

1 The Family Law Act 1996 in Context

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Divorce has been talked about *ad nauseam* by politicians, the media, a wide range of professionals and religious leaders. What else is there to say? Within the terms of the public debate, it seems, nothing, except more of the same. The preliminaries to the implementation of the Family Law Act 1996 are well underway. It crystallises a vision of the post-divorce family as harmonious and enduring, a vision which first found legislative expression in the Children Act 1989, a vision which emerges from a particular discursive framework that takes as axiomatic the need to reduce divorce-related 'conflict' and to encourage both parents to remain involved with their children. Talk about divorce within the public arena has, therefore, been constrained by a set of 'gate-keeping' principles of this nature; the ideas which have entered the public domain have been those which fit the dominant discursive framework. The result is that much has been left unsaid. It is the purpose of this book to address those silences and to give voice to a range of ideas which challenge the dominant discourses and provide new ways of thinking about divorce as both a social phenomenon and an individual life-event.

To achieve this aim, the authors of the essays in this book each address a different aspect of the divorce process; the hitherto unacknowledged politics and psychology of divorce emerge as the 'undercurrents' of the process, and as crucial at a number of levels, from policy-making, through day-to-day professional practices, to the everyday experiences of those involved. Together, the essays explain how and why these undercurrents have been marginalised in professional and political discourse, and seek to make visible the effects (practical, legal and emotional) of their exclusion from the public arena.

There are good policy reasons for exploring these undercurrents. Policy that is based on an incomplete understanding of how family law is implemented by professionals 'on the ground', or of how individual adults and children experience divorce runs the risk, at best, of failing to alleviate people's

4 Undercurrents of Divorce

problems or, at worst, of compounding them. If divorce policy is confined to the issues currently raised in public debate (a debate which has been constrained by financial and ideological imperatives), such that the undercurrents are neither known nor heeded, there is a real possibility that the reforms will be swept away by the undercurrents for which no provision has been made. This book attempts to broaden the sweep of the divorce debate; it is about divorce as a political and a personal as well as a legal issue. The contributors to this volume all work within an interdisciplinary framework, drawing on recent research and insights from law, sociology and psychology to address a range of crucial, though neglected, issues.

The contributors to this book, each in their own way, address four themes which characterise the dominant discourses with which we are concerned. First, there is a rhetoric of 'harmony' which provides the *raison d'être* of the Family Law Act and which underlies the conceptual shifts and provides the rationale for the new procedures. Here, matrimonial 'fault' appears as a damaging and unnecessary fiction; it is seen as creating undesirable 'conflict' and our legislators appear to assume that removing 'fault' by changing the divorce process will eliminate acrimony and blame.

Secondly, our legislators have declared explicitly that marriage is to be supported, and this is embodied in the 'principles' in section 1 of the Family Law Act. The underlying assumption is that marriage remains the preferred forum for the raising of children and the basis for family life. Divorce, on this view, is undesirable and potentially damaging; the Act provides for a damage-limitation exercise in cases where divorce is, unfortunately, inevitable. In so doing, however, the Act facilitates the continuance of 'the family', albeit in a different form.

Thirdly, particular interpretations of children's welfare, which have been invoked to justify the removal of fault, participate in the construction of the child as the vulnerable victim of divorce. The new law has been carried along on a tide of concern about the welfare of children, but there are very particular interpretations of 'risk' and 'harm' being made. Children's welfare has become synonymous with freedom from exposure to parental conflict, and their interests are seen as best served by continuing contact with both parents, regardless of circumstances.

Finally, there is a fourth theme implicit in the Act and in the discourses that inform it: that of gender. The provisions of family law are explicitly gender-neutral, a development which has been regarded by many as a wholly

positive one. But, as the contributors to this volume show, the realities of gender differences which are manifested structurally, materially and psychologically, continue to provide powerful undercurrents in the divorce process. Importantly, the gender-neutrality of the formal law renders the complex issue of gender marginal in the public debate. In what follows, we discuss these strands of the dominant discourses in more detail.

'Harmony' in Divorce and the Emergence of the New Post-divorce Family

The Family Law Act received the Royal Assent in July 1996 after a turbulent passage through Parliament. At the time of writing a number of pilot studies are underway; the divorce related parts of the Act are due to be implemented in 1999 at the earliest, when the results from the pilot studies are available and their implications have been discussed. The Act provides for two fundamental changes to the old scheme; first, the removal of fault from divorce and, secondly, the introduction of state-funded mediation (through the Legal Aid scheme) as the preferred dispute resolution procedure. Both of these provisions are part of a wider, and longer standing, dissatisfaction with adversarial premises and processes in family proceedings, as well as a move from formal to more informal and administrative modes of justice in divorce. At an ideological level, the Act is testimony to the dominance of the welfare discourse; it makes its ultimate appeal to 'the best interests of the child' (Lord Chancellor's Department, 1993, 1995), but its provisions apply to all divorcing people, regardless of whether they have children or not.

The removal of fault from divorce has not been and will not be, we suspect, easy to achieve. One of the central aims of the Divorce Reform Act of 1969 was the removal of matrimonial fault. That Act introduced 'irretrievable breakdown' as the sole ground for divorce but, such was the heated and ideological nature of the debates as the Bill passed through Parliament, that fault, in fact, lived on in the guise of the 'facts' required to prove the irretrievable breakdown. Similarly, the passage of the 1996 Act was troubled by a vocal lobby who argued that removal of fault represented an undermining of marriage and 'the family'. This lobby was undoubtedly placated by the introduction of the 'principles' at the Report stage, which include a provision that 'the institution of marriage is to be supported' (now in section 1 of the Act), but this principle, coupled with the removal of fault, conveys powerful

6 Undercurrents of Divorce

messages in which many tensions are manifest. The removal of fault from the legal process represents a legislative expression of the primacy of a discourse of harmony and one that prioritises a particular interpretation of children's interests. The principle that marriage is to be supported connotes a concern that marriage should remain the preferred basis for 'the family' and the best forum for raising children. But the passionate nature of the divorce debates, in 1969 and in 1996, indicate that in the popular mind at least, fault remains important and significant in divorce. As in 1969, we may find that we are not able to legislate it away.

At an individual level, studies show that divorcing people are deeply concerned about issues of blame, which colour their perceptions of fairness and their ideas about justice (see, for example, Davis, Cretney and Collins, 1994). For many, the notion of fault, of attributing blame to one party and exonerating the other, is what the legal system should be about, it is what ensures that justice is not only done but also is seen to be done. Brown and Day Sclater, in their chapter on the psychodynamics of divorce, argue that there are good psychological reasons why many divorcing people feel this way; faced with the loss that divorce inevitably entails, as well as the need to build a new life, the imputation of blame can feature prominently on the psychological agendas of divorcing people. These psychological 'roots' provide a bedrock for a culture in which divorce is pathologised and where fault goes hand-in-hand with divorce. There is clearly a tension between the kind of harmonious divorce that is envisaged for us, and the needs and expectations of divorcing people.

But it is important to bear in mind that the reform of the divorce law has come at a time of widespread concern about a 'crisis in the family'; the pro-family agendas of the main political parties, all seeking to claim to be *the* party of the family, have exerted a powerful influence. There can be no doubt that we, as individuals and as a culture, have a deep investment in 'family' as the guarantor of a stable society. Our so-called divorcing society has been held to be responsible for a whole range of social ills, and many feel 'the family' to be under threat. Anxieties about a whole range of broader social changes commonly touch base at the level of 'family', which provides a convenient ideological location to address those wider concerns. **In** this context, it is perhaps unsurprising that a reform of the divorce law should seek to provide support for marriage. Arguably, however, the new law goes further than that; there is a sense in which it addresses concerns about the 'decline of the family' by providing for the emergence of a new post-divorce family.

Reconstructing 'the Family'?

Carol Smart (1997) argues that recent changes in family policy, (she is referring to the Children Act 1989, the Child Support Act 1991 and the Family Law Act 1996), have become out of step with current understandings of social and ideological changes such as those discussed by sociologists Giddens (1992) and Beck (1992). She argues that, far from facilitating any adaptation to social change, family law is now taking the lead to promote further change of a particular sort, namely a return to the so-called traditional family of the 1950s. Smart sees family law as 'engineering policies to change the very nature of post-divorce family life' and she regards these as 'harmful tinkerings' which are likely to result, ironically, not in any return to the golden age of the nuclear family, but rather to preside over its demise.

Fears about the 'decline of the family' and its supposed adverse social consequences featured prominently in the Family Law Act debates. The high divorce rate was seen by many as threatening social stability and cohesion through its effects on 'the family'. For example, during the Bill's first reading in the House of Lords, the Lord Bishop of Chelmsford said:

For the avoidance of doubt, I must preface what I have to say on the Family Law Bill with a statement that the House of Bishops of the Church of England is second to none in its belief that marriage is part of the order of God's creation, designed to be a joyful and enriching partnership, bringing comfort and mutual help to those who commit themselves to it. The Bishops also believe that the family is essential to the health and well-being of our society and that no effort should be spared to prepare people for marriage and to assist them in understanding what it takes to maintain faithful marriage relationships and to provide a stable family life (Hansard, HL col 152, 20 November 1995).

This view was closely echoed by the then Lord Chancellor, Lord Mackay of Clashfern, during the Bill's second reading:

I personally believe that marriage should be for life. This is the ideal I believe most couples who marry strive for. It is this ideal which provides the most stable and secure background for the birth and development of children (Hansard, HL col 704, 30 November 1995).

These contributions to the divorce reform debates evidence a

8 Undercurrents of Divorce

commitment to marriage, and are premised on the idea that 'the family' is central to both personal fulfilment and social stability. However, this powerful ideology exists alongside a recognition that our society has undergone a range of profound social and demographic developments which herald fundamental change in the meanings of 'family'. Coote *et al* (1994), for example, discuss recent evidence of demographic patterns which show a number of distinct trends: a rising divorce rate, a declining marriage rate, increasing cohabitation, increases in the numbers of children born outside marriage, a separation of sex and marriage, and of marriage and parenthood, and so on. They point out that changes in family patterns are part and parcel of broader social, political and economic trends, as they have been throughout history. Seen in this light, it would appear that a family law which seeks to address, or even reverse, changes in 'the family', simply by means of legislation is attempting an impossible task.

But demographic changes are only one part of the story. According to sociologist Anthony Giddens (1992), our culture is currently characterised by changing mentalities, particularly in the sphere of intimacy; people are beginning to think quite differently than they did fifty years ago about the meanings of intimacy and marriage, as the ideology of romantic love is progressively eroded. Giddens sees an increasing tendency towards emotional investments in what he calls 'confluent love', a love which is pragmatic and contingent and which lacks the 'for ever' quality of romanticism. The search becomes that for the perfect relationship, rather than for Mr or Mrs Right. Giddens sees this 'transformation of intimacy' as closely tied to an ascendant individualism; the individual is seen as having rights to personal autonomy and fulfilment; where one relationship fails to satisfy, the individual must be free to move on to try another. Late modernity, he argues, is characterised by our preoccupation with what he calls 'a reflexive project of the self', as people become less bound by ideas of duty and obligation and more prone to reflect upon whether certain courses of action are in their own interests or not. Thus he sees changing beliefs and expectations associated with intimacy as not reducible to structural or economic change, but as representing new mentalities which are driving the contemporary separation of marriage, sex and parenthood.

Giddens also considers two further aspects of this transformation of intimacy which are relevant to our discussion on the undercurrents of divorce. First, he argues that the transformation is gendered; women have been at the forefront of redefining their place in both the public and the private spheres, whilst men, he says, are 'lagging behind'. This is evidenced in the fact that

almost three quarters of divorce petitions are currently presented by wives. Secondly, Giddens discusses the psychological correlates which accompany the transformation of intimacy he describes. Drawing on psychoanalytic theory, he considers the psychic configurations which predispose, respond to and result from changing gender relations and patterns of intimacy. What is important in his argument for our purposes is the notion of there being a close linkage among individual psychologies and broader social and discursive frameworks; social change both depends upon and impacts upon us at a material and a psychological level. In divorce, the law may provide us with new discursive frameworks (or it may reflect older, dominant ones), and it may provide us with the opportunities for new dispute resolution practices but, at the end of the day, it will be living, passionate people (Plummer, 1995) who must negotiate the power of law, and on whom the successful functioning of the new procedures depend.

Remarkably little is known about how adults experience separation and divorce. As Day Sclater argues in her chapter, the policy makers should not assume that implementation of the divorce reforms will proceed unproblematically. At the very least, the emotional investments which divorcing people have in engaging in conflict, and in dwelling on the past is something which should be taken into account by the professionals whose task it is to manage dispute resolution. Further, we cannot assume that divorcing people will uncritically accept or follow the prescriptions of the dominant discourses. Research shows that the exhortation to remain amicably involved with the other parent after divorce 'for the sake of the children' can clash quite dramatically with the need for a final separation, such that the desired independence and autonomy can be pursued. This is particularly crucial for mothers, with whom most children remain after divorce; many find the children's contact times particularly difficult and painful. In these cases, one finds concrete examples of the tension between the prescriptions of the welfare discourse, and the contemporary ideals of autonomy and individualism Giddens talks about. These tensions are not easy to resolve at an individual level, or to address at the level of social policy.

Smart (1997) argues that recent family law attempts to stem the tide of confluent love by forging links between a child's parents when the adults involved have no desire other than to end their relationship. Crucial in these developments has been an emphasis on 'the welfare of the child', interpreted to mean that children's interests are best served by continued relationships with

10 Undercurrents of Divorce

two parents who are able to remain amicably involved with each other after the divorce. We will be discussing this emphasis on the welfare of the child in more detail in the next section but suffice to say at this stage that, during the Family Law Act debates, both proponents and opponents of the Bill mobilised ideas about the centrality of children, and of 'the family' for children. The paradox is, as both Piper and Roche, in different ways, argue in their contributions to this book, there are few provisions in family law which, in fact, promote children's welfare, and the opportunities for hearing the 'wishes and feelings' of children are bedevilled by adult-centred practices and structural and financial constraints.

The positioning of children as victims of divorce - the incompetent objects of welfare discourse - is, of course, not new, but it now permits those who wish to re-assert the primacy of 'traditional family values' to utilise a powerful discourse in support of their case for arresting 'the decline of the family' and for the restoration of the old nuclear arrangement. At the same time, this positioning of children provides a basis for those who see 'the family', not as in decline, but as a social institution in a gradual process of transformation, to envisage new, non-threatening family formations which are consistent with broader historical changes. Arguably, the Family Law Act represents a site of tension between the kinds of regressive 'social engineering' aspirations that Smart (1997) discusses, and a more progressive (in some sense) attempt to keep up with and respond to, as well as manage, social change.

Divorce Law as the Solution to the 'Crisis in the Family'?

'Family' is a very powerful signifier, and the strength of feeling in relation to it should not be underestimated. As Lord Ashbourne said during the Family Law Act debates:

The decline of the traditional family and family values is disturbing, to say the least. The illegitimacy rate has escalated from being a little over 8% in 1971 to now well over 30% ... If the Government are really concerned about the problems of law and order and child abuse they must end the policies that encourage the one-parent family and introduce others that build up and support the traditional nuclear family ... Unless the Government are prepared to confront the threat which the collapse of the traditional family presents to the nation the problems will continue to escalate (Lord Ashbourne, **HL** col 170, 20 November 1995).

This quotation illustrates the kind of tension we have been talking about. On the one hand, the speaker recognises the reality of the demographic change (here, in relation to the increasing numbers of children born outside of marriage) but, on the other hand, is calling for some action to restore stability to family life, as traditionally conceived. There is some evidence from the Family Law Act debates, and from the Government papers that preceded them, to suggest that divorce, once pathologised as chaos and disaster, is in the process of being normalised as merely a transition in the family life cycle. In this way, the social anxieties generated by the fears about family breakdown can be addressed; if divorce is simply an event in the family life cycle, then it no longer unequivocally signifies either the breakdown of families or the decline of 'the family'.

In the USA, there has long been a lobby which views divorce as a normative family transition. For example, Furstenberg and Spanier (1984) state, (in words which prefigure Giddens' argument) that:

The high rates of divorce... are not just an indication that marriage as an institution is being devalued; in fact, just the opposite. But as the cultural importance placed on the personal gratifications of marriage grows, the commitment any given couple makes to the marriage becomes more conditional as either partner must be able to exit from the relationship *in* the event that it is not living up to her or his expectations ... Divorce is not so much an escape hatch from married life but a recycling mechanism (p.53).

Similarly, Mclsaacs (1995) sees the shift from the adversarial process of dispute resolution to mediation as consistent with the emergence of a 'new family system' in our post-industrial age. This new family system is to be brought into being by a discourse which represents divorce as a 'reorganisation of the family, not an end of the family', and it is dependent upon a 'concept of not being "divorced from" someone but being "divorced to" them' (Mclsaacs, 1995, p.ix). Constance Ahrons and her co-workers (Ahrons, 1983; Ahrons and Rodgers, 1987; Ahrons, 1995) argue that divorce is best seen, not as the destruction of the nuclear family, but as productive of the 'bi-nuclear family'. For Kaslow and Hyatt (1981) divorce is a potential 'growth experience' for the 'extended family'. Coleman and Ganong (1990) talk about step families in terms of extended families. In the UK, Robinson (1991) talks about divorce as 'family transformation' and includes the 'post-divorce family' in her family life cycle scheme. Divorce is thereby presented as an opportunity to restructure

12 Undercurrents of Divorce

families and to preserve 'the family' in the face of the demographic evidence of the diversity and multiplicity of family forms. In this sense, the Family Law Act paves the way for a new post-divorce family to emerge, one which is constituted within the discourses and practices of welfare, and which coheres around a child positioned as incompetent, vulnerable, innocent and victimised by divorce.

However, there is a powerful gendered dimension to these discourses and, perhaps, the fundamental object of concern is not any change in 'the family' *per se*, but the progressive erosion of traditional paternal authority accompanied, as it has been, by increasing formal legal rights for women in the public sphere, and developments in the economy which have impacted most adversely on men. As Richard Collier argues in his chapter, a further undercurrent here is the reinforcement of the values of heterosexuality in relation to family life.

If we are prepared to follow Giddens' train of thought, we might think about the enormous box-office success and world wide acclaim recently accorded to *The Full Monty*; here are the changed mentalities Giddens talks about, and here are masculinities forging new cultural positions for themselves in positive ways, and ways which express the emotional vulnerabilities of men. These are men who have taken up where Giddens left off, and who are facing the hardships of economic restructuring as well as the absence of any psychological space in our culture for vulnerable (or 'feminine') masculinities. Importantly too, for our purposes, this film says something new about divorce; it carries a new cultural script which suggests to us the inevitability of divorce in some circumstances. The pain is there, but so are positive images; the family is not altogether broken by divorce, but survives in a different form, conveyed in an appealing portrayal of the relationship between a divorced father and his son.

What is going on here? It seems that there is, at one level, a denial that there is any 'crisis' or 'decline' in 'the family'; instead, the concept of 'family' is being altered, and its boundaries shifted. But, it is noteworthy that these changes depend too upon older ideas, which are themselves being rejuvenated and transformed. The new family involves people who are tied to each other by blood, kinship, marriage or divorce. As Bren Neale and Carol Smart argue in their chapter, as marriage recedes as the basis for family life, it is being replaced by a new emphasis on (biological) parenthood. And, as Richard Collier argues in his chapter, the 'new' family continues to be structured by an ideology

of heterosexuality.

The provisions of the Family Law Act may be seen in the light of these ideas; there is a sense in which the Act legislates this 'new' family into being, building upon the foundations laid down in the Children Act, denying 'family breakdown' and reconstructing divorce as a normative transition. Importantly, the new discourse is capable of addressing the anxieties which accompany demographic change and talk about 'the decline of the family', as well as those which arise from the erosion of the old patriarchal authority.

The Welfare of the Child

Child as Victim

Crucially, this new family depends on the close linkage of divorce with the dominant welfare discourse. The new family coheres around a vulnerable child, who is the object of that discourse. Importantly, however, children's vulnerabilities are themselves constructed, as Felicity Kaganas argues in her chapter, around particular notions of 'risk' and 'harm'; their primary need is constructed as one for a relationship with the father. As Irving and Benjamin (1995) state: 'There is a strong association between negative consequences of parental divorce and ongoing dysfunction in the relations between these children and their biological parents, stepparents, or both' (p.85). These authors are opening the way for new formulations of 'dysfunction' to emerge; a dysfunctional post divorce family is one in which relations between children and their parents are disrupted in some way. What we might call the traditional divorce, in which the parents each claim rights and individually pursue entitlements, where the children stay with the mother, and may or may not maintain a relationship with the father, has become the thing to avoid at all costs.

It might seem that this emphasis on the needs of children is right and proper and that we, as adults, have a duty to protect the interests of those weaker members of our community. It is certainly true that recent family law has focused on children, but as several of the contributors to this volume note, it is certainly not the case that family law can adequately ensure that children's needs are, in fact, met or their interests ascertained and protected. On the contrary, there is an argument to be made that family law actually perpetuates

14 Undercurrents of Divorce

the social exclusion of children, another undercurrent that we would wish to bring to the surface.

The 'best interests of the child' is a pervasive notion in law, and the welfare discourse in which it acquires meaning is increasingly entering into our culture's stock of common sense. But, the best interests principle has no fixed meaning, although it informs (or perhaps justifies, retrospectively) legal decision-making. The positioning of children as innocent, dependent, vulnerable, incompetent, and as requiring the protection of adults and of the state has the effect of perpetuating the structural powerlessness of children as a group, as Kitzinger (1988) has argued in relation to child abuse. The images of children as the 'victims' of divorce (Piper, 1996) are powerful and seductive; they pervade the research which addresses the issue of the 'effects' of divorce on children, as well as legal practice.' The result, as Piper argues in this volume, is that children's voices are effectively ignored. Rodgers and Pryor (1998), concluding their recent extensive review of the vast literature on children and divorce, express a concern that echoes those of Roche and Piper in this volume:

The Family Law Act (1996) pays lip-service to its concern for children's well-being, but fails to provide concrete mechanisms to enable children to have a say in decision-making. Rather, parents are exhorted to take their children's views into consideration (p.45).

Potentially, the research could provide a scientific underpinning for the welfare discourse and for the meanings to be attributed to the concept of 'best interests', although it has long been recognised that the relations between law and social scientific discourse are far from straightforward (see, for example, Dingwall and Eekelaar, 1986; King, 1991; Sales *et al*, 1992; King and Piper, 1995). What is important for our argument here, however, is the point that the scientific research is often pervaded by the very same ideologies and images of children as are problematic in law. Furthermore, the findings from research studies remain equivocal, and general conclusions are difficult to draw, as there are undoubtedly many factors involved. For example, Rodgers and Pryor state that:

The relationship between the amount of access to the non-residential parent and child adjustment is not straightforward. Some studies find that frequent contact is associated with better adjustment for children; however, others find

no relationship. A few find a negative relationship between frequent levels of contact and child well-being. These diverse findings suggest that the relationship between contact and well-being is moderated by other factors (p.42).

Nevertheless, the dominant message of the research is taken to be that divorce is damaging to children. Invoking social scientific research, as did the Lord Chancellor in the Consultation and White Papers which preceded the Family Law Act, lends a degree of certainty, of scientific validity, authority and convincingness to arguments which would otherwise appear to be merely rhetorical or ideological in tone. For divorce discourses do not merely reflect particular visions of childhood and children, they help to construct them too and, in doing so, contribute to the social exclusion of children.'

Visions of Childhood

Trinder (1997), for example, explores the paradoxical situation whereby a range of adult professionals (court welfare officers) construct the very children whose voices they seek to represent. Importantly, she includes in her discussion some attempt to understand what children themselves make of the situation, although she points out that research here is extremely thin on the ground (most recently, see Smart and Neale, 1998). For our purposes, two important points emerge from her analysis. First, adult perceptions are based on idealised and stabilised conceptions of childhoods, with no distinction between 'children' as living beings and 'childhood' as a historically and culturally shifting set of ideas. Secondly, children see themselves, and their role in decision-making, in ways which do not coincide with adults' perspectives. She argues that children's interests would be better served if there were ways of appreciating their individuality, and the complexities and ambiguities of their individual lives. In the various constructions of childhood that Trinder discusses, however, the image of the child as vulnerable is present.

McWhinney (1997) talks about the 'moral imperatives' inherent in the notion of the child's best interests, and he raises the important, though neglected question, of why it is that the state assumes any responsibility for children at all. His answer to this question is framed in terms of the ways in which we, as a society, choose to conceptualise childhood. He talks, idealistically, of childhood 'innocence'; he says that human sensitivities are 'easily coarsened', especially by violence, including the 'violence of knowing too soon' and of being

16 Undercurrents of Divorce

'disillusioned prematurely'. Adults he sees as disillusioned, as 'separated from the sacred', as 'evicted from the garden'. He says that children remind us of what we were, what we have lost, although what we might still retrieve or become.

It is difficult, however, to challenge the dominant discourses which see children as vulnerable and as the privileged possessors of our lost innocence; these discourses are rooted in a construction of childhood subjectivity in wholly rational terms, and they have immense emotional appeal, and we have come to think that this emotional appeal has deep psychological roots. It is perhaps precisely because children are structurally powerless *vis a vis* adults, and precisely because the discourse ignores the irrational and the unconscious, that it has its emotional appeal. By this we mean that we, as adults, have an emotional investment in seeing children in this way - perhaps it is serving some psychological purpose for us.

But our own emotional investments in particular visions of childhood are not the only reasons why the discourses are so difficult to challenge. Bell (1993a), for example, looks at the politics of images of childhood. Using a Foucauldian framework, she considers the ways in which 'childhood' is deployed in governance. Children have become the objects of a range of 'psy-discourses', and the need to protect them and to ensure that they follow proper and desirable developmental pathways (themselves the province of science and psychology) is the route by which the state regulates the behaviours of individuals *through* 'the family'. There are thus, as Bell and others argue (see, Bell, 1993a; Burman, 1994; Morss, 1995), political imperatives embedded in particular social constructions of what children are. All this is now fairly commonplace but perhaps needs to be re-stated, since insights of this type are notable for their absence when it comes to thinking about children and divorce. The point is that we have both a political and an emotional investment in continuing to construct childhood in the ways that we do. Let us think a bit more about the psychological investments that are made at a social level.

In *The Good Society and the Inner World*, Rustin (1991) argues that the Kleinian psychoanalytic tradition has much to offer in understanding politics and culture, as well as individuals. Such an enterprise is not intended to reduce social, cultural and political formations to the level of individual psychology (such a psychologisation of society would be morally and politically insupportable), but it is intended to give us new tools with which to think about the many levels on which politics and power operate. In a similar vein,

sociologist and group psychotherapist Ian Craib (1994) uses a Kleinian framework to understand, amongst other things, the way we, as a society, organise grief. He argues that the human inability to reflect on or even to tolerate overwhelming emotions is reflected at a social level in institutional mechanisms that facilitate the denial of our deepest vulnerabilities. In the case of grief, it is our deep-set inability truly to accept the uncomfortable fact of our own mortality that underlies the production of theories about bereavement and the practices around death and grief. These insights are important when we think about children and divorce too.

The dominant image of childhood in our society today is one that is informed by developmentalism (Burman, 1994; Morss, 1995) which renders childhood as a predictable series of stages, knowable to the psychological experts. This idea of developmental progress is also reflected in the work on children and divorce, much of which seeks to document a predictable process of adjustment, and to inform us of the variety of factors which predispose one outcome or another. Ambiguities in adjustment and ambivalences in feelings are left out of account in the traditional model. Further, knowledge of these factors and processes has been claimed by psychological experts as their own province. What we have here is an underlying idea that things are controllable, that the disruptive emotions thrown up by family break-ups can be fashioned and contained by appropriate legal and psychological procedures. In relation to the massive social anxieties which are repeatedly generated by social changes which seem to threaten the centrality of 'family values', it is perhaps not surprising that we, as a society, seek to manage those anxieties by encouraging our experts to create theories and practices which put those anxieties at one step removed. As Walker (1991) puts it: 'We probably all have a vision of a society composed of "happy families". Pain and conflict, particularly for children, are a serious threat to that vision' (p.371). It is perhaps for this reason that social policy has seemed to ignore the equivocal nature of divorce research.' What we are arguing here is that our social policies are in the business of managing emotions; there is a psychological subtext to the laws and practices of divorce, and that our images of childhood are intimately linked to desires to contain the anxieties caused by apparent threats to 'the family'.

So, where does this take us? In summary, we have statutory provisions for children's voices to be heard, but, in practice, they fail children miserably and, as Jeremy Roche points out in this volume, our present system actually militates against the achievement of rights for children. In other words, we must

18 Undercurrents of Divorce

ask ourselves whether we are excluding children by the very means we seek to use to protect their interests. We think that we are, and we would now like to move on to explore some possible explanations for this paradoxical undercurrent.

Mason and Steadman (1997), discussing the Australian child protection system, argue that the barriers against children's voices being heard lie in the powerlessness of children as a social group, a powerlessness which is reflected and perpetuated by psychological notions of the child as dependent. However, we would like to go beyond this political argument, and look at the psychological constellations which underpin this state of affairs. We have argued that the welfare discourse positions children as vulnerable: what children say is heard *through* this welfare discourse, where children speak from a position of vulnerability, dependence and of being in need of protection. We think that the welfare discourse, in this way, may act as a repository for the vulnerable feelings of adults. Where feelings of vulnerability threaten to overwhelm us, we can disown them unconsciously, push them outside of ourselves, and locate them elsewhere. This is a process known in psychoanalysis as projection; its function is to protect the person who projects from experiencing an overwhelming anxiety, as it puts intolerable feelings at one step removed. So, in divorce, we adults can experience our own vulnerability in a tolerable way because we project it onto children, and it is the welfare discourse that facilitates this complex psychological manoeuvre.

We talked earlier about how we, as a society, deal with the anxieties generated by the prospect of family breakdown by taking refuge in discourses in which unruly emotions seem to be manageable. We are now talking about a similar phenomenon at an individual level. As Day Sclater has argued elsewhere (Day Sclater, 1998a), adults' vulnerabilities around separation can be acute, but there is little room for their expression within the way divorce is currently organised. Men may suffer particular difficulties in this regard, since they have traditionally been under strong social pressures to hide their dependent and vulnerable feelings (Chodorow, 1978; Giddens, 1991, 1992; Maguire, 1995, Minsky, 1998). There are well-documented gender differences in the ways in which women and men negotiate threat and psychological vulnerability, and the varied meanings these have for each of us. In relation to divorce, these issues provide another undercurrent which is not often brought into the open (Day Sclater, 1998b).

The Question of Gender

Parenthood is a gender-neutral concept in law but, in practice, it remains the case that men and women do different things as fathers and mothers, both before and after divorce. Divorce discourses intersect in complex ways with broader social discourses about masculinities and femininities and the practices of motherhood and fatherhood. As Maguire (1995) argues, male dominated social structures provide men with opportunities to deny their own dependency needs whilst permitting women to carry the practical and psychological burdens of caring and emotionality in the family. In so far as the dominant discourse makes available a new position for men as involved fathers, it could help to facilitate the construction of new masculinities. However, in the face of the substantive inequalities which continue to constrain women, the 'new' fatherhood has been perceived by many as another manifestation of the assertion of the old paternal authority (see, for example, Fineman, 1995). Thus, as Richard Collier argues in his chapter, divorce seems to provide a forum for the expression and strengthening of traditional (heterosexual) masculinities and gender differences, a far cry from the gender-neutrality of parental responsibility in family law.

Empirical research would seem to support such a contention. For example, Arditti and Allen (1993) examined distressed fathers' perceptions of inequities in divorce. They found that the fathers expressed strong negative feelings about the legal system, the emotional hardships they had suffered, and they spoke of a range of injustices. These men rarely saw divorce in neutral terms, but they saw things in clear black and white, being likely to blame others (lawyers, the ex-wife) for their negative feelings. They did not accept responsibility for their own negative and destructive impulses, which resulted in an enduring sense of injustice, a preoccupation with the unfairness of it all, and a prevailing hostility towards the perceived sources of the inequities.

Similarly, in a study of 91 divorced fathers (Simpson *et al*, 1995; Walker, 1997), interviewed 6 years after the divorce, none were content with the contact arrangements. 25% reported that they had been able to maintain a parenting role in the face of considerable opposition, and these fathers were the most angry and unhappy. They reported feelings of powerlessness, an inability to forgive past actions, were bitter and unwilling to readjust to their new circumstances. Arendell (1995) too shows how the divorcing men in her study were primarily intent on preserving a sense of masculine identity on divorce,

20 Undercurrents of Divorce

with all the implicit ideas about male privilege.

What we are seeing here, we think, is an acute vulnerability which some men find difficult to express in ways other than anger and hostility, and where their relationships with their children are infused with an emotional investment which derives, not only from parental love, but also from the need to rid themselves of their own painful feelings. The welfare discourse enables us to fight for the perceived needs of our vulnerable children, it acts as a repository for our own overwhelming feelings; in a word, we have an emotional investment in seeing things in the way that we do and in acting in the way that we do. This, perhaps, is why achieving true autonomy rights for children is proving to be such a difficult thing to do.

It is probably significant that particular interpretations of the best interests principle have gone hand in hand with what amounts to an extension of fathers' rights (Brophy, 1985, 1989; Smart, 1989a, 1989b; Harne and Radford, 1994; Hooper, 1994), and that this is happening at a time when traditional masculinities are under threat (Giddens, 1992; Collier, 1995; Connell, 1995; Frosh, 1996). As Deech (1993) points out, men's vulnerabilities may be particularly acute in relation to fatherhood, as the availability of new reproductive technologies have at least the potential for autonomous motherhood. In a climate where women have made quite considerable advances in their quest for autonomy, it perhaps should come as no surprise that we are currently seeing attempts to define a new role for men, a role which includes participation in the family sphere which was previously the province of women. We are beginning to hear quite loud calls for extending the 'rights' of unmarried fathers (see, for example, Lowe, 1997) and the Government has recently indicated an intention to extend parental responsibility to all those unmarried fathers who jointly register their children.

The chapters by Kaganas and by Neale and Smart in this book both support the idea that the deployment of the welfare discourse in divorce is linked as much to adult moral, emotional and political agendas as to the welfare of children. This is an undercurrent which underlies the continuing social exclusion of children and militates against their achievement of citizenship rights. As Smith (1997) puts it:

[E]ven the most convincing evidence about children's competence to decide and even the most thorough philosophical challenge to presumptions about capacity and autonomy, will not achieve fundamental changes in the way the law thinks about children. It may achieve some change ... But change will not

go so far as to reject a legal distinction between children and adults or allow that rights will take precedence over welfare, for the law itself only reflects and confirms a particular social construction of childhood. No wonder we bump into children's best interests at every turn - *adults* simply cannot manage without them (p.136).

These best interests are also linked to gender because conflict in divorce is gendered. Perceptions of children's interests have been constructed in relation to their 'need' for parents who can co-operate with each other, and on the assumption that some form of father-presence is essential for their well being. In the prevailing socio-political climate, when femininity no longer unproblematically signifies dependence, and when women are actively resisting being positioned as vulnerable in this way, we see the dominant welfare discourse as providing, primarily, a repository for masculine vulnerability. As women increasingly refuse men's projections of dependence and vulnerability, men are being forced to confront these difficult 'feminine' aspects of themselves (Maguire, 1995; Minsky, 1998). It has perhaps been easier for women to integrate their 'masculine' parts than it is for men to accept their feminine ones, simply because the characteristics of masculinity remain more highly culturally valued than those traditionally associated with femininity. Giddens (1992) suggests that male sexual violence, which has its roots in the inherent fragilities of masculinity (Maguire, 1995), will inevitably increase as part and parcel of the transformation of intimacy he describes.

But not all men are dealing with their vulnerabilities in this way. Some are actively trying to own and express qualities which have traditionally belonged to women but, in doing so, they must surmount considerable structural as well as psychological barriers. The prescriptions of the welfare discourse not only encourage a denial of the conflictual and gendered dynamics which emerge on the breakdown of an intimate relationship, but also facilitate the displacement of vulnerabilities and encourage men to compete with women on the terrain of mothering. In short, the discourse feeds directly into masculine fantasies that women can be dominated and that men can triumph (see, for example, Maguire, 1995). In this light, it perhaps should come as no surprise that recent research indicates that, far from ensuring parental co-operation and reducing litigation, the Children Act seems to have resulted in an *increase* in both litigation and delay in children cases (Bailey-Harris *et al*, 1998).

Clearly, parenting is changing, but lasting social change can only be

22 Undercurrents of Divorce

brought about if there are psychic changes too. In our view, our legislators have made the mistake of ignoring the important psychological undercurrents of divorce and, relatedly, the complex issues around gender. Neither parenting practices nor gender relations will change fundamentally simply because the law says they should. The welfare discourse continues to provide an institutionalised means of defence against male anxieties and, in the process, denies children both agency and competence. There will have to be political change, cultural change and psychic change before mothers and fathers can become 'equal' parents, and gender difference can become a source of richness and diversity, rather than a basis for conflict and oppression.

As Alison Diduck argues in her chapter, the discourses and dynamics of gender also influence the division of family assets on divorce. Feminists have long argued that mediation of the financial matters 'ancillary' to the divorce has the potential to be detrimental to women (see Bottomley, 1985; Fineman, 1991; Grillo, 1991); the crux of the argument is that the dominant discourses fail to take adequate account of the realities of women's lives. Similarly, Diduck shows how current and proposed means for dealing with finances and property militate against women achieving equitable outcomes, and she proposes new solutions which take account of the range of contributions which both sexes can make to the marriage. Hitherto, contributions whose value cannot be directly assessed in financial terms have been effectively bypassed in legal decision-making, because they both depend upon and support gendered readings of what is expected of women and men in a marriage. Gendered discourses are thus important undercurrents which both inform and are reproduced by family law, in relation to both children and financial matters (see Smart, 1992).

Children and Parents, Husbands and Wives

'Children and Parents' and 'Husbands and Wives' constitute the two main parts of this book. Opening the first section, Bren Neale and Carol Smart aim to shed some light on the realities of post-divorce parenting. They draw on an empirical study, recently completed, to show a range of post-divorce parenting patterns. Their findings challenge the assumptions of the dominant welfare discourse that the authors see as providing a narrowly prescriptive model for parenting which is impossible to achieve. They illustrate the limitations of the ideological model that underpins the operation of divorce law, and argue for a greater recognition

by policy makers of the actualities of practices, relationships and negotiations in both marriage and divorce.

In his chapter, Jeremy Roche looks at those parts of the dominant discourses surrounding divorce which sit uneasily with the languages of the modern children's rights movement. He points to the adult consensus that children - in their own best interests - should be excluded from decision-making in the divorce process and also to the effect of particular notions of family privacy which preclude languages of democracy and citizenship in relation to children affected by parental divorce. He argues further that the family justice system currently makes it more, not less, difficult to hear the voice of the child.

In the following chapter, Christine Piper examines, in more detail, how this exclusion of children arises in practice, despite the statutory emphasis on the importance of children's wishes and feelings. Drawing on recent empirical work, she reviews the relevant legal provisions and discusses the undercurrents that militate against ascertaining children's wishes in practice. Empirical research indicates that solicitors tend to rely on parental reports or assume that the court welfare officer will ascertain the child's views in the event of a dispute. The priority currently being given to parental agreement and harmony - in its own right and in the child's best interests - militates against the voice of the child being heard.

There is, of course, an inherent tension between advocating the realisation of children's rights and conceptualising children as incompetent dependants. Furthermore, whilst we maintain a particular conception of the 'abstract' child we are less likely to be able to hear the real voices of real children. We have already given reasons why we as adults are unlikely to let go of this conception of the child. But there is another sense in which the welfare discourse, and its positioning of children, is important; it also serves political purposes. Fairclough (1992) argues that we should not underestimate the power of discourse in effecting social change. Much of family law makes its ultimate appeal to a discourse of child welfare which serves to manage the behaviour of adults. There is a sense in which the discourses and practices of children's welfare regulate and prescribe for socially desirable ways of parenting.

Here we are touching again on the sorts of issues raised by Smart and Neale in their chapter. Felicity Kaganas, too, explores the ways in which particular conceptions of 'harm' have emerged in relation to contact. She argues that children are constructed as being 'at risk' unless they have continuing relationships with two harmonious parents; in seeking to manage these 'risks',

24 Undercurrents of Divorce

family law prescribes parenting for us all. Meanwhile, many children remain at risk from a range of other factors, such as poverty (Maclean, 1991) and violence (Hester and Radford, 1996) which family law fails adequately to address in relation to divorce.

This discursive and symbolic function of law is a powerful undercurrent which is explored in more detail by Richard Collier in his opening chapter of the section on 'Husbands and Wives'. Collier addresses changing patterns of fatherhood and masculinity in the context of transformations in intimacy and changing gender relations. He uncovers the hidden heterosexuality of recent divorce reform, and demonstrates the complexities of the mutual constitutions of heterosexuality, marriage, fatherhood and 'the family' in legal discourses and practices.

Jo Brown and Shelley Day Sclater then present a psychodynamic view of divorce. Drawing on psychoanalytic theory, they expose the powerful psychological undercurrents of divorce at both a social and an individual level. Reporting on the findings from an empirical study, the following chapter by Day Sclater illustrates a range of divorce experiences, and shows how psychoanalytic theory can be used to help understand the meanings of experience. Together, these two chapters challenge the current pathologising of divorce and suggest that 'conflict' is an inevitable outcome of ordinary coping strategies.

Issues of gender are prominent in the chapters by Felicity Kaganas and Christine Piper and by Alison Diduck. As we have seen, despite the gender neutrality, in principle, of family law, it remains highly gendered in practice (Brophy and Smart, 1985; Smart, 1989; Smart and Sevenhuijsen, 1989; Fineman, 1991; Smart, 1992; O'Donovan, 1994). As Kaganas and Piper argue in their chapter on domestic violence, the ideal of the harmonious divorce, and the informal, co-operative dispute resolution practices (mediation) which flow from it, may result in a decline in the visibility of wife abuse with the result that vulnerable spouses and children may remain unprotected. Whilst domestic violence as an issue has entered the public debate about divorce, empirical evidence reveals that there is still no clear consensus amongst professionals about the nature of domestic abuse and the need for proactive policies. This situation is perhaps all the more crucial in the light of recent findings of the linkages between spouse abuse and child abuse (Mullender and Morley, 1994; Hester and Radford, 1996). It would be a pity, however, if concern for protecting children from abuse meant a diversion away from protecting spouses

in their own right.

The tensions inherent in the gender-neutrality of the formal law are also evidenced in financial settlements. As Alison Diduck argues in her chapter, with the focus on the welfare of the child, and on the perceived benefits to spouses of reaching their 'own' agreements, there has been a failure to examine the consequences of the move towards informal justice in terms of the actual content of those agreements. Potentials for systematic inequities have been ignored. The undercurrents in relation to money and property, discussed by Diduck, are crucial to policy making; unless there emerges a more integrated picture of financial provision, which incorporates currently neglected issues, new policy initiatives might increase, and not reduce, the financial risks to family members who have least access to or command of resources.

Together, the chapters of this book critique the dominant discourses which have constrained the divorce debates and begin to address the complex undercurrents which will undoubtedly exert a hidden influence as the Family Law Act is implemented. The final chapter of the book draws out the themes which recur in this project. In critiquing the talk about divorce, in exposing these undercurrents and in drawing attention to professional and policy developments, we aim to introduce new ideas and perspectives into a debate which otherwise has functioned to further political, professional and moral agendas and to facilitate, in practice, the continuance of multiple exclusions.

Notes

1. Similarly, Mason and Steadman (1997) argue that the dominant adult ideological perspective is that of children as dependent, as needing protection, and as requiring the development of state systems to ensure this protection.
2. Fricker, a British judge, reflects this dominant view when he states that 'children are particularly vulnerable during separation and divorce' and he sees the child as the 'hidden client' in divorce proceedings (Fricker, 1995).
3. A number of authors have problematised the indeterminacy of the welfare principle. Kelly (1997), for example, refers to it as a 'concept in search of a meaning'. Alston (1994) says it has yet to acquire a specific content. Parker (1994) documents the criticisms which have been made on the basis of the open-endedness, indeterminacy and vagueness of the principle. He argues that it depends too much on the value system of the decision-maker, and that it can even provide a convenient cloak for 'bias, paternalism and capricious decision-making'. Parker (1994) is trying to understand the process by which 'content' is given to the best interests concept; he is looking for factors which lead to a degree of determinacy in its application, and he cites 'local'

26 Undercurrents of Divorce

factors as important in its meanings. It is in this context that we might raise the question of the significance of discourses as frameworks of meaning, as knowledge/power complexes, as closed systems of signification. Kelly (1997) advocates approaching the principle with more precision, drawing on psychological expertise where appropriate. Melli (1993), on the other hand, proposes abolishing it as a guiding principle, on the grounds that it seeks a goal which the machinery of law is incapable of attaining, and that it promotes litigation because of its inherent uncertainty.

4. For example, the Family Law Act is based on the desire to minimise the 'damage' caused to children by divorce. The Consultation Paper (LCD, 1993) and the White Paper (LCD, 1995) both accept that research findings 'show' that parental conflict is what damages children, and the equivocal nature of divorce research is neither acknowledged or addressed.

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