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# A Pragmatic Separation

An Analysis of Conflicting Moral  
Discourses in Theory and Practice



James Alexander, LL.B., LL.M.

RUSSELL ALEXANDER COLLABORATIVE FAMILY LAWYERS

**Abstract:**

This paper seeks to explore the current state of divorce law in England and Wales through the interpretive skeleton of two moral discourses: justice and pragmatism. As social values change over time, the Matrimonial Causes Act 1973 has proven to be ripe for reform. This is evident by the disconnection between the law's objectives on a micro and macro level. On a micro level, the law's objectives in theory can be defined in accordance with the retrospective 'justice-based' moral discourse that aims to protect the institution of marriage and provide justice to the petitioner. Conversely, the law's use in practice has shown to incline towards a more pragmatic moral discourse that seeks to reduce harm and provide autonomy.

The disparity between these objectives of the law in theory and its outcome in practice has been considered extensively in the past by both academics and the legal community, however this paper contends that the overarching error rests in non-reflective moral discourses. These findings can then be assessed on a macro level in relation to modern societal values and wider family law policy objectives. It will be concluded that the current law is non-reflective of these macro objectives due to the economic, psychological, and discriminatory effects the current law entails. This paper will conclude that the Ministry of Justice's Consultation Paper in terms of reform (as of March 31<sup>st</sup>, 2019) evidences a shift towards a more pragmatic moral discourse, however further shifts towards pragmatism are of valuable consideration for future reforms.

## Introduction

The purpose of this paper is to explore the current state of the law on divorce in England and Wales and its shift towards a no-fault based system through the interpretive skeleton of two conflicting moralities. The interaction between this area of law and morality is important to determine because family law is *sui generis* for its socio-legal roots.<sup>1</sup> “Morality cannot be legislated, but behaviour can be regulated. It may be true that the law cannot change the heart, but it can restrain the heartless”<sup>2</sup>. These words spoken by Martin Luther King in the midst of the civil rights era and his push for non-violent conflict resolution opposed to one of harm<sup>3</sup> highlights the relationship between moral discourses underpinning the law in theory, its collateral effects in practice, and the duty that the law has to accurately reflect modernity.

On a micro level, the theoretical objectives of the law have shown disparity with its use in practice. Understanding this disparity can in turn provide insight on a macro level to the interaction between overarching objectives of wider family law and modern societal values. These overarching objectives on a macro level relate to harm-minimisation and the promotion of long-term family relationships as expressly stated by the Resolution Code of Practice<sup>4</sup> and the Law Society Protocol<sup>5</sup> on Family Law.<sup>6</sup> This paper seeks to argue that the moral discourse underpinning the current law on divorce in *theory* does not reflect the discourse used in *practice* and in the overarching macro level objectives of wider family policy and modern social values, thus eliciting an out of date law on divorce. This paper will also contend that recent proposals for reform acknowledge this disconnection and evidence a shift towards a pragmatic moral discourse that reflects macro level objectives. It will be concluded that although the law’s shift to pragmatism is justified, there are further areas for reform that are of valuable consideration.

This paper is set out as follows: Chapter one will discuss the disparity between the law’s theoretical objectives and its use in practice. The recent case of *Owens v. Owens*<sup>7</sup> has sparked a resurgence of the debate surrounding the current hybrid-based system for divorce in the Matrimonial Causes Act (MCA) 1973. A critical analysis of the current law on divorce will be made in relation to previous research,

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<sup>1</sup> Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 16; Cretney SM, *Family Law in the Twentieth Century: a History* (Oxford University Press 2003), 383.

<sup>2</sup> UCLA CommStudies, “Martin Luther King Jr. at UCLA 4/27/1965” (*YouTube* January 15, 2015) from: [https://www.youtube.com/watch?v=ny6qP0rb\\_Ag](https://www.youtube.com/watch?v=ny6qP0rb_Ag) accessed April 11, 2019.

<sup>3</sup> As proposed by individuals such as Malcolm X. See Cook AE, “Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.” (1990) 103 *Harvard Law Review* 985, 988; Grimm J, “Hegemonic Framing of Malcolm X and Martin Luther King, Jr., in Northeastern Newspapers” (2015) 26 *Howard Journal of Communications*, 313.

<sup>4</sup> The Resolution Code of Practice is set out at [www.resolution.org.uk](http://www.resolution.org.uk); see also Resolution, ‘*Manifesto for Family Law*’ (2015) from: [http://www.resolution.org.uk/site\\_content\\_files/files/resolution\\_manifesto\\_for\\_family\\_law.pdf](http://www.resolution.org.uk/site_content_files/files/resolution_manifesto_for_family_law.pdf) accessed 15 November, 2018.

<sup>5</sup> Family Law Protocol (Law Society, 4<sup>th</sup> edn, 2015), part 1.

<sup>6</sup> Wright K, ‘The Evolving Role of the Family Lawyer: the Impact of Collaborative Law on Family Law Practice’ (2011) 23 *Child and Family Law Quarterly*, 390.

<sup>7</sup> [2017] EWCA Civ 182.

specifically expanding on the Nuffield Foundation's *Finding Fault* report<sup>8</sup> lead by Trinder<sup>9</sup>. Chapter two will then expand on the thesis proposed above in light of the findings determined in chapter one by relating the micro level disparity of the law to a macro perspective. Chapter three will then proceed to interpret the Ministry of Justice (MoJ) proposals<sup>10</sup> for reform through the lens of these moral discourses and go one step further by providing additional considerations for reform that may aid to the law's shift towards pragmatism. It is worth noting that this area of law on divorce has been subject to criticisms and commentary in the legal community for decades, however this paper seeks to provide originality by interpreting the law through not only two moral discourses and two levels of orientation, but by also expanding on prior research from Trinder and the MoJ's proposals for reform. This will be conducted through the relevant social, economic, political, policy, historical, philosophical, moral, ethical and cultural contexts.

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<sup>8</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017).

<sup>9</sup> For the purposes of this paper, "Trinder" will be in reference to the study: Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017). Therefore credit is not solely given to Trinder but Braybrook, Bryson, Coleman, Houlston, and Sefton, respectively.

<sup>10</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018) from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

## Chapter 1: The Law in Theory and in Practice

### Owens v. Owens

The law on divorce in England and Wales has been contested in both the judiciary and academia for decades.<sup>11</sup> Consensus following the decision in *Owens v. Owens*<sup>12</sup> in both the legal community and broader public domain has reflected the predilection for reform. Not only have the Supreme Court Justices called for reform in obiter of *Owens*, but extra-judicial calls have been affirmed as well across the judiciary.<sup>13</sup> Despite numerous calls for reform,<sup>14</sup> the law has remained consistent in *theory* since the enactment of the Divorce Reform Act (DRA) 1969 and subsequent consolidation to the Matrimonial Causes Act (MCA) 1973. The current hybrid-based system requires the petitioner to prove one ground for divorce, which is that the marriage has ‘irretrievably broken down’.<sup>15</sup> The petitioner has to satisfy the court that this has occurred by proving one of the five ‘facts’.<sup>16</sup>

The recent case of *Owens* has sparked a resurgence of the debate surrounding the use of Fault in the current law. In *Owens*, Mrs. Owens had petitioned for divorce from Mr. Owens in 2015 on the ground that the marriage had irretrievably broken<sup>17</sup> down based on the fact of ‘behaviour’<sup>18</sup>. For the ‘fact’ of ‘behaviour’ to be relied upon, the petitioner must prove that the respondent has behaved in such a way that it would be unreasonable to expect the petitioner to be able to live with them.<sup>19</sup> Judge Tolson had found that the marriage had broken down, although the petition for divorce was not granted as the allegations of behaviour that Mrs. Owens relied upon were often found to be ‘exaggerated’ and at best ‘flimsy’.<sup>20</sup> Mrs. Owens then proceeded to appeal to the Court of Appeal (CA) and subsequently the Supreme Court (SC).<sup>21</sup>

<sup>11</sup> See Law Commission, ‘*The Field of Choice*’, Command Paper Cmnd. 123 (London: HMSO, 1966); Law Commission, ‘*The Ground for Divorce*’ (Law Com No 192, 1990); Lord Chancellor’s Department, ‘*Looking to the Future: Mediation and the Ground for Divorce*’, Command Paper Cm 2799 (London: HMSO, 1995); Trinder L and Sefton M, *No Contest: Defended Divorce in England and Wales* (London: Nuffield Foundation, 2018).

<sup>12</sup> *Owens v Owens* [2017] EWCA Civ 182.

<sup>13</sup> See mainly Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 32; see also Deech R, ‘No Fault Divorce’ (*Lords of the Blog* 22 September, 2017) from: <http://lordsoftheblog.net/2017/09/22/no-fault-divorce/> accessed December 3, 2018; ‘Five Reasons Why ‘No-Fault Divorce’ Would Be a Disaster for Marriage’ (*Coalition For Marriage* November 22, 2017) from: <https://www.c4m.org.uk/five-reasons-no-fault-divorce-disaster-marriage/> accessed December 3, 2018; Gibb F, ‘Family Matters: Urgent Call for New Divorce Laws as Judges Demand Overhaul of ‘Corrosive’ System’ (*The Sunday Times* November 17, 2017) from: <https://www.thetimes.co.uk/article/urgent-call-for-new-divorce-laws-as-judges-demand-overhaul-of-corrosive-system-8k0ncg7gt> accessed 18 November, 2018.

<sup>14</sup> *Ibid.* See also Resolution ‘Allow People to Divorce without Blame’ from: [http://www.resolution.org.uk/editorial.asp?page\\_id=984&displayMode=preview](http://www.resolution.org.uk/editorial.asp?page_id=984&displayMode=preview) accessed December 3, 2018.

<sup>15</sup> Matrimonial Causes Act, s. 1(1).

<sup>16</sup> *Ibid.*, s. 1(2).

<sup>17</sup> *Id.*, s. 1(1).

<sup>18</sup> *Id.*, s. 1(2)(b).

<sup>19</sup> *Id.*; *Owens v Owens* [2018] UKSC 41, [47-48] (Mrs. Owens’ petition had included 27 individual examples of behaviour from Mr. Owens that included acts of moodiness, argumentativeness, and public disparaging of Mrs. Owens).

<sup>20</sup> [2017] EWCA Civ 182, [46]. See also: “Owens Supreme Court Press Summary” (July 25, 2018) from: <https://www.supremecourt.uk/cases/docs/uksc-2017-0077-press-summary.pdf> accessed December 4, 2018.

<sup>21</sup> *Ibid.*; [2018] UKSC 41.

Despite their apparent disagreement with the *consequence* of the decision, the CA and SC concluded that Judge Tolson had *applied* the substantive law correctly<sup>22</sup> and unanimously dismissed Mrs. Owens petition for divorce.<sup>23</sup> The grounds of appeal to the CA relied on: (i) the failure to make findings of fact, (ii) failure to assess the wife's subjective characteristics, (iii) failure to assess the cumulative impact, and (iv) failure to apply the law correctly.<sup>24</sup> The CA concluded that Judge Tolson had directed himself correctly; thus rejecting the grounds for appeal. LJ Hallett unenthusiastically identified that under the current law, being trapped in an unhappy marriage is not a ground for divorce.<sup>25</sup> However, citing Cretney<sup>26</sup>, LJ Munby highlights the case of *Owens* on a conceptual level as a challenge to the principle of public policy<sup>27</sup> for the courts obligation to 'inquire into the facts' of each case.<sup>28</sup> LJ Munby concludes that this principle of state intervention underlines the reality that its application is not justified because in practice not only is there an overall lack of scrutiny in judicial inquiry<sup>29</sup>, but many petitions are dishonest.<sup>30</sup> This is supported by the 592 cases examined in Trinder's study where there was not one where the court raised questions about the truth of the petition because in practice it is more of an administrative process and less a judicial inquiry.<sup>31</sup>

Mrs. Owens appeal to the SC relied on the novel interpretation of the third phase ('assessment of cumulative impact') of inquiry's 'subjective element'.<sup>32</sup> The SC concurred with that of the CA in that Judge Tolson's direction of the inquiry as an 'objective test with subjective elements'<sup>33</sup> was correct<sup>34</sup>, however the Lords concluded that the outcome of *Owens* could have resulted differently if the case had been managed with evidence properly marshalled at first instance.<sup>35</sup> LJ Wilson's judgement (with whom LJ Black and LJ Hodge agree) outlines that the current law practices a three-stage divorce inquiry.<sup>36</sup> Conversely, Lady Hale had provided three misgivings that she felt were cause to send the case back for a rehearing, however she concluded that this would only result in additional hardships for the parties.<sup>37</sup>

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<sup>22</sup> *Owens v Owens* [2017] EWCA Civ 182, [90].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Id.*

<sup>25</sup> *Owens v Owens* [2017] EWCA Civ 182, [100]; Morgan P, "Owens v Owens: Nobody Panic!" (*Polly Morgan's Family Law Guide* November 6, 2018) Retrieved from: <http://www.pollymorganlaw.uk/owens-v-owens-nobody-panic/> accessed February 19, 2019.

<sup>26</sup> Cretney SM, *Family Law in the Twentieth Century: a History* (Oxford University Press 2003), 391.

<sup>27</sup> *Owens v Owens* [2017] EWCA Civ 182, [90].

<sup>28</sup> As imposed by s. 1(3) of the Matrimonial Causes Act 1973.

<sup>29</sup> "In the year to January 2017, there were 113,996 petitions for divorce. The details are not published, but I understand that, over the same period, notice of intention to defend was given in some 2,600 acknowledgements of service (some 2.28% of all petitions) while actual answers filed were about 760 (some 0.67% of all petitions)." *Owens v Owens* [2017] EWCA Civ 182, [98] (Munby LJ).

<sup>30</sup> See 'Behaviour and inaccurate petitions'.

<sup>31</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 13.

<sup>32</sup> Matrimonial Causes Act 1973 s. 1(2)(b).

<sup>33</sup> Ferguson L, "Hard Divorces Make Bad Law" (2017) 39 *Journal of Social Welfare and Family Law* 3, 364.

<sup>34</sup> *Owens v Owens* [2018] UKSC 41, [39-40].

<sup>35</sup> Burrows D, "Family Law 2018: On Divorce Reform" (2018) 7813 *New Law Journal* from: <https://www.newlawjournal.co.uk/content/family-law-2018-divorce-reform> accessed February 19, 2019.

<sup>36</sup> *Owens v Owens* [2018] UKSC 41, [28].

<sup>37</sup> *Ibid.*, [53]; Morgan P, "Owens v Owens: Nobody Panic!" (*Polly Morgan's Family Law Guide* November 6, 2018) from: <http://www.pollymorganlaw.uk/owens-v-owens-nobody-panic/> accessed February 19, 2019.

The first phase (as determined by LJ Wilson) is an evidential inquiry that requires a determination of the allegations made in the petitioners' application.<sup>38</sup> This phase is objective and was satisfied in the case of Mrs. Owens. Despite the objectivity of this phase, Lady Hale believed that Judge Tolson had thought there to be a casual link between the 'behaviour' cited and the breakdown of the marriage.<sup>39</sup> It is also worth noting that Lady Hale identifies that general reference to the misleading diction of "unreasonable behaviour" is a reflection of the troubling nature that the current law seeks 'blame'.<sup>40</sup> The DRA removed the concept of 'matrimonial offences' in an effort to sweep away the assignment of blame, yet the requirement of 'behaviour' evidences that the current law still seeks to do so.<sup>41</sup>

The second phase of the court's inquiry is the contextual effect the behaviour had on this particular petitioner and their personal disposition.<sup>42</sup> The SC found this phase to be satisfied because trivial allegations are sufficient if the respondent's behaviour on the petitioner has a 'cumulative'<sup>43</sup> effect.<sup>44</sup> However, Lady Hale's dissent emphasizes the importance of conducting a hearing that would enable the cumulative effect of behaviour to be evaluated properly because isolated incidents of 'behaviour' may have a destructive effect in their totality.<sup>45</sup>

In the third phase the court must evaluate if the effect of the behaviour on the petitioner would make an "expectation that the petitioner continue to live with the respondent to be unreasonable"<sup>46</sup>. This phase was found not to be satisfied by Judge Tolson due to Mrs. Owens allegations defined as "at most minor altercations of a kind to be expected in a marriage"<sup>47</sup>. LJ Wilson<sup>48</sup> expressed unease about Judge Tolson's evaluation of Mr. Owens conduct in its totality, however it was concluded that it was inappropriate for the SC at this point to intervene with the judgement at first instance as the law was applied correctly.<sup>49</sup> It was for this reason that it would be reasonable to expect the wife to live with the husband until a period of five-years separation was complete; appeal dismissed.

This third phase *prima facie* appears objective, yet it is the courts duty to apply the facts of *each individual* case in accordance with the MCA. Case law has defined the application of this phase to be considered as: 'would any right-thinking person come to the conclusion that this respondent has behaved in such a way that

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<sup>38</sup> *Id.*, [28]; MCA 1973 s. 1(3).

<sup>39</sup> *Id.*, [49].

<sup>40</sup> *Id.*, [48].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* citing *Jamieson v Jamieson* [1952] AC 525.

<sup>44</sup> *Owens v Owens* [2018] UKSC 41, [53].

<sup>45</sup> *Id.*, [50].

<sup>46</sup> *Id.*, [28].

<sup>47</sup> *Owens v Owens* [2017] EWCA Civ 182, [46].

<sup>48</sup> With Lady Black and LJ Hodge concurring. LJ Mance agrees with LJ Wilson's wider legal analysis however he disagrees with his unease, [57-59].

<sup>49</sup> *Owens v Owens* [2018] UKSC 41, [43] (Wilson LJ).

this petitioner cannot reasonably be expected to live with them, taking into account the whole of the circumstances and the characters and personalities of the parties?’<sup>50</sup> Morgan states that the court’s determination of the ‘right-thinking person’s view’ is an objective element.<sup>51</sup> However the application of the MCA to individual cases is subject to change over time due to the altering of social and moral norms, thus making it more of a subjective inquiry from the court.<sup>52</sup> In the context of the behaviour threshold within a marriage, it is unreasonable to assume that case law from nearly half a century ago is still sufficiently applicable to modern social standards,<sup>53</sup> as reaffirmed by the court’s hesitation<sup>54</sup> to apply the principle in *Ash v Ash*<sup>54</sup> to the context of modern family law.<sup>55</sup> In *Hadjimilitis (Tsavliris) v Tasavliris*<sup>56</sup> the court granted the wife a decree nisi based on the husband’s criticisms, demanding behaviour, and public humiliation.<sup>57</sup> The similar allegations found to be unsatisfactory in *Owens* indicates differing interpretation from the courts, thus evidencing subjectivity. As indicated previously, the SC did express feelings of unease with the trial judgement, thereby suggesting *Tsavliris* being the rule and *Owens* the exception.<sup>58</sup>

### *Recognition for Reform*

The Supreme Court cannot change the substantive law, yet their interpretation of the MCA on the facts shows recognition of the need for reform. The significance of the decision in *Owens* has led to numerous calls for reform. LJ Munby has disclosed that many view the current law as “out dated and antediluvian”<sup>59</sup> as it does not adhere to society’s shift in values over time. Despite the outcome of *Owens*, the majority of the judiciary invite Parliament to enact new legislation that would allow for spouses such as Mrs. Owens to become divorced under the circumstances.<sup>60</sup> LJ Hallett states that the marriage between Mr. and Mrs. Owens has ended despite the courts denial<sup>61</sup>, thus reform of the MCA would enable spouses trapped in an unhappy marriage to get out.<sup>62</sup> The lack of similarity that Judge Tolson’s subjective decision - of the cumulative affect that the ‘behaviour’ had on Mrs. Owens - with that of the average modern individual in a progressive society<sup>63</sup> reflects the current law’s need for reform.<sup>64</sup>

<sup>50</sup> *Livingstone-Stallard v Livingstone-Stallard* [1974] 2 All ER 766; *Buffery v Buffery* [1988] 2 F.L.R. 365.

<sup>51</sup> Morgan P, “Owens v Owens: Nobody Panic!” (*Polly Morgan’s Family Law Guide* November 6, 2018) from: <http://www.pollymorganlaw.uk/owens-v-owens-nobody-panic/> accessed February 19, 2019.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Id.*

<sup>54</sup> “That a violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted; ... and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other.” [1972] Fam 135, [140] (Bagnall J).

<sup>55</sup> *Owens v Owens* [2018] UKSC 41, [30].

<sup>56</sup> [2002] Fam Law 883.

<sup>57</sup> Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 144.

<sup>58</sup> See ‘behaviour and inaccurate petitions’.

<sup>59</sup> [2017] EWCA Civ 182, [38].

<sup>60</sup> *Id.*, [44-45].

<sup>61</sup> [2017] EWCA Civ 182, [102].

<sup>62</sup> Miles J, ‘Divorce reform debate’ (2018) *Fam Law* 1367.

<sup>63</sup> Ferguson L, “Hard Divorces Make Bad Law” (2017) 39 *Journal of Social Welfare and Family Law*, 364-367; The UK currently sits as the 13<sup>th</sup> most progressive nation, see ‘2018 Social Progress Index Results’ (2018) from: <https://www.socialprogress.org/index/results> accessed March 8, 2019.

<sup>64</sup> *Id.*



Outside of the judiciary, Resolution<sup>65</sup> and the Times<sup>66</sup> have actively campaigned for a reform to a no-fault system of divorce. Yet, these calls for reform are nothing new as the legal community has identified issues with the hybrid-based system for decades.<sup>67</sup> However no major empirical studies had been conducted on divorce law in *practice* since the 1980s.<sup>68</sup> That is until in 2017 when the *Nuffield Foundation* produced a report<sup>69</sup> lead by Trinder on how the MCA's use of Fault impacts modern divorces in *practice*. The outcome of *Owens*, and findings from the Nuffield study has since transpired in the current MoJ Consultation Paper's proposals<sup>70</sup> for reform.

## The Current Law

The law for divorce in England and Wales is outlined in the Matrimonial Causes Act (MCA) 1973. Under the MCA an individual may rely on one ground for divorce, which is that the marriage has 'irretrievably broken down'.<sup>71</sup> The applicant may prove this has occurred by relying on one of the five 'facts'.<sup>72</sup> The 'facts' that may be relied upon for opposite-sex couples<sup>73</sup> are as follows: (a) adultery, (b) unreasonable behaviour, (c) desertion for continuous period of two-years preceding petition, (d) separation for a period of two-years with consent, and (e) separation for a period of five-years without consent.<sup>74</sup> It must be noted that the 'fact' that the petitioner chooses to rely on does not have to be the cause of the marital breakdown.<sup>75</sup> However, under the current law, contested cases must satisfy the court via one of the 'facts' in order for a decree nisi to be granted.<sup>76</sup> The requirement to assign blame under the MCA 1973 indicates the objectives of the current law in theory are to provide justice to the petitioner and to protect the institution of marriage. There are a number of factors that determine what 'fact' a spouse or couple may rely upon, however the shift of influence amongst demographic and socio-legal factors will show that the use of Fault under the current law results in hypocrisy and intellectual dishonesty.<sup>77</sup>

<sup>65</sup> See mainly Resolution 'Allow People to Divorce without Blame' from:

[http://www.resolution.org.uk/editorial.asp?page\\_id=984&displayMode=preview](http://www.resolution.org.uk/editorial.asp?page_id=984&displayMode=preview) accessed December 3, 2018

<sup>66</sup> See mainly "The Times View on No-Fault Divorce: Modern Marriage" (*The Sunday Times* February 8, 2019) from:

<https://www.thetimes.co.uk/article/the-times-view-on-no-fault-divorce-modern-marriage-60m0qtdjx> accessed February 19, 2019; See also 'Modern Marriage' (*The Sunday Times* November 17, 2017) from: <https://www.thetimes.co.uk/article/modern-marriage-7p7ds3rzl> accessed November 2018; Atherton M, "How No-Fault Divorce Could Speed up a Split" (*The Sunday Times* December 8, 2018) from: <https://www.thetimes.co.uk/article/how-no-fault-divorce-could-speed-up-a-split-z2x2k666p> accessed February 19, 2019.

<sup>67</sup> See Law Commission papers, *supra* note 9.

<sup>68</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 21.

<sup>69</sup> *Ibid.*

<sup>70</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018) from:

[https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>71</sup> Matrimonial Causes Act, s. 1(1).

<sup>72</sup> *Id.*, s. 2.

<sup>73</sup> This paper will not place any individual focus on same-sex couples/civil partnerships as the same formula of irretrievable breakdown is applied. This is except for the fact of 'adultery'.

<sup>74</sup> MCA 1973, s. 2 (a)-(e).

<sup>75</sup> *Stevens v Stevens* [1979] 1 WLR 885; Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 25.

<sup>76</sup> Matrimonial Causes Act 1973, s. 1(2).

<sup>77</sup> *Owens v Owens* [2017] EWCA Civ 182, [95] (Munby LJ).

*'Behaviour' and inaccurate petitions*

The behaviour threshold since the enactment of the MCA has drastically altered. Despite the decision in *Owens*, in practice the courts will rarely decline a petition that relies on 'behaviour'.<sup>78</sup> As a result, the number of divorce petitions that have relied on 'behaviour' has increased exceedingly whereas 'adultery' has declined.<sup>79</sup> Trinder states this shift of reliance from adultery to behaviour does not reflect a lack of marital fidelity but more the decline in the courts application of a strict behaviour threshold.

Figure 1: Fact proven at divorce in England & Wales from 1975-2017.<sup>80</sup>

Fact proven	1975	1985	1995	2005	2015	2016	2017
Adultery	30%	30%	26%	20%	12%	11%	10%
<b>Behaviour</b>	<b>26%</b>	<b>40%</b>	<b>44%</b>	<b>46%</b>	<b>46%</b>	<b>45%</b>	<b>47%</b>
Adultery + Behaviour	1%	0%	0%	0%	1%	>1%	>1%
Desertion	5%	1%	1%	0%	1%	>1%	>1%
[All fault]	[62%]	[71%]	[71%]	[66%]	[60%]	[58%]	[59%]
Two years separation	26%	22%	23%	24%	26%	27%	27%
Five years separation	12%	6%	6%	9%	14%	15%	15%
Total divorces (number)	119,792	159,095	154,576	141,017	100,685	106,602	101,337

Over the past few decades, case law surrounding behaviour petitions has evidenced a considerable dilution of Fault through the lowering of this 'behaviour threshold'. In *Thurlow v Thurlow*<sup>81</sup>, the court held that passive behaviour caused by a medical condition could be interpreted as sufficient under the MCA even if the behaviour was not their fault.<sup>82</sup> In *O'Neill v O'Neill*<sup>83</sup> the court found a husband's removal and delay in replacing a toilet seat to also be sufficiently unreasonable; thus proving the ease in which 'virtually any spouse'<sup>84</sup> could receive a decree nisi when relying on 'behaviour'. The Law Commission has concluded that the current law is "confusing and misleading which in *practice* encourages parties to lie or exaggerate" in

<sup>78</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 28.

<sup>79</sup> See Figure 1.

<sup>80</sup> Figure 1 summarized from Office for National Statistics dataset. Retrieved from:

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/datasets/divorcesinenglandandwales> accessed February 20, 2019. This chart only includes opposite-sex couples, although an inclusion of same-sex couple statistics would evidence the same finding (that is an additional increase on the reliance of 'behaviour').

<sup>81</sup> [1975] 3 W.L.R. 161.

<sup>82</sup> See also *Katz v Katz* [1972] 1 WLR 955.

<sup>83</sup> [1975] 3 All ER 289.

<sup>84</sup> Law Commission Report 170 (1988) in Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 143.

their petitions.<sup>85</sup> Trinder's study reveals that 29% of respondents stated that the 'fact' relied upon had 'very closely' matched the real reason for breakdown and 29% said that it did not match the real reason 'at all'.<sup>86</sup> These dishonest petitions being submitted to the courts are troublesome due to the lack of respect for not only the current law, but also the institution of marriage; thus undermining the objectives of the law in theory.

The hypocrisy and intellectual dishonesty<sup>87</sup> of divorce petitions are nothing new in divorce law. Prior to enactment of the DRA, 'hotel case'<sup>88</sup> examples highlighted similar tactics of dishonesty. In these a couple would collude to put forward a false petition of 'adultery' supported by evidence of a hotel bill or sightings with an adulterer in order to obtain the divorce they wanted.<sup>89</sup> After enactment of the current law, it was found that the lack of correlation between the 'fact' petitioned for and the *real* reason for the marital breakdown was still evident.<sup>90</sup> Therefore although the current law no longer requires the charade of a 'hotel divorce', the shift in the number of petitions filed from 'adultery' to 'behaviour' evidences that the same tactics have been replicated.<sup>91</sup> The cause of these inaccurate petitions in order to satisfy Fault will be shown to stem from a variety of influencing demographic and socio-legal factors that the current law does not accommodate.

#### *Factors that influence the use of Fault*

This issue of dishonest petitions stem from a range of factors that may influence an individual's reliance on Fault. From a rights-based perspective, the law should establish a place for traditionally marginalised groups and help shape the socio-political climate.<sup>92</sup> The current law is unsatisfactory in this respect because a couple's demographic and socio-legal profile plays heavily on their use of Fault in the divorce process even if they do not wish to assign blame. In the past, the Law Commission has identified the most accurate predictors of the use of Fault to be economic status, the presence of children, and sex.<sup>93</sup> Despite the large influence that children have on a parent's reliance on Fault<sup>94</sup>, Trinder's study evidences that these predictors have shifted over time, concluding with the retention of legal representation and duration of marriage as the

<sup>85</sup> Ibid, emphasis added; Law Commission, *The Ground for Divorce* (Law Com No 192, 1990), Para 2.7-2.21, 5

<sup>86</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 39-40.

<sup>87</sup> *Owens v Owens* [2017] EWCA Civ 182, [94] (Munby LJ).

<sup>88</sup> See generally Herbert AP, *Holy Deadlock* (first published 1934, Harlequin Books 1954); Waugh E, *A Handful of Dust* (first published 1934, Penguin Books 2018).

<sup>89</sup> Cretney SM, *Family Law in the Twentieth Century: a History* (Oxford University Press 2011), 176 citing *Todd v Todd* (1866) LR 1 P&D 121.

<sup>90</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 54; See also Chester R and Streater J, "Cruelty in English Divorce: Some Empirical Findings" (1972) 34 *Journal of Marriage and the Family* 706.

<sup>91</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 55.

<sup>92</sup> Wallbank JA, Choudhry S and Herring J, *Rights, Gender, and Family Law* (Routledge 2009), 12-19.

<sup>93</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41; Law Commission, *The Ground for Divorce* (Law Com No 192, 1990), 6-7.

<sup>94</sup> See 'Psychological Impact'

strongest predictors of the use of Fault.<sup>95</sup> This section will go one step further and contend that Trinder's findings might have been more interesting if it had considered the casual link between all the influencing factors and how economic status is the overarching element of determination for Fault reliance. These factors are important to consider as it highlights the consequences that the current law's theoretical aims have on individuals in practice.

The first predictor of the use of Fault presently is the retention of legal representation.<sup>96</sup> Family law professionals are aware of what the current law's process requires, therefore they often persuade their clients to proceed with relying on Fault because it enables couples to divorce quickly.<sup>97</sup> Therefore the desired duration in which the divorce process occurs is often linked to the economic status of the individuals involved. For example, lower class individuals are often found to rely on Fault due to the speed in which the assignment of blame enables couples to become divorced under the current law.<sup>98</sup> Conversely, middle/upper-class individuals often rely on 'separation' as they are more likely able to afford to live apart for a period of two-years.<sup>99</sup> Lawyers encourage Fault for lower class individuals because even if the respondent wishes to counter the allegations made against them, it would be impractical to do so due to the inevitable increase of legal fees, duration of the process, and need to finalise support.<sup>100</sup> This socio-legal issue is evident by the numerous cases that go uncontested simply due to financial costs.<sup>101</sup>

The second largest predictor of the use of Fault presently is the duration of marriage.<sup>102</sup> The correlation between marriage duration and economic status is apparent from the influence that financial matters have on marital stability. Considering on average the wealth of a couple increases by 16% per year of marriage, the longer a couple remains married therefore decreases the likeliness for divorce<sup>103</sup> because empirical data<sup>104</sup>

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<sup>95</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41-47; *See also generally* Haskey J, "A history of divorce reform law in England and Wales: evolution, revolution, or repetition?" (2018) *Fam Law* 1407.

<sup>96</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Id.*

<sup>99</sup> "Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 5" in Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41; Rights of Women, 'Briefing on Divorce Law Reform' from "Rights of Women Release Briefing on Divorce Law Reform" (*Rights of Women* July 31, 2018), 3-4 from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019.

<sup>100</sup> Haskey J, "Grounds for divorce in England and Wales – a social and demographic analysis" (1986) *Journal of Biosocial Science*, 127–153; Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41.

<sup>101</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 122.

<sup>102</sup> *Ibid.*, 41; "Divorces in England and Wales: 2017" (*Office for National Statistics* September 28, 2018) Retrieved from: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2017#median-duration-of-marriage-among-divorcing-opposite-sex-couples-was-12-years> accessed February 21, 2019 (The median duration of marriages that end in divorce currently rests at 12 years).

<sup>103</sup> Zagorsky J, "Marriage and divorce's impact on wealth" (2005) 41 *Journal of Sociology*, 4.

<sup>104</sup> Bramlett M and Mosher W, "Cohabitation, Marriage, Divorce and Remarriage in the United States" *Vital and Health Statistics* 23 (Washington, DC: National Centre for Health Statistics, 2002) Retrieved from: [http://www.stateofourunions.org/2011/social\\_indicators.php#divorce](http://www.stateofourunions.org/2011/social_indicators.php#divorce) accessed February 21, 2019.

over the last 50 years evidences<sup>105</sup> that annual incomes that are 16% above the national median decrease the risk for divorce by 30%.<sup>106</sup> This shows that the affect that martial duration has on the economic stability of a couple is profound because, as discussed above, the higher financial bracket a couple is in the more likely they are to retain legal representation and less likely they are to use Fault.<sup>107</sup>

Another large predictor of the use of Fault presently is sex.<sup>108</sup> The total number of ‘behaviour’ petitions consist of 69% female and 31% male, with 32% of **all** divorce applications from women petitioning under ‘behaviour’.<sup>109</sup> Despite the remaining inequality for women in modern society, the shift towards equality with respect to women’s roles in the workplace and home have affected their options in marriage by increasing their bargaining position to leave.<sup>110</sup> The large percentage of women who rely on ‘behaviour’ in their petitions<sup>111</sup> evidences that liberalized social values that began in the 1970s onwards have rightfully resulted in women’s heightened standards of treatment both inside and outside of the marriage.<sup>112</sup> From a feminist perspective, although family law policy has shifted dramatically from the times of a wife’s inability to apply for divorce<sup>113</sup>, the current law still inadvertently causes hardships and discrimination for women. Rights of Women (RoW) identify three main ways this discrimination is prevalent under the current law:<sup>114</sup> (i) it keeps women in abusive relationships longer, (ii) it forces a reliance on ‘unreasonable behaviour’ that unnecessarily raises the risk of further abuse, and (iii) it provides an opportunity for spouses to continue their abuse during the court proceedings.<sup>115</sup> In *Owens*, LJ Wilson identifies that developments in family law aim to recognize the equality of sexes<sup>116</sup> but the current law does nothing to aid women that are stuck in an unhappy marriage.<sup>117</sup> Trinder’s study evidences that 42% of behaviour petitions that were analyzed alleged abuse<sup>118</sup> and the traditional notion that mothers must “stay for the children” in abusive relationships has

<sup>105</sup> There is no equivalent report currently in England and Wales.

<sup>106</sup> This figure was determined from taking the original statistic (\$50,000 USD) and calculating the difference based on the national median at the time of the study (\$42,409).

<sup>107</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; “Divorces in England and Wales: 2017” (*Office for National Statistics* September 28, 2018) Retrieved from: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2017#median-duration-of-marriage-among-divorcing-opposite-sex-couples-was-12-years> accessed February 21, 2019.

<sup>110</sup> Stevenson B and Wolfers J, “Marriage and Divorce: Changes and Their Driving Forces” (2007) 21 *Journal of Economic Perspectives*, 46; Stevenson B, “Divorce-Law Changes, Household Bargaining, and Married Women’s Labor Supply Revisited” (2007) *Journal of Economic Perspectives*, 27; Hill Kay H, “No-Fault Divorce and Child Custody: Chilling out the Gender Wars” (2002) 36 *Fam. L.Q.*, 27; Barich R and Bielby D, “Rethinking Marriage” (1996) 17 *Journal of Family Issues*, 139.

<sup>111</sup> “Law Commission, *The Ground for Divorce* (Law Com No 192, 1990) Appendix C, para 3” in Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41.

<sup>112</sup> Coontz S, “The Origins of Modern Divorce” (2007) 46 *Family Process*, 14 citing Glendon (1989).

<sup>113</sup> Prior to the MCA 1923, women could only rely on the ground of ‘aggregated adultery’ against their husbands to be granted a divorce.

<sup>114</sup> Rights of Women, ‘Briefing on Divorce Law Reform’ from “Rights of Women Release Briefing on Divorce Law Reform” (*Rights of Women* July 31, 2018), 2 from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019.

<sup>115</sup> These responses from Rights of Women to the MoJ proposals for reform will also be discussed further in Chapter 3.

<sup>116</sup> *Owens v Owens* [2018] UKSC 41, [34].

<sup>117</sup> Miles J, “Divorce reform debate” (2018) *Fam Law* 1367, 2.

<sup>118</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41 in Ministry of Justice, ‘Reducing family conflict: Reform of the

proven to be illogical as studies show that this actually has adverse effects on child behavioural<sup>119</sup> problems.<sup>120</sup> However the current law requires blame in contested divorces - therefore spouses whom are subject to abusive husbands may feel trapped under the MCA due to the fear of repercussions that may arise from assigning blame. As a result, the effects of divorce on women show that 43% of mothers admit to contemplating suicide during the divorce process<sup>121</sup> and/or hold feelings of entrapment; all of which are contrary to other objectives of family law and the role of women in modern society.

The casualty between the use of Fault by women and economic status is linked through the economic realities for women during divorce. Despite the reduction in the gender pay gap over the last few decades<sup>122</sup>, the economic inequality amongst the sexes is still evident as the 2018 gender pay gap currently rests at approximately 18%.<sup>123</sup> This inequality has shown to only heighten when a divorce is mixed in because divorce affects large and persistent falls in income and living standards for women that typically only recover from re-partnering.<sup>124</sup> A couple of factors can be identified as causing these economic hardships. First, childcare responsibilities post divorce are often assumed by the mother, which<sup>125</sup> leads to the party suffering significantly in their career due to the requirement to obtain (often) part-time, low paying jobs.<sup>126</sup> Second, the average divorced woman's pension is less than one third of the male equivalent despite the fact that divorced women are 10% more likely to rely on them.<sup>127</sup> These factors of inequality all contribute to the economic difficulties that women are confronted with during a divorce. Taken together, these hardships suggest a likely explanation for the high use of Fault (particularly 'behaviour') from women as a consequence of the economic downfalls that a longer divorce process entails.

In summary, it has been shown from this discussion that in contested cases under the current law, the requirement to evidence the marriage has irretrievably broken down by proving one of the five 'facts' has

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legal requirements for divorce' (September 2018) from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>119</sup> See 'Psychological Impact'. For the purposes of this paper, 'behavioural' problems/issues will consist of an increase in externalised problems (e.g. as an inclination towards conflict and argumentativeness) and internalised problems (e.g. anxiety, depression, antisocial).

<sup>120</sup> Emery CR and Buehler C, "Stay for the Children? Husband Violence, Marital Stability, and Children's Behaviour Problems" (2009) 71 *Journal of Marriage and Family* 905; Seltzer J, "Consequences of marital dissolution for children" (1994) 20 *Annual Review of Sociology*, 235; Brüderl J and Kalter F, "The Dissolution of Marriages: The Role of Information and Marital-Specific Capital" (2001) 25 *The Journal of Mathematical Sociology*, 403.

<sup>121</sup> Sclater S, *Divorce: A Psychosocial Study* (Routledge 2017), 85 citing Arendell (1986).

<sup>122</sup> "Gender pay gap" (*Office for National Statistics* October 25, 2018) Retrieved from: <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2018> accessed February 22, 2019.

<sup>123</sup> This figure has dropped from 27.5% in 1998.

<sup>124</sup> Fisher H and Low H, "Finances after divorce in the short – and longer – term" (2018) *Fam Law*, 1533. Retrieved from: [https://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23\\_T28472404861&format=GNBFULL&startDocNo=0&resultsUrlKey=0\\_T28472404865&backKey=20\\_T28472404866&csi=432082&docNo=14&scrollToPosition=1707](https://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T28472404861&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T28472404865&backKey=20_T28472404866&csi=432082&docNo=14&scrollToPosition=1707) accessed February 22, 2019.

<sup>125</sup> "Dex S, Ward K, and Joshi H, *Changes in Women's Occupations and Occupational Mobility over 25 Years* (London: Centre for Longitudinal Studies, 2006)" in Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 216.

<sup>126</sup> Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 216.

<sup>127</sup> Chartered Insurance Institute (CII) "Risk, exposure and resilience to risk in Britain today: Women's Risk in Life" (2017), 64 Available: [https://www.cii.co.uk/media/7461333/risks\\_in\\_life\\_report.pdf](https://www.cii.co.uk/media/7461333/risks_in_life_report.pdf) accessed February 22, 2019.

lead to many petitioners choosing to rely on Fault in order to secure a petition quickly. This reliance on Fault is nothing new in UK divorce law because prior to the introduction of ‘behaviour’, divorce statistics show that most petitioners had relied on ‘adultery’ for similar reasons. The ‘hotel cases’ brought to light the issue of dishonest or exaggerated petitions that were being submitted to the court but even after the enactment of the current law, the shift of reliance from ‘adultery’ to ‘behaviour’ reveals that the issue of inaccurate petitions has not ceased. Trinder identifies that the shift from adultery to behaviour is not a consequence of marital infidelity but the lowering of the ‘behaviour’ threshold that has since resulted in the dilution of Fault. Considering findings<sup>128</sup> show that there is no link between the ‘fact’ relied upon and the reason for marital breakdown<sup>129</sup>, the decision for petitioners to rely on Fault opposed to ‘separation’ or ‘desertion’, stems from a range of demographic and socio-legal factors. Although these factors have shifted over time, the overarching element of economic status is still the strongest predictor of the use of Fault due to the casual link that it has with the other influencing factors. This disconnection between the law’s objectives in theory and its use in practice evidence the law as having an inaccurate moral discourse. This inaccuracy will be discussed further in chapter two, but before that, it is important to show the psychological impact that a retrospective law in theory has in practice.

### *Psychological Impact*

The ground of ‘irretrievable breakdown’ can be viewed in a prospective manner, however the requirement to evidence ‘facts’ proves the current law to be retrospective in its foundation because it requires couples in contested divorces to assign blame against each other to the court in order to secure a divorce quickly<sup>130</sup> and does not look to the future interests of the parties. This retrospection is non-justifiable because it forces couples to view the process in a hostile manner that only makes the experience more difficult. Parties involved often rely on Fault with hopes to obtain a quicker divorce that will minimize harm. However this harm inflicted during divorce is not exclusive to economic hardship, but has also shown to affect the psychological well being of those involved.<sup>131</sup>

Divorce is an emotionally painful event for all parties involved, which may affect short and long-term psychological functioning.<sup>132</sup> The association of divorce has been linked to increase anxiety, depression, alcoholism, and suicidal tendencies<sup>133</sup> that results with individuals often resorting to psychological

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<sup>128</sup> See mainly Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 12; Ministry of Justice, ‘Reducing family conflict: Reform of the legal requirements for divorce’ (September 2018) from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>129</sup> Nor is it even required (*Stevens v Stevens* [1979] 1 WLR 885).

<sup>130</sup> Couples that do not mind waiting the separation periods of 2-5 years are not required to assign blame (s. 1(2)(d-e)).

<sup>131</sup> Haskey J, “A history of divorce reform law in England and Wales: evolution, revolution, or repetition?” (2018) *Fam Law*, 1407.

<sup>132</sup> “Kelly J.B. and Emery R.E, “Children’s adjustment following divorce: Risk and resilience perspectives” (2003) *Family Relations* 352” in Ambert A-M, *Divorce: Facts, Causes, & Consequences* (Vanier Institute of the Family 3<sup>rd</sup> edn, 2009), 18.

<sup>133</sup> “McAllister F, *Marital Breakdown and the Health of the Nation* (One Plus One, UK, 1995) and Livingston Bruce M and Kim L.M, “Differences in the Effects of Divorce on Major Depression in Men and Women” (1992) *American Journal of Psychiatry*

manoeuvres to cope with the hostility and onslaught.<sup>134</sup> The most common manner in which divorcing couples do this is by creating a narrative where one of them is the perpetrator and the other a victim.<sup>135</sup> Trinder highlights that divorce petitions are not an accurate reflection of what caused marital breakdown, but are more a narrative that secures a divorce under the current laws requirements.<sup>136</sup> Assigning blame under the current law aids this psychological coping strategy for parties in the short term, however it will be shown to often result negatively in the long-term, specifically for children.

One of the current law's primary objectives in theory has shown to be providing justice for the petitioner, whereas overarching modern family law policy seeks to reduce conflict in order to uphold the child's best interests and well-being.<sup>137</sup> Despite surveys indicating that 81% of people believe that children are those that are most affected from divorce,<sup>138</sup> the current law's effect on children has been considered 'one of the most serious'<sup>139</sup> aspects that has not adequately provided for their interests.<sup>140</sup> Studies<sup>141</sup> find that children that are subject to divorce are more likely to have lower educational attainment, lower incomes, less prestigious occupations, greater risk of unemployment and an increased likeliness to live in social housing.<sup>142</sup> Further reports<sup>143</sup> conclude that children whose parents divorce experience an increase in anxiety and depression in comparison to children who are not subject to a divorce process.<sup>144</sup> However children that are subject to pre-divorce family dysfunction<sup>145</sup> are found to have a decrease in antisocial behaviour when the parental

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149" in Sclater S, *Divorce: A Psychosocial Study* (Routledge 2017), 85; Rotermann M, 'Marital breakdown and subsequent depression' (2007) 18 Statistics Canada, Health Reports, 33 from: <https://www150.statcan.gc.ca/n1/pub/82-003-x/2006005/article/marital-conjugal/4060665-eng.htm>

<sup>134</sup> Sclater S, *Divorce: A Psychosocial Study* (Routledge 2017), 169.

<sup>135</sup> Ibid.

<sup>136</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 12.

<sup>137</sup> See 'Paramount principle' in Children Act 1989; *J v C* [2006] EWCA Civ 551; Children and Families Act 2014, s. 17; UN Convention on the Rights of the Child, Article 3

<sup>138</sup> National Family Mediation survey, "Family dispute resolution week" (2014) *Fam Law*, 114.

<sup>139</sup> Cretney SM, *Family Law in the Twentieth Century: a History* (Oxford University Press 2003), 384 citing "Law Commission, 'The Field of Choice', Command Paper 123 (London: HMSO, 1966)".

<sup>140</sup> Cretney SM, *Family Law in the Twentieth Century: a History* (Oxford University Press 2003), 384.

<sup>141</sup> The National Child Development Study (NCDS) "Effects of Divorce on Children" (2008) *Fam Law*, 938 (*LexisNexis® Academic & Library Solutions* 2008) Retrieved from:

[https://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23\\_T28473348830&format=GNBFULL&startDocNo=1&resultsUrlKey=0\\_T28473393566&backKey=20\\_T28473393567&csi=432082&docNo=7&scrollToPosition=1063](https://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T28473348830&format=GNBFULL&startDocNo=1&resultsUrlKey=0_T28473393566&backKey=20_T28473393567&csi=432082&docNo=7&scrollToPosition=1063) accessed February 22, 2019 ("The National Child Development Study (NCDS) followed the lives of approximately 17,000 people born in Britain in 1958. The members of the cohort have been surveyed from birth, through their childhood and adolescence, and into adult life with the intention to track their physical, educational, social and economic progress from the cradle to the grave").

<sup>142</sup> Ibid; See also Strohschein L, "Parental divorce and child mental health trajectories" (2005) *Journal of Marriage and Family*, 67, 1286; Amato PR, "The Consequences of Divorce for Adults and Children" (2000) 62 *Journal of Marriage and Family*, 1269; Rappaport S.R, "Deconstructing the Impact of Divorce on Children" (2013) 3 *Family Law Quarterly* 47, 353-377

<sup>143</sup> National Longitudinal Survey of Children and Youth (NLSCY) in Strohschein L, "Parental divorce and child mental health trajectories" (2005) *Journal of Marriage and Family*, 67, 1286-1300 ("Consisted of tracking a nationally representative sample of Canadian children of ages 4-7 and living with two biological parents at initial interview in 1994 (N = 2,819), and comparing the mental health trajectories of children whose parents remain married with those whose parents divorce by 1998").

<sup>144</sup> "Lord Chancellor's Department, 'Looking to the Future: Mediation and the Ground for Divorce', Command Paper Cm 2799 (London: HMSO, 1995), 8" in Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018) from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>145</sup> Ibid, 1288 (Dysfunction in this paper is defined as "the absence of mutually supportive, trusting, and respectful family relationships").



relationship is dissolved,<sup>146</sup> thus indicating the source of the psychological harm to be from conflict and not the actual divorce.

It is important to note that parental conflict is not the only contributing factor to a child's psychological well-being, yet the impact of parent conflict during divorce is a highly influential component.<sup>147</sup> This is because children that are subject to unresolved parental conflict and witnesses their parent's inability to resolve issues pragmatically often learn that disagreements can only be solved through conflict, which in turn can have a negative effect on the child's current and future relationships.<sup>148</sup> Furthermore, allegations of conduct have found to detach the child's affection towards the parents<sup>149</sup> because the parental depression that is often caused from assigning blame has been found to negatively affect the relationship with the child as it limits parent responsiveness and/or (emotional) availability.<sup>150</sup> Trinder's study evidences that 62% of petitioners and 78% of respondents felt the use of Fault had made their experience more bitter, concluding that the (often exaggerated) infliction of Fault escalates conflict during the divorce process that children may be subject to.<sup>151</sup> There is on average 84% of divorce cases that have children under the age of 16<sup>152</sup> that "inevitably involve precisely the bitterness, distress and humiliation the *current law* has declared to minimise"<sup>153</sup>, thus evidencing a disparity between the law in theory and practice that children are subsequently victim to.

To conclude, the current law's objectives in theory often influence the use of Fault in order to secure a divorce quickly and minimize financial hardships. The affect of this discourse in theory has shown to not only increase the risk for further abuse and feelings of entrapment for women, but to also unnecessarily increase conflict that children may be witness to. All of these adverse consequences of the current law can lead to negative psychological functioning (especially for the children) that may take form of behavioural or

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<sup>146</sup> Ibid.

<sup>147</sup> Rappaport S.R, "Deconstructing the Impact of Divorce on Children" (2013) 3 *Family Law Quarterly* 47, 353 (Other factors may include: parental mental health, father absence, economic hardships, and the child's predisposed mental health all contribute to the overall impact that divorce will have).

<sup>148</sup> Ambert A-M, *Divorce: Facts, Causes, & Consequences* (Vanier Institute of the Family 3<sup>rd</sup> edn, 2009), 20; Rappaport S.R, "Deconstructing the Impact of Divorce on Children" (2013) 3 *Family Law Quarterly* 47, 353-377.

<sup>149</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 24 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018; *see also* Wilcox KL, Wolchik SA and Braver SL, "Predictors of Maternal Preference for Joint or Sole Legal Custody" (1998) 47 *Family Relations*, 93.

<sup>150</sup> "Shelton KH and Harold GT, "Interparental Conflict, Negative Parenting, and Children's Adjustment: Bridging Links between Parents' Depression and Children's Psychological Distress." (2008) 22 *Journal of Family Psychology*, 712" in Rappaport S.R, "Deconstructing the Impact of Divorce on Children" (2013) 3 *Family Law Quarterly* 47, 353-377.

<sup>151</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 15.

<sup>152</sup> "Divorces in England and Wales, children of divorcing couples: historical data" Retrieved from: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/datasets/divorcesinenglandandwaleschildrenofdivorcedcouples> accessed February 22, 2019. This figure was calculated by averaging the number of total divorcing couples with the number of couples that have children under 16 for the last three available years provided by ONS datasets.

<sup>153</sup> Cretney SM, *Family Law in the Twentieth Century: a History* (Oxford University Press 2003), 385. Emphasis added.

relationship problems. These effects of the current law run contrary to what reform of other areas of the family justice system<sup>154</sup> have aimed to accomplish.

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<sup>154</sup> The overarching objectives of harm-minimisation and the promotion of long-term family relationships are expressly stated by both the Resolution Code of Practice and the Law Society Protocol on Family Law. *See* The Resolution Code of Practice set out at [www.resolution.org.uk](http://www.resolution.org.uk); and Family Law Protocol (Law Society, 4<sup>th</sup> edition, 2015), part 1.

## Chapter 2: Two Conflicting Moralities

The influence of demographic factors and psychological impact show that the crux of family law objectives and the issues surrounding it are of socio-legal significance. Family law is rooted in subjective elements because there is no accepted definition of what a “family” is. Theoretical perspectives of family law can be used to assess how the law should operate in accordance with current societal values. The following assessment of the current law in relation to overall family law policy will be conducted through the lens of functionalism because of the law’s inherent link to ever-changing times and societal morals.<sup>155</sup> LJ Munby states that it once was the role of the courts to be *custos morum*<sup>156</sup>, yet judges today are tasked with the assessment of reasonable people according to today’s morals and not of those of the 1970s.<sup>157</sup> A functionalist perspective regards family law as having a series of goals/objectives to be fulfilled<sup>158</sup> and as social values change over time and moralities alter, it is necessary for family law to evolve to reflect modern objectives.

Principles of modern family law do not aim to enforce a substantive moral vision<sup>159</sup> in theory because individual moral perspectives on divorce differ from each person due to their pre-existent responsibilities and biographies.<sup>160</sup> Due to conflicting moralities that individuals may hold, the Law Commission states that modern family law is “not capable of being reduced to simple certainties”<sup>161</sup>, yet the moral standpoint of the current law on divorce proves contrary in *theory*. The theoretical objectives of the current law on divorce under the MCA differ from how it operates in *practice*. It will be shown that the law in theory takes the form of a *justice morality* but in practice the current law operates with a *pragmatic morality* – that objectives are more in accordance with modern societal values and overarching family law policy - to apply the law in the least harmful and most efficient way possible.<sup>162</sup> These conflicting moralities in theory and in practice reflect the disconnection between the substantive law’s attempt to legislate morality and the family law community’s efforts to regulate behaviour. As evidenced previously, social values have shifted dramatically because the acceptance of same sex marriage, independence of women, and interests of the child indicates liberalized values of equality and care are much more apparent today than when the DRA was enacted in the late 1960s, thus eliciting an out of date law on divorce.

<sup>155</sup> Munby J, “Law, Morality and Religion in the Family Courts” (2014) 16 *Ecclesiastical Law Journal*, 131.

<sup>156</sup> “Custos Morum” (*Merriam-Webster*) <https://www.merriam-webster.com/dictionary/custos%20morum> accessed February 23, 2019 (Defined as “The keeper/guardian of morals”).

<sup>157</sup> Munby J, “Law, Morality and Religion in the Family Courts” (2014) 16 *Ecclesiastical Law Journal*, 131.

<sup>158</sup> Eekelaar J, *Family law and personal life* (Oxford: Oxford University Press, 2006), chapter 6 in Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 17. (Eekelaar classifies the objectives of modern family law policy as: (i) Protective – shielding family members from emotional, physical, and economic harm, (ii) Adjustive – aid broken families to adjust to new lives, and (iii) Supportive – to support and encourage familial lifestyles).

<sup>159</sup> MC Regan, “Market Discourse and Moral Neutrality in Divorce Law” (1994) *Utah Law Review* 605” in Reece H, *Divorcing Responsibly* (Hart 2003), 227.

<sup>160</sup> Reece H, *Divorcing Responsibly* (Hart 2003), 229-232.

<sup>161</sup> Law Commission, ‘*The Ground for Divorce*’ (Law Com No 192, 1990), 11; Reece H, *Divorcing Responsibly* (Hart 2003), 227.

<sup>162</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 34.

The ‘justice’ based moral approach can be classified as ‘justice’ opposed past definitions of ‘traditional’ and ‘literalist’ because its objectives are to provide justice to the petitioner and protect the institution of marriage across all kinds, whereas traditional moral values in family law often relate to the longing for stability in a two-parent heterosexual relationship which mirror more ‘Victorian era’ principles.<sup>163</sup> These traditional moral values do not reflect the objectives of both the current law on divorce and other areas of family law policy in modern society.<sup>164</sup> The use of the ‘justice’ morality mirrors the purpose of Fault as it aims to achieve two objectives in theory: (a) to provide justice to the petitioner so that the psychological coping strategy of the perpetrator and victim can be fulfilled,<sup>165</sup> and (b) to act as a safeguard against easy divorces that would undermine the institution of marriage. It is for these reasons that the term ‘justice’ has been used to define this moral discourse. The ‘literalist’ moral approach would be an accurate description prior to the enactment of the current law, yet the introduction of irretrievable breakdown as the sole ground for divorce has evidenced a shift away from this literalist morality. ‘Pragmatism’ differs from literalist because its moral dimension is focused on achieving a ‘good’ divorce that has the least negative impact, whereas literalist is more focused on literal blame and punishment.<sup>166</sup> The use of these moral discourses as the ‘interpretive skeleton’ of this paper is intended to be an expansion on Trinder’s micro analysis of individuals within the divorce process.<sup>167</sup> Examining this area of law through the prism of two moralities juxtaposed with micro and macro perspectives can enable a wider understanding of the issues that have caused this ambivalence underpinning the law

In broad terms, Figure 2’s four-quadrant model below can be used to illustrate the law’s dissonance from different orientations. The horizontal axis represents the two main moral discourses that are used when divorcing. The vertical axis represents the theoretical orientation parallax that the law can be perceived from. Micro level issues - such as how the law is used in practice - can provide a better understanding of macro level issues. For example, law commission reports and academic studies can provide insight on the micro level issues of the current law that then influence proposals for reform that reflects macro level objectives of modernity. Finally, the dotted lines represent the law’s shift over time. In the context of the MCA, the micro level issues as they relate to the disconnection between the law in theory and its use in practice has resulted in the MoJ’s proposals for reform.<sup>168</sup> The dotted lines represent this paper’s thesis in the sense that the law has shifted over time towards a pragmatic discourse that is more in line with not only wider family law policy and modern socially values, but also reform towards no-fault. This paper attempts to analyze these micro and macro level issues to prove this.

<sup>163</sup> Cahn NR, Dowd NE and Whitehead BD, “The Moral Complexities of Family Law” (1997) 50 *Stanford Law Review*, 225.

<sup>164</sup> As evidenced by the Civil Partnership Act 2004 and Equality Act 2010.

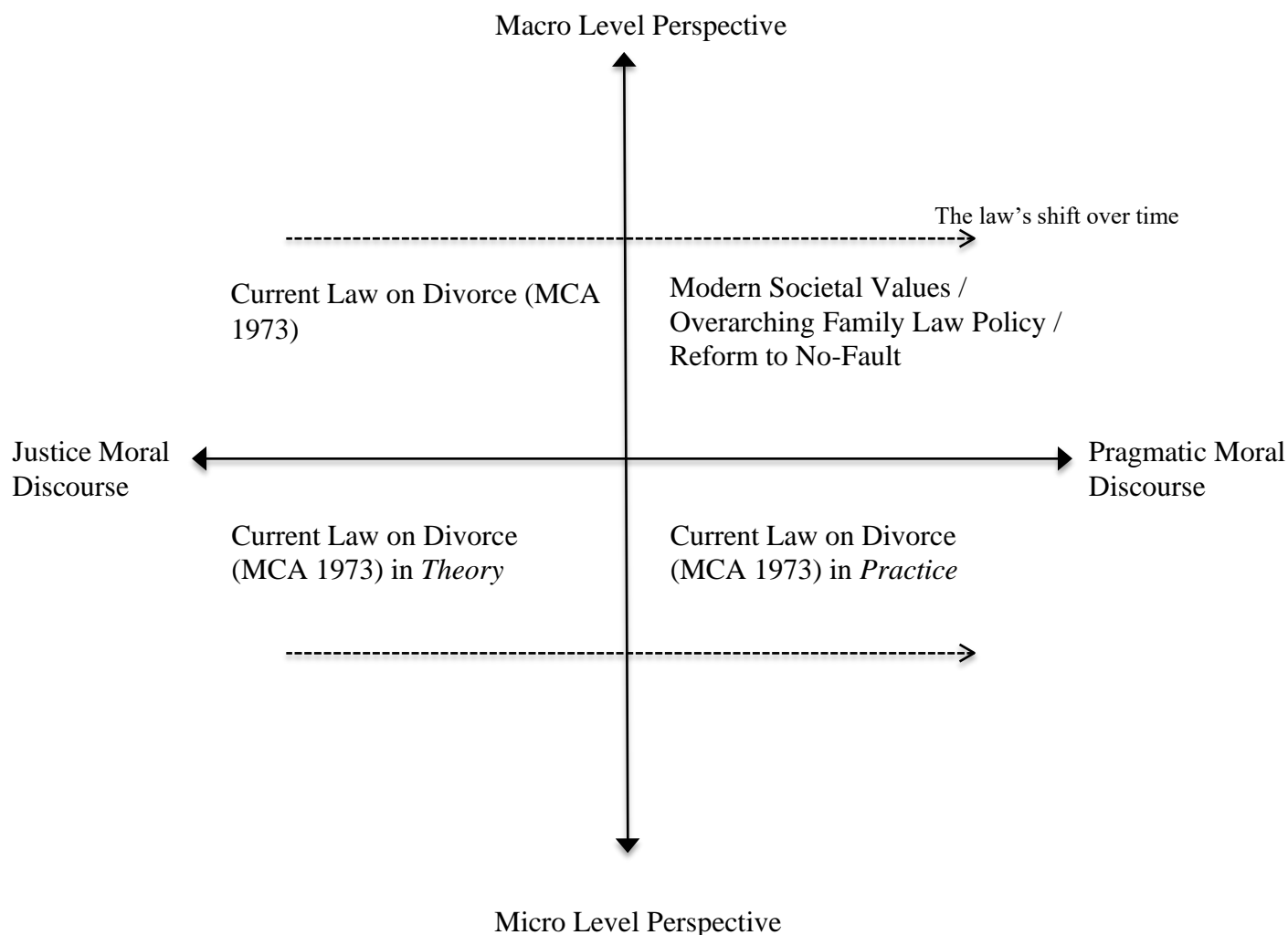
<sup>165</sup> See ‘Psychological Impact’

<sup>166</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 34.

<sup>167</sup> *Ibid*, 137.

<sup>168</sup> See Chapter 3.

Figure 2: Theoretical orientation of moral discourses of justice and pragmatism as they relate to the law on divorce in England and Wales on a micro and macro level perspective



From a micro-perspective, these two individual moralities mirror the state of the law on divorce presently in England and Wales. As discussed above, the moral discourse that the substantive law (in theory) encompasses is one of justice, yet divorcees and the legal community have shown to proceed pragmatically in practice. Trinder summarizes individuals during the divorce process as having moralities of *justice* or *responsibility*.<sup>169</sup> Individuals who hold a justice oriented moral code seek the truth through the assignment of blame being accurately determined for the marital breakdown.<sup>170</sup> The reduction of harm is not of importance to these individuals, however qualitative data<sup>171</sup> shows that in practice legal professionals often attempt to restrain these justice oriented wishes of excessive hostility due to the irrelevant effect that these submissions would have on the judiciary's decision in practice.<sup>172</sup> Conversely, individuals that hold a moral code oriented around responsibility/pragmatism seek to minimize harm to preserve relationships, especially for

<sup>169</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 139-140.

<sup>170</sup> *Ibid*, 141.

<sup>171</sup> *Id*, 145 (Interviewee stated that during their divorce they wished to disclose all names and detail in regards to her husband's

<sup>172</sup> *Id*.

the children.<sup>173</sup> These micro level findings are an extension on Trinder’s determination of how individual’s choose to proceed when they divorce<sup>174</sup> in the sense that not only are individual moral discourses conflicting but the use of the MCA is as well. In other words, the substantive law outlined in the MCA reflects this moral approach of justice, whereas the courts and individuals in practice reflect a more pragmatic moral discourse.<sup>175</sup> The results of the divorce under the current process from each moral approach can be summarized in Figure 3.

Figure 3: Results from divorce process from perspective of each individual moral approach.<sup>176</sup>

<b>Divorce Experience</b>	<b>Justice Morality</b>	<b>Pragmatic Morality</b>
Petitioner experience	<ul style="list-style-type: none"> <li>- Slow and difficult</li> <li>- Recognise collateral damage</li> <li>- Frustrated by pragmatic family justice system</li> </ul>	<ul style="list-style-type: none"> <li>- Slow, stressful, frustrating, expensive</li> <li>- Loss of control over life</li> <li>- Penalised for doing the right thing by avoiding Fault</li> </ul>
Respondent experience	<ul style="list-style-type: none"> <li>- Angry, unfair, apoplectic</li> <li>- Injustice that divorce rests on untested allegations</li> <li>- Anger at petitioner</li> </ul>	<ul style="list-style-type: none"> <li>- Some viewed as still upsetting even knowing the pragmatic rules</li> <li>- Others had nothing to report to study</li> </ul>
Spill over	<ul style="list-style-type: none"> <li>- Typically spill over into children and financial disputes</li> </ul>	<ul style="list-style-type: none"> <li>- Less or no likeliness to spill-over into later disputes</li> </ul>
Views on law reform and Fault (petitioner and respondent)	<ul style="list-style-type: none"> <li>- Some view Fault as essential with high threshold</li> <li>- Others view Fault as ultimately pointless and counter-productive</li> <li>- Some support of no-fault</li> </ul>	<ul style="list-style-type: none"> <li>- Fault unhelpful, harmful, irrelevant</li> <li>- Undermines autonomy and personal responsibility</li> <li>- Supportive of no-fault</li> </ul>

These results indicate that the current law’s ‘justice’ based morality aids those that seek goals parallel with that moral approach. These goals may result in instant gratification, yet the long term spill over effects are more prominent when this approach is taken.<sup>177</sup> Those that approach the divorce process pragmatically often cite the experience as slow and frustrating due to the requirement to wait 2-5 years before a decree absolute is to be granted. However the delayed gratification that is acquired from proceeding pragmatically is evidenced from the lack of negative spill over effect that would have been resulted in a divorce of conflict.

<sup>173</sup> *Id*, 140.

<sup>174</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 139-140.

<sup>175</sup> Chapter 3 will discuss how reform the no-fault based systems in other jurisdictions and in the UK government’s reform proposals reflect this overarching pragmatic morality.

<sup>176</sup> Figure 3 altered from Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 144.

<sup>177</sup> As evidenced by the long-term psychological and relationship effects on the family, *see* Chapter 1.

This relates to the conflicting moralities in modern family law because those whom proceed pragmatically are not only proven to be more satisfied with the process in the long run<sup>178</sup>, but are also often subject to qualities of the upper class (such as higher education and financial satisfaction).<sup>179</sup> As discussed in chapter one, the economic and psychological hardships that result from the use of Fault can be profound, therefore proceeding pragmatically can reduce these negative effects but the law must encourage this process to all demographics by removing Fault all together.

From a macro-perspective, the liberalized social values of modern society, overarching family law objectives, and reform to a no-fault based system can be considered to incline towards pragmatism because of principles of care. This concept of conflicting moralities within family law can be related to the feminist theory surrounding ethics of justice and care. This theory arose out of feminist appreciation for care but its relevance within a democratic framework is an inherently human ethic because being cared for is a universal experience.<sup>180</sup> This is important to consider because the ethics of care relate to human needs and social emotions, whereas ethics of justice are oriented towards human rights and moral rules.<sup>181</sup> Like justice and pragmatism, these conflicting moral perspectives produce different results when divorcing. The influence that demographics and socio-legal factors have on our moral choices within family law has shown to be profound<sup>182</sup> but the ethics of care transcends psychology and moral theory because it reflects the goals of modern familial relationships in law which is that of ‘doing’ family opposed to ‘being’ family.<sup>183</sup> These moral theories based in pragmatism and care practice doing the responsible thing in the context of conflicting relationships whereas justice moral approaches neglect these factors and connotes aggression<sup>184</sup> that can lead to negative psychological effects.<sup>185</sup> Henceforth, the current law on divorce should mirror that of other modern family law principles and encourage pragmatism as its focus towards no-fault would enable for a swift divorce and reduce conflict.

These pragmatic moral discourses come from a premise of connection and connotes an act of care that seeks solutions that are most inclusive of the collective’s (in this context, the ‘family’) needs and not the

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<sup>178</sup> See Mischel W, Ebbsen E. B, and Raskoff Zeiss A, “Cognitive and attentional mechanisms in delay of gratification” (1972) 21 *Journal of Personality and Social Psychology*, 204-218; Watts TW, Duncan GJ and Quan H, “Revisiting the Marshmallow Test: A Conceptual Replication Investigating Links Between Early Delay of Gratification and Later Outcomes” (2018) *Psychological Science*, 1159; This concept of instant versus delayed gratification and its relationship to moral perspectives is more rooted in individual demographics than psychology. Mischel’s ‘Marshmallow test’ determined that when individuals delay gratification of outcome, they are found to live more fulfilled lives long-term. Following studies determined that the root of these decisions was not explained by individual willpower but economic background.

<sup>179</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 140-142.

<sup>180</sup> Gilligan C, *In a Different Voice: Psychological Theory and Women's Development* (first published 1982, Harvard University Press 2016); Webteam, “Carol Gilligan” (*Ethics of care* July 8, 2018) from: <https://ethicsofcare.org/carol-gilligan/> accessed February 27, 2019.

<sup>181</sup> Held V, *The Ethics of Care: Personal, Political, and Global* (Oxford University Press 2007), 9.

<sup>182</sup> See ‘Psychological Impact’ and ‘Factors that influence Fault’

<sup>183</sup> Millbank J, “The role of functional family in same-sex family recognition trends” (2008) 20 *CFLQ*, 155.

<sup>184</sup> Gilligan C, *In a Different Voice: Psychological Theory and Women's Development* (first published 1982, Harvard University Press 2016), 38.

<sup>185</sup> *Ibid.*

individual.<sup>186</sup> Sandel argues the mode of governance that the current law enforces is indeed liberalist because it provides a ‘neutral’ framework of rights that free moral agents may use to provide their conception of a ‘good life’.<sup>187</sup> However he contends that this mode of governance is wrong to be applied to the collective (in this context, society) due to the moral ties that individuals are subjected to from our biographical dispositions (i.e. genetic psychology, economic status, culture, etc.).<sup>188</sup> Reece defines this shift to increased moral responsibility by removing Fault as ‘post-liberal’.<sup>189</sup> She states the increased moral pragmatism in practice allows us the opportunity to ‘divorce responsibly’ because both family law policy and morally pragmatic values are oriented towards harm-minimization.<sup>190</sup> Yet the law in theory aims to provide justice for the petitioner and for this purpose the current law’s emphasis on motive and intent (as determined by Fault) can be considered individualist. Reece concludes that this emphasis is incorrectly placed because the law should not value the individual over the collective<sup>191</sup> and Himmelfarb<sup>192</sup> identifies that the law should impose the same moral standard across all demographics to ensure ‘collective’ equality. Considering the overarching objectives of modern family law are that of the reduction of harm and conflict for the family, the law in theory should reflect these aims by conducting a mode of governance that encourages pragmatism for the collective opposed to justice for the individual.

Thus far, the thesis has argued that the objective of the current law in *theory* does not mirror with its use in *practice*. These conflicting moral discourses in theory and practice reflect the complexities of modern values, but the law in practice evidences that moral pragmatism serves as a strong base for the reconceptualization of the substantive law because of the lack of negative spill over.<sup>193</sup> In theory, the use of Fault to prove irretrievable breakdown of the marriage does not seek to minimize harm that the family may be subject to endure, but to provide justice to the petitioner and protect the institution of marriage. Yet in practice the courts lack of scrutiny of petitions and lowering of the behaviour threshold is evidence of the judicial discontent as to the current law’s requirements and desire to keep family policy consistent with evolved societal morals. Also, the use of Fault in the divorce process is contrary to that of other family law policy as empirical and qualitative evidence indicates its use only aggravates economic and psychological hardship that the family may be subject to.<sup>194</sup> These economic and psychological effects prove that for the most part divorce is an unwinnable event; therefore a morality based around justice can be considered inaccurate as perspectives of the law in a micro and macro context accentuate a desire for a law on divorce

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<sup>186</sup> *Id.*

<sup>187</sup> Sandel MJ, *Liberalism and the Limits of Justice* (first published 1982, Cambridge University Press 2010), 175-183; Sandel, “Liberalism and the Self” (*YouTube* March 16, 2018) from: <https://www.youtube.com/watch?v=4Za1T4quiiM> accessed April 30, 2019.

<sup>188</sup> *Ibid.*

<sup>189</sup> Reece H, *Divorcing Responsibly* (Hart 2003), 221.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Id.*, 235.

<sup>192</sup> “Himmelfarb G, *The De-Moralization of Society: from Victorian Virtues to Modern Values* (Vintage Books 1996), 128” in Gilmore S, Herring J and Probert R, *Landmark Cases in Family Law* (Hart Publishing 2016), 25.

<sup>193</sup> Cahn NR, Dowd NE and Whitehead BD, “The Moral Complexities of Family Law” (1997) 50 *Stanford Law Review*, 225.

<sup>194</sup> *Ibid.*



that is pragmatic and encourages a process that will result in the least defeat<sup>195</sup> as possible for all those involved.

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<sup>195</sup> *Id.*

### Chapter 3: Reforms to Pragmatism

The criticisms of the current law are nothing new. The hybrid-based system, which requires the use of Fault for a decree nisi to be granted in contested cases, has been called into question since the 1980s. The Law Commission's 1988 Consultation Paper<sup>196</sup> highlighted this reality that Fault and conflict often lead to undesirable outcomes.<sup>197</sup> Subsequent reports followed<sup>198</sup> resulting in Parliament's acceptance of the need for reform and a test period for Part II of the Family Law Act (FLA)<sup>199</sup> 1996 that was ultimately not implemented.<sup>200</sup> Over two decades later the MoJ has released proposals for reform again that mirror similar jurisdictions that have adopted unilateral divorce laws. Both the proposals for reform and international comparatives will be discussed and it will be concluded that these MoJ proposals evidence the laws shift towards a pragmatic morality in theory that reflects both its use in practice and that of modern societal values. After analysis of this shift, additional steps will be explored that have the potential to further the law even more into pragmatism that would ultimately continue to reduce conflict and minimize harm.

#### Ministry of Justice Proposals for Reform

The outcome of Owens and subsequent findings from Trinder's study has led to the MoJ's current Consultation Paper.<sup>201</sup> Reform to a no-fault based law on divorce would be prospective in its foundation as the objective would be to avoid any dwelling on past behaviour and to look forward in the most civil manner that will have the minimalist effect on those involved.<sup>202</sup> The proposals for reform highlight its objective to be of harm-minimisation with a focus to:<sup>203</sup>

*(a) make sure the decision to divorce continues to be a considered one, and that spouses have an opportunity to change course; and*

*(b) to make sure that divorcing couples are not put through legal requirements which do not serve their or society's interests, and that lead to conflict and poor outcomes for children.*

<sup>196</sup> Lord Chancellor's Department, 'Looking to the Future: Mediation and the Ground for Divorce', Command Paper Cm 2799 (London: HMSO, 1995).

<sup>197</sup> Ibid; Sclater S, *Divorce: A Psychosocial Study* (Routledge 2017), 16.

<sup>198</sup> See Law Commission, 'The Ground for Divorce' (Law Com No 192, 1990).

<sup>199</sup> Available: <https://www.legislation.gov.uk/ukpga/1996/27/part/II>.

<sup>200</sup> "Fourth Annual Report of the Advisory Board on Family Law, 2000/2001, Para. 2.13" in Cretney SM, *Family Law in the Twentieth Century: a History* (Oxford University Press 2011), 762-63; (There are many reasons for the failure of Part II of the FLA, yet the attempts to encourage reconciliation via mandatory meetings can be said to be its biggest misstep. This area of failure can shed light on the further shifts to pragmatism that the law could emphasize (such as Collaborative Law), however this is an area for further research).

<sup>201</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018) from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>202</sup> See 'Psychological Impact'.

<sup>203</sup> Ibid, 5.

These objectives of the MoJ Consultation Paper evidence a shift towards pragmatism in theory that reflects the current law in practice. Responses to these proposals for reform from the Law Society<sup>204</sup>, Rights of Women<sup>205</sup>, and Bar Council<sup>206</sup> have been for the most part supportive. The following analysis will show the MoJ's recognition of the impact that divorce has on a family and of society's shift to pragmatic values.

### *Retention of the sole ground for divorce*

The MoJ has elected to not remove the requirement of irretrievable breakdown of the marriage as the sole ground for divorce.<sup>207</sup> The introduction of the sole ground for divorce has been considered extensively<sup>208</sup> in the past and fostered the shift away from the literalist morality that was practiced under the MCA 1937 and prior legislation. Prior to enactment of the DRA, the Law Commission concluded that the objectives of a good law should be one that “encourages maximum fairness, minimum bitterness, and a reduction of distress and humiliation”<sup>209</sup> all of which the sole ground for divorce promotes. The Bar Council has stated that “the concept of irretrievable breakdown is clear and easily understood”<sup>210</sup> and conclude that this requirement should not be redrafted.<sup>211</sup> This prospective component of the current law encourages what the law aims to achieve in theory as it does not require any dwindling on the past.

It is worth noting that a recent *Nuffield Foundation*<sup>212</sup> report by Trinder and Scherpe highlights an international trend away from requiring any ground for divorce.<sup>213</sup> Other jurisdictions have shown to adopt systems in which divorce is a right and requires no proof other than notification or a period of separation.<sup>214</sup> Trinder also notes that, similarly to England and Wales, there is little scrutiny in jurisdictions that still require irretrievable breakdown as the sole ground.<sup>215</sup> The law in practice shows that the scrutiny that the courts apply to ‘inquire into the facts’<sup>216</sup> is more akin to a process of ‘administrative rubber stamping’<sup>217</sup> and

<sup>204</sup> Law Society, ‘Reform of the legal requirements for divorce – Law Society Response’ in “Reforming the Legal Requirements for Divorce - Law Society Response” (*The Law Society*) from: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/> accessed April 6, 2019.

<sup>205</sup> Rights of Women, ‘Briefing on Divorce Law Reform’ from “Rights of Women Release Briefing on Divorce Law Reform” (*Rights of Women* July 31, 2018) from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019.

<sup>206</sup> Bar Council response to the Ministry of Justice consultation paper ‘Reform of the legal requirements for divorce’ from: [https://www.barcouncil.org.uk/media/696163/reform\\_of\\_the\\_legal\\_requirements\\_for\\_divorce\\_kw1\\_.pdf](https://www.barcouncil.org.uk/media/696163/reform_of_the_legal_requirements_for_divorce_kw1_.pdf) accessed April 6, 2019.

<sup>207</sup> *Id.*, 29.

<sup>208</sup> See generally Law Commission, ‘*The Field of Choice*’, Command Paper Cmnd. 123 (London: HMSO, 1966); Lord Chancellor’s Department, ‘*Looking to the Future: Mediation and the Ground for Divorce*’, Command Paper Cm 2799 (London: HMSO, 1995); Family Law Act 1996.

<sup>209</sup> “Law Commission, ‘*The Field of Choice*’, Command Paper Cmnd. 123 (London: HMSO, 1966), 10” in Ministry of Justice, ‘Reducing family conflict: Reform of the legal requirements for divorce’ (September 2018), 19 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>210</sup> Bar Council response to the Ministry of Justice consultation paper ‘Reform of the legal requirements for divorce’, 3 from: [https://www.barcouncil.org.uk/media/696163/reform\\_of\\_the\\_legal\\_requirements\\_for\\_divorce\\_kw1\\_.pdf](https://www.barcouncil.org.uk/media/696163/reform_of_the_legal_requirements_for_divorce_kw1_.pdf) accessed April 6, 2019

<sup>211</sup> *Ibid.*

<sup>212</sup> Trinder L, and Scherpe J, *Reforming the Ground for Divorce: Experience from Other Jurisdictions* (London: Nuffield Foundation 2019).

<sup>213</sup> *Ibid.*, 5 & 19.

<sup>214</sup> *Id.* The jurisdictions referred to in this report are Spain, Sweden, and Finland.

<sup>215</sup> *Id.*

<sup>216</sup> Matrimonial Causes Act 1973, s. 1(3).

therefore poses the question if the presence of any ground for divorce is required at all. It is concluded that the MoJ's proposals to retain the sole ground of irretrievable breakdown can be of the same affect as these other jurisdictional shifts if the ability to contest is also removed because of the resulting reduction in conflict.<sup>218</sup>

### *Replacement of the five facts with notice of irretrievable marital breakdown*

The retention of Fault in the 1960s paused the progression towards pragmatism that the sole ground of 'irretrievable breakdown' was leading to and this failure to implement a pragmatic moral discourse into the law in theory exposed its effects over the last 50 years.<sup>219</sup> The Law Commission has stated that the retention of Fault rendered the (pragmatic) aims of the law impossible to achieve as the underlying basis of the marital breakdown (legally) relied on the parties' past conduct, thus outlining the downside of the retrospective component of the law.<sup>220</sup> It was concluded that with laws of Fault, the parties are "encouraged to dwell on the past and to recriminate"<sup>221</sup>, and therefore implements a moral discourse that runs counter to macro level aims of pragmatism that modern family law<sup>222</sup> seeks to encourage. The MoJ's Consultation recognises these results and have prompted to not retain the five 'facts' but to replace them with notice that the marriage has broken down.<sup>223</sup> Procedurally, this would entail one or both parties notifying the court of an intention for divorce without the requirement to evidence conduct.<sup>224</sup> Responses to this proposal are conclusive in their support towards this shift to 'no-fault' as this current requirement often results in a "destructive impact on families that the state should avoid at all costs"<sup>225</sup> especially towards the welfare of

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<sup>217</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 55.

<sup>218</sup> Trinder L, and Scherpe J, *Reforming the Ground for Divorce: Experience from Other Jurisdictions* (London: Nuffield Foundation 2019), 24. It is also worth noting that in jurisdictions that have adopted unilateral divorce laws, the divorce rate is victim to a short-term spike but eventually levels out. See González L and Viitanen TK, "The Effect of Divorce Laws on Divorce Rates in Europe" (2009) 53 *European Economic Review*, 127; Trinder L, *In anticipation of a temporary blip: Would a change in the divorce law increase the divorce rate?* (2015) LexisNexis. [Online]. [Accessed 19 March 2018]. Available from: [http://www.familylaw.co.uk/news\\_and\\_comment/in-anticipation-of-a-temporary-blip-would-a-change-in-the-divorce-law-increase-the-divorce-rate#.WqfNZ2aPnq2](http://www.familylaw.co.uk/news_and_comment/in-anticipation-of-a-temporary-blip-would-a-change-in-the-divorce-law-increase-the-divorce-rate#.WqfNZ2aPnq2); Kneip T, Bauer G and Teachman J, "Did Unilateral Divorce Laws Raise Divorce Rates in Western Europe?" (2009) 71 *Journal of Marriage and Family*, 592.

<sup>219</sup> See Chapter 1.

<sup>220</sup> "Law Commission, 'Facing the Future' (Law Com No 170, 1988), 28" in Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 22 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf). accessed November 1, 2018.

<sup>221</sup> Ibid.

<sup>222</sup> That is of harm-minimisation and the promotion of long-term family relationships, which is expressly stated by both the Resolution Code of Practice and the Law Society Protocol on Family Law. See *supra* notes 3 & 4

<sup>223</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 30 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>224</sup> Ibid.

<sup>225</sup> Law Society, 'Reform of the legal requirements for divorce – Law Society Response' in "Reforming the Legal Requirements for Divorce - Law Society Response" (*The Law Society*), 3 from: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/> accessed April 6, 2019.

children.<sup>226</sup> The following will show that this proposal to remove Fault would provide an improvement upon the multiple psychological and sociological factors that are impacted in the divorce process.<sup>227</sup>

First, this proposal to remove Fault acknowledges the indirect discrimination that certain marginalised groups may suffer from under the current law.<sup>228</sup> The Consultation Paper<sup>229</sup> and findings from RoW<sup>230</sup> reflect the analysis conducted above<sup>231</sup> that highlights the unfortunate discrimination that women are subject to under the current law. In practice, the current law has often shown to: keep women trapped in a relationship of abuse, force a reliance on Fault that “unnecessarily raises the risk of abuse”<sup>232</sup>, and enable the abusive spouses to continue the conflict through long divorce proceedings.<sup>233</sup> Therefore removing this requirement would enable victims of domestic abuse to withdraw from these difficult living environments without fear of repercussions that may arise from evidencing conduct.<sup>234</sup>

Second, the overarching factor that influences Fault is economic status.<sup>235</sup> RoW identify that low-income individuals (most commonly women) are discriminated against under the current law as it is not financially plausible for them to rely on ‘separation’.<sup>236</sup> Case law<sup>237</sup> has shown a shift towards pragmatism in the past by accepting a mental element of ‘separation’, however RoW indicates that this often imposes strain on the couple and children that results in the use of Fault to avoid 2-5 years of unhappy living.<sup>238</sup> These findings highlight not only the retrospection imposed by the current law (in theory) but also the desire for a prospective process in practice because individuals simply want to move on with their lives. Furthermore, since Fault has often shown to be used as a tool to get a quick divorce<sup>239</sup>, the introduction of a notification process would in turn decrease financial hardships as the retention of legal representation to argue Fault

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<sup>226</sup> Bar Council response to the Ministry of Justice consultation paper ‘Reform of the legal requirements for divorce’, 2-3 from: [https://www.barcouncil.org.uk/media/696163/reform\\_of\\_the\\_legal\\_requirements\\_for\\_divorce\\_kw1\\_.pdf](https://www.barcouncil.org.uk/media/696163/reform_of_the_legal_requirements_for_divorce_kw1_.pdf) accessed April 6, 2019.

<sup>227</sup> See Chapter 1.

<sup>228</sup> See ‘Factors that influence Fault’.

<sup>229</sup> Ministry of Justice, ‘Reducing family conflict: Reform of the legal requirements for divorce’ (September 2018), 30 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>230</sup> Rights of Women, ‘Briefing on Divorce Law Reform’ from “Rights of Women Release Briefing on Divorce Law Reform” (*Rights of Women* July 31, 2018) from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019.

<sup>231</sup> See Chapter 1.

<sup>232</sup> Rights of Women, ‘Briefing on Divorce Law Reform’ from “Rights of Women Release Briefing on Divorce Law Reform” (*Rights of Women* July 31, 2018), 2 from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019.

<sup>233</sup> Ibid.

<sup>234</sup> *Id.*

<sup>235</sup> See ‘Factors that influence Fault’.

<sup>236</sup> Rights of Women, ‘Briefing on Divorce Law Reform’ from “Rights of Women Release Briefing on Divorce Law Reform” (*Rights of Women* July 31, 2018), 3 from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019.

<sup>237</sup> *Santos v Santos* [1972] 2 All ER 246.

<sup>238</sup> Rights of Women, ‘Briefing on Divorce Law Reform’ from “Rights of Women Release Briefing on Divorce Law Reform” (*Rights of Women* July 31, 2018), 3 from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019.

<sup>239</sup> See Chapter 1.

petitions would become redundant in the stage from decree nisi to absolute because disclosure of past conduct would become unnecessary to receive a divorce.<sup>240</sup>

The shift to no-fault based divorce laws have not gone without criticism, although the removal of Fault would reflect modern society's inclination towards pragmatism.<sup>241</sup> The micro level criticisms of unilateral divorce laws can be compared to that of the macro level issues of conflicting moralities within family law because those opposed to the removal of Fault identify criticisms that can be viewed as parallel to the goals of a justice morality. For example, some argue that blame should be a crucial part of the divorce process because it can provide justice and psychological catharsis.<sup>242</sup> Yet Trinder's study concludes that unilateral divorce already exists in practice, albeit "masked by an often painful, and sometimes destructive, legal ritual (Fault) with no obvious benefits for the parties or state"<sup>243</sup>. Therefore a serious weakness with this argument against no-fault (and the overarching justice moral discourse) is that the psychological spill over effects that stem from assigning blame have proven to be profound on the couple and children.<sup>244</sup> Furthermore, Trinder's study also finds no empirical support that the use of Fault does anything to protect the institution of marriage but actually has an adverse affect due to its reliance to secure a divorce quickly.<sup>245</sup> The MoJ's proposals for reform acknowledge these micro level issues of the current law that have been in existence for decades and evidence a shift towards macro level values of pragmatism<sup>246</sup> that transcend all areas of modern family law.

### *Removal of the opportunity to contest*

In reality, the number of divorces that are contested is miniscule. Most recent data reports that a mere 2.28% of all petitions had an 'intention' to be defended and around 0.67% of them were actually answered.<sup>247</sup> Issues surrounding the ability to contest against divorce petitions mirror that of Fault because the increased conflict that stem from both serve 'no positive purpose'<sup>248</sup> and therefore the MoJ proposes to remove the opportunity to contest.<sup>249</sup> The MoJ's acknowledgement of this reality in practice evidences a further shift away from the present justice morality that the current law maintains and towards one of pragmatism.

<sup>240</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 30 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>241</sup> As evidenced by the law in practice.

<sup>242</sup> Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 17.

<sup>243</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 10.

<sup>244</sup> See Chapter 1.

<sup>245</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 16.

<sup>246</sup> See *supra* notes 3&4.

<sup>247</sup> "Divorces in England and Wales: 2017" (*Office for National Statistics* September 26, 2018)

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2017> accessed March 7, 2019; *Owens v Owens* [2017] EWCA Civ 182, [98] (Munby LJ).

<sup>248</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 34 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>249</sup> *Ibid.*

The Law Commission has identified that this area of the law (much like that of Fault) to be contrary to wider legal and public policy. The policy for reform can be identified as similar to that of pragmatism because it should aim to be “simple, logical, comprehensive, and should not prevent the dissolution of unions which have ceased to have meaning”<sup>250</sup>. In the context of the issues surrounding the opportunity to contest, justice moral discourse would argue (like it does in the context of Fault) that removing it would undermine the institution of marriage by encouraging divorce. However there is inconsistency with this argument because in reality the law cannot aspire to force a marriage to work because doing so would be akin to “trying to close a stable door after a horse has bolted.”<sup>251</sup> Furthermore, RoW highlight that the ability to contest is often a misused tool to continue abuse towards spouses<sup>252</sup> and therefore conclude that the proposal to rid the opportunity to contest would in turn “remove this avenue of abuse for perpetrators”<sup>253</sup> that often results in emotional and psychological harm for the rest of the family.

The Law Society indicates that this removal of the opportunity to contest can be criticized as ‘too liberal’ by those of the justice morality because of the lack of protection it would provide to the respondents side of the story.<sup>254</sup> Yet this justice-based moral discourse underpinning the current law in theory does not accomplish what it aims to achieve by enabling the option to contest because in practice less than 20% of respondents that do defend a petition do so on the ‘fact’ that is being relied upon and not that the marriage had broken down.<sup>255</sup> In other words, couples agree that the marriage has broken down but disagree as to why. Additionally, the majority of couples getting divorced are encouraged (often) by legal counsel that proceeding to contest will result in financial and emotional difficulties.<sup>256</sup> Therefore in practice most divorce petitions do not accurately reflect the real reason for marital breakdown<sup>257</sup> and most couples do not want to pay additional costs to contest an issue that is often ‘fruitless’.<sup>258</sup> As LJ Hallett highlights in *Owens*, even if

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<sup>250</sup> Law Commission, *Time Restrictions on Presentation of Divorce and Nullity Petitions* (Law Com. No. 116), 6.

<sup>251</sup> *Ibid.*

<sup>252</sup> Rights of Women, ‘Briefing on Divorce Law Reform’ from “Rights of Women Release Briefing on Divorce Law Reform” (*Rights of Women* July 31, 2018), 7 from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019.

<sup>253</sup> *Ibid.*, 8.

<sup>254</sup> *Id.*

<sup>255</sup> Trinder L and Sefton M, *No Contest: Defended Divorce in England and Wales* (London: Nuffield Foundation, 2018), 40 in Ministry of Justice, ‘Reducing family conflict: Reform of the legal requirements for divorce’ (September 2018) from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>256</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 5.

<sup>257</sup> *Id.*; Ministry of Justice, ‘Reducing family conflict: Reform of the legal requirements for divorce’ (September 2018), 31 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>258</sup> Ministry of Justice, ‘Reducing family conflict: Reform of the legal requirements for divorce’ (September 2018), 31 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018; Law Society, ‘Reform of the legal requirements for divorce – Law Society Response’ in “Reforming the Legal Requirements for Divorce - Law Society Response” (*The Law Society*), 6 from: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/> accessed April 6, 2019.

a petition is defended it does not do anything to prevent the marital breakdown in reality but merely forces spouses to be legally trapped in unhappy marriages<sup>259</sup> and the few number of cases that are defended endorses *Owens* as an exception to the law in practice.<sup>260</sup> In conclusion, the proposals to remove the opportunity to contest indicate the MoJ's recognition of the lack of pragmatism (that runs contrary to wider family law policy) that contesting allegations maintains because of the increased conflict that occurs as a result, and its overall purposeless in practice due to the lack of scrutiny that the courts often apply to petitions.<sup>261</sup>

#### *Minimum timeframe of the divorce process*

Fault in practice is often used to obtain a quick divorce, yet the requirement for a Fault-based petition to be evidenced and the possibility of those allegations being rebutted, still often leads to a lengthy divorce timeframe. The average timeframe from when the petition is issued to decree nisi is approximately 3.7 months (112 days) and 6.3 months (190 days) to decree absolute.<sup>262</sup> This duration between petition and decree nisi underlines the retrospective nature of the current law because more than half of the divorce process presently consists of the court attempting to find that the marriage to has broken down.

The MoJ Consultation proposals suggest that the timeframe between the decree nisi and decree absolute be a minimum period of six months.<sup>263</sup> The MoJ does not outline in detail its reasoning for this declared period other than the intention to give the couple a period to reflect on their decision and to consider the practical implication of the decision.<sup>264</sup> This timeframe can be considered logical in relation to the current duration of the process, however a more pragmatic solution will be discussed below.<sup>265</sup>

#### *Retention of the bar on divorce petitions in the first year*

The current minimum period that bars a couple from divorcing is one-year since the date of marriage.<sup>266</sup> The MoJ has elected to retain this duration as the requisite period before a petition may be submitted as it does not see evidence that the current time period causes difficulties.<sup>267</sup> Despite agreement with this proposal, the Law Society and Bar Council identify that the removal of the bar on petitions would be more in accordance with the pragmatic moral discourse that the MoJ is shifting towards because of the personal autonomy it

<sup>259</sup> *Owens v Owens* [2017] EWCA Civ 182, [100].

<sup>260</sup> See also Elston E, Fuller J, and Murch M, "Judicial Hearings of Undefended Divorce Petitions" (1975) *Modern Law Review*, 609.

<sup>261</sup> See 'Behaviour and inaccurate petitions'.

<sup>262</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 59.

<sup>263</sup> *Ibid*, 32.

<sup>264</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 31 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>265</sup> See 'one-year separation'.

<sup>266</sup> Matrimonial Causes Act 1973 s. 3(1).

<sup>267</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 35 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.



provides to the parties.<sup>268</sup> This consideration will be discussed further below in relation to the minimum timeframe for divorce.<sup>269</sup>

### *Retention of other requirements*

The MoJ has also elected to retain both the intervention of the Queen's Proctor (s.8)<sup>270</sup> and the certification that a discussion of the possibility of reconciliation (s.6)<sup>271</sup> has taken place.<sup>272</sup> In practice, under section 8 the power to intervene under the direction of the Attorney General typically takes the form of the Treasury Solicitor acting as a safeguard against false petitions from couples seeking to obtain a divorce quickly.<sup>273</sup> The calls for reform of this area of s.6 are not contemporary because the provisions of Part II of the FLA 1996 aimed to achieve similar goals to that of the MoJ's current proposals.<sup>274</sup> However this analysis relates more so to this concept of the moral discourses within family law post-divorce, and is therefore an area for further research.

In summary, the MoJ's proposals to remove the five 'facts', the opportunity to contest, and alter the minimum timeframe for the divorce process would result in an accurate reflection of how the law has proven to be used in practice. The retention of the sole ground of irretrievable breakdown, the one-year bar on petitions, and other requirements encompass this idea of the State doing its part to regulate behaviour without enforcing a morality that does not reflect that of modern society. To conclude, the use of Fault is not pragmatic in theory and the overwhelmingly positive response to the MoJ's proposals for reform indicate the shift to a legal policy that reflects the moral discourse of pragmatism is more analogous to how the law actually functions in practice.

## **Further Shifts to Pragmatism**

This paper has posed that the heart of the issue in regards to the current law on divorce in England and Wales is one of inconsistent moral frameworks. The law and courts can either provide a process of justice towards the petitioner and the institution of marriage (justice moral discourse), or it can focus on autonomy and harm-minimisation for the family (pragmatic discourse). At this point, the paper has shown that in

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<sup>268</sup> Law Society, 'Reform of the legal requirements for divorce – Law Society Response' in "Reforming the Legal Requirements for Divorce - Law Society Response" (*The Law Society*), 3 from: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/> accessed April 6, 2019.

<sup>269</sup> See 'one-year separation'.

<sup>270</sup> Matrimonial Causes Act 1973, s. 8.

<sup>271</sup> *Ibid*, s. 6.

<sup>272</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 36 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018.

<sup>273</sup> *Ibid*.

<sup>274</sup> See mainly SM, *Family Law in the Twentieth Century: a History* (Oxford University Press 2003), 390; Fairbairn, C and Rutherford T, "No-fault divorce" (2017) *Commons Library Briefing – UK Parliament*, 10-13 from: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01409> accessed April 27, 2019.

theory the law is of a justice morality, yet it practice it is pragmatic. The proposals for reform from the MoJ provide acknowledgment of this issue of inconsistent moral discourses of the current law in theory and in practice and evidence its shift towards pragmatism. However, strategies to enhance this shift to pragmatism might involve slight modifications to the following.

### *One-year 'separation'*

The objectives of the MoJ's proposals for a six-month minimum timeframe attempts to mirror that of both pragmatic **and** justice moral discourses as it would allow the couple time to reflect on their decision – thus protecting the institution of marriage - and to make the process as pain-free as possible – thus reducing harm.<sup>275</sup> Yet considering the average timeframe for divorce presently is approximately six months,<sup>276</sup> the MoJ's proposal of this similar timeframe can be considered non-pragmatic. Both the proposals of altering the minimum timeframe and retaining the bar on divorce petitions within the first year of marriage<sup>277</sup> are areas of debate because of the difficulty in determining the correct balance of these moral discourse objectives. In other words, the state intervenes in an attempt to protect the institution of marriage by implementing mandatory waiting periods, yet it also attempts to enable autonomy and reduce harm by minimizing these mandatory periods. Therefore the Law Society and Bar Council pose that removing the bar on petitions would be more aligned to pragmatic objectives of autonomy<sup>278</sup> and reduction of harm, however this paper contends that using this theoretical consideration is more relevant to be considered in the context of the 'minimum timeframe' proposals and will conclude that the reforms should go one step further in its shift to pragmatism by implementing a one-year minimum 'separation period'<sup>279</sup> before the divorce process begins opposed to the current proposal of six-months.<sup>280</sup>

Reforming the minimum timeframe to one-year from the date of separation (i.e. date the marriage has irretrievably broken down) can provide a pragmatic solution that would allow for both sides of the argument to be satisfied. Trinder's recent report identifies that the inclusion of a 'separation period' provision in addition to a notification scheme is common amongst other jurisdictions.<sup>281</sup> This proposal was considered in the Law Society's response<sup>282</sup>, however it was not considered in the MoJ Consultation despite its

<sup>275</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 33 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018; Law Society, 'Reform of the legal requirements for divorce – Law Society Response' in "Reforming the Legal Requirements for Divorce - Law Society Response" (*The Law Society*), 5 from: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/> accessed April 6, 2019.

<sup>276</sup> See *'minimum timeframe of the divorce process'*.

<sup>277</sup> See *'Retention on the bar on petitions in the first year'*.

<sup>278</sup> See also Diduck A, "Autonomy and Justice" (2016) *C.F.L.Q.*, 133.

<sup>279</sup> 'Separation' in this sense simply refers to the length of time the couple has been separated as a couple since the irretrievable breakdown of the marriage was notified to the court by one of the parties.

<sup>280</sup> See *'minimum timeframe of the divorce process'*.

<sup>281</sup> Trinder L, and Scherpe J, *Reforming the Ground for Divorce: Experience from Other Jurisdictions* (London: Nuffield Foundation 2019), 22.

<sup>282</sup> *Ibid.*

commonality amongst other jurisdictions. In a practical sense, other international jurisdictions commence the relevant notification scheme/waiting period when both parties are made aware of the application<sup>283</sup> with the purpose to act as a safeguard against unexpected divorces and also enable autonomy for the parties.<sup>284</sup>

A common criticism<sup>285</sup> against no-fault reform is that it allows for an easy divorce and thus undermines the institution of marriage. The MoJ's proposals and relevant responses<sup>286</sup> concur that some couples<sup>287</sup> require a period of reflection before a divorce is finalised.<sup>288</sup> Despite the accuracy of this statement, the current average timeframe of six-months for a decree absolute when Fault is used does not make the process any more difficult in a temporal sense in comparison to the MoJ's proposals.<sup>289</sup> Therefore the proposal to make the minimum timeframe for divorce is likely to undermine the goals of a justice morality because the 'quick divorce' would still be available except without the requirement of Fault. Conversely, those in favour of no-fault have outlined that the requirement for two-years separation even with mutual consent as too long of a timeframe.<sup>290</sup> This duration is non-pragmatic because the MoJ and Law Society have stated that the use of Fault is often linked to an individuals desire to avoid waiting a minimum of two-years before the divorce is finalised.<sup>291</sup>

To conclude, this one-year separation period adjustment to the MoJ's current proposal would serve as a middle ground between the average timeframe for divorce presently (six-months) and the minimum timeframe currently required when the couple does not wish to assign blame (two-year separation). The one-year timeframe would also satisfy those who value reflection because it enables a reasonable period to

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<sup>283</sup> Trinder L, and Scherpe J, *Reforming the Ground for Divorce: Experience from Other Jurisdictions* (London: Nuffield Foundation 2019), 28.

<sup>284</sup> Ibid; A similar one-year period was implemented in Canada's shift to no-fault. Prior to enactment of the Canadian Divorce Act 1968, it was highlighted that the one-year period would serve as middle ground for those that wish to divorce quickly and those that wanted to protect the institution of marriage. See Payne J, "Brief to the Special Joint Committee of the Senate and House of Commons on Divorce" (January 1967).

<sup>285</sup> Fairbairn, C and Rutherford T, "No-fault divorce" (2017) *Commons Library Briefing – UK Parliament*, 21-25 from: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01409> accessed April 27, 2019.

<sup>286</sup> I.e. Law Society, Rights of Women, and Bar Council, *supra* notes 208-210.

<sup>287</sup> Such as "reactive" spouses and newly wed couples. See Law Society, 'Reform of the legal requirements for divorce – Law Society Response' in "Reforming the Legal Requirements for Divorce - Law Society Response" (*The Law Society*), 6 from: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/> accessed April 6, 2019.

<sup>288</sup> Ministry of Justice, 'Reducing family conflict: Reform of the legal requirements for divorce' (September 2018), 31 from: [https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting\\_documents/reducingfamilyconflictconsultation.pdf](https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf) accessed November 1, 2018; Law Society, 'Reform of the legal requirements for divorce – Law Society Response' in "Reforming the Legal Requirements for Divorce - Law Society Response" (*The Law Society*), 6 from: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/> accessed April 6, 2019; Rights of Women, 'Briefing on Divorce Law Reform' from "Rights of Women Release Briefing on Divorce Law Reform" (*Rights of Women* July 31, 2018), 7 from: <https://rightsofwomen.org.uk/news/rights-of-women-release-briefing-on-divorce-law-reform> accessed April 6, 2019; Bar Council response to the Ministry of Justice consultation paper 'Reform of the legal requirements for divorce', 6 from: [https://www.barcouncil.org.uk/media/696163/reform\\_of\\_the\\_legal\\_requirements\\_for\\_divorce\\_kw1\\_.pdf](https://www.barcouncil.org.uk/media/696163/reform_of_the_legal_requirements_for_divorce_kw1_.pdf) accessed April 6, 2019.

<sup>289</sup> See 'minimum timeframe of the divorce process'.

<sup>290</sup> Ibid *supra* note 179.

<sup>291</sup> Law Society, 'Reform of the legal requirements for divorce – Law Society Response' in "Reforming the Legal Requirements for Divorce - Law Society Response" (*The Law Society*), 5 from: <https://www.lawsociety.org.uk/policy-campaigns/consultation-responses/reforming-the-legal-requirements-for-divorce/> accessed April 6, 2019.

consider reconciliation and at the same time discourages parties from relying on alternate routes to obtain a divorce (such as Fault) that may promote conflict.

### *Online divorce hub*

Before proceeding to discuss the shift to pragmatism in the context of ‘online divorce’ procedures, it is important to discuss the relevance of legal aid in divorce because of the profound the impact that economic status has on a couple’s experience during a divorce.<sup>292</sup> The ability to afford not only legal representation, but also the means to support a 2-5 year separation period has shown to be a major influencing factor on a couple’s use of Fault. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012<sup>293</sup> restricted the access to legal aid for private cases unless the individual was to have exceptional circumstances.<sup>294</sup> These restrictions were enacted mainly for monetary reasons<sup>295</sup> because the proposals prior to enactment estimated that these cuts to legal aid would save the Government an estimated £450-£500 million of the £2 billion annual budget.<sup>296</sup> Yet recent years since the implementation of these cuts have shown that these costs are still evident in other areas that prolong divorce,<sup>297</sup> which is troublesome due to the long-term effects an increased divorce timeframe has on the outcome for those involved. On the other hand, if the Government proceeds to implement unilateral laws and continue with a shift towards the digitisation of divorce then the role of legal aid for obtaining a divorce would become almost insignificant and greatly reduce the costs for all parties involved (especially those of low-income).<sup>298</sup>

The Family Justice Review<sup>299</sup> has originally made these proposals with the objectives to not only make the process less difficult for the parties but to also save the court’s time and money.<sup>300</sup> Critics<sup>301</sup> of the digitisation of divorce often cite parallel concerns to the justice based moral approach in the sense that it may make obtaining a divorce too simple and thus undermine the institution of marriage. Herring<sup>302</sup> states

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<sup>292</sup> See Chapter 1.

<sup>293</sup> Available: <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>.

<sup>294</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch 1; Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 39. Exceptional circumstances (categories) include: victims of domestic violence, forced marriages, allegations of child abuse, children who are party to the proceedings, or other exceptional circumstances.

<sup>295</sup> Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 39 citing “Ministry of Justice, *Reform of Legal Aid in England and Wales: The Government Response*, (London: Ministry of Justice 2011)”.

<sup>296</sup> “Five years of legal aid drought – the legacy of LASPO” (2018) *Fam Law* 362; Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 43.

<sup>297</sup> See specifically Litigants in Person (LiPs) and the subsequent increased divorce duration of process that stems from this in “Five years of legal aid drought – the legacy of LASPO” (2018) *Fam Law* 362; Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 43; Law Society of England and Wales, “*Access Denied? LASPO four years on: a Law Society review*” (2017), 2; “Wall P, “The President’s resolution address” (2012) *Family Law* 42” in Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 43; “Five years of legal aid drought – the legacy of LASPO” (2018) *Fam Law*, 362 (“In 2014 a reported 70% of children cases involved one or both parties without legal representation”); See also Chapter 1 for long-term negative spill over effects.

<sup>298</sup> It is worth noting that the process of determining practical agreements of the separation would still benefit from legal aid advice specifically dispute resolution methods. This is an area for further research.

<sup>299</sup> See Family Justice Review, *Final Report* (2011), 42-43; Ministry of Justice, *Government Response to the Family Justice Review* (London: Ministry of Justice 2012), 4.

<sup>300</sup> Herring J, *Family Law* (Seventh. Harlow, United Kingdom: Pearson 2017), 156.

<sup>301</sup> *Ibid*, 155.

<sup>302</sup> *Id*.

that the narrative around the divorce process historically allows a cathartic experience for those involved, yet the main weakness with this argument is that it relies on a procedure that has proven to increase conflict and bitterness both during and after the process.<sup>303</sup> Pilot versions for online divorce were implemented in 2018<sup>304</sup> that enabled uncontested couples to apply for a divorce digitally.<sup>305</sup> This pilot scheme proved to be very successful with an estimated 2,000 applications in the first month and a 93% satisfaction rate.<sup>306</sup> These results indicate that the introduction of a more digitised version of the divorce process aids this shift towards pragmatism because of the accessibility and simplicity it enables. Further developments have since been implemented into the pilot stage<sup>307</sup> thus evidencing further shifts to pragmatism.

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<sup>303</sup> See Chapter 1.

<sup>304</sup> Family Procedure Rules 2010, PD 35E.

<sup>305</sup> “Online divorce” (2018) *Fam Law*, 1243.

<sup>306</sup> Ibid; See also HM Courts & Tribunals Service, “More than 150,000 People Benefit from Online Justice in 2018” (*GOV.UK* January 4, 2019) from: <https://www.gov.uk/government/news/more-than-150000-people-benefit-from-online-justice-in-2018> accessed March 19, 2019 (In 2018 more than 150,000 people benefited from these online forms of justice that resulted with an 85% satisfaction rate and a reduction of more than half an hour per case).

<sup>307</sup> “Online divorce PD” (2019) *Fam Law*, 120 (Family Procedure Rules 2010, PD 36L came into force 14 January 2019).

## Conclusion

This paper has explored the current state of divorce law in England and Wales through the interpretive skeleton of two moral discourses: justice and pragmatism. Despite the law's justice-based objectives in theory, its use in practice has shown to incline towards those of pragmatism. Pragmatic moral discourses can be identified with prospective goals of harm-minimization and autonomy. The use of the law in practice evidences this moral discourse to be more accurate because in practice not only has there been a dilution of Fault from the inherent dishonesty of petitions in order to secure a quick divorce, but also the overall lack of scrutiny that the courts will apply. Continuing the analysis from a micro-perspective, research has identified that the current law is discriminatory towards traditionally marginalised groups. Trinder has recently identified that the most accurate predictors of the use of Fault is the retention of legal representation and the duration of marriage.<sup>308</sup> This paper has gone one step further and contended that although the specificity of the marginalised group does influence their probability to rely on Fault, the overarching trend is linked to economic status. These factors that influence Fault are important to consider because it highlights the discriminatory affect that an inaccurate moral discourse in theory can have on families in practice. Individuals within these marginalised groups often find themselves having to rely on Fault in order to achieve the most pragmatic outcome for the family because of the economic hardships that stem from prolonging a divorce.

The current law's non-justifiable pressure to proceed with this justice moral discourse in practice has revealed that assigning blame unnecessarily escalates conflict<sup>309</sup> that in turn can result in the manifestation of negative psychological functioning and behavioural problems in both the couple and children. Research evidences that couples subject to high conflict marital breakdowns often report increased feelings of depression, anxiety, substance abuse, and suicidal tendencies.<sup>310</sup> The current justice moral discourse does aid these effects by supporting the psychological coping strategy of painting one party as the perpetrator and the other as a victim, however the negative effects of this discourse have shown to be profound on the children. In the short-term, children subject to high conflict that stems from Fault within the divorce process have exhibited higher behavioural problems such as anxiety and depression.<sup>311</sup> In the long-term, children subject

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<sup>308</sup> Trinder L, Braybrook D, Bryson C, Coleman L, Houlston C, and Sefton M, *Finding Fault? Divorce Law and Practice in England and Wales* (London: Nuffield Foundation, 2017), 41-47.

<sup>309</sup> *Ibid*, 15.

<sup>310</sup> "McAllister F, *Marital Breakdown and the Health of the Nation* (One Plus One, UK, 1995) and Livingston Bruce M and Kim L.M, "Differences in the Effects of Divorce on Major Depression in Men and Women" (1992) *American Journal of Psychiatry* 149" in Sclater S, *Divorce: A Psychosocial Study* (Routledge 2017), 85; Richards M, Hardy R and Wadsworth M, "The Effects of Divorce and Separation on Mental Health in a National UK Birth Cohort" (1997) 27 *Psychological Medicine*, 1121.

<sup>311</sup> National Longitudinal Survey of Children and Youth (NLSCY) in Strohschein L, "Parental divorce and child mental health trajectories" (2005) *Journal of Marriage and Family*, 67, 1286-1300; "Effects of Divorce on Children" (2008) *Fam Law*, 938 (*LexisNexis® Academic & Library Solutions* 2008) Retrieved from:

[https://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23\\_T28473348830&format=GNBFULL&startDocNo=1&resultsUrlKey=0\\_T28473393566&backKey=20\\_T28473393567&csi=432082&docNo=7&scrollToPosition=1063](https://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T28473348830&format=GNBFULL&startDocNo=1&resultsUrlKey=0_T28473393566&backKey=20_T28473393567&csi=432082&docNo=7&scrollToPosition=1063) accessed February 22, 2019.

to this route of divorce have also shown to result in lower standards of living, educational attainment, job opportunities, and relationship difficulty with their parents and future spouses.<sup>312</sup> These findings and analysis from a micro-perspective display the difficulties that the MCA's theoretical objectives have on families in reality. The law's attempt to legislate morality by requiring these retrospective elements is inaccurate to how the legal community has chosen to proceed in practice in an effort to regulate behaviour by favouring a pragmatic process of divorcing that is prospective and aims to reduce harm.

This micro level analysis can then be applied macroscopically in relation to reform to no-fault, wider family law policy, and modern societal values. This paper has theorized that the conflicting moral discourses of the law in theory and in practice reflect that of the disconnection between the MCA and wider family justice policy. Overarching objectives of family law have shifted towards ethics of pragmatism and care<sup>313</sup> because of the inherent human needs and emotions that families are subject to and the theoretical objectives of the law on divorce should reflect this. The MoJ's proposals for reform towards no-fault evidence this disconnection between the law in theory and in practice on a micro level and this recognition reflects a shift towards the pragmatic objectives that are present macroscopically in wider family policy and societal values.

The overall positive response<sup>314</sup> to the MoJ's proposals indicate that this shift is a more accurate reflection of the macro level objectives of family law. Research<sup>315</sup> conducted on other international shifts towards pragmatic divorce laws indicates that reform in England and Wales could be more radical. Further reform towards pragmatism could entail: the incorporation of a one-year separation period or notification scheme for divorce, and an increased digitisation of the divorce process. It is worth noting that these proposals are unlikely to be implemented immediately due to political ramifications that would occur from reforming too radically, however international comparatives indicate they are of valuable consideration. In summation, despite the difficulty of legislating a morality that will stand the test of time, these reforms towards a pragmatic discourse in theory mirror modern values that will in turn restrain behaviour of those in practice that heartlessly seek blame and conflict, and ultimately lead to future socio-legal equity and familial prosperity.<sup>316</sup>

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<sup>312</sup> Ibid; Ambert A-M, *Divorce: Facts, Causes, & Consequences* (Vanier Institute of the Family 3<sup>rd</sup> edn, 2009), 20; Rappaport S.R, "Deconstructing the Impact of Divorce on Children" (2013) 3 *Family Law Quarterly*, 353-377;

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<sup>313</sup> See Chapter 2.

<sup>314</sup> *Supra* note 208-210

<sup>315</sup> Trinder L, and Scherpe J, *Reforming the Ground for Divorce: Experience from Other Jurisdictions* (London: Nuffield Foundation 2019), 22; See also Kneip T, Bauer G and Teachman J, "Did Unilateral Divorce Laws Raise Divorce Rates in Western Europe?" (2009) 71 *Journal of Marriage and Family*, 592

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