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Re-tying the knot? Remarriage and divorce by consent in mid-Victorian England.

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ABSTRACT

This article examines the lives of the women who commenced proceedings for nullity or divorce at the newly opened Court for Divorce and Matrimonial Causes in the mid-nineteenth century. Using a longitudinal analysis of multiple source records, new data is presented about the mid-Victorian women who petitioned for dissolution of their marriage, and makes new findings that challenge currently accepted understandings of these proceedings. This study finds that, contrary to official figures,[1] the majority of the women in the sample years remarried and did so promptly, suggesting that the ability to regularise new unions (current or prospective) was an important consideration for these female petitioners. The conduct of proceedings, considered in the context of the circumstances of the parties, reveals a heretofore undiscovered prevalence of undefended divorce and suggests, in effect, a tacitly accepted practice of divorce by consent.

The Court for Divorce and Matrimonial Causes was established in 1857.[2] Historians have written a great deal about the newly available jurisdiction, but the impact on the lives of those women who used it to petition to end their marriages has not been explored. This study is supported by a data set of 181 detailed legal biographies for female divorce and nullity

* The author is grateful for the input of [names]. All errors and deficiencies are of the author alone.

[1] Allen Horstman, *Victorian Divorce* (St. Martin's Press 1985) 156.

[2] By the Divorce and Matrimonial Causes Act 1857.

petitioners in the years 1858 and 1868. These biographies, created using intensive multiple source record linkage and longitudinal analysis drawn from official court documents, public records and newspaper reports, allow us to investigate the circumstances of, and consequences for, the women who made use of the new procedures. This study draws out previously unexamined evidence to suggest factors that may have affected these women's decisions whether or not to seek dissolution of their marriage and in so doing challenges accepted understandings of divorce in this period.

Three historical works used empirical data to consider the new divorce court: Griselda Rowntree and Norman Carrier analysed data from a sample of divorce and nullity petitions filed in 1871 and 1951[3]; Danaya Wright examined samples of court records between 1858 and 1866[4]; and Gail Savage has written extensively about the operation of the divorce court of which the most relevant paper is her analysis of newspaper reports and data from samples of divorce petitions filed at the court between 1858 and 1868[5]. These studies provide a useful snapshot of the court proceedings and make valuable contributions to our understanding of court processes, uptake/success of the new process, and the class and gender profiles of litigants. However historical work to date has not considered other factors which are necessary to contextualise the historical significance of these proceedings, including matters such as the incidence of remarriage, employment opportunities for divorced women, and the subsequent custody of children. This article aims to remedy that gap, by focusing on the previous and subsequent 'legal lives' of these women. By taking a more comprehensive view of the subsequent legal lives of these petitioners, this study is able to interrogate fundamental

[3] Griselda Rowntree and Norman Carrier, 'The resort to divorce in England and Wales 1858-1957' (1958) 11, 3 Population Studies 188.
[4] Danaya Wright, 'Untying the knot: an analysis of the English Divorce and Matrimonial Causes Court Records, 1858-1866' (2004) 38 U Rich L Rev 903.
[5] Gail Savage, 'Intended only for the husband: gender, class and the provision for divorce in England, 1858-1868' in Kristine Garrigan (ed), *Victorian scandals: representations of gender and class* (Ohio UP 1991).

assumptions underlying previous histories and reach a more nuanced understanding of women's motivations for seeking termination of their marriages. Most importantly this study challenges the assumption within Dayana Wright's work that women seeking a decree of divorce were not motivated by the possibility of remarriage.[6]

By carrying out a longitudinal analysis of multiple source records linked to female petitioners, this study presents new data about the mid-Victorian women who petitioned for dissolution of their marriage and, contrary to official figures, finds that most women in the sample years remarried without delay. Their life circumstances, as revealed by this research, can be contrasted with the official picture presented in the divorce pleadings: an illustration of the deception involved in party-controlled narratives,[7] even in a court that had publicly adopted an inquisitorial role. This examination of the conduct of proceedings finds a widespread practice of undefended divorce.. Like today, judges granted decrees without appearance by the respondent, provided that service of the papers could be proven. Despite the fearsome reputation of the court[8] (which would have deterred some from issuing), this study reveals that most divorces in the sample years were granted and also concluded in a matter of months. As well as offering an insight into the impact of the new legislation on the lives of the lives of female petitioners, this data is of significance because, contrary to received understandings, it strongly suggests that 'de-facto' divorce by consent was tacitly accepted at the time the divorce court first began sitting in the mid-Victorian era. This is of particular relevance today, given the campaigns for reform of the current system of divorce which encourages parties to present facts based on fault.[9]

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[6] Wright (n 4) 944.
[7] Daniel Farber and Suzanna Sherry, 'Telling stories out of school: an essay on legal narratives', (1993) 45 Stan L Rev 807
[8] Stephen Cretney, *Family Law in the Twentieth Century* (OUP 2005) 196.
[9] See the campaign led by Resolution First for Family Law, 'Manifesto for Family Law' (2015) 18-21.

I. Historiography

The impact of the newly available civil jurisdiction for divorce has been much examined by historians. Initial studies analysed statistical data produced for the 1912 Royal Commission on Divorce and Matrimonial Causes,[10] the first of note being Oliver McGregor's centenary study of divorce in England published in 1957.[11] Thirty years later in 1990, Lawrence Stone used this same data in his extensive review of marriage, separation and divorce 1530-1987 to conclude that 'as a result of the 1857 act, several hundred middle-class men and women were moved every year from the categories of the eloped, the deserted, the privately separated, or the judicially separated to the category of the divorced'.[12] Roderick Phillips' abridged survey of divorce in the Western world, published at the same time, by contrast concluded that despite the low numbers petitioning, 'the first English divorce law had dramatic effects on divorce in England' because of the change in the sex composition of petitioners (two-fifths of petitioners were women, compared to 1% under the old parliamentary procedure).[13] Indeed, the distinguished family lawyer Stephen Cretney analysed extensive primary and secondary sources to acknowledge the significance of the legislation and to conclude that 'it unquestionably constitutes a landmark in legal history'.[14]

[10] Gorell, *Minutes of Evidence taken before the Royal Commission on Divorce and Matrimonial Causes* (Cd 6478, 1912).
[11] O.R. McGregor, *Divorce in England* (Heinemann 1957).
[12] Lawrence Stone, *Road to Divorce* (OUP 1990) 387.
[13] R Phillips, *Untying the Knot* (CUP 1991) 130.
[14] Cretney (n 8) 166.

Other studies widened their sources. Gail Savage analysed a sample of contemporary newspaper reports in the London *Times* to comment on the social class of parties[15] and, in his 1985 book, Allen Horstman quoted extracts from newspaper reports to illustrate the impact of the legislation not on individuals but on societal norms of respectability.[16] Other studies analysed the data found in pleadings. Of note is a 1958 article which took a demographic perspective: by analysing data taken from a sample of divorce petitions filed in 1871, Griselda Rowntree and Norman Carrier were able to present findings about the occupational grouping and family size of couples resorting to divorce at that time.[17] Building on the conclusions of Rowntree and Carrier, Colin Gibson's book published 36 years later set out the social context of marital breakdown, considering the constraints of poverty and gender on the ability to petition the court.[18] In Gail Savage's piece on gender, class and the provision for divorce published in 1991, she analysed a sample of petitions filed between 1858 and 1868 to extract data on class and place of residence.[19] Danaya Wright took this one step further in 2004, presenting data from a sample of the entire court docket of petitions filed between 1858 and 1866 to consider the court process and outcome, finding a 70% success rate.[20] However, such studies are limited by their reliance on the accuracy of the facts as presented to the court. This study builds on past scholarship, uses entire data sets rather than samples, and employs a different methodological technique, in effect building a 'legal biography' of each petitioner to supplement analysis of information in court pleadings with data obtained by tracing the parties both before and after proceedings.

[15] Gail Savage, 'The Operation of the 1857 Divorce Act, 1860-1910' (1982) 16 Journal of Social History 103, 104.
[16] Horstman (n 1).
[17] Rowntree and Carrier (n 3).
[18] Colin S. Gibson, *Dissolving Wedlock* (Routledge 1994).
[19] Savage, 'Intended only for the husband' (n 5).
[20] Wright (n 4) 928.

II. Method

This study analyses cases initiated by wives in 1858 and 1868 seeking nullity or divorce, setting out a quantitative analysis of the sample's occupation, age, place of residence, family size and remarriage as well as qualitative descriptions of individual case studies. It draws on a data set of 181 legal biographies – representing nearly the entire cohort of female petitioners in 1858 and 1858. Multiple source record linkage enables the retrieval of information from vast stores of material[21] and is facilitated by online processes.[22] Having extracted information about the parties from court documentation for each sample year, the study carried out online searches of relevant databanks to trace the parties and any children, both before and after the proceedings.[23] To minimise the risk of reliance on incorrect information and consequent false identification of individuals, criteria were applied to ensure that information from only probable links was included, by requiring the presence of three identifying features. When attempting to trace one of the parties in the census, relevant entries were identified by name (with flexibility of spelling), age (plus or minus five years), occupation, place of residence, birth location and identity of companions in the household (such as a child of the parties, spouse, partner, parents or siblings). Even if links were accepted as probable, the information given within the various sources can be misleading. As will be seen, some people gave false information to officials, particularly minimising the age

[21] For an example of an earlier study using multiple source record linkage, see the study of the background and lives of the 454 surgeons who joined the army medical service during the Revolutionary and Napoleonic wars: Marcus Ackroyd, Laurence Brockliss, Michael Moss, Kate Retford and John Stevenson, *Advancing with the Army* (OUP 2006). A more recent study is Rachel Pimm-Smith and Rebecca Probert, 'Evaluating marital stability in late-Victorian Camberwell' (2018) 21 (1) Family & Community History 38.

[22] Pat Hudson, 'A new history from below: computers and the maturing of local and regional history' (1995) 25 (4) The Local Historian 209.

[23] The data was all available in the National Archives UK and extracted via the commercial provider Ancestry.co.uk. All references here refer to the National Archives UK unless otherwise stated.

of wives or children. Diverse spelling of common names made tracing more difficult and increased the risk of reliance on erroneous information. For example, petitioners called Elizabeth required checking against multiple versions of their name (Beth, Bess, Liz, Lizzie and Liza). A few of the parties were impossible to trace which is reflected in the quantitative analysis.

The data was drawn from a number of sources: court documentation, digitized newspaper reports of the hearing of each case, census data and birth, marriage and death registers. The entries were manually transcribed into a petitioner database for each sample year. Cases commenced in the first year of the divorce court's operation were considered to test the initial impact, as well as those commenced a decade later, when the operation of the statute had bedded down. By analysing all data from each year, instead of only sampling, it was felt that a more accurate picture would emerge. In addition, cases commenced in the years 1867 and 1869 were analysed to provide additional comparative data. This study focuses on 1858 and 1868; the data for the additional years is only mentioned in the text where there is a significant difference. Although the divorce court had jurisdiction to hear a wide variety of petitions,[24] only those for nullity and divorce are considered in this study. This is because, by seeking a decree of nullity or divorce, petitioners were wishing to bring about the legal termination of the marriage.

II. Context

The account presented in this article narrows the field to those cases where the woman had initiated the proceedings and chosen to seek the termination of the marriage, a step facilitated

[24] Causes included divorce, nullity, restitution of conjugal rights and jactitation of marriage amongst others.

by the new procedures. Prior to the enactment of the Married Women's Property Acts of 1870 and 1882, a married woman could not hold property in her own right, due to the legal doctrine of coverture that a married woman's property was owned by her husband. In addition, state support was limited to the workhouse and, throughout the nineteenth century, women were increasingly barred from paid work;[25] the ideology of domesticity reinforced a woman's dependence on her family.[26] To petition the court was a decision not to be taken lightly: divorce trials were intimidating, held in public and, until the enactment of the Matrimonial Causes Act 1860, presided over by a bench of three of the most senior judges in the land.[27] The court was obliged to carry out an inquisitorial process[28] and issues of fact could be determined by a jury.[29] All trials in 1858 and some of those in 1868 were reported in newspapers, bringing a risk of public notoriety and humiliation. In a House of Lords debate in 1859 about the salacious reporting of divorce trials, the Earl of Wicklow acknowledged the deliberate deterrent effect of reported proceedings, saying 'The very apprehension of publicity tended very often to deter persons from bringing cases forward where no fear of the costs would do so'.[30] Indeed, a possible motivation for these women petitioners may have been to minimise public censure by presenting as the wronged party, particularly if they considered proceedings to be inevitable and the alternative would be responding to allegations made in public by their husband.

[25] Edward Royle, *Modern Britain: A Social History 1750-1997* (Hodder Arnold 1997) 93.
[26] Rowntree and Carrier (n 3) 197.
[27] Matrimonial Causes Act 1860, s 1 gave the Judge Ordinary the power to sit alone in all cases.
[28] Divorce and Matrimonial Causes Act 1857, s 29.
[29] Divorce and Matrimonial Causes Act 1857, s 36.
[30] HL Deb 28 July 1859, vol 155, col 515.

The Court for Divorce and Matrimonial Causes began sitting on 11th January 1858,[31] having been established by the first Matrimonial Causes Act in 1857,[32] a landmark statute which transferred jurisdiction for divorce to the civil court and gave both men and women in England and Wales legal standing to petition for a decree of nullity or divorce, enabling them to remarry.[33] The statute was the first Matrimonial Causes Act, culminating in the current statutory framework for divorce. Before the new procedures, obtaining a divorce was a complicated process which required women to seek both an order from the ecclesiastical court ('divorce *a mensa et thoro*' which permitted separation but not remarriage) and dissolution of the marriage by private Act of Parliament ('divorce *a vincula matrimonii'*).[34] This was expensive, all stages costing between £200 to £5000,[35] and in 1854, high profile campaigner Caroline Norton published the first of two pamphlets in which she criticised the inaccessibility of divorce for women.[36] Over a period of 187 years from 1670 to 1857 there were only eight female petitioners in total, of whom four were successful.[37] This can be contrasted with 321 divorces obtained by men over the same period.[38] Limited access to divorce has been linked with the custom of wife selling, prevalent throughout the eighteenth and nineteenth centuries.[39] Although involving ritualistic practices symbolic of patriarchy (such as the wife being paraded through the market place while wearing a halter and being

[31] Henry Kha & Warren Swain, 'The enactment of the Matrimonial Causes Act 1857: The Campbell Commission and the Parliamentary Debates', (2016) 37 (3) JLH 303, 328.
[32] Divorce and Matrimonial Causes Act 1857.
[33] Divorcees had the option of remarriage since the Marriage Act 1836 had introduced civil marriage and ended the church's exclusive right to solemnise marriages.
[34] The process was only two stages for women, not three, because a wife could not be plaintiff in the criminal conversation stage: J F Macqueen, *A practical treatise on the appellate jurisdiction of the House of Lords & Privy Council: together with the practice of parliamentary divorce* (London 1842) 492.
[35] Savage 'The Operation of the 1857 Divorce Act, 1860-1910' (n 15) 103. However, see Sybil Wolfram 'Divorce in England 1700-1857' (1985) 5 OJLS 155, 166: the costs figure quoted by the Royal Commission on Divorce in 1853 was £700 but Wolfram calculates (based on the costs figures of published cases) that this is an over-estimate.
[36] Caroline Norton, *English Laws for Women in the Nineteenth Century* (London 1854) 158.
[37] Gibson (n 18) 41.
[38] Phillips (n 13) 66.
[39] Edward Palmer Thompson, *Customs in Common* (Penguin Books 1991) 409.

sold to the highest bidder), these sales can also be viewed as a means of legitimating a new union, providing a privately regulated, much-needed alternative to divorce.[40]

After the statute, women accounted for 40 per cent - 45 per cent of all petitioners each year,[41] yet despite permitting a huge increase in the proportion of female petitioners, the reform was presented at the time as simply procedural,[42] only seeking to codify past ecclesiastical and parliamentary practice. Section 22 of the Divorce and Matrimonial Causes Act 1857 directed the new divorce court to 'proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief'. This limited the court to granting decrees of nullity on previously established grounds and also meant that the different grounds for divorce for men and women were retained: men were able to divorce on the basis of their wife's adultery alone, whereas women had to prove adultery aggravated by marital offence, although the statute did expand the marital offences so that they now comprised incest, bigamy, cruelty or desertion of two years.[43]

IV. Demographic data

The divorce records supply details of 87 and 94 women who petitioned for nullity or divorce in 1858 and 1868 respectively. There is a similar sample size for 1867 and 1869.[44] The numbers are heavily weighted in favour of divorce: in 1858 only seven of the petitions were

[40] Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985) 51.
[41] Stone (n 12) 385.
[42] Sybil Wolfram, 'Divorce in England 1700-1857' (1985) 5 OJLS 155, 178.
[43] Divorce and Matrimonial Causes Act 1857, s 27.
[44] The sample size for 1867 was 89 cases (85 divorce and 4 nullity) and for 1869 was 116 cases (109 divorce and 7 nullity).

for nullity, whereas in 1868 none of the petitions were for nullity. The subsequent sub-sections consider the occupational grouping, age and place of residence of these petitioners, followed by the failure rate and duration of proceedings, before going on to consider what happened to both parties and their children after decree. Cumulatively, this data enables a consideration of the impact of the new procedures, as well as the factors that may have influenced the decision to petition the court.

A. Occupation

The assumption of earlier studies was that working people were denied access to the court because of cost,[45] yet more recent studies have identified a surprisingly high proportion of divorce litigants belonging to the working class: one which considered divorce suits from 1858 to 1868 found that working class litigants comprised 23 per cent of the sample.[46] However, these studies were limited by reliance on information provided in the petition, in which a high proportion did not specify the occupation of the husband.[47] This study aims to improve the identification rate by widening the source material to include census and other data.

[45] For example, McGregor (n 11) 19.
[46] Savage, 'Intended only for the husband' (n 5) 22. Gail Savage lists the working class families in the text as comprising shopkeepers, servants, labourers, shoemakers, compositors, carpenters, cabinet makers and soldiers.
[47] For example, in the study by Savage ibid 24 per cent of the sample cases and in the study by Rowntree and Carrier (n 3) 23 per cent of the sample petitions did not provide details of occupation.

An attempt was made by the author to assign each of the petitioners to one of five socio-economic groups,[48] as devised by the General Register Office for the 1951 census:[49] Class I professional occupations (such as accountant, dentist, vicar), Class II intermediate occupations (such as auctioneer, railway inspector, schoolmaster), Class III skilled occupations (such as bricklayer, joiner, carpenter), Class IV partly skilled occupations (such as gardener, rope maker and brewer) and Class V unskilled occupations (such as general labourer and waste collector).[50] This analysis was based on the husband's occupation because of the difficulty of obtaining accurate information about work done by Victorian women.[51] Table 1 shows the number and proportion of husbands belonging to each of the groups. In 1858 and 1868 47 per cent and 51 per cent of husbands in the respective years belonged to Class III and below.[52] This analysis confirms the findings of previous studies that a surprisingly high proportion of those seeking a decree of nullity or divorce were from lower occupational groupings. Further details of the occupations of both husband and wife are given throughout the text in the case studies. [Insert Table 1]

Although the volume of cases under the new procedures was greater than expected,[53] the numbers were insignificant when compared to the size of the population. Lawrence Stone

[48] The exercise of categorisation presented a number of challenges including the unreliability of source information about the nature of each husband's employment and the artificiality of applying modern understandings of 1951 census categories to work being undertaken in the nineteenth century.
[49] This is the classification framework recommended by Alan Armstrong to analyse occupations in the 1841 and 1851 census in 'The use of information about occupation' in Edward Wrigley (ed), *Nineteenth-Century society: essays in the use of quantitative methods for the study of social data* (CUP 1972) 209.

[50] ibid 215.
[51] Wright no 4) 934, 982; Pat Hudson 'Women and industrialisation' in June Purvis (ed) *Women's History Britain 1850-1945* (UCL Press 1995) 25.
[52] A similar socio-economic grouping distribution of the husbands was evident on an analysis of the women petitioning in 1867 and 1869. 1867: Class I 17 (19%), Class II 20 (22%), Class III 37 (42%), Class IV 9 (10%), Class V 2 (2%), not known 4 (5%). 1869: Class I 21 (18%), Class II 40 (34%), Class III 46 (40%), Class IV 8 (7%), Class V 0 (0%), not known 1 (1%).
[53] Kha & Swain (n 31) 329.

has pointed out that Victorian England was essentially a non-divorcing society.[54] There are a number of possible reasons for the low numbers of petitions from groups I and II. Private ordering of affairs, by way of a deed of separation, across the middle and upper classes, was commonplace.[55] The wealthiest may have needed to renegotiate the terms of any marriage settlement, entered into to circumvent the legal doctrine of coverture. In addition, they may have had less need to petition: remarriage would have been less of an economic priority and the divorce court did not have power to make provision for transfer of capital or property between parties. The low number of petitions from the higher occupational groupings revealed by this study confirms the findings of previous studies that the new divorce court dealt with a surprising number of working class litigants.

B. Age

Figures 1 and 2 show that, although the ages ranged from 18 to 57, most female petitioners for both sample years were aged in their thirties. The figures show the ages of 99 per cent (n=86) of the 1858 female petitioners and 85 per cent (n=80) of the 1868 female petitioners, as the ones not shown could not be ascertained.[56] [Insert Figures 1 and 2]

One issue is whether an advanced age at petitioning was linked to impediments to accessing the divorce court. For the 1858 petitions, the women could not have petitioned prior to the new procedures being available in 1858 and so initiating proceedings was inevitably delayed until that year. For the 1868 petitioners, factors other than the lack of availability of judicial

[54] Stone (n 12) 387.
[55] Olive Anderson, 'State, civil society and separation in Victorian marriage', Past and Present (1999) 161, 163.
[56] The mode age for 1867 and 1869 petitioners is 30 and 33/34 respectively.

divorce must have influenced the date of filing. The range of available grounds meant that there was no minimum separation period. One petitioner who benefited from this is Rebecca Prendergast, pub landlady. Rebecca filed for divorce from her second husband William Henry Prendergast in November 1868, having married him six months earlier. Rebecca alleged violence with a knife and poker as well as adultery with 'divers' (sic) unnamed women.[57] Decree absolute was pronounced in December 1869.[58]

The fact that some petitioners were not able to file immediately upon marital breakdown, even though the law allowed them to, is supported by an analysis of the date of separation of the 1868 petitioners: more than a quarter (n=24) had been living separately for more than five years, of whom 8 had been separated for longer than a decade.[59] Postponement may have been necessitated by having to acquire sufficient money to fund the proceedings. While cheaper than past ecclesiastical and parliamentary procedures, potential costs were still an important consideration, particularly as pauper cause assistance was only available to those of very limited means (property valued at less than £25) and was difficult to obtain, as a petitioner would have to find a lawyer prepared to give their services for free (although disbursements were still payable). A contemporary newspaper report about 'The Cost of a Divorce' in 1861 said: "Some people think that a divorce is obtained cheaply now a-days, and that £50 or £60 will serve for that purpose, whereas the fact is that £200 - viz. £100 for the

[57] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 949. Appellant: Rebecca Prendergast. Respondent: William Henry Prendergast. Type: Wife's petition;J 77/88/949.

[58] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; J 77.

[59] A similar year of separation distribution was evident on an analysis of the women petitioning in 1867 and 1869. In both sample years 20 per cent had been separated for longer than five years: 17 in 1867 and 22 in 1869.

wife's cost and £100 for the husband's is the smallest sum that can be calculated on".[60] Such expense was beyond the means of most of the population at that time: eighty per cent had average earnings of less than £100 a year.[61]

Strictly speaking, the husband had a common law duty to pay the wife's costs as well as his own 'from day to day' and, when the matter was set down for hearing, to give security to the wife's solicitor for all future costs of the action,[62] regardless of whether or not she was respondent and regardless of the outcome of the case. However, despite this legal obligation and the available court sanctions of sequestration of assets and imprisonment,[63] enforcement could pose a difficulty, particularly where the husband was of limited means or had emigrated, which was commonplace.[64] A case in which a costs order was made was that of 1868 petitioner Susannah Cash, mill hand of Derby. Susannah's husband was ordered to pay the sum of £61.1.3 within seven days[65] yet he gave his occupation on the marriage certificate as marble polisher[66] and it must be questioned whether Susannah's solicitor managed to obtain payment from him.

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[60] Galway Vindicator & Connaught Advertiser, (21 December 1861) 4.
[61] Gibson (n 18) 43.

[62] Cretney (n 8) 169.

[63] Anderson, 'State, civil society and separation in Victorian marriage', Past and Present (1999) 161, (n 55) 173.

[64] Wilbur Shepperson estimates that almost seventeen million people emigrated from Britain in the nineteenth century: 'Industrial Emigration in Early Victorian Britain' (1953) 13 (2) The Journal of Economic History 179.

[65] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[66] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 817. Appellant: Susannah Cash. Respondent: Alfred Cash. Type: Wife's petition; J 77/84/817.

It was necessary to instruct a solicitor to draft and file the necessary pleadings[67] and, prior to issuing, the solicitor may have required a payment on account or, at the very least, verbal assurance as to how costs were going to be paid, particularly as married women could not own property and payment by the husband may not have been forthcoming. Therefore, the women in this study would have had to make arrangements for costs, perhaps by agreement with the current husband, prospective new husband or family member or by saving. One petitioner who conformed to this pattern is Ann Spate of Bilston who wrote in her 1868 petition[68] that she had separated from her husband four years previously but she had not been able to afford to start the proceedings, having been working as a housekeeper to a mine agent.

> *"Your Petitioner has hitherto delayed taking proceedings for a Divorce for want of the pecuniary means to institute and carry on the same. The circumstances of the said Joseph Spate are such (he being merely a working miner) as to preclude the recovery of costs from him. And your Petitioner has with difficulty at length raised the funds necessary for the prosecution of the Petition by the savings of several years and the help of friends."*

In the case of 1868 petitioner Mary Southerton (formerly Tozer), her brother funded the divorce and she lived with him after the proceedings. The 1871 census shows the following household in Devon: William H. Tozer head 50 general clerk, Mary Southerton sister 35

[67] Anon 'Practice of the Divorce Court' (1874) 3 Law Magazine and Review 775, 784.

[68] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 983. Appellant: Ann Spate. Respondent: Joseph Spate. Type: Wife's petition; J 77/89/983.

housekeeper and Frederick W. Southerton nephew 10.[69] In her petition Mary had sought custody of her only living child Frederick William Southerton born 1860[70] and this was granted on the pronouncement of decree nisi.[71] Mary gave evidence at the trial that *"my husband came to where I was living and beat me so severely that my friends could not recognise me… I returned to my mother, having miscarried with twins in consequence of my husband's ill-treatment."* Mary's brother gave evidence that he had been obliged to help her with money when the husband (a school teacher) had left her destitute to live with another woman.[72] The difference between the economic position of Mary and her brother is striking: Mary was obliged to seek assistance from a male relative, given the limited opportunities available to her in mid-Victorian society. The fact that, as revealed by this study, most female petitioners in the sample years were aged in their thirties is indicative of the financial constraints operating upon women in the mid-Victorian era.

C. Place of residence

The divorce court was based in one location only, namely London, so costs for those living at a distance from the capital could be inflated. Proceedings comprised numerous hearings and the eventual trial could last days so a party's expenses would include, not only legal representation and travel to London, but also overnight accommodation for them and their

[69] Census Returns of England and Wales, 1871; *RG 10/2103, 20.* GSU roll *831789.*

[70] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 848. Appellant: Mary Southerton. Respondent: Robert Grindley Southerton. Type: Wife's petition; J 77/85/848.

[71] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[72] Western Times Exeter (8 June 1869) 8.

witnesses. It would therefore be expected that petitioners living further afield would be discouraged from filing at the court. Table 2 shows the place of residence of female petitioners for both the 1858 and 1868 samples as stated in their petition, grouped into the geographical areas of Middlesex, Home Counties and elsewhere. [Insert Table 2]

The data shows that a large number did live in the environs of the divorce court, namely Middlesex and the Home Counties, although nearly half of the 1858 petitioners were living at a greater distance, including counties of Northumberland, Lincolnshire and Devonshire (now 'Devon'). This proportion was a third in 1868 and a half in both 1867 and 1869.[73] Therefore women from further afield did petition the London based divorce court despite the practical difficulties this may have posed for them.

Nevertheless, the effect of location is suggested by the differing success rates, namely the differing proportions of petitions that resulted in a final decree, by geographical area. In three of the four sample years,[74] the divorce petitions[75] filed by women from further afield than Middlesex and the Home Counties had a lower failure rate.[76] This could suggest that the location of the court had a deterrent effect for women living at a greater distance as those

[73] In 1867 and 1869 52 per cent and 44 per cent of petitioners from those respective sample years came from Middlesex and the Home Counties.
[74] The exception is 1867: the petitions that were filed by women who lived further afield than Middlesex and the Home Counties had a failure rate of 49 per cent failure rate compared to 36 per cent for those filed by women living in Middlesex and the Home Counties.
[75] Nullity petitions are excluded from these calculations because of the small numbers involved and the high failure rates.
[76] In 1858 the petitions that were filed by women who lived further afield than Middlesex and the Home Counties had a failure rate of 22 per cent failure rate compared to 30 per cent for those filed by women living in Middlesex and the Home Counties. Comparable figures are in 1868 12 per cent compared to 22 per cent; and in 1869 15 per cent compared to 33 per cent.

with a weaker case were deterred from petitioning the court, perhaps with the benefit of legal advice.

D. Failure rate– divorce

Unlike the administrative process today,[77] the court enquiry was inquisitorial and only a certain proportion of petitioners were awarded a divorce decree.[78] Some suits were dismissed by the court, reduced to judicial separation (which did not permit remarriage) or abandoned by the petitioner. Table 3 shows the award of a decree in divorce causes commenced by women in 1858 and 1868. [Insert Table 3]

Of the 80 petitions for divorce filed by women in 1858, 25 per cent (n=20) were not granted a decree of divorce; in 1868, the proportion with no divorce decree was 19 per cent (n=18). Of the 20 cases filed in 1858 where no divorce decree was awarded, 9 were abandoned by the petitioner which wider research can link to their death (n=3), emigration (n=5) or reconciliation with the respondent (n=1). Of the 18 cases filed in 1868 where no divorce decree was awarded, 13 were abandoned by the petitioner. Although the failure rate for 1869 is a similar 23 per cent (n=25), the 1867 data reveals a 42 per cent failure rate (n=36) of which 27 were abandoned.

[77] In England and Wales, fewer than 1% of petitions each year are defended and, for those that are not defended, a decree can be granted upon approval by a judge or court administrator so neither enquiry into the truth of the allegations nor attendance by the parties at court is required: Nuffield Foundation, *No Contest* (Nuffield 2018) 5.

[78] The failure rate of the nullity petitions has not been set out because of the small numbers involved.

Abandonment seems to have been more prevalent amongst those petitioners in the sample with a large number of children and may have been a consequence of financial constraints. In the 1868 Venthem case, Mary Ann Venthem (formerly Russell) and her husband Henry Venthem bricklayer had seven children, of whom six were living at the time of the divorce. The petition alleges that the husband had committed adultery with Mary's sister called Emily Russell.[79] The proceedings were started in December 1868 and in February 1869 there was a hearing about alimony but no order was made[80] and after that hearing neither party took any further action. The parties did not reconcile: the 1871 census shows the husband Henry Russell 36 builder cohabiting with Emily Russell 26 wife in St Pancras with their three children Emily Russell daughter 8, Harry Russell son 4 and Arthur Russell son 1.[81] Presumably, he was using the name of Russell as he could not marry Emily, still being married to Mary. The Divorce and Matrimonial Causes Act 1857 contained provision for the court to order a husband to pay spousal maintenance but only if it could be secured,[82] so the court could not award maintenance to a wife if her husband did not own property, regardless of the level of the husband's income and his ability to pay. Perhaps Mary abandoned the proceedings when she failed to obtain an order for alimony from the court. Alternatively, Mary may have chosen to abandon the proceedings if she had reached terms for settlement, the threat of a public hearing acting as leverage on the husband.

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[79] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 973. Appellant: Mary Ann Ventham. Respondent: Henry Ventham. Type: Wife's petition; J 77/88/973.

[80] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[81] Census Returns of England and Wales, 1871;. *RG 10/217,16.* GSU roll *824599.*

[82] Divorce and Matrimonial Causes Act 1857, s 32.

A decree of judicial separation was granted instead of a decree for divorce where only one ground could be proven, such as adultery.[83] In the case of 1868 petitioner Sophia Twinam, only a decree of judicial separation was granted.[84] This is despite the fact that Sophia had alleged that her husband James Twinam was drunken and violent (*on one occasion "he knocked [the Petitioner] down in the said public house and then seized her by the hair of her head and dragged her along the street*")) and now cohabiting with a woman called Betsey Loader in Whitechapel.[85] Even though the husband did not appear or contest the cause, it was held that the cruelty was not proven so only a decree of judicial separation could be pronounced. The 1871 census shows the parties living together in Spitalfields: the husband making shoes and Sophia sewing shoes.[86]

A wealthier case is that of 1858 petitioner Elizabeth Laura Boynton. On marriage the husband George Boynton (son of a late Baronet) had signed an agreement to settle upon his wife two thirds of her property.[87] He opposed the divorce, by producing letters written by his wife addressing him in affectionate terms. At the trial heard by jury Elizabeth gave evidence that her husband had violently dragged her about and quarrelled with her about money.

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[83] Divorce and Matrimonial Causes Act 1857, s 16.

[84] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[85] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 925. Appellant: Sophia Twinam. Respondent: James Twinam. Type: Wife's petition; J 77/87/925.

[86] Census Returns of England and Wales, 1871;. *RG 10/505,13.* GSU roll *823379.*

[87] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: B27. Appellant: Elizabeth Laura Boynton. Respondent: George Boynton. Type: Wife's petition for divorce; J 77/2/B27.

Justice Wightman commented that it was as much to the interest of the wife, from a pecuniary point of view, to obtain a decree of dissolution as it was to the interest of the husband to resist it.[88] The jury found that the husband had been guilty of both adultery and cruelty so a decree of divorce was granted. The success of Elizabeth Boynton can be contrasted with the refusal of a decree of divorce to 1868 petitioner Sophia Twinam, described in the preceding paragraph. Given the similarity of the allegations (and the fact that Sophia's husband did not contest the allegations), it is tempting to infer that the judge(s) and jury were more easily persuaded by the evidence given by educated and wealthy Elizabeth Boynton than that of Sophia Twinam who was illiterate and nearly destitute.

A grant of judicial separation condemned the parties to legal limbo because remarriage was not possible. The 1868 petitioner Philomena Geraldine Parkinson (formerly Tighe) was determined to avoid this fate. Philomena was seeking a divorce from her husband John Parkinson army lieutenant.[89] The petition was filed in December 1868 but the evidence was subsequently deemed insufficient for a decree of divorce. To avert the risk of a decree of judicial separation, Philomena filed an additional affidavit giving details of the venereal disease she had contracted from her husband: *"I was informed in the end of September last by Mr Michael Alfred Connolly of number 10 King Street Camden Town surgeon (who had attended me during the last twelve months) and whom I had then consulted for an affliction of*

[88] The Hull Packet and East Riding Times (3 February 1860) Issue 3916 3.

[89] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 992. Appellant: Philomena Geraldine Parkinson. Respondent: John Parkinson. Type: Wife's petition; J 77/89/992.

the mucous membrane of the nose… He told me that I had suffered from syphilis".[90] To be able to remarry must have been a priority as just one month after the divorce was concluded, Philomena remarried. On 13th March 1872 Philomena married the doctor who had given evidence in the divorce, Michael Alfred Conolly surgeon.[91] He died two years later leaving her £3,000[92] and Philomena went on without delay to have a third husband, her widowed brother-in-law.[93] Philomena's success story is a striking example of the majority of female petitioners in the sample years who, it is revealed, did manage to achieve dissolution of their marriage.

E. Duration of proceedings

Abandonment of proceedings may have been linked to financial and family pressures, exacerbated by the duration of proceedings. Figures 3 and 4 show the number of months to a decree of divorce or judicial separation or refusal of decree for the 1858 and 1868 samples.[94] Figure 3 excludes one outlier: at 42 months where the husband was pursued to Australia.

[Insert Figures 3 and 4]

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[90] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[91] London Metropolitan Archives; London, England; Saint Pancras Parish Church, Register of marriages, 1872; P90/PAN1.

[92] Principal Probate Registry; London, England; Calendar of the Grants of Probate and Letters of Administration made in the Probate Registries of the High Court of Justice in England, 1874; Cabbell-Cyples.

[93] London Metropolitan Archives; London, England; Church of England Parish Registers, 1754-1921; P77/ALL/027.

[94] Regarding the meaning of 'decree' in the table, for the 1858 sample 'decree' refers to a decree of nullity or decree of divorce whereas for the 1868 sample 'decree' refers to a decree of nullity or decree nisi of divorce. After 1861 divorce became a two stage process. Matrimonial Causes Act 1860 s.7 provided that decree nisi could only be made absolute after a time period of three months; Matrimonial Causes Act 1866 extended the period to six months.

For 1858, the mode duration was 8 months; for 1868 the mode duration was 11 months.[95] This was a relatively short duration. However, as shown in Figures 3 and 4, there were some cases that took years. A straightforward divorce was that of 1868 petitioner Anna Farrand. The petition was filed in September 1868,[96] decree nisi pronounced in May 1869 and decree absolute pronounced in November 1869.[97] Given the minimum six month period between the two decrees, the process was efficiently carried out. This may have been helped by the husband's lack of challenge. He did not file an answer or appear, perhaps because he was living with the co-respondent Charlotte Symonds and, once decree absolute was pronounced, went on to marry her. They married on 10th December 1869 in Newington, Surrey.[98] After the divorce, Anna worked as a housekeeper at a school in Kendal: the 1881 census gives an entry for Anna Farrand 55 lady housekeeper at the Clergy Daughters School.[99] Anna did not remarry.

Divorce by mutual consent was contrary to public policy and collusion between the parties was an absolute bar to the granting of a decree.[100] In 1860 parliament established the Queen's

[95] Comparable figures for 1867 and 1869 are 10 months and 5 months respectively.

[96] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 908. Appellant: Anna Farrand. Respondent: Henry Farrand. Type: Wife's petition; J 77/87/908.

[97] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[98] London Metropolitan Archives; London, England; Church of England Marriages and Banns, 1754-1932, P92/PET1/039.

[99] Census Returns of England and Wales, 1881; RG 11/5210,15. GSU roll: 1342256.

[100] Divorce and Matrimonial Causes Act 1857, s 30.

Proctor who could intervene after the pronouncement of decree nisi to investigate any allegations of collusion and, if found, rescind the decree. Of particular concern were undefended cases, so one of his powers was to appoint counsel to represent the undefended party where the husband failed to appear.[101] Despite this, successful petitions in this study usually benefited from a level of cooperation between the parties or at least an absence of contest. Provided service could be proven, an undefended trial would only last 10 to 15 minutes[102] indicating only minimal interrogation of the parties' testimony.

In some cases where it is apparent that both parties had already set up home with new partners, it is tempting to infer consent on the part of the husband. Some couples may have agreed prior to proceedings that the wife should be the petitioner as it would be more respectable for the husband to have committed adultery than the wife.[103] In the case of 1858 petitioner Marion Elliott, both she and her husband seemed to have met someone else. Marion was seeking a divorce from her husband Thomas William Elliott chemist.[104] They had married in 1829 and had a daughter called Rose but by 1851 both the husband and wife were living with other people, who they went on to marry after the divorce. According to the 1851 census the following household is living in Birmingham: Thomas Elliott head 40

[101] Matrimonial Causes Act 1860, s 5.

[102] Testimony of Lord Alverstone in Gorell, *Report of the Royal Commission on Divorce and Matrimonial Causes* (Cd 6478, 1912) 2:126,.

[103] Wendie Schneider, 'Secrets and lies: the Queen's Proctor and judicial investigation of party-controlled narratives'(2002) 27 3 Law and Social Inquiry 449, 473.

[104] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: E7. Appellant: Marion Elliott. Respondent: Thomas William Elliott. Type: Wife's petition; J 77/16/E7.

druggist, Ellen Elliott wife 31 and William son 3.[105] In addition the following household is living in Shoreditch: Edward Humm head 35 hat maker, Marion Humm wife 33, Phillis Humm daughter 13, Rose Elliott daughter 14 and servant.[106] A decade later both couples are still together.[107] Marion had alleged her husband's adultery with a laundress called Ellen Reed but the husband had not made any counter-allegations of Marion's adultery with the hat maker Edward Humm, suggesting a level of cooperation between the parties.

The divorce court had a discretion not to grant a decree if found that petitioner had committed adultery during the marriage[108] and, although the bar was discretionary, Stephen Cretney has written that it was 'wholly exceptional' for the divorce court to grant a decree in favour of an adulterous petitioner.[109] However, this study reveals that a number of the female petitioners were not 'innocent' of marital fault. In the case of 1858 petitioner Rachel Holmes (formerly Lefley) she was seeking a divorce from her husband Frederick Henry Holmes, builder on the grounds that he had given her venereal disease, been imprisoned for indecent exposure on a bus and convicted of bigamy.[110] They had married in 1852 and separated a year later. The petition acknowledges that five of the six children had been born before the marriage but that all six children had died at the time of birth. After the breakdown of the marriage, Rachel had

[105] Census Returns of England and Wales, 1851;. *HO 107/2052,24.* GSU roll *87308.*

[106] Census Returns of England and Wales, 1851;. *HO 107/1535,3.* GSU roll: *174765.*

[107] Census Returns of England and Wales, 1861; *RG 10/664,37*. GSU roll: *823322* , *RG 9/237,23.* GSU roll 542597.

[108] Divorce and Matrimonial Causes Act 1857, s.31.
[109] Cretney (n 8) 193.

[110] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: H23. Appellant: Rachel Holmes. Respondent: Frederick Henry Holmes. Type: Wife's petition; J 77/23/H23.

already set up a home with her next husband to be, with whom she had a daughter Georgiana born 1855 and a son William born 1858 (in the year she commenced divorce proceedings). There is a record of marriage: on 4th February 1861 between John Richard Thomas Lawford 26 bachelor builder and Rachel Lefley 30 spinster.[111] The 1861 census gives details of the following household living in Middlesex: John Lawford head 27 bricklayer, Rachael Lawford wife 30 wardrobe purchaser, Georgiana Lawford daughter 6 and William son 3, plus mother-in-law.[112] By remarrying, Rachel would be able to regularise her affairs, legitimate her children and acquire respectability.

Adultery may have been a prompt for the adulterer to seek dissolution of marriage. This is illustrated by 1868 petitioner Rosina Emily Westley of Windsor, Berkshire. Rosina was seeking a divorce from her husband Stephen Westley with whom she had one child namely Fred Stephen Westley born 1862.[113] Rosina petitioned for divorce in November 1868, by which time she had had a baby with her new partner George Radnor. This is shown by the 1871 census which states that the following household is living in Windsor: George Radnor 34 pawnbroker, Rosina Emily Radnor 26 wife, Frederick Stephen Westley stepson 7, Cuthbert George Radnor son 3 and a number of shop staff.[114] Cuthbert must have been born before April 1868, before the divorce. Stephen did not cross petition or draw the court's

[111] London Metropolitan Archives; London, England; Saint Stephen The Martyr, Hampstead, Register of marriages; P81/STE1.

[112] Census Returns of England and Wales, 1861, *RG 9/88,36.* GSU roll: *542571.*

[113] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 956. Appellant: Rosina Emily Westley. Respondent: Stephen Westley. Type: Wife's petition; J 77/88/956.

[114] Census Returns of England and Wales, 1871, *RG 10/1301,6.* GSU roll: *838775.*

attention to Rosina's adultery and the decree was granted on the basis of his adultery and desertion. Thus, 1868 petitioner Rosina Westley can be viewed as an illustration of the (perhaps tacit) cooperation between parties which enabled a decree of divorce to be obtained. This study reveals that proceedings in the sample years were of a relatively short duration, with minimal interrogation, and an examination of the circumstances of some of the parties suggests a practice of divorce by consent.

F. Life after decree

Despite the statutory requirement that a petitioner must have clean hands,[115] an analysis of the destinations of female petitioners after a decree of divorce or nullity shows that more than half of them went on to remarry and promptly, suggesting that other unions were already established prior to the proceedings. The rapid remarriage rate suggests that a prospective new husband may have provided financial support for the divorce, or family members wishing to avoid a scandal. In addition, women who did not already have a potential husband lined up may be been deterred from petitioning because of fear that the stigma of divorce would make remarriage less likely. In the 1858 sample, 61 were granted a decree of divorce or nullity: 10 per cent (n=6) remained with family members, 28 per cent (n=17) lived on their own and 51 per cent (n=31) remarried, often after staying with family members. Of the remaining 11 per cent, 4 died and 3 were untraceable. Figure 5 shows the year of remarriage for the 1858 petitioners who were successful and can be traced. [Insert Figure 5]

[115] Divorce and Matrimonial Causes Act 1857, s 31.

A similar picture is apparent when considering the 1868 petitioners. Out of the 76 divorce decrees granted, 5 per cent (n=4) were untraceable, 26 per cent (n=20) lived with family members for some years after the divorce and 18 per cent (n=14) lived on their own. The majority (n= 39) went on to remarry: 28 within 2 years of the divorce and the majority within months.[116]

In the case of 1868 petitioner Elizabeth Mary Wingfield (formerly Smith), there was a very quick remarriage which was combined with no appearance by the respondent and mild particulars, namely adultery with a cohabitant of three years and desertion of four years. Elizabeth was seeking a divorce from her husband George William Wingfield.[117] They had married in 1863 and had no children. Elizabeth commenced the proceedings in June 1868, having already tried to remarry in 1866. There is a record of marriage on 31 March 1866 at St Pauls Deptford between Thomas Williams commercial clerk and Elizabeth Mary Wingfield widow.[118] They are shown to be living together in the 1871 and 1881 census, firstly in Southwark and then in Lewisham, with a son Walter T. Williams aged 7.[119]

The new two stage process introduced in 1861 did not seem to have been understood by all petitioners. Four of the 1868 petitioners appeared to have assumed that decree absolute was

[116] For 1867 53 per cent of the eligible sample (n=27) remarried and for 1869 51 per cent did so (n=45), the vast majority within 3 years of decree.

[117] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 837. Appellant: Elizabeth Mary Wingfield. Respondent: George William Wingfield. Type: Wife's petition; J 77/85/837.

[118] London Metropolitan Archives; London, England; Saint Paul, Deptford, Register of marriages; P75/PAU.

[119] Census Returns of England and Wales, 1871; *RG 10/634,21.* GSU roll: *818929* and Census Returns of England and Wales, 1881, –*RG 11/735,14.* GSU roll: *134171.*

not necessary. A petitioner who married before decree absolute was Fanny Hampton of Brierley Hill, Staffordshire. Fanny had petitioned for divorce under a pauper cause as her husband had left her destitute in 1860 to live with another woman called Jemima Stone, having sold all their belongings by auction.[120] Fanny filed an affidavit in December 1868 testifying that *"Since the respondent deserted me up to the present time I have not earned anything, but have lived and am now living with my widowed mother and have been and am now entirely dependant upon her for support"* .[121] Decree nisi was pronounced in June 1869[122] and Fanny remarried two months later (so before decree absolute). There is a record of marriage between Fanny Hampton and Samuel Warrender at St Mary's Church, Kingswinford, Stafford, taking place on 1st August 1869.[123] They lived together at High Street, Wordsley until her death in 1916.[124]

These high remarriage rates contradict official figures. The Registrar-General published annual reports from 1861[125] which suggested that 20 per cent of divorcees (men and women) went on to remarry.[126] Danaya Wright queries the motivation for seeking a divorce because

[120] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 978. Appellant: Fanny Hampton. Respondent: Joseph Hampton. Type: Wife's petition for divorce; J 77/88/978.

[121] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[122] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[123] General Register Office England Select Marriages; London, England; Civil Registration Marriage Index, 1837-1915; FHL Film Number 1040006.

[124] Census Returns of England and Wales, 1871; *RG 10/3025,1.* GSU roll: *838832* and Principal Probate Registry; London, England; Calendar of the Grants of Probate and Letters of Administration made in the Probate Registries of the High Court of Justice in England, 1917; Tabb-Zutner.

[125] The Annual Report of the Registrar-General of births, deaths and marriages in England and Wales (HMSO 1861-1878).

[126] (n 1) 156.

'women who, today, have a very difficult time remarrying – middle aged women with adolescent children – were the group most likely to choose a divorce over a separation in the mid-nineteenth century'.[127] In contrast, the findings of the study presented in this article strongly suggest that one motivation for women seeking the dissolution of the marriage was to be able to remarry: limited employment opportunities and state support contributed to the risk of severe financial hardship on marital separation.[128]

Given the number of cases in these sample years involving new partners, it is difficult to accept that all of the husbands were unaware of their wife's new living arrangements. Had the husband brought the wife's present circumstances to the attention of the court, there was a risk for both parties that the divorce may not have been granted. Wendie Schneider has commented that extreme measures proposed in draft bills to combat collusion after the institution of the divorce court 'suggest the extent to which deception in the divorce court was publicly perceived as a threat'.[129] The judges in the new divorce court were under pressure to reassure the public that their interrogative processes were able to discover the truth. In May 1858, one of the divorce court judges Lord Campbell was quoted in the weekly British paper 'The Era' as expressing confidence that in all eight cases heard by that date 'the facts had been fully established, and no imputation of collusion or connivance had been suggested.'[130] However, this is contradicted by the data revealed by this study which suggests that some level of cooperation between the parties was more commonplace than admitted.

[127] Wright (n 4) 944.
[128] Gibson (n 18) 74.
[129] Schneider (n 103) 457.
[130] The Era (16 May 1858) 6.

If not remarrying, petitioners lived on their own or with family members, such as 1868 petitioner Ann Bennett. After the divorce, Ann lived with her sisters in Hackney for the next forty years until her death in 1913 aged 91.[131] In the 1881 census her occupation is given as shirt maker.[132] Surprisingly, the divorce court had ordered her husband to pay alimony pending suit (a period of thirteen months) of five shillings per week[133] even though there were no children and he was a mariner and living with the co-respondent Augusta Vaines and their children,[134] whom he had bigamously married in 1854 while still married to Ann.[135] The husband never appeared in the proceedings and the order was made in his absence.

After proceedings, the occupation of the women appears to have been determined by family or new partner connections and past practice,[136] as some continued to run successful small businesses. 1858 petitioner Mary Bennett ran a grocers shop in Studley, Birmingham and was seeking a divorce from her husband John Bennett with whom she had a son and a daughter. In her petition, Mary alleged that in 1855 they came to an agreement whereby she ran the shop and paid him five shillings a week but he unexpectedly returned: *"After some few months during which time he abstracted and pawned various articles of furniture purchased*

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[131] Census Returns of England and Wales, 1871; *RG 10/321,11.* GSU roll: 818895. Census Returns of England and Wales, 1881, *RG 11/297,19.* GSU roll: 1341064. Census Returns of England and Wales, 1901, *RG 13/207,29* and England & Wales, Civil Registration Death Index, 1913; Q2, B.

[132] Census Returns of England and Wales, 1881, *RG 11/297,19.* GSU roll *1341064.*

[133] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

[134] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 938. Appellant: Ann Bennett. Respondent: Alfred Bennett. Type: Wife's petition; J 77/87/938.

[135] London Metropolitan Archives; London, England; , Church of England Marriages and Banns, 1754-1932; P71/ALL/011.

[136] Petitioner occupations included, for all sample years, dressmaker/milliner (9%), servant (7%), housekeeper (6%), governess/teacher (4%), and actress (1%), as well as running small businesses (7%).

by and out of the separate earnings of your petitioner he severely beat and ill-treated your petitioner and was now committed in consequence to Warwick Gaol for six months". [137] After the husband was released from prison, Mary paid for him to stay at the workhouse in Warwick. In the 1861 census the following information is given about one household living in Studley, Warwickshire: Mary Bennett head 46 grocer, James Bennett son 13 and servant.[138] The daughter cannot be traced.

Within the 1868 sample, petitioner Isabella Elizabeth Stennett (formerly Hurdsman) is described in the newspaper report of the trial as supporting herself and her son by running a photography business in Chester.[139] Isabella and her husband John Archibold Stennett had one child, Ralph Archibold Hurdsman Stennett born 1857. Isabella's petition alleges that the husband had been imprisoned for three months for assaulting her;[140] their former maid Mary Evans aged 20 gave evidence at the trial that he had raped her, making her pregnant.[141] The husband did not attend the trial or file an answer. Decree absolute was granted on 1st February 1870 and custody of Ralph was awarded to Isabella.[142] There is a record for

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[137] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: B19. Appellant: Mary Bennett. Respondent: John Bennett. Type: Wife's petition; J 77/2/B19.

[138] Census Returns of England and Wales, 1861, -*RG 9/2233,28.* GSU roll: *542940.*

[139] Liverpool Daily Post (3 May 1869) 5.

[140] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: 880. Appellant: Isabella Elizabeth Stennett. Respondent: Archibald Stennett. Type: Wife's petition; J 77/86/880.

[141] Liverpool Daily Post (3 May 1869) 5.

[142] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

marriage in 1870 at West Bromwich between Frank Bocquet and Elizabeth Hurdsman Stennett.[143] The 1871 census shows the following household in Wednesbury: Frank Bocquet head 28 artist photographic, Bessie Bocquet wife 32, Ralph Hurdruan stepson 14 and staff.[144] The census records her simply as 'wife' so, by remarrying, Isabella lost her status as head of household and proprietor of the photography business, in contrast with the grocer Mary Bennett who did not remarry. The prompt remarriage of 1868 petitioner Isabella Stennett and the running of the grocery business by Mary Bennett are illustrations of the options available to women on marriage breakdown in the mid-Victorian era.

G. Custody of children after proceedings

Table 4 shows the number of children of female petitioners for both the 1858 and 1868 samples as stated in their petition. [Insert Table 4]

In the 1858 sample, most had no children: in 39 cases the parties were childless and in 12 cases the children had all died. The figures are similar for the 1868 sample. Only in a quarter of the cases were there two or more children. Compared to the married population, this was a remarkably child-free sample: Griselda Rowntree and Norman Carrier calculate that only eight per cent of married couples in 1871 were childless[145] whereas more than half of the 1858 and 1868 divorcing couples were childless.[146] This suggests that women with

[143] General Register Office England Select Marriages; London, England; Civil Registration Marriage Index, 1837-1915; 6b, 763.

[144] Census Returns of England and Wales, 1871, *RG 10/2989,17.* GSU roll: *838870.*

[145] Rowntree and Carrier (n 3) 228.

[146] In 1867 and 1969 47 per cent and 42 per cent respectively involved parties with no children.

children were less likely to access the divorce court (perhaps because of fears that they would lose custody of their children) and that considerations related to those children mitigated against separation and divorce, whether they related to the welfare of the children or the possible effect of children on remarriage.

The divorce court had the power to make provision for the custody, maintenance and education of children as deemed by the court to be 'just and proper'.[147] One case where an order for custody was made is 1858 petitioner Ann Popplewell over the parties' daughter Dorothy A E Popplewell. Ann was seeking a divorce from her husband on the grounds of adultery and cruelty which included threatening to kill her and giving her syphilis. The divorce petition says that before and since the marriage in 1848 Ann had carried on a business in Bradford as a china and glass dealer.[148] Ann can be found in the 1861 census living in Bradford: Ann Popplewell head divorced 42 glass and china dealer and Dorothy AE Popplewell daughter 7, with one female assistant.[149] The divorce petition mentions a business partner called Thomas Ogden. Ann went on to marry him, but only in 1864, five years after the decree was granted. The marriage certificate records that on 24th September 1864 in the Parish Church of Halifax Thomas Ogden bachelor woollen merchant married Ann Popplewell divorced by decree of M. Court of Divorce.[150]

[147] Divorce and Matrimonial Causes Act 1857, s.35.

[148] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: P7. Appellant: Ann Popplewell. Respondent: Ralph Popplewell. Type: Wife's petition; J 77/41/P7.

[149] Census Returns of England and Wales, 1861; ~~,~~ *RG 9/3326,28.* GSU roll: *543114.*

[150] West Yorkshire Archive Service; Wakefield, England; Yorkshire Parish Records, 1864; WDP53/1/3/68.

In proceedings where the wife was respondent, custody could be denied to her if the husband's decree was granted and she was found to be guilty of adultery.[151] The Judge Ordinary said in *Seddon v Seddon* that 'it will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this Court is concerned, all right to the custody of, or access to her children'.[152] As well as the possibility that some women might be deterred from petitioning for dissolution of the marriage because of the risk of losing custody of children, another possibility is that other women ~~with children~~ may have felt obliged to petition to avoid the risk of forfeiting custody of children – whether owing to actual adultery or threatened false allegations.

Among the files of petitioning women considered in this study, there are few custody orders[153] and this may have been because custody was presumed to pass to the petitioner if successful: Gail Savage noted from an analysis of cases reported in the London *Times* that custody of children was not routinely allocated to the mother but to the party judged to be innocent in the divorce.[154] In addition, in cases involving desertion (which were commonplace), custody of children would not be an issue. This study has revealed no orders for custody in favour of husbands in the sample years and, using the census to review the whereabouts of children after the conclusion of proceedings, the subsequent residence of

[151] Cretney (n 8) 576.
[152] Seddon v Seddon and Doyle [1862] 2 Sw&Tr 640, 642.
[153] This accords with the research of Danaya Wright who found that in the first nine years of the divorce court, out of 525 marital termination petitions (which included those of both husbands and wives) only 17 custody orders were made: Wright (n 4) 948.
[154] Savage 'The Operation of the 1857 Divorce Act, 1860-1910' (n 15) 106.

children seems to have depended on the financial circumstances of the petitioner (having de facto custody), not court adjudication.

1858 petitioner Isabel Devereux was seeking a divorce from her husband Thomas Herbert Devereux, clothier and outfitter in Stockton, Middlesborough. Isabel's petition states that, since leaving her husband in 1857 to work in her brother's shop, she had kept and maintained all of their five children,[155] yet no application for custody was made by her. Even though the husband was represented at the trial by counsel and defended the allegations, a decree was granted in February 1859 and Isabel kept the children despite the lack of an order. According to the 1861 census, there is the following household living in Durham: Isabel Deveraux head divorced 40 merchant tailor employing ten men living with five children and one servant.[156]

There are a number of cases where the children were either boarded out or looked after by relatives including the husband's family. In the case of 1868 petitioner Emily King there were two children namely Mary Ann King aged 16 and Emily Catherine King aged 14, one of whom was looked after by the husband's parents. In the petition it was stated: 'your petitioner has had to support herself and one of her said children by working as a seamstress, the other child having been supported by the parents of the said William King'.[157] The parties had been separated for 15 years and Emily explains in her petition that she had been

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[155] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: D2. Appellant: Isabel Devereux. Respondent: Thomas Herbert Devereux. Type: Wife's petition; J 77/13/D2.

[156] Census Returns of England and Wales, 1861, *RG 9/3692,4.* GSU roll: *543173.*

[157] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002. J 77.

prevented by poverty from petitioning sooner. Emily sought an order for custody but the proceedings were later abandoned.

The 1858 petitioner Harriet Horton was seeking a divorce from her husband James Horton brickmaker. The petition states that the parties had married in 1855 in Brierley Hill and had one living child, a daughter called Hannah Alice Eugene Horton aged 8 months.[158] In the petition Harriet says that, after separation, she and her daughter stayed at the house of her father in law, William Horton. Only judicial separation was granted. The newspaper report states that, although the allegations of adultery were proven as the 'evidence was abundant' the cruelty was deemed insufficient, comprising only abusive language and sometimes striking her.[159] After the decree, the daughter remained with the father's family but on the 1861 census day neither parent is there. The 1861 census gives details of the following household living in Oldbury: William Horton head 61 brick maker, Mary Horton wife 59 and Hannah Alice Eugene Horton granddaughter 3.[160]

In the case of 1868 petitioner Mary Ann Priscilla Squires (formerly Tyler), the court awarded custody to her of the five children of the marriage but initially Mary was not able to keep them with her. The children were: Mary Ann Emma born 1862, Helen Ada born 1863, George William John born 1864, Alice Emily born 1866 and Alfred John born 1867. After

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[158] Court for Divorce and Matrimonial Causes, later Supreme Court of Judicature: Divorce and Matrimonial Causes Files, 1858–2002; Divorce Court File: H31. Appellant: Harriet Horton. Respondent: James Horton. Type: Wife's petition; J 77/23/H31.

[159] Birmingham Journal 2 July 1859 6.

[160] Census Returns of England and Wales, 1861, -*RG 9/2023,4.* GSU roll: 542905.

the divorce, in the 1871 census Mary is shown living with her parents running the Blue Anchor Public House Bermondsey: John Tyler head 62 licensed victualler, Mary Ann Tyler wife 52, Mary Ann Tyler daughter 29 and siblings.[161] None of the children are with her. Four of Mary's children can be found in the 1871 census boarding with a bricklayer called James Ellis and his family in Tottenham: James Ellis head bricklayer 60, Mary Ellis 60, Mary A E Squires boarder 8, Helen A Squires boarder 7, Alice E Squires boarder 5 and Alfd Jno Squires boarder 3.[162] Once Mary's parents died she took over the running of the public house and had two of the children with her. The 1881 census states: Mary Ann P. Squires head widow licensed victualler, Mary Ann E. Squires daughter 18 and Alfred John son 13.[163] It is noteworthy that when in her parent's home without children Mary called herself by her maiden name of Tyler and when Mary was the head of the household with children she reverted to the married name of Squires. 1868 petitioner Mary Squires juggled the care of the children with running the public house, with the benefit of an order for custody. However, this study reveals that, among the files of the petitioning women in the sample years, there were few custody orders.

V. Conclusion

In theory, the newly established Court for Divorce and Matrimonial Causes broadened the options available to mid-Victorian women unhappy in their marriages, but in reality the ability to exercise the right to petition the court was limited by a number of practical

[161] Census Returns of England and Wales, 1871, *RG 10/637,36.* GSU roll: *818931.*

[162] Census Returns of England and Wales, 1871, *RG 10/1339,16.* GSU roll: 828281.

[163] Census Returns of England and Wales, 1881,*RG 11/565,1.* GSU roll: *1341129.*

obstacles which varied in their effects across socio-economic groups. One obstacle was the expense of proceedings, exacerbated for some by the location of the court. Yet this did not affect all equally: women with access to resources could locate the necessary funds to litigate (even if this may have involved lengthy delay) whereas, for others, cost would have presented an insurmountable difficulty. Another factor determining whether or not to petition may have been the attitude of the husband: a woman who was aware that her husband was likely to defend may have decided that such a battle was not worth fighting. The low number of petitions overall may be explained by the fact that those women with easiest access to funds were those with more at stake from adverse publicity. A privately negotiated deed of separation may have been a more attractive option, even though remarriage would not be possible. If a woman had the ability to fund the proceedings (through savings or payment by the husband, new partner or family member) and was prepared to brave the ordeal of publicity, she could seek to improve her position by petitioning the court. For those women for whom remarriage was an economic necessity, the stigma may have been considered worth enduring. However, once commenced, proceedings could be concluded with minimal interrogation and without delay if the husband accepted service and did not present any challenge: an arguably pragmatic approach still prevalent in England and Wales today, supporting the need for reform of the substantive law of divorce which encourages allegations of fault.[164]

Motives at the time of petitioning the court cannot be determined, only surmised by piecing together what is known about the parties' circumstances both before and after. The matters that compelled a woman to petition for dissolution of marriage may well have acted in

[164] Nuffield Foundation, *No Contest* (Nuffield 2018) 16.

combination: family support or pressure, financial concerns (for example to force a husband to pay secured alimony if left destitute or to be rid of a dependant husband if running a successful business) and physical or emotional needs (perhaps prompted by ill-treatment, desire for revenge or hope that a happier life and return to respectability might be possible with a second husband). While the power of custody as a motivating force is unclear, the remarriage rate of these petitioners suggests that the ability to regularise unions (both present and prospective) was an important consideration when seeking dissolution of marriage, perhaps a consequence of the continuing financial dependence of women on men prior to the expansion of employment opportunities for women early the following century.[165]

This longitudinal analysis of multiple source records linked to the female petitioners of 1858 and 1868 has revealed new data about the mid-Victorian women who petitioned for dissolution of their marriage, some of which contradicts the official picture presented in the divorce pleadings, and the findings of previous historical studies. This new data highlights the deception involved in party-controlled narratives, even in a court that had publicly adopted an inquisitorial role. The divorce court carried out a delicate balancing act: maintaining the appearance of upholding public decency while at the same time granting decrees to those considered deserving and the appointment of the Queen's Proctor to root out collusion must be viewed in this context. An examination of the conduct of the proceedings reveals that the court frequently granted decrees without appearance by the respondent provided service of the papers could be proven. Despite the reputation of the court (intended to uphold public decency), this study reveals that most divorces in the sample years were granted and also concluded in a matter of months.

[165] Edward Royle, *Modern Britain: A Social History 1750-1997* (Hodder Arnold 1997) 93.

The detailed legal biographies of female petitioners created for entire cohorts, not merely for sample sets, that underpin this study show that, far from being unmarriageable, half the (largely middle-aged) women who petitioned for divorce remarried relatively quickly. Census data reveals that many of these women were in new relationships prior to being granted a divorce, as were their soon-to-be ex-husbands. A remarkable number of these divorces were uncontested. While it is not possible to prove definitively active cooperation or collusion on the parts of these unhappy couples, this study strongly suggests that among the working classes in mid-Victorian England divorce by at least passive consent was a practice tolerated by communities and the courts. This conclusion stands in stark contrast to aspirational public policy of the period and the mission of the new court.