MACCABAEAN LECTURE IN JURISPRUDENCE

FAMILY BREAKDOWN AND SOCIAL POLICY

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IN England and Wales some 800,000 persons married in 1971. No one supposes that they will all cleave to their spouses till death parts them. Marriage is a romantic lottery and, as John Stuart Mill observed, 'whoever is in a state of mind to calculate chances calmly and value them correctly, is not at all likely to purchase a ticket. Those who marry after taking great pains about the matter, generally do but buy their disappointment dearer.'[1] We cannot predict how many of the brides and grooms of 1971 will have drawn winning or losing tickets, and we do not know what proportion of earlier marriage cohorts have experienced breakdown. Indeed, marriages collapse for so many different reasons and with so many different outcomes that, death apart, only those regulated by the courts leave a statistical record. Even so, we have no precise measure of the relationship between *de facto* and *de jure* marriage breakdowns in the past or today, and therefore the massive increase in divorce during this century cannot be interpreted as pointing to greater marital instability. Nevertheless, the number of marriage breakdowns is now formidable. Recent census data suggest that nearly one-tenth of all families with dependent children have only one parent by reason of death, divorce, separation, or illegitimate births. Half of these families are accounted for by the marriages broken by divorce or factual separation which leave nearly 400,000 lone parents, mostly mothers, to bring up single-handed almost 700,000 children. During the last decade, evidence has accumulated to show that such families are very much worse off than those with two parents. They have to live on significantly lower incomes and are more frequently dependent upon the Supplementary Benefits Commission. They find it much harder than other poor people to obtain and to retain suitable housing.

[1] F. A. Hayek, *John Stuart Mill and Harriet Taylor* (1951), p. 69.

The adults suffer the unrelieved loneliness of sole parenthood, and the children experience multiple material disadvantages as well as the emotional deprivation which may result from incomplete parental support. Awareness of the number and difficulties of one-parent families made them a political anxiety which was formally recognized in 1969 by the appointment of a departmental committee under the chairmanship of Mr. Justice Finer.

The law has always regulated marriage breakdown and recognized a husband's duty to maintain his wife whether or not he was living with her, provided that she had not forfeited her right by behaviour which cut at the root of the marriage. If her legal remedy failed to produce sufficient maintenance and if her kinsfolk could not afford to keep her, she had to rely upon the poor law or, since its abolition in 1948, upon the social security authorities which replaced it. My present purpose is to examine the relation between family law and social policy as sources of financial support for the casualties of broken homes and to suggest that there are grave defects in the legal and administrative institutions and procedures which deal with marriage breakdown. It is not widely appreciated that three systems of family law grew up in England. One served the wealthy and powerful, another developed for the remainder of the economically independent population, and a third dealt with the dependent poor. The third system was embedded in the poor law which survived for the first half of this century. The action of these three systems generated conflicts of principle and policy and threw up institutions which still today mock the ideal of one law of family breakdown for the whole community. So much of this tangled past lives on in the present that a long historical perspective is indispensable if this branch of law is to be understood in its current social context.

The Church always permitted disaffected spouses to live apart after a decree of divorce *a mensa et thoro* from an ecclesiastical court. But this decree did not confer a licence to marry again and thus gave no relief to husbands faced with the disaster which an indissoluble marriage without offspring could inflict upon the succession to family properties and estates. In all periods a cure for this fatal disease of matrimony has been available, although the treatment has changed over the centuries. In the later Middle Ages the doctrine of nullity enabled the canonists to square the matrimonial circle by maintaining the theory of indissoluble marriage whilst granting the practical

freedom of divorce *a vinculo*. After the Reformation, treatment became more difficult because England retained the rigorous theory of indissoluble marriage although at the same time abandoning the very fictions and loopholes that had made it tolerable in medieval society. From the Reformation to the middle of the nineteenth century, the ecclesiastical courts could not grant a divorce *a vinculo*, the secular courts had no jurisdiction, and so wealthy and powerful husbands had to turn for relief to Parliament. There they obtained 317 private acts dissolving their marriages, thus enabling them to marry again.[1]

The provision made for the maintenance of divorced and legally separated wives has to be seen against the background of the effect of marriage upon the economic relations of the spouses. The common law stripped a wife both of property which she brought into or acquired during marriage and of any earnings, although, if she came of a wealthy family, her kinsmen could protect their economic interests by employing equitable devices to give her a separate estate secure against spoliation by her husband. Thus there came to be, as Dicey put it, 'not in theory but in fact one law for the rich and another for the poor. The daughters of the rich enjoyed, for the most part, the considerate protection of equity, the daughters of the poor suffered under the severity and injustice of the common law.'[2]

The common law did indeed impose upon husbands a duty to support their wives. The judges derived this principle from the same doctrine of the unity of husband and wife as served to deprive wives of their property rights. Just as a husband owed it to the community to support himself, so also he ought to maintain his other self because, as Mr. Justice Hyde remarked in 1663, she is 'bone of his bone, flesh of his flesh, and no man did ever hate his own flesh so far as not to preserve it'.[3] In that year, it was conclusively established that the recognition of a husband's obligation did not imply a right on the part of a wife to enforce it directly against him for the reason that marriage and the incidents of marriage were exclusively within the jurisdiction of the ecclesiastical courts and the common law could not invade the spiritual jurisdiction. The most that the common law conceded was a right for any woman cohabiting with a man to pledge his credit for necessary household goods

[1] PP 1857, Sess. 2 (106–1), vol. xlii, p. 117.

[2] *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (1905), p. 381.

[3] *Manby* v. *Scott* 1 Mod. Rep. 128.

and services, and a right to a wife to pledge her husband's credit for whatever she reasonably required given his station and means. Nor did the common law recognize any enforceable duty upon a parent to support his or her child, though there might be a criminal liability if neglect caused injury to a child's health. During the nineteenth century the courts came to treat the wife's agency to pledge her husband's credit as extending, if she had custody, to cover the reasonable expenses of a child's maintenance.

A right to maintenance was available to a wife who could prove misconduct by her husband in proceedings for a divorce *a mensa et thoro* in the ecclesiastical courts. They could pronounce a decree of alimony requiring the husband to pay his wife an annual sum, calculated as a proportion of his income, or, if the wife had a separate estate, a proportion of their joint income. But alimony could not be sued for as a debt in the secular courts, and the only sanction available to the ecclesiastical courts against a defaulter before 1813 was excommunication or some other spiritual censure. Thereafter, it became technically possible to imprison a defaulting husband on a writ *de contumace capiendo*. There is no record that this was ever done. Wives divorced by private Act of Parliament, on the other hand, were assured of support because the House of Commons had always insisted that a husband should guarantee maintenance before his act was passed. Hence the parliamentary procedure differed from that of the ecclesiastical courts in two respects. Financial provision had to be made for all wives, whatever the degree of their matrimonial misconduct, and, secondly, it had to be secured upon property permanently set aside.[1]

Thus, by the middle of the nineteenth century the matrimonial law which applied to the economically independent population had two characteristics. Firstly, it enacted the subjection of wives to their husbands. Secondly, it discriminated between rich and poor. For all wives save those who came as brides from wealthy families, the bonds of marriage were bonds indeed, A wife could not live apart from a husband who was innocent of matrimonial offences and determined to keep her in his house because he could deny her the very means of subsistence. Even if she secured alimony from the ecclesiastical court, she could not enforce payment. Her only escape could be by charity or the poor law.

[1] The procedure is explained in Frederick Clifford, *A History of Private Bill Legislation* (1885), vol. 1, pp. 412–14.

The aim of the reformed poor law of mid-Victorian days was to reinforce the distinction between poor folk and paupers, between poverty and destitution, by ensuring that the indigent were kept in a worse situation than that endured by the poorest labourer who earned his own living. In theory, this distinction was enforced by abolishing all forms of assistance for able-bodied paupers and their families in their own homes and by requiring them to seek relief in workhouses which subjected inmates to severely deterrent regimens as well as inflicting loss of civic rights, separation from spouses, and the deliberate stigma of pauperism. Since 1601, legislation had put sanctions behind the ordinary obligations of kinship by empowering the poor law authorities to seek reimbursement of expenditure from the liable relatives of paupers. The poor law developed as a system of family law for the destitute. It comprised the imposition of support obligations upon relatives; the denial or subordination of their parental rights to the control or custody of children and the determination of their education or occupational training; as well as a general regulation of family relationships. In the view of Professor Jacobus Ten Broek,

> the poor law was thus not only a law *about* the poor but a law *of* the poor. It dealt with a condition, and it governed a class. The special legal provisions were designed not to solve the causes and problems of destitution but to minimize the cost to the public of maintaining the destitute. They were accordingly concomitants of the central concept and great achievement of the poor law—the assumption of public responsibility for the support of the poor—and of the necessity it entailed of keeping public expenditure down.[1]

From the middle years of the century, widespread criticism of legal discrimination between rich and poor and between husbands and wives produced a deliberate, if often halting, legislative drive towards equality. In common with many who wished for cheaper law, Lord Chancellor Cranworth objected to parliamentary divorce on the grounds that 'such complicated proceedings were too expensive for the pockets of any but the richest sufferers, and that relief was put beyond the reach of all but the wealthiest classes'.[2] Such criticisms were blunted in 1857 by abolishing both private act divorces and the matrimonial jurisdiction of the ecclesiastical courts and by setting up

[1] 'California's Dual System of Family Law: Its Origin, Development and Present Status', *Stanford Law Review*, Part I, vol. 16, 1963–4, p. 286 (*ital.* in original).

[2] *Hansard*, 3rd series, vol. 145, 489.

a new secular divorce court with power to hear petitions for the dissolution of marriage. A husband could petition on the ground of his wife's adultery, a wife only if her husband's adultery had been aggravated by an additional matrimonial offence. By the 1880s the new court's maintenance jurisdiction had settled down to follow in part the old parliamentary practice by awarding something to a guilty wife, and in part the old ecclesiastical practice by giving one-third of the joint income to an innocent wife in addition to an amount in respect of any children committed to her custody. One further effect of this jurisdiction was to give substance to the legal rights of a wife whose marriage had collapsed. Alimony became a debt enforceable in the common law courts, and the new court acquired in 1866 the power to order periodical payments by a husband who had no property on which an annual sum could be secured. A wife separated from her husband under a decree of judicial separation was entitled to be treated as a feme sole with respect to any property which she might acquire after the decree, and a deserted wife could obtain an order which prevented her husband from pocketing her earnings. These improvements preceded the Married Women's Property Acts which gave all married women rights to their earnings and equated the rights of all wives with those of wealthy married women who had separate estates.

The Act of 1857 resulted in very few divorces: the annual average on the eve of the first world war was only 689. The relief it offered was still far beyond the means of ordinary folk and it perpetuated, albeit in milder form, the inequality between husbands and wives. The most pressing need was to protect working-class wives ill-used by brutal husbands. By the initiative of Frances Power Cobbe the Matrimonial Causes Act 1878 gave magistrates' courts the power to grant a non-cohabitation order with unlimited maintenance to a wife whose husband had been convicted of aggravated assault upon her, and to grant her legal custody of the children of the marriage under the age of ten. Further acts in 1886, 1895, and 1902 greatly extended the grounds on which wives could seek orders from magistrates' courts with the result that there were more than 10,000 matrimonial complaints annually in the years before 1914. From 1886 until 1949 the maximum amount that could be awarded for a wife was limited to £2 a week, and there has always been a bar against awarding maintenance to an adulterous wife.

Thus by the early twentieth century, husbands had acquired

a statutory obligation to maintain their wives and children, and two systems of judicature existed side by side for the purpose of regulating breakdown of marriage. One was a superior court with the highest rank of professional judges; the other was a summary court in which jurisdiction was exercised by an overwhelmingly lay magistracy chiefly concerned with petty crime. In this way, the aim of extending to the independent poor the benefits and protection which the matrimonial law afforded to the well-off was frustrated by a system created and administered exclusively for the working class.

There is no information about the effectiveness of maintenance ordered by either the divorce court or the magistrates' courts in providing money for divorced women or for separated wives and mothers because official statistics showing the amounts awarded or the regularity of payments or the extent of arrears have never been collected. As far as the magistrates' courts were concerned, it is likely that the experience of Mr. Edmund Garratt, metropolitan police magistrate for West London, was representative. Giving evidence to the Gorell Commission in 1910, he described the case of the unskilled labouring classes.

> . . . as the applications do not occur as a rule early in married life there are usually a number, sometimes a large number, of children. In such cases the wife has virtually no earning capacity, and the magistrate is faced with the impossibility of making 21*s.* (the husband's average earnings), what was barely sufficient to maintain one home, maintain two. Even if he leaves the man only the barest necessaries of existence, in which case he will not comply with the order, there is insufficient to maintain the wife and children in a separate home. In my experience the result in the majority of cases is that the wife has no alternative but either to return to her husband, in which case her position is worse than before, or to go with her children into the workhouse. No one administering the Act can avoid being impressed with the misery and destitution resulting in a large proportion of cases from separation orders. . . .[1]

Certainly the statistics of enforcement suggest that many women with orders had to resort to the poor law as refuge of last resort. Even though there was no court collecting office and women had to enforce their own orders, nearly one-third of the husbands obligated to maintain their wives and children were sent to prison for default in the years immediately before the Kaiser's

[1] *Minutes of Evidence taken before the Royal Commission on Divorce and Matrimonial Causes*, Cd. 6480, 1912, vol. ii, Q. 12, 952, p. 31.

war.[1] The poor law authorities were much better placed than were wives to arraign liable relatives in an attempt to enforce claims for reimbursement of expenditure on poor relief; yet, in more than half the cases in which orders were obtained, the result was not reimbursement but the imprisonment of the defaulting liable relative.[2]

In 1909, a Royal Commission was appointed, under the chairmanship of Lord Gorell, President of the Probate Divorce and Admiralty Division of the High Court, 'to enquire into the present state of the law in England and the administration thereof in divorce and matrimonial causes and applications for separation orders, especially with regard to the position of the poorer classes in relation thereto'. The two themes which had dominated discussions in Victorian days—the discriminations against wives and against the poor—dominated the evidence which the Commission received and the Report which it produced. The chief recommendations in respect of divorce were the placing of men and women on an equal footing in respect of the grounds, the addition of new grounds, and the decentralization of sittings so that persons of limited means could have their cases heard locally. In the case of the magistrates' jurisdiction, the Commission reported that

> we should have been glad if we could have recommended that the whole of the jurisdiction at present exercised by these courts, should be transferred to a superior court. It cannot be considered satisfactory that a court of summary jurisdiction should have power to make orders, which may separate married persons for the rest of their lives. . . . Moreover, these courts form part of the judicial system for administering the criminal law in the case of petty offences. We think there is a serious objection to a court, whose main duties are of a criminal character, entertaining applications, which are of a civil nature, concerning the domestic relations of men and women and their children, applications which, if granted, may produce the practical although not the legal dissolution of the marriage tie. The evidence satisfies us that the general administration of the Acts is not satisfactory where these cases are dealt with by lay magistrates. . . . [On] the question of the effect of permanent separation between husband and wife, without divorce . . . we need here only state that, where it has been effected by these separation orders, its consequences are in many cases disastrous; in the case of men, leading in numerous instances to adulterous connections

[1] O. R. McGregor, Louis Blom-Cooper, and Colin Gibson, *Separated Spouses* (1970), Table 2, p. 34.

[2] Ibid.

and general immorality, and in the case of women, but to a lesser extent, to the same results.[1]

Nevertheless, the Commission thought it impracticable to abolish altogether the magistrates' jurisdiction, 'at present the only remedy within reach of the very poor',[2] and it recommended that these courts should be turned into staging posts on the route to the High Court by limiting the duration of separation orders to a period of two years and by giving complainants easy access to the High Court to obtain divorce or judicial separation. Although this recommendation was made sixty years ago, it has entirely failed to influence policy-makers despite, as I shall argue, the accumulation of compelling evidence to support the Gorell Commission's conclusion.

From that time until Hitler's war, the two separate systems continued in isolation. In 1914 the Poor Persons' Procedure replaced the *in forma pauperis* procedure by which alone poor people had previously been able to obtain access to the divorce court, and there was a steady increase in the number of assisted petitioners between the wars. Dr. Colin Gibson has shown that they constituted nearly one-quarter of all petitioners in the aftermath of the first world war and more than a third on the eve of the second, a period during which the number of petitioners nearly doubled to reach some 7,500. Even so,[3] there were still in 1935 nearly five times as many complainants for matrimonial orders to the magistrates' courts as petitions for divorce by wives. Most working people were denied divorce as a relief for the breakdown of marriage, and the extension of the grounds of divorce in 1937 did not affect the social composition of the divorcing population. Meanwhile, depression and heavy unemployment were reflected both in a sharp rise in the numbers of maintenance defaulters sent to prison—they almost doubled in the 1920s—and in public concern for the silting up of prisons with debtors of all kinds. One result was the appointment of the Fischer Williams Committee on Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and Other Sums of Money. Among its significant recommendations, enacted in 1935, were the proposals that magistrates should always investigate a defaulter's

[1] *Report of the Royal Commission on Divorce and Matrimonial Causes*, Cd. 6478, 1912, paras. 140–2.

[2] Ibid., para. 144.

[3] 'The Effect of Legal Aid on Divorce in England and Wales', *Family Law*, vol. 1, no. 3, May/June 1971, Table 2, p. 44.

circumstances before sending him to prison and that all maintenance payments should be made through a collecting officer of the court with power to take enforcement proceedings on behalf of wives. The Committee also suggested the appointment of an investigating officer to assist the court in making inquiries in maintenance and affiliation cases because a situation where 'a court dispensing justice should have to act on less information than a society dispensing charity is an indication of the defects of the system'.[1] The Committee also urged the introduction of attachment of defaulters' earnings as a mode of enforcement. Neither of these recommendations was accepted.

Throughout the inter-war years more attention was paid to the machinery of enforcement than to the capacity of men to meet their obligations under orders. Women who depended upon defaulters had to rely, as in earlier generations, on the poor law. There had been scattered talk of other sources of financial provision. The idea of pensions for widows and unsupported mothers had been floated before 1914 and some spoke even then of the endowment of motherhood as a profession.[2] War provided a new context and urgency for such discussions. On the one hand, there was the experience of providing pensions for war widows and allowances for the wives —licit or illicit—of members of the armed forces. On the other, a new awareness of the value of children, of the community's responsibility for their welfare, and of the need to support lone mothers. A Ministry of Reconstruction had been set up in 1916. Its Women's Advisory Committee, appointed in 1918, considered a memorandum from Mrs. Vaughan Nash on *Pensions for Mothers* which proposed pensions 'on the same footing as war pensions and old age pensions' for 'mothers in need' defined as 'widows; deserted, divorced and separated wives, wives of men in prisons, asylums etc.; and unmarried mothers'. Mrs. Nash was concerned to insulate her proposals from the stigma attaching to poor relief. Unsupported mothers, she wrote, should be

> pensioned because their welfare is of national importance. They should not be treated as economic delinquents nor as subjects for extraordinary supervision of health or morals apart from the needs of strict observation of the terms embodied in the Act of Parliament, on which the pensions are granted. They should not be punishable on administrative

[1] Cmd. 4649, 1934, para. 125.

[2] For example, H. G. Wells, 'The Endowment of Motherhood', in *An Englishman Looks at the World* (1914).

order by the withdrawal of their livelihood if they do not come up to the official standard in . . . their way of living.[1]

in a further memorandum, Mrs. Nash considered the difficulties of determining eligibility, of avoiding collusive desertion, and of improving recovery from defaulting husbands; and she insisted on the importance of 'treating all unsupported mothers in a permanent way'. Her memoranda seem to have formed the basis of an outline scheme put forward by the Ministry of Reconstruction in 1919 and reported on by the Government Actuary in that year. After several parliamentary debates in the early 1920s, proposals for mothers' pensions were reported on in 1925 by a committee of senior civil servants under the chairmanship of Sir John Anderson. The committee proposed that 'pensions should be granted to widowed mothers, supplemented by allowances in respect of children so long as they are dependent . . .' and excluded out of hand such other categories of unsupported mother as deserted or separated wives and unmarried mothers.

. . . it would be wholly inappropriate and impractical to make provision for them by a contributory system on a contractual basis. It is, moreover, far from being the case that no provision exists for these classes. The law already recognises the need for financial provision in proper cases, and it is important that the responsibilities of the husband or father now enforceable by means of maintenance or affiliation orders should not be weakened.[2]

Thus, the widows' pensions enacted in 1925 were a very restricted version of the mothers' pensions advocated during the previous twenty years. Nevertheless, a new principle had been established and one category of one-parent families, without other resources, had been removed from exclusive reliance upon the poor law. But, for the rest, the mothers' pensions movement broke down on its inability to translate an aspiration into an administrative system that was viable in itself and acceptable to current notions of family responsibility, legal and moral. At the outbreak of the last war, the situation remained for divorced, separated, and deserted wives what it had always

[1] Public Record Office: Recon. 1.59×1.658. Ministry of Reconstruction Women's Advisory Committee. Memorandum by Mrs. Vaughan Nash on Pensions for Mothers, dated 9 December 1918, pp. 1 and 3.

[2] Committee on Insurance and other Social Services. Second Interim Report. Contributory Pensions. Pensions for Widows and Orphans and for Persons between 65 and 70. (Public Record Office, 27/276 5812, para. 14, p. 7.)

been. They could secure maintenance from their husbands either by agreement or by a court order and, if such means of support failed, they had to seek their subsistence from the poor law. How hard it was to break out of that iron circle may be demonstrated from the history of the Beveridge *Report*. The main recommendation of this cardinal document in the history of social policy was the extension of compulsory insurance to the whole population, and Beveridge tried very hard, for the sake of completeness, to devise cover for the risks of marriage breakdown. But he found the difficulties intractable. In one draft of the Report he explained that

> divorce, legal separation, desertion and voluntary separation may cause needs similar to those caused by widowhood. They differ from widowhood in two respects; that they may occur through the fault of the wife, and that, except where they occur through the fault of the wife, they leave the husband's liability for maintenance unchanged. If they are regarded from the point of view of the husband, they may not appear to be insurable risks: a man cannot insure against events which occur only through his fault or with his consent; and if they occur through the fault or with the consent of his wife, his wife should not have a claim to benefit. But from the point of view of the woman, loss of her maintenance as a housewife without her consent and not through her fault is one of the risks against which she should be insured. Recognition of housewives as a distinct insurance class performing services not necessarily for pay implies that if a marriage ends otherwise than by widowhood she is entitled to the same provision as widows unless the marriage is ended through her fault or voluntary action without just cause.[1]

The practical difficulties of reconciling insurance rights, to which married women were entitled as their husbands' dependants, with the complications of marriage breakdown and, in particular, with the guilt or innocence of a matrimonial offence, and with the related liability of the husband to pay maintenance, proved insuperable. The White Paper on Social Insurance, published in 1944, followed Beveridge in most of his proposals but declared that 'the Government feel that the question whether loss of maintenance is the fault of the wife is not one which should be determined by a Department responsible for administering the social insurance scheme. The wife must seek other remedies open to her to secure maintenance.'[2] The upshot was that the principles on which provision was made for those involved in marriage breakdown remained after the enactment of Beveridge's

[1] Public Record Office, PIN. 8187, Draft Report dated 29 September 1942, p. 16.

[2] Cmd. 6550, para. 118.

design precisely what they had been before. Widows received pensions with the possibility of supplementation by the National Assistance Board which replaced the poor law in 1948; but divorced, deserted, or separated wives had to look exclusively to the new Board in the event of their receiving no support from their husbands. On the other hand, their children did benefit from the introduction in 1945 of the family allowances which Eleanor Rathbone had first proposed in 1924.[1]

After 1948, the National Assistance Board and its successor, the Supplementary Benefits Commission, retained the old poor law power to seek reimbursement for its expenditure from liable relatives, by then restricted to parents and spouses. But the post-war legislation departed from poor law principles in one vital respect. It had been the express purpose of the poor law to impose a stigma of pauperism upon those it relieved. It was the express purpose of the National Assistance Act 1948, as it is of the Ministry of Social Security Act 1966, not to impose a stigma upon recipients of what is now called benefit. Accordingly, the unsupported wife today both retains her legal right of maintenance from her husband by securing a court order and also enjoys in her capacity as citizen a right to support without stigma from the Supplementary Benefits Commission if she is in need.

Since the reconstruction and extension of the social services by the Labour Government in the late 1940s, access to divorce as a remedy for matrimonial breakdown has widened and the basis on which it is granted has been transformed. In the last two generations, the effects of war, changes in the status and situation of women, and opinions about approved familial, parental, and sexual relationships have all promoted a greater willingness to resort to divorce when marriages collapse. They have also reduced, if not eliminated, the stigma which used to accompany it, especially for women. The legal aid scheme, now twenty-two years old, has contributed significantly to this end. The authors of a detailed statistical study of *The Effect of Legal Aid on Divorce* conclude that

> the availability of legal aid is very important in helping those with low incomes to seek a divorce . . . Some two-thirds of all manual (working class) petitioners proceed . . . (with) . . . legal aid. The similarity in resort to legal aid of the husbands (81%) and the wives (80%) in social class V shows that the very low wage earning husbands in this class are no more able than their wives to pay for divorce. In the other social

[1] In *The Disinherited Family*.

classes there is roughly a 30% difference between the proportion of husbands and wives who are legally aided. In all but social class V . . . wives are more dependent than husbands upon financial assistance when seeking divorce.[1]

Lord Buckmaster's act in 1923 put husbands and wives on a footing of equality in respect of the grounds on which they could petition, but it has required the legal aid scheme to compensate wives for their lack of incone or low earnings in gaining access to the court.

Legal aid developed at a time when the matrimonial offence as the basis of divorce law was coming under attack. The most important, immediate influence in securing reform was the publication by the Law Commission in 1966 of a brilliant commentary on the conversion of the Church of England to a belief in irretrievable breakdown of marriage as the sole ground of divorce. Their paper on the *Reform of the Grounds of Divorce: The Field of Choice* defined the objectives of a good divorce law as '(1) To buttress, rather than to undermine the stability of marriage; and (2) When, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation.'[2] The Commission went on to explain that 'the second objective has two facets. First, the law should make it possible to dissolve the legal tie once that has become irretrievably broken in fact. If the marriage is dead, the object of the law should be to afford it a decent burial . . . It should not merely bury the marriage, but do so with decency and dignity and in a way which will encourage harmonious relations between the parties and their children in the future.'[3]

Given the emphasis which the Law Commission placed upon the desirability of providing decent burials for dead marriages, it is remarkable that little thought was given to the matrimonial jurisdiction of magistrates in the discussions which led to the Divorce Reform Act 1969 and the Matrimonial Proceedings and Property Act 1970. This legislation left the summary jurisdiction intact with the matrimonial offence as its central principle.[4]

[1] C. Gibson and A. Beer, *Family Law*, vol. 1, no. 4, July/August 1971.

[2] Cmnd. 3123, para. 15. [3] Ibid., para. 17.

[4] Parliamentary pressure led to the setting up in 1971 of a joint Law Commission and Home Office Working Party on Matrimonial Proceedings in Magistrates' Courts with terms of reference to consider 'what changes in the matrimonial law administered by magistrates' courts may be desirable as a result' of the legislation of 1969 and 1970. Its first working paper was

In the last ten years the number of petitions for divorce has risen sharply but the number of matrimonial applications to magistrates has been stable at around 32,000 annually. Recent research has thrown light on the characteristics of the populations using the system. In 1951 and 1961, the divorcing and still married populations were remarkably similar in social composition.[1] On the other hand, those who take their marriage breakdowns to the magistrates' courts belong almost exclusively to the poorest stratum of the working class.[2] The summary jurisdiction still caters for the section of the population for which it was first devised in 1878. A survey of orders made in 1971[3] disclosed that their amounts were invariably less, and frequently substantially less, than the minimum rates of supplementary benefit to which the wives and mothers would have been entitled as citizens without financial resources. This would have been the case even if no allowance were made for the rent allowance paid by the Supplementary Benefits Commission. Such a comparison assumes that court orders for maintenance are being paid regularly and in full, but in fact a high proportion of them are in arrears. Moreover, the larger the amount of the order the greater the likelihood of arrears. Contrary to general belief, orders for the maintenance of children fare no better than those for wives. Much was hoped from the introduction in 1958, a quarter of a century after the recommendation of the Fischer Williams Committee, of attachment of the earnings of maintenance defaulters; but there is no evidence of other than a marginal improvement.[4]

Survey data show conclusively that the matrimonial jurisdiction of magistrates is not restricted, as is often suggested,[5] to dealing with temporary disputes. On the contrary, some 58,000

published in 1973 by the Law Commission as Working Paper No. 53 *Family Law Matrimonial Proceedings in Magistrates' Courts.*

[1] McGregor, Blom-Cooper, and Gibson, op. cit., pp. 136–8.

[2] The data are assembled in the *Report* of the Committee on Statutory Maintenance Limits (the Graham Hall Committee), Cmnd. 3587, 1968, ch. 4, and in McGregor, Blom-Cooper, and Gibson, op. cit., ch. 5.

[3] This was undertaken for the Committee on One-Parent Families by Dr. Colin Gibson and the present author. It will be published as an appendix to the Committee's *Report.*

[4] See the Report of a special study undertaken on behalf of the Committee on the Enforcement of Judgment Debts, *Report,* Cmnd. 3909, 1969, Appendix 2, pp. 409–31.

[5] For example, the Law Commission Working Paper No. 53, op. cit., para. 24 where the magistrates' court is likened to a 'casualty clearing station'.

matrimonial orders live in July 1971—probably one-third of the total—were more than ten years old. The variation procedure by which amounts of maintenance can be kept in line with changes in the cost of living and circumstances of the parties is so little used that it can be described without exaggeration as a complete failure. Finally, the best estimate suggests that only one-half of the complainants for orders from magistrates' courts go on to become petitioners or respondents in the divorce court. For the other half, the magistrate's court is the terminus at which their marital journeys end. When this happens, most husbands set up illicit unions and cannot pay maintenance to their wives because there is not enough money to keep two homes going on one low income. The default and arrears which occur result chiefly from inability rather than from unwillingness to pay. Thus, in the last ten years, this jurisdiction has preserved the empty legal shells of some 150,000 dead marriages; and it retains today as much capacity for social mischief as when it was denounced by the Gorell Commission in 1912.

Inevitably, many of the wives and mothers with court orders will have to resort to the Supplementary Benefits Commission just as their grandmothers had to depend on the poor law. Unhappily, very little is known about the relation between the courts and the social security authorities, save that it is the official policy of the Supplementary Benefits Commission to encourage and assist a wife to take her own proceedings in the magistrates' courts wherever possible.[1] In the past, social and legal research have been ill acquainted. The clients and liable relatives who meet the officers of the Supplementary Benefits Commission have been the concern of students of social policy, whilst the complainants and defendants who pass through the magistrates' courts have belonged to family lawyers. But to a large extent these two groups are the same folk—a stage army wearing the insignia of legal orders on one shoulder and the epaulets of supplementary benefit on the other. How they are classified depends on the observer's angle of vision. Some information about them as clients of the National Assistance Board was made available to the Committee on Statutory Maintenance Limits. It showed 104,000 separated wives receiving national assistance in 1965 of whom more than half had a court order or out-of-court arrangement with their husbands, almost two-thirds of whom were paying nothing. In that year only 16 per cent of the assistance received by separated

[1] *Supplementary Benefits Handbook* (revised April 1971), para. 150.

wives came from their husbands, the remainder was contributed by the taxpayer through the Board.[1] In 1970, the respective contributions of husbands and taxpayers were the same, although the Supplementary Benefits Commission was paying out a much larger sum to an increased number of divorced wives, separated wives, and mothers responsible for illegitimate children. On any showing, the amount which maintenance orders contribute to the support of their beneficiaries is meagre indeed.

Legal theory has known little of social policy. The law has asserted an obligation upon husbands and fathers to maintain their wives and children which it has never been possible to enforce in practice, and the result has been that social policy actually provides the subsistence which the courts promise. The starting-point for reconstructing the arrangements for handling these family matters is the long overdue recognition that the community has no choice but to carry the costs of marriage breakdown through the social policy which now confers rights of support upon wives and mothers in their independent capacity as citizens. What social policy contributes is basic, what comes from the private obligation to maintain is marginal. This does not imply that family obligations should be done away with or disregarded, but only that they should be assessed and met within an institutional framework which enables the courts and the social security authorities to engage in a common enterprise. A democratic welfare society cannot restrict the right of spouses to live apart or to divorce and marry again to those who are able to guarantee maintenance in advance, as in the old days of parliamentary divorce. Such a requirement would involve either an attempt to reintroduce indissoluble marriage or the acceptance of different sexual rules for different income groups. Equality before the law demands the introduction of a system in which all citizens seeking legal remedies for matrimonial breakdown will use the same courts administering the same law. Only thus can consistent effect be given to the public morality embodied in the Matrimonial Causes Act 1973 which requires that the empty shells of dead marriages should be decently buried; and only thus can the offensive discrimination between the very poor and the rest of the community be ended.

[1] Cmnd. 3587, 1968, Appendix D, Table 17(b), pp. 93–4.