Victorian Sexual Morality: A Case of Double Standards

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... I was told that an impassable gulf divided the Rich from the Poor; I was told that the Privileged and the People formed Two Nations, governed by different laws, influenced by different manners, with no thoughts or sympathies in common; with an innate inability of mutual comprehension.[1]

For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility.[2]

Immorality is but the natural outcome of conditions like these. "Marriage", it has been said, "as an institution, is not fashionable in these districts". And this is only the bare truth. Ask if the men and women living together in these rookeries are married, and your simplicity will cause a smile. Nobody knows. Nobody cares. Nobody expects that they are.[3]

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1 Benjamin Disraeli, *Sybil,* Book IV, Chapter 8.

2 Sir William Scott (Lord Stowell) in the case of *Evans v Evans* (1790) 1 Hag Con 35.

3 Andrew Mearns, *The Bitter Cry of Outcast London, (An Inquiry into the Condition of The Abject Poor)* London, 1883.

Introduction

This paper deals with marriage and divorce, and with relations between the sexes. It is about trends and double standards, about one law for the rich and one for the poor; of one law for men and one for women. It relates specifically to the Age of Victoria, but, in history, it is impossible to draw hard and fast chronological dividing lines. Inevitably, we have to look to events and attitudes that were current both before and after our period. But we can say that what the paper is concerned with is what happened or was current during the time under review.

One Nation

The laws and legal institutions governing marriages were designed by and for one of the two nations perceived by Disraeli. For a large proportion of the "labouring classes" in pre-industrial England, marriage probably meant very little. It has been argued that while the poor were subject to the law, like everyone else, the law had almost nothing to say of relevance affecting them. The law was about property, but property they had none. Marriage settlements were made by and for the wealthy, to preserve property settled on their daughters upon marriage, and to protect them, and their children, against spendthrift husbands. The novels of Jane Austen, for example, contain some very good accounts of marriage settlements.[4] These rules were part of a social network across the whole of society, but it affected only the propertied classes. The rules and laws of marriage and later, of divorce, were predominantly the laws of that One Nation.

Marriage was for All Time

The prevailing philosophy of the English establishment, and therefore of the general community in our period, is expressed in the quotation from the judgment of that prominent and influential family law judge Lord Stowell in *Evans v Evans,* (see previous page) which dates from the end of the eighteenth century. But in the course of the nineteenth century a more sophisticated view began to gain ground, which perceived that an injustice could exist where parties who were married, could not legally relinquish their relationship, where in their own opinions and/or according to their conduct the marriage no longer had any meaning for them. In order to overcome the strongly held anti-divorce views, it required something really compelling to

[4] J F G Gornall, "Marriage and Property in Jane Austen's Novel" (1907) 17 *History Today* 805.

make divorce conceptually acceptable. Only adultery could be argued to be such an obvious and deliberate infringement of the marriage contract as could allow of its dissolution: *Matthew v 31-32*, xix, 6,9. The trouble with upholding marriage at all cost was that whatever the law said, it could not forcibly uphold indissolubility *in fact*. Unless, of course, one were also prepared to make adultery illegal and punishable at law. In a growingly industrial and secular age, with increasing geographical, as well as social mobility, of growing literacy and wealth, the growth of rationalism and the doctrine of the greatest good for the greatest number, such a regime was out of the question in any sense of *realpolitik*.

If one could not enforce the outlawing of adultery or desertion, one was faced with two contradictions. On the one hand, there would be those who were married, but not living with their spouses. On the other hand, there would be others who were living together as man and wife, but without being married to each other. So far from upholding the institution of marriage, such a situation was actually destructive of it. As an institution, marriage would simply lose its essential meaning of one man and one woman living together for life. To uphold marriage, therefore, one had to create a legal climate within which people could regularise their *de facto* status of separation or disengagement and bring it into accord with the law.

We then have to look at other factors in addition to those that have already been referred to: the rise of nonconformism and the growth of a social conscience, tempered with enlightened self-interest which caused the development of laws and conditions promoting minimum standards of public hygiene, public health and housing, the regulation of wages, the rise of social security and the beginnings of the Welfare State as we know, or knew, it. These views were endorsed by the *Royal Commission into the Law of Divorce* of 1853

The constraints of indissoluble marriage were increasingly becoming unacceptable in the mid-nineteenth century. And just because divorce was not generally available as a matter of law, this did not mean that there were not ways of getting around the law.

How to Get Rid of your Wife (without Divorce)

The unavailability of divorce before 1857 was an article of faith to which the English establishment paid lip-service and which nurtured the pretence that marriages were more likely to succeed if the parties knew that there was no

way they could get out of their marriage - very much as set out in Lord Stowell's dictum. Undoubtedly it was a fact of life there would always be people who came to lose interest in their marriage and in their spouse and wanted to take another partner. To meet this simple fact of human nature, a great industry had developed in the church courts which made the fullest use of the concept of nullity of marriage. If a marriage was null and void, then no marriage had ever come into existence, and it remained but for that fact to be recognised and have the presumed "marriage" set aside by a court order.

A marriage was void if there was an impediment to its formation. The most obvious was where one of the parties was already married. Another impediment existed if the parties were too closely related. This could occur where they were related by consanguinity (blood relationship) or by affinity (relationship by marriage) Prior to the Reformation, under the Roman Church, the ecclesiastical lawyers developed quite elaborate rules about these two relationships. Those rules were described by that great English legal historian Frederick Maitland as a "calculus of kinship", and "a maze of flighty fancies and misapplied logic".[5] Joseph Jackson has described the rules of affinity specifically as "a mixture of mathematics and mysticism".[6] The 1912 *Royal Commission on Divorce and Matrimonial Causes* commented on these rules with a quotation from the prominent ecclesiastical court judge Sir Lewis Dibdin by saying:

> These elaborate and highly artificial rules produced a system under which marriages theoretically indissoluble, if originally valid, could practically be got rid of by being declared null ab initio on account of the impediment of relationship. This relationship might consist in some remote or fanciful connection, between the parties or their godparents, unknown to either of them until the desire to find a way out of an irksome union, suggested minute search into pedigrees for obstacles - a search which somehow seems to have been generally successful.[7]

Under these rules, people who were related by what we should regard as a fairly distant family relationship, were prohibited from marrying each other. If one of the parties had had sexual intercourse with a near relative of the

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5 Pollock and Maitland, *History of English Law*, 1911, Vol 2, p 389.

6 Joseph Jackson, *The Formation of Annulment of Marriage*, 2nd ed, 1969, p 21.

7 Sir Lewis Dibdin, *English Church Law and Divorce*, London, 1812, p 24.

other, or even, premaritally, with the other party, that was enough to raise the impediment. There was then deemed to exist a relationship akin to a blood relationship between the parties, rendering marriage between them incestuous, and therefore unlawful.

If these relationships were not obvious, or were unknown at the time, or even if the parties simply chose to ignore them, and no one raised any objection at the time of the marriage, the marriage could be celebrated, and possibly never be disturbed during the parties' lifetime. Then, if for any reason, one of them wanted it set aside, she (but more usually he) needed only to prove the impediment and upon coming before the ecclesiastical court, the marriage was liable to be declared null and void. A prominent example of this device of nullity because of affinity was that of Henry VIII, who used it in the course of his marital adventures. It first happened when he "discovered" that he had previously had sexual relations with Anne Boleyn's elder sister Mary before his marriage to Anne. His marriage to Anne was therefore incestuous. This gave him a valid ground for having it annulled. For good measure, he managed to find some other grounds as well, such as Anne's alleged adultery with four courtiers, to enable him to use that ultimate method of annulment, of having her head chopped off.

The First Double Standard

In the absence of a general law of divorce, a double standard prevailed. This was: "One law for the Rich, and one law for the Poor". It applied across the whole spectrum of the law. Before 1857, as we have seen, the law did not provide for divorce as we now know it, ie a complete dissolution of the marriage relationship, with liberty for each party to remarry. The most that was generally available was what was called a "divorce a *mensa et thoro*" divorce from bed and board, but without involving a complete severance of the marriage tie. This was what later came to be known as a "judicial separation": a simple order of a judge enabling the parties to live legally separately from each other, without affecting such legal rights flowing from marriage as the wife's right to maintenance for herself. This remedy of a legal separation was the sole province of the ecclesiastical courts; the courts of the land having no jurisdiction over domestic matters of this kind.

There was still another method of severing the marriage bond, and this was more thorough, more complete than either of the first two. For the past 150 years or so, it had in fact been possible to obtain a legal divorce by Act of Parliament. It was open to anyone (in practice this was almost invariably a

husband) who had been "wronged" by the adultery of his spouse, to petition the House of Lords for an Act of Parliament dissolving his marriage. The procedure for obtaining such an Act consisted of four steps. First, you had to identify the adulterer, - not always an easy task. Second, you had to obtain a divorce a *mensa et thoro* in the ecclesiastical courts. Third, you had to sue the adulterer in a common law court for damages for "criminal conversation" or "crim con" as it was quaintly known. These damages were for what the adulterer had done to you, the husband. Never mind about the damage sustained by the seduced wife, who had lost her husband, her status, her main source of income, and her children because she had become an adulteress.

Of course the damage to the man was considered very serious indeed. He had been deprived of the *services* of his wife, and of her *womb* to which he had a legal claim for the production of his heirs. His honour, his reputation had been soiled. A remedy had to be found for freeing him from this situation. More importantly, he had to be free to contract a legal marriage to another woman whose *womb* would be at his disposal and of his lineage. The rationale for this latter consideration was expressed in 1697 by the Earl of Macclesfield who, having failed to persuade the ecclesiastical courts to grant him a divorce a *mensa et thoro*, successfully petitioned the House of Lords for a private Act, the first, granting him an absolute divorce on the grounds that:

> ... it would be a most unreasonable hardship upon him, ... that for his wife's fault he should be deprived of the common privilege of every freeman in the world, to have an heir of his own body to inherit what he possessed.[8]

Finally, having succeeded in a legal action for criminal conversation and obtained damages, you then petitioned the House of Lords for the dissolution of your marriage. This was again a costly procedure, and although proof of your spouse's adultery had already been established before a Court of Law, it had to be proved all over again. Once these steps had been taken, you could be granted an Act of Parliament for the dissolution of your marriage. You were then free to find someone else to carry your progeny.

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[8] *First Report of Royal Commission on The Law of Divorce*, 853, p 12, fn 6. Note the male-centred reasoning.

It is obvious that such a law was a law for the rich and not for the poor. The anecdote of what was said by Mr Justice Maule in 1845, a well-known and humane English judge, when he sentenced a labourer by name of Thomas Hall, who was charged with bigamy is well enough known.[9]

It was quite clear what Justice Maule thought of the state of the law in cases like this. It was just one of many straws in the wind leading up to the institution of legal divorce. In 1850 a Royal Commission was set up under Lord Campbell, to investigate the whole question. It led directly to the enactment of the *Divorce and Matrimonial Causes Act* of 1857.

The Second Double Standard

We have already seen the first parliamentary divorce was granted in 1697. In the years between 1715 and 1862, fewer than 300 divorces were obtained by this means. The cost to the petitioner was upward of £1,000. If for no other reason than cost, a wife had the utmost difficulty in raising this kind of money, and only four parliamentary divorces were ever granted to wives against their husbands. But these divorces already were subject to the double standard which obtained as between men and women which has been mentioned, whereby a husband had only to prove one simple act of adultery against his wife, whereas a wife had to prove aggravating circumstances coupled with adultery: such as cruelty, wilful desertion, bigamy or incest. The rationale was articulated by the Lord Chancellor, Lord Cranworth, when speaking in the House of Lords on the *Divorce Bill* in 1857:

> A wife might, without any loss of caste, and possibly with reference to the interests of her children, or even of her husband, condone an act of adultery on the part of the husband; but a husband could not possibly condone a similar act on the part of the wife. No one would venture to suggest that a husband could possibly do so, and for this, among other reasons: ... that the adultery of the wife might be the means of palming spurious offspring upon the husband, while the adultery of the husband could have no such effect with regard to the wife.[10]

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[9] Many versions of this anecdote exist, but all are substantially to the same effect. Cf also the judgment in the bigamy case of William Hawes at the Oxford Assizes of 1855 which is very similar.

[10] *Hansard* 1857, Vol 145, col 813.

It could be said that the law was only carrying into effect the prevailing view of women's adultery, but this was in itself a self-perpetuating attitude. Women were the subordinate sex, the "weaker vessel", "relative creatures".[11]

It has been well said that the history of English divorce law was conditioned by three factors: Wealth, the Church and the Aristocracy. Marriage was a vehicle for the transmission of wealth, of titles and of estates within the families of the rich. There was among the Victorian upper classes a fear, amounting to an obsession, with the spectre of "spurious offspring". This was the notion that if your wife were seduced, perhaps by the stable-boy or the gardener, she could be the means of introducing "spurious offspring" into your noble family.[12] Eventually, this interloper would walk off with your name, your title, your estates and your money. The threat which such a situation constituted for the aristocracy and the landed gentry and, in short, the propertied classes as a whole, had to be averted at all cost.

The double standard of having no general law of divorce available for all, but making it possible for the rich who could afford the costly procedure required to obtain a parliamentary divorce, was not widely discussed even in the parliamentary debates leading up to the *Divorce Act* of 1857, although reformers like Lords Lyndhurst and Brougham were not slow to see it. Even when the law finally came into being, it contained another double standard. Because adultery was regarded as so much worse in a woman than in a man, having regard to the possible consequences, divorce was much easier for a man to obtain than for a woman. A man had to prove nothing more than a single act of adultery by his wife. A wife, on the other hand, had to prove aggravating factors. Her husband had to be guilty of repeated adultery, coupled with cruelty or desertion, or incest or rape before she could divorce him. This double standard was not removed in England until 1923,[13] - while in the modern Australian State of Victoria it was to continue until 1959 when the federal *Matrimonial Causes Act* was enacted and superseded the separate State laws of divorce.[14] But even after the double standard had been removed from the law, it took a long time to disappear from public attitudes. A social stigma continued to adhere to divorce and to those caught up in it until well into the present century, and it affected women more

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11 S Ellis, *The Women of England*, 1839, p 155, quoted in Basch, *Relative Creatures*, 1947, which see generally for a very good attitudinal survey.

12 *Hansard*, above, n 10.

13 *Matrimonial Causes Act 1923* (Eng), s 1.

14 *Matrimonial Causes Act, 1959*, s 28(a).

severely han men. Only in the second half, or to be more specific, in the last quarter of the present century, and with the growth in the number of divorces, has it finally all but disappeared.

The Other Nation

How did all this affect that *other* nation that was England, to which Disraeli had alluded? I remember 20 years ago Professor Oliver (now Lord) McGregor, then Head of the Centre for Socio-Legal Studies at Oxford University saying to me in response to my question as to what "the common people" felt about marriage and divorce: "Well, of course, you won't find anything'. And coming to these questions from a legal perspective, for a long time I didn't. But more recently, I have been looking at writings which show quite a different picture from the traditional received wisdom. The quotation from Andrew Mearns at the head of this paper is an example.

What did "marriage" mean to the poor? The fact is, that for a large proportion of the population, for "the Other Nation", the laws of marriage and, after 1857, of divorce also, meant comparatively little by themselves. Rules such as the one that a deserted wife could pledge her husband's credit for necessaries were meaningless to the deserted wife of a labourer or of a pauper who wasn't worth any credit. The maintenance laws were too cumbersome and slow to be an effective means of securing a wife's financial support, even assuming that there was anything to be obtained from her husband. Legal divorce was out of the question, even after 1857, for reasons of expense alone. Even quite recently it has been said of conditions in England, that there are two or three systems of family law dealing with marriage and divorce and with maintenance or protection orders, a thesis which has been consistently argued by McGregor and others.[15] According to McGregor, Blom-Cooper and Gibson:

> Thus by the early twentieth century, there were two systems of legal remedy for matrimonial difficulties in England. Working class women went to the magistrates' courts and there obtained some 8,000 matrimonial orders every year, their financial betters went to a centralized divorce court and obtained annually some 600 divorces, that is, licences to marry again, and some 80 judicial separations.[16]

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[15] O R McGregor, Louis Blom-Cooper & Colin Gibson, *Separated Spouses*, London, 1970, Duckworth, *passim*

[16] O R McGregor, above, n 15, p 16 cf p 69, 70.

This theme is developed more fully in the *Finer Report*.[17] The Finer Committee was led by a judge of the Family Division, Sir Maurice Finer. Professor McGregor was again a prominent member of that Committee and, I believe, wrote much of the Report. In particular, Appendix 5 on "The History of the Obligation to Maintain" was written jointly by Finer and McGregor and largely the work of the latter.

The Report traces what is perceived as "the three systems of family law which have emerged from the ecclesiastical courts, from the criminal jurisdiction of the magistrates and from the poor law".[18] This thesis is developed at length in the appendix. Traces of a similar tripartite division can be detected in the Australian legal system, but it is submitted that it is of less direct relevance here, where access to the courts was probably more widely available. Where this was not the case, the developing welfare state did much to overcome the disability. It is relevant for the theme of this paper to point it out, as it supports the view that Disraeli's "Two Nations" have continued in England into modern times.

Another Double Standard: The Poor Laws

Yet another double standard can be seen in the Poor Laws and their administration in relation to families. We have all read examples of how the Victorian establishment paid at least lip-service to the values of family life. Yet, when the really poor were unable to maintain themselves, the New Poor Laws of 1834 separated whole families.[19] If a couple were sent to the Workhouse, husband and wife were assigned to separate quarters. If the couple had children, they were separated from their parents. We have a description of conditions in one workhouse, known as the Bastille, where on Sunday afternoons, children were permitted to visit their mothers in the women's room for an hour. When this happened, "Bedlam was let loose for an hour".[20]

Poverty, after all, was a social offence. Paupers were held to be responsible for their poverty. To be a pauper was regarded as a sign of weakness of character, of indolence and unwillingness to work, rather than of an inability to find work. Maintenance at the expense of the parish was held at a bare

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17 *Report of the Committee on One-Parent Families*, HMSO, London, 1974, cf pp 66 et seq.

18 *Report of the Committee*, above, n 17, p 66.

19 Cf J Perkin, *Women and Marriage in Nineteenth Century England*, Routledge, London, 1989, p 116.

20 C Shaw, *When I was a Child*, Methuen, 1903, quoted by Perkin, see previous footnote.

minimum to keep body and soul together, but nothing more. This was supposed to constitute an incentive for the poor to get themselves out of their predicament as soon as possible. If they didn't, they were feckless and lazy, and not to be encouraged by offering them support.

The same kind of thinking seems to have been behind the separation of convicts who were transported to the Australian Colonies for their crimes. Again, they had forfeited the "right" to live with their families. By transporting them, they were prevented from infecting their children with their criminall propensities. The fact that many convicts, once in the colonies, contracted new alliances, including ostensible marriages, ie committing bigamy, does not seem to have disturbed the authorities in the least. It was as if the right hand didn't know what the left hand was doing: the home authorities did not seem to care what the convicts did in the way of matrimonial arrangements, once they were safely out of the country. Or, more probably, these conditions simply mirrored the official attitudes to poverty and/or crime. Persons who were so feckless or depraved as to be guilty of poverty or crime had forfeited the right to be considered citizens and upright members of the community. Hence, they were, in fact, treated as outcasts who had forfeited the rights of civilised members of the community. If, in the case of convicts, they then contracted new "marriages" in the Colonies, there appears to have been a degree of laxity in the administration, so far as this aspect of the law was concerned. Or, it may be, the desire to see the colonies peopled with families was a stronger motive for official policy than the enforcement of marriages which had little, if any, chance of being reconstituted as such in the Antipodes.

Peter McDonald has commented on the marital arrangements of convicts:

> It might also be speculated that some of the convicts did not marry legally because they still had wives in Britain. Robson has estimated that about 25% of the male convicts had wives before they left Britain. It is apparent, at least in this early period, that very few of the convicts' wives were able to follow their husbands to the colony. In fact, King had complained that the few who had been allowed to accompany their husbands were of the "worst description". Also, in 1820, the Reverend John Youl stated that there was a general belief amongst the convicts that "those who had been transported to this country are released from their matrimonial engagements.
>
> ...

> The fact that only 27% of the adult women were reported as married should not, therefore, be seen as a revolt against the institution of marriage, but rather as a result of a number of factors which led the majority of the population to ignore the official or legal form of marriage.[21]

The law was actually clear enough. Where a person's spouse had disappeared or departed for parts unknown, eg beyond the seas, and had not been heard of for not less than 7 years, *in spite of all reasonable diligent enquiries having been made*, such a person could be legally presumed to be dead. It would appear that this doctrine may have been at times freely applied and without being too fussy about the enquiries that had, or had not been made. I am not aware of any work in depth into the administration of the law in the Convict Colonies on this question; if it has not been done, then it needs to be enquired into. George Rude has drawn attention to the case of 25 transported labourers in 1831-6 who appeared on the records as being already married before their transportation and who married in Van Diemen's Land. Although he found one case of a man who was subsequently convicted of bigamy, Rude says: "some presumably got away with bigamy".[22]

An interesting aspect of the attitude towards marriage and cohabitation among the Australian convicts gave rise to a widespread belief among middle class observers that there was a high degree of immorality and prostitution among the women. This belief was current for long and persisted until comparatively recent times. One comment written in 1957 quotes the evidence of James Mudie, a magistrate who gave evidence before the Select Committee on Transportation in 1837:

> I should say, of almost the whole of the convict women that arrive in New South Wales, that there is hardly an exception amongst them; there are some sent out for bigamy that have been in better society; but others that have attended the theatres, and the lowest girls possible that have been streetwalkers, all sorts; but they all smoke,

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[21] Peter McDonald, *Marriage in Australia*, ANU, Canberra, 1974, p 33.

[22] "Captain Swing and Van Diemen's Land" THRA Papers and Proceedings 1964, p 17. I am indebted to Maree Ring for this reference.

> drink, and in fact to speak in plain language, I consider them all prostitutes.[23]

These views have more recently been challenged.[24] Michael Sturma has shown that the term "prostitute" was often used in contemporary England, as referring to a woman living in what we today should describe as a *de facto* relationship:

> The "prostitute" was not necessarily a professional harlot, nor even promiscuous. Patrick Colquhoun's often quoted estimate that 50,000 prostitutes resided in London alone included "the multitude of low females, who cohabit with labourers and others without matrimony. By mid-century Bracebridge Hemyng, who investigated prostitution as part of Henry Mayhew's inquiries, estimated that prostitutes in the Metropolis numbered about 80,000. But it is worth noting the definition of prostitution given by Mayhew and Hemyng:
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> > Prostitution ... may be done either from mercenary or voluptuous motives; be the cause however, what it may, the act remains the same ... Prostitution, then, does not consist solely in promiscuous intercourse, for she who confines her favours to one may still be a prostitute.
>
> In short, the woman labelled a "prostitute" might be guilty of no more than cohabitation.[25]

Here, then, was yet another double standard. Relevantly for our purposes, Sturma also says that: "In part, cohabitation in Australia may be regarded as an extension of English culture".[26]

Divorce for the Poor

To come back to the Two Nations, we need to focus again on the matrimonial arrangements of the Other Nation. Even where its members had

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[23] Quoted by M S Brown in "Changing Functions of the Australian Family" in *Marriage and the Family in Australia*, A P Elkin, Angus & Robertson, 1957, p 88.

[24] A Summers, *Damned Whores and God's Police*, Penguin Books, 1975; P Robinson, *The Women of Botany Bay*, Macquarie Library, 1988.

[25] M Sturma, "The Eye of the Beholder: The Stereotype of Women Convicts 1788-1852" May 1978, 34 *Labour History*.

[26] Sturma, above, n 25, p 8.

entered into legal marriage, it had its own ways of dealing with divorce in cases where the parties wanted to get out of their marriage. One way would be for the husband - it was usually easier for him, - to go under; simply to disappear. This was especially easy before the *Registration Act* of 1837. Before that, marriages were recorded only in parish registers and there was no centralised system of recording this information. There was a great disparity in the standard of care with which the incumbents of different parishes treated their registers. Many, no doubt, stored them properly. But in other cases, the attitude was somewhat lackadaisical. It has been reported that in some cases, registers were used as door stops, or simply stacked under church roofs, where they might be subject to rain and weather damage, or vermin, fine and other risks.

So if a married labourer turned up in another county, perhaps under another name, there was usually no way of tracing him, and if he then entered into another marriage, the fact that this constituted bigamy might not involve much danger of ever coming to light.

Another way of getting rid of your wife was by selling her to the highest bidder. The expedient of selling one's wife had been well documented. Possibly the best-known literary report of it occurs in Thomas Hardy's *The Mayor of Casterbridge.* It has been investigated and reported on in depth by Menefee.[27] While, of course, the sale of a wife was totally inefficacious in law to dissolve a marriage, there was a widespread popular belief that it did. Accounts of such sales are numerous and the practice was obviously quite open and well-known, but little seems to have been done by the authorities to curb the practice. It is freely referred to in 18th and 19th century literature, including comic songs and even operatic farces. Thus in a broadsheet published in London in 1832, the following song appears:

> Now come jolly neighbours, let's dance, sing and play,
> And away, to the neighbouring wedding away.
> All the world is assembled, the young and the old
> To see the fair beauty that is to be sold.
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> So sweet and engaging the Lady did seem,
> The market with bidders did presently teem,
> A Tailor sung out that his goose he would sell,
> To buy the fair Lady - he loved her so well.

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[27] S P Menefee, *Wives for Sale*, Blackwell, Oxford, 1961, frontispiece.

> But a gallant young Publican 15*l*. did pay
> And with the young Lady he marched away.
> Then they drank, & carouz'd & rejoiced all day
> The glass pass'd around and the piper did play.
>
> Success to this couple, & to keep up the fun,
> May the bumpers fly round at the birth of a son.
> Long life to them both, in peace & content,
> may their days & their nights for ever be spent.[28]

It appears that as the 19th century wore on, and especially after divorce became available in 1857, "clouds of ignorance appear to have settled around the institution". Hardy's *Mayor of Casterbridge*, published in 1886, was virulently attacked because the opening wife sale was considered unbelievable.[29]

Another graphic account is related by Pinchbeck[30] of the officers of a parish actually *inducing* such a sale. She relates the following incident:

> A case at Croyden, in which parish officers induced a man to sell his wife, shows the lengths to which a parish would go to secure a removal, and the way in which a woman might be bandied about from one parish to another. In 1814 Henry Cook of Effingham, Surrey, was forced under the bastardy laws to marry a woman of Slinfold, Sussex, and six months after the marriage she and her child were removed to the Effingham workhouse. The governor there, having contracted to maintain all the poor for the specific sum of £210, complained of the new arrivals, whereupon the parish officers of Effingham prevailed on Cook to sell his wife. The master of the workhouse Chippen, was directed to take the woman to Croyden market, and there on June 17, 1815, she was sold to John Earl, for the sum of one shilling, which had been given to Earl for the purchase. To bind the bargain, the following receipt was made out:
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> June 17, 1815.
> Received of John Earl, the sum of one shilling, in full for my lawful wife, by me, Henry Cook

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28 Menefee, above, n 27, quoted in flyleaf.

29 Menefee, above, n 27, p 4.

30 I Pinchbeck, *Women Workers and the Industrial Revolution, 1750-1850*, Cass, 1969, p 83.

Daniel Cook }
John Chippen } Witnesses

> In their satisfaction at having got rid of the chargeability of the woman, the parish officers of Effingham paid the expenses of the journey to Croyden, including refreshments there, and also allowed a leg of mutton for the wedding dinner which took place in Earl's parish of Dorking. The ruse, however, was not successful. After some years, Earl, having ascertained that the marriage was invalid, deserted his wife, and she with a large family of children was again removed to be maintained by the parish of Effingham. In despair the officials now applied to the magistrates to compel Cook, the original husband, to support the whole family. The appeal, naturally, was dismissed.

This incident shows, first, how the indissolubility of marriage drove those who couldn't afford the way-out expense of obtaining a parliamentary divorce to expedients not recognised by the law. Second, how those expedients were (a) widely known, (b) connived at by minor officialdom, and (c) legally ineffective. And, third, how women were regarded as economic liabilities. To expect them to have been treated as persons in their own right, or with anything amounting to personal autonomy, would have been to expect something in the nature of an anachronism. How demeaning it must have felt to a woman to be shunted from parish to parish and from man to man, simply to balance some local authority's books. Pinchbeck comments:

> That the expenses incurred by such transactions could be entered up in the parish accounts and regularly passed by a parish vestry, is sufficient evidence, not only of the futility of parish administration under the old Poor Laws, but also of the straits to which women were reduced by the weakness of their economic and social position.[31]

Here was surely a double standard, if ever there was one.

Another popular method of "divorce" was "jumping the broom". Menefee quotes accounts of marriage by jumping over the broom or besom and says:

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[31] Pinchbeck, above, n 30.

> The informal ceremony appears to have been widespread in former times. It was used by navvies; at Woodhead Tunnel, Cheshire in 1845 one couple jumped over a broomstick in the presence of a roomful of celebrating men and were officially put to bed. Gypsies practised other variations. A besom was held, with one end on the ground, by one parent, and the boy and girl leapt over it.[32]

It was then a matter of common sense and simple logic that to undo the transaction of marriage, all that was needed to undo it was to jump back over the broom. To quote Menefee again:

> One form of informal divorce was associated with broomstick marriages in Wales. Such a union was sundered by the exact reversal of the form used for marriage. If divorce was desired and twelve months had not elapsed, a broom was again placed in the doorway in the presence of witnesses. The dissatisfied person then jumped backwards over the besom into the open air, making sure neither broom nor door jamb was touched in the process.[33]

It is obvious, then, that for the poor, there were ways of getting out of an irksome marriage, as there were ways for the upper classes.

More double-standards: Bastardy

Lastly, I want to comment briefly on illegitimacy, or ex-nuptiality, as we would call it today (if we call it anything), or bastardy as it was still officially known in England until quite recently. In Victorian times, and indeed until comparatively recently in our own society, the birth of a person to parents who were not legally married carried a social and official stigma. Persons in that position were not automatically included among the family members or heirs of their begetters.[34]

For a long time, the incidence of illegitimacy was not openly discussed, let alone researched. Rather, it was swept under the carpet or talked about in whispers. It is understandable, therefore, that the subject was not really

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[32] Menefee, above, n 27, p 9.

[33] Menefee, above, n 27, p 20.

[34] Dr Johnson is said to have stated the obvious truism, that the chastity of woman was "of the utmost importance, as all property depended upon it" - quoted by Alan Macfarlane, "Illegitimacy and illegitimates in English history" in Laslett and others, *Bastardy and its comparative History*, p 75.

understood or its causes and details understood, until recently. For example, in the seventies the Cambridge Group for the History of Population and Social Structure began to publish some of its findings[35] and this has added considerably to our knowledge of the subject of the demography of illegitimacy in England and Europe. It goes beyond our present scope to look deeply into this subject, which is beset with technical details and statistics. This paper is confined to noting general trends and tendencies. These indicate the incidence of illegitimacy was subject to quite marked fluctuations.

What we want to note here is the fact that as a social phenomenon it was always present, contrary to the frequent pretence of society that things were otherwise.

What goes with that fact is that while popular attitudes varied, there was always a far greater acceptance of illegitimacy than the official literature might have suggested. Macfarlane explains:

> A brief survey of 17th century English sources tends to give the impression that bastardy, though its ascription might be libellous, was not greatly disapproved of, as long as the child was maintained. Thus one vicar described how a neighbour had a maid who produced four successive bastards, "yet because she was a good work woman he kept her still". Gervase Holles recorded, more with fond indulgence than indignation or horror, that one of his uncles was very enamoured of women and begat several illegitimate children. It seems quite likely that sympathy with the plight of the mother and general tolerance of bastardy as a frailty, but not as a sin, continued at least until the nineteenth century. It is possible that the situation was similar to that observed in other societies, where there may be a scandal at the time, but afterwards the child, mother and father are accepted back into normal social relations and the affair does not cause shame.[36]

We know from early times, the illegitimate offspring of royalty were accorded the honours due to the royal blood, even if diluted by common

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[35] See, for example, P Laslett, *The World we have lost*, (1971), P Laslett and K Oosterveen, *Long-term Trends in Bastardy in England* (1973), P Laslett, *Family Life and illicit Love in earlier generations* (1977), P Laslett, K Oosterveen and R Smith, *Bastardy and its comparative History* (1980), cf R B Outhwaite, *Marriage and Society* (1981).

[36] Macfarlane, in Laslet, Oosterveen and Smith, above n 35, pp 75-76.

stock. William the Conqueror was illegitimate. It was so in the time of Charles II, as it was among Victoria's Wicked Uncles. Even in Victorian times, when illegitimacy was strongly frowned upon, Bertie, the heir to the throne, openly kept mistresses, who on that account occupied positions in society. So here again, we encounter a double standard, at least at times when official morality, and practice diverged.

In fact, it has been argued Victorian society was a "paradigm of sexual hypocrisy".[37] Barret-Ducrocq argues:

> An ostensibly, even ostentatiously virtuous society which furtively broke its own rules of conduct; a society which had nothing to say on sexual matters but left them to the professions: medical specialists, pornographer and prostitute.[38]

The author shows how social class very much determined the course which discussion of sexual matters took. She relates that:

> ... the most consistent, the most resounding sexual references are to be found in the immense literature dealing with the condition of the labouring classes, especially in the metropolis. Victorians saw the sexual depravity of the majority of Londoners as a threat to the moral and, potentially, the political order. The nation must be made aware of this situation - so unworthy of a great Christian country - and alerted to its dangers. The "condition of the workers" and the question of working-class morality in the capital were seen as early signs of malfunction in a healthy social body.[39]

In all these discussions, little thought was given to the very real sufferings of the labouring classes and the poor who were the subject of study, and that mainly means, the women. As the ruling classes were concerned with the moral danger which sexual licence on a large scale was believed to constitute to society and the body politic, individual fates were of secondary consideration: objects of charity, true, but also, and predominantly, of re-education and improvement:

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[37] Francoise Barret-Ducrocq, *Love in the Time of Victoria*, Penguin Books, 1992, p 1.

[38] Barret-Ducrocq, above, n 37.

[39] Barret-Ducrocq, above, n 37, p 2.

> The behaviour of the poor, seen as a whole, blatantly violated the principles of the dominant moral order. The labouring classes must therefore be immoral. The outward appearance, the manners, customs and culture of the people, were unequivocal signs of this immorality.[40]

Love in the Time of Victoria is an analysis of the records of the London "Thomas Coram Foundling Hospital". They covered the years 1850-1880. It appears that the author discovered them when they were available for inspection prior to 1980. As she says: "The institution then decided that to protect privacy of their living descendants, the files would be closed for another fifty years. Thus only those prior to 1840 are currently available."

It is not proposed here to enter into any detailed discussion of the disclosures made by the author, but merely to point to them as corroboration of the prevalence of illegitimacy in 19th century England, in spite of the widespread pretence to the contrary. To be fair, it must be pointed out that the seduction of young girls often, perhaps more often than not, occurred pursuant to a promise to marry. Nor were such promises necessarily always insincere or pretended.

Conclusion.

In conclusion, we could comment on some of the aspects of 19th century English sexual morality that have been the subject of this paper. The one that stands out relates to attitudes and practices relating to marriage. While lip service was always paid to marriage as the highest and universal goal to be striven for as the one legitimate model for inter-sexual relationships, that model was honoured in the breach perhaps as much as in the observance.

The period is beset with double standards, with hypocrisy and with selective reporting. But what comes through is an evolutionary process - not yet complete - leading to a view of marriage that is working its way slowly towards a relationship between equals, to be entered upon when the parties have a commitment, and to be dissolved if that commitment has come to an end. At the same time, there is the growing acceptance of *de facto* unions as being of equal status. Indeed, the view has been put that a growing coalescence is taking place of formal and informal marriage. As legal marriage is easier to get out of, so are *de facto* relationships becoming more

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[40] Barret-Ducrocq, above, n 37, p 9.

widespread and "respectable".[41] In the end, terms such as de facto relationships or illegitimacy are becoming meaningless, as human relationships are seen, not in terms of the external forms in which they are cast, but the reality in which they are lived.

Taking such an evolutionary view, it makes the attitudes towards 19th century sexual relationships seem but a step along the path towards a more honest environment in which the relationship between the sexes can and will be transacted.

[41] Cf H A Finlay, "Defining the Informal Marriage" (1980) 3 *UNSWLJ* 279.