

## NON-FAULT DIVORCE IN OHIO

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Since the Civil War and the industrial revolution in the United States there has been sweeping social change which has made a restructuring of divorce laws desirable. Prior to the Civil War the social structure of the United States was primarily made up of a network of many small rural family units that were basically self-sufficient. The economy of the country was based on these rural families, and naturally laws were passed to preserve the existence of these individual family units. These laws were designed to keep the family unit together and functioning, unless there was some drastic reason for allowing divorce. So rigid was this system that there were only four narrow grounds for divorce in Ohio in 1804.<sup>1</sup> The feeling of the courts at this time was exemplified by the opinion of the United States Supreme Court in *Maynard v. Hill*:

Other contracts may be modified, restricted or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.<sup>2</sup>

### I. SOCIETAL CHANGE

Since the middle of the last century change in our country's social climate has decreased the need for such rigid protection of the family. The cultural outlook of the United States is no longer predominantly rural; its economy is based on a massive industrial complex. The general movement of people to urban communities has provided new opportunities to the individual members of a family thereby making their participation in the unit less vital for their welfare. Modern schools and governmental aid have produced a more affluent and intellectually stimulating climate resulting in increased opportunities to children outside the family unit. There is also an increased mobility in life which makes existence more impersonal. Modern transportation has made it possible for the members of an individual family unit to be separated by many hundreds and even thousands of miles; the mother visiting friends, the father en-

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<sup>1</sup> Kovachy, *The Evolution of Ohio Divorce Laws: Their Development to Meet Present Day Needs*, 5 CASE W. RES. L. REV. 62, 67 (1953).

<sup>2</sup> *Maynard v. Hill*, 125 U.S. 190, 211 (1887). See also, *Heim v. Heim*, 35 Ohio App. 408, 172 N.E. 451 (1930) "The ten causes for which divorce may be granted under the Ohio Statutes are as explicit as the Ten Commandments, and can be changed by the Legislature only."

gaging in business and the children attending school. This type of family unit is certainly in less need of protection than the stalwart farm family of the pre-Civil War era. Not only has the family unit decreased in importance in our economy, but it has become cumbersome and inefficient. This age of specialization and the increase in trade facilities has bypassed the individual rural family trying to completely provide for its own needs.

The status of women has also increased in society so that they need not have the absolute protection of an indissoluble marriage. This trend started in Ohio as far back as 1887 with the passage of the Married Woman's Act. This act "practically emancipated a woman from the control of her husband."<sup>3</sup> Since 1887 a married woman has had the right to separately own property, enter into business, acquire earnings and profits and participate in legal matters free from any right of control by her husband. This has led to independence for a married woman and an economic emancipation from the support provided by her spouse. The trend was further emphasized by the woman's suffrage movement culminating in 1920 in the Nineteenth Amendment to the United States Constitution giving women equal voting rights with men. The extent to which this legal and economic emancipation has grown is reflected in the equal opportunity employment laws that have been recently passed to give women equal footing with men in seeking and holding jobs.<sup>4</sup>

Liberal social and professional standards have also made women more independent. At one time women were theoretically and practically barred from participation in the professions, but these bars have been dropped as is evidenced by the increasing number of women entering the professions. So strong is this trend that the law profession, traditionally reserved for the "stronger" sex, is almost completely open to women. Practically every law school in the country admits women students.<sup>5</sup>

Along with the increased status of women in society and the decline in importance, both economically and sociologically, of the family unit has come a greatly liberalized view of divorce in the United States. There has been a transition from an indissoluble marriage to a terminable form. Public opinion has changed from a sharp to mild disapproval of divorce. Not only does society realize that "bad" marriages lead only to greater problems if forced to continue, but the increased independence and mobility of our society often removes the divorce from public view and releases persons from the force of public opinion.

In education, there has been a shift to increased emphasis on pre-marital education reflecting the philosophy of solving problems before they occur, rather than trying to hold a marriage together after it has become

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<sup>3</sup> *Dillingham v. Dillingham*, 9 Ohio App. 248 (1917).

<sup>4</sup> See OHIO REVISED CODE ANN. § 4111.17 (Page 1954).

<sup>5</sup> BARRON'S GUIDE TO LAW SCHOOLS (1968).

plagued with problems. Testimony at the hearings leading to the reform of the California domestic relations laws reflect this emphasis:

My main recommendation to this committee would be that California launch upon an aggressive program of education for marriage and parent-hood in the schools. The evidence shows that California cannot afford to neglect this kind of basic education.

. . . .

Adequate courses in family living create in students some caution about marrying hastily. Young people who get a realistic understanding of what marriage means realize that it is not a quick and easy escape from problems in life. The well prepared young person will be more inclined to take a longer look before he goes into a youthful marriage.

Adequate preparation for marriage also should improve the student's chances for success when he does marry. If he gains some conception of the responsibilities and obligations that marriage involves he should become better able to assess and improve his ability to meet the requirements for building a good marriage.<sup>6</sup>

Reflecting the liberalized public sentiment toward divorce is the change in laws governing it. There has been an increase in the number of grounds for divorce as legislators have tried to keep pace with change. Ohio, for example, now has ten grounds for divorce in a system that is derived from a constitution that originally had no provision for divorce or alimony.<sup>7</sup> There has been an increasing liberalization of judicial interpretation of the various grounds. In 1953 Julius M. Kovachy, a judge of the 8th District Court of Appeals of Ohio, and a former Cuyahoga County Common Pleas judge, listed no less than twenty-one reasons for granting divorces ranging from "repeated physical attack" to "in-law interference" and "hobby first."<sup>8</sup> In addition to this judicial liberalization of the grounds for divorce, there is a definite mellowing in judicial opinion as a whole toward the problem of divorce. This mellowing is shown in a case decided by the Supreme Court of California. The court stated that "public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed."<sup>9</sup> This is a far cry from the philosophy expressed by the United States Supreme Court in *Maynard v. Hill*.

The traditionally conservative view of the various religious organizations toward divorce has undergone change. Recently, when Canada was in the midst of a drive to modernize and liberalize its divorce laws, the traditionally conservative Catholic Church showed signs of relenting on

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<sup>6</sup> *Hearings on Domestic Relations Before the Assembly Interim Committee on Judiciary*, California Assembly at 40-41 (1964). [hereinafter cited as *1964 Hearings*].

<sup>7</sup> *Dillingham v. Dillingham*, 9 Ohio App. 248 (1917).

<sup>8</sup> Kovachy, *supra* note 1, at 64.

<sup>9</sup> *Hill v. Hill*, 23 Cal. 2d 82, 93, 142 P.2d 417, 422 (1943).

the matter. The Canadian Catholic Conference, the national organization of the Catholic Bishops of Canada, stated:

Since other citizens, desiring as we do the promotion of the common good, believe that it is less injurious to the individual and to society that divorce be permitted in certain circumstances, we would not object to some revision of the Canadian divorce laws that is truly directed to advancing the common good of civil society.<sup>10</sup>

The marital breakdown concept which is the heart of most, if not all, of the recent legislation was recently approved by a group appointed by the Archbishop of Canterbury and headed by Bishop Mortimer.<sup>11</sup>

## II. DEFICIENCIES OF OHIO'S PRESENT LAWS

Presently Ohio has a traditional system of divorce laws that is basically similar to that of the majority of the states. This system is composed of ten grounds for divorce with their individual defenses and the equity based defense of recrimination. The ten grounds for divorce in Ohio are: (A) Either party had a husband or wife living at the time of the marriage from which the divorce is sought; (B) Willful absence of the adverse party for one year; (C) Adultery; (D) Impotency; (E) Extreme cruelty; (F) Fraudulent contract; (G) Any gross neglect of duty; (H) Habitual drunkenness; (I) Imprisonment of the adverse party in a state or federal penal institution under sentence thereto at the time of filing the petition; (J) Procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while such obligations remain binding upon the other party.<sup>12</sup> These grounds have been interpreted by Ohio courts so that a divorce can not be granted on the mere ground of expedience,<sup>13</sup> nor merely on account of the fact that the parties are not able to live together happily.<sup>14</sup> Thus it can be seen that the Ohio interpretation of its divorce laws does not include any specific concept of marital breakdown such as has been included in the recent changes in New York and California. In fact, Ohio courts in their interpretation of the Ohio Revised Code provisions on divorce adhere mainly to the view presented by Justice Hitchcock in *Harter v. Harter* in 1832:

Perhaps there is no statute in Ohio more abused than the statute concerning 'divorce and alimony.' Perhaps there is no statute under which greater imposition is practised upon the court and more injustice done to individuals . . . . I would not be understood that there are no meritorious

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<sup>10</sup> CANADIAN CATHOLIC CONFERENCE, REPORT ON DIVORCE REFORM, (1966).

<sup>11</sup> PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY (London, 1966).

<sup>12</sup> OHIO REVISED CODE ANN. § 3105.01 (Page 1954).

<sup>13</sup> *Seibert v. Seibert*, 32 Ohio App. 487, 168 N.E. 223 (1929).

<sup>14</sup> *Burke v. Burke*, 36 Ohio App. 551, 173 N.E. 637 (1930).

cases. That there are some such there can be no doubt. But of the great multitude of cases which are before this court I am confident that by far the greater number are not of this class. Aware of these circumstances, and aware, too, of the immoral and mischievous tendency of an easy dissolution of this most solemn of all contracts, we have ever been disposed to give a strict construction to the law, and not to hear a case unless the applicant brings himself or herself within both the letter and spirit of the statute.<sup>15</sup>

One can easily see that this strict construction of the laws in an area so affected by social change can only have a stifling effect on our legal system. Society has undergone tremendous and sweeping changes since the Civil War, but still Ohio is trying to function with a system of laws that was established 150 years ago.

In addition to the basic inflexibility built into the system by the rigid "grounds" classification, there are several specific aspects of the system which lead to inequities. One of the most glaring examples is the defense of recrimination. Basically this is a check built into the system whereby a person can not bring divorce proceedings against his spouse unless he approaches the court with "clean hands." Psychiatrists and sociologists tell us time and again that seldom is there an innocent party in a divorce, so an equitable "clean hands" defense can seldom, if ever, be rationally applied. A vivid example showing the fallacy of the recrimination defense is provided by Brigitte M. Bodenheimer, Professor of Law, University of California at Davis:

Husband and wife do not get along. They have incessant fights, invariably ending with kitchen utensils and other objects being thrown in both directions. The husband brings a divorce action on the ground of cruelty. The wife answers charging the husband with cruelty towards her. The divorce is denied on the basis of the ancient doctrine of recrimination which does not permit a plaintiff who is himself guilty of a marital offense to obtain a divorce.<sup>16</sup>

Obviously the couple in the preceding situation were not succeeding in marriage; they posed as a threat to each other, both physically and mentally. What use is there in preserving a marriage where the partners incessantly fight? What rights of either party were protected by the defense of recrimination? In this example as in many other cases the defense of recrimination serves no useful purpose. Even more damaging than this lack of beneficial attributes is that recrimination is often used as a coercive tool by a vindictive spouse to hold together a marriage that has irreparably broken down. This serves only to breed more family problems for the partners and lead to sad effects on the children.

Another part of the Ohio system of divorce laws that reduces its effi-

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<sup>15</sup> *Harter v. Harter*, 5 Ohio St. 319 (1832).

<sup>16</sup> Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179 (1968).

cacy is the requirement of corroboration. Under this rule as set out in Section 3105.11 “. . . a judgment for divorce or alimony shall not be granted upon the testimony or admissions of a party unsupported by other evidence.” Since marital disputes are generally private situations, the corroboration must come almost exclusively from other members of the immediate family. Therefore, the other members of the family are called as witnesses and put under a psychological strain at even the mere possibility of having to testify against one party or the other. Having to give corroborating testimony can even cause disputes in the witness's own family if other members view the circumstances differently than the witness himself. It seemingly would be better to replace this device with a reinforced law governing perjury in divorce cases. This would both advance the objective of gaining true evidence and relieve the stress placed on other members of the family that would otherwise be called as corroborating witnesses. Besides this, it would expedite the divorce hearings by omitting much testimony, thus making them less expensive for both the parties and the state.<sup>17</sup>

There are also other drawbacks that accompany a system of divorce like Ohio's. Since the divorce process is an adversary process it is quite amenable to negotiations either to gain an uncontested divorce or to stop defending in a divorce action. This completely goes against the objectives of the laws because the negotiation omits any reference to the guilty party, but it is practical because it is often faster and less expensive than trying to litigate a contested divorce. Also the threat of alimony, custody and support are used as coercive tools in pretrial negotiations between the parties to gain an advantage in the adversary system. When the system is comprised of one person being pitted against another in an adversary process with only one “winner” all of these factors play an important part.

Dr. Jerry P. Nims, Chairman of the Subcommittee on Marriage Counseling, California State Psychological Association summarizes the problem:

It is a serious matter to break up a home and it should be done only after consultation and very serious and thoughtful deliberation, after a good deal of searching examination. But there is no point to the adversary approach. The quibbling or the inventing of legal grounds is a kind of fictional inventive process which really is a test of imagination and not an assessment of the situation. My own experience also reveals that invariably there is a far greater amount of anger between the parties at the end of the legal

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<sup>17</sup> The following are the usual questions asked of a witness as corroboration in an uncontested divorce: Have you heard the testimony of the plaintiff?

Do you know these statements to be true?

proceedings than there was actually at the time they made the decision to divorce.<sup>18</sup>

Aside from these major shortcomings in Ohio's divorce system, there are other faults that should be explored. First, in Ohio at the present time, the courts have no jurisdiction to make custody orders where a divorce action has been dismissed.<sup>19</sup> This leaves the young children as pawns to be shuffled about by the parents and also leads to "bribing" of older children as to which separated parent to choose. During the impressionable years of childhood this unsteady climate is certainly a disadvantage to the child. It has been noted that a child from divorced or separated parents is more likely to become divorced himself<sup>20</sup> and this poor family atmosphere may well be a part of this problem. Even after the child is older, he is by no means free from the stresses caused by a separation. Although the older child is ordinarily free to elect with which parent he wishes to live, he certainly does not make his decision in a vacuum. Both parents naturally want custody of the child and often promise many gifts and privileges if the child elects to live with that parent. This "bribing" can become very competitive and place the child in a tense, trying situation. Not only does this "bribing" put undue pressure on the child, but it also leads to friction between the parents that may suffocate any hope of conciliation that remains. The Court should be given jurisdiction to order supervision of the family after granting a decree of separation. If this is not done, the separation serves no useful purpose. The family is torn apart by the competition between the parents; the separation period, which hopefully will give people time to solve their problems, only serves to kindle new ones. If the objective of our divorce laws is to preserve the family, then the separation period must be accompanied by counseling and supervision of the family we are to preserve so that inner tensions do not cause it to break apart.

The residence requirement set out in Section 3105.03 is also entirely too long. A person who has established a bonafide residence in Ohio should be accorded the rights of an Ohio citizen. This includes allowing them to avail themselves of Ohio courts in handling their marital dispute. The parties should not be made to suffer through an entire year in the tension ridden environment accompanying an impending divorce. The one-year time period is wasteful and serves no useful purpose. Forcing the parties to live together can lead to little good, and actually may have harmful effects. There is no reason why a new citizen of Ohio cannot be granted a divorce without having to live here for a period so long as a year. This

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<sup>18</sup> 1964 *Hearings*, at 42; see also, Traynor, *Law and Societal Change in a Democratic Society*, U. ILL. L. F. 230 (1956).

<sup>19</sup> OHIO REV. CODE ANN. § 3109.04 (Page 1954). See, *Ainsworth v. Ainsworth*, 21 Ohio L. Abs. 590 (App., Franklin County, 1936).

<sup>20</sup> 1964 *Hearings* at 37-40.

long period also puts a tremendous burden on the plaintiffs because time is money when an attorney is on retainer. The requirement was originally passed to prevent Ohio from becoming a "divorce mill," but other Ohio laws now negate this chance. For instance, the venue requirement provides that a plaintiff must be a bonafide resident of the county where the action is initiated at least 90 days prior to the action.<sup>21</sup> Certainly no person is going to migrate to Ohio for a divorce if he has to establish a bonafide residency and stay three months in the county where he desires to file.

### III. FOREIGN AND DOMESTIC REFORM

As stated before, divorce reform is not a new concept in the United States or the rest of the world. In the past few years the divorce laws of many foreign jurisdictions have undergone massive revisions. Divorce after proof of marital breakdown is already in operation in Greece, Switzerland, Yugoslavia and Japan. It is the sole basis in the Soviet Union and most communist countries. Moreover, to go further, mutual consent of husband and wife is grounds for divorce, with certain safeguards, in Norway, Sweden, Denmark, Belgium and Portugal.<sup>22</sup>

The concept of marital breakdown is also implicit in some of the grounds that exist today and have existed for many years in the United States. Grounds such as insanity, living separate and apart, physical malformation preventing intercourse, feeble-mindedness and epilepsy imply a non-fault breakdown rather than a matrimonial offense.<sup>23</sup> Incompatibility itself as a ground is present in some form in Alaska,<sup>24</sup> New Mexico,<sup>25</sup> Oklahoma,<sup>26</sup> and the Virgin Islands.<sup>27</sup> Twenty-two states, Puerto Rico and the District of Columbia now provide for divorce on the ground of living separate and apart without cohabitation for certain periods.<sup>28</sup> Con-

<sup>21</sup> OHIO REV. CODE ANN. § 3105.03 (Page 1954).

<sup>22</sup> Mace, *Marriage Breakdown or Matrimonial Offense: A Clinical or Legal Approach to Divorce?* 14 AM. U. L. REV. 178 (1965).

<sup>23</sup> Insanity (29 states), living apart (18 states), disappearance (4 states), mental incapacity (2 states, Georgia and Pennsylvania) physical malformation preventing intercourse (Kentucky), incompatibility (3 states), feeble-mindedness and epilepsy (Delaware). BOWMAN AND HENRY, *DIVORCE FOR MODERNS* 534-35 (4th ed. 1960).

<sup>24</sup> ALASKA STAT. ANN. § 09.55. 110(5)(c) (1962) ["incompatibility of temperament"].

<sup>25</sup> N. M. STAT. ANN. § 22-7-1 (8) (1953) ["incompatibility"].

<sup>26</sup> OKLA. STAT. ANN. tit. 12, § 1271 (7) (1961) ["incompatibility"].

<sup>27</sup> V. I. CODE, tit. 16, § 104 (a) (8) (1964) ["incompatibility of temperament"].

<sup>28</sup> ALA. CODE, tit. 34, § 22 (1) (1958); ARIZ. REV. STAT. ANN. § 25-312 (West, 1956); ARK. STAT. ANN. § 34-1202 (Bobbs-Merrill, Replacement, 1962); COLO. REV. STAT. ANN. § 46-1-1 (J) (Supp. 1960); DEL. CODE ANN., tit. 13, § 1522(11) (1957); D. C. CODE ANN. § 16-403 (1961); IDAHO CODE ANN. § 32-610 (1947); KY. REV. STAT. § 403.020 (1)(b) (1955); LA. REV. STAT. ANN. § 9-301 (1950); MD. ANN. CODE art. 16 § 24(5) (1957); MINN. STAT. ANN. § 518.06(8) (1958); NEV. REV. STAT. § 125-010 (1957); N. H. REV. STAT. ANN. § 458.7 (Supp. 1957); N. Y. DOM. REL. LAW § 170 (McKinney Session Laws 1966); N. C. GEN. STAT. § 50-6 (1950); N. D. CENT. CODE § 14-06-5 (1943); P. R. LAWS ANN., tit. 31, § 321(9) (1955); R. I. GEN. LAWS ANN. § 15-5-3 (1956); TEX. REV. CIV. STAT., art. 4629(4)



sidering that the separation provision is premised on the notion that remaining apart for a given time is conclusive evidence of the fact of marriage breakdown, the separation provision is probably the major non-fault ground for divorce in America.<sup>29</sup> Also it should be noted that another recent reform focusing on eliminating the deterioration of family life and marriage is the addition of conciliation departments to divorce courts. They exist in varying degrees in at least fifteen states.<sup>30</sup>

The Ohio legislature has taken a significant step in divorce reform already by providing for conciliation procedures in all major Ohio counties. Newly enacted Ohio Revised Code sections 3117.01 to 3117.08 inclusive outline the structure of the conciliation procedure which provides for a separate branch of the common pleas court to work with a trained staff to attain settlement of marital disputes. The new law also establishes a simple form petition procedure whereby the parties can invoke the aid of the conciliation judge either singly or jointly irrespective of the pendency of any action for divorce, annulment, or alimony. Once the petition has been filed the conciliation judge may fix a reasonable time and place for a private hearing, and the judge has the authority to issue citations to the parties and to witnesses to appear at these hearings. He also has the authority, with the consent of the parties, to invoke the aid of physicians, psychologists, clergymen or other persons with expertise in the matter in controversy. He may also make such orders as he deems necessary to preserve the marriage or implement the reconciliation.

The law also provides that no action for divorce, annulment, or alimony can be commenced or proceed during the time that the conciliation proceeding is pending; and whenever it appears during divorce, annulment or alimony proceedings that conciliation may prevent dissolution of the marriage, the case may be transferred to the conciliation judge for conciliation proceedings.

In the past several years California and New York have made outstanding contributions to divorce reform in the United States. California's new law started as Assembly Bill 230 and Senate Bill 86 introduced in the regular session of the California Legislature in 1968. Recently the bill was passed by both houses and placed on Governor Reagan's desk to be signed into law. The bill basically provides California with a family court and an accompanying professional staff. This act

authorizes the court to make order dissolving the marriage effective when made when it finds that the legitimate objects of matrimony have been destroyed and there is no reasonable likelihood that the marriage can be

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(1958); UTAH CODE ANN. § 30-3-1(8) (Supp. 1963); VT. STAT. ANN., tit. 15, § 551 (1958); WASH. REV. CODE ANN. § 247.07(6) (Supp. 1965); WYO. STAT. ANN. § 20-47 (1957).

<sup>29</sup> Kleinfeld and Moss, *Divorce Reform Act*, 5 HARV. J. LEGIS. 563 (1968).

<sup>30</sup> McIntyre, *Conciliation of Disputed Marriages by or Through the Judiciary*, 4 J. FAM. L. 117 (1964).

saved or in lieu thereof on request of both parties to order legal separation.<sup>31</sup>

The new California law is revolutionary in several aspects. First, it replaces the necessity of marital fault and the concepts of guilt and innocence with a concept of marital breakdown. Secondly, it substitutes an inquisitory process for the traditional adversary process as an adjunct to the abolition of the concept of marital fault. Thirdly, as stated before, it includes in its family court system a staff of investigators and counselors with an eye to conciliation of the parties rather than punishment of the "guilty" spouse.

The mechanics of this new law are as simple as the concept of the law is revolutionary. The action is commenced with the filing of a petition known as "a petition of inquiry to dissolve marriage or for legal separation." This is accompanied by a requirement that the parties have an initial interview with the professional staff to explore the desirability of continuing their marriage. The professional counselor then, within 30 days of filing the petition and proof of service of summons, must file a report with the court stating whether the parties have decided to become reconciled, continue counseling for a period not to exceed 60 days with a view toward reconciliation, or continue their application for inquiry into the marriage with a view toward dissolution. In the last instance there still must be further consultation, not to exceed 60 days from the date of filing proof of service, to work out details of the dissolution of the marriage. The act also provides that where the court fails to dissolve the marriage the procedure is continued for 90 days and then if one or both parties decide the marriage should be terminated, the court shall dissolve the marriage.

The new California law goes far to overcome many deficiencies in systems such as that in Ohio. First, as was stated before, the inquisitorial process is substituted for our traditional adversary system. This in itself is a major improvement in the domestic relations law. Since there is no adversary process, the marital partners are no longer pitted as adversaries and there is no need to dredge up fault on the part of one party or another. By doing away with the fault-oriented system California can take a realistic attitude in recognizing the end of the *de facto* marriage. Therefore California under the new law can dissolve a marriage because of the incompatibility of the partners

[w]hen it appears that the purpose of matrimony had been destroyed to the extent that further living together was intolerable, it was in accordance with the court's duty and prerogative to grant the plaintiff a divorce. It is not the policy of the law that a man and wife should be required to

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<sup>31</sup> A. B. 230, California Legislature, Regular Session (1968).

live together or be held in a marital relationship when they have come to regard each other as mere strangers.<sup>32</sup>

This is the policy that lies behind the use of incompatibility as a basis for dissolving marriage.

Similar in ideal to incompatibility is voluntary separation. Both of these criteria depend on the concept of breakdown of the marriage to an irreparable extent. Voluntary separation, though, has had in the past the implication of divorce by mutual consent and has been shunned. California under its new law, however, can recognize a divorce by mutual consent as long as the public policy of dissolving only marriages which have irreparably broken down is kept in mind. As was stated in the *Final Report on Domestic Relations*:

The principal distinction between voluntary separation and incompatibility lies, however, not so much in the indicia which go to establish the existence of the cause, but in the implications of voluntary separation. Granting a divorce upon the latter basis is to recognize divorce by mutual consent.<sup>33</sup>

It is unrealistic to fail to recognize that in practice numerous divorces are carried out under circumstances of mutual consent. One of the factors which has brought divorce law into disrepute is that it continues to regard litigation as an adversary proceeding, and, not as it is in many cases, a mutual arrangement.<sup>34</sup> The number of undefended cases is but further evidence which goes to prove this now well-accepted statement.<sup>35</sup>

By doing away with the fault-oriented concept of divorce, California also has eliminated the fault-oriented defenses. Therefore, recrimination and condonation can no longer be used by a spouse to block a divorce when the marriage has actually broken down and serves no useful purpose.

As one can readily see, the California proposal is a revolutionary new plan. It almost completely abolishes "grounds for divorce" per se and substitutes for these a system of divorce based on irreparable breakdown. Though this is probably the basic cause of most divorces, up until now it has never been recognized as a justifiable reason for divorce. The primary reason for this is that most people felt that by eliminating grounds

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<sup>32</sup> *Ohligschlager v. Ohligschlager*, 125 Cal. App. 2d 458, 270 P.2d 577 (1954); see also *Inskeep v. Inskeep*, 5 Iowa 204 (1857); *Clyburn v. Clyburn*, 175 Ark. 330, 299 S.W. 38 (1927); *Widstraud v. Widstraud*, 87 Minn. 136, 91 N.W. 432 (1902).

<sup>33</sup> 23 FINAL REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON JUDICIARY—RELATING TO DOMESTIC RELATIONS, No. 6 at 77 (California Assembly 1969) [hereinafter cited as 23 FINAL REPORT 6].

<sup>34</sup> *Id.* at 77.

<sup>35</sup> In the United States answers were filed to about 1/7 of all petitions (14.8 percent 1946-50), but this does not necessarily reflect controversy over the granting of the decree, for it may only extend to the terms governing the "incidentals." Cf. *Jacobson, MARRIAGE AND DIVORCE* (1959).

for divorce, it would encourage people to file for divorce. The California Committee on Domestic Relations, however, dealt with the problem and after extensive hearings concluded that:

Most sociologists would be hostile to the argument that easy grounds for divorce would lead to individuals taking marriage lightly, for most people intend, on entering the relationship, to make the partnership last for life. Certainly there is no evidence to support the contrary view.<sup>36</sup>

In New York, like Ohio, revision of the divorce laws was a slow process. The first major revision since 1787 of the substantive law of divorce in New York was enacted by the legislature and signed by the Governor on April 27, 1966.<sup>37</sup> Most of this new law became effective on September 1, 1967. The main features of the new law include: (1) the expansion of grounds for divorce including cruelty and two non-fault grounds which may be invoked when the couple is separated; (2) the limitation of the historic defenses to just one based on the ground of adultery; (3) the elimination of prohibitions against remarriage by the guilty spouse; (4) the new conciliation and counseling procedures established by Article 11-B; (5) a revised section on jurisdiction over matrimonial actions; (6) an amendment to the General Obligations law which narrowly limits the definition of void and collusive agreements; and (7) new Section 250 of the Domestic Relations Law which enacts a version of the Uniform Recognition Act.<sup>38</sup>

As can be seen from this summary, New York has gone far toward liberalizing their divorce laws by including non-fault grounds; and also has taken the initial steps toward a Family Court system by including the conciliation and counseling facilities.

The principal innovation of the new law is the creation at state expense of a Conciliation Bureau in each judicial district under the supervision of a supreme court justice which will put into effect a three stage procedure of (1) conciliation conferences, (2) conciliation hearings, and (3) counseling. The new procedure will involve conciliation commissioners and special guardians chosen from the bar and conciliation counselors chosen from the counseling profession.<sup>39</sup>

The new non-fault grounds also are a revolutionary change in the New York divorce law.<sup>40</sup> Although they are not as general and inclusive as the California proposal, the new grounds in New York approach very closely the concept of divorce because of irreparable breakdown of the marriage. Two good examples of this are the two grounds based on the living sepa-

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<sup>36</sup> See, 1964 Hearings; 23 FINAL REPORT 6 at 70.

<sup>37</sup> LAWS 1966, Ch. 254 (McKinney, 1966).

<sup>38</sup> FOSTER AND FREED, THE DIVORCE REFORM LAW at 6 (1968).

<sup>39</sup> *Id.*

<sup>40</sup> N.Y. DOM. REL. LAW § 170 (3), (5) & (6) (McKinney Supp. 1969).

rate by the parties for a period greater than two years. Section 170 (5) entitled "Living Separate and Apart Pursuant to Decree of Separation" is called a "conversion" ground whereby judicial separation is transformed into absolute divorce. The rationale behind the ground is that living separate and apart for two years is conclusive evidence of the irreparable breakdown of the marriage. Some eleven states have enacted various forms of "conversion" statutes.<sup>41</sup> The ground is completely non-fault as is evidenced by the fact that the party that was the defendant in the separation proceeding may file for divorce as long as he has substantially performed the terms accompanying the separation decree. Section 170 (6) of the New York Domestic Relations Law embodies the same rationale as Section 170 (5), and closely approaches the voluntary separation ground in the California proposal. This new ground also goes far to eliminate the adversary process because of the non-fault basis. The original agreement is jointly filed with no reference to a guilty party or even any guilt, and then the divorce can be granted either party under Section 170 (6) as long as he has met the terms of the separation agreement. This non-fault orientation combined with the counseling and conciliation facilities make the New York law a great improvement over the traditional system employed in Ohio.

The legislatures of California and New York have not been the only ones to recognize and attempt to meet the need for divorce law reform. The Committee on Divorce of the National Conference of Commissioners of Uniform State Laws has adopted a preliminary draft of a uniform code using the "irretrievable breakdown" concept as its principal ingredient, along with several subsections to make the general concept more specific. In Section 2.5 of the *Report to the Committee of the Whole*, the Committee on Divorce recommended a dissolution standard for the Uniform Marriage and Divorce Act, phrased in the following language:

SECTION 2.5 After consideration of all relevant factors, including the circumstances which gave rise to the filing of the Petition of Inquiry and the prospect of reconciliation between the spouses, if the court finds that the marriage has broken down irretrievably, it shall enter its order dissolving the marriage.<sup>42</sup>

More specific content is then given to this general dissolution standard:

SECTION 2.6 If the court finds that (a) ninety days have elapsed since the filing of the Petition of Inquiry, and that (b) both parties freely join in the Petition of Inquiry, it shall conclude that the marriage has broken down irretrievably and shall enter its order dissolving the marriage. In these cases the provisions of Section 2.5 shall not apply.

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<sup>41</sup> See Foster and Freed, *Living Apart as Ground for Divorce*, N. Y. L.J., May 17, 18 & 19, 1965.

<sup>42</sup> REPORT OF THE SPECIAL COMMITTEE ON DIVORCE TO THE COMMITTEE OF THE WHOLE, National Conference of Commissioners on Uniform State Laws (19—).

SECTION 2.7 If the court finds that the parties have lived separate and apart for not less than six months immediately preceding the filing of the Petition of Inquiry, it shall conclude that the marriage has broken down irretrievably and shall enter its order dissolving the marriage. In these cases the provisions of Section 2.5 shall not apply.<sup>43</sup>

As can be seen, the standards articulated in the New York Family Court Act, the California divorce reform and the Uniform Marriage and Divorce Law are quite similar when exposed to the bare bones. All are founded on the basic concept of "irretrievable breakdown" of the marriage with the superstructure being specifics to delineate the boundaries of the "irretrievable breakdown." All include the "living separate and apart" standard, and all go far to avoid the strict adversary process by providing non-fault grounds for divorce. These proposals also make provision for professional help in counseling and conciliation.

#### IV. CONCLUSION

As has been shown, psychologists, sociologists and many members of the legal profession agree that systems of divorce law like Ohio's adversary approach cannot adequately handle the growing problem of divorce. To meet the problem proposals similar to the plans of California and New York have been proffered. These seem to be the most logical approach to the modern divorce problem. Ohio has already recognized the need for change and has responded by producing the bill authorizing conciliation judges in domestic relations actions. This bill, however, as significant as it is, is still only one step in the process of reform. The Ohio General Assembly has recognized that the new law is only a stop-gap measure and has recently passed a joint resolution "[t]o appoint a committee from among the members of the house and senate judiciary committees to make a comprehensive study of the Ohio laws relating to the field of domestic relations."<sup>44</sup> It is hoped that the General Assembly's efforts will result in substitution of a viable, sensitive, non-fault oriented system similar to those discussed for what the Assembly itself has termed "an archaic adversary fault system which only seldom concentrates on the real problems. . . ."<sup>45</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> House Joint Resolution No. 38, 108th Ohio General Assembly (1969).

<sup>45</sup> *Id.*