet Secretary), John Sparrow (Head of the Central Policy Review Staff), Ferdinand Mount (Number 10 Policy Unit). It is notable that, of the group's fifteen members, only two were women.

<sup>76</sup> PREM 19/783, 26 May 1982.

<sup>77</sup> Ferdinand Mount, *The Subversive Family: An Alternative History of Love and Marriage* (The Free Press 1992).

<sup>78</sup> Pamela Abbott and Claire Wallace, *The Family and the New Right* (Pluto Press 1992) 71.

<sup>79</sup> 'The rate of divorce is not in itself an argument against marriage, any more than the number of bad poems is an argument against poetry. The risk of failure is not to be avoided. What modern divorce laws ensure is that at least the risks are known. If, in spite of these risks being so publicly advertised, young people persist in rushing into this perilous enterprise, there is, in a democracy, little more to be said. All efforts to bring marriage back under some kind of public control are, quite simply, illegitimate. For if freedom is perilous, it is also irreplaceable and unanswerable.' Mount (n 77) 218.

<sup>80</sup> PREM 19/783, 26 May 1982, 4.

<sup>81</sup> *Ibid*, unnumbered opening page.

Group' seems a much better fit, but I speculate that the use of the word 'social' did not sit comfortably with the Party leadership of the time.

By November 1982 the purpose of the group had been refined, and was:

[T]o ensure that all the Government's domestic policies help to promote self-respect and a sense of individual responsibility. We are concerned with the overall well-being of the family, and not solely or specifically with the provision of welfare by the state...<sup>82</sup>

Personal responsibility was to replace a collectivist attitude to family policy. Seven 'priority themes' and three 'reserve themes' were identified, although Thatcher thought this too many. The following table sets out when the group met and the main issues discussed at each meeting.

<b>Date of Meeting</b>	<b>Subjects Discussed</b>
20 July 1982	Discussed Mount's paper: property ownership; education; community facilities; industry
10 September 1982	Taxation; social security; education; law and order; preparation for parenthood; council house sales
30 November 1982	Taxation of husband and wife
9 February 1983	The elderly (care within the family; housing)
15 February 1983	Assured tenancies; council house sales; the management of problem estates
9 March 1983	Use of school sports facilities outside school hours; preparation/education for parenthood
19 April 1983	Self-help family centres; charity law

The taxation paper from the 30 November meeting was prepared by the Chancellor of the Exchequer, Geoffrey Howe, who favoured moving to a system of transferable personal allowances. He argued that the existing system, which was based on a model of the wife being financially dependent upon the husband, was increasingly difficult to defend in the late twentieth century. Thatcher demurred, believing that it

<sup>82</sup> Ferdinand Mount, 'A Guidance Note for Officials' (FP/82/1, 1 November 1982).

was not actually that difficult politically to defend the status quo, and perhaps she was right because the Married Couples' Allowance survived until 2000. It was, though, perhaps odd that the CFPG did not grasp the nettle of reforming the 'shambles' of a personal taxation system which 'favour[ed] and encourage[d] separation and divorce'.<sup>83</sup>

Another area which emphasised women's economic dependence was the Invalid Care Allowance (ICA). ICA applied only to single people and married men caring for seriously disabled family members. It could not be claimed by carers who were married women, presumably because they were conceived not to be otherwise in receipt of an independent income, the loss of which needed to some extent to be compensated through the benefit system. The wife was expected to be a caregiver, and to do so for free. The group rejected the idea of extending ICA to married women because it would be 'a step in the wrong direction' and people should 'cope from their own resources'.<sup>84</sup>

All of this is interesting because in late 1983 the Government introduced a Bill (the MFPA 1984) which outlined the court's duty to consider the appropriateness of a clean break in all ancillary relief applications. So, at the same time the Government advanced policies which aimed to push women towards financial independence, it perpetuated their dependence on men through the tax and benefits system.

During the life of the CFPG there was almost no discussion of divorce per se. It is hard to fully assess what the group achieved in terms of demonstrable changes affecting governance of the family, but a study of its files does at least clarify what leading actors understood to be 'family policy'. CFPG members were realistic about what the law could achieve, with no one advocating a return to pre-1969 divorce law, or arguing that divorce should be made somehow 'harder'. The group focussed on what levers of state were available to it, and these were areas of 'family ecology',<sup>85</sup> such as housing, tax, and schools. This approach chimes with a statement in some early correspondence which records that 'the Government would not have a family policy as such, but rather a number of policies which, taken

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<sup>83</sup> Roger Kerridge, 'Taxation and Marriage' (1988) 47 Cambridge Law Journal 77, 77.

<sup>84</sup> Letter from Timothy Flesher to John Halliday, PREM 19/1050, 9 February 1983. By contrast, however, the PFPG recommended extension of ICA to married women 'as resources become available' (Report of the Family Policy Group, THCR 2/7/3/9 f65, 1 March 1983, 6).

<sup>85</sup> Mary Ann Glendon, *The Transformation of Family Law* (The University of Chicago Press 1989) 306-311.

together, made up a coherent policy towards the family',<sup>86</sup> although the extent to which Thatcherite family policies cohered is open to question.

### **Lessons from a letter to a child**

Before moving on to discuss the detail of the MFPA 1984, I want briefly to consider a letter written by Thatcher on 1 July 1981 which provides insight into her understanding of the limits of law to change personal behaviour, limits which concerned both the power (what can the law do) and legitimacy (what should the law do) of legal rules.<sup>87</sup>

Apparently a child wrote to the Prime Minister (a copy of his or her letter is not on file) in a state of upset over his/her parents' impending divorce and appealed to Thatcher for help. Thatcher's response, which is part typed and part manuscript, conveys regret and compassion: 'Whenever I hear of people getting divorced and having problems, I would love to be able to help...My own children had a happy time and I should like you to have the same'. Then, in a sentence with a workaday tone which belies its profound statement of the limits of family law in a liberal state, she wrote, 'But whatever I say or do won't really help unless you and your mother and father agree'. The 'I' in that sentence in effect represents Her Majesty's government and by extension – given the healthy Conservative majority – parliament. Thatcher and her governments were well known for their confident use of law and policy to bring about significant economic reform, but in social affairs usually considered to fall within liberalism's private sphere, this confidence often deferred to the domain of individual choice and a realistic assessment of the limits of law. Such reticence was not, however, universal and did not extend to certain other areas of personal moral and sexual behaviour (eg same-sex couple families and section 28 of the Local Government Act 1988).

It appears that Thatcher's views in her letter accorded with the prevailing mood of the Party at that time, which found expression in the 1983 general election manifesto (written by Ferdinand Mount) under the heading 'Supporting Family Life':

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<sup>86</sup> Letter from Michael Scholar to Peter Jenkins, PREM 19/783, 10 September 1982.

<sup>87</sup> Letter from Margaret Thatcher to unknown child, THCR 3/2/64 f109, 1 July 1981.

*It is not for the Government to try to dictate how men and women should organise their lives. Our approach is to help people and their families fulfil their own aspirations in a rapidly changing world. As an employer, this Government is fulfilling its commitment to equal opportunities for men and women who work in the public services. We have brought forward for public discussion proposals for improving the tax treatment of married women, whether or not they go out to work.*

We are reviewing the family jurisdiction of the courts, including their conciliation role, with a view to improving the administration of family law. We shall also reform the divorce laws to offer further protection to children, and to secure fairer financial arrangements when a marriage ends.<sup>88</sup>

The next part of this chapter will critically discuss that promised divorce law reform, including whether it did indeed lead to further protection for children and greater financial fairness on dissolution.

## **THE MATRIMONIAL AND FAMILY PROCEEDINGS ACT 1984**

### **Genesis of the Act**

Prior to divorce law reform becoming a manifesto commitment, issues regarding time restrictions on presenting divorce petitions and the financial consequences of divorce had been raised with the then Lord Chancellor, Lord Hailsham, who referred these matters to the Law Commission for consideration. The Law Commission produced four papers: two covering the time restrictions on presentation of divorce and nullity petitions,<sup>89</sup> and two on the financial consequences of divorce.<sup>90</sup> In each case the first paper was a Discussion Paper (akin to a government Green Paper)

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<sup>88</sup> Conservative Party, *The Challenge of Our Times*, 1983 General Election Manifesto (Conservative Party 1983) (emphasis added).

<sup>89</sup> Law Commission, *Time Restrictions on Presentation of Divorce and Nullity Petitions* (Law Com No 76, 1980); *Time Restrictions on Presentation of Divorce and Nullity Petitions* (Law Com No 116, 1982).

<sup>90</sup> Law Commission, *The Financial Consequences of Divorce: The Basic Policy, A Discussion Paper* (Law Com No 103, 1980); *The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper* (Law Com No 112, 1981).

and the second was a report of the consultation responses and the Commission's recommendations (similar to a White Paper). Although the two areas under consideration ended up being dealt with in the same Bill, they are largely discrete matters, at least on a practical level, and so I will deal with them separately below.

### **The divorce time bar - previous law and criticisms**

Section 3 of the Matrimonial Causes Act 1973 provided that petitions for divorce could not be presented within the first three years of marriage unless exceptional hardship or exceptional depravity could be shown. The restriction dated back to section 1 of the Matrimonial Causes Act 1937; prior to which there had been no time limit. The original proposal in A. P. Herbert's Bill had been for a five year absolute bar, which was intended to pacify opponents of the Bill's core liberalising provisions. Through a process of parliamentary compromise, involving input from both upper and lower chambers, the restriction was eventually reduced to three years with a discretion available for earlier dissolution on the grounds mentioned above.<sup>91</sup> Even where a case was made out the court retained a discretion not to grant leave,<sup>92</sup> and the court would be mindful of the welfare of any children of the family and the possibility of reconciliation.<sup>93</sup> The exceptional test was subjective, ie based on the impact on *that* petitioner,<sup>94</sup> and a holistic view was taken, including any hardship already caused, being caused and likely to be caused in the future if leave was not granted. But still, the older cases sometimes required of the petitioner a degree of forbearance which seemed unreasonable to modern minds; for example, in one case leave was refused even though medical evidence showed that the husband might attempt suicide if he could not divorce and remarry.<sup>95</sup> The Law Commission observed that whereas the focus on exceptional hardship was on 'exceptional', the exceptional depravity element revolved more around considerations of what amounted to 'depravity' for the purpose of the Act.<sup>96</sup> Although applications for leave were increasing, they were still at a low level (1,462 in 1978, against 143,667 divorces), and most of them were successful.<sup>97</sup>

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<sup>91</sup> Law Commission, *Time Restrictions on Presentation of Divorce and Nullity Petitions* (Law Com No 76, 1980) 4-5.

<sup>92</sup> *Eg C v C* [1967] P 298.

<sup>93</sup> Matrimonial Causes Act 1973, s 3(2).

<sup>94</sup> *Hillier v Hillier and Latham* [1958] P 186.

<sup>95</sup> *Sanders v Sanders* (1967) 111 S.J. 618.

<sup>96</sup> Law Commission (n 91) 16.

<sup>97</sup> *Ibid* 33.

This was not the first time the Law Commission had considered reform of the time limit. In *The Field of Choice* it recommended retention, stating: 'In our opinion it is a useful safeguard against irresponsible or trial marriages and a valuable external buttress to the stability of marriages during the difficult early years.'<sup>98</sup> As Freeman witheringly observed, this contained two assertions: one unsubstantiated and the other unsubstantiable. He doubted the provision's ability to 'safeguard' and 'buttress' and tested his suspicions with a straw poll of family law students at University College London which showed that less than ten percent of them were aware of its existence.<sup>99</sup> Freeman identified the inconsistencies in the Commission's stance:

Why the Law Commission should have favoured its retention it is difficult to understand. It wanted to bury empty shells; the restriction merely preserves them longer. It wanted to regularise illicit unions; the restriction encourages their formation. It wanted to do away with recrimination, to avoid bitterness, distress and humiliation; but to obtain leave to petition within three years you have to prove exceptional depravity on the party [sic] of the respondent or exceptional hardship suffered by the petitioner and this is calculated to ensure the maximum bitterness, distress and humiliation.<sup>100</sup>

The growing criticisms of the three year rule were of two types: it served no useful purpose, or it served some purpose but the law was outdated and needed reform.<sup>101</sup> Regarding the first position, it was felt that the philosophy underpinning the current law was cut from a different cloth to the liberal divorce reform embodied in the rest of the Divorce Reform Act 1969 (this is Freeman's point above). The Law Commission found little, if any, evidence for the view that it buttressed the institution of marriage, but rather that it tended merely to delay divorce.<sup>102</sup> The requirement particularly to show exceptional depravity directed the petitioner to dredge up unpleasant details of the marriage. This could only serve to heighten bitterness and

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<sup>98</sup> Law Commission, *Field of Choice: Reform of the Grounds for Divorce, the Field of Choice* (Law Com No 15, 1966) para 19.

<sup>99</sup> Michael Freeman, 'When Marriage Fails – Some Legal Responses to Marriage Breakdown' (1978) 31 CLP 109, 119. Alcock makes the same point: Peter Alcock, 'Remuneration or Remarriage? The Matrimonial and Family Proceedings Act 1984' (1984) 11 *Journal of Law and Society* 357, 358.

<sup>100</sup> Freeman (n 99) 119.

<sup>101</sup> Law Commission, *Time Restrictions on Presentation of Divorce and Nullity Petitions* (Law Com No 76, 1980) 37-38.

<sup>102</sup> *Ibid* 43.



tension between the parties, thereby diminishing any hope of a conciliatory approach being taken, which was otherwise encouraged under section 6 of the MCA 1973. In addition, the rule 'merely creates a space between marriages'.<sup>103</sup> Regarding the second position, the central (only?) argument for retention was to do with the alleged stabilising effect on marriage. Although there was no evidence for this, the Law Commission accepted that scrapping the time bar would probably be perceived by the public as a liberalisation of divorce law, ie making divorce easier to obtain.<sup>104</sup>

### **Law Commission proposals**

The majority of respondents to the Working Paper supported the view that the present law is unsatisfactory, with most criticism directed at reliance on the exceptional principles causing heightened animosity between the parties, and possible inconsistency of judicial approach through application of the discretionary element within them.<sup>105</sup> As to the way forward, the Commission found '[t]here was a considerable body of opinion which saw no case for retaining a restriction'.<sup>106</sup> But when discussing the rationale *for* retaining a restriction it said 'the underlying objective is more subtle [than marriage-saving]: it is to shape an attitude of mind',<sup>107</sup> although it was hazy about what actual impact any such shaping would have on marriages. In the following paragraph, it acknowledged, however, that the evidence from the consultation suggested that people were ignorant of the existing provision, which would cast doubt on the claimed channelling function of the law here. This apparent, or actual, departure from logic also emerges in the parliamentary debates and is discussed further below. However, the Commission then stated, rightly in my view, that greater public awareness would probably result from the law being changed and it was at pains to stress that it did not want to be complicit in spreading 'an attitude of mind' that exiting a marriage through divorce was being made easier.<sup>108</sup> It concluded with the recommendation that there should be a one year absolute bar on the presentation of a petition, claiming that it struck a balance

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<sup>103</sup> Michael Freeman, *A Guide to the Matrimonial & Family Proceedings Act 1984* (CCH Editions 1984) 4.

<sup>104</sup> Law Commission (n 101) 47.

<sup>105</sup> Law Commission, *Time Restrictions on Presentation of Divorce and Nullity Petitions* (Law Com No 116, 1982) 3-4.

<sup>106</sup> *Ibid* para 2.10.

<sup>107</sup> *Ibid* para 2.14.

<sup>108</sup> *Ibid* para 2.15.

between concern over hasty divorce and not imposing undue hardship on those with genuine reasons to divorce.<sup>109</sup> Law Commissioner Stephen Cretney later confirmed during the Bill's Committee Stage that this conclusion was very much a compromise position.<sup>110</sup>

### **The financial consequences of divorce - previous law and criticisms**

The focus of my discussion here is the proposals to remove the so-called 'statutory hypothesis' or 'minimal loss' principle from the MCA 1973, and to introduce the clean break principle. The minimal loss principle was then to be found in section 25 of the MCA 1973, having been introduced by section 5 of the Matrimonial Proceedings and Property Act 1970. It required a court when exercising its adjustive ancillary relief function to:

place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

As law goes, the impact of the minimal loss principle was marginal at best. The wording which became section 5 of the 1970 Act was 'scarcely explained' in the relevant Law Commission report, 'was hardly discussed in the parliamentary debates',<sup>111</sup> and was rarely implemented, or implementable, in practice.<sup>112</sup> It was conceptually similar to the principle of contractual damages and harked back to the law prior to the Divorce Reform Act 1969, when divorce was only available upon commission of a matrimonial offence. The parties were then constructed in terms of a guilty respondent having wronged an innocent petitioner. Marriage conferred upon the wife a right to be maintained by her husband for life. It was therefore reasonable that a divorced wife should have an expectation in law that her husband would be required to maintain her at the level she would have experienced had the marriage

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<sup>109</sup> Ibid para 2.32.

<sup>110</sup> SSC Deb (Bill 96) 20 March 1984, col 66.

<sup>111</sup> Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003) 427.

<sup>112</sup> Law Commission, *The Financial Consequences of Divorce: The Basic Policy, A Discussion Paper* (Law Com No 103, 1980) 3; John Eekelaar, *Regulating Divorce* (Clarendon Press 1991) 36.

not broken down.<sup>113</sup> So it is not surprising that the minimal loss principle was seen to rest on questionable foundations once matrimonial offences were swept away by the standard of irretrievable breakdown in the Divorce Reform Act 1969: it had become old wine in a new wineskin. The Law Commission understood section 25(1) to mean that ‘the primary objective [of the court] is that the financial position of the parties should so far as possible be unaffected by their divorce’.<sup>114</sup> As Cretney (qua historian) observes, this gave the impression that although divorce terminated the marriage, it did not bring to an end the financial obligations it created.<sup>115</sup>

If, as I claim, the impact of the minimal loss principle was fairly marginal in practice, why were there loud calls for reform? It was the policy reflected in the principle and the absence of a legislative steer towards severance of financial obligations between spouses upon divorce, sometimes giving rise to long-term maintenance, that were the objects of criticism. These criticisms drew particular attention to hardship for divorced husbands; hardship for their new second families; and hardship suffered by divorced wives.<sup>116</sup> Groups such as the Campaign for Justice in Divorce<sup>117</sup> (claiming to represent the interests of divorced men) agitated for change based on their perceived injustice of section 25.<sup>118</sup> Indeed, the overwhelming response to the Discussion Paper was that the minimal loss principle was ‘a fundamentally mistaken objective’ and one that could produce ‘unjust and inequitable results’. The Law Commission admitted, however, that it did not have evidence to prove the latter objection<sup>119</sup> and that it was largely operating in an evidence vacuum.<sup>120</sup> So much for evidence-based lawmaking.

### **Law Commission proposals**

The Law Commission observed that the income of post-divorce families was often comprised of public and private funded maintenance as well as earned income; and that issues of poverty arose because of the low level of one or more of those

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<sup>113</sup> Law Commission (n 112) 7.

<sup>114</sup> *Ibid* para 22.

<sup>115</sup> Cretney (n 111) 427.

<sup>116</sup> Law Commission, *The Financial Consequences of Divorce: The Basic Policy, A Discussion Paper* (Law Com No 103, 1980) 15-18.

<sup>117</sup> A lobby group consisting of divorced men and their second wives, established in 1978.

<sup>118</sup> Cretney (n 111) 428, 433.

<sup>119</sup> Law Commission, *The Financial Consequences of Divorce: The Response to the Law Commission’s Discussion Paper* (Law Com No 112, 1981) para 6.

<sup>120</sup> *Ibid*, para 8.

elements. Despite the fact that reform of private maintenance would, so it claimed, make only marginal improvements in the economy of most such households (as most people do not have sufficient income to maintain two families), it held that reform was important nevertheless because of the need for the family justice system to command public respect by being founded clearly on principles of justice and equity.<sup>121</sup> This was a mealy-mouthed way of saying that ancillary relief law should be reformed because periodical payments made little difference to ex-wives whilst causing a substantial sense of injustice for ex-husbands. It went on to reformulate this point: '[N]o reform of the private law can provide more resources to relieve the poverty of single-parent families. It would accordingly be quite wrong to encourage exaggerated expectations about the likely effect of reform'.<sup>122</sup> This was a startling statement. Not only was the assertion questionable, but it also missed the point made by many of the Bill's opponents that reform of the private law could, on the contrary, *worsen* the poverty of single-parent families.

However, as the Law Commission repeatedly acknowledged throughout the Report, it really had no data to indicate whether the current system did in fact produce injustice. Paragraph 8 confessed this cluelessness ('very little reliable up-to-date information is in fact available', '[e]ven the most basic questions...cannot be answered', '[w]e do not know...[s]till less do we know...'), before concluding the point in paragraph 9, 'it is in our view unsatisfactory that law reform should have to proceed on the basis of inadequate information about the operation of the law'. Yet this unsatisfactoriness did not stop the Commission from proposing measures to reform the existing law. This paucity of evidence scarcely improved during the life of the Bill, resulting in an Act which was largely informed by anecdotal impressions.<sup>123</sup>

Undeterred by the lack of hard empirical data, the Law Commission recommended that the minimal loss principle should be repealed and that the MCA 1973 should instead contain statements that the provision of financial support for children should be an 'overriding priority' and that the parties should move towards self-sufficiency following divorce as far as it is possible to do so, ie a rebuttable presumption of a clean break.<sup>124</sup>

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<sup>121</sup> Ibid, para 6.

<sup>122</sup> Ibid, para 16.

<sup>123</sup> Similar observations have been made about Australian family law; see Reg Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millenium?' (2000) 24 Melbourne University Law Review 737.

<sup>124</sup> Ibid, para 46.

## **Analysis of the Bill in parliament**

The Bill was introduced by the Lord Chancellor, Lord Hailsham, in the House of Lords on 2 November 1983. It received its Second Reading on 21 November, with Hailsham arguing that '[t]his is an important Bill and it is urgently needed'.<sup>125</sup> Although it was a government Bill, it was one which was, by and large, 'a Law Commission Bill'.<sup>126</sup> The Bill's Second Reading in the House of Commons came on 16 February 1984 and ran from 4.03pm until the division at 10pm. The Second Reading contained almost no explicit references to members' underlying political beliefs and the issue of 'party' was also not very visible. The Conservatives who spoke tended to voice concern over the Bill, rather than support. However, as the Second Reading was whipped, such dissent ultimately manifested in abstention instead of rebellion (no Conservatives voted against), with only four Conservatives speaking unequivocally in support of the legislation: Michael Havers, Toby Jessel, Humfrey Malins and Patrick Mayhew. A close reading of the parliamentary debates surrounding the Bill revealed the following themes:

- (1) A Conservative preoccupation with the expressive, or symbolic, function of law which was...;
- (2) At the expense of concern over the substance of the law and its possible effects on vulnerable groups...;
- (3) Caused by a distrust of experts and of much of what passed for evidence in the parliamentary proceedings, and an indifference to obtaining hard evidence to establish claims.

### **(1) The Conservative preoccupation with the expressive, or symbolic, function of law**

A substantial proportion of the parliamentary debates was taken up with a Conservative preoccupation with the expressive, or symbolic (the terms are here interchangeable), function of law,<sup>127</sup> particularly in relation to changes to the time

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<sup>125</sup> HL Deb 21 November 1983, vol 445, col 28.

<sup>126</sup> Hailsham, *ibid.*

<sup>127</sup> See chapter two for a discussion of the expressive function of law.

bar. Conservative arguments for retention of the bar were largely about a defence of marriage at a rhetorical level, and were based upon an assumption of a causal relationship between law and behaviour.

The central concern was whether the time bar change would make divorce 'easier', thereby increasing its incidence and undermining the institution of marriage. While this discussion was conducted at a superficial level, the concerns expressed were not fatuous. There is evidence which supports the claim that there is a correlation between unilateral divorce regulations and an increase in the incidence of divorce.<sup>128</sup> In the British context, Smith found that 'changes in legislation induce an immediate but once-and-for-all surge in divorces resulting from the formal burial of long dead marriages and the additional impetus given to the failure of marriages which are already "on the rocks"', but that the influence of law was otherwise limited.<sup>129</sup> At Second Reading, Lord Hailsham insisted the Bill would not make divorce easier.<sup>130</sup> The reality was that it would make the divorce process easier (ie more accessible) to some couples (those who wanted to divorce after one year, but before three years, of marriage and who could not have shown exceptional hardship or exceptional depravity); but harder (ie impossible) for others (couples who wanted to divorce in the first year of marriage and who could have shown exceptional hardship or depravity under the old law), and of no effect for the vast majority of couples who divorce after three years of married life.<sup>131</sup>

During his evidence at Committee Stage, Cretney confirmed that the Law Commission took a 'conservative' view of the matter. He thought the concern related to whether the nature of marriage was being altered, and would be perceived more as 'a short-term lease rather than a freehold'.<sup>132</sup> He confirmed that opinion had been divided in the Commission over how to proceed and the one-year

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<sup>128</sup> Ian Smith, 'Explaining the Growth of Divorce in Great Britain' (1997) 44 *Scottish Journal of Political Economy* 519; Jonathan Gruber, 'Is Making Divorce Easier Bad for Children? The Long-Run Implications of Unilateral Divorce' (2004) 22 *Journal of Labor Economics* 799; Clarisse Coelho and Nuno Garoupa, 'Do Divorce Law Reforms Matter for Divorce Rates? Evidence from Portugal' (2006) 3 *Journal of Empirical Legal Studies* 525; Thorsten Kneip and Gerrit Bauer, 'Did Unilateral Divorce Laws Raise Divorce Rates in Western Europe?' (2009) 71 *Journal of Marriage and Family* 592.

<sup>129</sup> Smith (n 128) 541; see also Colin Gibson, *Dissolving Wedlock* (Routledge 1994) 223.

<sup>130</sup> HL Deb 21 November 1983, vol 445, col 32.

<sup>131</sup> Some Conservative MPs clearly believed that easier divorce leads to more divorce, eg Roger Sims (HC Deb 16 February 1984, vol 54, col 431) and Jill Knight (*ibid*, col 450). Labour's Harriet Harman argued that divorce is a symptom, not cause, of marriage breakdown (*ibid*, col 435).

<sup>132</sup> SSC Deb (Bill 96) 20 March 1984, col 64.

proposal was a compromise. To emphasise the reform's conservative credentials, he said that he saw it as 'a symbolic assertion of the community's interest in preserving the stability of marriage as an institution'.<sup>133</sup> In his evidence the then President of the Family Division, Sir John Arnold, predicted the change would lead to an initial increase in divorce due to a backlog but would then 'level to their normal pattern'.<sup>134</sup> He thought that the complete removal of the bar would 'cheapen' the institution of marriage in the public eye.<sup>135</sup> If there was any doubt about what he meant by this, the country's most senior family law judge opined that the bar 'is only justified socially'.<sup>136</sup>

Some Committee members did not accept the analysis of witnesses such as Cretney and Arnold, and one member, the newly-elected Tony Blair, tabled an amendment to remove the time bar completely.<sup>137</sup> In response, a number of Conservative MPs raised the concern that, if the bar was removed, 'the message would go out to the community as a whole that we are making divorce easier', eg David Sumberg,<sup>138</sup> and Tony Baldry.<sup>139</sup> Angela Rumbold questioned whether a time bar might still deter some waiverers from seeking a divorce, although not those who are absolutely determined.<sup>140</sup> She opposed the bar's removal for two reasons: 'It will be perceived by the public that the House is not doing justice to people's expectations of the institution of marriage' and 'it will help to prevent people from marrying for the wrong reasons'.<sup>141</sup> Nicholas Fairbairn thought this was 'an utterly false argument',<sup>142</sup> while the Conservative MP for Cambridge, Robert Rhodes James, supported Blair's amendment saying, 'We cannot be expected to pass legislation for which the only argument is that it is symbolic and a signal...[W]e should be providing not symbolism, but decent, humane, compassionate and sensible law'.<sup>143</sup>

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<sup>133</sup> Ibid, col 66.

<sup>134</sup> SSC Deb (Bill 96) 22 March 1984, col 76. He was right in this respect, see Lorraine Fox Harding, *Family, State and Social Policy* (Macmillan 1996) 56.

<sup>135</sup> Fox Harding takes the view that the Conservative government made divorce easier in the MFPA 1984 and undermined the idea of permanent marriage, see Lorraine Fox Harding, "Family Values" and Conservative Government Policy: 1979-1997' in Gill Jagger and Caroline Wright (eds), *Changing Family Values* (Routledge 1999) 129.

<sup>136</sup> Arnold (n 134) col 89.

<sup>137</sup> SSC Deb (Bill 96) 5 April 1984, col 465.

<sup>138</sup> Ibid, col 491.

<sup>139</sup> Ibid, col 492.

<sup>140</sup> Ibid, col 469.

<sup>141</sup> Ibid, col 494.

<sup>142</sup> Ibid, col 471.

<sup>143</sup> Ibid, col 479.

The battle over the place of symbolism in law continued at Report Stage in the House of Commons. Sir Edward Gardner admitted he knew of no evidence in support of the claim that the bar would save marriages, but he was afraid that removal of the bar 'shall risk misunderstanding in the country at large. We could give the impression, although it would be false, that Parliament did not have the respect for the institution of marriage that it clearly does'.<sup>144</sup> And Roger Sims went on to put the claim at its highest:

In Committee, there was some reference to any bar being purely symbolic – as though it was therefore unimportant. But symbols play a very important part in our religious and secular life. They are all-important...Even if a bar is purely symbolic, that is an important reason for keeping it.<sup>145</sup>

Sir Ian Percival was candid in his visceral preference for a one year bar, 'I do not base my case in logic, nor do I believe that there is any logical argument against it'.<sup>146</sup> (It is hard to argue with a man who takes up such a stance.) Other MPs were also willing to trust their judgement over logic. Sumberg found the evidence against the time bar compelling, but he was concerned about the symbolic effect: 'I accept that my position about the one-year bar is not entirely logical, but sometimes we have to be a little illogical'.<sup>147</sup> Towards the end of the Report Stage Harry Greenway said, 'It is important that marriage remains, *and is seen to remain*, as the bedrock of our society'. To his mind, a one year bar 'devalues marriage in the public eye', whereas his preference for a two-year absolute bar apparently would not.<sup>148</sup> If there was any doubt that these views of predominantly backbench Conservative MPs represented the Government view, the Solicitor-General, Patrick Mayhew, settled the position in his closing speech. He confirmed that the most important argument against the abolition of the time bar was the 'false signal' it might send 'to people who are now wholly unaware of the position'.<sup>149</sup> After spending four and a half hours discussing this provision alone, all the amendments (no bar; no change; two year absolute bar) were convincingly defeated.

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<sup>144</sup> HC Deb 13 June 1984, vol 61, col 959.

<sup>145</sup> HC Deb 13 June 1984, vol 61, col 966.

<sup>146</sup> Ibid, col 971.

<sup>147</sup> SSC Deb (Bill 96) 5 April 1984, col 491.

<sup>148</sup> HC Deb 13 June 1984, vol 61, col 991 (emphasis added).

<sup>149</sup> Ibid, col 997.



It forms an important part of the methodology of this thesis that the power of law operates diffusely, including in highly coercive forms and through subtle message-sending. Claims about the time bar's symbolic power, however, are flimsy given the evidence gathered by the Law Commission.<sup>150</sup> In the absence of any empirical data to show the effectiveness of the signal sent by such a law, it can only reasonably be concluded that its proponents believed the transmission of these claimed symbolic messages possessed a sort of mystical, ethereal property. Destructive societal forces were held back, and marriage was somehow buttressed, through legislators taking a stand on the need for a time bar despite any convincing evidence of its efficacy. Such wishful thinking even seems to fall short of what Barlow and Duncan call the 'rationality mistake', ie the assumption that individuals act rationally when faced with decisions of an affective or moral character.<sup>151</sup> However, an alternative reading of the position taken by pro-symbol legislators is that the obvious empirical obstacles to measuring the impact of symbols in law cut both ways – it is possible that their claims could be correct. Conservatives, relying on the change principle, would also be right to require the initiators of any change to discharge the burden of establishing the case for change. That said, while it is clear from an analysis of the parliamentary discourse that most Conservative contributors appealed merely to the efficacy of law as symbol as a means of supporting marriage, it is surprising that only one Conservative MP, William Benyon, actually called for government to put its efforts into actively supporting marriage by funding organisations specialising in relationship education and counselling.<sup>152</sup> In conclusion, the dominant Conservative narrative was concerned with a defence of marriage and the traditional family, employing law as a sort of 'constitutive rhetoric'<sup>153</sup> in an attempt to keep alive in the community those values which were felt to be ebbing away.

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<sup>150</sup> See Law Commission, *Time Restrictions on Presentation of Divorce and Nullity Petitions* (Law Com No 76, 1980) paras 48-49, and the comparison with Scotland which has no time bar. Only seventeen marriages were dissolved in the first year of marriage in Scotland in 1977.

<sup>151</sup> Anne Barlow and Simon Duncan, 'Supporting Families? New Labour's Communitarianism and the "Rationality Mistake": Part I' (2000) 22 *Journal of Social Welfare and Family Law* 23; 'Supporting Families? New Labour's Communitarianism and the "Rationality Mistake": Part II' (2000) 22 *Journal of Social Welfare and Family Law* 129. See also, Helen Reece, 'Leaping without Looking' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014).

<sup>152</sup> HC Deb 13 June 1984, vol 61, col 958.

<sup>153</sup> James Boyd White, 'Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life' (1985) 52 *University of Chicago Law Review* 684, 690.

**(2) ...That this preoccupation was at the expense of concern over the substance of the law and its possible effects on vulnerable groups**

It seems that most Conservatives had a blindspot to this matter during the debates, despite the Lord Chancellor at Second Reading saying that the reform of section 25 was the 'most important' part of the Bill.<sup>154</sup> Even religious organisations, which, as well as declaring support for marriage, might be expected to evince a concern for the vulnerable, seemed uninterested in the Bill's ancillary relief provisions. The General Synod stated its belief that a one year time bar 'will have the effect of lowering marriage in public esteem',<sup>155</sup> as did the British Evangelical Council,<sup>156</sup> and Christian Action Research and Education.<sup>157</sup> But, in submitting evidence to the Special Standing Committee for the Bill, all of these organisations dealt just with the time bar and had nothing to say over the impact of the clean break on women and children.

When giving evidence to the Committee on behalf of the Law Commission, Stephen Cretney said that the Commissioners did not believe in the existence of the 'alimony drone'<sup>158</sup>, and the Bill was 'designed to remove any credibility from claims that the existing law was operating unfairly'.<sup>159</sup> As the Law Commission rejected the existence of the 'alimony drone', it clearly did not believe that the unfairness lay in a cohort of ex-wives being unduly enriched through the law's application. It took up a contradictory position, saying it did not think that some women were receiving maintenance they should not be entitled to (in some normative sense), yet the law was nevertheless justifiably viewed as operating unfairly. The only way to reconcile this contradiction is to conclude that the Commission simply thought it right to move to a more contractual, individualistic model of marriage, or to put it another way, that what was 'fair' needed to be redefined for marriage in the late twentieth century. (It is worth noting that Part II of the Bill – the ancillary relief provisions – did not emerge from the Commission, but were drafted by parliamentary counsel on instructions from ministers.)<sup>160</sup>

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<sup>154</sup> HL Deb 21 November 1983, vol 445, col 34.

<sup>155</sup> SSC Deb (Bill 96) 20 March 1984, col 39.

<sup>156</sup> SSC Deb (Bill 96), col 296.

<sup>157</sup> SSC Deb (Bill 96), col 302.

<sup>158</sup> SSC Deb (Bill 96) 20 March 1984, col 62. The term referred to 'women who prefer to rely on maintenance rather than their own earnings', see Michael Freeman, *A Guide to the Matrimonial & Family Proceedings Act 1984* (CCH Editions 1984) 4.

<sup>159</sup> SSC Deb (Bill 96) 20 March 1984, col 63.

<sup>160</sup> Ibid.

Conservatives tended to perceive the position of women in marriage and divorce in a way which overlooked the reality of economic disadvantage experienced by many, especially those who also had caregiving responsibilities for children. Some constructed women's dependence as 'demeaning to women',<sup>161</sup> thus justifying the clean break. Others believed that the clean break would lead to more independence.<sup>162</sup> And others seemed to have a rather weak grasp of the realities of life for many women in the 1980s: 'I should have thought that today, when a couple decide to get married, the man must be undertaking just as much financial disadvantage as the woman'.<sup>163</sup> A counterpoint was provided by Anne Bottomley, Julia Brophy, Susan Olley and Carol Smart who gave evidence for the feminist group Rights of Women: 'The assumption that all women should and could achieve self-sufficiency within a short period after divorce cannot be borne out by an examination of the realities of women's present economic position'.<sup>164</sup> It was perhaps significant that Rights of Women received an unfriendly reception at the Committee, with Tony Baldry rudely suggesting the group might be considered a 'pernicious irrelevance'.<sup>165</sup> But the core of their argument was captured by Carol Smart: '[I]f there is to be independence for women, it must start at the point of marriage and not at the point of divorce. It's about maintaining independence throughout marriage'.<sup>166</sup>

Conservatives were resistant to feminist arguments which highlighted potential inequities arising from the Bill's ancillary relief reforms, and tended to construct the ex-wife in terms of being more or less deserving; for example, Toby Jessel thought that maintenance was appropriate 'to protect a wife who has devoted many years to the care of her family, as a good wife and mother' and who could not easily re-enter the labour market.<sup>167</sup> Jill Knight talked of 'innocent and worthy women', and 'I am not worried about the avaricious woman who does not deserve maintenance for life, but I am worried about the woman who deserves it'.<sup>168</sup> Despite her concern over

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<sup>161</sup> Lord Hailsham, *ibid*, col 175.

<sup>162</sup> Humfrey Malins, HC Deb 16 February 1984, vol 54, col 444.

<sup>163</sup> Angela Rumbold, SSC Deb (Bill 96) 27 March 1984, col 273.

<sup>164</sup> SSC Deb (Bill 96) 27 March 1984, col 253.

<sup>165</sup> *Ibid*, col 269. See also Tim Brinton's question to Margaret Thatcher and her response at HC Deb 25 November 1982, vol 32, col 1008. Brinton asked if Thatcher was aware that the Labour-controlled Greater London Council had spent '£220,000 on minority groups such as the English Collective of Prostitutes, Lesbian Line, and the Teenage Gay Rights Group?', and whether she agreed that it was a waste of money. Thatcher thought it was 'a disgraceful waste of money'. Rights of Women was also funded by Greater London Council grants.

<sup>166</sup> SSC Deb (Bill 96) 27 March 1984, col 272.

<sup>167</sup> HC Deb 16 February 1984, vol 54, col 414.

<sup>168</sup> *Ibid*, col 452.

whether the Bill would ensure that the deserving woman would get maintenance, Knight was not so concerned that she voted against it (she appears not to have voted at all at Second Reading).

So it was left largely to Labour MPs to advance arguments against the provisions because of their likely impact on women and children. Tony Blair, Harriet Harman and Jo Richardson united in a feminist exposé of the Bill's ancillary relief provisions. Harman called the 'alimony drone' a 'mythical creature'.<sup>169</sup> She rejected the argument that the clean break produced equality because it ignored the division of labour in the home – an argument that formal legal equality is not the same as substantive equality.<sup>170</sup> Richardson saw the Bill as tipping the balance in favour of the non-custodial parent – usually the ex-husband - and was concerned about the lack of express provisions in the Bill about child support.<sup>171</sup> And in the end it fell to Tony Blair to spell out to Conservative MPs that legislation predisposing courts to sever financial obligations upon divorce is more likely to lead to a 'loosening of the ties of marriage', which undermined the Government's claim that the Bill would strengthen marriage.<sup>172</sup> It can only be speculated why no Conservative MP made this point during the Bill's passage, and why there was almost no Conservative interest in the clean break measure during the debate. The Labour triumvirate pressed amendments to the ancillary relief provisions at Report Stage which sought to recognise marriage as a 'common endeavour',<sup>173</sup> and to emphasise that 'many of the abilities and advantages that a woman brings to that institution are not easily translated into definable financial terms'.<sup>174</sup> None of the amendments was successful. Revealingly, Mayhew thought these changes would constitute 'a revolutionary restructuring of the legislation' which would cause uncertainty in the courts.<sup>175</sup>

A further indication of the combined importance of the various issues in the Bill to the minds of legislators is seen in that at Report Stage and Third Reading four and a half hours were spent debating the time bar (two clauses of the Bill) and just three

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<sup>169</sup> Ibid, col 435. The concept was also rejected in the same debate by Robert Maclennan (SDP) (col 449) and Jo Richardson (col 457).

<sup>170</sup> See, for example, Susan Moller Okin, *Justice, Gender and the Family* (Basic Books 1989) and Martha Fineman, *The Illusion of Equality* (The University of Chicago Press 1991).

<sup>171</sup> (n 167) col 457.

<sup>172</sup> HC Deb 13 June 1984, vol 61, col 1010.

<sup>173</sup> Ibid, col 1009.

<sup>174</sup> Ibid, col 1010.

<sup>175</sup> Ibid, col 1013.

hours dealing with the entire rest of the Bill (46 clauses and three schedules), running from 10.45pm until the Third Reading division at 1.48am, when MPs were surely not at their most attentive. At the division the ayes had it, 119 to 16.

### **(3) The general failure to grasp the implications of the financial provisions stemmed from a distrust of experts and of much of what passed for evidence in the parliamentary proceedings**

It is both implicit and explicit in conservatism that it distrusts the notion and evidence of experts in matters of state administration. It is implicit in the knowledge principle broadly understood, and explicit in the writing of, particularly, Burke and Oakeshott (see chapter three). Burke wrote disparagingly of 'men of theory',<sup>176</sup> and believed that '[t]here is no qualification for government, but virtue and wisdom, actual or presumptive'.<sup>177</sup> For Burke, it followed that these qualities were likely to be found in the class with experience of ruling, but left open the possibility that exceptional talent might arise from without ('Every thing ought to be open; but not indifferently to every man').<sup>178</sup> However, it is Burke's views on the nature of the relationship between electors and their elected representatives which have enduring influence upon modern parliamentary practice.<sup>179</sup> In his famous speech to the electors of Bristol upon being elected their MP in November 1774, Burke developed his idea that MPs should operate as representatives, not as delegates, saying, 'Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion'.<sup>180</sup> The elitist tone of Burke's speech sounds discordant today, and in the modern era of strict party discipline, the notion of members of parliament as representatives really only applies to unwhipped votes.

Oakeshott developed Burke's ideas further in his essay *Rationalism in Politics*.<sup>181</sup> He thought knowledge is universally of two sorts: technical knowledge and practical

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<sup>176</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 128.

<sup>177</sup> *Ibid* 139.

<sup>178</sup> *Ibid*.

<sup>179</sup> For examples of Burke's enduring influence in this respect, see Philip Cowley (ed), *Conscience and Parliament* (Frank Cass 1998) 51, 171, 186-7.

<sup>180</sup> Quoted in Iain Hampsher-Monk, *The Political Philosophy of Edmund Burke* (Longman 1987) 109.

<sup>181</sup> Michael Oakeshott, *Rationalism in Politics and Other Essays* (2<sup>nd</sup> edn, Liberty Fund 1991).

knowledge.<sup>182</sup> Technical knowledge is knowledge ‘that is susceptible of precise formulation, although special skill and insight may be required to give it that formulation’.<sup>183</sup> Practical knowledge, on the other hand, ‘exists only in use, is not reflective and (unlike technique) cannot be formulated in rules’.<sup>184</sup> He saw every human activity as involving both types of knowledge and gave cookery as one example. This led him to understand rationalism as being ‘the assertion that what I have called practical knowledge is not knowledge at all, the assertion that, properly speaking, there is no knowledge which is not technical knowledge’.<sup>185</sup> This rejection of rationalism forms part of what I observed in chapter three as conservatism’s epistemological modesty, leading to scepticism around universal theory.

In the parliamentary debates there was a suspicion of experts amongst Conservatives which, I would argue, went beyond a mere healthy forensic disposition that an expert should prove her claims. This is seen in John Eekelaar and Mavis Maclean’s evidence in Committee on behalf of the Centre for Socio-Legal Studies, Wolfson College, Oxford, which found no support for the existence of the so-called ‘alimony drone’ with her ‘meal ticket for life’. The Oxford study came under severe and sustained criticism as to its design and the soundness of its conclusions. It was undermined by challenges to its statistical methods, which seem to have come from members of the Campaign for Justice in Divorce, and this eroded the study’s credibility before the Committee. The general impression given from my reading of the proceedings is of a wariness towards social scientists and intellectuals generally. In contrast, the Committee appeared more comfortable with, and open to, the contributions from practising lawyers and judges, which perhaps indicates a bias in favour of those majoring in Oakeshott’s ‘practical knowledge’. Further Burkean suspicion of experts, and confidence in the judgement of the governing class, is seen at Report Stage:

One might take the view that the reform suggested by the Law Commission, a group possessing such expertise and knowledge of the law, must be right. If we accept that view, we will be heading towards government by experts rather than by elected member. This House must be responsible for the political consequences of its acts. Hence, we must reach a decision based on our collective mind and

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<sup>182</sup> Ibid 12.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid 15.

not necessarily based on expert advice, however proficient that advice might be thought to be.<sup>186</sup>

Following James Pawsey was David Amess, 'I regard Clause 1 [the new one-year time bar], as drafted, as utter madness, ill-thought out, ill-conceived and downright stupid. This is a matter on which the consequences of what is proposed are *mere conjecture*'.<sup>187</sup> He concluded, without any hint of irony, by conjecturing, 'If we put through these changes tonight we will open the floodgates to divorce and regret the day we ever took the decision'.<sup>188</sup> Jill Knight, who seemed quite confused by many of the arguments around the time bar, said, 'The more I see of experts, the more I mistrust them, because it is difficult for them to agree even among themselves'.<sup>189</sup>

It is highly instructive to observe how information became 'evidence' during the legislative process. This is one example: individuals who were members of the Campaign for Justice in Divorce wrote to the Lord Chancellor.<sup>190</sup> Lord Hailsham then instructed the Law Commission to examine the law and it published its findings in which the various responses from the public became 'evidence', which then added momentum to the apparent justifications for the Bill.<sup>191</sup> The Solicitor General, Patrick Mayhew, said that the clean break provisions were included as a result of the Law Commission's recommendations, which:

were themselves the result of the widespread *feeling*, amongst the many people and organisations who commented on the Law Commission's discussion paper, that greater weight should be given to the importance of each party doing what is reasonably practicable to become self-sufficient.<sup>192</sup>

Cretney, in his evidence before the Committee, said that the Law Commission did not initially think there was a case for reform of section 25, and that Part II of the Bill did not emerge from the Law Commission but was drafted by parliamentary counsel

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<sup>186</sup> James Pawsey, HC Deb 13 June 1984, vol 61, col 981.

<sup>187</sup> Ibid, col 981 (emphasis added).

<sup>188</sup> Ibid, col 982.

<sup>189</sup> Ibid, col 986.

<sup>190</sup> HL Deb 21 November 1983, vol 445, cols 29-30.

<sup>191</sup> Similar observations have been made about Australian family law; see Reg Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millenium?' (2000) 24 Melbourne University Law Review 737.

<sup>192</sup> SSC Deb (Bill 96) 20 March 1984, col 9 (emphasis added).

on instruction from ministers,<sup>193</sup> which partly contradicts the Lord Chancellor's earlier statement.<sup>194</sup> It seems odd that the Government did not attempt to gather more data before introducing the Bill.<sup>195</sup> It had a few years' notice that the data were missing and therefore had adequate time between the Law Commission reports and the Bill to fill this lacuna. The fact that the Government did not, suggests that it was not open to being dissuaded from pursuing its desired course.

## CONCLUSION

Throughout the Bill's parliamentary passage a number of tensions were evident in the discourse. One tension was between an idealistic view of marriage and family and a realistic one. Lord Hailsham's speech at Second Reading illustrated this well, with a form of words which would be repeated many times in the debates:

I believe that the family is the solid foundation upon which all human society should be built. I believe that the ideal of marriage is one man and one woman during their joint lives...Nonetheless one must be realistic.<sup>196</sup>

Another tension was between a construction of marriage as an institution, in which the state and society have an interest, and marriage as a contract between two autonomous individuals. The time bar issue was located more within the former, whereas the clean break was validated on the basis of the latter standpoint. For example, speaking of the time bar, Tony Baldry said, 'But this legislation has another effect – on the community as a whole'.<sup>197</sup> Humfrey Malins, at Report Stage, declared he wanted the bar to 'buttress the institution of marriage'.<sup>198</sup> Similar sentiments were expressed by Edward Gardner,<sup>199</sup> Peter Mills,<sup>200</sup> Roger Sims,<sup>201</sup>

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<sup>193</sup> SSC Deb (Bill 96) 19 March 1984, cols 60, 63.

<sup>194</sup> HL Deb 21 November 1983, vol 445, col 28.

<sup>195</sup> Although this is nothing new in the context of divorce reform. Similar concerns over 'unsupported cliché' were observed in the operation of the Royal Commission on Marriage and Divorce (the Morton Commission), see Oliver McGregor, *Divorce in England* (Heinemann 1957) 176.

<sup>196</sup> HL Deb 21 November 1983, vol 445, col 32.

<sup>197</sup> SSC Deb (Bill 96) 5 April 1984, col 492.

<sup>198</sup> HC Deb 13 June 1984, vol 61, col 953.

<sup>199</sup> *Ibid*, col 959.

<sup>200</sup> *Ibid*, col 965.

<sup>201</sup> *Ibid*, col 966.



Elizabeth Peacock,<sup>202</sup> Ian Percival,<sup>203</sup> Ivor Stanbrook,<sup>204</sup> James Pawsey,<sup>205</sup> David Amess,<sup>206</sup> Jill Knight,<sup>207</sup> and Peter Bruinvels.<sup>208</sup> It was probably Greenway's contribution which captured best the anti-liberal nature of the argument, evincing the conservative prioritising of institutions over individuals:

We must decide whether to prolong the agony in a small minority of cases for a little longer and enshrine the value of marriage in law or to be seen as making divorce easier for all and undermining the institution of marriage.<sup>209</sup>

When it came to financial provision on divorce, paradoxically a New Right individualism-inspired move to the clean break made it *more likely* that much maintenance would be socialised. This point was made with forensic succinctness by Joseph Jackson QC in Committee, 'A clean break is all very well, provided that the state is prepared to underwrite the consequences'.<sup>210</sup> However, this point was lost on a Conservative Party which was otherwise intent on rolling back the frontiers of the state, although it is consistent with Ruth Lister's assessment that Conservative tax and social security policies from the 1980s caused increased insecurity and dependency for women.<sup>211</sup>

There was also a tension between considerations over the responsibilities owed to first and second families. Mayhew, as Solicitor General, made it clear that the second family does not rank equally with the first family,<sup>212</sup> and the Lord Chancellor dismissed the suggestion that he was favouring any side but that 'on the whole I am on the side of first wives if their marriages have been of long duration and if there have been children'.<sup>213</sup> Section 25(1) of the amended MCA 1973 gives 'first consideration...to the welfare while a minor of any child of the family', which can only mean children raised within a first family, but then section 25(2)(b) allows

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<sup>202</sup> Ibid, col 969.

<sup>203</sup> Ibid, col 970.

<sup>204</sup> Ibid, col 975.

<sup>205</sup> Ibid, col 978.

<sup>206</sup> Ibid, col 981.

<sup>207</sup> Ibid, col 985.

<sup>208</sup> Ibid, col 989.

<sup>209</sup> Ibid, col 992.

<sup>210</sup> SSC Deb (Bill 96) 27 March 1984, col 286.

<sup>211</sup> Ruth Lister, 'Future Insecure: Women and Income Maintenance under a Third Tory Term' (1987) 27 Feminist Review 9.

<sup>212</sup> SSC Deb (Bill 96) 1 May 1984, col 567.

<sup>213</sup> HL Deb 2 February 1984, vol 447, col 783.

second family considerations into the equation under obligations the party 'has or is likely to have in the foreseeable future'. As 'first consideration' has been interpreted not to mean paramount,<sup>214</sup> the statute is devoid of any policy prescription over the priority of needs of first and second families, relying instead on the division of marital wealth according to an overall assessment of what fairness requires in each individual case. In general, however, it is clear that there remained a greater degree of consensus around the regulation of adult relationships where this was necessary to promote the welfare of children, than where no such considerations were present.

Another aspect was what was the place of a second wife's wealth in the ancillary relief calculus? What it came down to is if the former husband's means (either in isolation or freed up by a second wife's means) are more than sufficient for his current needs then he will be vulnerable to a claim for spousal maintenance under section 23, but if not then the first wife is thrown back onto the state to supplement her income. Despite official protestations to the contrary,<sup>215</sup> logically this can only be seen as the second wife's means subsidising the first wife's household.

A further tension existed between Thatcherite/New Right messages on the traditional family and women's place in it and its emphasis on the individual as homo economicus.<sup>216</sup> A clear message from the Bill was to sound a warning to women that financial dependence on their husbands might leave them vulnerable in the future, and they should therefore get out of the home and nurture their careers.<sup>217</sup> Smart criticised the Bill because it aimed to push women into self-sufficiency, yet without considering how this will effectively be achieved.<sup>218</sup> An emphasis on formal legal equality actually perpetuates, and perhaps exacerbates, a profound inequality of opportunity to achieve those formal outcomes, while the shift to place more emphasis on the maintenance of children (at the expense of spousal support) results in women effectively becoming financially dependent on their children.<sup>219</sup> Back in 1981 the Law Commission thought it was unacceptable for a

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<sup>214</sup> *Suter v Suter and Jones* [1987] 2 FLR 232.

<sup>215</sup> Patrick Mayhew, SSC Deb (Bill 96) 3 May 1984, col 607.

<sup>216</sup> The mixed messages around women are explored in Loretta Loach, 'Can Feminism Survive a Third Term?' (1987) 27 *Feminist Review* 23.

<sup>217</sup> Jill Knight, HC Deb 16 February 1984, vol 54, col 452; also observed by Fox Harding in Lorraine Fox Harding, "Family Values" and Conservative Government Policy: 1979-1997' in Gill Jagger and Caroline Wright (eds), *Changing Family Values* (Routledge 1999) 130.

<sup>218</sup> Carol Smart, *The Ties That Bind* (Routledge & Kegan Paul 1984) 241.

<sup>219</sup> *Ibid* 242. Diduck explores different notions of equality in ancillary relief in Alison Diduck, 'Ancillary Relief: Complicating the Search for Principle' (2011) 38 *Journal of Law and Society* 272.

man to transfer financial responsibility for his ex-wife to the state upon divorce, yet this situation was made more likely by the MFPA 1984.<sup>220</sup>

What results from the Act's reforms is a constriction of private sources of maintenance without any correlative compensation through public provision. In summary, 'it introduces a firm principle into family law, namely that women must bear the full adverse consequences of their economic dependence on men – even though it is men who continue to accrue the benefits of this dependence'.<sup>221</sup> Similar concerns were expressed by Kingdom,<sup>222</sup> Freeman,<sup>223</sup> Land<sup>224</sup> and Brophy and Smart,<sup>225</sup> the latter of whom observed that the Bill 'seemed so neutral' but was anything but: 'The most significant thing about the Bill was that it completely ignored the division of labour in marriage, and the differences in the roles that men and women play in marriage and in the rest of society'.<sup>226</sup> In effect, men managed to renegotiate the terms of marriage in their favour but without any corresponding trade-off given to women, thereby reinforcing a contractual, rather than an altruistic relational view of marriage; 'a business partnership model of marriage' in Douglas' words.<sup>227</sup> This was part of 'a subtle redrawing of the boundaries between the public and the private'<sup>228</sup> by the Conservative Government, although not in a consistent fashion, giving rise to tensions between a shift away from direct supply of public support and towards private or marketplace provision.<sup>229</sup>

So, to what extent are the time bar and the clean break provisions in the MFPA 1984 consistent with the conservative disposition towards aspects of family and law outlined in chapter three? The maintenance of a reduced time bar exhibited a

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<sup>220</sup> Law Commission, *The Financial Consequences of Divorce: The Response to the Law Commission's Discussion Paper* (Law Com No 112, 1981) para 42.

<sup>221</sup> Smart (n 218) 242.

<sup>222</sup> Julia Brophy and Carol Smart (eds), *Women-in-Law: Explorations in Law, Family and Sexuality* (Routledge and Kegan Paul 1985) 147.

<sup>223</sup> Michael Freeman, *A Guide to the Matrimonial & Family Proceedings Act 1984* (CCH Editions 1984) 5.

<sup>224</sup> Hilary Land, 'Changing Women's Claims to Maintenance' in Michael Freeman (ed), *State, Law, and the Family* (Tavistock Publications 1984) 25.

<sup>225</sup> Brophy and Smart (n 222) 198.

<sup>226</sup> *Ibid* 199.

<sup>227</sup> Gillian Douglas, 'Family Law under the Thatcher Government' (1990) 17 *Journal of Law and Society* 411, 416.

<sup>228</sup> Jane Lewis and Fenella Cannell, 'The Politics of Motherhood in the 1980s: Warnock, Gillick and Feminists' (1986) 13 *Journal of Law and Society* 321, 323.

<sup>229</sup> Peter Alcock, "'A Better Partnership between State and Individual Provision": Social Security into the 1990s' (1988) 16 *Journal of Law and Society* 97; Susan Boyd, 'Can Law Challenge the Public/Private Divide? Women, Work and Family' (1996) 15 *Windsor Yearbook of Access to Justice* 161.

concern to restrict access to divorce. Although it is apparent that this concern was based on misplaced faith in the efficacy of such a measure to buttress the institution of marriage, it is consonant with a conservative prioritising of institutions over individuals in general, and a belief in the wider functional benefits which flow from marriage in particular. At the same time, the realistic view that some marriages end in divorce is consistent with a Burkean understanding of the moral imperfection of human beings. But, of course, just because a legislator's standpoint aligns with a particular philosophical perspective, does not necessarily mean that it is informed by that perspective, and the idea that law should permit divorce also chimes with, for example, libertarianism, liberalism and communitarianism.

I observed in chapter three that the clean break is consistent with a view of the individual who is free and independent and able to trade her labour unencumbered in a free market system. While classical conservatism upholds inequality as an inevitable consequence of the social ecology, it also clearly emphasises the importance of *personal responsibility* for family members by those who have assumed such responsibility. Put broadly, responsibility is more important than liberty. Support for the family in conservative thought is unequivocal, although there is disagreement over whether this extends to all family forms or just some. In contrast, support for equality is not ruled out, but contextualised. So in the event of a conflict, I argued in chapter three that support for the family should prevail over concerns about inequality. In the context of ancillary relief, this means that it may be appropriate for the economically stronger spouse to support the weaker one after divorce. The amendments to the MCA 1973 did not preclude that outcome because the court was only charged with considering the appropriateness of a clean break in the case before it. However, the clean break provisions were arguably complicit in a shift away from an altruistic and institutional view of marriage, which is more consistent with conservatism, towards a contractual one. The other issue around the clean break was to do with the division of responsibility between first and subsequent families. I argued that the general approach should be to prioritise the responsibilities which were assumed first in time (see chapter three), ie to the first family. There was support for this from some Conservatives during the parliamentary debates, but this was not reinforced through the provisions of the Act. So I conclude that the Conservative Party's support for the clean break diverged from a conservative disposition in that it did not give sufficient consideration to the needs of the economically weaker spouse and the responsibility of the economically stronger spouse.

Finally, the changes brought about by the MFPA 1984 could be accommodated within an evolutionary conservative paradigm, as part of a trend towards a family ideology based on support for *remarriage* stemming from at least as far back as the Divorce Reform Act 1969.<sup>230</sup> On this understanding, the reduction in the time bar was designed to enable the more rapid burial of dead marriages, and the clean break made remarriage more likely on two fronts: for the ex-wife whose best hope of improving her living standards after divorce was to remarry, and for the ex-husband who is freed from ongoing financial obligations to his former wife. Although this analysis is compelling, I found no explicit evidence of it in the discourse I examined.

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<sup>230</sup> Peter Alcock, 'Remuneration or Remarriage? The Matrimonial and Family Proceedings Act 1984' (1984) 11 *Journal of Law and Society* 357, 364.

## CHAPTER 5

### MAJOR CHANGE? – FAMILY LAW AND POLICY IN THE DECADE FOLLOWING THE MATRIMONIAL AND FAMILY PROCEEDINGS ACT 1984

#### INTRODUCTION

This chapter aims to provide a broad narrative of some notable developments in family law from the mid-eighties to the mid-nineties, thereby linking the detailed consideration of the Matrimonial and Family Proceedings Act 1984 and the Family Law Act 1996 (FLA 1996) in the chapters immediately before and after it. While I contend that it is chiefly by looking closely at the discourse around particular examples of family lawmaking that we can best understand the relationship between British conservatism and the legal regulation of intimate adult relationships, it is my concern that such microevaluation does not come at the expense of an attempt at a coherent metanarrative. Before turning to a series of family law vignettes, I will first consider the advent of the premiership of John Major and the character of his leadership regarding family law and policy in the broadest sense. The chapter will conclude by identifying themes and transitions from this decade of change.

#### THE MAJOR PREMIERSHIP – THATCHERISM AFTER THATCHER?

The resignation of Margaret Thatcher on 28 November 1990 was as a result of a confluence of many factors, and much has been written about this landmark in British political history.<sup>1</sup> The loss of heavyweight supporters of the Thatcherite project from her close circle (eg Norman Fowler, Geoffrey Howe, Nigel Lawson, Cecil Parkinson, Nicholas Ridley), the damage inflicted on the Government by its

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<sup>1</sup> See, for example, Peter Riddell, *The Thatcher Era and its Legacy* (Blackwell 1991) 219-221; Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) chapter xxviii; Robert Blake, *The Conservative Party from Peel to Major* (Arrow Books 1998) chapter xiii; John Ramsden, *An Appetite for Power: A History of the Conservative Party since 1830* (HarperCollins 1999) chapter 17; Michael Heseltine, *Life in the Jungle: My Autobiography* (Hodder and Stoughton 2000) chapter 16; John Campbell, *Margaret Thatcher Volume 2: The Iron Lady* (Jonathan Cape 2003) chapter 17; Robin Harris, *The Conservatives: A History* (Bantam Press 2011) chapter 17.

heavy-handed implementation of the poll tax, Thatcher's hubristic attitude to cabinet government and her distance from many of her backbenchers, and ultimately the Party's slump in the opinion polls, all led to what was the undoing of many a Conservative leader: a growing *mood* that she no longer looked like a winner.<sup>2</sup> Following Thatcher's resignation, her choice of successor was also to be that of her Party – John Major.<sup>3</sup> Some regarded what Major offered as 'Thatcherism without Thatcher',<sup>4</sup> apparent change but with an enduring core of continuity.

It was said of John Major's career that 'he rose without trace'.<sup>5</sup> From probably the least privileged background of any British Prime Minister,<sup>6</sup> he held the premiership for seven turbulent years. After becoming an MP in 1979, he occupied junior government posts during much of the 1980s before being promoted to the cabinet as Chief Secretary to the Treasury in 1987. His rise thereafter was meteoric: appointed Foreign Secretary in July 1989; Chancellor from October 1989 to November 1990; then Party leader and Prime Minister until May 1997. His electoral performance is one of extremes: in 1992 the Conservatives polled more votes than any party before or since (Major's Huntingdon constituency majority was a staggering 36,230); but in 1997 their defeat was the heaviest of any governing party in the twentieth century. Major would later reflect that his time in Number 10 was 'too conservative, too conventional. Too safe, too often. Too defensive. Too reactive'.<sup>7</sup> He believed in 'a rough-and-ready decency' but lamented that, to many still wedded to Thatcher's Manichaeian vision, this was not considered enough:

They demand an ideology, intellectual mentors, a political template by which to judge every circumstance. I reject that...Of course there must be broad principles and recognised values to underpin political decisions, but to believe that decisions can only be in the national interest if they conform to the ideology of some guru [perhaps a veiled reference to Friedrich Hayek and Milton Friedman] must surely be nonsense...A politician's responsibility should above all be a

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<sup>2</sup> Blake (n 1) 383; Ramsden (n 1) 467-469.

<sup>3</sup> Harris (n 1) 495-6.

<sup>4</sup> Ramsden (n 1) 471.

<sup>5</sup> Peter Norman, 'Tory Leader Who Rose Without Trace' *Financial Times* (London, 28 November 1990).

<sup>6</sup> Simon Jenkins, *Thatcher and Sons: A Revolution in Three Acts* (Penguin 2006) 159.

<sup>7</sup> John Major, *John Major: The Autobiography* (HarperCollins 1999) xxi.

readiness to do what is best in all the circumstances to deal with the issue at hand.<sup>8</sup>

The seeds of the Party's demise were already sown by the time Major took over. Andrew Taylor identifies the Party's ideological flexibility as one of the main reasons it dominated British politics during the Thatcher years.<sup>9</sup> While there may have been strong ideological narratives at a rhetorical level, he argues that the Conservatives' principled pragmatism enabled them to adapt successfully to a complex and dynamic political environment. However, Taylor observes that this advantage had been lost by the time Major became leader. Although Major was ideologically agnostic, he inherited a party for which pragmatism had ossified into an often exclusionary ideology.<sup>10</sup> As Major later testifies, 'The broad tradition of our party was tolerant. If a certain shrill and censorious tone had set in, it was that tone which broke faith with our past'.<sup>11</sup>

Undoubtedly the Major Governments made efforts to counter what was often perceived to be the divisive legacy of Thatcherism, but these efforts were sometimes ill-conceived, disastrously executed, or lacked salience with the public: the 'classless society', Citizen's Charter, and 'Back to Basics' all stand as examples. Back to Basics arose from Major's speech to the Conservative Party Conference in October 1993. Major wrote that Back to Basics 'came from [his] innermost personal beliefs',<sup>12</sup> which objected that '[p]rofessional wisdom had become divorced from public sentiment and from reality',<sup>13</sup> echoing Burke's distrust of so-called experts and his trust in the good of the status quo. Back to Basics rested on a belief in 'personal responsibility and individual values',<sup>14</sup> and this is what Major saw as the essence of the 'basics' to which he wanted to return. As will be seen in the next chapter, this belief chimes with the spirit and letter of Part II of the FLA 1996, although it seems that Back to Basics was primarily aimed at matters of crime, health, and education. It is evident, though, that what was intended as the purpose

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<sup>8</sup> Ibid xxii.

<sup>9</sup> Andrew Taylor writing in the preface to Timothy Heppell, *The Conservative Party Leadership of John Major 1992 to 1997* (Edwin Mellen Press 2006).

<sup>10</sup> Heppell, *ibid* 16. Heppell elsewhere calls Major 'ideologically enigmatic' (252). Heppell's chapter five contains a useful overview of the ideological attitudes of the parliamentary Conservative Party in the 1992-1997 parliament, and of its ministers in chapter seven and pages 138-142.

<sup>11</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 165 (original author's emphasis).

<sup>12</sup> John Major, *John Major: The Autobiography* (HarperCollins 1999) 387.

<sup>13</sup> *Ibid* 387.

<sup>14</sup> *Ibid* 388.



of Back to Basics was lost when it was reinterpreted as a moral crusade against personal behaviour by a hostile media following a parade of high profile indiscretions by Conservative politicians.<sup>15</sup> Yet, provided they did not impact upon the proper performance of public office, Major was tolerant of personal misdemeanours.<sup>16</sup> However, Back to Basics was so undermined by events and the attritional effects of press stories about those events, that the policy approach was abandoned in February 1994, and Major subsequently shied away from such broad-brush social policy initiatives for the remainder of his premiership.<sup>17</sup>

What was Major's attitude to matters of the family? Heppell's assessment is that Major is a social liberal,<sup>18</sup> but he led a party with a majority of socially conservative MPs.<sup>19</sup> The Prime Minister's room for manoeuvre, therefore, was limited because, despite his liberal views of family matters, he owed his success in the party leadership contest in no small part to the right-wing of the party. McManus points to Major's family background in the Music Hall and considers him a 'man without prejudice';<sup>20</sup> and Major himself claims he 'did not see homosexuality as a social evil'.<sup>21</sup> When he met with Ian McKellen at Downing Street in September 1991 - something which *The Times* believed Thatcher would never have done - this signified Major's open-mindedness towards matters of homosexual law and policy.<sup>22</sup> There was some reform in this area under Major's premiership which removed (or ameliorated) discrimination against gay men and lesbians in certain matters (see my chapter seven). On the specific matter of the Family Law Bill, Major believed 'it would help families and work for the benefit of children'.<sup>23</sup> However, with effectively no Commons majority during his last year or so in office, it is easy to see why his more modern and inclusive stance on the family did not hold sway in the Party at the time. In the end, it was the Major Government's record on the family (as well as

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<sup>15</sup> There is no shortage of examples, but a particularly notorious one was the case of Jerry Hayes, the married MP for Harlow, who was reported to have had an affair with Paul Stone. Stone was under the lawful age for homosexual activity (21) at the time. See, Peter Popham, 'Back to Basics of Vaudeville' (*The Independent*, 7 January 1997) <[www.independent.co.uk/news/uk/back-to-basics-of-vaudeville-1282058.html](http://www.independent.co.uk/news/uk/back-to-basics-of-vaudeville-1282058.html)> accessed 23 July 2015.

<sup>16</sup> Major (n 12) 551. With hindsight, it might be speculated that Major was tolerant because his own closet was not without its skeletons, ie his affair with Edwina Currie from 1984 to 1988, revealed by Currie in 2002.

<sup>17</sup> Anthony Seldon, *Major: A Political Life* (Weidenfeld & Nicolson 1997) 406.

<sup>18</sup> Timothy Heppell, *The Conservative Party Leadership of John Major 1992 to 1997* (Edwin Mellen Press 2006) 166.

<sup>19</sup> *Ibid*, chapter 5.

<sup>20</sup> McManus (n 11) 165, 183.

<sup>21</sup> Major (n 12) 213.

<sup>22</sup> Seldon (n 17) 215-218.

<sup>23</sup> *Ibid* 641.

on Europe) that caused the *Daily Mail* to turn lukewarm in its support of the Party in the run up to the 1997 general election.<sup>24</sup>

Before considering specific examples of family law from this time, one point of continuity between the Thatcher and Major Governments can be observed: Lord Mackay held the office of Lord Chancellor from 1987 to 1997, making him the longest serving Lord Chancellor of the twentieth century. The significance of this point could be overstated, however. And this is because family law and policy in the United Kingdom is not the preserve of any one government department, but could variously involve, for example, Education, Health, Social Security, as well as Mackay's Lord Chancellor's Department (as it then was). However, Lord Mackay's influence *is* apparent in the Children Act 1989, the Human Fertilisation and Embryology Act 1990 and the FLA 1996, for example, but it is merely one of many forces which shaped those statutes.

## **FAMILY LAW AND POLICY PRIOR TO THE FAMILY LAW ACT 1996**

Unsurprisingly, the family law and policy of mid- to late-Thatcherism paints a mixed picture. Developments in housing law lessened the privileged status of married couples and gave greater rights to opposite-sex cohabitants.<sup>25</sup> The Housing Act 1985, which governs succession rights of council tenants, states that a person may succeed the tenant under a secure tenancy if they occupied the property as the tenant's spouse or other family member.<sup>26</sup> Section 113(1)(a) defines 'family' to include cohabitants (living 'together as husband and wife'). Similarly section 39 and schedule 4 of the Housing Act 1988 amended the Rent Act 1977 by giving legal equivalence of a person 'living with the original tenant as his or her wife or husband' with that of the original tenant's spouse, thereby removing another legal distinction between married and cohabiting couples.

The Family Law Reform Act 1987 further eroded legal distinctions between married and unmarried couples; this time with regard to the legal status of children born to mothers who were not married to the child's father. The Act effectively abolished the concept of illegitimacy, although not in so many words. Again, this is more in line

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<sup>24</sup> *Ibid* 712.

<sup>25</sup> The later case of *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 extended it to same-sex couples' tenancies under the Rent Act 1977.

<sup>26</sup> See ss 87-89.

with a libertarian approach to the regulation of the family, than one which might be considered a return to the traditional Victorian values of late Thatcherism.<sup>27</sup> It is also in line with the pronouncements of the European Court of Human Rights (ECtHR) around this time. The case of *Marckx v Belgium*<sup>28</sup> held that Belgium's illegitimacy laws were in breach of the applicants' rights to a private and family life under Article 8 of the European Convention on Human Rights (ECHR). Stephen Cretney, who was a Law Commissioner at the time of its first report on illegitimacy,<sup>29</sup> confirms that the *Marckx* case was considered in the discussions which lead to the Family Law Reform Act.<sup>30</sup> The apparent influence of the Strasbourg court stands as evidence that other factors, aside from party political ones, were influencing the development of family law during this period.

A couple of technical changes were made to marriage, which could be interpreted as measures to modernise the concept of marriage, specifically who may enter into it and greater recognition of the wife as a separate individual and economic actor within marriage. The former point was covered in the Marriage (Prohibited Degrees of Relationship) Act 1986, which provided that marriage between certain people connected by affinity would no longer be void (eg a step-child and his/her step-parent or step-grandparent provided the step-child was over 21 and had never been treated as a child of the family by the other party). The latter point was addressed by section 32 of the Finance Act 1988, which further eroded the doctrine of unity by abolishing the rule whereby a wife's income is aggregated to her husband's for income tax purposes.

The Surrogacy Arrangements Act 1985 came about because of media and popular reaction to the baby Cotton surrogacy case.<sup>31</sup> It is a short Act which outlaws the practice of commercial surrogacy, but leaves people free to enter into private surrogacy arrangements (and these were given a legal framework in the subsequent Human Fertilisation and Embryology Act 1990, section 30). Gillian Douglas says of the Act that its attempt to uphold traditional family values and counter the forces of the market are 'an expression of Conservative, rather than far-

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<sup>27</sup> Gillian Douglas, 'Family Law under the Thatcher Government' (1990) 17 *Journal of Law and Society* 411, 418.

<sup>28</sup> (1979) 2 EHRR 330.

<sup>29</sup> Law Commission, *Illegitimacy* (Law Com No 118, 1982).

<sup>30</sup> Stephen Cretney and Judith Masson, *Principles of Family Law* (6<sup>th</sup> edn, Sweet & Maxwell 1997) 86.

<sup>31</sup> See *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

right libertarian philosophy'.<sup>32</sup> This is borne out by fact that the birth mother cannot be forced to hand over a child born following surrogacy: surrogacy agreements are not enforceable. Overall, the Act can be seen as a sensible and proportionate response to a minor social issue, and one which followed the recommendations in the Warnock Report.<sup>33</sup> Although it followed Warnock, its timing was certainly influenced by the media storm around the Kim Cotton case, which immediately followed the birth of baby Cotton on 4 January 1985. A Cabinet paper prepared by Willie Whitelaw (then Deputy Prime Minister), dated 21 January 1985, confirms that the previous week's meeting of the Home and Social Affairs Committee wanted to resist popular pressure to legislate immediately, but invited Cabinet to consider whether to legislate in the current parliamentary session '[i]n view of the current controversy'.<sup>34</sup> It is evident that Cabinet was swayed by such pressure because the Bill received Royal Assent before the summer recess.

The three most significant family law Acts of the late Thatcherite period, however, were the Children Act 1989, the Human Fertilisation and Embryology Act 1990 and the Child Support Act 1991.<sup>35</sup> Space does not permit detailed examination of these measures here but I will briefly consider their main provisions and how they relate to the discussion in this chapter.

The Children Act 1989 (CA 1989) was a landmark piece of legislation, codifying many of the private and public law provisions concerning children which were considered to be 'complicated, confusing and unclear'.<sup>36</sup> Sir Geoffrey Howe, then Deputy Prime Minister and Leader of the House of Commons, described it as 'the most comprehensive and far-reaching reform of this branch of the law ever introduced'.<sup>37</sup> The Act was a result of the confluence of two streams, having its origins in the work of the Law Commission and a Government interdepartmental

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<sup>32</sup> Gillian Douglas, 'Family Law under the Thatcher Government' (1990) 17 *Journal of Law and Society* 411, 417.

<sup>33</sup> *Department of Health and Social Security, Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) specifically recommendation 59 on page 86 of the Report. The Warnock Report is considered further below.

<sup>34</sup> Memorandum by the Lord President of the Council on Legislation on Commercial Surrogacy, CAB 129/219/2, 21 January 1985.

<sup>35</sup> Another significant provision from that period was section 28 of the Local Government Act 1988 which labelled homosexuality as a 'pretended family relationship'. I consider section 28 as part of the prehistory of the Civil Partnership Act 2004 in chapter seven.

<sup>36</sup> Law Commission, *Review of Child Law, Guardianship and Custody* (Law Com No 172, 1988) para 1.1.

<sup>37</sup> HC Deb 26 October 1989, vol 158, col 1075.

working party.<sup>38</sup> The Law Commission's work was largely focussed on private law issues and it began its review of child law in 1984. Four Working Papers were published and put out for consultation,<sup>39</sup> and they culminated in a full report and draft Bill published in 1988.<sup>40</sup> The Government review concerned itself with child care responsibilities of local authorities and interim and final reports were published.<sup>41</sup> The call for reform gathered pace following a number of high-profile child abuse cases, most notably in Cleveland, culminating in the Bill beginning its parliamentary passage in the House of Lords on 23 November 1988 under the promotion of Lord Mackay.<sup>42</sup> It has been observed that the Bill was enacted with a high degree of consensus across political parties,<sup>43</sup> which is perhaps more remarkable given that the policy of the Bill was split between the Department of Health (public law) and the Lord Chancellor's Department (private law).

At the heart of the Act's philosophy is 'the belief that children are best looked after within the family with both parents playing a full part and without recourse to legal proceedings'.<sup>44</sup> It has been argued that this idea is informed by four approaches to child welfare: laissez-faire and patriarchy, state paternalism and child protection, the defence of the birth family and parents' rights, and children's rights and child liberation.<sup>45</sup> The two central concepts in the Act, of parental responsibility and the

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<sup>38</sup> The working party was set up following a recommendation contained in the Second Report of the Social Services Committee, *Children in Care* (HC 1983-84, 360-I), also known as the 'Short Report' after its chairperson, Renee Short MP. For an insider's view of the whole process see Mavis Maclean and Jacek Kurczewski, *Making Family Law* (Hart 2011) chapter 2.

<sup>39</sup> They covered guardianship (Law Commission, *Review of Child Law: Guardianship* (Law Com No 91, 1985)); custody (*Review of Child Law: Custody* (Law Com No 96, 1986)); care, supervision and interim orders in custody proceedings (*Review of Child Law: Care, Supervision and Interim Orders in Custody Proceedings* (Law Com No 100, 1987)); and wards of court (*Review of Child Law: Wards of Court* (Law Com No 101, 1987)).

<sup>40</sup> Law Commission, *Review of Child Law, Guardianship and Custody* (Law Com No 172, 1988).

<sup>41</sup> See *Review of Child Care Law* (Report to Ministers of an Interdepartmental Working Party 1985); *The Law on Child Care and Family Services* (White Paper, Cm 62, 1987). Evidence suggests that the Government's position was influenced to some extent by cases decided in the ECtHR (eg *O v United Kingdom* (1988) 10 EHRR 82), see Gillian Douglas, 'The Family and the State under the European Convention on Human Rights' (1988) 2 International Journal of Law and the Family 76, 98-99 and Stephen Cretney and Judith Masson, *Principles of Family Law* (6<sup>th</sup> edn, Sweet & Maxwell 1997) 85-86.

<sup>42</sup> *Report of the Inquiry into Child Abuse in Cleveland 1987* (Cm 412, 1988) (the 'Cleveland Report'); Department of Health, *Child Abuse: A Study of Inquiry Reports 1980-89* (HMSO 1991).

<sup>43</sup> Lorraine Fox Harding, 'The Children Act 1989 in Context: Four Perspectives in Child Care Law and Policy (1)' (1991) 13 The Journal of Social Welfare and Family Law 179, 180.

<sup>44</sup> Stephen Cretney and Judith Masson, *Principles of Family Law* (6<sup>th</sup> edn, Sweet & Maxwell 1997) 775.

<sup>45</sup> Lorraine Fox Harding, 'The Children Act 1989 in Context: Four Perspectives in Child Care Law and Policy (1)' (1991) 13 The Journal of Social Welfare and Family Law 179.

child's welfare being the court's paramount consideration, very much flow from these approaches. The notion of parental responsibility could have come straight from the Cabinet-level Family Policy Group (see chapter four), but did in fact emerge from the Law Commission's draft Bill in its Report No. 172. Its report also placed child welfare as the guiding star in a court's deliberations, although the draft Bill proposed that it should be a court's 'only concern',<sup>46</sup> which suggested too much emphasis on the child's interests. The final Act has welfare as the court's 'paramount consideration',<sup>47</sup> meaning that it 'rules upon or determines the course to be followed'<sup>48</sup> by a court.

Smart has written that the CA 1989 might be the first statute to address itself to the idea of the post-divorce family and that that family is not beyond the reach of state regulation.<sup>49</sup> The Act certainly reorders the balance of power between the triad of parents, children and state, semantically and substantively shifting from parental rights to parental responsibility. Some have seen this as part of the privatisation or deregulation of child law, such that the expectation is that parents look after their children, with the state supporting families in a more diffuse, ecological sense.<sup>50</sup> Others have argued that there is no contradiction between the interventionist provisions of the Act and general Thatcherite discourse opposed to state intervention by postulating that the Act is only 'against the type of intervention that brings into question the "naturalness" of family life'.<sup>51</sup> This demarcation is consonant with the then Government's neoliberal views on economic matters and a neo-conservative, or libertarian, stance on the state's withdrawal from the direct regulation of family life.<sup>52</sup>

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<sup>46</sup> Law Commission, *Review of Child Law, Guardianship and Custody* (Law Com No 172, 1988) 73.

<sup>47</sup> Children Act 1989, s 1(1).

<sup>48</sup> Lord MacDermott in *J v C* [1970] AC 668, 710.

<sup>49</sup> Carol Smart, 'Divorce in England 1950-2000: A Moral Tale?' in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (OUP 2000) 384.

<sup>50</sup> Michael Freeman, 'Disputing Children' in Katz, Eekelaar and Maclean (eds), *ibid* 446; Judith Masson, 'From Curtis to Waterhouse: State Care and Child Protection in the UK 1945-2000' in Katz, Eekelaar and Maclean (eds), *ibid* 581. I have borrowed the 'ecological' term from Mary Ann Glendon, *The Transformation of Family Law* (The University of Chicago Press 1989) 308.

<sup>51</sup> Karen Winter and Paul Connolly, "'Keeping It in the Family": Thatcherism and the Children Act 1989' in Jane Pilcher and Stephen Wagg (eds), *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (Falmer Press 1996) 39.

<sup>52</sup> Gillian Douglas, 'Family Law under the Thatcher Government' (1990) 17 *Journal of Law and Society* 411, 419.

A significant part of the shift in the balance of power in the CA 1989 is in terms of a growing discourse around the rights of the child. I considered in chapter three how conservatism is more concerned with the maintenance of authority within society than in the advancement of rights, so was it incongruous for the Thatcher administration to reinforce the rights of children through legislation? I agree with Karen Winter and Paul Connolly's reading which suggests a mixed response, but on the whole answers in the negative. It is a mixed response in the sense that the Act sets out a child's rights in relation to the state and towards his or her parents, but it has far more to say about the former than the latter.<sup>53</sup> And even then, a child's rights under the Act really boil down to a right to remain within their natural family wherever possible and for the child's voice to be heard in decision-making about their future, rather than full-blown rights to self-determination. All of which serve to reinforce notions of the naturalness of the nuclear family and the essentially private sphere of family life, consistent with Ferdinand Mount's Thatcherite thesis and a liberal view of the family generally.<sup>54</sup>

The CA 1989 is also concerned with the redefinition and restriction of social work intervention,<sup>55</sup> - also part of the process of public/private demarcation going on in the Act - which although part of the rational, evidence-based review process, was very much fuelled by the series of moral panics around children and the professionals who work with them during the 1980s. There are similarities here with the attitudes towards marriage counsellors in the next chapter about the Family Law Act 1996. Professionals who work with families are an essential part of the state's apparatus but they were often viewed with suspicion by Conservative legislators, and as an unnatural interference in the 'natural' order of 'the family'.

Another significant piece of legislation regulating the family was the Human Fertilisation and Embryology Act 1990 (HFEA 1990). This Act arose primarily out of a felt need to address scientific advances in, and widespread fears regarding, fertility treatment and embryo research which had outgrown existing legal frameworks, but also to codify the law on parentage and to clarify exceptions to the

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<sup>53</sup> Karen Winter and Paul Connolly, "'Keeping It in the Family": Thatcherism and the Children Act 1989' in Jane Pilcher and Stephen Wagg (eds), *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (Falmer Press 1996) 38.

<sup>54</sup> Ferdinand Mount, *The Subversive Family: An Alternative History of Love and Marriage* (The Free Press 1992). See my chapter three for a discussion of the public/private dichotomy in liberal theory of family and the state.

<sup>55</sup> Winter and Connolly (n 53) 35.

common law principle that legal parentage followed genetic parentage.<sup>56</sup> The thinking behind the Act is drawn from the *Report of the Committee of Inquiry into Human Fertilisation and Embryology*<sup>57</sup> (the 'Warnock Report') chaired by Dame Mary Warnock and the subsequent Government White Paper.<sup>58</sup> The Committee began its work in July 1982 and was tasked 'to examine the social, ethical and legal implications of recent, and potential developments in the field of human assisted reproduction.'<sup>59</sup> The Report recommended the establishment of a regulatory body (what became the Human Fertilisation and Embryology Authority), as well as various legal provisions which would determine who would be treated as the parents of a child born following assisted reproduction.

The Bill was introduced into the House of Lords by Lord Mackay on 22 November 1989. It was sponsored in the Commons by the Health Secretary, Kenneth Clarke, and had its Second Reading there on 2 April 1990.<sup>60</sup> Clarke thought it was a 'complex and sensitive Bill that deals with matters that are fundamental to the well-being of our society' and it was 'one of the most significant measures to be brought forward by a Government in the last 20 years'.<sup>61</sup> As such, the more controversial ethical issues in the Bill were not subject to the normal rules of party discipline. The parliamentary debates then, and when the 1990 Act was reformed in 2008, considered abortion too. The result in the Commons Second Reading was 273 Ayes and 135 Noes, with most Conservatives supporting the Government. The result was more pronounced at the Commons Third Reading on 21 June 1990: 303 Ayes; 65 Noes – those opposed included a number of Conservatives (including Julian Brazier, Jill Knight, and Ann Widdecombe).

There is an obvious tension in the Act between accepting the potential for artificial reproduction to fragment the heterosexual nuclear family model (and to facilitate its alternatives) and the attempt to shore up that model in the face of such challenges to it. Section 13(5) is emblematic of this tension:

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<sup>56</sup> On the origins of the Act see Ruth Deech, 'The Legal Regulation of Infertility Treatment in Britain' in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (OUP 2000) 165-186.

<sup>57</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984).

<sup>58</sup> Department of Health and Social Security, *Human Fertilisation and Embryology: A Framework for Legislation* (Cm 259, 1987).

<sup>59</sup> DHSS (n 57) iv.

<sup>60</sup> HC Deb 2 April 1990, vol 170, col 914.

<sup>61</sup> *Ibid*, col 914.



A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

While this provision did not prevent the treatment of single women or lesbian couples,<sup>62</sup> it is consistent with the underlying policy of the legislation and much of the discourse around it, namely to privilege the married heterosexual family unit yet at the same time grudgingly accommodate those whose family forms deviate from this dominant paradigm. All of this suggests an ideological struggle playing out through the legislative process. Davina Cooper and Didi Herman interpret the Act as providing a necessary alternative technique with which to regulate (ie channel the behaviour of) intimate adult relationships in the light of a dominant heteronormative ideology losing its force in society more broadly.<sup>63</sup> However, much as in the case of civil partnership and same-sex marriage (see chapters seven and eight), acceptance of alternative family forms rested on their being assimilated with, or analogised to, the patriarchal nuclear family model, not simply being accepted for what they were. This led arguably to a reinforcing of familial ideology, embracing some gay and lesbian people within the mainstream, while further marginalising others.<sup>64</sup>

This heteronormative concern over the importance of fathers playing a role in the lives of their children was also prominent in the debates around the Child Support Act 1991 (CSA 1991).<sup>65</sup> The system prior to the implementation of the CSA 1991 had been criticised for being fragmented, uncertain, slow, inconsistent and ineffective.<sup>66</sup> Spending on social security had increased through the 1970s and 1980s, in part due to a dramatic increase in the proportion of lone-parent families claiming benefit.<sup>67</sup> Evidence showed that only around a third of children benefitted

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<sup>62</sup> But note that the crossbench peer Lady Saltoun proposed an amendment during the Committee Stage to prohibit the provision of reproductive technologies to 'unmarried women, lesbian couples or unmarried couples', which was defeated by only one vote (Contents, 60; Not-Contents, 61), HL Deb 6 February 1990, vol 515, cols 787-804. For a detailed examination of section 13(5) in theory and practice, see Gillian Douglas, 'Assisted Reproduction and the Welfare of the Child' (1993) 46 *Current Legal Problems* 53.

<sup>63</sup> Davina Cooper and Didi Herman, 'Getting "The Family Right": Legislating for Heterosexuality in Britain, 1986-1991' (1991) 10 *Canadian Journal of Family Law* 41, especially 77.

<sup>64</sup> Richard Collier and Sally Sheldon, *Fragmenting Fatherhood* (Hart 2008) chapter 3.

<sup>65</sup> Collier and Sheldon (n 64) 72-78.

<sup>66</sup> Department of Social Security, *Children Come First* (Cm 1263, 1990).

<sup>67</sup> Peter Riddell, *The Thatcher Era and its Legacy* (Blackwell 1991) 133-136, 233-234.

from regular maintenance payments from their fathers.<sup>68</sup> This concerned Thatcher personally, and the Conservative Government corporately, for two reasons: the impact on public spending and the moral objection to fathers (and non-resident parents generally) abdicating their responsibilities.<sup>69</sup> The CSA 1991 enjoyed all-party support for its measures which replaced the previous discretionary court-based system with a bureaucratic formula administered by the newly created – and later much maligned – Child Support Agency. Whilst the underlying aim of the Act had widespread support, the Government had been naively optimistic in its belief in the likely efficacy of measures to enforce maintenance obligations against recalcitrant parents.<sup>70</sup> The failings of the new approach are well-documented and universally accepted, but the CSA 1991, with its emphasis on individual responsibility and the privatisation of family maintenance, stands as an exemplar of late-Thatcherite family lawmaking, and is consistent with the themes I have traced through from the origins of Conservative Party ‘family policy’ two decades before.<sup>71</sup>

Before I sketch out some concluding thoughts, I turn to a brief discussion of probably the most well-known piece of family law litigation during the eighteen years of Conservative administration from 1979: the case of *Gillick v West Norfolk and Wisbech Area Health Authority*.<sup>72</sup> The case is significant because, although it was ostensibly about the provision of contraception to girls under sixteen, it served as a proxy for a pervasive theme of the period which was to do with ‘a subtle redrawing of the boundaries between the public and the private’<sup>73</sup> and the ideology of motherhood.<sup>74</sup>

The case arose after the Department of Health and Social Security (DHSS) issued a notice in December 1980 which contained revised guidance to doctors about the provision of contraceptive advice to under sixteen year olds. It said it would be ‘most unusual’ for doctors to provide such advice without parental consent.<sup>75</sup> However, recognising that children could suffer if they were unable to receive the necessary

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<sup>68</sup> Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003) 474-475.

<sup>69</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 630; Mavis Maclean and Jacek Kurczewski, *Making Family Law* (Hart 2011) chapter 3.

<sup>70</sup> Stephen Cretney and Judith Masson, *Principles of Family Law* (6<sup>th</sup> edn, Sweet & Maxwell 1997) 542.

<sup>71</sup> For a helpful summary of the literature see Cretney and Masson (n 70) 542-543.

<sup>72</sup> [1986] AC 112.

<sup>73</sup> Jane Lewis and Fenella Cannell, ‘The Politics of Motherhood in the 1980s: Warnock, Gillick and Feminists’ (1986) 13 *Journal of Law and Society* 321, 323.

<sup>74</sup> *Ibid* 331.

<sup>75</sup> Quoted in Cretney and Masson (n 70) 587.

advice in confidence, the guidance left the matter ultimately to the clinical judgement of the physician. Doctors should try to persuade children to involve their parents, but if this was not possible, and the best interests of the patient required it, then doctors were permitted to give contraceptive advice and services to minor children. At the time, Victoria Gillick was the mother of five girls under sixteen. Gillick had long expressed concern about this area of health policy and had written to Margaret Thatcher about it on 28 January 1980. Thatcher's response, with which years later Gillick was to be disappointed, included the following words:

I entirely sympathise with your concern for the welfare of young people and with your belief in the crucial importance of family life. I agree that, ideally and wherever possible, the family unit should be the first source of support and advice to young people faced with the problems of growing up and with all the pressures to which they can be exposed. I know that this view is shared by the Secretary of State and that in his review he is paying particular attention to the points which you have set out so clearly in your letter.<sup>76</sup>

When the DHSS issued its revised notice later that year, Gillick sought an assurance from her local health authority that her girls would not be given contraceptive advice or treatment without her consent. When no satisfactory assurance was forthcoming, she applied to the High Court challenging the lawfulness of the DHSS notice. Gillick's case comprised of three strands: on criminal law, on the age of consent to treatment, and on parental rights.<sup>77</sup> Her case failed in the High Court in July 1983;<sup>78</sup> succeeded in December 1984 in the Court of Appeal;<sup>79</sup> and largely failed in October 1985 when the House of Lords, by a majority of three to two, upheld the lawfulness of the DHSS advice. Despite the Government's success, five of the nine judges involved in the litigation gave judgment in favour of Gillick.<sup>80</sup>

Some campaigners felt 'betrayed' because the Government did not deliver on what they believed Thatcher's letter from February 1980 had indicated the policy would

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<sup>76</sup> Letter from Margaret Thatcher to Victoria Gillick, 80 Feb 21 Th, 21 February 1980.

<sup>77</sup> For a helpful summary of these arguments, and of the case generally, see Cretney and Masson (n 70) 587-593.

<sup>78</sup> [1984] QB 581.

<sup>79</sup> [1985] 2 WLR 413.

<sup>80</sup> For Gillick were Eveleigh LJ, Fox LJ, Parker LJ, Lord Brandon, Lord Templeman; against her were Woolf J, Lord Fraser, Lord Scarman, Lord Bridge.

be following the ministerial review.<sup>81</sup> The Government spent a lot of time and money opposing 'pro-family' Mrs Gillick through the courts, yet the Government also laid claim to being 'pro-family'. How can this apparent tension be explained? In short, the Thatcher Government, if it was pro-family, it was definitely not pro the type of family established by young, unmarried (due to age) girls. The DHSS guidance framed the risks of pregnancy and sexually transmitted disease, which could arise from a failure to provide young people with contraceptive advice and services, as matters which may '*threaten family life*',<sup>82</sup> and here lies another key to understanding *Gillick*. As I observed above in relation to the Children Act 1989, the Government was not averse to state intervention in the family if its purpose was to uphold the naturalness of the nuclear, married, family unit as the preferred site for sex and reproduction: that principle was ultimately more sacred than any rights claim advanced on behalf of parents or children. And, of course, of a less ideological and more practical concern was the cost to the taxpayer of births to teenage mothers in terms of health, housing, and welfare budgets, and the opportunity cost of the possible loss to the economy of the mother's labour.

## **MAJOR CHANGE? – SOME CONCLUDING THOUGHTS**

The 1987 general election manifesto contained many references to 'One Nation' (the term was consistently spelled using upper case letters) and to 'family' or 'families'. The emphasis on One Nation was arguably an attempt to counter the widely divisive effects of, inter alia, the 1984-85 miners' strike, and the following excerpt was typical of many: 'Together we are building One Nation of free, prosperous and responsible families and people. A Conservative dream is at last becoming a reality'.<sup>83</sup> The central argument was that the Conservatives had made it possible for people to have more control over their lives through, for example, council house sales and privatisation of nationalised industries, thereby fostering greater self-reliance and personal responsibility. This chimed with the central agenda of the Cabinet-level Family Policy Group explored in the previous chapter. As a result of these changes the manifesto deduced: 'In this way the scope of

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<sup>81</sup> Martin Durham, *Sex and Politics* (Macmillan 1991) 43, see also 51.

<sup>82</sup> Jane Pilcher, 'Gillick and After: Children and Sex in the 1980s and 1990s' in Jane Pilcher and Stephen Wagg (eds), *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (Falmer Press 1996) 79 (emphasis added).

<sup>83</sup> Conservative Party, *The Next Moves Forward, 1987 General Election Manifesto* (Conservative Party 1987).

individual responsibility is widened, the family is strengthened, and voluntary bodies flourish. State power is checked and opportunities are spread throughout society'.<sup>84</sup> These late twentieth-century outcomes are ones which Burke could have endorsed.

So, in essence, the manifesto claimed that the family (families?) is strengthened by the state stepping back. I will briefly examine this claim in relation to four metrics: marriage, divorce, cohabitation and lone-parent households. In 1979 there were 368,853 marriages and 138,706 divorces, and these were in steady decline (although there was the odd blip) so that by 1987 there were 351,761 marriages and 151,007 divorces. The rate of divorced people had gone from 11.2 per thousand men (the figure was the same for women) in 1979, to 12.7 per thousand men and 12.6 per thousand women in 1987. By the time the Conservatives left office in 1997 the number of marriages per year had fallen to 272,536 and 146,689 divorces, with the rate per thousand being 13.1 for men and 12.9 for women.<sup>85</sup> However, by contrast, an 'alternative' family form – cohabitation – grew from around one-third of a million couples in 1979 to 1.56 million couples in 1996,<sup>86</sup> with such couples enjoying more rights at the end of that period of Conservative government than at the beginning.<sup>87</sup> The percentage of all households which comprised a lone parent and dependent children increased from 5% in 1981 to 6% in 1991.<sup>88</sup> Whilst these metrics are a crude indicator of whether 'the family' has been 'strengthened', they clearly paint a mixed picture. On the one hand, it is difficult to interpret them in any way which might support a Conservative claim to success with regard to the kind of traditional married nuclear family which was the darling of Conservative discourse. Yet on the other hand, some research suggests an alternative reading of these changes in families at the turn of the millennium, which indicates a refashioning of the nature of commitment but no loss of commitment as such, differing methods of caregiving (but not necessarily less caregiving), and shifts in the composition of support networks.<sup>89</sup>

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<sup>84</sup> Ibid.

<sup>85</sup> Office for National Statistics, *Divorces in England and Wales, 2012* (Office for National Statistics 2014) <[http://www.ons.gov.uk/ons/dcp171778\\_351693.pdf](http://www.ons.gov.uk/ons/dcp171778_351693.pdf)> accessed 5 September 2015.

<sup>86</sup> Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (CUP 2012) 226.

<sup>87</sup> Ibid 224.

<sup>88</sup> Office for National Statistics, *Social Trends 39* (Office for National Statistics 2009) 15.

<sup>89</sup> Fiona Williams, *Rethinking Families* (Calouste Gulbenkian Foundation 2004).

The 1992 manifesto continued the themes of responsibility, choice and less government intervention, with the then unreformed Labour Party providing a socialist foil to these neoliberal prescriptions. The manifesto committed the Party to implementing 'a code of family law that will continue to underpin the institution of marriage, give priority to the welfare of the child, and emphasise the primary responsibility of parents for the welfare of children and the family' and 'a family support initiative, encouraging the voluntary sector to work in partnership with families and local authorities'.<sup>90</sup> Given that much of the CA 1989 had only commenced in the previous year, and it dealt with most of these issues, it is not clear what the former promise related to or why it was considered necessary.

So, considering some of the discourse contained in official sources such as general election manifestos, as well as the effect of substantive legal provisions, it is clear that there was a shift in emphasis towards greater individual responsibility, with the state stepping back in terms of formal legal power. This entailed a redrawing of the boundary line running through the public/private dichotomy, enlarging the latter to the diminution of the former, although the line remained no less distinct as a result.<sup>91</sup>

I also observe that the drivers for the statutes discussed above were diffuse. Some were largely shaped by expert committees (HFEA 1990), others predominantly by the Law Commission (Family Law Reform Act 1987), some, like the Children Act 1989, following Government and Law Commission reports and ECtHR case law, and others were in direct response to events (Surrogacy Arrangements Act 1985). The point is that the influence of Conservatives and conservatism on family law was diluted within the pluralistic and consensual process of the Westminster legislative system. It is not surprising then that throughout this period tensions and antinomies are evident in the outcomes of the family lawmaking process, consistent with Dewar's analysis.<sup>92</sup> There are examples above of C/conservative accommodation of gradual social change seen in, for example, the changes in illegitimacy law and the greater recognition of non-married relationships in housing law. However, these stand in tension with a desire to privilege traditional family forms manifested in the CA 1989 and the HFEA 1990. This privileging, and even promotion, also comes

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<sup>90</sup> Conservative Party, *The Best Future for Britain, 1992 General Election Manifesto* (Conservative Party 1992).

<sup>91</sup> Jane Lewis and Fenella Cannell, 'The Politics of Motherhood in the 1980s: Warnock, Gillick and Feminists' (1986) 13 *Journal of Law and Society* 321, 323-325.

<sup>92</sup> John Dewar, 'The Normal Chaos of Family Law' (1998) 61 *MLR* 467.

across in the Act which will be considered in detail in the next chapter: the Family Law Act 1996.

## CHAPTER 6

### DIVORCING RHETORIC FROM REALITY – THE FAMILY LAW ACT 1996

#### INTRODUCTION

Reform of divorce law started out being largely driven by fairly technical concerns about the operation of the existing law found in the Matrimonial Causes Act 1973. However, by the time the Government completed its pre-legislative process, the reforms had been cast in a more party-political mould. The ultimately abortive Part II of the Family Law Act 1996 (FLA 1996) was an overt attempt to save marriages and shore up marriage as an institution. The story of the Act is richly illustrative of the Conservative Party's views on intimate adult relationships and the law, and of the challenge to conservatives of how to deal with organic change which apparently damages society.

Much has been, and is still being, written about the FLA 1996; and it was only in 2014 that the abortive sections of the Act were eventually repealed.<sup>1</sup> Some scholars, like Dewar, think the FLA 1996 pursued two objectives: behaviour modification and the informalisation/delegalisation of divorce.<sup>2</sup> He writes: 'In short, the 1996 Act seeks both to give the parties greater autonomy while at the same time seeking to influence how they use it'.<sup>3</sup> Echoing Donzelot, Dewar identifies an apparent contradiction, whereby the FLA 1996 could be understood as a retreat of law from the arena of divorce but law in fact advanced, though in more diffuse and unconventional ways – governance *through*, rather than *of*, the family.<sup>4</sup> Traditional legal formalities (incarnated in the personnel and institutions of the legal process) gave way to some extent to the influence of extra-legal experts (eg mediators and

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<sup>1</sup> Part II of the Act was repealed by section 18(1) of the Children and Families Act 2014 on 13 May 2014.

<sup>2</sup> John Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467, 476.

<sup>3</sup> *Ibid.*

<sup>4</sup> Dewar sees such contradictions as 'normal' in family law – see his 1998 article. For Donzelot's approach, see Jacques Donzelot, *The Policing of Families* (Pantheon Books 1979).



counsellors – Donzelot’s “psy” organisations<sup>5</sup>) in a process which, also to some extent, took place on the peripheries of the family justice system.

This chapter will first consider the origins of the FLA 1996, in particular the work of the Law Commission and the two Government reports which followed. I will then briefly outline the main provisions of the Act, before going on to examine some dominant themes from the parliamentary discourse. Again, it will be noticed how C/conservatives concerned themselves with the expressive or symbolic function of law. Dewar has argued that this is because legislators were ‘seeking to replace a vanished system of collective or shared values by legislating them back into existence’; and this is a claim which I will specifically test.<sup>6</sup> Alongside this, I will also analyse the discourse for what it reveals about Conservatives’ views on the nature of the human condition and on the role of experts in developing and implementing divorce law. Before concluding, I will discuss the important monograph of Helen Reece, *Divorcing Responsibly*. Responsibility was undoubtedly a golden thread running through the reforms, but this theme can be interpreted in different ways. Reece sees it as an expression of post-liberalism, yet it could also be viewed as a way of emphasising traditional family values while simultaneously reducing public spending - a quintessentially C/conservative objective.<sup>7</sup>

## **THE GENESIS OF THE FAMILY LAW ACT 1996**

### **The Law Commission reports**

From its inception in 1965 the Law Commission has taken a keen interest in the development of family law, particularly the law of divorce. In keeping with its general remit to keep all law under review, it decided in the late 1970s to look again at how the Matrimonial Causes Act 1973 (which incorporated the Divorce Reform Act 1969) was working out in practice.<sup>8</sup> The Commission was also aware of a growing swell of criticism of divorce law from academics, practitioners and legislators from at least

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<sup>5</sup> Jacques Donzelot, *The Policing of Families* (Pantheon Books 1979).

<sup>6</sup> Dewar (n 2) 478.

<sup>7</sup> See, for example, Lord Chancellor’s Department, *Looking to the Future, Mediation and the Ground for Divorce, the Government’s Proposals* (Cm 2424, 1993) 1-2.

<sup>8</sup> Law Commission, *Fourteenth Annual Report 1978-1979* (Law Com No 97, 1980) para 2.24.

the late 1970s.<sup>9</sup> Criticism also came from the *Report of the Matrimonial Causes Procedure Committee* under Mrs Justice Booth, which urged authenticity in the law, ie that the law should be based truly on a no-fault ground and the old guilt-based concepts swept away.<sup>10</sup> Booth emphasised the interplay between the substantive and procedural elements of divorce law; and that options for procedural reform were very much limited while the law remained wedded to the concept of fault. Further to all of this, in May 1988 the Commission published *Facing the Future, A Discussion Paper on the Ground for Divorce*.<sup>11</sup>

The Commission considered that the desired objectives of the current law were to encourage the parties to reach agreement on the consequences of their divorce (principally matters relating to finances, property and children), and to encourage the parties to look to the future following the burial of the dead marriage, rather than linger over the circumstances of its demise.<sup>12</sup> It then went on to assess whether the law met these objectives by considering a series of questions, including ‘does the law buttress the stability of marriages?’, ‘does the law promote “minimum bitterness, distress and humiliation”?’, and ‘does the law avoid injustice to an economically weak spouse, usually the wife?’<sup>13</sup> In response to the buttressing argument, it sagely observed that ‘[m]oral pressure of this sort can only operate effectively upon those who accept the moral system on which it is based’.<sup>14</sup> In paragraph 3.8 it considered that the current law seemed to do little to ‘buttress the stability of marriage’ when evidence showed that the Act effectively provides for divorce on demand:

Experience from abroad together with that in this country would tend to suggest that it is not possible to prevent parties obtaining immediate consensual divorce so long as immediate divorce is available upon fulfilment of certain requirements, because determined parties will succeed in satisfying the conditions.<sup>15</sup>

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<sup>9</sup> Law Commission, *Facing the Future, A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988) 1.

<sup>10</sup> Mrs Justice Booth, *Report of the Matrimonial Causes Procedure Committee* (HMSO 1985) para 2.10.

<sup>11</sup> Law Commission, *Facing the Future, A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988).

<sup>12</sup> *Ibid* paras 3.2 and 3.3.

<sup>13</sup> *Ibid* paras 3.4-3.50.

<sup>14</sup> *Ibid* para 3.6.

<sup>15</sup> *Ibid*.

Many of the arguments deployed against fault were similar to those discussed in chapter four above, and will not be repeated here. Overall the Commission thought that the radical theoretical shift from matrimonial offence to irretrievable breakdown in the 1969 reforms had made little impact on the practical experience of divorcing couples. As the Commission saw it, 'the subtlety that the facts are not grounds for divorce, but merely evidence of breakdown, is seldom grasped'.<sup>16</sup> In effect, the first three facts are viewed as matrimonial offences.<sup>17</sup> Petitioners are required to particularise the allegation of a fault 'fact' in order to demonstrate irretrievable breakdown, although without any real requirement to substantiate such allegations. This inevitably suggests a causative link between the two, when, in many cases, the particulars are *symptoms* of the breakdown rather than its cause, with both parties bearing an element of responsibility for the failure of the marriage.<sup>18</sup> Furthermore, the way the most popular fact (behaviour in section 1(2)(b)) was formulated means that it is almost impossible to defend. This defensive disadvantage, coupled with the removal of Legal Aid for defended divorces, often meant that a respondent felt embittered through having no scope to challenge the allegations in a petition and having to allow the divorce to proceed undefended.

Not only did the law fail the adults in a divorce but the Commission also believed that this had a knock-on effect for any children of the marriage.<sup>19</sup> In conclusion, the Commission felt that the current law fell short of the objectives outlined above, and generally that '[t]his clear divergence between law and practice can only bring the law of divorce and the administration of justice generally into disrepute'.<sup>20</sup> The compromises reached during the passage of the Divorce Reform Bill led to an incoherent and confusing divorce system which does not serve its end users well. Moreover, retention of the fault element meant that it was 'impossible'<sup>21</sup> to attain the goals of maximum fairness and minimum bitterness. Significantly, the Commission's assessment that the law did not recognise that divorce is a transition, not an end result, led to its core recommendation that divorce should become a process over time, conceding that the latter was 'a relatively new and unfamiliar idea'.<sup>22</sup>

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<sup>16</sup> Law Commission (n 11) para 3.15.

<sup>17</sup> Michael Freeman, 'Divorce Gospel Style' (1997) 27 Family Law 413, 413.

<sup>18</sup> On this point see generally, Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (OUP 1988).

<sup>19</sup> Law Commission (n 11) paras 3.37-3.43.

<sup>20</sup> *Ibid* para 3.46.

<sup>21</sup> *Ibid* para 3.48.

<sup>22</sup> *Ibid* para 6.3. Gibson describes the Commission's proposals for divorce reform as 'radical' (Colin Gibson, *Dissolving Wedlock* (Routledge 1994) 218).

The follow-up Law Commission Report, *Family Law, The Ground for Divorce*, confirmed that the 1988 Discussion Paper provoked a large response.<sup>23</sup> These responses, plus other investigative work procured by the Law Commission, led it to three firm conclusions: first, the current law was 'confusing and unjust' and did not fulfil its original objectives;<sup>24</sup> second, those original objectives were still valid, but to which must now be added that divorce law should encourage the parties to reach an amicable resolution of the practical issues arising on divorce, and to minimise harm to children and foster the post-divorce parent/child relationship;<sup>25</sup> and third, that irretrievable breakdown should remain the ground for divorce.<sup>26</sup>

The Commission was concerned that '[the current law] also makes it extremely difficult for couples to become reconciled'.<sup>27</sup> The validity of this view must be questioned. The MCA 1973 requires solicitors to certify to the court whether s/he has discussed reconciliation with the client,<sup>28</sup> and the court may adjourn proceedings if it appears there is a reasonable prospect of reconciliation.<sup>29</sup> Moreover, at no stage in the legal process are the parties compelled to proceed inevitably towards divorce: if they will it, then they are free to reconcile and desist with the divorce at any point. It is not principally the law which makes reconciliation difficult, but the intransigence of the parties. Significantly and conversely, however, this view of law's agency extended to also seeing law as a force for good and the idea of 'marriage-saving' began to crystallise further. The Commission wrote, '[divorce] should not be available for those [marriages] which are capable of being saved'.<sup>30</sup>

The idea of marriage-saving was briefly mentioned in the Law Commission's report entitled *Reform of the Grounds of Divorce: The Field of Choice*.<sup>31</sup> It took the view then that attempts to reconcile the parties after a divorce petition had been issued

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<sup>23</sup> Law Commission, *The Ground for Divorce* (Law Com No 192, 1990). The Law Commission drew its conclusions on questionable methodological grounds, namely that respondents were more likely to indicate dissatisfaction with the existing law. Whilst this was true, people are less likely to respond just to confirm that they are happy with the status quo.

<sup>24</sup> Law Commission (n 23) para 1.5.

<sup>25</sup> *Ibid* para 1.6.

<sup>26</sup> *Ibid* para 1.7.

<sup>27</sup> *Ibid* para 2.17.

<sup>28</sup> Section 6(1).

<sup>29</sup> Section 6(2).

<sup>30</sup> *Ibid* para 1.7.

<sup>31</sup> Law Commission, *Field of Choice: Reform of the Grounds for Divorce, the Field of Choice* (Law Com No 15, 1966) paras 29, 32, 71.

were unlikely to succeed.<sup>32</sup> In the 1988 Report there was some brief consideration of marriage-saving<sup>33</sup> but the conclusion echoed the 1966 Report, although the Commission considered that its proposals would be more likely to save marriages than the current law.<sup>34</sup> In Part III of the 1990 Report the Commission discussed models for reform, opening with what it believed was the generally agreed aims of a good divorce law. Interestingly, at the top of the list (although no hierarchy is implied) was now '[divorce law] should try to support those marriages which are capable of being saved'.<sup>35</sup> There is evidence here of a shift in emphasis towards the importance of divorce law promoting marriage-saving, away from its previous lukewarm stance: 'There is also a sound public interest in helping to preserve those marriages which can be saved'.<sup>36</sup> As a foretaste of what was to be a major concern throughout the parliamentary debates on the Family Law Bill, the Commission believed 'it was important that divorce law should send the right messages, to the married and the marrying, about the seriousness and permanence of the commitment involved'.<sup>37</sup> The message of marriage-saving would intensify during the gestation of the legislation.

The consultation led the Commission to summarise that the 'preferred' reform model which was 'acceptable to a considerable majority of the general population' is that of divorce as a process over time.<sup>38</sup> This resulted in a recommendation that irretrievable breakdown be retained as the sole ground for divorce, but that the breakdown be evidenced by a period of reflection of one year.<sup>39</sup> I observe, however, that regarding the suggestion of whether or not to reform the law at all, the results were ambivalent. Despite the well-founded criticisms of the MCA 1973, there was no public clamour for change.<sup>40</sup>

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<sup>32</sup> Ibid para 32

<sup>33</sup> Law Commission, *Facing the Future, A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988) paras 3.10, 3.27, 5.32, 6.4.

<sup>34</sup> Ibid para 6.4.

<sup>35</sup> Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) para 3.1.

<sup>36</sup> Ibid para 3.3.

<sup>37</sup> Ibid para 3.4.

<sup>38</sup> Ibid para 1.8.

<sup>39</sup> Ibid para 3.48.

<sup>40</sup> 45% thought it should be changed; 43% thought it should stay the same; 11% did not know; based on 1001 respondents. See *ibid* 186.

## The Government's responses

The Government's Consultation Paper, *Looking to the Future: Mediation and the Ground for Divorce* was published in December 1993.<sup>41</sup> It is significant that 'mediation' appears before 'divorce' in the title because it emphasises the essence of what the Government wanted this reform to achieve: a move away from the adversarial, juridical divorce towards one conducted in the suburbs of the law, in information meetings, periods of reflection, and mediators' offices.

The foreword, penned by the then Lord Chancellor, James Mackay, was so idiosyncratic that it is difficult to know where his personal beliefs around divorce ended and official Government policy began, as the following excerpt illustrates:

I personally believe strongly in the value of the institution of marriage and I believe that it is a divinely appointed arrangement fundamental to the wellbeing of our community. The breakdown of marriage is a serious problem. Seeking to prevent the breakdown of marriages is an objective which goes far beyond the scope of the law. The divorce law is intended to deal with the situation in which a breakdown has taken place.<sup>42</sup>

There was much discussion throughout the Paper of what divorce law should be *for*, settling on a view that it should enable couples to dissolve their unions with the minimum of unhappiness and cost and to maximise post-divorce cooperation (where required) and flourishing generally. Mackay thought that the typical period of around six months for a divorce on the basis of adultery or behaviour was 'such a short time' and did 'little to demonstrate that the marriage has actually broken down

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<sup>41</sup> Lord Chancellor's Department, *Looking to the Future, Mediation and the Ground for Divorce* (Cm 2424, 1993).

<sup>42</sup> Lord Chancellor's Department (n 41) iii. A similar example can be found on page v, 'It would be unrealistic for the law not to recognise this fact [that marriages break down] and make provision for an orderly process of dealing with it: for example, when the Pharisees said to Jesus that Moses permitted a man to write a certificate of divorce and then to divorce his wife, Jesus replied that Moses permitted it because of their hardness of heart (Mark's Gospel, chapter 10 at verses 4 and 5).' See also Michael Freeman, 'Divorce Gospel Style' (1997) 27 Family Law 413.

irretrievably or to make the parties face the consequences of divorce before it takes place'.<sup>43</sup>

However, there was also a strong, and growing, emphasis on the function of law to 'prevent' marriage breakdown, which was considered a 'highly desirable result'.<sup>44</sup> And even if the law could not save a marriage, then 'it can make sure that people are made to realise the full consequences of divorce for themselves and their children, before they are committed to it. In that way, they can take personal responsibility for their decisions themselves'.<sup>45</sup> The Government view was that no statute can make two people love and respect each other, but this was not going to stop it from trying.<sup>46</sup> In the midst of the often cold rationalism of the lawmaking process, there was a childlike naivety about intimate adult relationships: 'However, even where the couple are certain in their own minds, or at least one of them is, that there is no hope for their marriage, this does not necessarily mean that the marriage cannot be saved'.<sup>47</sup> Despite the introduction of the slant towards marriage-saving, the Consultation Paper otherwise followed the main recommendations of the Law Commission, and it was these to which the Government sought responses.

In April 1995 the Government published the White Paper, *Looking to the Future, Mediation and the Ground for Divorce, the Government's Proposals*.<sup>48</sup> There was a very considerable response to the consultation (and this is perhaps why it took so long for the proposals in the White Paper to come forward), the drift of which was that the present law was unsatisfactory and needed reform. There were three channels through which respondents made their views known: through a freestyle response to the Green Paper; by completing the questionnaire that accompanied the Green Paper; by being surveyed by MORI. The responses to the first two were apparently largely of a qualitative nature, whereas the results of the MORI survey were more amenable to being expressed in quantitative form. As the raw data are not reproduced in the White Paper, it is not possible to say whether the Government's representation of that data is accurate.

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<sup>43</sup> Ibid iv. This last point is discussed further at para 5.4. The Government clearly believed that people in 'quickie' divorces did not give thought to consequences before dissolution. Similar points are made at para 5.6 and para 5.7.

<sup>44</sup> Ibid iv, see also, for example, pages 1-2.

<sup>45</sup> Ibid 2.

<sup>46</sup> Ibid 13.

<sup>47</sup> Ibid 4. A similar point is made at para 4.13 and para 5.10.

<sup>48</sup> Lord Chancellor's Department, *Looking to the Future, Mediation and the Ground for Divorce, the Government's Proposals* (Cm 2799, 1995).

While the review of divorce law followed on from the Government's review of the family justice system in the context of the Children Act 1989, it also drew from the contemporaneous work of the Law Commission discussed above. The White Paper confirmed that the Government's proposals were based on the Commission's recommendations.<sup>49</sup> The Government took the clear line of moving to a divorce law still based on proof of irretrievable breakdown, but this time it would be evidenced by the parties undertaking a process of reflection and consideration lasting twelve months.<sup>50</sup> Everyone would be encouraged during this period to resolve any outstanding matters through mediation, and Lord Mackay hoped that 'some will change their minds about going through with the divorce'.<sup>51</sup> In the foreword he referred to his strong belief that marriage should be for life but, again drawing support from the Gospel of Mark, he recognised that the civil legislator has to deal with the reality of marriage breakdown and must therefore devise the best possible scheme of divorce law in all the circumstances.<sup>52</sup> The proposed scheme was set out in the Family Law Bill, which was introduced into parliament on 16 November 1995.

## **MAIN PROVISIONS OF THE BILL**

Unusually for an Act of the Westminster parliament, section 1 sets out some general principles which are to be regarded by the court and others (such as lawyers and mediators) when acting under Parts II and III. I discuss these principles in the next section below.

The approach of Part II of the FLA 1996 was that divorce should be a process over time. That process was far from straightforward, but its essence was as follows. The first stage was for the spouse seeking the divorce to attend an information meeting (pursuant to section 8). The other spouse could also attend, but was not required to do so under the Act. Information meetings were intended to provide participants with information about the divorce process and matters arising from it (children, finances etc.), and to afford them an opportunity to meet a marriage counsellor. The parties then spent the next three months considering whether they wished to pursue a

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<sup>49</sup> Ibid para 1.8.

<sup>50</sup> Ibid para 4.7. It is interesting to note here what Cretney (when he was a Law Commissioner) said during his MFPA Committee appearance: 'all the evidence...suggests that countries which seek to build an obligatory conciliation stage into the divorce process find the experience unsatisfactory' (SSC Deb (Bill 96) 20 March 1984, col 64).

<sup>51</sup> Ibid iii.

<sup>52</sup> This pragmatic approach can also be seen in the statement at paragraph 1.10.



divorce. If one party wished to proceed, then he or she filed a statement of marital breakdown (this was subject to the one-year limitation period following marriage).<sup>53</sup> Fourteen days later the period for reflection and consideration commenced. Lawyers, mediators and marriage counsellors may be consulted at this point, and the parties should begin to plan for life post-divorce, particularly with regard to finances, property and the care of children. Nine months later (ie 12 months and 14 days into the process) a divorce order could be applied for, provided there were no children and neither party had sought, and been granted, an extension of time. Under section 3 the court was required to grant the order provided the marriage had broken down irretrievably, the requirements were satisfied regarding information meetings under section 8, and the parties had complied with section 9 (ie they had settled financial and child care matters (under section 11)).

Unlike the MCA 1973, in which irretrievable breakdown was proved by the existence of one of the five facts, section 5(1) of the FLA 1996 established irretrievable breakdown by:

- One or both parties filing a statement that they believed the marriage had broken down (the 'statement of marital breakdown' under section 6); and
- The period for reflection and consideration (under section 7) had ended; and
- The application for a divorce order under section 3 was accompanied by a declaration by the applicant that, having reflected on the breakdown and considered the requirement to make post-divorce arrangements, the applicant believed the marriage could not be saved.

Parties with children under 16 were required to wait until the expiration of 18 months and 14 days before they could apply for a divorce order.<sup>54</sup> As under section 5 of the MCA 1973, in all cases the court would retain a discretion under section 10 FLA 1996 to refuse to grant a divorce if to do so would cause substantial financial or other hardship to the applicant spouse and any children of the family, and that it would be wrong in all the circumstances to dissolve the marriage.<sup>55</sup> This has hardly

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<sup>53</sup> S 6.

<sup>54</sup> Ss 7(11) and (13).

<sup>55</sup> Note that the MCA 1973 does not extend consideration of hardship to children of the family. This was added in the FLA 1996.

ever been used in the MCA 1973<sup>56</sup> and there is no good reason to think matters would have been different under the FLA 1996.

Before moving on, I should mention Part IV of the Act, which contained the new law on domestic violence. In the 1994-95 parliamentary session the Government introduced the Family Homes and Domestic Violence Bill. Like the Family Law Bill, the domestic violence Bill was mainly the progeny of Law Commission labours and was designed to consolidate an untidy patchwork of statutory provisions into a unified system of discretionary civil remedies.<sup>57</sup> The Bill enjoyed a largely uneventful parliamentary passage, at least until its final stages. Although it was always clear that the Bill afforded certain remedies to cohabitants, as well as to married couples, it was withdrawn just prior to its Third Reading in the House of Commons following a furore whipped up by two articles in the *Daily Mail*.<sup>58</sup> The newspaper took the view that marriage would be undermined if cohabitants were allowed to seek non-molestation or occupation orders against violent partners in much the same way as married applicants. Preposterous though this sounds, the Government's wafer-thin majority meant that a small number of Conservative MPs who were opposed to the Bill effectively precipitated its withdrawal. The measures then reappeared only weeks later in the Family Law Bill, but this time with a number of measures to differentiate, and privilege, the rights of married couples over those of cohabitants. Compared to Part II, the domestic violence part of the Bill went through 'with very little discussion' and 'very little difficulty'.<sup>59</sup>

Although subject to a number of pilots, the divorce reforms in the FLA 1996 were never implemented. Part II of the Act was eventually repealed by section 18(1) of the Children and Families Act 2014 on 13 May 2014. But section 22 of Part II, which relates to funding for marriage support services, was not repealed and is in force. I turn next to an analysis of the parliamentary discourse surrounding the Bill.

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<sup>56</sup> Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003) 374.

<sup>57</sup> Law Commission, *Domestic Violence and Occupation of the Family Home* (Law Com No 113, 1989); *Family Law: Domestic Violence and Occupation of the Family Home* (Law Com No 207, 1992).

<sup>58</sup> For a useful summary of events, see Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (CUP 2012) 250-253. See also Lord Mackay's view: James Mackay, 'Family Law Reform – A Lord Chancellor's View' in Stephen Cretney (ed), *Family Law: Essays for the New Millennium* (Jordan 2000) 14-15.

<sup>59</sup> James Mackay, 'Family Law Reform – A Lord Chancellor's View' in Stephen Cretney (ed), *Family Law: Essays for the New Millennium* (Jordan 2000) 15.

## ANALYSIS OF THE BILL IN PARLIAMENT

### Pessimistic versus realistic assessments of the human condition

A legislator's view of the nature of the human condition inevitably colours their approach to making family law and policy. As Schneider put it: 'A family law that fears that people are naturally depraved must differ from one that hopes they are naturally virtuous'.<sup>60</sup> I have argued in chapter three that conservatism takes a pessimistic view of humanity. This section explores readings of the construction of the human condition in the parliamentary discourse of the Bill, and seeks to discover to what extent the standpoint of Conservatives accords with a conservative perspective on these matters. It will be seen that the dominant view of human nature which emerges from my reading is essentially a pessimistic one, that people who divorce are irresponsible and are at risk of not acting in their own (or their children's, or society's) best interests. The Bill therefore needed to provide a process through which divorcing couples had to pass, which would engender the necessary degree of responsibility, resulting in divorce for most, but a redeemed marriage for some. I will now consider this claim in more detail.

First, what can be learned from statements in the primary discursive location of official Government papers and speeches? From the outset the Government's position was clear, and the following statement typified its view: 'I believe that a good divorce law will support the institution of marriage by seeking to lay out for parties a process by which they receive help to prevent a marriage being dissolved'.<sup>61</sup> And a little further on: 'It is important that the process leading to divorce should enable the parties to do as much as possible to prevent their marriage from finally ending if that sad event can be avoided'.<sup>62</sup> So it is evident that law should 'help' and 'enable' couples to avoid divorce in the first place. This is the language of a divorce law which sees couples as possessing limited agency and autonomy, who need the state to act, and to enable them to act, so as to maximise individual and collective happiness. However, this obvious pessimism was tempered with a realism, drawn (at least with regard to the Lord Chancellor) from biblical thought:

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<sup>60</sup> Carl Schneider, 'The Next Step: Definition, Generalization, and Theory in American Family Law' (1985) 18 *University of Michigan Journal of Law Reform* 1039, 1057.

<sup>61</sup> Lord Mackay, Lord Chancellor's Department, *Looking to the Future, Mediation and the Ground for Divorce* (Cm 2424, 1993) iii.

<sup>62</sup> *Ibid* iv.

It would be unrealistic for the law not to recognise this fact [that marriages break down] and make provision for an orderly process of dealing with it: for example, when the Pharisees said to Jesus that Moses permitted a man to write a certificate of divorce and then to divorce his wife, Jesus replied that Moses permitted it because of their hardness of heart (Mark's Gospel, chapter 10 at verses 4 and 5).<sup>63</sup>

This pessimism/realism tension pervades the Bill and can be seen in the important statement of objectives for a divorce law:

- To support the institution of marriage;
- To include practicable steps to prevent the irretrievable breakdown of marriages;
- To ensure that the parties understand the practical consequences of divorce before taking any irreversible decision;
- Where divorce is unavoidable, to minimise the bitterness and hostility between the parties and to reduce the trauma for the children; and
- To keep to the minimum the cost to the parties and the taxpayer.<sup>64</sup>

The verbs here are revealing: 'prevent' suggests the actor would, without restraint, otherwise pursue an unwise course of action; 'understand' suggests the actor occupies a position of ignorance or foolishness; and 'minimise' and 'reduce' suggest a propensity otherwise to act excessively. This is a vision of a flawed humanity, corrupted to the extent that it is not able, without law's help, to act in its own best interests.<sup>65</sup>

What about the parliamentary discourse on this aspect of the Bill? Again, the idea that divorcing parties do not know their own minds is evident: 'It is of course vitally important that marriages are not dissolved if they could be saved and therefore important that the mechanism used for testing breakdown is one which we are satisfied will do just that'.<sup>66</sup> Breakdown had to be 'tested' through juridical process, the mere assertion of the parties themselves that their marriage had irretrievably broken down was not enough. The existing one year bar on divorce and the

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<sup>63</sup> Ibid v. See also Mackay at Second Reading, HL Deb 30 November 1995, vol 567, col 704.

<sup>64</sup> Ibid 1-2. These objectives ended up, after some amendment, as section 1 of the Act.

<sup>65</sup> See also ibid paras 5.9 and 5.10.

<sup>66</sup> Mackay, HL Deb 30 November 1995, vol 567, col 702.

additional twelve month reflection period were also seen to act as a 'brake' on a precipitous rush out of marriage.<sup>67</sup> But this pessimistic paternalism was opposed by those leading for Labour and the Liberal Democrats. Earl Russell (for the Liberal Democrats) thought the approach of trying to prevent divorce by tightening divorce law was 'a bit like thinking that one can prevent death by postponing the funeral'.<sup>68</sup> His prescription for strengthening marriage was focused on matters such as addressing the impact of long working hours on families and the provision of child care and paternity leave, and this point links to the discussion below regarding the shift towards regulation of intimate adult relationships via less direct channels.<sup>69</sup>

There is a logical progression from a pessimistic assessment of human nature to a paternalistic attitude to lawmaking. If people are bad, and the law is able to mitigate or transform that badness, then the law should intervene to do so. This is especially the case if the legislator believes that some divorce petitions are a cry for help.<sup>70</sup> Intervention could also be justified for the sake of children of parents seeking divorce:

We are not babies in this House and we must know what is going on around us. Some of us may pretend that we do not know and lead lives in ivory towers, but we have only to read the press to know of the horrors that are affecting young children and their standards, education and chances in life. If we do not protect the children of today who will be the adult society of tomorrow, is it not the duty of this House to ensure that every opportunity is given to defend the lives of those children within a sure and stable family life?<sup>71</sup>

This was partly countered by crossbencher Lord Marsh: 'It is worth reminding ourselves that the vast majority of people who get divorced are not babies either. They are adults'.<sup>72</sup> He approached the matter from a liberal public/private divide perspective, and did not think that legislators had a legitimate role to direct people's lives in this domain. As moral certainties gave way to moral relativities in the late twentieth century, there remained a greater degree of consensus around the

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<sup>67</sup> Ibid, col 703.

<sup>68</sup> Ibid, col 713.

<sup>69</sup> Ibid, col 714.

<sup>70</sup> Baroness Young, HL Deb 22 January 1996, vol 568, col 878, citing the White Paper in support of this claim. See also, Lord Chancellor's Department, *Looking to the Future, Mediation and the Ground for Divorce* (Cm 2424, 1993) para 5.10.

<sup>71</sup> Baroness Elles, HL Deb 11 March 1996, vol 570, col 624.

<sup>72</sup> Ibid, col 642.

regulation of adult relationships where this was necessary to promote the welfare of children, than where no such considerations were present. The shift towards the oblique regulation of adult relationships through the regulation of the parent-child dyad has been identified as a feature of family law in this period.<sup>73</sup> There is some evidence of this shift in the debates, although not just from Conservatives.<sup>74</sup>

### **Legislators' views of experts – a tension between trust and distrust**

The Bill's reliance on the central issue of mediation and the attitude of many Conservative legislators towards mediators (and other family support professionals encountered in the divorce process) gave rise to a tension between trust and distrust of experts.<sup>75</sup> An example of this tension can be seen in an amendment proposed by Lord Mackay requiring mediators to keep reconciliation in mind and to consider the welfare of children. The legislative scheme placed faith in mediators to deliver the good divorce (and to prevent it happening in some cases), yet their professional judgement was not completely trusted: the vital role of marriage-saving had to be spelled out in legislation.<sup>76</sup> Furthermore, it might not be going too far to suggest that this nagging distrust is what was behind the statement of principles at the start of the Bill.

To illustrate this tension, I will first consider the claim that some Conservative lawmakers were negatively disposed towards certain actors in the family justice system broadly defined. Jill Knight said:

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<sup>73</sup> Eg Kathleen Kiernan, Hilary Land and Jane Lewis, *Lone Motherhood in Twentieth Century Britain* (Clarendon Press 1998) 89-96; John Dewar and Stephen Parker, 'English Family Law Since World War II: From Status to Chaos' in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the United States and England* (OUP 2000) 131-133; Jane Lewis, 'Family Policy in the Post-War Period' in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *ibid* 90-99; Carol Smart, 'Divorce in England 1950-2000: A Moral Tale?' in Sanford Katz, John Eekelaar and Mavis Maclean (eds), *ibid*.

<sup>74</sup> Eg Lord Stoddart (Labour) HL Deb 22 January 1996, vol 568 col 817; Lord Simon (crossbencher but former Conservative MP) argued that a marriage is alive in the children and the extant parental responsibility, *ibid*, col 827; see also Lord Simon's comments at Report Stage, HL Deb 22 February 1996, vol 569, cols 1179-1180. Cowley observes how children were often co-opted into the arguments as a regulator of when divorce should or should not be permitted (Philip Cowley (ed), *Conscience and Parliament* (Frank Cass 1998) 74).

<sup>75</sup> See chapter four above for a discussion of the conservative attitude to experts.

<sup>76</sup> This amendment was discussed at HL Deb 4 March 1996, vol 570, cols 99-101. See s 27 FLA 1996.

This is a lawyer's Bill, cooked up by the Law Commission. I shall never forget that a very prominent member of the Law Commission [referring to Brenda Hoggett, now Hale] - without doubt an architect of this Bill - said in 1980: 'We have reached a point when we should be considering whether the legal institution of marriage serves any useful purpose.'<sup>77</sup>

Edward Leigh questioned the democratic legitimacy of the Law Commission by claiming that it is not one of its duties to consider public opinion,<sup>78</sup> which seems to ignore the reality that it clearly does so through its consultations. He stated that the impetus behind the Bill had come from 'lawyers sitting in the Law Commission—one of whom, who is now a High Court judge, has questioned the very institution of marriage'.<sup>79</sup> He went on: 'Should we in this Parliament make laws based on what the Law Commission advises, or laws based on our own experience and on common sense, and on what our constituents tell us is necessary?'<sup>80</sup> It is hard to find a more Burkean modern statement on the relationship between legislators and experts. Leigh starkly juxtaposed the advice of the Law Commission with the 'experience', 'common sense' and democratic accountability of the politician. A little further on in the debate Patrick Nicholls referred to the 'academic ideas' of the Commission as a way of questioning their resonance with the experience of practical politics;<sup>81</sup> and Angela Rumbold expressed suspicion about 'the views of the elderly people who sit on commissions'.<sup>82</sup> For the Government, Jonathan Evans attempted to defend the Commission by arguing that the origins of the single ground for divorce are to be found in *Putting Asunder* in 1966, not from a 1990s Law Commission.<sup>83</sup> But I do not think that that really dealt with the point his Conservative opponents were making.

Suspicion and distrust also extended to those identified as likely providers of mediation services, such as Relate and the Church of England. John Patten expressed his concern thus: 'We must be extremely cautious if we are to provide

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<sup>77</sup> HC Deb 25 March 1996, vol 274, col 770.

<sup>78</sup> He is correct in so far as section 3 of the Law Commissions Act 1965 does not expressly require consideration of public opinion.

<sup>79</sup> HC Deb 24 April 1996, vol 276, col 450, again obliquely referring to Brenda Hoggett; Patrick Nicholls also sees the Law Commission as the 'driving force behind the proposals', *ibid*, col 457.

<sup>80</sup> *Ibid*, col 450.

<sup>81</sup> *Ibid*, col 457.

<sup>82</sup> *Ibid*, col 469.

<sup>83</sup> HC Deb 25 March 1996, vol 274, col 801.

large sums in the search for a small band of counsellors, some of whom might not be wholly committed to the sustaining of marriage and might be more concerned with couple counselling, or whatever it is fashionably called'.<sup>84</sup> Knight similarly bemoaned Relate's apparent political correctness underlying its dropping of the words 'marriage guidance' from its name (it was formerly known as the National Marriage Guidance Council), and said:

I have yet to be persuaded - I should very much like to be - that Relate counsellors really are interested in ensuring that careful thought is given to the end of a marriage. I am not at all sure that Relate is so concerned, as are some hon. Members, about the institution of marriage.

If counsellors are to be spirited from the Church, I must admit that I should like to know a bit more about the clergy or their associates who may be giving advice. In recent years, there have been some rather extraordinary statements from Church people, who - even by example - do not always support and believe in marriage, in the manner that some of us would very much like.<sup>85</sup>

Despite such concerns, the Government, through the Act, placed much faith in what Donzelot, following Foucault, calls the "psy" organisations' to enable couples to divorce responsibly.<sup>86</sup> Marriage breakdown was conceived in medicalised terms; it was a pathology of health rather than morals.<sup>87</sup> According to the official Government narrative, divorce was to be seen, not as an ever-deepening social crisis, but as 'a transition in the life-cycle of the family'.<sup>88</sup> It presented opportunities for personal growth and, with a functional post-divorce relationship, the creation of bi-nuclear families, headed by adults educated in the lessons of divorce. This is consistent with Donzelot's view that 'the development of psychologism and psychoanalysis as the solution [to the crisis of the family], [is] the least objectionable response to the situation'.<sup>89</sup> In a plural liberal state at the end of the twentieth century, regardless of

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<sup>84</sup> HC Deb 17 June 1996, vol 279, col 541.

<sup>85</sup> HC Deb 17 June 1996, vol 279, cols 539-540.

<sup>86</sup> Jacques Donzelot, *The Policing of Families* (Pantheon Books 1979).

<sup>87</sup> Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003) 195. For a discussion of the medicalisation of marriage, see David Morgan, *The Family, Politics and Social Theory* (Routledge & Kegan Paul 1985) chapter 2.

<sup>88</sup> Donzelot (n 86) 159.

<sup>89</sup> *Ibid* 220.



who was in power, a psychological response – although not without controversy - was simply ‘the least objectionable’ way forward. Opponents within the Party did, of course, object to the Government’s approach and this stance, particularly as it related to the Law Commission’s role, echoed in Burke’s belief in legislators as representatives, not as delegates. However, the official reliance on those with *practical* knowledge of dealing with marriage breakdown is consistent with Oakeshott, and not necessarily inconsistent with Burke because it is not clear that Burke – for whom the state was a smaller and simpler entity – would have had any issue with the appropriate use of experts in a complex, modern polity.

### **Message-sending and the agency of law generally (again)**

I discussed the symbolic nature of law and its importance to Conservatives in chapter four, and speculated that it grew in significance as a means of trying to keep alive traditional conceptions of the family in the face of their decline in wider society. The emphasis on the symbolic function of law in the Family Law Bill debates provides further support for my speculation.

An analysis of the parliamentary discourse reveals not just C/conservative views on the symbolic function of law in particular, but also regarding the agency of law in general. For Lord Mackay there was a tension in his views on these matters: he was very realistic about the place of fault in divorce and how harmful it can be if it forms the basis of divorce, yet he retained a naïve optimism about the potential of the reflection and consideration period to save marriages. When Baroness Young proposed an amendment to reintroduce the 1969 Act fault grounds, she made an explicit statement about the role of law:

Law influences behaviour and it sends out a very clear message. There would be no point in legislating at all if law did not influence behaviour and, indeed, I believe that my noble and learned friend the Lord Chancellor expects the Bill to influence behaviour.<sup>90</sup>

The perceived need for law to fulfil such a role was based on the view that many people contemplating divorce do not really know what they are doing, in the sense

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<sup>90</sup> HL Deb 29 February 1996, vol 569, col 1638.

that they do not think seriously enough about it. They need, therefore, to be awoken to the implications of their actions through a state-directed process of reflection following compulsory education through the information sessions.<sup>91</sup> This view that adults cannot be trusted to act in the best interests of themselves and their children is summed up in the following statement:

My concern is that if we do not have a greater reason for divorce, we will hand it on a plate to those who do not have such a sense of responsibility—partly because people such as myself have not given them a sense of responsibility over the years—and that it will become all too easy for them to have children and to part company without serious thought.<sup>92</sup>

The Bill's opponents seemed to believe in the efficacy of the existing law to buttress marriage and deter divorce and that the new law would undermine that. This was based on a view that the existence of fault in divorce law was good for marriage because it fostered a sense of responsibility: remove fault, remove responsibility to behave in accordance with the marriage covenant, remove marriage of all meaning.<sup>93</sup>

Crossbench peer Lord Jakobovits claimed that the rise in divorce was partly due to the loss of stigma around divorce and these amendments would reattach some stigma.<sup>94</sup> Some MPs, such as Plaid Cymru's Elfyn Llwyd, argued that those who held this view merely did so as a cover for their naked opposition to divorce per se.<sup>95</sup> Certainly the attempts to introduce amendments to restrict the availability of divorce suggest that there is substance to Llwyd's claim.<sup>96</sup> The religious motivations underlying these amendments were dismissed by Labour MP Harry Cohen as 'fundamentalist claptrap'.<sup>97</sup> But there was a contradiction in opponents' placing of

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<sup>91</sup> For Mackay the information sessions were 'the heart of the Bill', HL Deb 22 January 1996, vol 568, col 839.

<sup>92</sup> Angela Rumbold, HC Deb 24 April 1996, vol 276, col 469.

<sup>93</sup> Eg Jenkin HC Deb 24 April 1996, vol 276, col 460; Patten HC Deb 17 June 1996, vol 279, col 575. This argument has featured in all debates over divorce reform since the nineteenth century.

<sup>94</sup> HL Deb 29 February 1996, vol 569, col 1657.

<sup>95</sup> Llwyd, HC Deb 25 March 1996, vol 274, col 781.

<sup>96</sup> For example, Leigh's amendment at Committee Stage to reintroduce fault and an objective test of intolerable behaviour, HC Deb 24 April 1996, vol 276, col 443; and support for the introduction of covenant marriage from Knight, HC Deb 17 June 1996, vol 279, col 559.

<sup>97</sup> HC Deb 17 June 1996, vol 279, col 570.

faith in the efficacy of law to regulate behaviour, as demonstrated in the following statement:

We do not claim that divorce legislation or Parliament can stop people getting divorced...[but] it can lay down a moral cornerstone or a moral foundation for the nation. It can provide some guidance. We believe that that is what the existing law does, and that is why we believe that it should be retained...We may not be able to stop people getting divorced, but do we want to make divorce even easier, given the state we are in?<sup>98</sup>

While Edward Leigh claimed not to believe that law can prevent divorce, he contradicted this view by his placing of faith in the law to provide moral guidance (presumably to guide people away from divorce and towards continuing their marriages) and that, if it is possible by changing the law to make divorce 'easier', then by implication keeping it as it is makes it 'harder' and perhaps has the effect of making it so hard as to prevent some divorces taking place.<sup>99</sup> Extraordinarily, Leigh also acknowledged as a 'fiction' that fault is considered by the courts but opposed the removal of that fiction because it would undermine marriage.<sup>100</sup> As a legislator he seemed at ease with widespread public misunderstanding of divorce law, but once parliament made the fiction explicit in new legislation then he thought this was problematic.

All of these claims around law's agency are based on a questionable premise, namely that married people *actually know* what the law of divorce is. No evidence was produced during the parliamentary debates to support this claim and its veracity must be questioned. Nevertheless, at the close of the Commons Second Reading, on behalf of the Government Jonathan Evans made a bold prediction that the Bill will lead to fewer divorces.<sup>101</sup> It is not possible to know if Evans' prediction would have been correct, but Ian Smith attempts to explain the growth of divorce in Great Britain and concludes that legal factors play a limited role.<sup>102</sup> Changes in the law do impact divorce numbers, but only temporarily, facilitating the 'burial of long dead

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<sup>98</sup> Leigh, HC Deb 24 April 1996, vol 276, col 446.

<sup>99</sup> There is a brief discussion of the difficulty of classifying 'easier' and 'harder' divorce at Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) paras 3.46 – 3.47.

<sup>100</sup> HC Deb 25 March 1996, vol 274, col 784.

<sup>101</sup> HC Deb 25 March 1996, vol 274, col 802.

<sup>102</sup> Ian Smith, 'Explaining the Growth of Divorce in Great Britain' (1997) 44 *Scottish Journal of Political Economy* 519.

marriages' and giving a final push to those whose marriages are broken beyond retrieval.<sup>103</sup> What Smith discovered has had more of an impact on divorce levels is diminishing transaction costs of getting divorced and divorce settlements which are economically more favourable to women. He predicted that the FLA 1996 would have had a negligible impact on divorce levels provided the efficiencies gained through a less adversarial divorce procedure were offset by the increase in time costs as a result of the scrapping of divorce based on adultery or behaviour.<sup>104</sup>

The whole premise of thought, reflection and consideration in the Act is startling: that divorcing couples do not otherwise properly apply their minds to the consequences of their actions. There is substantial evidence to challenge this view, such as the Rowntree and Nuffield funded research of Gwynn Davis and Mervyn Murch,<sup>105</sup> and the Economic and Social Research Council funded study by Carol Smart and Bren Neale.<sup>106</sup> According to Reece, the Law Commission's original view of the period of reflection and consideration was 'merely to provide conclusive evidence that the marriage had broken down', although she adds that it was additionally to provide an opportunity for the resolution of practical matters and to keep open the possibility of reconciliation.<sup>107</sup> She also argues that the period of reflection and consideration started out largely just about reflection, but the tone grew more obligatory as time went on: a shift from 'an opportunity to reflect' to creating 'an obligation to reflect'.<sup>108</sup> The 1993 Green Paper emphasised reflection and consideration as the primary purpose of the waiting period, relegating further the evidentiary function. Reece states that when the Bill was enacted, the evidentiary element had vanished in favour of marriage-saving and settling post-divorce arrangements.<sup>109</sup> This last point is only partly correct in that there is no mention of the evidentiary function in section 7(1) FLA 1996, although the passing of the period was still necessary to prove irretrievable breakdown under section 5(1)(c).

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<sup>103</sup> Ibid 541.

<sup>104</sup> Ibid 542.

<sup>105</sup> Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (OUP 1988).

<sup>106</sup> Carol Smart and Bren Neale, *Family Fragments?* (Polity Press 1999).

<sup>107</sup> Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003) 147, citing in support Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) 31.

<sup>108</sup> Reece (n 107) 71-73.

<sup>109</sup> Ibid 148.

I think Reece might be rather overstating the evolution of the purpose of the waiting period. The 1988 report calls it 'a period for reflection and transition',<sup>110</sup> the main point being to treat divorce as a process of legal and practical uncoupling, rather than treating the legal dissolution as separate from its practical consequences.<sup>111</sup> This process may also 'increase the chances of a reconciliation between [the parties] *even though it is not the express objective of the system to do so*'.<sup>112</sup> The words 'reflection' and 'consideration' are essentially static verbs, whereas 'transition' necessarily implies movement and change, ie the law takes the view that once the divorce process begins it is not primarily a question of *if* this couple will divorce, but of *when* and *how* they will do so. This supports the view that the purpose of the period was always to facilitate the good divorce by preparing the parties for life post-dissolution. However, while the evidentiary and salvific functions were always present, the latter certainly took on greater significance as the legislation progressed.

The final Bill, however, conceived reflection and consideration in regulatory terms, requiring parties to explore whether their marriage could be saved, or to resolve post-divorce arrangements. It was important that the couple *understood* the effects of their decisions: this was law as educator, not merely as influencer.<sup>113</sup> I agree with Reece's argument that the moral divide was no longer between those who divorce and those who stay married, but between those who divorce well and those who do so badly.<sup>114</sup> The notion of law as educator has much explanatory potential in relation to the emphasis on law's symbolic or expressive function by Conservatives. With the decline of religion as a basis on which to establish duty and responsibility, we have to rely on education: 'Education is the new civil religion, and it must continue into, and throughout, adult life'.<sup>115</sup> Although, as I say above, the claim to the efficacy of the symbolic function of law was based on a number of questionable premises, it was clearly an important claim to many in the Conservative Party. Reece has more to say on the Act, and I will explore her contribution further in the next section.

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<sup>110</sup> Law Commission, *Facing the Future, A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988) para 5.25.

<sup>111</sup> *Ibid* para 5.22.

<sup>112</sup> *Ibid*, emphasis added.

<sup>113</sup> Reece (n 106) 149. See also John Eekelaar, 'Family Law: Keeping Us "On Message"' (1999) 11 CFLQ 387.

<sup>114</sup> Reece (n 107) 128.

<sup>115</sup> *Ibid* 139.

## REECE AND A POST-LIBERAL INTERPRETATION OF THE FLA 1996

This chapter would not be complete without engaging with the most extensive theoretical treatment of the FLA 1996, which is found in Helen Reece's monograph *Divorcing Responsibly*. Reece sees the Act as being influenced by liberalism and conservatism, but also – centrally to her thesis – post-liberalism, which she takes as including feminism, communitarianism and civic republicanism.<sup>116</sup>

She starts from the position that the FLA 1996 'was the first departure from a simple historical trend away from a conservative model towards a liberal model of divorce law'.<sup>117</sup> Her understanding of what is conservatism is implicit in her discussion; she does not attempt to engage with conservatism on a deeper theoretical level. Presumably though she sees a fault-based divorce system with an emphasis on matrimonial offence as being 'conservative', and, in its instinct to conserve what has gone before, it is; although that is an understanding of conservatism devoid of a theory of, and capacity to, change. She also cites the abolition of quick divorce as 'a conservative dimension to the Family Law Act' and, she goes on:

Less uncontroversially conservative was the emphasis on supporting marriage, visible both in the bald statement in Part I of the Act that "the institution of marriage is to be supported" and in the (originally fairly muted) encouragement to attempt reconciliation in the scheme.<sup>118</sup>

So she also sees the time limits and the marriage-saving elements as being essentially conservative. However, it might be argued that these elements could also be characterised as orthodox in the sense outlined in chapter three above.

Reece's central claim is that there is post-liberal strand in the Act. In staking her claim, she argues that 'it is indisputable' that some post-liberal theorists were familiar to members of the House of Lords during the Family Law Bill debates.<sup>119</sup> Even if it is conceded that there was awareness, it is then quite a methodological

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<sup>116</sup> Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003) 4.

<sup>117</sup> *Ibid* 1. However, Freeman argues that the idea of divorcing responsibly has probably always been part of civil divorce, and I am minded to agree (Michael Freeman, 'Review: *Divorcing Responsibly*' (2006) 69 MLR 120, 120).

<sup>118</sup> Reece (n 116) 3.

<sup>119</sup> *Ibid* 7.

leap to argue that this awareness actually influenced the shape of the final Act. She cites some support for her claim that leading communitarian writers were influencing New Labour,<sup>120</sup> but her evidence that they also influenced the Conservative government of the day (and indeed the Law Commission) is more tenuous. On the contrary, Lord Mackay was probably more influenced by the New Testament than by post-liberal thought, as Freeman argues.<sup>121</sup> There is, however, evidence that the following were influencing legislators: Ruth Deech;<sup>122</sup> Melanie Phillips;<sup>123</sup> *Families Without Fatherhood* by Dennis and Erdos;<sup>124</sup> leader articles in the *Daily Mail* and *Daily Telegraph*;<sup>125</sup> and the Conservative Family Campaign.<sup>126</sup> Even if Conservative legislators were immersing themselves in the works of Sandel and Etzioni, there remains a lack of proof that their ideas had actual influence on the actors. As Probert points out, there is a difference between a law being consistent with an idea, and the law therefore being influenced by that idea.<sup>127</sup> So, while I concede that Reece may be correct in her analysis, I am not convinced that she is, and I incline to the view that Reece's interpretation is 'too subtle to match the political realities'.<sup>128</sup>

Reece also states that the popularity of communitarianism reached its zenith in around 1995/1996, yet, as I have elucidated above, most of the core provisions of the Bill originated in the Law Commission's work at the end of the 1980s. Reece does seek, further, to link post-liberalism with the Conservative Party by arguing that the Act emerged 'five years after the demise of Thatcherism';<sup>129</sup> though, as I argued in the previous chapter, Thatcherism did not end immediately upon the resignation of Margaret Thatcher. John Major was the continuity candidate (but with a 'human face'<sup>130</sup>) and much of his government carried on in the same vein as his predecessor. Importantly, one thread of continuity was that of the Lord Chancellor,

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<sup>120</sup> Ibid 8.

<sup>121</sup> Michael Freeman, 'Review: *Divorcing Responsibly*' (2006) 69 MLR 120, 120. See also Michael Freeman, 'Divorce Gospel Style' (1997) 27 Family Law 413.

<sup>122</sup> Janet Young, HL Deb 30 November 1995, vol 567, col 730; Lord Stallard (Labour) HL Deb 30 November 1995, vol 567, col 745; John Patten, HC Deb 25 March 1996, vol 274, col 762.

<sup>123</sup> Janet Young, HL Deb 11 January 1996, vol 568, col 327.

<sup>124</sup> Janet Young, HL Deb 30 November 1995, vol 567, col 731; HL Deb 29 February 1996, vol 569, col 1714; Norman Dennis and George Erdos, *Families Without Fatherhood* (2<sup>nd</sup> edn, IEA Health and Welfare Unit 1993).

<sup>125</sup> Alleged by John Hutton (Labour), HC Deb 25 March 1996, vol 274, col 789.

<sup>126</sup> Julian Brazier, HC Deb 25 March 1996, vol 274, col 792.

<sup>127</sup> Rebecca Probert, 'Review: *Divorcing Responsibly*' (2005) 19 International Journal of Law, Policy and the Family 126, 129.

<sup>128</sup> Ibid 129.

<sup>129</sup> Reece (n 116) 9.

<sup>130</sup> The term is Simon Jenkins' from Simon Jenkins, *Thatcher and Sons: A Revolution in Three Acts* (Penguin 2006) 159.

Lord Mackay, who was appointed by Thatcher in 1987 and continued until he was replaced by Labour's Derry Irvine in 1997. Mackay espoused many of the Victorian values which drove Thatcherite social policy throughout the 1980s and 1990s.

I also take issue with Reece's claim that the FLA 1996 'does not bear the hallmarks of traditional conservatism' because I think that, in its practical and rhetorical emphasis on marriage-saving, it does.<sup>131</sup> She writes, 'Introduced in a period in which the Conservative Party was flailing around for new ideas, it is less surprising that post-liberalism held some attraction'.<sup>132</sup> Reece then quotes an article by Melanie Phillips in *The Observer*. 'Duty, responsibility and community are the fashionable buzz-words on everyone's lips. The Prime Minister claimed them yesterday as the essence of Tory thinking'.<sup>133</sup> And that is exactly my point, much of what passes for communitarianism can also be said of conservatism, at the heart of both is an understanding of the contextualised individual. Communitarianism was then in the ascendancy because it appeared to connect with concern over the disintegration and alienation of modern society at the end of the millennium,<sup>134</sup> but, as I demonstrated in chapter three, these have also long been the concerns of classical conservatism. An alternative reading of the Prime Minister's words might be that 'duty, responsibility and community' were identified with 'Tory thinking' because they are part of it, rather than because Conservatives were trying to present themselves as on-trend communitarians.

The following quote illustrates precisely my argument that there are parallels between post-liberalism/communitarianism and conservatism, and replacing the word 'post-liberal' with 'conservative' would not alter the integrity of the statement: 'Post-liberal [conservative] theory replaces the atomistic individual of liberal theory with a subject who is embedded in and constituted by context'.<sup>135</sup> Drawing on Sandel, Reece writes, 'People acquire their identity through their relations with others in their communities, so that we discover who we are by examining our attachments to our communities'.<sup>136</sup> Again, set alongside a conservative statement of the individual and society, further parallels are evident: 'The bulk of the activities

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<sup>131</sup> Reece (n 116) 9.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid 26.

<sup>135</sup> Ibid 13.

<sup>136</sup> Ibid 22.



of individuals concerned with living in ways that strike them as good is composed of participation in the various traditions of their society'.<sup>137</sup>

Central to Reece's argument is the assertion that the framers of the Act rejected a liberal notion of autonomy in respect of divorce which would have simply allowed a spouse to divorce because this is what the spouse wanted. Instead a post-liberal approach to autonomy in the context of marital breakdown emphasised *thought*, only permitting divorce on the basis of the individual's internal state.<sup>138</sup> The context for this was the period for reflection and consideration, through which the parties had to pass before a divorce order could be made by the court. According to Reece, 'The theoretical basis for this emphasis is that self-discovery through reflection represents both the predominant and the most coherent post-liberal conception of autonomy'.<sup>139</sup> This is characterised as a cognitive approach to autonomy, which emphasises self-discovery rather than choice:<sup>140</sup> 'On a post-liberal analysis divorce must be permitted because marriage is crucial to self-identity'.<sup>141</sup> An alternative, and more straightforward, analysis is that conservatives accepted the arguments that the existing fault-based (hybrid) system was not working, and wanted to remove fault, but drew back from a unilateral demand-based divorce law (as the Law Commission and Government consultation papers testify). Instead, legislators settled on, in effect, a system of divorce on demand,<sup>142</sup> but with a system of procedural hurdles and a statutory statement of marriage-saving which acted to mitigate the potentially negative (as perceived by opponents) impact of the reforms.

Both sides of the debate emphasised the importance of responsibility but disagreed over what constituted responsible behaviour. One side saw it as being about establishing fault or blame and the other saw it as being about facing up to the problems in the marriage and reflecting through the divorce process. 'Post-liberal responsibility is no longer about discrete decisions; responsible behaviour has become a way of being, a mode of thought; the focus has shifted from the content of

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<sup>137</sup> John Kekes, *A Case for Conservatism* (Cornell University Press 1998) 39; Scruton makes similar points in Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) especially 182-194.

<sup>138</sup> Reece (n 116) 45.

<sup>139</sup> *Ibid* 46.

<sup>140</sup> *Ibid* 46. There are obvious parallels here with Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press 1995) and Anthony Giddens, *The Transformation of Intimacy* (Polity 1993).

<sup>141</sup> Reece (n 116) 115.

<sup>142</sup> Stephen Cretney, 'Divorce on Demand' *The Times* (London, 14 December 1993) 33.

the decision to the process of making the decision.<sup>143</sup> Reece contends that Conservative opponents were still attached to a liberal notion of responsibility (ie some things were right, others were wrong) and had not converted to a post-liberal understanding and this was the reason for their opposition.<sup>144</sup> Like many of Reece's conclusions this might be correct, but there are other valid explanations, some of which I have explored above.

## CONCLUDING THOUGHTS

If, as Colin Gibson thinks, the FLA 1996 offered 'a realistic and rational improvement over the present system', then why did Part II ultimately fail?<sup>145</sup> Freeman's view is that tensions within the family were more the reason for the failure of Part II rather than tensions within post-liberalism, as Reece suggests. The legislation did not go with the grain of human nature, as perhaps conservative legislation ought to: 'The Act was an attempt at social engineering...Laws work best where they are impacting on instrumental activities and least when they come up against expressive areas of life'.<sup>146</sup> It was ironic that one of the main reasons for the retreat from fault in the Law Commission reports was because the law was ill-suited to a forensic examination of the intimate reasons for the breakdown of a marriage, yet the approach under the FLA 1996 was arguably much more intrusive.<sup>147</sup> As an example of the more coercive legislation of the 1990s, the Act sought to apply corrective force against the permissive lawmaking over the previous three decades, but it failed because it was based on a mistaken assumption that individuals behave rationally when faced with decisions of an affective nature.<sup>148</sup>

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<sup>143</sup> Helen Reece, *Divorcing Responsibly* (Hart Publishing 2003) 209.

<sup>144</sup> *Ibid* 178-179, 208.

<sup>145</sup> Colin Gibson, *Dissolving Wedlock* (Routledge 1994) 223. Probably the best collection of reflections on this question is Mathew Thorpe and Elizabeth Clarke (eds), *No Fault or Flaw: The Future of the Family Law Act 1996* (Jordan 2000).

<sup>146</sup> Michael Freeman, 'Review: *Divorcing Responsibly*' (2006) 69 MLR 120, 121.

<sup>147</sup> Reece (n 143) 236.

<sup>148</sup> Ezra Hasson, 'Setting a Standard or Reflecting Reality? The Role of Divorce Law, and the Case of the Family Law Act 1996' (2003) 17 International Journal of Law, Policy and the Family 338, 362. See also Helen Reece, 'Leaping without Looking' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2014).

It was particularly at the level of the information meetings that failure of the statutory framework became apparent,<sup>149</sup> and this is perhaps not surprising given that the meetings were ‘a strikingly direct form of regulation of social relations’.<sup>150</sup> The role of information meetings changed during the life of the legislation.<sup>151</sup> They were not present at all in the 1990 Law Commission report, but they first appeared in the 1993 Government consultation paper, as an information *interview*.<sup>152</sup> Two years later there was a significant shift in the purpose and format of information meetings in the 1995 White Paper, to provide information on the services available to divorcing couples and to inform them of the consequences of divorce in a *group* session.<sup>153</sup> The Act reverted to private meetings requiring the attendance of at least the spouse applying for the divorce, although the pilot information meetings did include some group meetings.<sup>154</sup> The official portrayal of information meetings, and mediation generally, as benign facilitative processes, masked the gendered inequalities which lurk below the surface, particularly concerning women who are more likely to be initiating the divorce, more likely to be the economically weaker partner, and who may have been subjected to domestic violence.<sup>155</sup>

I considered in chapter three that the imperfection of human nature is an important component in classical conservatism. This imperfection is understood as both intellectual and moral; intellectual imperfection giving rise to scepticism around grand theory, and moral imperfection underlying the emphasis on authority. For Burke, as for Lord Mackay, humanity’s moral deficit stems from the biblical doctrine of original sin. As Mackay was such a central player in the advent of the Act, it is not surprising that the discourse echoed his worldview.<sup>156</sup> However, I observe that the views of many non-C/conservatives coalesced with the dominant narrative that high

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<sup>149</sup> For the full report of the University of Newcastle study, see Lord Chancellor’s Department, *Information Meetings and Associated Provisions Within the Family Law Act 1996: Final Evaluation Report* (LCD 2001).

<sup>150</sup> Richard Collier, ‘The Dashing of a “Liberal Dream”? – The Information Meeting, the “New Family” and the Limits of Law’ (1999) 11 CFLQ 257, 259.

<sup>151</sup> Janet Walker, ‘Whither the Family Law Act, Part II?’ in Mathew Thorpe and Elizabeth Clarke (eds), *No Fault or Flaw: The Future of the Family Law Act 1996* (Jordan 2000) 5.

<sup>152</sup> Lord Chancellor’s Department, *Looking to the Future, Mediation and the Ground for Divorce* (Cm 2424, 1993) 62.

<sup>153</sup> Lord Chancellor’s Department, *Looking to the Future, Mediation and the Ground for Divorce, the Government’s Proposals* (Cm 2799, 1995) 56.

<sup>154</sup> William Arnold, ‘Implementation of Part II of the Family Law Act 1996: The Decision Not to Implement in 2000 and Lessons Learned from the Pilot Meetings’ in Mathew Thorpe and Elizabeth Clarke (eds), *No Fault or Flaw: The Future of the Family Law Act 1996* (Jordan 2000); Pat Fitzsimons, ‘Managing an Information Meetings Pilot’ in Thorpe and Clarke (eds), *ibid.*

<sup>155</sup> John Eekelaar, ‘Family Law: Keeping Us “On Message”’ (1999) 11 CFLQ 387.

<sup>156</sup> Michael Freeman, ‘Divorce Gospel Style’ (1997) 27 Family Law 413.

divorce rates are a symptom of individual moral decline and that the traditional married family model is to be protected, supported and promoted.<sup>157</sup> In respect of its foundational proposition that ‘people are naturally depraved’,<sup>158</sup> the FLA 1996 can be seen as a Conservative measure which is consistent with conservative political thought.

There is, however, one respect in which a number of Conservative contributions seem to depart from the conservative disposition outlined in chapter three; and that is with regard to the faith placed in law’s ability to save marriages. Whilst conservatism is pessimistic, it is also realistic; and I contend that the Government position went beyond a realistic assessment of the human condition. The view that couples enter into divorce lightly, that making divorce harder would deter people from pursuing it, and that information meetings might cause divorcing couples to reconsider at the eleventh hour, were all then known, or have been since shown, to be unrealistic.<sup>159</sup>

In the context of the domestic violence provisions in Part IV of the Act, limiting rights for cohabitants because of a desire to uphold marriage suggests a conservatism which sees such inequalities as natural, and subordinates an equality claim to a perceived higher principle. The apparent indifference to the dangers posed to cohabitants through weaker statutory protection, provides easy ammunition for opponents that Conservatives (and possibly conservatism) are unconcerned about the weak and vulnerable. There is a class issue lying just below the surface here, for cohabitants are more likely to be poorer and have less secure housing tenure than married couples.<sup>160</sup> I would argue that, while conservatism does not privilege equality in the way that liberalism does, without any evidence that providing

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<sup>157</sup> Richard Collier, ‘The Dashing of a “Liberal Dream”? – The Information Meeting, the “New Family” and the Limits of Law’ (1999) 11 CFLQ 257; Carol Smart, ‘Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy’ (1997) 26 Journal of Social Policy 301.

<sup>158</sup> Carl Schneider, ‘The Next Step: Definition, Generalization, and Theory in American Family Law’ (1985) 18 University of Michigan Journal of Law Reform 1039, 1057.

<sup>159</sup> On the failure of information meetings, see Richard Collier, ‘The Dashing of a “Liberal Dream”? – The Information Meeting, the “New Family” and the Limits of Law’ (1999) 11 CFLQ 257; Lord Chancellor’s Department (n 149); Ezra Hasson, ‘Setting a Standard or Reflecting Reality? The Role of Divorce Law, and the Case of the Family Law Act 1996’ (2003) 17 International Journal of Law, Policy and the Family 338.

<sup>160</sup> There was another class issue implicit in the Act: the adultery and behaviour facts in the MCA 1973 are used disproportionately by working class women with children as a means of accessing the MCA’s financial and property remedies (see Brenda Hale, ‘The Family Law Act 1996 – Dead Duck or Golden Goose?’ in Stephen Cretney (ed), *Family Law: Essays for the New Millennium* (Jordan 2000) 28).

cohabitants with equivalent protections to married couples would *actually* undermine marriage, the conservative concern with authority and societal stability (eg preventing and punishing domestic violence) suggests that the Conservative Party approach in the Act was not a conservative one. I speculate that Lord Mackay might not have withdrawn the Family Homes and Domestic Violence Bill (and not subsequently had to make concessions to weaken cohabitant protections in the FLA 1996) if the Government had had a sufficient majority to enable it to ignore the demands of its own contrarian backbenchers.<sup>161</sup> The last point is an example of how principles are sometimes sacrificed on the altar of political expediency.

I have also discussed in this chapter the tension between Conservatives' trust and distrust of experts, elements of which I also covered in chapter four. Whilst some Conservatives evidenced their distrust in, for example, the Law Commission and *Relate*, it was clearly not the official Government view. The Government very much drew on the Law Commission's work in drafting the Bill and pinned its hopes on family support professionals to implement the new divorce process successfully.

The FLA 1996 is illustrative of the dilemma conservatives face when considering how to deal with change that appears to be organic but which also appears to be damaging the fabric of institutions which are constitutive of society. From a conservative viewpoint, organic change, being bottom-up and demand-driven is more likely to confer benefits because it emerges naturally from the infinitudinal interactions of a complex society, rather than the a priori assumptions of decision-makers. Conservatives who oppose, or seek to reverse, organic change act in a way which is 'futile, wrong-headed and ultimately counterproductive'.<sup>162</sup> Above all, conservatism is concerned with the management of change and how change can be reconciled with existing institutions. I rehearse below the change principle criteria drawn from chapter three:

1. The burden of proof is on the innovator to show that the benefits of the change outweigh its costs.
2. The change must be in response to a felt need, rather than in pursuit of a utopian vision.

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<sup>161</sup> James Mackay, 'Family Law Reform – A Lord Chancellor's View' in Stephen Cretney (ed), *Family Law: Essays for the New Millennium* (Jordan 2000) 15.

<sup>162</sup> Kieron O'Hara, *Conservatism* (Reaktion Books 2011) 97.

3. In terms of the scale and rate of change, the change should be incremental and evolutionary.
4. The change should be rigorously evaluated before the next incremental step.
5. The change should be reversible where possible.

Applying these five principles leads me to conclude that the Government acted largely with a conservative attitude to change in its enactment of the FLA 1996. It relied on evidence of a felt need for reform from the Law Commission and its own consultation to argue the case for a new divorce law. The new law, though innovative in some respects, retained the old core of irretrievable breakdown which had to be evidenced, not by proof of fault, but by vaulting certain procedural hurdles. Rigorous evaluation subsequently took place, resulting in a successor government deciding to repeal (in a sense, 'reverse') Part II. However, while the Government's attitude to *divorce* reform could be seen as conservative, it stopped short of extending this approach to wider issues around the place of marriage in society, and the rise of alternative family forms. Arguably, with regard to its privileging of marriage over cohabitation, and its unrealistic expectations of law's ability to save marriages, the Major Government adopted an orthodox, immobilist position characteristic of Conservative opponents to the FLA 1996 such as Baronesses Elles and Young, Jill Knight and Edward Leigh. Ultimately, and perhaps not surprisingly, the Conservative Government was not able (or not willing) to transcend the dominant paradigm in which marriage and the intact family are 'good' and 'normal', whereas divorced, reconstituted, non-traditional families are 'bad' and 'abnormal'.<sup>163</sup>

As a postscript to my discussion of the FLA 1996, in late 2015, the No Fault Divorce Bill, a Private Members' Bill, was introduced by Conservative MP Richard Bacon. The Bill seeks to augment the current divorce and dissolution provisions in the MCA 1973 and CPA 2004 to include scope for the presentation of a joint petition based on irretrievable breakdown. No proof of fault would be required, but the decree absolute would not ordinarily be granted until 12 months after decree nisi. Bacon's First Reading speech contained the all too familiar concerns around not making the 'tragedy' of divorce 'easier' and the need for 'reflection' and 'easier access to counselling' amongst couples prior to divorce.<sup>164</sup> Perhaps not surprisingly, the only response came from Edward Leigh, who spoke against the Bill based on his view that no fault divorce led to higher levels of divorce, and family breakdown was one

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<sup>163</sup> Collier (n 159) 268-9.

<sup>164</sup> HC Deb 13 October 2015, vol 600, cols 189-191.

of the key drivers in poverty for women and children. Significantly, as evidence perhaps that Leigh recognises the greater challenges of opposing divorce reform twenty years after the FLA 1996, he stated, 'I am not making any argument to do with morality'. Instead, he argued that 'this is about evidence, scientific research and observable outcomes'.<sup>165</sup> Time will tell if this preference for empirical research over moral claims is to be the strategy deployed by Conservative opponents to future divorce law reforms.

In chapters four, five and six I have analysed a range of statutes which impacted upon the regulation of intimate adult relationships during a period in which the Conservative Party largely dominated the political culture of the United Kingdom. Many of those statutes (eg Matrimonial and Family Proceedings Act 1984, Children Act 1989, Human Fertilisation and Embryology Act 1990, Family Law Act 1996) were the products, more or less, of the outputs of various commissions, committees, and Government departments, ie they emerged predominantly 'from the top down'.<sup>166</sup> Conservatives were not given an opportunity to govern again until 2010 (in coalition with the Liberal Democrats), and it was almost twenty years after the FLA 1996 that the Party was able to form a majority government. During this interregnum, there was a noticeable change in the British political and legal climate, with the entrenching of a discourse of rights and equality ushered in following the Human Rights Act 1998.<sup>167</sup> It is to a consideration of developments in the law regulating same-sex relationships in the UK around the turn of the millennium, and the Conservative Party's place in those developments, that I turn in the next two chapters.

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<sup>165</sup> Ibid, col 194.

<sup>166</sup> Carol Smart and Bren Neale, *Family Fragments?* (Polity Press 1999) 175.

<sup>167</sup> I observe that the Conservative Party's 2010 general election manifesto was entitled *A Contract for Equalities*.

## CHAPTER 7

### **'COMMITMENT REWARDED' – THE CIVIL PARTNERSHIP ACT 2004**

#### **INTRODUCTION**

This chapter takes its title from an editorial in *The Times* and considers the Conservative Party's attitude to the legal regulation of same-sex relationships.<sup>1</sup> One of the major social changes of the last 50 years has been the legal treatment of the intimate lives of gay (and, in part, lesbian) people – “from “odious crime” to “gay marriage”” as Cretney pithily puts it.<sup>2</sup> The scale and pace of change has not been uniform over time, with periods of regression as well as those of breathtakingly rapid transition. How to deal with non-heterosexuality has been a source of tension within the body of postwar Conservatism, laying bare the authoritarian and libertarian dispositions at war between its members. Sometimes an authoritarian approach won the day (section 28 of the Local Government Act 1988 comes to mind), whereas at other times the ghost of John Stuart Mill has prescribed a more permissive policy. Indeed, I shall argue in this chapter that the latter approach was one feature of the official party line on the advent of civil partnerships. Before doing so, this chapter will first sketch out the postwar Party's record on homosexual law reform, and go on to consider the genesis of the Civil Partnership Bill and its rough passage through parliament. Drawing on my discussion of conservatism in chapter three, I then examine the nature of the Conservative dissent to the Bill, the conceptualisation of sex in the statutory scheme, some issues around class, and finally how the innovation of civil partnership was understood within a conservative attitude to change.

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<sup>1</sup> Times (Editorial comments), 'Commitment Rewarded' *The Times* (London, 1 April 2004) 23. Large parts of this chapter have been published in Andrew Gilbert, 'From "Pretended Family Relationship" to "Ultimate Affirmation": British Conservatism and the Legal Recognition of Same-Sex Relationships' [2014] CFLQ 463.

<sup>2</sup> Stephen Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP 2006).



## THE CONSERVATIVE PARTY AND HOMOSEXUAL LAW REFORM

The postwar Conservative Party has had an ambivalent attitude towards the legal treatment of homosexuality. The Party established the Wolfenden Committee which led, eventually, to the decriminalisation of certain homosexual acts; introduced section 28 of the Local Government Act 1988 (LGA 1988); opposed same-sex couple adoption in the Adoption and Children Act 2002; supported the introduction of civil partnerships; and in coalition put same-sex marriage on the statute book. To some extent, explanations for each of these events lie in their various social and temporal locations, making unifying principles difficult to discern. This chapter and the one following, however, seek to discover what part conservatism, qua a body of political thought, played in the passage of two Bills regulating the intimate lives of gay and lesbian people.

A high peak in the history of twentieth-century social reform was the formation of the Wolfenden Committee, announced by David Maxwell Fyfe, Home Secretary in Churchill's government.<sup>3</sup> The *Report of the Committee on Homosexual Offences and Prostitution* (to give the Wolfenden Report its full name) was published in 1957 and it recommended that private consensual homosexual acts should be decriminalised. The fledgling parliamentarian Margaret Thatcher supported implementing the Wolfenden recommendations from when her time in parliament began, and she backed Leo Abse's Sexual Offences (No.2) Bill in 1967, along with a majority of those who voted in her Party.<sup>4</sup> The wider liberalising effect of the Sexual Offences Act 1967 is evident in that Britain's first Gay Pride march took place in London on 1 July 1972. However, the Party's default position was generally, like the majority view in the country at the time, not supportive of gay people. By way of example, McManus notes that a proposal to give homosexual partners the same rights to succession of a tenancy as opposite-sex cohabitants arose in a Standing Committee debate on a Housing Bill.<sup>5</sup> The sponsoring minister, Geoffrey Finsberg, opposed the measure, saying that it was 'quite unacceptable' to give the same rights to homosexual cohabitants.<sup>6</sup> He elaborated that it would make

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<sup>3</sup> HC Deb 8 July 1954, vol 529, cols 2313-2314.

<sup>4</sup> Geoffrey Fry, 'Parliament and "Morality": Thatcher, Powell and Populism' (1998) 12 *Contemporary British History* 139.

<sup>5</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 88. The amendment was proposed by Labour MP John Tilley at the request of the Campaign for Homosexual Equality, SC Deb (F) 28 February 1980, cols 677-681.

<sup>6</sup> SC Deb (F) 28 February 1980, col 681.

it difficult for landlords to ascertain the nature of the occupants' relationship (even though the amendment provided that occupants could clarify the position by making a statutory declaration), and that the Bill's purpose was not to lead on 'social policy'.<sup>7</sup> 'We are dealing with housing policy', said Finsberg in an unintelligent attempt to account for the Government's opposition.<sup>8</sup> The amendment was defeated by a number of Conservative MPs, including the newly-elected John Major.

In addition to reforms driven by events at home, winds of change were blowing in from continental Europe, specifically from the European Court of Human Rights (ECtHR). In September 1981, Jeffrey Dudgeon succeeded in his complaint before the ECtHR that the criminalisation of homosexual acts in Northern Ireland, in so far as it related to men over 21, was a breach of Article 8.<sup>9</sup> This was the first positive outcome for a homosexual rights case in the Strasbourg court, and it led to a swift change in domestic law in 1982.<sup>10</sup> The influence of the European Convention on Human Rights (ECHR) would continue to grow, both in terms of ECtHR decisions binding on the United Kingdom and the more pervasive effect of the spirit of Convention jurisprudence. The ECtHR's narrower, rights-based terms of reference, in contrast to the broad spectrum of moral, religious, social, political and economic concerns impacting law reform in Westminster, have enabled it to play a significant role in the development of LGBT rights in Britain and beyond.<sup>11</sup>

In a Party which was largely hostile towards homosexuality, Conservative contrarians were few, but there were some, such as the 'firmly heterosexual'<sup>12</sup> MP for Hornchurch, Robin Squire, who gave longstanding support to the gay lobby at a time when it was not just unpopular to do so but when it was also risky from a party and electoral perspective. (Squire was the only Conservative MP to oppose section 28 of the LGA 1988.) Attitudes began to harden after the 1983 election which saw a

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> *Dudgeon v United Kingdom* (1982) 4 EHRR 149. The Sexual Offences Act 1967 did not extend to the province.

<sup>10</sup> Mervyn Read and David Marsh, 'Homosexuality' in Philip Cowley (ed), *Conscience and Parliament* (Frank Cass 1998) 29-30.

<sup>11</sup> For example, *Goodwin v United Kingdom* (2002) 35 EHRR 18 led to the Gender Recognition Act 2004. See also, Nicholas Bamforth, 'The Benefits of Marriage in All but Name?' Same-Sex Couples and the Civil Partnership Act 2004' [2007] 19 CFLQ 133.

<sup>12</sup> Andrew Pierce, 'Cheers Ring Out as David Cameron Lays Tory History of Homophobia to Rest' (*The Telegraph*, 2 July 2009)

<<http://www.telegraph.co.uk/comment/columnists/andrewpierce/5724476/Cheers-ring-out-as-David-Cameron-lays-Tory-history-of-homophobia-to-rest.html>> accessed 26 April 2016.

change in the demographic of Conservative MPs.<sup>13</sup> John Major believes that the wartime generation of MPs often had a more tolerant inclination towards homosexuality but that many of the new intake held more ideological views.<sup>14</sup> This shift, combined with the AIDS crisis, was to set back the cause of gay rights by perhaps a decade. McManus observes that '[t]he tone of moral indignation was growing',<sup>15</sup> as seen in section 46 of the Education (No. 2) Act 1986, which, foreshadowing section 28 of the LGA 1988, required sex education in schools to encourage pupils 'to have due regard to moral considerations and the value of family life'. Some Conservative MPs wanted to go further, particularly to deal with the infamous *Jenny Lives with Eric and Martin* library book issue, and proposed an amendment which would have given the Secretary of State the power to remove any sex education books which 'are unsuitable or morally corrupting'.<sup>16</sup> It was not long before the Government did go further when it introduced what became section 28, which prohibited local authorities from 'intentionally promoting homosexuality' or promoting 'the teaching in any maintained school of the acceptability of homosexuality as a *pretended family relationship*' (emphasis added). It was the final three words which proved particularly incendiary to opponents. Section 28 is emblematic of high-Thatcherite social policy; a populist authoritarian measure, justified by a Conservative claim to the importance of defending the traditional married, heterosexual family unit.<sup>17</sup> With hindsight it can be argued that the Conservatives scored a spectacular own goal with the introduction of this section because, first, there was little evidence that 'promotion' was going on on anything more than a tiny scale, and, two, it served as a very effective 'recruiting sergeant' for the gay cause and led directly to the founding of lobby group Stonewall.<sup>18</sup>

The confluence of AIDS, section 28, and Conservative 'Victorian values' rhetoric was no accident. While each can be seen to be independent of the others, their coincidence provided synergistic energy to one of the defining social issues of the decade. The emergence of AIDS, which was first reported in 1981, was a double-

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<sup>13</sup> Philip Norton, "'The Lady's Not For Turning' But What About the Rest? Margaret Thatcher and the Conservative Party 1979-89' [1990] Parliamentary Affairs 41.

<sup>14</sup> McManus (n 5) 100. On John Major's social liberalism, see Anthony Seldon, *Major: A Political Life* (Weidenfeld & Nicolson 1997) 215-218.

<sup>15</sup> McManus (n 5) 111.

<sup>16</sup> Peter Bruinvels, HC Deb 21 October 1986, vol 120, col 1055.

<sup>17</sup> Martin Durham, *Sex and Politics* (Macmillan 1991) 117; Joan Isaac, 'The New Right and the Moral Society' (1990) 43 Parliamentary Affairs 209.

<sup>18</sup> Carl Stychin, 'Family Friendly? Rights, Responsibilities and Relationship Recognition' in Alison Diduck and Kathleen O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006) 21.

edged sword for the gay rights movement. In one respect it was a huge setback, providing ammunition for some social conservatives - who saw it as a consequence of a promiscuous and hedonistic gay 'scene' - to argue for state-sanctioned measures to prevent attempts to normalise homosexuality (eg section 28). On the other hand, it was then but a small step of logic to contend that there is no better way to combat such selfishness and promiscuity than to offer same-sex couples formal legal recognition for their relationships, but it would not be until the next millennium that this would be realised.<sup>19</sup>

The 1990s saw little change in the Party's attitude towards homosexuality. John Major succeeded Thatcher largely because he stood for continuity rather than change, and much family law and policy during his premiership was authoritarian and emphasised the traditional family form (eg the Child Support Act 1991 and the Family Law Act 1996). There were, however, some concessions towards fairer legal treatment of gay men and lesbians. In 1991 Major announced that homosexuality would no longer be a bar to appointment to sensitive posts in the civil service,<sup>20</sup> and a few years later the Criminal Justice and Public Order Act 1994 decriminalised homosexuality in the armed forces, although gay men and lesbians could still be dismissed from their posts until the ECtHR decision in *Smith and Grady v United Kingdom* at the end of the decade.<sup>21</sup> This begrudging, incremental approach is also observed in the reduction – but not equalisation - of the age of consent for homosexual sex from 21 to 18 in February 1994.

William Hague succeeded Major in June 1997. Despite occasional socially liberal notes, the overall tone of Hague's leadership was designed to appeal to its core supporters, and it did not deviate substantially from the attitudes towards gay men and lesbians which had ossified during the 1980s.<sup>22</sup> Hague was possibly more socially liberal than much of his parliamentary party, but he conveyed mixed messages, making any pro-gay overtones seem opportunistic at best. For example, Hague reportedly expressed support for equalising the age of consent, yet only 18

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<sup>19</sup> Stephen Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP 2006).

<sup>20</sup> Charles Crawford, 'The Love That Dared Not Speak its Name in the Foreign Office' (*The Independent*, 30 March 2010) <[www.independent.co.uk/news/uk/this-britain/the-love-that-dared-not-speak-its-name-in-the-foreign-office-1931127.html](http://www.independent.co.uk/news/uk/this-britain/the-love-that-dared-not-speak-its-name-in-the-foreign-office-1931127.html)> accessed 15 January 2014.

<sup>21</sup> (1999) 29 EHRR 493.

<sup>22</sup> Richard Hayton, 'Conservative Party Modernisation and David Cameron's Politics of the Family' (2010) 81 *The Political Quarterly* 492, 493-495, 499; Robin Harris, *The Conservatives: A History* (Bantam Press 2011) 509-510.

Conservative MPs voted in favour of that measure in June 1998.<sup>23</sup> Efforts to equalise the age of consent were driven by a Labour Government committed to complying with the European Commission on Human Rights decision in *Sutherland v United Kingdom*.<sup>24</sup> Hague purposefully courted the support of religious groups,<sup>25</sup> and thanked them for 'fighting to retain Section 28'.<sup>26</sup> And when it came time to write the 2001 general election manifesto it contained these two painfully contradictory statements: 'Tolerance is one of Britain's historic virtues. A strong society is built on respect for all people – whatever their race, religion, gender or sexual orientation';<sup>27</sup> and, 'We will also retain Section 28 of the Local Government Act'.<sup>28</sup> When the election resulted in an overall gain for the Party of just one seat, Hague resigned.

Although the electorate largely rejected Hague's 'crude right-wing populism',<sup>29</sup> it did not deter the Party from electing the Thatcherite Iain Duncan Smith to succeed him. So while expectations were understandably low, there were 'very slight signs of softening' in the Party's approach to homosexual law reform during Duncan Smith's tenure.<sup>30</sup> During his leadership campaign, Duncan Smith declared he would review the Party's policy on section 28, but when it came to a vote he opted for its retention, as did David Cameron.<sup>31</sup> Duncan Smith and Cameron were in the minority of MPs and the section was finally repealed in 2003.

The other issue of homosexual law reform arising under Duncan Smith's leadership was that of adoption by gay and lesbian couples in the Adoption and Children Bill. This is a good example of the rapidity with which public attitudes towards gay and lesbian people changed. Cretney notes the British Attitudes Survey 1989 recorded

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<sup>23</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 208, 216. The Commons voted in favour of equalisation in the Crime and Disorder Bill but it was overwhelmingly defeated in the Lords, in a move led by Baroness Young. Equalisation was eventually realised in the Sexual Offences (Amendment) Act 2000.

<sup>24</sup> (1997) 24 EHRR CD22. The Commission held that the applicant's complaint was admissible regarding the violation of Articles 8 and 14 due to the age of consent for consensual homosexual acts being 18 rather than 16 as for heterosexuals.

<sup>25</sup> Nick Cohen, 'Onward, Christian Tories' (*New Statesman*, 1 May 2000) <[www.newstatesman.com/node/137502](http://www.newstatesman.com/node/137502)> accessed 20 July 2015.

<sup>26</sup> William Hague, 'Speech to Conservative Faith Communities Conference' (Westminster, November 2000).

<sup>27</sup> Conservative Party, *Time for Common Sense, 2001 General Election Manifesto* (Conservative Party 2001) 33.

<sup>28</sup> *Ibid* 45.

<sup>29</sup> Harris (n 22) 510.

<sup>30</sup> McManus (n 23) 245.

<sup>31</sup> McManus, *ibid* 262, and HC Deb 10 March 2003, vol 401, cols 49-90; Cameron later repented, see Nicholas Watt, 'David Cameron Apologises to Gay People for Section 28' (*The Guardian*, 2 July 2009).

78% of respondents against adoption by lesbians and 86% against for gay men, while in 2002 a MORI poll suggested 44% in favour of gay and lesbian couple adoption, 36% against, and 20% undecided.<sup>32</sup> Despite these data, the fact that such matters were often considered conscience issues, and that most of the parliamentary party agreed with the leadership anyway, Conservative MPs were whipped to oppose the Bill.<sup>33</sup> Conservative opposition, though substantial, was not enough to stop the Bill becoming law. The Adoption and Children Act 2002 was strategically important in the advance towards civil partnership and same-sex marriage because it removed from the debate the clearly highly divisive issue of same-sex couple adoption.<sup>34</sup> But it was in the area of what became civil partnerships that there were signs of a more ameliorative attitude towards gay and lesbian people.

## **THE CIVIL PARTNERSHIP ACT 2004 – MARRIAGE-LIKE, NOT MARRIAGE-LITE**

### **The genesis of the Act**

The Labour Party's landslide victory in the 1997 general election gave it a mandate to bring about one of the most far-reaching politico-legal reforms in modern British history: the Human Rights Act 1998 (HRA 1998). The HRA 1998 not only required courts to interpret domestic legislation in line with the ECHR<sup>35</sup> and enabled higher courts to declare erring statutes incompatible with the Convention,<sup>36</sup> but it also made it unlawful for a public authority to act contrary to the ECHR.<sup>37</sup> Aside from the 1998 Act's substantive provisions, it has led to the entrenching of a discourse of rights and equality which has permeated the development of English family law since the turn of the millennium.

When the Labour Party won the 2001 general election with a 167 seat majority, and following the removal of all but 92 of the hereditary peers from the House of Lords in 1999, the Government's dominance of the legislature was assured. Yet although the

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<sup>32</sup> Stephen Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (OUP 2006) 12.

<sup>33</sup> McManus (n 23) 256.

<sup>34</sup> Mark Harper, Martin Downs, Katherine Landells and Gerald Wilson, *Civil Partnership – The New Law* (Jordan Publishing 2005) 4.

<sup>35</sup> S 3.

<sup>36</sup> S 4.

<sup>37</sup> S 6.

Civil Partnership Act 2004 (CPA 2004) was a government Bill, it is reasonable to suppose that it probably would not have come about when it did but for the provocation of a couple of Private Members' Bills which emerged in the 2001-02 parliamentary session. Despite New Labour's one-nation egalitarian platform, there was nothing in their 1997 or 2001 manifestoes about legal recognition of same-sex relationships. Moreover, the official party line appeared to give reformers little cause for hope. In reply to a question from Labour MP Stuart Bell, the then Home Secretary, Jack Straw, gave 'undertakings' that the Government 'have no plans whatever to introduce legislation' for 'homosexual marriages' or the 'legal adoption of children by homosexual couples'.<sup>38</sup> Undeterred, and with preparatory support from Stonewall, Labour MP Jane Griffiths presented the Relationships (Civil Registration) Bill under the ten-minute rule procedure in October 2001.<sup>39</sup> The Bill would have enabled cohabitants (regardless of sexuality) to register their partnership and thereby attain certain legal rights. At First Reading on 24 October the Bill was opposed by Griffiths' Labour colleague Stuart Bell because it would have permitted, in effect, same-sex marriage, and it was not needed by heterosexual couples who could avail themselves of the legal rights attaching to marriage.<sup>40</sup> The Bill nevertheless proceeded to Second Reading following a division of 179 Ayes and 59 (mostly Conservative) Noes. The Second Reading took place on 23 November 2001, but it hardly got going before being adjourned to 10 May 2002 and then eventually running out of time. The Griffiths' Bill, though, was instrumental in setting in motion the policy review which led ultimately to the 2004 Act.

The first official policy review meeting took place on the same day as Anthony Lester introduced his Civil Partnerships Bill into the House of Lords.<sup>41</sup> (The meeting was attended by 60 officials from across Whitehall, which gives an indication of the scale of the task.)<sup>42</sup> There were differences in style and content between the Bills, but like Griffiths', Lester's also proposed a registration scheme for both same-sex and opposite-sex couples. Lester withdrew his Bill on 11 February 2002 because it was clear that the Government review was underway, but the Second Reading

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<sup>38</sup> HC Deb 25 January 1999, vol 324, col 22.

<sup>39</sup> HC Bill 36 of 2001-02, HC Deb 24 October 2001, vol 373, col 321.

<sup>40</sup> *Ibid*, col 324.

<sup>41</sup> HL Bill 41 of 2001-02, HL Deb 9 January 2002, vol 630, col 561.

<sup>42</sup> Lord Williams (Labour), HL Deb 25 January 2002, vol 630, col 1740.

debate on 25 January 2002 proved useful for smoking out the Conservative position prior to the government's Bill being introduced.<sup>43</sup>

In that Second Reading debate, Baroness Buscombe, speaking for the Conservative Party, said:

[The Bill] gives us, the Conservative Party, an opportunity to restate our commitment to marriage - indeed, I prefer to say our celebration of marriage - and the special rights that come with that association...We must build on success, in which case we must do nothing to undermine the institution of marriage.<sup>44</sup>

She went on to say, however, that the Conservative Party could not support the Bill because heterosexual civil partnership would undermine marriage. And then, foreshadowing the issue which would dominate the government Bill's parliamentary passage, she raised the 'spinster sister' issue in objection.<sup>45</sup> Overall, though, she thought that the Bill raised matters which needed addressing, but refinement was needed. However, Conservative peers were given a free vote, and the softening of the party line was recognised by the press.<sup>46</sup>

Judith Wilcox, who would later lead for the Conservatives on the Civil Partnership Bill, deployed conservative arguments for legal recognition of same-sex relationships,<sup>47</sup> as well as raising the spinster sister concern:

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<sup>43</sup> House of Commons Research Paper 02/17, *The Relationships (Civil Registration) Bill and the Civil Partnerships Bill* (House of Commons 2002) 26.

<sup>44</sup> HL Deb 25 January 2002, vol 630, cols 1736-1737.

<sup>45</sup> Ibid, col 1738. The 'spinster sister' argument ran that it was unfair to give legal recognition (specifically favourable tax treatment) to same-sex relationships, but deny it to, for example, a pair of unmarried sisters who live together. As it happened, two spinster sisters did unsuccessfully challenge their exclusion under the provisions of the CPA 2004 in a case before the European Court of Human Rights, see *Burden and another v United Kingdom* [2007] 44 EHRR 51 and Brian Sloan, 'The Benefits of Conjugal and the Burdens of Consanguinity' (2008) 67 *The Cambridge Law Journal* 484.

<sup>46</sup> Greg Hurst, 'Tories in Gay Policy Change' *The Times* (London, 26 January 2002) 4; Anne Perkins, 'Tories Soften Line on Gay Partnerships' (*The Guardian*, 25 January 2002) <[www.theguardian.com/politics/2002/jan/25/uk.conservatives](http://www.theguardian.com/politics/2002/jan/25/uk.conservatives)> accessed 20 July 2015; Telegraph (Editorial comments), 'Not Wedded to Dogma' *Daily Telegraph* (London, 25 January 2002).

<sup>47</sup> See, for example, Jonathan Rauch, 'For Better or Worse?' (1996) 214 (19) *The New Republic* 18; *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America* (Henry Holt 2004); Andrew Sullivan, 'Here Comes the Groom: A Conservative Case for Gay Marriage' (1989) 201 (9) *The New Republic* 20; *Virtually Normal* (Picador 1995).



I would argue that it is preferable for a homosexual lifestyle to be lived within the context of a single committed relationship and recognised as such...However, for the safety and harmony of society, I believe that some legal protection should be sought to support those loving monogamous relationships and to protect them better in age and sickness and in death.<sup>48</sup>

As it transpired, the debate over the Lester Bill was a reliable bellwether of how the Conservative Party (officially and not) would approach any future Bill. The events in parliament ran alongside the policy review coordinated by the Cabinet Office. From November 2001, Barbara Roche, Labour minister for Social Exclusion and Equalities, oversaw the development of the proposed civil partnership policy within the Women and Equality Unit (WEU), which was part of the Department of Trade and Industry. Tellingly, the unofficial draft policy title was, 'I can't believe it's not marriage'.<sup>49</sup>

The concept of partnership registration had already been trialled by the mayor of London, Ken Livingstone, after he set up the London Partnerships Register in September 2001, and some other councils then followed the Greater London Authority.<sup>50</sup> The register did not confer any legal rights, but Livingstone apparently believed it would help in disputes over housing, taxation, inheritance and so on. Given the scheme's extralegal status, this was unlikely; more likely it would 'act as a trigger for real change'.<sup>51</sup> Following the WEU review, the Government announced how it was going to proceed: 'Gay men, lesbians and bisexual people are to be offered the same rights as married couples, a government minister indicated today, although she said this will not amount to "gay marriages"'.<sup>52</sup> This statement encapsulated the discursive tightrope the Government would have to walk throughout the Bill's gestation: stressing civil partnership's sameness to marriage, but then being at pains to maintain at least a terminological distinction. The then

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<sup>48</sup> HL Deb 25 January 2002, vol 630, col 1700 and similar comments from Lord Elton at col 1714.

<sup>49</sup> Hugh Muir, 'Hideously Diverse Britain: 10 Years of Civil Partnerships' (*The Guardian*, 2 December 2012) <[www.theguardian.com/uk/2012/dec/02/hideously-diverse-britain-10-years-civil-partnerships](http://www.theguardian.com/uk/2012/dec/02/hideously-diverse-britain-10-years-civil-partnerships)> accessed 15 January 2014.

<sup>50</sup> BBC, 'Mayor Attends Gay "Marriage"' (*BBC*, 5 September 2001) <<http://news.bbc.co.uk/1/hi/uk/1525205.stm>> accessed 3 December 2013.

<sup>51</sup> Ken Livingstone, quoted in (n 50).

<sup>52</sup> Guardian, 'Equal Rights Plan for Gay Couples' (*The Guardian*, 6 December 2002) <<http://www.theguardian.com/world/2002/dec/06/gayrights.immigrationpolicy>> accessed 14 January 2014.

shadow Home Secretary, Oliver Letwin, gave an early indication that the Conservatives would support the legislation. Letwin's statement displays a conservative attitude to evidence-based, incremental change and support for marriage alongside a recognition of the validity (because of their functional utility) of alternative forms of intimate adult relationships:

Whilst we attach a huge importance to the institution of marriage we do recognise that gay couples suffer from some serious particular grievances...If what the government is coming forward with is indeed a set of practical steps to address a set of practical problems that affect people, then we will welcome them.<sup>53</sup>

He dismissed concerns that civil partnership would undermine marriage and insisted that 'there was nobody in his party who saw a contradiction between believing in marriage and accepting that gay people have concrete grievances about their current legal status'.<sup>54</sup>

The Consultation Paper was published in June 2003 by the WEU (then headed by former Stonewall director, Angela Mason) and entitled *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples*. The document took care not to expressly state the similarities between civil partnership and marriage ('It is a matter of public record that the Government has no plans to introduce same-sex marriage'<sup>55</sup>), instead from the outset it is suffused with an accepting, assimilationist message:

Today there are thousands of same-sex couples living in stable and committed partnerships. These relationships span many years with couples looking after each other, caring for their loved ones and actively participating in society; in fact, living in exactly the same way as any other family. They are our families, our friends, our colleagues and our neighbours. Yet the law rarely recognises their relationship.<sup>56</sup>

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Department of Trade and Industry, *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (DTI 2003) 13.

<sup>56</sup> Opening paragraph of the foreword by the minister, Jacqui Smith, (n 55) 9.

The New Labour communitarian (and, perhaps coincidentally, conservative) theme of responsibility led to the Bill's beneficiaries not being gay men and lesbians in toto, but specifically those 'stable', 'committed', active citizens who, to some extent, are already woven into society's paradigmatically heteronormative tapestry. The narrative envisions a virtuous circle of responsibility and stability being created as commitment begets stability, first within the family and then flowing out to society:

Committed same-sex relationships would be recognised and registered partners would gain rights and responsibilities which would reflect the significance of the roles they play in each other's lives. This in turn would encourage more stable family life.<sup>57</sup>

Civil partnership registration would bring increased security and stability to those same-sex couples who register, and to their children.<sup>58</sup>

In November 2003 a White Paper was published entitled *Responses to Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples*. It stated that 3,167 responses to the consultation were received. The document ended with a commitment to introduce legislation as soon as parliamentary time allowed. The *Daily Telegraph* pre-empted the Bill's announcement in the Queen's Speech of that year with an editorial entitled 'Gay couples should be equal under the law'.<sup>59</sup> The following year, *The Times* also welcomed the Bill's publication with a classic conservative argument in an editorial entitled 'Commitment rewarded', although its prediction that the Bill 'would have a relatively easy passage through Parliament' proved not to be its most prescient.<sup>60</sup>

### **The Bill in parliament**

The Bill was in poor shape when it began its parliamentary journey, evidenced by the hundreds of Government amendments tabled during its passage. Christopher Chope's comment that it was 'a buggers' muddle', while more suited to a junior

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<sup>57</sup> Ibid 13.

<sup>58</sup> Ibid 69.

<sup>59</sup> Telegraph (Editorial comments), 'Gay Couples Should Be Equal Under the Law' *Daily Telegraph* (London, 25 November 2003) 23.

<sup>60</sup> Times (Editorial comments), 'Commitment Rewarded' *The Times* (London, 1 April 2004) 23.

common room debate than the UK's primary legislative chamber, did therefore have an element of truth about it.<sup>61</sup> The final Act – which runs to 442 pages, 264 sections and 30 schedules – essentially translates 'the entire package of rights and responsibilities, and benefits and detriments, of marriage into a same-sex context'.<sup>62</sup> It is fair to say that it creates same-sex marriage in all but name: civil partnership is therefore marriage-like, but not marriage-lite.<sup>63</sup> It was 'a *secular* solution to the disadvantages which same-sex couples face in the way they are treated by our laws'.<sup>64</sup>

The Conservative Party leadership's support of the Civil Partnership Bill is significant because it is the first time it moved 'beyond grudging tolerance of same sex relationships'.<sup>65</sup> McManus calculates that 74 Conservative MPs voted for the Bill at Second or Third Reading but never against it, whereas 49 voted against in those sessions but never for it. He makes the point that the Bill was supported by Conservatives in the lower house by about three to two, but it was opposed to the last by a majority of Conservative peers.

### **Official Conservative position – conservative, liberal and libertarian strands**

On 9 February 2004, Party leader Michael Howard (who took over from Duncan Smith in November 2003) delivered his so-called 'British Dream' speech at centre-right thinktank Policy Exchange. In the main, the speech ranged over familiar Conservative territory – lower taxes, less regulation, more discipline in schools, support for 'the conventional marriage and family' – but there was also unequivocal support for the forthcoming Civil Partnership Bill. The significance of this support ensured it headlined *The Guardian's* report,<sup>66</sup> while it was conspicuous by its

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<sup>61</sup> HC Deb 12 October 2004, vol 425, col 213.

<sup>62</sup> Carl Stychin, 'Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004' (2006) 14 *Feminist Legal Studies* 79, 79.

<sup>63</sup> See Brenda Hale, 'Homosexual Rights' [2004] CFLQ 125, 132 (civil partnerships are 'marriage in almost all but name'); and in a judicial capacity in *Secretary of State for Work and Pensions v M* [2006] UKHL 11, para 99 (civil partnerships have 'virtually identical legal consequences to those of marriage'); and the views of the President, Sir Mark Potter, in *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam), para 122.

<sup>64</sup> Baroness Scotland, HL Deb 22 April 2004, vol 660, col 388 (emphasis added).

<sup>65</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 280.

<sup>66</sup> Nicholas Watt, 'Howard Endorses Gay Partnerships' (*The Guardian*, 10 February 2004) <[www.theguardian.com/politics/2004/feb/10/uk.gayrights](http://www.theguardian.com/politics/2004/feb/10/uk.gayrights)> accessed 13 December 2013.

absence in the *Daily Mail* record.<sup>67</sup> While some in his own Party questioned whether Howard's change of heart was principled or purely expedient,<sup>68</sup> it was significant that the Party had moved from opposition, beyond mere neutrality, on to an affirmative stance on a matter of gay rights. (It was, after all, only 16 years since the enactment of section 28.) Howard ensured that the Bill would get robust and sincere support in the Commons when he appointed Alan Duncan to speak for it. Not only was Duncan an able politician, but he was also the first openly gay Conservative MP.

Despite this strong support for the Bill, and the advent of adoption by same-sex couples following the Adoption and Children Act 2002, the official message remained 'that the best environment for bringing up a child is with two loving, married parents'.<sup>69</sup> Here then was a classical conservative perception of change as continuity; as Duncan put it, 'We have always accepted that ordered change is the best way to conserve those things that we value'.<sup>70</sup> There was an acceptance that families are changing and a recognition that public attitudes had shifted. It was also easy to see the Bill as the next logical step, an incremental change which arose from an Oakeshottian 'felt need' that justice required legal recognition of same-sex unions. One of the Bill's most articulate and enthusiastic supporters, John Bercow, claimed that the Bill could be supported from socialist, liberal and conservative standpoints, and that 'the principles of civil partnership for gay couples are eminently defensible in and can be expressed as part of Conservative philosophy'.<sup>71</sup>

Conservative (small 'c') arguments in favour (like support for the Bill generally) were constructed largely in analogous and assimilationist terms. Marriage was held up as an exemplar which instructs us as to what civil partnerships could and should look like. The Conservative (and conservative) case rested on two main contentions: that civil partnerships would, by analogy, bring marriage-like benefits to the parties and to society, and that civil partnerships would not undermine marriage.

Carl Stychin observes that the parliamentary debates are permeated with assimilationist discourse, with no mention of the feminist critiques of marriage and

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<sup>67</sup> *Daily Mail*, 'Howard Reveals the "British dream"' (*Daily Mail*, 10 February 2004) <<http://www.dailymail.co.uk/news/article-207709/Howard-reveals-British-dream.html>> accessed 13 December 2013.

<sup>68</sup> McManus (n 65) 281.

<sup>69</sup> Baroness Wilcox, HL Deb 22 April 2004, vol 660, col 394.

<sup>70</sup> HC Deb 12 October 2004, vol 425, col 187.

<sup>71</sup> HC Deb 9 November 2004, vol 426, col 756.

the possibility of alternative legal forms of relationship being made available to same-sex or opposite-sex couples: 'Inclusion, rather than social change, is the message'.<sup>72</sup> The elimination of the 'otherness' of gay men and lesbians was central to the Conservative case. For gay and lesbian people to be accepted, and acceptable, difference had to be suppressed and sameness accentuated. As Nicola Barker argues, the law 'would not recognize a same-sex relationship which was not analogized to a heterosexual relationship'.<sup>73</sup> This was acceptance by analogy. This approach reproduces the functional, essentialist accounts of marriage favoured by the House of Lords in *Fitzpatrick v Sterling Housing Association*<sup>74</sup> and *Ghaidan v Mendoza*.<sup>75</sup> By stressing the importance of a relationship's function over its form, the court was able radically to extend certain legal rights to surviving tenants from homosexual relationships.<sup>76</sup> Again, however, it is not the promiscuous and hedonistic gay man who is the law's darling, but couples who are in a committed relationship of mutual love and caregiving.

The emphasis on family function over form had another aspect to it. This aspect was founded on a Burkean understanding of institutions and can be observed in the pragmatic, non-ideological support for marriage in contributions such as this one:

Our support for marriage therefore stems not from dogma or religious values...our support for marriage stems from the increasingly available evidence that marriage has significant benefits for present and future generations.<sup>77</sup>

Burke's idea of the intergenerational social contract ('benefits for present and future generations') is also discernible here.<sup>78</sup> Not only was marriage held up as an unquestionable social good, but the Conservative leadership persistently asserted that the Bill would not undermine marriage but would encourage commitment and family values: 'Far from undermining marriage the Bill will, we hope, encourage the

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<sup>72</sup> Stychin (n 62) 81.

<sup>73</sup> Nicola Barker, *Not the Marrying Kind* (Palgrave Macmillan 2012) 168.

<sup>74</sup> [1999] 4 All ER 705.

<sup>75</sup> [2004] 3 All ER 411.

<sup>76</sup> Lisa Glennon, 'Fitzpatrick v Sterling Housing Association Ltd – An Endorsement of the Functional Family?' (2000) 14 *International Journal of Law, Policy and the Family* 226; Alison Diduck, 'A Family by Any Other Name...or Starbucks Comes to England' (2001) 28 *Journal of Law and Society* 290.

<sup>77</sup> Baroness Buscombe, HL Deb 22 April 2004, vol 660, col 410.

<sup>78</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 194-195. See also my chapter three.

long-term commitment and mutual support that makes marriage such a benefit to society'.<sup>79</sup>

There was also extensive appeal to a notion of 'justice' by Conservatives: 'This Bill is about justice';<sup>80</sup> 'The Bill is about fairness and justice'.<sup>81</sup> Alan Duncan, opening the case for the Official Opposition at Second Reading, framed his argument with reference to both justice and assimilation narratives:

The need for the Bill is obvious to anyone who has seen and felt some of the heart-rending injustices that can occur when a committed gay couple are denied the basic rights that a married heterosexual couple would take for granted. Despite sharing their lives together, too many of these people find that their mutual love and commitment count for absolutely nothing in the eyes of the law.<sup>82</sup>

And a little further on he said:

If we preach that the values inherent in marriage – love, mutual commitment and responsibility – strengthen and enrich society, how can we claim that the replication of such values for gay couples will cause damage? Imitation is, after all, the sincerest form of flattery...The Bill does not undermine or compete with marriage.<sup>83</sup>

Conservatives also backed the Bill on liberal and libertarian grounds. Baroness Wilcox, quoting Michael Howard, justified her Party's support thus: 'It is to recognise and respect the fact that many people want to live their lives in different ways. And it is not the job of the state to put barriers in their way'.<sup>84</sup> Similarly, the Earl of Onslow supported the Bill 'because it is really a matter of liberty'.<sup>85</sup> However, a libertarian argument does not necessarily direct a particular outcome here. It could be used to support or oppose a claim for the legal recognition of same-sex relationships. Charles Hendry, for example, did use it to express approval: 'Governments should not become involved in such decisions [about how individuals order their intimate

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<sup>79</sup> Baroness Wilcox, *ibid*, col 394.

<sup>80</sup> Robert Key, HC Deb 12 October 2004, vol 425, col 206.

<sup>81</sup> Charles Hendry, *ibid*, col 230.

<sup>82</sup> *Ibid*, col 183.

<sup>83</sup> *Ibid*, col 184, and a similar point is made by Robert Key at col 207.

<sup>84</sup> HL Deb 22 April 2004, vol 660, col 395.

<sup>85</sup> *Ibid*, col 416.

lives] unless they have a negative impact on other people'.<sup>86</sup> But Ann Widdecombe used it to oppose: 'As I said earlier - and I think that most Conservative Members will agree - it is inappropriate for Government to intervene in people's exercise of choice'.<sup>87</sup> Her point was that there was nothing stopping gay and lesbian people forming relationships and living together. She seemed to be saying that government should not be in the business of regulating people's intimate lives, yet she did not extend this logically to include the state withdrawing from the regulation of marriage.

In summing up the case for the Official Opposition, Duncan identified libertarian and authoritarian strands of thought in the debates, in the process referring to the Hart/Devlin debate and Mill.<sup>88</sup> He concluded with a classical liberal appeal: 'The role of the state is to intervene when two people are doing harm to each other, not when they just happen to love each other';<sup>89</sup> and an essentialist argument for legal recognition: '[B]eing gay is not a matter of choice. A natural disposition, which does no harm to others, cannot be immoral, however much it might be intensely despised by some'.<sup>90</sup>

### **The Conservative dissent**

It is fair to say that both supporters and opponents of the Bill covered their arguments with a degree of obfuscation. The Labour Government was engaged in downplaying any suggestion that this was 'gay marriage' in all but name, but it was not helped by newspapers like *The Guardian*, which frequently gave civil partnerships the gay marriage label and goadingly wrote, 'New Labour will doubtless shrink timidly from the phrase'.<sup>91</sup> Same-sex marriage was presumably a goal which *The Guardian's* leadership wanted to realise, yet I question if it knew that its terminological trailblazing would play into the hands of the Bill's opponents.<sup>92</sup> The fact that the Government's strategy was to avoid the label of 'gay marriage' attaching to the Bill, and the opponents' was to try to make it stick, implies that they both understood the totemic significance of 'marriage'. Public and parliamentary

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<sup>86</sup> HC Deb 12 October 2004, vol 425, col 234.

<sup>87</sup> *Ibid*, col 203.

<sup>88</sup> HC Deb 9 November 2004, vol 426, col 799.

<sup>89</sup> *Ibid*, col 801.

<sup>90</sup> *Ibid*, col 801.

<sup>91</sup> Eg Jackie Ashley, 'Equality Warrior Bloodied But Unbowed' (*The Guardian*, 30 June 2003) <[www.theguardian.com/politics/2003/jun/30/uk.gayrights](http://www.theguardian.com/politics/2003/jun/30/uk.gayrights)> accessed 14 January 2014.

<sup>92</sup> Eg Gerald Howarth, HC Deb 12 October 2004, vol 425, col 239.



opinion had come round to the view that justice required a legal form for same-sex couples, but one which was formally separate from marriage, even if it was not substantially distinct. It is evident from some of the Bill's most ardent apologists that there was little parliamentary and popular support for same-sex marriage.<sup>93</sup> For the Bill to succeed, 'gay marriage' had to be kept safely locked up in a box – for now at least.

Conservative opponents were dogged in their attempts to 'expose' the Bill as creating same-sex marriage, which, presumably, they felt would then rally sufficient opposition for the Bill to fail. Baroness O'Cathain was considered to be the spiritual successor to Lady Young, who died in 2002, and she was the Bill's most vociferous enemy.<sup>94</sup> Her first contribution to the debates opened with a plain statement: 'I firmly believe that this Bill creates gay marriage. This is a gay marriage Bill. The Government may call it civil partnership but in reality it is a form of marriage for same-sex couples'.<sup>95</sup> During the Committee Stage she was metronomic in her attempts to get the 'gay marriage' label to adhere to the Bill.<sup>96</sup> This tactic continued during the Commons stages. Edward Leigh thought it would be fairer to the House 'if the Government came clean and announced that they support same-sex marriage. Why will they not do so?'<sup>97</sup> Ann Widdecombe also pressed the Government for an admission that civil partnership is same-sex marriage in all but name, which enabled her then to shift the debate and ask, 'do we think that homosexual marriage is right?'<sup>98</sup> At Report Stage, Leigh set a trap for the Government saying that he would withdraw his amendment (to allow siblings to form civil partnerships) if the minister said that it was inappropriate because the Bill is about creating same-sex marriages.<sup>99</sup> Jacqui Smith saw what was behind these attempts to conflate 'gay' and 'marriage' in the public consciousness: '[The] reason for wanting to call this new relationship a gay marriage was precisely to provoke protest out in the country'.<sup>100</sup> She did later acknowledge that civil partnerships are 'akin' to civil marriage,<sup>101</sup> so it may be too strong to accuse the Government of

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<sup>93</sup> Eg Chris Bryant (Labour), SC Deb (D) 21 October 2004, col 70.

<sup>94</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 255.

<sup>95</sup> HL Deb 22 April 2004, vol 660, col 403.

<sup>96</sup> HL Deb 10-25 May 2004, vol 661, cols GC44, GC54, GC57, GC135, GC177, GC178.

<sup>97</sup> HC Deb 12 October 2004, vol 425, col 177.

<sup>98</sup> *Ibid.*, col 201.

<sup>99</sup> HC Deb 9 November 2004, vol 426, col 734.

<sup>100</sup> *Ibid.*, col 776.

<sup>101</sup> *Ibid.*, col.776.

obfuscation, but ministers did present a united front in stressing the distinctiveness of civil partnerships.

The opponents' tactics certainly deserve being imputed with obfuscatory motives. On the basis of my discussion below, I contend that opponents mainly objected to the legal recognition of same-sex relationships on moral grounds, but were unable to express their full-throated condemnation because of the opprobrium it would have attracted and the damage it would have inflicted on the Conservative Party's tentative steps towards rebranding.<sup>102</sup> Perhaps Gerald Howarth let the cat out of the bag with his Second Reading speech, revealing the true nature of much of the Conservative opposition to the Bill. He expressed concern that civil partnerships will send out the message that heterosexual and homosexual lifestyles are equally valid and 'encourage the proliferation of homosexuality'.<sup>103</sup> He expanded on this a little later on, 'I take the view that this is an overwhelmingly Christian country, that our laws must be founded on the Christian faith',<sup>104</sup> and said that civil partnership would also send out a 'false signal' that 'a homosexual relationship is an equally valid lifestyle',<sup>105</sup> which was semantically only a hair's breadth away from the 'pretended family relationship' of section 28. Similarly Chope opined: 'I do not believe that such a [same-sex] relationship is a valid one under the laws of God'.<sup>106</sup> These arguments can perhaps be located under Muller's broad orthodox category and the new natural law theory of Finnis et al.

So instead of full-frontal moral condemnation, opponents set up a sort of Aunt Sally (an object which is designed to attract negative attention and waste an opponent's energy), which came to be known as the 'spinster sister' issue.<sup>107</sup> The argument went as follows. Many family members live together in the same household, often playing a caring role, sometimes over many years. When one of them dies the survivor is liable to pay inheritance tax (IHT) on their estate, which can sometimes only be paid through the sale of the home they occupied, causing upset and

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<sup>102</sup> There is support for this view in Nicola Barker, 'After the Wedding, What Next? Conservatism and Conjuality' in Nicola Barker and Daniel Monk (eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015) 220.

<sup>103</sup> HC Deb 12 October 2004, vol 425, col 217.

<sup>104</sup> Ibid, col 239.

<sup>105</sup> Ibid, col 241.

<sup>106</sup> SC Deb (D) 19 October 2004, col 32.

<sup>107</sup> I accept the legitimacy of the arguments around the need for reform for people falling into this category, but maintain here that the main aim of many proponents in the debates was to wreck the Bill. More detailed exploration of those arguments is beyond the scope of this chapter.

hardship. This situation would not arise for same-sex civil partners under the Bill (because they would be covered by the same exemption available to married couples), and therefore the Bill *causes* this injustice. Opponents claimed the Bill would therefore ‘create another enormous inequality’<sup>108</sup> and that ‘ordinary people will lose out under the Bill if enacted’,<sup>109</sup> a situation which should be remedied through extension of the Bill’s privileges to carers and home sharers. The inequality discourse became more audacious, even to the point of turning the thing on its head so that opponents of scope-widening (ie those who *supported* the Bill on grounds of justice and equality) and even gay people themselves were characterised as mean-spirited. Judith Wilcox, speaking for the Conservative Party, declared:

It is wrong for gay people, who have suffered for too long from discrimination, to secure for themselves what this Bill gives and to resist it for others, who are equally loving, equally committed and equally debarred from the ability to marry...It grieves me that those who have fought so long and nobly for this Bill turn their backs on the cry for justice from others who are equally deserving. Bluntly, this is what all those who oppose the noble Baroness’s [O’Cathain] amendment will be doing.<sup>110</sup>

A concept of justice was deployed by supporters and opponents, but for opponents it was often conceived of as a finite resource – a zero sum game in which if justice is given to same-sex couples then familial cohabitants must necessarily be deprived of it. A similar tactic emerged in the later stages of the Marriage (Same Sex Couples) Bill in relation to a Conservative amendment to extend civil partnerships to opposite-sex couples (see chapter eight).

Baroness O’Cathain led the contrarians in the Lords and her amendment at Report Stage to widen the scope of the Civil Partnership Bill was successful (Contents, 148; Not-contents, 130). The amendment made the Bill a nonsense, apparently incompatible with the ECHR,<sup>111</sup> and likely to cost the Treasury at least £2.25 billion

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<sup>108</sup> Lord Tebbit, HL Deb 10 May 2004, vol 661, GC13.

<sup>109</sup> Lord Kilclooney (crossbench), HL Deb 24 June 2004, vol 662, col 1378.

<sup>110</sup> Ibid, col 1382.

<sup>111</sup> HC Deb 12 October 2004, vol 425, cols 177-178 and col 198. The amendment would have meant, for example, that a son in a civil partnership with his mother would have to prove irretrievable breakdown of that relationship before he could marry his fiancée. By extending only to opposite sex pairs aged over 30 who had been in a relationship for 12 years, the provision arguably breached Article 14 ECHR in conjunction with Article 8.

per year.<sup>112</sup> Despite the spinster sister/IHT issue never having been raised before by Conservatives in Finance Bill debates, no one denied it was a valid concern and one which should be remedied. The Conservatives even appeared to promise they would resolve it if they got into power,<sup>113</sup> but this was quietly dropped when it came time to write the manifesto for the 2005 general election. Yet advocates of the amendment knew it was unaffordable,<sup>114</sup> and all the evidence pointed to it being a wrecking amendment.<sup>115</sup>

The Opposition game plan in respect of the spinster sister issue appeared two-pronged: first, to provide their attempts to defeat the Bill with a cloak of legitimacy and to avoid charges of 'homophobia'; and, second, to try to provoke the Government into an admission that this was, in essence, same-sex marriage. The first part has been considered above, so I turn now to the second aspect. The Government was caught on the horns of a dilemma. The easiest way for it to kill off rebel Conservative demands to widen the Bill's scope would have been to state unequivocally that this was essentially a Bill which replicated marriage for same-sex couples and it would not, therefore, have been appropriate to include family members in a non-intimate relationship. However, this would have risked stoking opposition to the Bill in parliament and in the country, with the possible loss of the Bill. It therefore had to minimise the conjugality implicit in the Bill,<sup>116</sup> thereby opening up space for opponents to field arguments about extension of the Bill's provisions – basically, once conjugality was forced to the margins, it then made it easier for opponents to emphasise the apparent sameness of same-sex couples and familial home-sharers. The Government, aided by a substantial Commons majority, was then forced into a war of attrition, with much effort expended countering persistent and repetitive arguments and amendments to widen the Bill's remit.

Conservative opponents adopted a discursive strategy which avoided explicitly homophobic arguments and instead tried to wreck the Bill by extending it to cover non-sexual relationships such as cohabiting siblings. Stychin notes the irony that the Conservative opponents' critique of the CPA 2004 shares much in common with the

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<sup>112</sup> Scotland, HL Deb 1 July 2004, vol 663, col 394.

<sup>113</sup> HC Deb 9 November 2004, vol 426, col 727.

<sup>114</sup> Leigh, HC Deb 12 October 2004, vol 425, col 211.

<sup>115</sup> See Bercow's blatant indiscretion in Committee, SC Deb (D) 19 October 2004, col 17.

<sup>116</sup> One example of where conjugality was implicit in the Bill is in the prohibition of partnership registration within the prohibited degrees of affinity and consanguinity.

radical feminist/queer objections to it.<sup>117</sup> The common ground seems to be around affording legal status to relationships of care which are often extra-familial and non-conjugal. Opponents concentrated inordinately on the tax repercussions of the scenarios they narrated, and diminished the other aspects the Bill was designed to promote. They also saw the Bill in binary terms: either it was same-sex marriage in all but name (and therefore not appropriate to extend it to siblings etc.), or it was not-marriage (in which case its scope could be extended). What critics did not (want to) accept was that it created a marriage-like, yet distinct, legally recognised estate for same-sex couples in an intimate, and probably sexual, relationship. I turn next to consider in more detail the discourse around sexual intimacy in the Bill.

### **Sex in the shadows**

There has long been an aversion to the discursive exploration of intimate sexual behaviour in English law; witness the discomfort of Dr Lushington in *D-e v A-g*: 'How is [sexual intercourse] to be defined? This is a most disgusting and painful inquiry, but it cannot be avoided'.<sup>118</sup> And what seems to be squeamishness towards the mechanics of human sexuality persists, being evident in the development of the English law of civil partnership and same-sex marriage. This part of the chapter, though, explores what has emerged when judges and legislators have been unable to avoid the subject.

In English law a divorce may be obtained if irretrievable breakdown of the marriage can be evidenced through proof of the respondent's adultery.<sup>119</sup> Adultery is voluntary sexual intercourse between a party to a marriage and a person of the opposite sex. Similar to the test for consummation (see below), adultery requires a sufficient degree of penile-vaginal penetration.<sup>120</sup>

Furthermore, a marriage is voidable under section 12 of the Matrimonial Causes Act 1973 if 'the marriage has not been consummated owing to the incapacity of either party to consummate it',<sup>121</sup> or 'the marriage has not been consummated owing to the

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<sup>117</sup> Carl Stychin, 'Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004' (2006) 14 *Feminist Legal Studies* 79, 81.

<sup>118</sup> [1845] 1 *Rob Ecc* 280, 298.

<sup>119</sup> *Matrimonial Causes Act* 1973, s 1(1) and s 1(2)(a).

<sup>120</sup> *Sapsford v Sapsford and Furtado* [1954] P 394; *Dennis v Dennis* [1955] P 153.

<sup>121</sup> Section 12(a).

wilful refusal of the respondent to consummate it'.<sup>122</sup> The leading case on consummation is *D-e v A-g*, which held that:

Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all.<sup>123</sup>

Upon medical examination by a number of doctors it was found that the respondent wife had no uterus and that her vagina formed 'an impervious cul-de-sac'.<sup>124</sup> Arguably, none of this would have mattered if the vagina had been of sufficient length to permit full penetration of the penis, so as to enable 'vera copula'.<sup>125</sup> This leads to the conclusion that 'ordinary and complete intercourse' involves an erect penis penetrating the vagina to a sufficiently 'natural' degree.<sup>126</sup> The legal standard resolves into a phallogentric physiological pairing – orgasm and conception being unnecessary – but with a lingering ambiguity as to the necessary degree of penetration and the importance of male sexual pleasure.<sup>127</sup> What is clear from the case law is the central location of a heterosexual, phallogentric construction of adultery and consummation.<sup>128</sup> The focus of legal discourse on the actus reus of adultery, at the expense of the mens rea, so to speak, of the matrimonial offence, namely marital infidelity, is useful for those who would seek to deny the recognition of conjugality to same-sex relationships. If adultery is *essentially* heterosexual then, regardless of how compelling arguments might be about the need for an explicit fidelity standard in the law regulating same-sex couples, it will remain confined to the institution of opposite-sex marriage.

The legal differences between civil partnership and marriage are few, but they are worth considering because of what they say about the construction of sexualities in

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<sup>122</sup> Section 12(b).

<sup>123</sup> [1845] 1 Rob Ecc 280, 298.

<sup>124</sup> Ibid 286.

<sup>125</sup> Ibid 299.

<sup>126</sup> See also *B v B* [1955] P 42; *SY v SY* [1963] P 37.

<sup>127</sup> Richard Collier, *Masculinity, Law and the Family* (Routledge 1995), especially chapter 4.

<sup>128</sup> Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (3<sup>rd</sup> edn, Hart 2012) 49.

official legislative discourse. The most significant omissions from the CPA 2004 are the ones outlined above: adultery in divorce suits and non-consummation in annulment suits. Stychin sees this as ‘a useful illustration of the continuing centrality of penetrative intercourse in the way in which law *constitutes* heterosexual relationships’.<sup>129</sup> Barker’s understanding of conjugality refers to ‘a sexual relationship in which a couple share their economic, social and emotional lives’,<sup>130</sup> and she sees its significance as being ‘probably the primary method used for distinguishing “serious” or “significant” primary relationships from other relationships’.<sup>131</sup> She maintains that ‘there is no mention of sex’ in the Act,<sup>132</sup> but there are some mentions of adultery and consummation in the discourse surrounding the Bill, and these are considered below.

It is notable that the Consultation Paper omits any mention of adultery and non-consummation in its discussion of the grounds for dissolution and annulment of civil partnership.<sup>133</sup> They are absent from the text without any explanation. These omissions were raised by consultees and the White Paper explains the reason for the absence of adultery: ‘Adultery has a specific meaning within the context of heterosexual relationships and it would not be possible nor desirable to read this across to same-sex civil partnerships’;<sup>134</sup> and the same form of words is used in relation to consummation.<sup>135</sup>

While Barker is right in that there is no mention of what same-sex couples get up to in the bedroom, the subtext of the issue which dominates the debates (viz the spinster sister issue) is indeed all about sex. The essence of the amendment to extend the scope of the Bill concerned sex, in that it questioned why same-sex couples should be privileged over others in familial caring relationships who are of the same sex. For example, the Conservative Lord Higgins asked:

Why should it be the case that two spinsters who have lived together for many years should not enter into a civil partnership and, as a

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<sup>129</sup> Stychin (n 117) 83.

<sup>130</sup> Nicola Barker, ‘Sex and the Civil Partnership Act: The Future of (Non) Conjugality?’ (2006) 14 *Feminist Legal Studies* 241, 247.

<sup>131</sup> *Ibid* 247.

<sup>132</sup> *Ibid* 241.

<sup>133</sup> Department of Trade and Industry, *Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (DTI 2003) 27-29.

<sup>134</sup> Department of Trade and Industry, *Responses to Civil Partnership: A Framework for the Legal Recognition of Same-Sex Couples* (DTI 2003) 36.

<sup>135</sup> *Ibid* 37.

result, enjoy the various benefits that would accrue to a same-sex couple with a sexual relationship?<sup>136</sup>

Lord Tebbit also questioned where in the Bill it said that civil partners must be homosexuals, which was an attempt to establish the whereabouts of conjugality in the statutory scheme.<sup>137</sup>

There is some discussion of adultery in the House of Lords Grand Committee.<sup>138</sup> At one point, Delta O’Cathain said that she found it ‘interesting’ that adultery is omitted and that ‘[t]here are grounds of unreasonable behaviour, but a breach of sexual exclusivity between the members of a civil partnership would not directly constitute grounds for dissolution’. She then invited the minister to comment on this omission.<sup>139</sup> Lord Filkin, speaking for the Government in response, stated: ‘In a sense adultery is a concept – without going into the physiology of it – that applies to opposite-sex marriage. Clearly that does not apply in this respect’.<sup>140</sup> He went on to repeat that the behaviour ground for dissolution could be used to deal with acts that ‘went to the heart of the trust in the relationship’.<sup>141</sup> After a brief, and slightly confused, exchange between several Lords over the legal definition of adultery, Lord Filkin added, ‘It is penetration of the female by the male’.<sup>142</sup> And that was the end of the matter. O’Cathain went on to withdraw her amendment that would have enabled a court to simply dissolve a civil partnership on request (no grounds needed), which, by diminishing civil partnership’s marriage-like qualities, would have helped open the way for her spinster sister amendment.

On the final day of the Commons Committee Stage, Christopher Chope proposed an amendment which would have permitted dissolution of a civil partnership on the ground that the respondent had ‘committed an act of sexual infidelity’.<sup>143</sup> This was a curious amendment from someone who persistently lamented the Bill’s aping of marriage, but his intention was to make civil partnership easier to get out of and thereby make it more like the French PACS (he also tried to introduce other

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<sup>136</sup> HL Deb 22 April 2004, vol 660, col 429.

<sup>137</sup> HL Deb 10 May 2004, vol 661, col GC14.

<sup>138</sup> It seems to be first mentioned by Baroness Scotland (Labour) at HL Deb 10 May 2004, vol 661, col GC19.

<sup>139</sup> HL Deb 12 May 2004, vol 661, cols GC172-173.

<sup>140</sup> *Ibid*, col GC175.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid*.

<sup>143</sup> SC Deb (D) 26 October 2004, col 143.



dissolution grounds). His logic was questioned by Labour's Chris Bryant and the Conservative John Bercow, and they accused Chope of trying to make the Bill more marriage-like.<sup>144</sup> This is perhaps unfair. Chope's 'sexual infidelity' amendment, in departing from the term 'adultery', with its extensive legal archaeology, was a potentially transgressive measure. It returned to the mischief of the original matrimonial offence – to enable the innocent party to dissolve the marriage due to infidelity – and presented an opportunity to take out of the box the sexual lives of gay and lesbian people. When Chope then asked Bercow why he was opposed to the amendment, Bercow held the established line: infidelity in civil partnerships is covered by 'unreasonable behaviour and "adultery" has a specific legal connotation'.<sup>145</sup> The Liberal Democrat solicitor Alistair Carmichael was concerned that the expression 'sexual infidelity' was unknown to the law and would therefore require development through case law.<sup>146</sup> The amendment was withdrawn without Chope elaborating on his understanding of what would constitute 'sexual infidelity', alas.

Undeterred, Chope then unsuccessfully moved an amendment which would have introduced the established nullity ground based on the respondent having a communicable sexual disease (as in the Matrimonial Causes Act 1973, section 12(e)).<sup>147</sup> It was his attempt to 'tease out the Government's thinking',<sup>148</sup> and to elucidate the conjugal credentials of a Bill which he saw as creating same-sex marriage in any event. He was told that the Government omitted it from the Bill because:

The Government's intention in drafting the Bill was that civil partners would be treated in the same way as spouses except where there was justification for a difference in treatment. This was one matter on which we felt that there was justification for difference. It is a medical fact that men and women may carry certain sexually transmitted infections for many years without knowing it, and we do not believe that it is appropriate in present-day circumstances to include that as a ground for nullifying a civil partnership.

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<sup>144</sup> Ibid, col 146.

<sup>145</sup> Ibid, col 147.

<sup>146</sup> Ibid, col 148.

<sup>147</sup> Ibid, col 159.

<sup>148</sup> Ibid.

I suggest that were we starting now to create marriage law, it would be highly questionable whether we would include such a provision in that law. It is a provision from a bygone age when, perhaps, we were less informed about sexually transmitted diseases.<sup>149</sup>

The predecessor to section 12(e) dates back to the Matrimonial Causes Act 1937, when detection and treatment of such diseases was much less advanced.<sup>150</sup> Anne McGuire's claim that its inclusion would be unlikely in a marriage law drafted de novo therefore seems credible. However, as the justification for its omission applies regardless of sexuality, it is odd that the Government did not consider that justice (or at least parity) required the repeal of section 12(e), which could have simply been included in the voluminous schedules to the Bill. This all begs two questions, which for now unfortunately remain definitively unanswered: first, by omitting a section 12(e) equivalent from the CPA 2004 did the Government seek consciously to disarticulate any link between homosexuality and sexually transmitted infections (especially given the confluence of HIV/AIDS and section 28 of the Local Government Act 1988 in the 1980s)?; and, second, as the Government clearly was prepared to alter existing marriage law when it felt it necessary, why did it draw back from reforming the law on adultery and consummation? My speculative response to the first question is that that probably was the Government's aim; and to the second question, that the Government picked its battles carefully and did not want to risk losing the Bill by including ancillary controversial measures.

At the Commons Report Stage, Edward Leigh moved an amendment which would have allowed siblings to form a civil partnership. It is clear in contributions from Labour's Angela Eagle (parliament's first openly lesbian MP), that a sexual relationship was something which distinguished civil partners from carers or home sharers. She referred to civil partners as people who are 'in an openly sexual relation [sic]',<sup>151</sup> and distinguished home sharers as people who 'do not want to be in a sexual relationship'.<sup>152</sup>

Consummation was not mentioned in the House of Lords until the last half an hour of the Bill's parliamentary journey. Lord Tebbit again pressed the minister for an explanation of the difference between civil partnership and civil marriage. Baroness

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<sup>149</sup> Anne McGuire, *ibid*, col 162.

<sup>150</sup> Stephen Cretney, *Family Law in the Twentieth Century: A History* (OUP 2003) 83.

<sup>151</sup> HC Deb 9 November 2004, vol 426, col 738.

<sup>152</sup> *Ibid*, col 739.

Scotland's reply was not entirely accurate. She stated that one difference is consummation:

For a marriage to be valid, it has to be consummated by one man and one woman...There is no provision for consummation in the Civil Partnership Bill. *We do not look at the nature of the sexual relationship that enters into the civil partnership.* It is totally different in nature. I thought that that was fully and properly understood.<sup>153</sup>

So we can see that some Conservative amendments were designed to sexualise the Bill, thereby making it more like marriage, and fortifying an argument that the Bill creates same-sex marriage. While other amendments sought to desexualise it, making it easier to argue for its extension to those in close, but not sexual, relationships. Examples of the latter strategy can be seen in the Lord Higgins' amendment ('contract' instead of 'relationship' – 'Civil partnership is a *contract* between two people of the same sex');<sup>154</sup> and Lord Tebbit, who said that the Bill did not say civil partners have to be homosexuals and he proposed to remove 'of the same sex' from the above definition.<sup>155</sup>

The construction of the discourse around carers and sharers and same-sex couples, specifically through a narrative of sameness, was also a means of eliminating any conjugality implicit in the Bill. An example can be found in a speech by Baroness Wilcox: '[carers and sharers] are equally loving, equally committed and equally debarred from the ability to marry'.<sup>156</sup> These moves resulted in attempts to defend civil partnership against the spinster sister amendment without playing into the hands of opponents by overemphasising conjugality. Liberal Democrat Lords Goodhart and Lester moved an amendment to insert the word 'mutually committed' into the definition of a civil partnership in clause 1.<sup>157</sup> Their amendment would have made it clear 'that a civil partnership involves a commitment akin to that entered into by marrying heterosexual couples, and is therefore not appropriate to be extended to the relationship of home sharers or close relatives'.<sup>158</sup> The fact that the Bill did not require any form of vows to be used in the formation of a civil partnership added

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<sup>153</sup> HL Deb 17 November 2004, vol 666, col 1479 (emphasis added).

<sup>154</sup> HL Deb 10 May 2004, vol 661, col GC1.

<sup>155</sup> Ibid, col GC14, col GC26.

<sup>156</sup> HL Deb 24 June 2004, vol 662, col 1382.

<sup>157</sup> HL Deb 24 June 2004, vol 662, col 1354.

<sup>158</sup> Ibid, col 1355.

weight to their amendment. Concerns were expressed that this would create ‘an additional hurdle’ for same-sex couples which heterosexual ones are not subject to,<sup>159</sup> and that they were ‘confusing words’ which added nothing.<sup>160</sup> The amendment was subsequently withdrawn. Alan Duncan moved a similar amendment in the Commons Committee Stage, which would have inserted into clause 1 the words: ‘who intend to make a serious, mutually supportive and indefinite commitment’.<sup>161</sup> Again, from his justification for the amendment, it is clear he would not have felt it necessary but for the assault on the Bill facilitated by the Bill’s apparent aconjuality. As in the Lords, there was sympathy for the amendment and support for the motivation behind it, but it was felt to be ‘patronising and condescending’<sup>162</sup> and a potential source of much legal ambiguity. The amendment was withdrawn.

Barker’s two possible interpretations for the omission of sex in the Act are that ‘the only “legitimate” sexual relationship is a heterosexual one therefore same-sex civil partnerships do not need to be sexual’, or the omission indicates ‘that the boundaries between sexual (primary, significant) and non-sexual (secondary, less significant) relationships are being challenged’.<sup>163</sup> Her view of the probable impact of the Act is that it will be ‘conservative, rather than either transgressive or transformative’,<sup>164</sup> which will serve to strengthen traditional family values, whilst extending beyond traditional family forms.<sup>165</sup> I think Barker is right, and I will revisit her interpretations at the end of this chapter.

The primary strategy of Conservative opponents to the Bill of arguing for widening its scope, also gave opportunity for the expression of a classist dimension to the discourse, and I discuss this next.

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<sup>159</sup> Lord Alli (Labour), *ibid*, col 1356.

<sup>160</sup> Lord St John, *ibid*, col 1356.

<sup>161</sup> SC Deb (D) 21 October 2004, col 56.

<sup>162</sup> Bryant, *ibid*, col 58.

<sup>163</sup> Nicola Barker, ‘Sex and the Civil Partnership Act: The Future of (Non) Conjuality?’ (2006) 14 *Feminist Legal Studies* 241, 248.

<sup>164</sup> *Ibid* 249.

<sup>165</sup> See also Nicola Barker, ‘Civil Partnership: An Alternative to Marriage? Ferguson and Others v UK’ [2012] *Family Law* 548; *Not the Marrying Kind* (Palgrave Macmillan 2012).

## Class

Although it has not been much articulated in the literature on the Bill,<sup>166</sup> the issue of class permeated its entire parliamentary passage. I think there are a number of aspects to this claim. First, the beneficiaries (and attempted beneficiaries, ie spinster sisters etc.) of the Bill were largely conceived of as middle income and middle class, with those of a lower socio-economic standing being largely invisible in the discourse. An assumption operating in the debates was that couples would have something to gain from the status of civil partnership – that it would, in some way, matter to them. As Nan Hunter speculates: ‘It is possible that less affluent persons in the lesbian and gay community will be less benefited by legalization of marriage, because they have less property, and much of marriage law concerns property’, and that a wedding is often ‘a display, or attempted display, of class position’.<sup>167</sup> There is evidence for the relatively recent ‘emergence of marriage as a marker of class’,<sup>168</sup> whereas previously it appeared to transcend class.<sup>169</sup> Large swathes of the Act would simply have no connection with the lives of poorer same-sex couples. Also, prior to the Act, same-sex couples with means to access legal services could have availed themselves of various legal mechanisms to protect their interests anyway (eg trusts, wills, enduring powers of attorney). The Act provides a comprehensive system of family property law which can be appropriated by same-sex couples for just the cost of registering a civil partnership (around £100).

Second, a side-effect of enacting the CPA 2004 is that a same-sex cohabitant’s partner could be considered in social security calculations in the same way as for a heterosexual cohabitant.<sup>170</sup> For the assessment of welfare benefit claims the financial means of married couples are aggregated, ie it is assumed de jure that the financial resources of a claimant’s spouse are shared within the household

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<sup>166</sup> Although Barker does comment on some class issues, see Nicola Barker, ‘For Better or For Worse: The Civil Partnership Bill [HL] 2004’ (2004) 26 *Journal of Social Welfare and Family Law* 313, particularly 316; ‘Sex and the Civil Partnership Act: The Future of (Non) Conjuality?’ (2006) 14 *Feminist Legal Studies* 241, 243.

<sup>167</sup> Nan Hunter, ‘Marriage, Law, and Gender: A Feminist Inquiry’ (1991) 1 *Law & Sexuality Review* 9, 26.

<sup>168</sup> June Carbone, ‘Out of the Channel and Into the Swamp: How Family Law Fails in a New Era of Class Division’ (2011) 39 *Hofstra Law Review* 859, 866.

<sup>169</sup> See, for example, Jane Lewis, *The End of Marriage? Individualism and Intimate Relations* (Edward Elgar 2001) chapter 2; Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (CUP 2012) 64-70.

<sup>170</sup> Nicola Barker, ‘Sex and the Civil Partnership Act: The Future of (Non) Conjuality?’ (2006) 14 *Feminist Legal Studies* 241, 243; Rosemary Auchmuty, ‘Dissolution or Disillusion: The Unravelling of Civil Partnerships’ in Nicola Barker and Daniel Monk (eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015) 202.

economy (it is irrelevant whether this is the case de facto). And in social security legislation this rule is extended by analogy to heterosexual cohabitants ('living together as husband and wife'). As the domestic relations of the welfare claimant had to conform to the opposite-sex paradigm, same-sex cohabitants were actually advantaged through the law prior to the CPA 2004.<sup>171</sup> Following the Bill's enactment, civil partners are now treated the same as married couples for welfare benefit purposes. This at least ensures that there is no direct financial disincentive to registration for same-sex cohabiting couples, as the means of all cohabiting couples, regardless of sexuality, are dealt with in the same manner under social security law following the Bill's enactment. While any claim to equality should arguably include equality of burdens and benefits with the comparator group, the implications of these changes for poorer same-sex couples were nevertheless not considered in the debates.

The attempts by some Conservatives to widen the Bill's scope, which almost torpedoed the legislation, were also riddled with classist concerns. At a cursory glance, extending the Bill to cover family carers does not seem particularly class-b(i)ased. However, it was no secret that this was primarily 'a tax reduction scheme',<sup>172</sup> particularly with regard to inheritance tax (which was payable on estates valued then in excess of £263,000), as well as capital gains tax. Clearly, both of these taxes are payable by those of means; the poor need have no fear of death duties. As so much of the Bill was about drawing comparisons and highlighting similarities, these middle-class carers were constructed in parallel with their same-sex counterparts, who were then also perceived to be propertied and – but for a statutory exemption – taxable.

All of this underlines the enduring existence of two family law systems: one for those with means (which is the one taught in most university family law modules), and another for the poor.<sup>173</sup> Family law for the poor was by and large the domain of the Poor Law and its modern welfare system successor.<sup>174</sup> It remains the case that 'at

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<sup>171</sup> For an overview, see Nichola Gray and Dominic Brazil, *Blackstone's Guide to the Civil Partnership Act* (OUP 2005) 141-145.

<sup>172</sup> Lord Goodhart (Liberal Democrat), HL Deb 10 May 2004, vol 661, col GC15.

<sup>173</sup> June Carbone, 'Out of the Channel and Into the Swamp: How Family Law Fails in a New Era of Class Division' (2011) 39 *Hofstra Law Review* 859; Janet Halley, 'What is Family Law?: A Genealogy Part II' (2011) 23 *Yale Journal of Law & the Humanities* 189.

<sup>174</sup> Jacobus Tenbroek, 'California's Dual System of Family Law: Its Origin, Development, and Present Status (Part I)' (1964) 16 *Stanford Law Review* 257.

the level of description, [family law] carries a class bias'.<sup>175</sup> The debates contribute to our understanding of how the state constructs and relies upon the family as a private welfare system.<sup>176</sup>

## CONCLUDING REMARKS

From the moment Baroness Scotland introduced the Bill and said it was 'a secular solution',<sup>177</sup> there was, in my view, an inevitability that in time there would be a movement calling for access for same-sex couples to the religious (and civil) institution of marriage. Indeed, Nan Hunter argues that both civil partnership and same-sex marriage should be essential components of the LGBT agenda:

As between legalizing lesbian and gay marriage and seeking domestic partnership laws, neither strategy is complete without the other. Reforming marriage alone, diversifies only by eliminating gender from the definition of marriage; creates no mechanism by which to reject, rather than seek to refashion, the customs of marriage; and offers no choice except marriage for any couple seeking any of the benefits of legal recognition. Domestic partnership laws, without the degendering of marriage, create a second-class status rather than an alternative, leaving lesbian and gay couples still excluded by force of state law; in no sense, without a marriage option available, could they be assumed to be 'choosing' partnership.<sup>178</sup>

However, what was not inevitable, or even reasonably foreseeable following the enactment of the Bill, was that it would be a Conservative-led coalition which would champion the cause of same-sex marriage.<sup>179</sup> It is clear from the ensuing Marriage (Same Sex Couples) Bill debates that some Conservative MPs took a strategic line

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<sup>175</sup> Halley (n 173) 291.

<sup>176</sup> Eg Brenda Hale, 'Equality and Autonomy in Family Law' (2011) 33 *Journal of Social Welfare and Family Law* 3, 4; Janet Halley, 'What is Family Law?: A Genealogy Part I' (2011) 23 *Yale Journal of Law & the Humanities* 1.

<sup>177</sup> HL Deb 22 April 2004, vol 660, col 388.

<sup>178</sup> Nan Hunter, 'Marriage, Law, and Gender: A Feminist Inquiry' (1991) 1 *Law & Sexuality Review* 9, 26.

<sup>179</sup> Evidence suggests that, rather than the Lib Dems pushing the Conservatives into this reform, the coalition parties competed for ownership of the Bill. See, Matthew D'Ancona, *In It Together* (Penguin 2013) 310-312; also, Iain Dale, 'Can You Be Gay and Be a Tory?' (*iaindale.com*, 24 November 2013) <<http://iaindale.com/posts/2013/11/24/attitude-column-can-you-be-gay-and-be-a-tory>> accessed 16 December 2015.

in supporting civil partnerships (or perhaps there was some revisionism going on), believing that by so doing that would ‘be the end of the story’.<sup>180</sup> Edward Leigh even claimed later that he ‘was given solemn assurances on the Floor of the House, including by some sitting on the Opposition Benches now, that the Civil Partnership Act would not lead to full same-sex marriage’.<sup>181</sup> However, a careful reading of the debates evinces no such ‘assurances’, although comments such as the Government spokesman Lord Filkin’s were not uncommon: ‘We do not see [the Bill] as a drift towards gay marriage’.<sup>182</sup> Regardless of what was said and intended, these complaints betray a weak grasp of the realities of parliamentary supremacy and a naivety about the mechanisms of social change.

Some Conservative opponents to the Bill predicted that it would lead to same-sex marriage;<sup>183</sup> if others thought so too, they kept quiet about it. Presciently Chope prophesied that the Act would be challenged in the courts by opposite-sex couples,<sup>184</sup> as the Joint Committee on Human Rights also suspected,<sup>185</sup> and the *Ferguson* and *Steinfeld* cases bear witness.<sup>186</sup> Strangely perhaps, Chope put forward an amendment at Committee Stage to extend civil partnerships to heterosexuals<sup>187</sup> and was pulled up by Alan Duncan who pointed out the potential for it to undermine marriage.<sup>188</sup> But equally bizarrely this was a moment when an argument was advanced - a sort of (radical) feminist argument - that some might wish to choose an alternative to the heteropatriarchal marriage model.<sup>189</sup> While the Party leadership adopted a consistently supportive approach to the Bill, the manoeuvrings of individual Conservative legislators were multifarious and sometimes counter-intuitive. A decade on, Conservative MPs continue to press for the extension of civil partnership to heterosexual couples, and Tim Loughton’s Civil

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<sup>180</sup> Bernard Jenkin, HC Deb 5 February 2013, vol 558, col 160.

<sup>181</sup> HC Deb 5 February 2013, vol 558, col 160. See also Gerald Howarth, *ibid*, cols 184-185.

<sup>182</sup> HL Deb 12 May 2004, vol 661, col GC179.

<sup>183</sup> See O’Cathain at HL Deb 12 May 2004, vol 661, GC178; and Leigh at HC Deb 12 October 2004, vol 425, col 243.

<sup>184</sup> SC Deb (D) 21 October 2004, col 48.

<sup>185</sup> Joint Committee on Human Rights, *Civil Partnership Bill* (2003-04, HL Paper 136; HC 885).

<sup>186</sup> *Ferguson and Others v United Kingdom*, Application 8254/11. See, Nicola Barker, ‘Civil Partnership: An Alternative to Marriage? *Ferguson and Others v UK*’ [2012] Family Law 548. The ECtHR ruled that the application was inadmissible in February 2015. See also *R (Steinfeld and Keidan) v Secretary of State for Education* [2016] EWHC 128 (Admin). The applicants were unsuccessful in the High Court, but the Court of Appeal is due to hear their appeal on 19 January 2017.

<sup>187</sup> SC Deb (D) 19 October 2004, col 29. Chope introduced a similar amendment at Report Stage, see HC Deb 9 November 2004, vol 426, cols 744-783.

<sup>188</sup> SC Deb (D) 21 October 2004, cols 49-50.

<sup>189</sup> *Ibid*, col 51.



Partnership Act 2004 (Amendment) Bill is due for its Second Reading in the House of Commons on 29 January 2016.

Kees Waaldijk surveyed legal regulation of homosexuality in a number of European countries and found a broadly common progression which went from criminalisation of gay sex followed by its decriminalisation, equalisation of age of consent, enactment of anti-discrimination law, then creation of legal partnership. He ventured a fifth stage – legal recognition of homosexual parenthood – which I would agree is a significant milestone, although in England it occurred in large part before legal partnership.<sup>190</sup> In chapter three I stated that conservatism is cautious towards change because, *inter alia*, its consequences are often difficult to foresee and change thereby presents a risk to the stability of the socio-political order. Compared to the Conservative parliamentary discourse around the Marriage (Same Sex Couples) Bill, there was very little concern expressed about ‘change’ in the civil partnership debates.

As I will show in the next chapter, one of the consequences of civil partnership was that, once the law extended marriage to same-sex couples, opposite-sex couples were then at a disadvantage. If a heterosexual couple wanted legal recognition of their relationship they only had the option of marriage open to them, whereas same-sex couples had a choice. Conservatives who argued for civil partnership and same-sex marriage often did so in the belief that the institution of marriage would be thereby strengthened. Many of these same people opposed the idea of extending civil partnership to opposite-sex couples because they perceived this would act in competition with marriage and thereby undermine it. Although it was not unforeseeable that civil partnership would lead to calls for its extension to opposite-sex couples, with the negative consequences this may have for marriage, I contend that the possibility was not sufficiently proximate to be of much concern, and certainly not of sufficient concern to warrant rejecting the Civil Partnership Bill. I will consider the issue of change further, and contrast its treatment by Conservatives in the civil partnership and same-sex marriage debates, in the next chapter.

The Conservative Party leadership’s support of the Civil Partnership Bill is significant because it was the first time it moved ‘beyond grudging tolerance of

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<sup>190</sup> Kees Waaldijk, ‘Standard Sequences in the Legal Recognition of Homosexuality – Europe’s Past, Present and Future’ (1994) 4 *Australasian Gay and Lesbian Law Journal* 50.

same-sex relationships'.<sup>191</sup> McManus calculates that 74 Conservative MPs voted for the Bill at Second or Third Reading but never against it, whereas 49 voted against in those sessions but never for it.<sup>192</sup> He makes the point that the Bill was supported by Conservatives in the lower house by about three to two, but it was opposed to the last by a majority of Conservative peers. Even the Party's opponents recognised it had changed in its attitude to the legal regulation of sexual minorities.<sup>193</sup> That shift was certainly due in part to a political pragmatism and perceived need to detoxify the Conservative Party brand, but it may also be due to a recognition that greater acceptance of homosexuality was part of organic societal change, and the Conservative leadership sought to go with the grain of society. Further change was to come under the leadership of David Cameron, who succeeded Michael Howard on 6 December 2005, and this is discussed in the next chapter.

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<sup>191</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 280.

<sup>192</sup> *Ibid* 280. In the 2001 general election, 165 Conservative MPs were elected.

<sup>193</sup> Angela Eagle, HC Deb 9 November 2004, vol 426, col 802.

## CHAPTER 8

### AN UNNATURAL UNION? – BRITISH CONSERVATISM AND THE MARRIAGE (SAME SEX COUPLES) ACT 2013

#### INTRODUCTION

Section 1(1) of the Marriage (Same Sex Couples) Act 2013 reads: 'Marriage of same sex couples is lawful'. These seven words proved to be amongst the most controversial in the history of family lawmaking in the United Kingdom, as well in the history of the Conservative Party. Why were they such an issue? Why did the Government's pre-legislative consultation provoke more responses (just over 228,000) than any other before it,<sup>1</sup> and why did it so offend Conservative members that many apparently left the Party?<sup>2</sup> I think Ettelbrick and Sullivan can provide an answer. Marriage has the power to transform 'outsiders' to 'insiders'<sup>3</sup> – 'It is the final acceptance, the ultimate affirmation of identity'.<sup>4</sup> Drawing a parallel with marriage and the anti-miscegenation laws in America, Sullivan believes it is because same-sex marriage would signal wholesale acceptance of homosexuality in society.<sup>5</sup> To go from the 'pretended family relationship' of section 28 of the Local Government Act 1988 to 'ultimate affirmation' in around two decades was a change of such magnitude that it led inevitably to fault-lines opening up within the Party.

In the previous chapter, I showed how the Labour Government advanced a case that, while civil partnership is distinct from marriage, it is nevertheless as good as

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<sup>1</sup> Government Equalities Office, *Equal Marriage: The Government's Response* (HM Government 2013) 6. Large parts of this chapter have been published in Andrew Gilbert, 'From "Pretended Family Relationship" to "Ultimate Affirmation": British Conservatism and the Legal Recognition of Same-Sex Relationships' [2014] CFLQ 463 and Andrew Gilbert, 'An Unnatural Union? – British Conservatism and the Marriage (Same Sex Couples) Act 2013' in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill 2015).

<sup>2</sup> Matthew Holehouse, "Dire" Fall in Tory Membership a Threat to Election Victory' (*Daily Telegraph*, 9 August 2013)

<[www.telegraph.co.uk/news/politics/conservative/10234601/Dire-fall-in-Tory-membership-a-threat-to-election-victory.html](http://www.telegraph.co.uk/news/politics/conservative/10234601/Dire-fall-in-Tory-membership-a-threat-to-election-victory.html)> accessed 20 July 2015.

<sup>3</sup> Paula Ettelbrick, 'Since When is Marriage a Path to Liberation?' in Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004) 123.

<sup>4</sup> *Ibid* 126.

<sup>5</sup> Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004) xxvi.

marriage. While the expediency of this narrative was apparent at the time, it did pose a problem for the Coalition Government in 2013. As civil partnership conferred substantively the same legal status as marriage, the Coalition Government had to show that same-sex marriage somehow added value to the status of civil partnership. The way it did this was to deploy a discursive strategy which classified civil partnership as second best. In the Marriage (Same Sex Couples) Bill (MSSC Bill) the Government acknowledged that civil partnerships are not as good as marriage:

As we have heard, marriage should be defended and promoted in every way. To those who argue that civil partnerships exist and contain very similar rights, that marriage is “just a word” and that this Bill is unnecessary, I say that that is not right. A legal partnership is not perceived in the same way and does not have the same promises of responsibility and commitment as marriage. All couples who enter a lifelong commitment together should be able to call it marriage.<sup>6</sup>

And Yvette Cooper, speaking for the Official Opposition, set out the revised position of the Labour Party:

Civil partnerships have been a fantastic step forward, providing for the first time proper legal recognition for same-sex relationships, and they continue to be a great source of great joy and of security. It was right of Labour to introduce them in the face of deep controversy, but it is time to take the next step for equality and to allow gay and lesbian couples the chance to marry if they choose to.<sup>7</sup>

Indeed, there is evidence to support the view that civil partnership is perceived as inferior to marriage. Research conducted by Smart, Mason and Shipman showed that 80% of participants were pleased with the introduction of civil partnerships, but nearly half of them hoped that same-sex marriage would be available in the future.<sup>8</sup> In a smaller study involving 12 people and seven semi-structured interviews, Rolfe

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<sup>6</sup> Maria Miller, HC Deb 5 February 2013, vol 558, col 127.

<sup>7</sup> HC Deb 5 February 2013, vol 558, col 136.

<sup>8</sup> Carol Smart, Jennifer Mason and Beccy Shipman, *Gay and Lesbian ‘Marriage’: An Exploration of the Meanings and Significance of Legitimizing Same-Sex Relationships* (Morgan Centre, University of Manchester 2006) 2.

and Peel found ambivalence towards civil partnership. The three paradoxes they identified from their discourse analysis of the interviews was that civil partnership was 'good but not good enough', ie it was a consolation prize which is not culturally or legally the equal of marriage; civil partnership was an 'unwanted prize', this was constructed through a feminist discourse of not wanting to conform to an oppressive heteropatriarchal marriage model; and third, the act of entering into a civil partnership had the potential to draw out homophobic reactions from family and friends such that respondents would be put off going through with it. There were also objections that this assimilationism is usually on heterosexuality's terms, ie the Civil Partnership Act 2004 (CPA 2004) offers the same rights as marriage but the homosexual 'other' is maintained through a lexicon ('civil partnership', 'dissolution' etc.) and apparatus (Register Office only etc.) of exclusion.<sup>9</sup> Despite all of that, the total number of civil partnerships to the end of 2012 was 60,454, which is much higher than the Government's original predictions.<sup>10</sup> Until recently, the annual figure had been fairly constant since 2008, after a spike in the first two years, and the male/female split is almost equal, following a preponderance of male unions until 2009/10.<sup>11</sup>

In this chapter I begin with a short history of the interlude between the enactment of the CPA 2004 and the introduction of the MSSC Bill in January 2013. I then go on to outline the Bill's main provisions, before considering the parliamentary discourse around the Bill, particularly in the House of Commons Second Reading, in more detail. My concluding remarks contrast the differences in approach by Conservatives towards the CPA 2004 and the Marriage (Same Sex Couples) Act 2013 (MSSCA 2013), and I suggest reasons why most Conservative MPs in favour of the 2013 Act relied only partially on conservative arguments when expressing their support. I close with the observation that, while it is clear that the Conservative Party's attitude to the legal recognition of same-sex relationships has changed over the last thirty years, this change has been possible because it holds its ideology lightly, and pragmatism has often prevailed over principle.

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<sup>9</sup> Alison Rolfe and Elizabeth Peel, "It's a Double-Edged Thing": The Paradox of Civil Partnership and Why Some Couples are Choosing Not to Have One' (2001) 21 *Feminism and Psychology* 317, 328.

<sup>10</sup> Office for National Statistics, *Civil Partnership in the UK, 2012* (Office for National Statistics 2013) 2.

<sup>11</sup> *Ibid* 3. The number of civil partnership formations has declined significantly following the introduction of same-sex marriage: Office for National Statistics, *Marriages in England and Wales (Provisional), for Same Sex Couples, 2014* (Office for National Statistics 2015).

## FROM CIVIL PARTNERSHIP TO SAME-SEX MARRIAGE – A SHORT HISTORY

*Our achilles heel, though, has been our social attitude. Censorious judgmentalism from the moralising wing, which treats half our own countrymen as enemies, must be rooted out. We should take JS Mill as our lodestar, and allow people to live as they choose until they actually harm someone. If the Tory Taliban can't get that, they'll condemn us all to oblivion. Thank heavens for the new intake of MPs who do.*<sup>12</sup>

Alan Duncan used the above piece both to announce his withdrawal from the Conservative leadership contest in July 2005 and to give his prescription for the Conservative Party avoiding yet another general election defeat. Duncan's article appears to be a call for Conservatives to adopt liberal, rather than conservative, values; it is striking that he does not appeal to Burke as a lodestar. While it was clear that the Party had changed (Labour's Angela Eagle had magnanimously acknowledged that during the CPA 2004 Third Reading,<sup>13</sup> as had Ben Summerskill and Peter Tatchell<sup>14</sup>), it was also clear that its 'moralising wing' remained strong and influential.

One event which was of modest impact in isolation, but is part of more significant structural change in the Party, was the selection of Nick Herbert for the safe Conservative seat of Arundel and South Downs in April 2005. Herbert was thereby the first Conservative to be elected to parliament who was openly gay prior to their election. Over the course of the next eight years the number of gay and lesbian Conservative parliamentarians increased markedly, partly through the addition of new MPs in 2010, but also as a result of some sitting MPs coming out. By the time the MSSC Bill was introduced, there were around thirteen openly gay Conservatives in parliament (Stuart Andrew, Greg Barker, Lord Guy Black, Crispin Blunt, Nick Boles, Conor Burns, Alan Duncan, Nigel Evans, Mike Freer, Nick Herbert, Margot James (the first Conservative out lesbian), Eric Ollerenshaw, Iain Stewart), curiously

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<sup>12</sup> Alan Duncan, 'The Tory Taliban Must Be Rooted Out' (*The Guardian*, 18 July 2005) <[www.theguardian.com/politics/2005/jul/18/conservatives.uk](http://www.theguardian.com/politics/2005/jul/18/conservatives.uk)> accessed 9 January 2014 (emphasis added).

<sup>13</sup> HC Deb 9 November 2004, vol 426, col 802.

<sup>14</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 313.

probably more than in any other party.<sup>15</sup> This increase was partly due to David Cameron's introduction of the 'A-list' of parliamentary candidates which was designed to increase the number of MPs in unrepresented demographics (particularly women and black and minority ethnic candidates). Crucially, Duncan's analysis of the Conservatives' achilles heel was shared by the leadership contest's winner, David Cameron. From the outset of his leadership, Cameron sent inclusive messages to the gay and lesbian community:

And by the way, [commitment] means something whether you're a man and a woman, a woman and a woman or a man and another man...That's why we were right to support civil partnerships, and I'm proud of that.<sup>16</sup>

In 2008, probably the then most powerful Conservative in the country, the mayor of London, Boris Johnson, attended the Pride London event and has since become a regular during his time in office. In the same year, however, contrary messages were sent during the passage of the Human Fertilisation and Embryology Bill. Iain Duncan Smith tabled an amendment which required fertility clinics to consider a child's need for a father and a mother, effectively making it more difficult for gay men and lesbians to access fertility services. The amendment was defeated by 292 votes to 217, but it attracted the support of a majority of Conservatives, including David Cameron.<sup>17</sup> The following year Cameron became the first Conservative leader to address a (private) Gay Pride event, at which he apologised for section 28.<sup>18</sup> The apology was personal as well as corporate, as he had voted for its retention in 2003. The *Pink News* report also mentioned a readers' poll which showed that 37 per cent of respondents agreed and 63 per cent disagreed with the statement that the Party was becoming more gay-friendly, and 39 per cent intended

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<sup>15</sup> McManus, *ibid* 302; Evan Davis, 'Glad to be Gay, Glad to be Tory' (*The Guardian*, 20 April 2012) <[www.theguardian.com/politics/2012/apr/20/gay-tory-conservative-party](http://www.theguardian.com/politics/2012/apr/20/gay-tory-conservative-party)> accessed 7 January 2014.

<sup>16</sup> David Cameron, 'Speech to Conservative Party Conference' (Conservative Party Conference, Bournemouth, 4 October 2006). See also Dylan Jones, *Cameron on Cameron* (Fourth Estate 2008) 169.

<sup>17</sup> HC Deb 20 May 2008, vol 476, col 214.

<sup>18</sup> Jessica Geen, 'David Cameron Speaks at Private Pride Event but will not join Gay Rights March' (*Pink News*, 1 July 2009) <[www.pinknews.co.uk/2009/07/01/david-cameron-attends-private-pride-party/](http://www.pinknews.co.uk/2009/07/01/david-cameron-attends-private-pride-party/)> accessed 10 January 2014; Nicholas Watt, 'David Cameron Apologies to Gay People for Section 28' (*The Guardian*, 2 July 2009) <<http://www.theguardian.com/politics/jul/02/david-cameron-gay-pride-apology>> accessed 10 January 2014.

to vote Conservative at the next general election, 29 per cent for Labour. A survey of Conservative prospective parliamentary candidates carried out around the same time showed that 62 per cent said that same-sex couples should be given the same benefits as married couples.<sup>19</sup> Only weeks before that, a Populus poll revealed 68 per cent of voters expressed support when asked a similar question, with 61 per cent in favour of same-sex marriage specifically.<sup>20</sup> If the Party believed in working 'with the grain of human nature' – as the 1979 manifesto claimed – then here was just such an opportunity.

When McManus published his history in 2011, it was not clear to him that Cameron was definitely pro-gay marriage.<sup>21</sup> However, any doubt was removed by the Prime Minister's 2011 Party Conference Speech:

And to anyone who has reservations, I say: Yes, it's about equality, but it's also about something else: commitment. Conservatives believe in the ties that bind us; that society is stronger when we make vows to each other and support each other. *So I don't support gay marriage despite being a Conservative. I support gay marriage because I'm a Conservative.*<sup>22</sup>

These words were greeted by (mostly) enthusiastic applause in the conference hall, but I wonder if, in drawing rooms across the English shires, could be heard the quieter sound of Party membership cards being torn up and thrown on the fire.<sup>23</sup> What is clear from Cameron's statement is that he believes that support for same-sex marriage is consistent with conservative thought, and it is these conservative arguments around same-sex marriage that I explored in chapter three.

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<sup>19</sup> Tim Montgomerie, 'Pro-nuclear, Gay Friendly, Barely Unionist, Very Eurosceptic...Meet the Next Generation of Tory MPs' (*ConservativeHome*, 3 July 2009) <<http://conservativehome.blogs.com/goldlist/2009/07/pronuclear-gay-friendly-barely-unionist-very-eurosceptic-meet-the-next-generation-of-tory-mps.html>> accessed 10 January 2014.

<sup>20</sup> Populus, 'The Times "Gay Britain" Poll' (*Populus*, June 2009) <[www.populuslimited.com/the-times-the-times-gay-britain-poll-100609.html](http://www.populuslimited.com/the-times-the-times-gay-britain-poll-100609.html)> accessed 10 January 2014.

<sup>21</sup> Michael McManus, *Tory Pride and Prejudice: The Conservative Party and Homosexual Law Reform* (Biteback 2011) 307.

<sup>22</sup> David Cameron, 'Speech to Conservative Party Conference' (Conservative Party Conference, Manchester, 5 October 2011) (emphasis added).

<sup>23</sup> Matthew Holehouse, '"Dire" Fall in Tory Membership a Threat to Election Victory' (*Daily Telegraph*, 9 August 2013) <[www.telegraph.co.uk/news/politics/conservative/10234601/Dire-fall-in-Tory-membership-a-threat-to-election-victory.html](http://www.telegraph.co.uk/news/politics/conservative/10234601/Dire-fall-in-Tory-membership-a-threat-to-election-victory.html)> accessed 20 July 2015.



The next part of this chapter considers the background to the Bill and its main provisions before going on to examine how Conservative support and opposition were constructed in the parliamentary debates.

## THE BACKGROUND TO THE BILL

For such a radical piece of legislation it could be said that the Marriage (Same Sex Couples) Bill almost rose without trace. There was no mention of the reform in the 2010 general election manifestoes of either the Conservative or Liberal Democrat parties which went on to form a coalition government, and the subsequent Coalition Agreement was also silent on the matter. However, the following statement can be found in *A Contract for Equalities* which was launched by the then Shadow Minister for Women and Equality, Theresa May MP on 3 May 2010: 'We will also consider the case for changing the law to allow civil partnerships to be called and classified as marriage'.<sup>24</sup> It seems that 'launched' may be putting it too strongly, as evidence from the parliamentary debates suggests that many Conservative MPs were oblivious as to the document's existence, which is unsurprising as they will all have been dutifully on the stump at the time, with the general election then only three days away.<sup>25</sup> But even giving the Party leadership the benefit of any doubt about the timing of *A Contract for Equalities*, the statement above is still not an accurate description of what the MSSC Bill actually set out to do. If Conservative MPs were unaware in May 2010, by July they would have realised something was going on in Whitehall when Simon Hughes MP, the deputy leader of the Liberal Democrats, announced that the Government was planning a consultation on 'taking civil partnerships to the "next level"' and that the new law would be in place before the next general election in 2015.<sup>26</sup>

The consultation document *Equal Civil Marriage: A Consultation* was published by the Government in March 2012 and was championed by Theresa May MP (by then Home Secretary and Minister for Women and Equalities) and the then (Liberal

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<sup>24</sup> Conservative Party, *A Contract for Equalities* (Conservative Party 2010) 14.

<sup>25</sup> See, for example, Peter Bottomley, HC Deb 5 February 2013, vol 558, col 213.

<sup>26</sup> Gerri Peev, 'We Will Allow Gay Couples to Get Married, Says Top Lib Dem' (*Daily Mail*, 20 July 2010) <[www.dailymail.co.uk/news/article-1296127/We-allow-gay-couples-married-says-Lib-Dem.html](http://www.dailymail.co.uk/news/article-1296127/We-allow-gay-couples-married-says-Lib-Dem.html)> accessed 20 July 2015.

Democrat) Minister for Equality, Lynne Featherstone MP.<sup>27</sup> The consultation was open for 12 weeks and was framed in terms that suggested the Government had already decided to legislate for same-sex marriage but just wanted views on how best to do it. The opening sentence of the Executive Summary reads: 'This consultation is about how the ban can be lifted on same-sex couples having a marriage through a civil ceremony'.<sup>28</sup> Not surprisingly this presumptive tone upset many of the Bill's opponents.

The Bill was given its First Reading in the House of Commons on 24 January 2013 and completed its Commons stages on 21 May 2013. The House of Lords First Reading was on the same day and it finished its Lords stages on 10 July 2013, before receiving Royal Assent on 17 July 2013. Many of the discursive themes in the debates echoed those from the Civil Partnership Bill in 2003-4.

## **MAIN FEATURES OF THE MARRIAGE (SAME SEX COUPLES) BILL**

The Bill ran to eighteen clauses and seven lengthy schedules, which mostly concerned amending existing legislation or setting out the position regarding religious rites and same-sex marriage. Perhaps the main area of tension, given the often religious nature of marriage ceremonies, was the position of religious bodies in relation to conducting, or not conducting, same-sex weddings. So concerned was the Government to uphold religious conscience that it devised the so-called 'quadruple lock'. This meant that: (1) no religious organisation or minister could be compelled to marry same-sex couples or to permit such a marriage on their premises; (2) religious organisations which wanted to conduct same-sex marriages would have to *opt-in* in order to do so;<sup>29</sup> (3) the Equality Act 2010 would be amended so that (1) was not unlawful; and (4) the Church of England's duty to marry parishioners under common law would not be extended to same-sex couples.<sup>30</sup>

Four further aspects of the Bill are worth noting here. First, paragraph 5(2) of schedule 3, part 2, makes an interesting statement about change and tradition. By

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<sup>27</sup> Government Equalities Office, *Equal Civil Marriage: A Consultation* (HM Government 2012).

<sup>28</sup> *Ibid* 3.

<sup>29</sup> The Church of England is expressly excluded from these provisions: see sections 4 and 5.

<sup>30</sup> Section 1(4).

setting out that 'husband' includes a man married to another man, and 'wife' a woman married to another woman, it both embraces the fundamental change at the heart of the Bill but holds to the established heterosexist nomenclature of 'husband' and 'wife'.

Second, paragraph 3 of schedule 4, part 3, inserts a new section 1(6) into the Matrimonial Causes Act 1973 (MCA 1973): 'Only conduct between the respondent and a person of the opposite sex may constitute adultery for the purposes of this section'. This caused a divergence of opinion in parliament, with some suggesting this meant that same-sex married couples would be treated differently with regard to using adultery as a basis for divorce.<sup>31</sup> In one sense, same-sex and opposite-sex couples will be treated the same in that only penile/vaginal penetrative sex amounts to adultery, with extra-marital homosexual sex founding a divorce under the behaviour fact. But on the other hand, there is a clear double standard here as the implied fidelity expectation in opposite-sex marriage is not extended to gay men and lesbians in a way that is consonant with their sexual orientation.<sup>32</sup> It seems paradoxical that the Government felt able radically to revise the meaning of marriage but not adultery. I discuss this aspect of the Bill further below.

Third, paragraph 4 of schedule 4, part 3, deals with non-consummation, amending section 12 of the MCA 1973 to make it clear that the non-consummation grounds do not apply to same-sex marriage. What was written by many feminist and queer theorists about the Civil Partnership Act 2004 seems to apply in whole or part to the MSSCA 2013.<sup>33</sup> The 'continuing centrality of penetrative intercourse'<sup>34</sup> in the construction of conjugality is likely to mean that same-sex marriage will be 'conservative, rather than either transgressive or transformative',<sup>35</sup> especially given the dominant assimilationist discourse around the Bill.

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<sup>31</sup> Eg HL Deb 19 June 2013, vol 746, cols 375-382.

<sup>32</sup> Eekelaar overlooks this point in John Eekelaar, 'Perceptions of Equality: The Road to Same-Sex Marriage in England and Wales' (2014) 28 *International Journal of Law, Policy and the Family* 1, 16. However, the argument is explored well in Peter Nicolas, 'The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct' (2011) 63 (1) *Florida Law Review* 97.

<sup>33</sup> For a helpful discussion see Lucy Crompton, 'Where's the Sex in Same-Sex Marriage?' [2013] *Family Law* 564.

<sup>34</sup> Carl Stychin, 'Not (Quite) a Horse and Carriage. The Civil Partnership Act 2004' (2006) 14 *Feminist Legal Studies* 79, 83.

<sup>35</sup> Nicola Barker, 'Sex and the Civil Partnership Act: The Future of (Non) Conjugality?' (2006) 14 *Feminist Legal Studies* 241, 249; 'Civil Partnership: An Alternative to Marriage? *Ferguson and Others v UK*' [2012] *Family Law* 548; *Not the Marrying Kind* (Palgrave Macmillan 2012).

Finally, section 12 and schedule 5 make important changes to the law regarding trans people, specifically by providing a means to avoid the upsetting situation where a person in transition is forced to choose between obtaining a full gender recognition certificate and continuing with their marriage or civil partnership. This provision attempts to balance the interests of the trans person and their spouse/civil partner, and was considered in parliament.<sup>36</sup>

## **ANALYSIS OF THE DEBATES**

### **An overview**

Space does not permit a detailed examination of the Bill's entire parliamentary passage, so instead I will give an overview of the discursive terrain. The House of Commons Second Reading was taken up with debate over the merits and impact of same-sex marriage and the robustness of the quadruple lock, particularly whether it would withstand legal challenge under human rights law. The Public Bill Committee comprised 21 MPs, of whom only four voted against the Bill at Second Reading (David Burrowes, Kwasi Kwarteng, Tim Loughton, Jim Shannon).<sup>37</sup> These four were nicknamed 'team marriage' by Burrowes.<sup>38</sup> From reading the Committee minutes it is evident that, were it not for the dogged determination of Burrowes in particular, and his Labour foil, Chris Bryant, the Bill would have almost evaded scrutiny. The proposed amendments in Committee were largely of a probing nature and covered changing the word 'marriage' to 'union',<sup>39</sup> as well as statements on the moral purpose of marriage.<sup>40</sup> The Bill completed the Committee stage unamended.

By the time the Bill was back before the full House at Report stage, the concerns over religious liberty at an institutional level appear to have been largely assuaged, but some amendments were tabled covering individual religious liberties which would have allowed registrars, for example, to conscientiously object to conducting

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<sup>36</sup> Eg HC Deb 21 May 2013, vol 563, cols 1123-1148; HL Deb 10 July 2013, vol 747, cols 295-301. For a discussion, see Flora Renz, 'Consenting to Gender? Trans Spouses After Same-Sex Marriage' in Nicola Barker and Daniel Monk (eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015).

<sup>37</sup> The first three are Conservative MPs; Jim Shannon is a member of the Democratic Unionist Party.

<sup>38</sup> PBC Deb (Bill 126) 7 March 2013, col 427.

<sup>39</sup> *Ibid*, col 425.

<sup>40</sup> PBC Deb (Bill 126) 26 February 2013, col 187.

same-sex marriages.<sup>41</sup> A new strategy also emerged at this stage: one of the Bill's long-standing opponents, Tim Loughton, seemingly overwhelmed by a spirit of egalitarianism, tabled an amendment extending civil partnership to different-sex couples.<sup>42</sup> The world then momentarily turned upside down with the *Daily Telegraph* calling it a wrecking amendment,<sup>43</sup> while Peter Tatchell came out in support.<sup>44</sup> Loughton's motivation behind the amendment is unclear, but the move was reminiscent of opposition wrecking strategies during the Civil Partnership Bill's passage nine years earlier.<sup>45</sup> The amendment was heavily defeated but the matter was clearly not going to go away; the MSSCA 2013 contains a Government commitment to review the CPA 2004.<sup>46</sup> At Third Reading, many speeches were either euphoric or portentous, capturing the historic nature of the occasion.<sup>47</sup>

The Bill was sponsored in the Lords by Baroness Stowell who stated her belief that the institution of marriage will be strengthened the more 'it reflects modern society'.<sup>48</sup> Her speech echoed the assimilationist tones of her Commons counterpart; the love and commitment of gay and lesbian people was 'no different from that of opposite-sex couples'.<sup>49</sup> In contrast, although not presenting as a radical feminist/queer apologist, Baroness Cumberlege urged gay people 'to be

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<sup>41</sup> HC Deb 20 May 2013, vol 563, col 926.

<sup>42</sup> *Ibid*, col 990.

<sup>43</sup> Dan Hodges, 'The Tory Rebels Think Gay Marriage is an "Infestation". If Labour Helps Them Wreck the Bill, it will be a Disgrace' (*Daily Telegraph*, 20 May 2013) <<http://blogs.telegraph.co.uk/news/danhodges/100217723/the-tory-rebels-think-gay-marriage-is-an-infestation-if-labour-helps-them-wreck-the-bill-it-will-be-a-disgrace/>> accessed 20 July 2015.

<sup>44</sup> George Eaton, 'Equality Campaigners Divided Over 'Wrecking' Amendment to Gay Marriage Bill' (*New Statesman*, 20 May 2013) <[www.newstatesman.com/politics/2013/05/equality-campaigners-divided-over-wrecking-amendment-gay-marriage-bill](http://www.newstatesman.com/politics/2013/05/equality-campaigners-divided-over-wrecking-amendment-gay-marriage-bill)> accessed 20 July 2015.

<sup>45</sup> Some doubt is now cast on the assertion that it was a wrecking amendment because Loughton introduced a Private Members' Bill on 3 September 2014 entitled the Civil Partnership Act 2004 (Amendment) Bill. The Bill extends civil partnerships to opposite-sex couples. That Bill did not progress beyond First Reading. He introduced the same Bill under the Ten Minute Rule on 21 October 2015. It was expected to have its Second Reading on 11 March 2016, but the motion was not moved. Loughton's stated aims were to 'correct...inequality' and to improve 'family stability' (HC Deb 21 October 2015, vol 600, cols 960-962).

<sup>46</sup> The Government review has since concluded that no changes will be made to civil partnerships, see Department for Culture, Media and Sport, 'Civil Partnership Review (England and Wales) – Report on Conclusions' (DCMS 2014). See also Ruth Gaffney-Rhys, 'Same-Sex Marriage But Not Mixed-Sex Partnerships: Should the Civil Partnership Act 2004 Be Extended to Opposite-Sex Couples?' [2014] CFLQ 172.

<sup>47</sup> For example, Diane Abbott (Labour), HC Deb 21 May 2013, vol 563, col 1167; Jeffrey Donaldson (Democratic Unionist), *ibid*, col 1160.

<sup>48</sup> HL Deb 3 June 2013, vol 745, col 939.

<sup>49</sup> *Ibid*, col 941; also HL Deb 17 June 2013, vol 746, col 47; HL Deb 8 July 2013, vol 747, col 32.

bold, to be confident and eschew the institutions of others, to build their own and be themselves',<sup>50</sup> which prompted gay Conservative Lord Black to respond: 'We do not want different institutions; we want the same institutions'.<sup>51</sup> The arguments at Second Reading covered much the same ground as in the Commons but there was a sense that resistance was futile given the overwhelming support the Bill received in the lower chamber. In Committee, there were a number of creative suggestions to change reference to 'marriage' in the Bill to 'union',<sup>52</sup> 'espousal',<sup>53</sup> 'matrimony',<sup>54</sup> 'matrimonial marriages',<sup>55</sup> 'marriage (same sex couples)',<sup>56</sup> 'traditional marriage/same sex marriage',<sup>57</sup> or 'ancient marriage/modern marriage'<sup>58</sup>. All of these ultimately fell away, but they stand as evidence of a discursive strategy to prevent the (mis)appropriation of the word 'marriage' by those seeking to extend its compass. When the Lords eventually voted on the Bill, it attracted overwhelming support.<sup>59</sup>

### **The diminishing of difference and the assimilation of the gay 'other'**

I observed in chapter seven that a conservative assimilationist strategy was prominent in the CPA 2004 debates, and it was no less so in the passage of the MSSC Bill. Ettelbrick's claim that marriage 'is the final acceptance, the ultimate affirmation of identity',<sup>60</sup> is only true - at least in the context of the MSSCA 2013 - in so far as the acceptance and affirmation are on the terms of an otherwise traditional heterosexist understanding of marriage. From the perspective of the homosexual couple, their assimilation is passive: they are accepted; they are affirmed. The minister sponsoring the Bill in the House of Commons, Maria Miller, confirmed that this was the philosophy underlying the Bill when she opened the Second Reading debate:

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<sup>50</sup> HL Deb 3 June 2013, vol 745, col 968.

<sup>51</sup> Ibid, col 988.

<sup>52</sup> HL Deb 17 June 2013, vol 746, col 11.

<sup>53</sup> Ibid, col 14.

<sup>54</sup> Ibid, col 15.

<sup>55</sup> Ibid, col 17.

<sup>56</sup> Ibid, col 23.

<sup>57</sup> Ibid, col 28.

<sup>58</sup> Ibid.

<sup>59</sup> Eg HL Deb 4 June 2013, vol 745, col 1109.

<sup>60</sup> Paula Ettelbrick, 'Since When is Marriage a Path to Liberation?' in Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004) 123.

What marriage offers us all is a lifelong partner to share our journey, a loving stable relationship to strengthen us and mutual support throughout our lives. I believe that that should be embraced by more couples. The depth of feeling, love and commitment between same-sex couples is no different from that depth of feeling between opposite-sex couples. The Bill enables society to recognise that commitment in the same way, too, through marriage. Parliament should value people equally in the law, and enabling same-sex couples to marry removes the current differentiation and distinction.<sup>61</sup>

The assimilationist strategy could not be made plainer than by her statement that same-sex marriage 'removes the current differentiation and distinction'. A discourse of sameness was found across the political spectrum. Yvette Cooper, who led Labour's response to the Bill, quoted with approval what a same-sex couple had told her: 'We want to have the same celebration and status as our parents and grandparents - it's about being normal'.<sup>62</sup> And Ben Summerskill, then chief executive of Stonewall, took a similar approach in his evidence at Committee stage:

First, we are alive to the fact that there are now an increasing number of lesbian and gay people, particularly younger ones, who want their family structures to be described in exactly the same way as everyone else's. For those who have children, that is particularly important.<sup>63</sup>

In chapter three I mentioned Andrew Sullivan's belief that, as well as the traditional family serving as a model for homosexual family life, there can be beneficial counterflows too.<sup>64</sup> Gay Conservative MP, Stuart Andrew, thought that extending marriage to same-sex couples 'can only strengthen it and ultimately build the better society that we all want'.<sup>65</sup> And it seems that this strengthening of marriage would come about because of a particular kind of same-sex relationships. Again, similar to the narrative in the civil partnership debates, it was not promiscuous, hedonistic gay

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<sup>61</sup> HC Deb 5 February 2013, vol 558, col 125. See also her opening words in Committee, PBC Deb (Bill 126) 12 February 2013, col 3.

<sup>62</sup> HC Deb 5 February 2013, vol 558, col 136.

<sup>63</sup> PBC Deb (Bill 126) 12 February 2013, col 56.

<sup>64</sup> Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004) 155.

<sup>65</sup> HC Deb 5 February 2013, vol 558, col 203.

men legislators had in mind, but 'a loving couple',<sup>66</sup> and those in 'loving and committed'<sup>67</sup> relationships; and, for example, a story was told of a chronically ill gay man cared for by his long-term gay partner.<sup>68</sup>

Another significant factor which affected the tone of the parliamentary debates, compared to those a decade earlier, was the larger number of openly gay MPs. It is probably a truism that the presentation, and perhaps the substance, of a speaker's argument would be influenced if the issue under discussion affected the intimate lives of the speaker's friends and colleagues who were listening to the speech. Although a difficult hypothesis to test satisfactorily, I think it is more likely than not that the presence of gay and lesbian legislators in both chambers altered the style and content of the debates. By way of example, a noticeable difference from the civil partnership debates was that the speeches of a number of gay and lesbian MPs were voiced in the first person singular. While in 2004 it might be said that proponents of the CPA 2004 spoke as legislators who happened to be gay; in 2013 speeches came from gay men and lesbians who happened also to be lawmakers. These contributions went beyond mere advocacy of the cause of same-sex marriage, to sometimes very personalised arguments for law reform so that the individual contributor might avail him- or herself of the opportunity to marry:

I look at the marriage that my parents have - 45 years and going strong - and I aspire to the same thing. I do not have someone at the minute, but if I do, I want to cherish that person, love them, support them. It is not just about a ceremony; it is about being with them for the rest of a life, in good times and bad, richer or poorer, sickness and health. That can apply as much to me as to a straight couple. I do not understand why some people feel threatened that allowing me to have that in any way diminishes what a heterosexual couple has. I want the same things.<sup>69</sup>

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<sup>66</sup> Yvette Cooper, HC Deb 5 February 2013, vol 558, col 135; similar comments from Jane Ellison, *ibid*, col 207.

<sup>67</sup> Steve Reed (Labour), HC Deb 5 February 2013, vol 558, col 162.

<sup>68</sup> Yvette Cooper, *ibid*, col 140.

<sup>69</sup> Iain Stewart, HC Deb 5 February 2013, vol 558, col 225. See also contributions from Toby Perkins (Labour), *ibid*, col 149, whose mother came out as a lesbian towards the end of her life; and MPs confirming their gay orientation during the debates: Stephen Gilbert (Liberal Democrat), *ibid*, col 149; Margot James, *ibid*, col 164; Stephen Williams (Liberal Democrat), *ibid*, col 176; Mike Freer, *ibid*, col 178; Stuart Andrew, *ibid*, col 202; Crispin Blunt, *ibid*, col 215; Iain Stewart, *ibid*, col 225.



In the House of Lords, Lord Black, the first openly gay Conservative peer, even went so far as to say of his civil partner: 'I love him very much and nothing would give me greater pride than to marry him'.<sup>70</sup> It is hard to imagine such a bold and confident statement being made by a Conservative member of the House of Lords a decade earlier, and this is testimony to the more widespread acceptance of (a particular manifestation of) homosexuality in contemporary British society.

It was interesting, though, that the good of marriage was taken as given throughout the Bill's parliamentary passage. As Craig Whittaker observed, 'No real debate has taken place on the nature of marriage itself'.<sup>71</sup> Some commentators have considered the potential for the queering of traditional marriage through its extension to same-sex couples,<sup>72</sup> but marriage is less likely to be transformed if its essence is not discussed in any detail at important discursive locations such as during statutory reform. A potential site of transformation is in the area of sexual intimacy in marital relationships, but, like in the CPA 2004, the MSSCA 2013 holds to the established heterosex paradigm. As Barker observed,<sup>73</sup> and as the passage of the MSSCA 2013 confirmed, most of the parliamentary discourse around same-sex marriage is occupied with access to the institution of marriage, rather than a deeper engagement with what it actually means to be married, 'legally, socially or ideologically'.<sup>74</sup>

### **Sex in the shadows (again)**

I observed above that the MSSCA 2013 expressly limits 'adultery' to sexual intercourse between people of the opposite sex. The Act also amends section 12 of the MCA 1973 to proscribe non-consummation as a basis for the annulment of

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<sup>70</sup> Lord Black, HL Deb 3 June 2013, vol 745, col 988. See also Stuart Andrew, HC Deb 21 May 2013, vol 563, col 1165.

<sup>71</sup> HC Deb 5 February 2013, vol 558, col 169.

<sup>72</sup> Nan Hunter, 'Marriage, Law, and Gender: A Feminist Inquiry' (1991) 1 *Law & Sexuality Review* 9; Nancy Polikoff, 'We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"' (1993) 79 *Virginia Law Review* 1535; Paula Ettelbrick, 'Since When is Marriage a Path to Liberation?' in Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004); E J Graff, 'Retying the Knot' in Andrew Sullivan (ed), *Same-Sex Marriage: Pro and Con: a Reader* (Vintage 2004); Nicola Barker, *Not the Marrying Kind* (Palgrave Macmillan 2012); Nicola Barker, 'Two Myths About Same-Sex Marriage' in Anastasia De Waal (ed), *The Meaning of Matrimony* (Civitas 2013); Brian Heaphy, Carol Smart and Anna Einarsdottir, *Same-Sex Marriages: New Generations, New Relationships* (Palgrave MacMillan 2013).

<sup>73</sup> Nicola Barker, *Not the Marrying Kind* (Palgrave Macmillan 2012) 12.

<sup>74</sup> *Ibid.*

same-sex marriages. The definitions of adultery and consummation are both to be found in common law,<sup>75</sup> so why did the Government simply not leave the courts to determine whether, and if so, how, these concepts should be extended to homosexual sexual behaviour? It appears that this is what the Government had planned to do, but it was persuaded by the Catholic Bishops' Conference and the Family Law Bar Association that an incremental case law approach would create uncertainty in the law.<sup>76</sup> So, there were two ways in which parliamentary counsel could have provided the desired certainty: by expressly limiting adultery to the traditional definition, or by expressly extending it to encompass same-sex sexual acts.

Attempts to broaden the scope of the fidelity grounds for divorce were not new, however. In the parliamentary debates of the Marriage Bill 1937, Viscount Dawson moved the following amendment: '[the respondent] has since the celebration of the marriage been guilty of the practice of homo-sexuality'.<sup>77</sup> At that time, a wife could petition on the basis of a husband's act of sodomy, but there was no direct equivalent cause of action for a husband whose wife had had sexual relations with another woman. Dawson's concern was to treat men and women alike, so that both gay and lesbian sexual 'practice' (he had in mind here something more than a single, isolated act) could give rise to a petition for divorce. In one of the earliest uses of the word 'lesbian' in parliament, Dawson said, 'You ought to protect the man against the Lesbian just as you protect a woman against a male homo-sexualist'.<sup>78</sup> The amendment was withdrawn after a short discussion because it had not been recommended by the Royal Commission on Divorce and Matrimonial Causes (the Gorell Commission) and the Lords were not minded to start introducing new grounds at that point in the Bill's gestation.

Almost 80 years later, former President of the Family Division, Baroness Butler-Sloss attempted to use the MSSC Bill to add the following words to the adultery fact in section 1(2)(a) of the MCA 1973: 'or a sexual act with a person of the same sex similar to adultery'.<sup>79</sup> Even though 'similar to adultery' obviously required some

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<sup>75</sup> *D-e v A-g* [1845] 1 Rob Ecc 280; *Sapsford v Sapsford and Furtado* [1954] P 394; *Dennis v Dennis* [1955] P 153.

<sup>76</sup> Government Equalities Office, *Equal Marriage: The Government's Response* (HM Government 2013) paras 9.8-9.11.

<sup>77</sup> HL Deb 7 July 1937, vol 106, col 140. The Bill became the Matrimonial Causes Act 1937.

<sup>78</sup> *Ibid*, col 145.

<sup>79</sup> HL Deb 8 July 2013, vol 747, col 142. Butler-Sloss sits as a crossbencher. It is interesting to contrast her well-intentioned amendment with James Mackay's 'probing' amendment to

judicial interpretation, Butler-Sloss was confident that the judges would work it out, and indeed might never have to, given the rarity of defended divorce. However, some Lords did not share her confidence, and Lord Alli (Labour) and Lord Pannick (crossbench) both objected on the basis that they could not see how adultery between two lesbians could be defined, so entrenched was adultery's phallocentrism.<sup>80</sup> After a short debate it was clear that there was as little support for the proposal as there was for continuing the discussion after midnight, and the amendment was withdrawn, and the debate adjourned, at 12.26am.

There was a divergence of opinion over whether it *actually* mattered that adultery was to remain wedded to the traditional heterosexual penetrative standard. Some opponents of the Bill used the adultery and consummation omissions as an oblique means of attacking the claim that the Bill provided for marriage equality, and that supporters should therefore reject it:

The Government have tucked this aspect right at the back of the Bill, possibly because they do not want it to be debated in Committee. That is sad, because it is part of the inequality. If I were part of a gay couple, I would feel like a poor relation as a result of this Bill. I would feel that it was a shoddy Bill in which gay couples are not as well considered as heterosexual couples. It highlights the inequalities.<sup>81</sup>

At the heart of the inequality argument was an apparent deduction that the Bill does not therefore require sexual fidelity within same-sex marriages. Burrowes argued:

The defining characteristic of marriage is exclusivity, a commitment to sexual fidelity, but the Government have taken sexual fidelity out of the definition of marriage by not applying the definition of adultery to same-sex couples.<sup>82</sup>

On the other hand, some of the Bill's firmest supporters were ambivalent towards the invisibility of the sex lives of gay and lesbian people in the Bill. When giving evidence in the Public Bill Committee, Ben Summerskill thought that it was not a

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remove conjugality and allow sibling marriage at HL Deb 24 June 2013, vol 746, col 635. Mackay's amendment was a throwback to the Civil Partnership Bill debates.

<sup>80</sup> Ibid, col 143.

<sup>81</sup> Nadine Dorries, HC Deb 5 February 2013, vol 558, col 147.

<sup>82</sup> HC Deb 5 February 2013, vol 558, col 197. See also, Helen Goodman (Lab), *ibid*, col 178.

'problem' that adultery had not been available as a basis for dissolution of civil partnerships since their introduction.<sup>83</sup> And regarding consummation he said pointedly, 'We have not seen a lot of our stakeholders saying they are deeply concerned about consummation. It may be that perhaps sex is something that heterosexual people are slightly more fixated about than homosexuals'. When Burrows asked him how he would define same-sex adultery, he replied that he would not do it, although he thought it would be possible. Summerskill observed the longstanding 'anomaly' that sexual relations with someone of the same sex has never amounted to adultery in English law, and repeated the claim that adultery is not a problem with which Stonewall's stakeholders are 'particularly obsessed'.<sup>84</sup>

Sodomy remained a distinct matrimonial offence until it was repealed in the Divorce Reform Act 1969. Presumably parliament was sufficiently clear about what it had in mind when it was considering that legislation. There is no evidence in the consultation response that the Government thought it too difficult to draft new definitions (just a preference to leave it to the courts), which leads me to conclude that it did not wish to expressly include a revised definition for reasons of political expediency. The Coalition whips knew how controversial the Bill would prove and they did not want to risk losing it by incorporating further points of contention. While this standpoint is defensible on pragmatic grounds, it does nonetheless reinforce the view that 'real' sex is heterosexual, penetrative intercourse. Yet, although these omissions appear to close down the transgressive potential of same-sex marriage, the Act's failure to engage meaningfully with the sexual lives of same-sex couples inadvertently provides potential opportunities for the queering of marriage in two respects: first, the legal presumption of monogamy only extends to sexual relationships between a same-sex spouse and someone of the opposite sex; and second, the consummation lacuna provides formal recognition of legally privileged non-sexual relationships.<sup>85</sup>

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<sup>83</sup> PBC Deb (Bill 126) 12 February 2013, col 64.

<sup>84</sup> *Ibid.*

<sup>85</sup> Barker makes this point in relation to civil partnerships in Nicola Barker, *Not the Marrying Kind* (Palgrave Macmillan 2012) 186.

## **The centrality of religion in the debates**

The complex and peculiar relationship between marriage, law and the Church of England<sup>86</sup> meant that the Bill had to address concerns over the protection of religious liberty, as Maria Miller confirmed: 'The Bill provides for and promotes religious freedom through the Government's quadruple lock. These protections are absolutely carved on the face of the Bill and are the foundation on which the legislation is built'.<sup>87</sup> As well as religion being central to the Bill's substance, religious belief also influenced the content of many contributions during the debates. During the Commons Second Reading the words 'Christ', 'Christian', 'Christianity' and 'God' occurred 77 times, 28 times by Conservatives and 49 times by others (but this includes the Northern Irish MPs who significantly inflated the figure). Occasional reference was made to other faiths such as Islam and Judaism, but Christianity dominated.

A religious narrative permeated the Bill's entire passage, although it was an unreliable indicator of a speaker's party allegiance or voting behaviour: Christianity was prayed in aid by members of all main parties and by the Bill's supporters and opponents alike. The words 'free' and 'freedom' were used 83 times, and 'liberty' 10 times, mostly by Conservatives, and almost always when voicing concern over the Bill's perceived threat to religious liberty, ie almost never as an argument *for* same-sex marriage ('equal'/'equality' often did the work there). This supports the view that Conservatives opposed the Bill for two main reasons: it would harm the institution of marriage, and restrict religious freedom to speak out against same-sex marriage and for ministers and churches to refuse to conduct same-sex marriage ceremonies.

## **Conservatives and conservatism in the Commons Second Reading**

The remainder of this chapter focuses on the House of Commons Second Reading, which ran for six hours on 5 February 2013. I have focused on this debate because the speeches tended to be more concerned with the broad themes of the Bill (particularly arguments pro and contra same-sex marriage) rather than with the

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<sup>86</sup> On which, see Giles Goddard, 'The Church of England and Gay Marriage: What Went Wrong?' in Nicola Barker and Daniel Monk (eds), *From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections* (Routledge 2015).

<sup>87</sup> HC Deb 5 February 2013, vol 558, col 129.

details thereof, and as such I believe that the speakers' ideas and beliefs are made plainer. I divided my detailed analysis into two, and considered the arguments of Conservative MPs in favour of the Bill and of those against. A total of 115 members of parliament spoke in the debate, of whom 56 were Conservative. Speeches were limited to four minutes, which typically amounted to about 600 words of text. At the end of the debate the House voted – it was a free vote – in favour 400 to 175, with Conservatives voting 136 against, 127 in favour, and 40 abstentions.

### **Conservative MPs in favour of the Bill**

I have noted that a large minority of Conservative MPs voted in favour of the Bill. Younger MPs and those elected to parliament in 2010 were more likely to support the Bill, and the majority of Conservative supporters in the Commons were female. Conservatives used the word 'institution' (in relation to marriage) on 34 occasions (non-conservatives: 21 occasions) and 'tradition'/'traditional' on 20 occasions (non-conservatives: 21 occasions). Non-conservative MPs made 67 references to the words 'equal', 'equally' and 'equality' in their arguments in favour of the Bill, while Conservative supporters referred to the same term 41 times. The former group used 'fair' or 'fairness' only twice but the latter made seven references to it. This is a crude indicator of the discursive strategies employed in parliament, but it does give a sense that Conservatives used a broadly similar lexicon to non-Conservatives in framing their arguments.

The Second Reading motion was moved by the Conservative minister, Maria Miller. Her speech was a hybridised defence of the Bill's central provision, drawing on conservative and liberal ideas. She began by seeming to plant her flag firmly on liberalism's lawn: 'Parliament should value people equally in the law, and enabling same-sex couples to marry removes the current differentiation and distinction',<sup>88</sup> and then underlined the Bill's liberal credentials by insisting that 'this is not about numbers'.<sup>89</sup> The minister was referring to the (Christian) Coalition for Marriage online petition, which obtained about ten times the support of the Coalition for Equal

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<sup>88</sup> HC Deb 5 February 2013, vol 558, col 125.

<sup>89</sup> Ibid, col 127.

Marriage, yet this reform was about the advancement of minority rights, notwithstanding the tyranny of apparent internet majorities.<sup>90</sup>

However, Miller then moved into familiar conservative territory with a Burkean argument that marriage has evolved over time.

Some say that the Bill redefines marriage, but marriage is an institution with a long history of adaptation and change...Suggestions that the Bill changes something that has remained unchanged for centuries simply do not recognise the road that marriage has travelled as an institution.<sup>91</sup>

She drew again on both political traditions in the following conclusion to her speech, although she made no attempt to adduce any evidence to establish her claim about the Bill supporting and cultivating marriage:

[T]his Bill is about one thing – fairness. It is about giving those who want to get married the opportunity to do so, while protecting the rights of those who do not agree with same-sex marriage. Marriage is one of the most important institutions we have; it binds families and society together, and it is a building block that promotes stability. This Bill supports and cultivates marriage, and I commend it to the House.<sup>92</sup>

A similar hybrid approach is seen in Margot James' contribution, although her words are also remarkable for her denunciation of the social conservatism of the American Republican Party. Despite her attempt to distance her own views from those held by those in what is often considered to be the Conservatives' sister party, she demonstrated some awareness of her Party's anxieties about the Bill's impact on tradition. It is doubted that her assurance will have satisfied sceptical colleagues as no attempt was made to discharge the burden of proving that the measure's benefits will outweigh its societal costs.

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<sup>90</sup> See also Sarah Wollaston, HC Deb 5 February 2013, vol 558, col 131; and Jane Ellison, *ibid*, col 206.

<sup>91</sup> *Ibid*, col 126.

<sup>92</sup> *Ibid*, col 133.

My party should never flinch from the requirement to continue this progression [towards treating people equally]; otherwise we may end up like the Republican party, which lost an election last year that it could have won were it not for its socially conservative agenda...I can assure hon. Members that this will not undermine tradition.<sup>93</sup>

Others also seemed to misunderstand how change is understood within the conservative ontology. John Howell switched the burden of proof and placed it on those opposing same-sex marriage: 'No compelling case has yet been made against the change'.<sup>94</sup> But to his limited credit he then went on to mention Spain's introduction of same-sex marriage in 2005 and his view that since then 'life has gone on as normal',<sup>95</sup> although this mere assertion hardly passes as sound empirical data.

On the other hand, some contributors demonstrated an accurate understanding of the inevitability of change and the conservative imperative that change should also be continuity as far as possible:

I am by nature a small "c" conservative. I do not like change...For conservatism to work, we have to accept that the world changes. If we do not, we become an anachronism. What we have to do as Conservatives is to shape that change and try to preserve the best of what we inherited.<sup>96</sup>

Nick Herbert highlighted how today's heresy is often tomorrow's orthodoxy with a statement which also belongs to the classical conservative school:

I believe that many who do not share that view nevertheless have a principled concern that gay marriage would mean redefining the institution for everyone, yet Parliament has repeatedly done that. If marriage had not been redefined in 1836, there would be no civil marriages. If it had not been redefined in 1949, under-16-year-olds would still be able to get married. If it had not been redefined in 1969,

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<sup>93</sup> Ibid, col 164.

<sup>94</sup> Ibid, col 216.

<sup>95</sup> Ibid.

<sup>96</sup> Gavin Barwell, HC Deb 5 February 2013, vol 558, col 218.



we would not have today's divorce laws. All those changes were opposed.<sup>97</sup>

How Conservatives understood the magnitude of a proposed change on a revolutionary/evolutionary scale was an indicator of whether they would go on to support it. For those MPs who perceived same-sex marriage as a positive broadening of the marriage franchise which would increase the sum total of human happiness, it was then a small step for them to endorse the measure, and even more so if they were satisfied that no damage would ensue to opposite-sex unions. The following two contributions demonstrate this point:

My starting point in this debate is that if we can extend to some people rights that will bring them great joy and happiness, without damaging the rights of other people or institutions, that is a good thing. I believe that that is what the Bill sets out to do.<sup>98</sup>

Essentially, we are asking whether we can remove the barriers that stop same-sex couples enjoying the commitment - the "at one" meaning - of marriage. That is what the Bill comes down to. It does not redefine marriage; it just takes away barriers.<sup>99</sup>

It was unusual for parliamentarians – especially Conservative ones - actually to make explicit reference to political philosophers, and even rarer for them to quote them. Given conservatism's antipathy towards liberalism, it was surprising that Andrea Leadsom (who abstained) quoted Mill's harm principle and esteemed him as one of her political heroes.<sup>100</sup> There are numerous examples of other supporters making naked appeals to liberal values in their arguments, with little or no attempt to place them within a conservative framework. Mike Freer, reflecting on his own civil partnership, said:

I am not asking for special treatment; I am simply asking for equal treatment...I ask my colleagues, if I am equal in this House, to give me every opportunity to be equal. Today, we have a chance to set

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<sup>97</sup> Ibid, col 155.

<sup>98</sup> Jane Ellison, *ibid*, col 206.

<sup>99</sup> Peter Bottomley, HC Deb 5 February 2013, vol 558, col 212.

<sup>100</sup> *Ibid*, col 221.

that right and I hope that colleagues will join me in voting yes this evening.<sup>101</sup>

In chapter three I drew on insights from the knowledge and change principles in tentatively offering the following classical conservative argument in favour of same-sex marriage:

We value marriage because of its functional benefits and not for metaphysical reasons. We therefore have no objection on normative grounds to same-sex marriage and we recognise that in order to conserve the institution of marriage it might be necessary for it to change. But any change carries risks that marriage and society may be, somehow, damaged. In arguing for this change therefore we need to show that institutional and societal damage will not ensue, or at least that the risks of any damage are outweighed by the potential benefits of the change. And should unforeseen damage ensue, then it ought to be possible to reverse the change.

Following my close reading of the debates, I found that, at best, speeches made in support of the Bill sometimes contained a partial appeal to conservative principles, but there were no examples of the wholesale deployment of the argument outlined above.

### **Conservative MPs against the Bill**

The conservative knowledge and change principles were more apparent in the discourse of those MPs who spoke against the Bill, and some MPs in particular articulated them with clarity and precision. However, there were a number of examples of the error Muller identifies in his discussion of conservatism and orthodoxy. It is sometimes a fine line in practice between tradition and orthodoxy, but Muller is clear that '[t]he orthodox theoretician defends existing institutions and practices because they are metaphysically *true*'.<sup>102</sup> An example of an orthodox,

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<sup>101</sup> Ibid, col 179.

<sup>102</sup> Jerry Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press 1997) 4 (original author's emphasis).

rather than a conservative, defence of marriage can be seen in Roger Gale's contribution:

It is not possible to redefine marriage. Marriage is the union between a man and a woman. It has been that historically and it remains so. It is Alice in Wonderland territory - Orwellian almost - for any Government of any political persuasion to try to rewrite the lexicon. It will not do.<sup>103</sup>

Others thought that it was 'impossible' for the sponsoring minister to change the meaning of the word 'marriage' through legislation.<sup>104</sup> These are all at root semantic arguments about the immutability of the word 'marriage', which are founded neither on the reality of parliamentary supremacy nor on conservative doctrine.

Turning to consider examples of well-framed conservative arguments, the knowledge principle was evident in Edward Leigh's speech:

We must get away from the idea that every single thing in life can be forced through the merciless prism of equality. I am a Conservative. I believe we should be concerned with equality, but not at the expense of every other consideration - not at the expense of tradition. We should be in the business of protecting cherished institutions and our cultural heritage. Otherwise, what is a Conservative party for?<sup>105</sup>

And he concluded with, 'I will vote tonight to proclaim my support for the future of our children and for the essence of traditional marriage'.<sup>106</sup> These words are reminiscent of Burke's social contract theory. Burke rejected Rousseau's theory but believed in a social contract based on the enduring link of intergenerational responsibility: '[A] partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born'.<sup>107</sup>

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<sup>103</sup> HC Deb 5 February 2013, vol 558, col 152.

<sup>104</sup> Cheryl Gillan, *ibid*, col 174; see also Leigh, *ibid*, col 161; Howarth, *ibid*, col 185; David Simpson (Democratic Unionist), *ibid*, col 202; and Ian Paisley (Democratic Unionist), *ibid*, col 206.

<sup>105</sup> HC Deb 5 February 2013, vol 558, col 161.

<sup>106</sup> *Ibid*.

<sup>107</sup> Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 2004) 194.

Aspects of the change principle are clear in this excerpt from Angie Bray's speech: 'I would like to make it clear that, although I am not implacably opposed to change, I need to be convinced that it is necessary and has been properly thought through'.<sup>108</sup> She insisted that change must arise from a felt need and its likely effects evaluated prior to implementation. Gerald Howarth also questioned the mandate for 'this massive social and cultural change'.<sup>109</sup>

Democratic Unionist MP Ian Paisley (conservative, but not Conservative), took a similar, but more detailed line, although still stymied by the causation issue:

[T]he facts paint a very different picture. Since same-sex marriages were introduced in Portugal, Spain and the Netherlands, the number of mixed-sex marriages has decreased considerably - indeed, by tens and tens of thousands - *[Interruption.]* The facts are clear. When they were introduced in Spain, 208,000 people were married in mixed-sex marriages, whereas last year 161,000 people were married in mixed-sex marriages, so the numbers are declining, not increasing.<sup>110</sup>

Albert Hirschman identified three principal conservative stances towards change: the perversity thesis (action to improve an aspect of social life will only make that aspect worse), the futility thesis (the proposed change will not work), and the jeopardy thesis (the change threatens to harm a previous, precious accomplishment).<sup>111</sup> The jeopardy thesis, in particular, was evidenced in the oft-heard argument that same-sex marriage would undermine opposite-sex marriage. It is not worth quoting examples of this claim from opponents because it is never developed beyond a mere assertion. The claim was, however, countered in a rather mocking fashion by a number of the Bill's proponents:

The other argument against the Bill is that it would undermine marriage. Mrs Barwell suffers enough as a result of my job, and if I thought it likely that I would go home tonight only to be accused of undermining my marriage by voting for the Bill, I would not vote for it.

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<sup>108</sup> HC Deb 5 February 2013, vol 558, col 174.

<sup>109</sup> Ibid, col 130.

<sup>110</sup> Ibid, col 136.

<sup>111</sup> Albert Hirschman, *The Rhetoric of Reaction* (The Belknap Press of Harvard University 1991).

However, no one has yet come up with a credible explanation of how it would undermine marriage.<sup>112</sup>

Finally, a number of opponents appeared to rely on the Burkean understanding of MPs as representatives, not as delegates, citing overwhelming opposition to the Bill from constituents. For example, John Glen said, 'By a factor of at least 30:1, my constituents have expressed their opposition',<sup>113</sup> and Fiona Bruce added, 'I also thank the many constituents of faith and of no faith who have written to me urging me to vote against this Bill - some 95% of those who wrote to me have done so'.<sup>114</sup> There was certainly a strong element of confirmation bias in how opponents interpreted the significance of the contents of their mailbags and email inboxes. However, the constitutional expert and Conservative peer, Lord Norton, had a more rational analysis. His view was that these letters were 'political intelligence, not somehow a reflection of public opinion',<sup>115</sup> explaining that various opinion polls have shown a shift in public support for same-sex marriage in recent years.

## CONCLUDING REMARKS

There are some obvious similarities between the Conservative Party's treatment of the Civil Partnership Bill and the Marriage (Same Sex Couples) Bill: both Bills polarised opinion within the parliamentary and voluntary Party; the Party leadership came out clearly in support of both Bills; and in relation to both Bills Conservatives were permitted a free vote on central matters. Significantly, both Bills were also not only politically expedient, but also economically expedient during a period of welfare retrenchment.<sup>116</sup> The legal recognition of same-sex relationships enables the state to further privatise care and dependency through enlisting the help of gay and lesbian people who chose to enter into civil partnerships and marriage. While it is a

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<sup>112</sup> Gavin Barwell, HC Deb 5 February 2013, vol 558, col 218.

<sup>113</sup> Ibid, col 191.

<sup>114</sup> Ibid, col 193; see also Jim Shannon (Democratic Unionist), ibid, col 164; Howarth, ibid, col 184; Christopher Chope, ibid, col 187; Bob Blackman, ibid, col 223; Kris Hopkins, ibid, col 219; Bob Stewart, ibid, col 184.

<sup>115</sup> HL Deb 4 June 2013, vol 745, col 1095.

<sup>116</sup> Welfare spending fell by 1.5 per cent of GDP between 1993 and 2008, increased by 2.5 per cent of GDP from 2008 to 2013, and is forecast to fall by 1.2 per cent of GDP from 2013 to 2019. See, Office for Budget Responsibility, *Welfare Trends Report, October 2014* (Office for Budget Responsibility 2014) 6-7.

matter of perspective whether this is a 'troubling economic policy',<sup>117</sup> the law's emphasis on family function over family form imbues the family with greater utility in a capitalist, neoliberal state.<sup>118</sup> As I noted in chapter three, however, this view of the family as a miniature welfare state is not exclusive to neoliberalism, but is also to be found in conservative thought. For perhaps obvious reasons, the privatisation of care was not an explicit policy objective of the civil partnership and same-sex marriage legislation,<sup>119</sup> although this is clearly a significant side effect of the reforms.

There were, however, some significant differences between the two Bills. First, conservative arguments in favour of the legal recognition of same-sex relationships were more readily articulated in the civil partnership debates chiefly because it was seen as an evolutionary development and there was no existing institution which would be the subject of change. There was generally no concern that marriage would be threatened – unless civil partnership was extended to opposite-sex couples – and opposition was therefore conceptualised in the obfuscatory terms of the spinster sister argument. There is evidence that some Conservatives accepted civil partnerships in order to remove pressure for calls for same-sex marriage – a good example of a Burkean approach – but it did not work out that way.

Second, in the same-sex marriage debates it was clear that marriage was being redefined; an existing institution was being changed. How a Conservative perceived the change affected the likelihood that they would support and promote it. Does same-sex marriage *change* the concept of opposite-sex marriage, or do they just exist alongside each other, with each one catering for the needs of a different constituency? I would argue that where on a revolutionary/evolutionary scale of change a Conservative MP perceived the legalisation of same-sex marriage affected how willing they were to support the Bill (or perhaps causation was flowing the other way?). For example, Leigh, 'The Minister claims that marriage has always evolved. The Bill is not evolution, but revolution';<sup>120</sup> Howarth, 'This is a massive change';<sup>121</sup> Burrowes, 'This is indeed an historic change'.<sup>122</sup> Compare these

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<sup>117</sup> Nicola Barker, 'Two Myths About Same-Sex Marriage' in Anastasia De Waal (ed), *The Meaning of Matrimony* (Civitas 2013) 80.

<sup>118</sup> Richard Collier and Sally Sheldon, *Fragmenting Fatherhood* (Hart 2008) 21.

<sup>119</sup> There is no mention of it in either of the Government's Impact Assessments: Government Equalities Office, *Marriage (Same Sex Couples) Bill – Impact Assessment, January 2013* (HM Government 2013) 5; *Marriage (Same Sex Couples) Bill – Impact Assessment, April 2013* (HM Government 2013) 5.

<sup>120</sup> HC Deb 5 February 2013, vol 558, col 161.

<sup>121</sup> *Ibid*, col 183.

<sup>122</sup> *Ibid*, col 197.

statements with the following one from Peter Bottomley, 'It does not redefine marriage; it just takes away barriers'.<sup>123</sup> MPs who constructed same-sex marriage as a radical change – a redefinition of marriage – tended to oppose it (eg Leigh, Howarth, Burrowes), whereas others who saw it as merely extending the marriage franchise to same-sex couples, approached it as an evolutionary change which could be accommodated within their conservative mindset (eg Bottomley).

My analysis of the 2013 debates indicates that conservative ideology was more readily articulated in *opposition* to the Bill, rather than in favour of it. This is perhaps unsurprising, given that conservatism is more easily deployed as a politics of opposition and stasis. Other grounds to support the MSSC Bill therefore had to be found. Conservative MPs in favour almost all conceptualised their support (in so far as they did conceptualise it) in hybridised terms, drawing from liberal ideas and the conservative assimilationist arguments outlined in chapter three. They tended not to construct their support exclusively from conservative political theory, in an apparent departure from their Party leader's boast that he was a supporter of same-sex marriage *because* he is a conservative.<sup>124</sup> Moreover, it is clear that the majority of Conservative MPs did not agree with David Cameron that support for same-sex marriage should follow from being conservative. This was apparent at Third Reading, when 133 Conservative MPs voted against the Bill and 117 in favour. I suggest that this lack of reliance on a conservative conceptual framework might be for three reasons:

1. Conservatives are simply more comfortable conforming to the dominant liberal narrative of equality and fairness. Perhaps they perceive that this makes them (seem) more in touch with the *Zeitgeist* and therefore more electorally attractive; or
2. They are not familiar enough with the tenets of classical conservatism to be able to construct an argument from them in favour of same-sex marriage; or
3. That they are aware of the arguments in support but were simply not able to deploy them as they could not produce sufficient evidence to satisfy the Oakeshottian insistence on proof that change would bring a net societal

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<sup>123</sup> Ibid, col 212.

<sup>124</sup> David Cameron, 'Speech to Conservative Party Conference' (Conservative Party Conference, Manchester, 5 October 2011).

benefit because *the changes had not yet happened*. Wax identifies this probative problem as ‘a war that conservatives are destined to lose’.<sup>125</sup> This limitation effectively means that in many policy areas conservatism lacks a practical theory of progressive change.

My findings do not go as far as John Barnes’ conclusion that conservative ideology ‘arguably plays very little part in shaping the way the Party actually operates’,<sup>126</sup> but conservatism’s influence was certainly diluted. This is nothing new: the Conservative Party has never been simply a conduit through which the pure ideological waters of conservatism flow. Perhaps it is asking too much to expect intellectual coherence in the Conservative Party’s approach towards the legal recognition of same-sex relationships. And perhaps its support for civil partnership and its trailblazing of same-sex marriage are merely further expressions of its *raison d’être* ‘to acquire and exercise power’.<sup>127</sup> What is clear is that the Conservative Party’s attitude to the legal recognition of same-sex relationships has changed over the last thirty years. This change has been possible because, as I have argued implicitly here, it holds its ideology lightly, and pragmatism has often prevailed over principle.

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<sup>125</sup> Amy Wax, ‘The Conservative’s Dilemma: Traditional Institutions, Social Change and Same-Sex Marriage’ (2005) 42 *San Diego Law Review* 1059, 1083.

<sup>126</sup> John Barnes, ‘Ideology and Factions’ in Anthony Seldon and Stuart Ball (eds), *Conservative Century: The Conservative Party since 1900* (OUP 1994) 318.

<sup>127</sup> Robin Harris, *The Conservatives: A History* (Bantam Press 2011) 4.



## CHAPTER 9

### CONCLUSION

#### THE END OF ILLUSION, OR, WHY IT IS NEVER THE RIGHT TIME TO BE A CONSERVATIVE

In chapter one I set out the questions which would guide my research. Having completed my study, I now return to summarise my answers to those questions. Rebecca Probert writes that '[t]he process of research is rather like doing a jigsaw without the picture on the box: one does not know what one is going to find until most of the pieces are in place'.<sup>1</sup> This has largely been my experience, although I thought I had at least a vague idea what the picture looked like when I began. The picture which has emerged is more in the style of abstract than realist art, and that complex and discordant image is what I attempt to sketch out in this closing chapter.

#### RESEARCH QUESTION ONE

What are the core elements of a conservative disposition towards family law, particularly regarding the regulation of intimate adult relationships?

This was considered in detail in chapter three. I formulated my approach under two headings: the knowledge principle and the change principle. Throughout this thesis I have maintained this understanding of conservatism as an ontology which is sceptical of claims to grand universal theory and averse to abstraction when it is not informed by the lessons of history and tradition. Conservatism is also centrally concerned with the management of change. The application of the conservative change principle to the dynamism of family law in late modernity has proved a richly fertile field of inquiry, as I had hoped and expected. I also synthesised elements of the conservative canon to attempt what I categorised as a disposition towards some

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<sup>1</sup> Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (CUP 2012) 278.

specific issues in the legal regulation of intimate adult relationships. I will summarise under question five below my reading of the extent to which this disposition was actually reflected in the case studies of family lawmaking in chapters four to eight.

## **RESEARCH QUESTION TWO**

To what extent has the substance of the law under discussion here been determined by Conservative Party politicians?

As this question suggests, by concentrating on the (party) political forces at work during the period I was not necessarily seeking to argue that those forces were the most significant ones in shaping the development of family law at that time. I was interested in the possibility that, despite the apparent importance that Conservative politicians attribute to family law matters, much of the law had in fact emerged from locations outside of the Conservative Party's policymaking apparatus.

My research shows that the Conservative Party's power to initiate and determine the final form of legislation was constrained largely by the deliberative and pluralistic nature of democratic decision-making. The issue of experts was raised by Conservative opponents to Bills, particularly during the passage of the MFPA 1984 and the FLA 1996. Modern states are immeasurably more complicated than those in Burke's time, and governments cannot do without experts if they want to implement evidence-based law and policy. While many of the statutes discussed above were of interest to the popular press because they contained newsworthy themes, they were also often highly technical and detailed pieces of legislation. The lawmaking machinery required to produce such legislation inevitably involves specialist committees and commissions, and public consultations eliciting popular and expert opinion. Once that mass of information is put into the mix, this limits the scope for a governing party to shape draft legislation in line with its own ideology, and that is even before a Bill traverses the turbulent waters of the parliamentary process.

The extent to which Conservative politicians have determined the final form of the legislation examined in this thesis has varied between statutes. In chapter four I looked at the time bar and the clean break in the Matrimonial and Family Proceedings Act 1984. The time bar was mostly a symbolic measure, whereas the clean break was of much greater practical significance. Despite much heat and light

being generated in the parliamentary debates, the Act ended up, for all intents and purposes, exactly as the Law Commission had recommended.

The Family Law Reform Act 1987, which abolished the concept of illegitimacy, was driven by the work of the Law Commission and the influence of the European Court of Human Rights. In contrast, while the Surrogacy Arrangements Act 1985 followed the recommendations of the Warnock Report, its timing was directly influenced by the Thatcher cabinet in response to controversial events which were widely reported in the media. The Human Fertilisation and Embryology Act 1990 was also the progeny of the Warnock Report, although probably its most controversial provision – the requirement to consider a child’s need for a father as part of the welfare evaluation in section 13(5) - was the result of an amendment by Conservative backbench MP, David Wilshire. It seems that this subsection made little difference to the practice of fertility clinics,<sup>2</sup> but it was another example of the deployment of the symbolic function of law. The Children Act 1989 bore the hallmarks of Thatcherite concerns over personal responsibility and suspicion of state involvement in the family, but it nonetheless came about largely as the confluence of many streams, some from within central government, and others from the peripheries of officialdom. By contrast, the Child Support Act 1991 stands out as an exception to my finding that the influence of Conservatives in family lawmaking was diluted within the democratic legislative process. The CSA 1991 had the imprimatur of Thatcher herself, and the Act exhibited clear linkages between political ideology and law.<sup>3</sup> However, regardless of the merits of the principles of the Act, its implementation is a well-documented failure.

Part II of the Family Law Act 1996 had a more complex evolution than the divorce reforms in the MFPA 1984, but it remained true to its Law Commission blueprint in so far as divorce became, or would have become, a process over time. Clearly, the Act differed in some important respects from the Law Commission’s vision and these differences resulted from Conservative influences during the legislative process. I venture to suggest that if Part II had been true to the Law Commission’s recommendations then it might not have failed. So, perhaps, direct Conservative influence was instrumental in the Act’s undoing.

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<sup>2</sup> Gillian Douglas, ‘Assisted Reproduction and the Welfare of the Child’ (1993) 46 *Current Legal Problems* 53.

<sup>3</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 630; Mavis Maclean and Jacek Kurczewski, *Making Family Law* (Hart 2011) chapter 3.

Conservative Party legislators in the House of Lords succeeded in securing amendments to the Civil Partnership Bill which would have fundamentally altered the character of civil partnerships. However, not only were those amendments reversed in the House of Commons, they were not the official position of the Party and not therefore supported by the Party leadership. The Party line was firmly behind the Labour Government's proposals, but in any event Labour's substantial majority meant that it could easily get its legislative way without help from other parties (at least in the Commons). The Conservative Party's support for civil partnerships is significant, therefore, as evidence of its radical change of attitude towards the legal regulation of same-sex relationships and for the reputational benefits which flowed to the Party as a result, but the Party's support did not alter the shape of the Act itself.

The Marriage (Same Sex Couples) Act 2013 is, of course, a different story. In time, following the publication of memoirs and the release of official files, more will become known about the genesis of the Act, but until then it appears that the Conservative and Liberal Democrat parties competed for ownership of the Bill, and David Cameron was personally committed to driving through the reform.<sup>4</sup> Of the four statutes considered in chapters four, and six to eight, the MSSCA 2013 is perhaps the one which, judging from a twentieth-century perspective, one might have least expected to be advocated by the Conservative Party. While the Bill encountered substantial opposition from the Party's voluntary and parliamentary wings, I have shown that same-sex marriage can be accommodated within a conservative approach to the family, although there are difficulties with meeting some of the demands of the change principle.

Ultimately, given the nature of the United Kingdom's parliamentary system, a majority government can, at least in theory if not in practice, do what it likes when it comes to making family law. However, lawmaking in the UK is based on the implicit assumption that a broad, inclusive, consultative approach leads to better law.<sup>5</sup> My study shows that the Conservative Party leadership has tended to hold to that assumption, and on the occasions when the leadership deviated from it and took a

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<sup>4</sup> See, Matthew D'Ancona, *In It Together* (Penguin 2013) 310-312; also, Iain Dale, 'Can You Be Gay and Be a Tory?' (*iaindale.com*, 24 November 2013) <<http://iaindale.com/posts/2013/11/24/attitude-column-can-you-be-gay-and-be-a-tory>> accessed 16 December 2015.

<sup>5</sup> Mavis Maclean and Jacek Kurczewski, *Making Family Law* (Hart 2011); David Feldman (ed), *Law in Politics, Politics in Law* (Hart 2013).

more party political line the results were not always successful. My methodology that the Conservative Party operates from a position of situated agency has led me to credit it with being instrumental in the legalisation of same-sex marriage, for example, but in matters of divorce reform it was largely at the mercy of powerful social winds blowing it away from the shores of traditional notions of marriage towards the new world of 'pure relationships'<sup>6</sup> and 'love' as 'secular religion'.<sup>7</sup>

### RESEARCH QUESTION THREE

Has the Conservative Party's attitude to the legal regulation of intimate adult relationships changed over the period under consideration?

The first challenge in answering this question is establishing what I mean by the 'Conservative Party'. Who is the Conservative Party, and who speaks for it? What is abundantly clear from the preceding chapters is the heterogeneity of the Party. Like all political parties it incorporates a diversity of beliefs about the relationship between the state, families and individuals. The distinction I have tried to maintain throughout my work is between official Conservative Party positions and those of other Conservatives who deviate from the official line. Returning to Probert's jigsaw analogy, not one, but two pictures have emerged as a result of my research: broadly speaking, pictures of two Conservative Parties.

In most writing about British conservatism and social policy, legislators are usually grouped into two camps: social liberals and social conservatives. Put crudely, it appears to me that Conservatives who embrace social change are often categorised as social liberals, and those opposing change are labelled social conservatives. From the outset, I have not accepted this simple dichotomy. It has been one of my aims to better understand what social conservatism means and critically to identify examples of it in operation in the lawmaking process. So, in answering question three I will consider how the official line taken by the Party has changed since the 1980s, and also comment on the state of alternative opinion in the Party during that period. Change is more evident in the former, with an enduring

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<sup>6</sup> Anthony Giddens, *The Transformation of Intimacy* (Polity 1993).

<sup>7</sup> Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity Press 1995).

core of continuity apparent in the latter. I will reserve commenting on which Conservative positions were more consistent with conservatism until question five.

I begin with the area of personal life where a change of approach has been unequivocal. Looking at the official Party attitude as reflected in the discourse of Conservative ministers or shadow ministers, there has been a marked change in its legal regulation of the intimate lives of gay and lesbian people, as the journey from section 28 of the Local Government Act 1988 to the Marriage (Same Sex Couples) Act 2013 starkly illustrates. This stands as one of the most remarkable socio-legal policy shifts in modern British history, yet, as I have argued, it is one which can be seen as broadly consistent with a classical conservative approach. I identified a number of drivers of this change, but without claiming to have exhausted the list of possible catalysts: responding to changing social attitudes; a heightened rights and equality discourse as a result of the Human Rights Act 1998 and decisions of the European Court of Human Rights; a desire to rebrand the Party's image; a Prime Minister in David Cameron who was personally committed to legalising same-sex marriage; and an increased number of openly gay members of the parliamentary Party. Whatever the inspiration and motivation for these changes, they seem to have had the desired effect on voters.<sup>8</sup>

The point of overlap between the legal regulation of opposite-sex and same-sex relationships has been marriage. Officially, the Party has stayed true to its belief that marriage is the optimal context for the flourishing of coupled individuals and for the raising of children. However, it has sent mixed messages regarding unmarried cohabitation, sometimes enhancing the legal status of cohabitants (eg in the Housing Acts 1985 and 1988), but otherwise being careful not to undermine marriage (so the argument goes) by privileging cohabitation in law and policy. The mostly superficial distinctions between civil partnership and marriage reassured the Party leadership that marriage-like reforms are actually preferable to marriage-lite ones. I observed that once Cameron was vested with the premier's authority, he let rip his deduction that if commitment is good for society, and if marriage is about commitment, then marriage should also be open to same-sex couples.<sup>9</sup> In the

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<sup>8</sup> Andre Rhoden-Paul, 'Tories Draw Level With Labour in Winning Gay Vote' (*The Guardian*, 23 March 2015)  
<<http://www.theguardian.com/politics/2015/mar/23/tories-level-labour-gay-vote>> accessed 2 December 2015.

<sup>9</sup> David Cameron, 'Speech to Conservative Party Conference' (Conservative Party Conference, Manchester, 5 October 2011).

process of the Party leadership – and a majority of Britons – coming to support same-sex marriage, the Party’s privileging of marriage, both rhetorically and in policy, has not altered.

The extent to which I can comment on how the Party’s attitude to divorce has changed over time is limited because my consideration of divorce law and policy is mostly confined to the years from the late seventies to the mid-nineties. There was some coverage of the legal basis for dissolution and divorce in the CPA 2004 and MSSCA 2013 debates, but this was incidental to the main issue regarding the new legal status for same-sex couples, although it does confirm that the Party had no plans for the radical overhaul of divorce like the one it attempted in the FLA 1996.

The Party’s attitude to divorce law is more complicated than that pertaining to marriage, and it is riven with tension and antinomy. Threads of continuity were evident in the formation of the MFPA 1984 and the FLA 1996, namely a preoccupation with the symbolic function of law as a means of attempting to impose a moral code from which large sections of the population had departed, and a lack of obvious concern over inequalities and imbalances of power in the divorce process and post-divorce settlements. In general, the official line was one of divorce as concession; preferring to live in a world where only death dissolved marriages, but being realistic that a legal remedy was necessary. However, in the FLA 1996 this concession came with paternalistic strings attached, with hope being placed in the agency of law to save marriages. When the time comes to reconsider divorce law reform, I would expect the Party to adopt the more pragmatic tone of the MFPA 1984, rather than revisit the ‘divorce gospel style’<sup>10</sup> of the FLA 1996.

In contrast to the official position, a more consistent approach to the legal regulation of intimate adult relationship is observed amongst Conservatives opposed to the statutes considered in chapters four to eight. Over the four decades I surveyed, opponents steadfastly stood against any attempts which they perceived would make divorce easier to obtain (eg reduction of the time bar and removal of the fault grounds for divorce), although they were ambivalent towards the potential for the clean break to undermine traditional notions of interdependence in marriage.

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<sup>10</sup> Michael Freeman, ‘Divorce Gospel Style’ (1997) 27 Family Law 413.

There was also a thread of continuity in the Conservative opposition to homosexual law reform. The complex story of the parliamentary debates around civil partnership includes some short-lived successes for opponents in their attempts to widen the scope of the new legal status. Some opponents were candid about their antipathy to homosexuality, but most claimed to be concerned with the interests of family members who would be unable to register partnerships (the spinster sister issue) or that civil partnership would lead to same-sex marriage, thereby undermining marriage. This last concern, along with worries about religious expression, formed the core of opposition speeches in the same-sex marriage debates, in which more Conservative MPs voted against the Bill at Second and Third Readings than for it.

The consistency in the opposition method is partly due to the personnel involved. The names of some Conservatives appear numerous times in the pages of Hansard across a range of statutes spanning the last few decades: Christopher Chope, Gerald Howarth, Jill Knight, Edward Leigh, James Mackay, Detta O’Cathain and Janet Young. Ideology is merely history if it is not incarnated in institutions and individuals, and these individuals were, and in some cases still are, instrumental in the defence of the traditional, heterosexual family form. Despite obvious shifts in how people in Britain do family, opponents have struggled with ‘the dilemma as to whether law should be about the world as it is, or as we would like it to be’.<sup>11</sup> Unlike the Party’s leadership, which tended towards a pragmatic disposition, opponents’ attempts to recover a lost world of family life (if it ever existed as they suppose) had an air of unreality about them. O’Gorman sums up the position well:

In some ways, then, Conservatism operates at two levels. On the one hand there is the Conservatism of sentiment, nostalgia and symbolism while on the other there is the Conservatism of reason, necessity and political reality.<sup>12</sup>

I interpret his use of ‘Conservatism’ here as meaning the praxis of the Conservative Party, with his first level describing opponents, and the second level consistent, in the main, with my reading of the official Party line on the legal regulation of intimate adult relationships.

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<sup>11</sup> Ezra Hasson, ‘Setting a Standard or Reflecting Reality? The Role of Divorce Law, and the Case of the Family Law Act 1996’ (2003) 17 *International Journal of Law, Policy and the Family* 338, 362.

<sup>12</sup> Frank O’Gorman, *British Conservatism: Conservative Thought from Burke to Thatcher* (Longman 1986) 7.



## RESEARCH QUESTION FOUR

What does the modern Conservative Party think family law is *for*, at least in so far as it relates to the regulation of intimate adult relationships?

In this section I again draw a distinction between the perspective of the Conservative Party qua government or official opposition and the view of a majority of opponents within the Party. There have been points of agreement between the two camps, but I will also note the significant areas of divergence.

Clearly, the Party as a whole thinks that family law transmits messages to society. This was most evident in the debates around the time bar in the MFPA 1984 and the reform of divorce in the FLA 1996. Although the symbolic or expressive function of law was less explicit in the discourse around the CPA 2004 and the MSSCA 2013, it was probably more the Party leadership's express intention to engage the message-sending function of law in those statutes than in the two earlier statutes. The symbolic impact of the provisions in the MFPA 1984 and the FLA 1996 was largely incidental to the substantive legal provisions, but it was perhaps as significant as them in the CPA 2004 and the MSSCA 2013. Much of the opposition's recourse to the symbolic function was based on an orthodox defence of the traditional, married family. There is nothing in conservative thought which suggests it is inappropriate for Conservatives to espouse the symbolic impact of law, provided however, there is evidence that the symbolism is efficacious. If it is not, then that standpoint goes beyond even the rationality mistake into the realms of illogic and is then certainly outside the doctrines of classical conservatism.

Another thread which runs through British conservatism during this period is that of recognising and rewarding commitment, and enforcing responsibility. Thatcher emphasised these twin imperatives in her memoirs: 'All that family policy can do is to create a framework in which families are encouraged to stay together and provide properly for their children'.<sup>13</sup> She was realistic as to how much law and policy could achieve: 'We had not the slightest illusion that the effects of what could be done would be more than marginal'.<sup>14</sup> I am sceptical that this is a fully accurate description of Thatcher's time in office. However, the modest impact of the Family

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<sup>13</sup> Margaret Thatcher, *The Downing Street Years* (HarperCollins 1993) 631.

<sup>14</sup> *Ibid* 630.

Policy Groups during the 1980s verifies, to some extent, Thatcher's claim regarding 'what could be *done*' (emphasis added), although, on a rhetorical level, what could be *said* was not constrained by the limits of realism, and overblown statements about supporting the family and strengthening marriage were sometimes found in official Party communications. As Gamble observed: 'The gap between political rhetoric and political achievements, between what politicians say and what they do, is a large one'.<sup>15</sup> The gap narrowed during the leadership of Michael Howard and David Cameron, with both leaders emphasising the importance of commitment and responsibility in intimate adult relationships regardless of sexuality,<sup>16</sup> and following through with parliamentary support for the CPA 2004 and the MSSCA 2013.

There has been a shift in the official Party view of the place of equality in some aspects of family law. In the MFPA 1984 and FLA 1996 debates there was little or no claim for law to address inequalities, yet this was the Party's central narrative in the CPA 2004 and the MSSCA 2013. Why was this? In large part it was due to the cultural-legal transformation caused by the Human Rights Act 1998, which was part of New Labour's equalities agenda. Labour had moved the issue of equality in socio-economic policy to the centre ground of British politics and the Conservative Party simply had to align itself with that new paradigm in the interests of political expediency: it was another example of the Party's principled pragmatism. So, it can be asserted with some certainty that over the last decade or so the official position of the Conservative Party is that family law as it relates to gay and lesbian people should serve the function of addressing inequality. In contrast, further research would be needed before I could assess to what extent the Party's attitude to the equality of men and women generally has changed since the 1980s. Studying the law of divorce provides some insight into the gendered nature of family lawmaking, but much richer revelations are often to be found in the law and policy around housing, welfare and taxation, education, and employment rights. Clearly, things have changed. In the 1980s the Party wrestled with the notion of state-subsidised childcare, whereas in 2015 the Conservative Government announced plans for a significant expansion of 'free childcare for working families'.<sup>17</sup> In areas such as childcare, gender is now obscured to some extent by the narrative of 'working

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<sup>15</sup> Andrew Gamble, 'The Politics of Thatcherism' (1989) *Parliamentary Affairs* 350, 351.

<sup>16</sup> Nicola Barker, *Not the Marrying Kind* (Palgrave Macmillan 2012) 173.

<sup>17</sup> HM Government, 'Government Brings Forward Plans to Double Free Childcare for Working Families' (*gov.uk*, 1 June 2015)

<<https://www.gov.uk/government/news/government-brings-forward-plans-to-double-free-childcare-for-working-families>> accessed 2 May 2016.

*parents'* and '*working families*' (my emphasis), with discrimination occurring perhaps more on the basis of economic productivity rather than gender. So, while much Conservative law and policy is now ostensibly more egalitarian than in former decades, it may still be masking and reinforcing gendered assumptions in the conduct of intimate adult relationships, and therefore more work needs to be done before firmer conclusions can be reached.

Returning to my bifurcated understanding of the Party, the essential difference between the Party's two factions was that one had, in the main, become reconciled to social change, but the other had not. Officially, the Party implicitly accepted that while 'the family' may be in decline, families are not. Although the heterosexual, married family did not attract the degree of veneration amongst Conservatives it once had, in a functional sense that family type remained an important analogue of other family forms in law and policy. The Party ended up promoting policies which generally supported the reconstitution of families which had experienced divorce, and the formation of families headed by same-sex couples. This support was tacit recognition that the interests of the neoliberal state were best served, not primarily by the enforcement of spousal maintenance, but by 'legal policy support for the idea of the project of the self in which one could remake oneself and start another life'.<sup>18</sup> However, formal limitations were placed on 'the project of the self' where there were dependent children of the relationship, and Conservatives were instrumental in increasing state regulation of the adult-child dyad.<sup>19</sup> Some expressions of 'the project of the self', notably lone parents, attracted opprobrium in some of the Party discourse, and were made subject to legal sanction in, for example, the Child Support Act 1991. The Party's official emphasis on family function over family form is consistent with the conservative approach to the family I outlined in chapter three.

Conservative thought was not a significant influence on the statutes considered above, but was merely one ingredient in a recipe of family lawmaking which also included orthodoxy, (neo)liberalism, and libertarianism. Over the last three decades or so, much as Mark Jarvis observed of the middle of the twentieth century, 'the Tories found themselves presiding over an unruly modernity, which could not be

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<sup>18</sup> Carol Smart, 'Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy' (1997) 26 *Journal of Social Policy* 301, 311. See also Giddens (n 6) and Beck and Beck-Gernsheim (n 7).

<sup>19</sup> Jane Lewis, 'Debates and Issues Regarding Marriage and Cohabitation in the British and American Literature' (2001) 15 *International Journal of Law, Policy and the Family* 159, 176-177.

tamed and could only be partially influenced by policy'.<sup>20</sup> When the Party appeared to swim against the prevailing societal tide, such as in the FLA 1996, then the effects were short-lived. Ultimately, whatever the Conservative Party *thought* family law was for, in practice the Party leadership largely used it simply as a means of giving legal effect to observed social change.

## RESEARCH QUESTION FIVE

To what extent is the Conservative Party's approach to the legal regulation of intimate adult relationships consistent with the core elements outlined in response to question one above?

Some commentators, such as John Murphy, have argued that legislators are unlikely to be receptive to abstract philosophical approaches when it comes to considering reforms such as same-sex marriage.<sup>21</sup> Nicholas Bamforth, who is strongly critical of this view, concedes that politicians do not debate proposed legislation at the same level of abstraction as that found in academic articles, but claims that while 'ideas are discussed more rhetorically and loosely in the legislature [it] does not mean that they are not rooted in deeper philosophical positions'.<sup>22</sup> I might add, given conservatism's antipathy towards abstraction, that Conservative politicians would be even less likely than politicians of other parties to be attracted to the deployment of high-level theory in policy discussions. My methodology is consistent with Bamforth's position: my discourse analysis has rested on the belief that the normative arguments advanced by lawmakers all stem from a philosophical wellspring. So, although C/conservatives are unlikely to frame their arguments in theoretical terms, disconnected from experience, their arguments are no less likely 'to rest ultimately on a sense of philosophical commitment'.<sup>23</sup> What has been a continual challenge of this thesis, however, is trying to decode words in the discourse such as, for example, 'equal', 'responsibility' and 'commitment' to reach the philosophical bedrock underneath.

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<sup>20</sup> Mark Jarvis, *Conservative Governments, Morality and Social Change in Affluent Britain, 1957-1964* (Manchester University Press 2005) 167.

<sup>21</sup> John Murphy, 'Same-Sex Marriage in England: A Role for Human Rights?' (2004) 16 CFLQ 245, 250.

<sup>22</sup> Nicholas Bamforth, 'The Role of Philosophical and Constitutional Arguments in the Same-Sex Marriage Debate: A Response to John Murphy' [2005] 17 CFLQ 165, 176.

<sup>23</sup> *Ibid.*

After examining the various statutes in chapters four to eight, conclusions were difficult to draw, for reasons captured by Schneider: '[C]omplexity does make the path to generalization and theory perplexingly difficult'.<sup>24</sup> I found many examples of consonance between the actions of Conservatives and conservatism: support for marriage as an institution; an incremental approach to the development of divorce law; a pessimistic view of human moral propensities; a distrust of the role of experts in law and administration; an indifference to sexual equality claims in divorce legislation; a desire to assimilate sexual minorities into the heterosexual mainstream and to defend heteronormativity in marriage and divorce law despite its extension to same-sex couples. However, there were also many instances of dissonance between conservative thought and Conservative praxis: an unrealistic view of human behaviour in response to legislative change; the elevation of the symbolic function of law to an unreasonably and unrealistically high level; an orthodox view of marriage and a limited and piecemeal approach to the legal recognition of alternative family forms such as cohabitation; the deployment by some Conservatives of a strong equality narrative in their arguments in favour of homosexual law reform; and a tendency to gloss over the evidential demands of the change principle.

The core challenge for British conservatism, however, has been, and remains, how to manage change. If '[l]egislation is all about changing things',<sup>25</sup> then making law is always going to be a problem for C/conservatives. However, even before a C/conservative attempts to satisfy the evidential demands of the change principle, the formulation of the principle in classical conservatism is itself problematic. The principle's general vagueness, its insistence that the innovator prove a favourable cost/benefit analysis (often in cases where any costs and benefits are prospective and probably unknowable with any certainty), and the stipulation that change should ideally be reversible, all conspire to make the principle of little practical use in most matters of family law reform. Hayek summarised the problem of change for the conservative as follows:

Conservatives feel instinctively that it is new ideas more than anything else that cause change. But, from its point of view rightly, conservatism fears new ideas because it has no distinctive principles

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<sup>24</sup> Carl Schneider, 'The Next Step: Definition, Generalization, and Theory in American Family Law' (1985) 18 *University of Michigan Journal of Law Reform* 1039, 1047.

<sup>25</sup> Stephen Laws, 'Legislation and Politics' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart 2013) 88.

of its own to oppose to them; and, by its distrust of theory and its lack of imagination concerning anything except that which experience has already proved, it deprives itself of the weapons needed in the struggle of ideas. Unlike liberalism with its fundamental belief in the long-range power of ideas, conservatism is bound by the stock of ideas inherited at a given time.<sup>26</sup>

I have uncovered examples of consistency and divergence between conservatism and the Conservative Party position on the legal regulation of intimate adult relationships. Clearly, it is not necessary for a Conservative legislator to be a conservative. In an unwhipped vote, it is up to the individual member to decide how to vote, and conservatism may inform that decision in whole, in part, or in no way whatsoever. Even if the legislator is being guided by conservatism, I have observed that the application of conservative principles might reasonably result in differing outcomes (eg with regard to the allocation of private resources to first and second families on divorce). Alternatively, the legislator may be influenced, consciously or not, by liberal, libertarian, communitarian, or feminist thought, amongst others. Ultimately, the individual is shaped by 'a set of theories or narratives, and associated practices, which people inherit that form the background against which they reach beliefs and perform actions', or by 'tradition' as Bevir and Rhodes call it.<sup>27</sup>

Conservatism, as outlined in this thesis, does not seem to appeal to many Conservatives when it comes to matters of family lawmaking. But maybe it does not have to be that way. Could the change principle itself undergo change so that it becomes more of a simple cross-check that reforms are being implemented carefully and thoughtfully, much as many Conservative MPs deployed it in the Marriage (Same Sex Couples) Act 2013 debates? The answer comes down to who *owns* the idea of conservatism. And, of course, the answer is that no one owns the idea of conservatism, nor any other ideas for that matter. It is within the power of conservatives and Conservatives to remould conservatism for the twenty-first century, and perhaps the MSSCA 2013 suggests some already have. The Conservative Party has demonstrated its ability to survive political setbacks, principally through its ideological flexibility and its pragmatic approach to governing.

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<sup>26</sup> Friedrich Hayek, *The Constitution of Liberty* (first published 1960, Routledge 1999) 404.

<sup>27</sup> Mark Bevir and Rod Rhodes, 'Interpretive Theory' in David Marsh and Gerry Stoker (eds), *Theories and Methods in Political Science* (2<sup>nd</sup> edn, Palgrave Macmillan 2002) 140.

It would be unwise to predict the Party's demise any time soon. However, unless modern conservatism deploys less onerous hurdles to reforming the law, I am less sanguine about the future of conservatism as a political idea which has any practical significance for lawmakers.

## CLOSING COMMENTS

Donald Herzog identifies the essential problem with being conservative:

So it's never the right time to be a conservative, in this sense of conservatism. When illusion is in place, when the masses defer unthinkingly, when they take inequality to be providential, there is no need for conservative rhetoric. Indeed, it could only be pernicious: It could only invite people to start thinking about just those possibilities they're not supposed to think about. When "the most atrocious monsters that have ever disgraced and plagued mankind," the Jacobins, have started their assault on illusion, when they've led people to ask critical questions, then it is too late to be a conservative. Decrying such developments, applauding the good old days, is nothing but a futile attempt to cram revolutionary (dis)contents back into Pandora's box and slam the lid shut. Once this Pandora's box is open, nothing can be done. That is why conservative rhetoric has a shrill and strident edge. The nostalgia is for good old days that cannot be regained, regardless of whether they ever did exist.<sup>28</sup>

Despite challenges from, amongst others, feminism and post-liberalism, the liberal paradigm dominates family lawmaking, which is consistent with Scruton's claim that liberalism is 'the official ideology of the Western world'.<sup>29</sup> The contemporary relevance of conservatism consists primarily, I would argue, as an important critique of the liberal monolith. Conservatism's privileging of tradition, caution towards change and insistence that the drive for human happiness be contextualised, can all provide a valuable check on liberalism's tendency to be 'essentially revisionary of

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<sup>28</sup> Donald Herzog, 'Puzzling through Burke' (1991) 19 *Political Theory* 336, 361. Muller also makes this argument in Jerry Muller, *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton University Press 1997) 422-423.

<sup>29</sup> Roger Scruton, *The Meaning of Conservatism* (3<sup>rd</sup> edn, Palgrave 2001) 182.

existing institutions'.<sup>30</sup> Ultimately though, family law reform is most likely to succeed when it is consonant with practices in family life, regardless of the prevailing political wind.<sup>31</sup> And for the reasons set out by Herzog, it is never the right time to be a conservative, although being a Conservative is clearly a different matter.

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<sup>30</sup> Ibid 186.

<sup>31</sup> For example, Mary Ann Glendon, *The Transformation of Family Law* (The University of Chicago Press 1989) 312.



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