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Marriage and Civil Law

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MARRIAGE AND CIVIL LAW

"We have not been doing the kind of basic thinking so necessary in such a vital aspect of our culture—indeed of our very life." [1]

THE time has arrived to consider seriously, to analyze objectively, and to solve prudently some of the problems growing out of the relation between marriage and the civil law. Such a need has been apparent to most people, particularly to many lawyers, for a long time. The urgent necessity for a sane consideration of fundamental concepts and principles of both marriage and civil law and the relation between them has grown upon the writer during his judicial experience.

What is marriage? How important is it? What fields of knowledge deal with marriage? Who are qualified to answer these questions? Is there any law of marriage? What is it? What is the duty of the State with reference to marriage? To what extent is that duty being fulfilled? Again, who are qualified to answer these questions?

This paper is intended to state the problems rather than to answer all of the questions, to arouse interest rather than to evoke controversy, to indicate the comparatively limited contribution of man-made law to the solution of the problems, to discourage superficial and hasty remedies, and to appeal for a better treatment of the institution of marriage by the State. It is an appeal to do the kind of basic thinking so necessary in this vital aspect of our culture, indeed of the very life of our nation.

[1] Sermon of Rt. Rev. Msgr. William T. Dillon, LL.B., J.D., at Red Mass, Catholic Lawyers' Guild, Brooklyn, September 23, 1948, which made no reference to marriage, but concerned the civil law and lawyers generally.

MARRIAGE

The word "marriage" has two meanings. It is the lawful union of a man and a woman and it is also the act whereby a man and woman enter into this union. It is an institution and also a contract. For present purposes, marriage shall be considered as "an institutional state which originates, but originates only, in a contract." [2]

In civil law, "marriage is a contract under which a man and a woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife. Marriage is generally considered a civil contract differing in notable respects from ordinary contracts, but it is also and specially a status or personal relation in which the State is deeply concerned and over which the State exercises exclusive dominion." [3]

The importance of marriage can hardly be overestimated or overemphasized. Jurists have said: "Marriage is more than a personal relation between a man and a woman. It is a status founded on contract and established by law. It is . . . based upon principles of public policy affecting the welfare of the people of the State." [4] Marriage creates the most important relation in life and has more to do with the morals and civilization of a people than any other institution.[5] "Marriage is not merely a contract between the

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[2] PAUL CUCHE, LA SUPPRESSION DU DIVORCE, pp. 292-294, quoted in MARRIAGE AND THE FAMILY by DR. JACQUES LECLERCQ, PH.D., LL.D., translated by Thomas H. Hanley, O.S.B., Ph.D., p. 32, Frederick Pustet Co. (Inc.), New York, 1941.

[3] 55 C. J. S., Marriage § 1(b) 806 (1948). This is the position of the American civil law. The Roman Catholic Church does not admit (1) that marriage is a mere civil contract, and (2) that the State exercises exclusive dominion over the marriage contract. The Church holds that marriage is a natural contract or a sacramental contract. Helpful studies on the relationship between the law of the Church and that of the State in reference to marriage may be found in *The Competence of Church and State Over Marriage—Disputed Points,* Goldsmith, J. William—Catholic University of America Canon Law Studies, n. 197, Washington, D. C., Catholic University of America, 1944; also, Kay, Thomas H., *Competence in Matrimonial Procedure,* Catholic University of American Canon Law Studies, n. 53, Washington, D. C., Catholic University of America, 1929; CHRISTIAN MARRIAGE: A HISTORICAL AND DOCTRINAL STUDY, JOYCE, C. H., Sheed & Ward, London, 1933.

[4] Fearon v. Treanor, 272 N. Y. 268, 272, 5 N. E. 2d 815, 816 (1936); see also footnotes 35, 39, 40, 41, 42.

[5] Maynard v. Hill, 125 U. S. 190, 205, 31 L. ed. 654, 657 (1887). Cited with approval in Bunim v. Bunim, 298 N. Y. 391, 83 N. E. 2d 848 (1949).

parties. It is the foundation of the family. It is a social institution of the highest importance." [6]

The sociologist has this to say: "The one social institution upon which society depends most intimately is the family. This cell, as it were, of the social organism is necessary for both the existence and the well-being of the human race. Its importance to the State is hardly less than proverbial. 'As the family, so the State,' is a true and tried saying. But its high importance reaches even beyond this. The family is basic to all of society, to all civilization." [7]

An excellent study on the philosophy of the family contains this: "For the vast majority of men the family is the indispensable agent of their virtue and their happiness; first in their childhood, the period of their education; then in adulthood, in the home that they found. A nation's moral level depends, not exclusively but mainly, upon respect for the family institution." [8]

The President of the United States has said: "The measure of a civilization is the measure of its family life. It is normally the soil of the steady and responsible home that begets the important driving incentive of a people that induces them to strive and work to move upward and onward to progress." [9]

A large volume could be compiled of such statements by jurists, sociologists, philosophers and statesmen on the importance of marriage and the family. They represent the view of the vast majority of the people of this country. Yet we do know that many people who concur with these appraisals of marriage and the family live contrary to their beliefs. Further, we must realize that some teachers and professors, who consider themselves philosophers and sociologists, as well as some lawyers do not agree that marriage and the family should hold such high place in our national life. Later reference will be made to such minority views.

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[6] French v. McAnarney, 290 Mass. 544, 546, 195 N. E. 714, 715 (1935).

[7] AN INTRODUCTORY STUDY OF THE FAMILY, EDGAR SCHMIEDELER, O.S.B., PH.D., p. 1, D. Appleton-Century Company, Inc., New York, 1947.

[8] DR. JACQUES LECLERCQ, PH.D., LL.D., *op cit. supra* note 2 at 17.

[9] President Harry S. Truman, letter dated February 1, 1946, to National Family Life Conference, Washington, D. C.

CIVIL LAW

Civil law is here used in the comprehensive sense to mean "a rule of action, mandatory in form, freely established and promulgated by the competent authority in the State for the common good." [10]

Civil law consists of the common law and our federal and state constitutions, municipal charters, statutes and other enactments of our legislative bodies. It is interpreted by our courts and enforced by the executive branches of our federal, state and local governments.[11]

No rational person questions the necessity for civil law. It is "required to adapt and regulate harmoniously the social activities of the citizens in order that the purpose of the existence of the State may be secured. This purpose . . . is social peace and temporal prosperity."

> Briefly, we send men to the legislature that with a larger and truer view of the tangled civic and political problems (a view gained at least by their position in the legislature), they may decide what is a practical, wholesome way of solving them and may pass appropriate laws to secure this end. The legislator who is false to this high purpose is one of the worst enemies of society.
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> Furthermore, the purpose of [civil] law is not to regulate each and every detail of man's life or to impose upon him every manner of virtuous conduct. It has as its proper function to regulate and control those larger aspects of human life and conduct that bear on social relationships.[12]

Civil law is not the source of the basic rights of man, *i.e.*, life, liberty, property and happiness. Its purpose, however, is to secure and protect those rights. "To secure these rights governments are instituted among men." [13] What is the source of human rights and human obligations, the basis of civil law?

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[10] THE AMERICAN PHILOSOPHY OF LAW, LEBUFFE AND HAYES, 4th Ed., p. 168, Crusader Press, Inc., New York, 1947.

[11] N. Y. CONST. Art. I, § 14 (1938). Civil law, of course, includes criminal law, or penal law which is only a branch of, but sometimes distinguished from, civil law.

[12] LEBUFFE & HAYES, *op. cit. supra* note 10 at 188, 189.

[13] DECLARATION OF INDEPENDENCE.

It must be noted that some American jurists and professors may not concede there is any law other than civil law or any authority above the State which establishes and promulgates civil law or any sanction except force. They contend that civil government is the source of all law and the only source of man's rights, if he has any, and of his obligations. This, of course, is unadulterated totalitarianism, which takes the form of Communism in Soviet Russia and its satellites and existed as Nazism in Germany under Hitler and as Fascism in Italy under Mussolini. At this point the advocates of the total supremacy of the State may stop reading. Limitations of space and time prevent a lengthy exposition of their errors. However, men who believe in American Democracy must find another source for their freedom, some basis for their inalienable rights.

The American philosophy of law is founded upon the basic principle that a human being, just because he is a human being, is endowed with certain fundamental rights, and if he is to enjoy those rights, his fellow men are subject to certain obligations to respect his rights. Likewise, his fellow men have similar rights and he in turn is subject to the same obligations to respect the rights of his fellow men. These rights and obligations arise from man's nature. They are called natural rights and natural duties. They are found in the natural law. Natural law is the ultimate source of civil law.

NATURAL LAW

That source is a "higher law" which is "first in order of thought and superior in way of authority and ultimate as the source of all obligation." [14] Natural law is the sum total of those rules of action, "mandatory in form, which *reason* itself reveals as established and promulgated by the Author of nature and imposed upon all men through their very nature." [15]

The existence and dictates of the natural law have been affirmed by primitives, the Greeks, the Romans and the Eng-

[14] LEBUFFE & HAYES, *op. cit. supra* note 10 at 59.
[15] LEBUFFE & HAYES, *op. cit. supra* note 10 at 39.

lish common law. The traditional American philosophy of law is natural law philosophy. It is the basis of the Declaration of Independence and the Federal Constitution. The Bill of Rights is a statement of limitations upon the civil law. That Bill is largely a statement of man's natural rights. Most recent affirmations of the natural law are found in "The Pattern for Peace," a Catholic, Protestant and Jewish declaration, issued July 17, 1943, in the Atlantic Charter and in declarations of the United Nations.[16]

In a scholarly address, which fortunately has been preserved for us, Mr. Justice Dore of the Appellate Division, First Department, shows that the source of human rights is the natural law. He states, "Thus, natural law may be defined as the order discernible by reason according to which man should seek to fulfill his nature as man. As Jacques Maritain says, 'It is not a ready-made code rolled up within the conscience of each one of us, which each one of us has only to unroll, and of which all men should naturally have an equal knowledge.' On the contrary, he continues: 'Natural law is not a written law. Men know it with greater or less difficulty, and in different degrees, running the risk of error here as elsewhere. The only practical knowledge all men have naturally and infallibly in common is that we must do good and avoid evil. This is the preamble and the principle of natural law; it is not the law itself. Natural law is the ensemble of things to do and not to do which follow therefrom in *necessary* fashion, and *from the simple fact that man is man,* nothing else being taken into account.' " [17]

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[16] LEBUFFE & HAYES, *op. cit. supra* note 10, Chapters IV and V.

[17] *Human Rights and the Law,* Edward S. Dore, Associate Justice of the New York Supreme Court, Appellate Division, First Department, N. Y. L. J., March 20, 21, 22, 25, 1946, 15 FORD. L. REV. 3 (1946). Quotation from JACQUES MARITAIN is from his THE RIGHTS OF MAN AND NATURAL LAW, pp. 62-63. See also *Hobbes, Holmes and Hitler* by Ben W. Palmer, 31 A. B. A. J. 569; *Defense Against Leviathan* by Ben W. Palmer, 32 A. B. A. J. 328; *Justice Holmes Was Not on a Ladder to Hitler* by Charles W. Briggs, 32 A. B. A. J. 631; *Reply to Mr. Charles W. Briggs* by Ben W. Palmer, 32 A. B. A. J. 635; *The Higher Law* by Harold D. McKinnon, 33 A. B. A. J. 106; *Law and Philosophy* by Harold R. McKinnon, CAN. B. REV., Ottowa, Ont., Canada, August-September, 1948, reprinted in The Catholic Mind, New York, Vol. XLVII, No. 1034, February, 1949.

SOURCE OF LAW OF MARRIAGE

No historian, philosopher or lawyer worthy of the title would contend that marriage as a contract or as an institution is a creature of the civil law. Before the state, before the tribe, before civil law was promulgated, the family, the basic unit of society, existed and there was marriage. The true source and juridical dignity of marriage has been recognized by writers and the courts.[18]

The general statute, "that marriage, so far as its validity in law is concerned, shall continue in this State a civil contract, to which the consent of parties, capable in law of contracting, shall be essential," [19] is not decisive of the question. (2 R. S. 138.) This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes and distinguishing features it does not interfere with, or attempt to define. It is declared a civil contract for certain purposes, but it is not thereby made synonymous with the word contract employed in the common law or statutes. In this State, and at common law, it may be entered into by persons respectively of fourteen and twelve. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the com-

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[18] No attempt will be made herein to cite all the decisions of higher courts which affirm the source, the purposes and the essentials of marriage. Those mentioned, however, are representative of what appears to be the unanimous opinion of jurists who in deciding marital questions have referred to fundamental principles.

"The relation of marriage is founded upon the will of God and the nature of man; it is the foundation of all moral improvement and of true happiness. No legal topic surpasses this in importance." 2 PARSONS, CONTRACTS 75 (7th ed. 1883).

"Marriage is a contract. It was said by Sir William Scott, in Dalrymple v. Dalrymple (2 Hagg. 45), that it was 'in its origin a contract of natural law.'" Wait v. Wait, 4 Barb. 192, 208 (N. Y. 1848).

"Marriage is unquestionably a civil contract founded in the social nature of man, and intended to regulate, chasten, and refine the intercourse between the sexes; and to multiply, preserve, and improve the species." Town of Milford v. Town of Worcester, 7 Mass. 48, 52 (1810).

"Marriage is founded on the law of nature and is anterior to all human law." *In re* McLaughlin's Estate, 4 Wash. 570, 30 Pac. 651, 652 (1892).

[19] Now N. Y. DOMESTIC RELATIONS LAW § 10.

munity. Kent says: "It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the race." (2 Kent Com. 75.) Judge Story says: "But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties." (Story on Con. of Laws § 108, note.) He quotes, approvingly, a distinguished Scottish judge: "That marriage is *sui generis* and differing in some respects from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this." (Sec. 109.) In *Ditson v. Ditson* (4 R. I. 87, 101), the court say (*sic*): "In strictness, though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract which they can make." It has been held not to be a contract within the provision of the United States Constitution, prohibiting States from passing laws impairing the obligations of contracts. (5 Barb. 480; 6 Conn. 540; 7 Dana 181; 4 R. I. 87.) Mason, J., in 5 Barbour 480, concludes his opinion by saying that "the marriage relation is not created by what we understand to be a contract, in the strict common-law sense of that term." Lamont, J., in 1 Lansing 268, held that it is not a contract within the meaning of the attachment laws. The marriage relation is essentially personal. Neither the rights, duties nor obligations created by or flowing from it can be transferred, and the action scarcely resembles, in its main features, an action upon contract.[20]

Unlike other contracts, it is one instituted by God Himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society.[21]

Man's intelligence enables him, wiser than all other creatures, to read his own nature and interpret, govern and regulate all of his various and seemingly contradictory powers, appetites and passions, according to right reason. The first dictate of right reason is that the higher, nobler spiritual faculties of man must dominate the lower instincts, keeping them always in subjection to the end and purposes for which they were designed.

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[20] Wade v. Kalbfleisch, 58 N. Y. 282, 284 (1874); cited with approval in Maynard v. Hill, 125 U. S. 190, 212, 31 L. ed. 654, 670 (1887).

[21] 1 FRASER, DOMESTIC RELATIONS 87, quoted with approval in Lewis v. Tapman, 90 Md. 294, 45 Atl. 459 (1900).

One of man's yearnings, a lower instinct of animal nature, is at first mysterious. It is the strong and insistent urge within him for association with a helpmate, a companion, a partner of the opposite sex, who will share with him and sweeten for him the tiresome journey of life. Reason, man's intelligence, tells him that these strange things are planted in him in order to lure him on into that very serious and difficult work, the task of human parentage. The great powers found in nature are to be used and enjoyed for the purpose of bringing new creatures into the world. It is contrary to man's nature to abuse or degrade those powers in ways that frustrate their glorious purposes. This is the natural law of marriage.[22]

Only in the natural law may be found the basic law of marriage. To it one must go for the purposes and the essentials of the marriage contract and the institution which that contract originates.

Purposes and Properties of Marriage

According to the natural law the *primary end* of conjugal society consists in the proper procreation and education of children. The *secondary end* consists of the mutual love and helpfulness of the married couple. These ends or purposes may be easily demonstrated.

According to the natural law the *essential properties* of that conjugal society are the unity of the matrimonial bond and its indissolubility. The first essential property, unity, one husband and one wife, is generally accepted. The second essential property, indissolubility, of course, has been for centuries a subject of controversy, but permanency has never been seriously questioned.

As to the primary end of marriage the physiological and psychological faculties, tendencies and temperament of men and women, the way they complement each other, indicates that they were intended to form a natural society for the procreation and education of children. These are elemen-

[22] Adapted from *A Bird's-eye View of the Five Kinds of Law*, Rev. Francis X. Salaway, S.T.D., P.P., Radio Replies Press, Saint Paul, Minn., pp. 8-9.

tary facts of life. An enduring union of one man and one woman called marriage has been the primary society of human existence from its beginning. No other institution has been the subject of such universal agreement. It has been self-evident.

What marriage is may be verified historically from what it has been, and traditionally from what civilized people have always considered it to be. This is true, even though at times the complete pattern has been partly obscured by some local or individual practices or theories. Polygamy or promiscuity, and the more recent vogue of "free love," have never had any sanction remotely approaching the universal. Even where locally legalized, these practices have not been generally adopted. Monogamous marriage has been the general rule of western civilization.

These purposes and essentials of marriage have been affirmed directly and indirectly by judicial construction of the natural and civil law as well as by statutory enactment.

Marriage "is defined to be a contract between a man and woman for the procreation and education of children." [23]

Rutherford, in his first volume of Natural Law, p. 162, says, "marriage is a contract between a man and woman, in which, by their mutual consent, each acquires a right in the person of the other for the purpose of their mutual happiness and for the production and education of children." [24]

But the refusal of husband or wife without any adequate excuse to have ordinary marriage relations with the other party to the contract strikes at the basic obligations springing from the marriage contract when viewed from the standpoint of the State and of society at large. However much this relationship may be debased at times it nevertheless is the foundation upon which must rest the perpetuation of society and civilization. If it is not to be maintained we have the alternatives either of no children or of illegitimate children, and the State abhors either result.[25]

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[23] White v. White, 4 How. Pr. 102, 107 (N. Y. 1849). *See also* Wenders v. Powers, 217 N. C. 580, 9 S. E. 2d 131, 132 (1940).

[24] Goodrich v. Goodrich, 44 Ala. 670, 674. *See also* State to Use of Gentry v. Fry, 4 Mo. 120, 180 (1835).

[25] Hiscock, Ch.J., Mirizio v. Mirizio, 242 N. Y. 74, 80, 150 N. E. 605, 607 (1926).

Marriage is a mutual and voluntary compact, springing from sentiment, emotion, affection, and the desire for sacrifice and surrender each for the other, properly based on mutual regard and love, suitably ratified, to live together as husband and wife until death, with the object of constituting a family for the preservation of moral and social purity, the continuance of the race, the propagation of children and their nurture, training and preparation for family welfare and the general good of society.[26]

Marriage, therefore, "does not mean a mere temporary agreement to dwell together for a time for the gratification of sexual or lustful desires, but it is essential that the contract be entered into with a view to its continuance through life, and then be followed by celebration and cohabitation, with the apparent object of continuing such cohabitation through life." [27]

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent. Com. 79), and from the earliest history of England polygamy has been treated as an offense against society.[28]

The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring. It would tend to defeat this object, if error or disappointment in personal qualities or character was allowed to be the basis of proceedings on which to found a dissolution of the marriage tie.[29]

"Marriage" being in its nature permanent and being the most important of all civil relations, the law will not lightly allow the inducements which have led up to it to be disturbed.[30]

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[26] Amsterdam v. Amsterdam, 56 N. Y. S. 2d 19, 22 (1945), not officially reported.

[27] Olson v. Peterson, 33 Neb. 358, 361, 50 N. W. 155, 156 (1891). *See also* Collins v. Hoag & Rollins, Inc., 121 Neb. 716, 238 N. W. 351, 353 (1931).

[28] Reynolds v. United States, 98 U. S. 145, 164, 25 L. ed. 245, 249 (1878). *See also* Davis v. Beason, 133 U. S. 332, 341, 33 L. ed. 637, 639 (1889); Cleveland v. United States, 329 U. S. 14, 20, 91 L. ed. 12, 13 (1946).

[29] Richardson v. Richardson, 246 Mass. 353, 355, 140 N. E. 73 (1923), 31 A. L. R. 146, 147, citing Reynolds v. Reynolds, 3 Allen 605, 607 (1862). *See also* Wolkovisky v. Rapaport, 216 Mass. 48, 50, 102 N. E. 910, 911 (1913); Chipman v. Johnston, 237 Mass. 502, 504, 130 N. E. 65 (1921).

[30] Welch v. Mann, 193 Mo. 304, 92 S. W. 98, 101 (1906), quoting and

In addition to the safeguards erected by decisional law, marriage has also been protected by legislative enactment. Bigamy and adultery have been made penal offenses. Husband and wife have been forbidden to "contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife.[31] Certain types of marriage have been declared void and others voidable.[32] Separation, divorce and annulment have been permitted but have been hedged by restrictions.

Some of these provisions are demanded and others, *e.g.*, separation (divorce *a mensa et thoro*), may be justified by the natural law. But the greatest conflict between the natural law and the civil law is the assumption by civil authority to dissolve a valid marriage or to grant a divorce *a vinculo*, a divorce in the fullest sense of the term. This will be treated later.

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adopting definition in Cohen v. Knox, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711 (1891).

" 'Marriage' is a civil contract by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge toward each other the duties imposed by law upon such relation. Each must be capable of assenting, and must in fact consent to form this new relation." *In re* Stevenson's Estate, 272 Pa. 291, 116 Atl. 162, 165 (1922), quoting and adopting definition in Topper v. Perry, 197 Mo. 531, 546, 95 S. W. 203 (1906).

"Marriage is a civil contract by one man and one woman, competent to contract, whereby they are mutually bound to each other, so long as they both shall live, for the discharge to each other and the community of the duties and obligations which flow by law from such relation." Banks v. Galbraith, 149 Mo. 529, 51 S. W. 105, 106 (1899). *See also* State v. Bittick, 103 Mo. 183, 15 S. W. 325 (1891).

Marriage is a contract "by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife." Mott v. Mott, 82 Cal. 413, 22 Pac. 1140, 1141 (1889), quoting BOUVIER'S LAW DICT., tit. "Marriage." *See also* Seuss v. Schukat, 358 Ill. 27, 192 N. E. 668, 671, 95 A. L. R. 1461 (1934); Meister v. Moore, 96 U. S. 76 (1877); Heymann v. Heymann, 218 Ill. 636, 75 N. E. 1079 (1905); Cartwright v. Cartwright, 121 Ill. 388, 12 N. E. 737 (1887).

"Formulation of exact rule which may be applied without difficulty in each case—is impossible, yet at least it may be said that under varying circumstances the principle which always must guide the courts is that the permanence and immutability of the marriage relation must be sustained and vindicated and honest observance of its spirit must be required from both parties." Lehman, J., Mirizio v. Mirizio, 242 N. Y. 74, 95, 150 N. E. 605, 613 (1926).

[31] N. Y. DOMESTIC RELATIONS LAW § 51.

[32] N. Y. DOMESTIC RELATIONS LAW § 5, part of § 6 and parts of § 7, and the requirement of consent as provided in § 10.

First, however, it should be noted that almost without exception every natural law philosopher, every sociologist and every intelligent proponent of the Judeo-Christian civilization agree upon (1) the primary purpose of marriage, (2) the necessity for monogamy, and (3) the necessity for permanency if not indissolubility.

Dr. Jacques LeClercq opens his excellent study in social philosophy by a reference to "Revelation and natural law in family ethics" which is quoted here to expose a common erroneous idea that the ends and essentials of marriage have been the creations of churchmen.

It is a common practice to speak of a Christian doctrine of marriage and the family. This Christian doctrine of the family furnishes one of the most typical examples of the close relationship between Revelation and natural ethics. The new principles supplied by Revelation are very few indeed. In the Old Testament, the Mosaic law took over and hallowed the family institution as it existed among the Hebrews from the time of the patriarchs. We find in the law of Moses an effort to purify the institution of the family, but we cannot say that it introduces new principles. In the New Testament, the family institution has undergone still further purification; but about the only novelty to be found therein is the elevation of marriage to the dignity of a sacrament, and perhaps its absolute indissolubility. Apart from this, Christian teaching takes up again, while purifying, what may be termed the human tradition, a conception of the family common to all civilized peoples.

Nor should this surprise us. Regarding the family there exists a universal agreement of the human race that finds its explanation in the very character of the family institution. No institution is closer to nature. A simple society resting immediately upon primal instincts, it arises spontaneously from the development of human life itself.

Let us compare it with the State. The State too corresponds to requirements of nature. But what a distance separates the State as it exists in our civilized society, a complex institution abounding in intricate machinery and artificial organs, from the elemental social instinct which impels man to shun isolation and to join with other men! On the contrary, the natural urge of the sex instinct and of mother love, together with man's tendency to desire that others continue him, provides as direct a basis of the family as it is possible to have. Parental authority becomes established without any recourse to principles, by the sole fact that children are born to their

parents and can neither live nor develop without them. Accordingly, it should not come as a surprise to discover among all civilized peoples a fairly identical family organization, or to meet with it again among the peoples closest to nature. Since the family is an institution extremely close to nature, the requirements of nature are much stricter in the case of the family than they are in political matters; and just as mankind's development is bound up with respect for the laws of human nature, so, too, is it linked with the laws of the family order, and to such a degree, indeed, that one can safely say that the social groups that evade them must perish or fall back into barbarism.

Consequently, the moral law of the family is a natural one. The ethics of the Christian family is but the natural moral law taken over by Christ's Church, who brought it to the highest degree of purity and placed it under the positive guarantee of God. That is why the study of the family falls within the field of natural law; and that is also why, in the pages that follow, it will rarely be necessary to refer to Revelation.[33]

Churchmen recognize that the basic law of marriage is found in the natural law. Thus, the Canon Law following the natural law defines marriage as a contract made by the consent of the parties legitimately manifested by persons who are juridically capable of doing so, by which each gives and accepts the perpetual and exclusive right over his own and the body of the other for the purpose of performing that act which is designed by nature for the generation of offspring.[34]

From these juridical and sociological quotations we may conclude that marriage was instituted by God, the author of nature, and its nature and character were defined by Him, so that human legislators or civil law cannot change the nature or character of the contract. If any legislature or civil authority attempts to do so, it may "legalize," according to the civil law, a new contract and relationship between men and women, but this new contract and relationship are not marriage and have no validity before God.

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[33] LECLERCQ, *op. cit. supra* note 2 at 1-2. See also LEBUFFE & HAYES, *op. cit. supra* note 10 at 324, 325.

[34] Canon 1081 of the Code of Canon Law. *Cf.* MARRIAGE LEGISLATION IN THE NEW CODE OF CANON LAW, VERY REV. H. A. AYRENHAC, SS., D.D., D.C.L., revised and enlarged by Rev. P. J. Lydon, D.D., Benziger Brothers, Inc., 1946, p. 1.

For those who accept the Old Testament, the natural law of marriage is confirmed by the Ten Commandments (positive divine law) which provide:

POWER AND DUTY OF CIVIL AUTHORITY

The importance of marriage, its purposes and essentials as found in the natural law, have been considered. Civil law has been defined and its source traced to the natural law.

What then is the duty of the civil authority with reference to marriage? Certainly the State has a very definite interest and civil authority is properly charged with a great responsibility for the welfare of marriage upon which the peace and prosperity of the family and society depend.

The courts have repeatedly asserted the State's authority over marriage and have frequently recognized the responsibility of the civil law to protect marriage.

The legislature of each state has the power to control and regulate marriages within its jurisdiction.[35]

Marriage is a social institution or status, in which, because the foundations of the family and the domestic relations rest upon it, the Commonwealth has a deep interest to see that its integrity is not jeopardized.[36]

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out

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"Honor thy father and thy mother," "Thou shalt not commit adultery" and "Thou shalt not covet thy neighbor's wife." For those who accept the Old and the New Testaments, the natural law is further confirmed by Jesus Christ in numerous pronouncements against fornication and adultery and particularly when He said, "What God hath joined together, let no man put asunder." (Positive Christian Law.)

These confirmations of the Old and New Testaments have no weight with those who accept neither or who do not believe in a Supreme Being. On the other hand, they have great weight with the vast American majority who believe in the Creator-creature relationship without which there are no inalienable rights. When one does basic thinking he must eventually arrive at the point where he contemplates The First Cause. His whole view of life is influenced by his conclusions.

"The institution of marriage has a three-fold significance; religiously it is a Sacrament; sociologically it is the corner-stone of the family and therefore the foundation of organized society; legally it is a contract." (Wenzel, J., Shea v. Shea, 46 N. Y. S. 2d 141, 142 (1943), not officially reported.)

[35] 55 C. J. S., Marriage § 1809 (1948). The legislative power of the state is not absolute. It is limited by constitutions and the dictates of natural law. LEBUFFE & HAYES, *op. cit. supra* note 10, Chapter XII.

[36] Coe v. Hill, 201 Mass. 15, 86 N. E. 949, 950 (1909). *See also* French v. McAnarney, 290 Mass. 544, 546, 195 N. E. 714, 715, 98 A. L. R. 530 (1935).

of its fruits spring social relations, and social obligations and duties, with which government is necessarily required to deal.[37]

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.[38]

Marriage, however, is not a matter of commerce, nor is it merely a contract between the parties. Marriage is a basic social institution of the higher type and importance in which society at large has a vital interest.[39]

"Marriage" is a civil contract to which there are three parties —the husband, the wife, and the State—and it is regarded as a status based on public necessity and controlled by law for the benefit of society at large.[40]

While a suit for divorce upon its face is mere controversy between the parties to the record, yet the public occupies the position of a third party, and it is the duty of state, in the conservation of the public morals, to guard the relation.[41]

There are three parties to a marriage contract—the parties marrying and society—so the doctrine of estoppel concerns not only the parties to the marriage, but also the public. The contract cannot be dissolved either by agreement or by collusive proceedings in court.[42]

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[37] *In re* DeLaveaga's Estate, 142 Cal. 158, 170, 75 Pac. 790, 795 (1904), citing Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244 (1878).

[38] Maynard v. Hill, 125 U. S. 190, 211, 31 L. ed. 654 (1887); Bunim v. Bunim, 298 N. Y. 391, 83 N. E. 2d 848 (1949).

[39] Holloway v. Holloway, 130 Ohio St. 214, 198 N. E. 579, 154 L. R. A. 439, 441, 442 (1935). However, in a case involving the recovery of an engagement ring and other gifts, a modern trend to consider marriage from a business viewpoint was indicated. *See* Schultz v. Duitz, 253 Ky. 135, 69 S. W. 2d 27, 92 A. L. R. 600, 603 (1934).

[40] Van Koten v. Van Koten, 323 Ill. 323, 154 N. E. 146, 147, 50 A. L. R. 347 (1926). *See also* Beard v. Beard, 53 Idaho 440, 24 P. 2d 47 (1933).

[41] Leland v. Leland, 319 Ill. 426, 150 N. E. 270, 271 (1926).

[42] Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901-911 (1942). See also DOMESTIC RELATIONS LAW § 51; Fearon v. Treanor, 272 N. Y. 268, 5 N. E. 2d 815, 816, 109 A. L. R. 1229 (1936); *In re* Young's Estate, 319 Ill. App. 527, 49 N. E. 2d 742 (1943); Johnson v. Johnson, 381 Ill. 362, 45 N. E. 2d 625 (1943); *In re* Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263, 265 (1905), citing many cases.

"Marriage" is civil status existing in one man and one woman legally united for life. Although relation includes contract, it constitutes more than contract in creating status in which society in general has an interest.[43]

MARRIAGE FAILURES

Before considering how well or how poorly civil law has dealt with marriage, the present condition of marriage should be briefly reviewed. In surveying the physical condition of the population, one finds the health of individuals varies; it may be good, or fair or poor. So in the marital life some marriages are successful, or just existing, or utter failures.

It is common knowledge that marriages, so important to individuals and to the nation, are failing at an alarming rate. Conservatively, marriages are now failing in the United States at the rate of 700,000 a year. An all-time high record of 610,000 reported divorces was reached in 1946. Even after the decline from that record year, the estimate of 700,000 is still conservative. The divorce rate has constantly and steadily increased since 1867 when national records were first compiled. Except for slight "depressions" and post-war "bulges," the number of divorces in each five years has exceeded the number for the preceding five years and the momentum of increase has become fantastic. In 1867, 9,937 divorces were reported. In 1901 the total was 60,984. The 100,000 mark was passed in 1914; the 200,000 mark was first passed in 1928; the 300,000 mark was reached in 1942. 400,000 was exceeded in 1944. The 500,000 mark was passed in 1945, and the record of over 600,000 was made in 1946. In 1947 the number exceeded 500,000.

In twenty-five years (1923 to 1947) 6,616,724 divorces were granted; in five years (1943-1947) 2,325,000 marriages were dissolved by court decree. These figures include only the divorces reported to Washington by state or local officials. They are not complete. The national statistics include only matrimonial failures that have adjudicated end-

[43] Evitt v. Evitt, 160 Ga. 497, 128 S. E. 661, 663 (1925).

ings. It is true that for most states separations and annulments are not included. A more conservative estimate of our national family bankruptcy might be in excess of 750,000 marriages annually, or an average of one matrimonial wreck for every two current marriages. About one out of every three terminate in the divorce court.[44]

No other facts portray more graphically the increasingly serious problems of marriage. There are millions of successful marriages and there will be more but the shocking growth of marriage failures shows that the United States of America, the greatest country in the world, has, to say the least, started, and even advanced, along the road of national disintegration.[45]

CAUSES OF MARRIAGE FAILURE

The next logical step in our thinking should be a consideration of the causes of marriage failures. Little research is required to find that the causes are numerous and varied and do not lend themselves to exact classification. Some are primary, some are secondary. Some are serious, some are trivial. One cause may weaken a marriage and another may break it. These causes may be divided broadly into two classes:

> First: Circumstances, difficulties and influences not made directly by the parties, but which they fail to surmount. Second: Defects or faults in one or both of the parties.

Under the first might be listed:

(a) The industrial revolution of the last 150 years, the

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[44] The figures used herein, others and some very helpful analyses of them may be found in Marriage and Divorce Statistics prepared by the National Office of Vital Statistics, Public Health Service, Federal Security Agency, Washington, D. C.

[45] FAMILY AND CIVILIZATION, CARLE C. ZIMMERMAN, Professor of Sociology, Harvard University, Harper & Brothers, New York, 1947, Analytical and Predictive Conclusions, pp. 798-801.

Reference to various works herein does not necessarily indicate approval of the entire content. However, the authors are recognized as earnest scholars whose careful research, analyses and predictions merit the consideration of those who would attempt to remedy an admittedly grave social problem. They also indicate the inadequacy of superficial remedies.

development of the machine age and the factory; the growth of crowded cities and their economic and sociological impact upon the family. In 1790 the United States were 94.9% rural and 5.1% urban; in 1940, 43.5% rural and 56.5% urban.[46]

(b) The ideological revolution, the growth of religious indifference and the rise of secularism, a philosophy of life which ignores or denies the existence of the higher law.

(c) The assumption by civil authority of complete power over marriage, laws legalizing divorce and remarriage, easy laws and lax administration.

(d) Exploitation, misrepresentation and debasement of marriage in print, on the stage, in the movies and on the radio.

(e) World Wars.

Under the second general classification may be listed:

(a) Ignorance or denial of the true purposes and essentials of marriage, resulting in a distorted psychological approach.

(b) Selfishness and exaggerated individualism; mothers employed outside the home; inordinate craving for pleasure.

(c) Insufficient or improper marriage preparation and hasty marriages. Couples acquainted less than six months have a 22% chance of a good adjustment, whereas couples acquainted five or more years have a 53% chance of a good adjustment. Wives who marry under the age of 18 years and men who marry

[46] Very convincing statistics and charts may be found in a fine high school text-book, YOUR MARRIAGE AND FAMILY LIVING, PAUL H. LANDIS, Dean of the Graduate School, State College of Washington, McGraw Hill Book Company, New York, 1946. Much of the data is taken by Dean Landis from BURGESS & COTTRELL, PREDICTING SUCCESS OR FAILURE IN MARRIAGE, Prentice-Hall, Inc., New York, 1939.

under the age of 21 years have the least chance of a good adjustment.[47]

(d) Minor mental maladjustments. Many family disorganizations may be traced to personality disorders and many such disorders may be traced to marital maladjustment.

(e) Lust and infidelity.[48]

(f) Unnatural practices such as birth prevention and abortion of which the almost constantly declining birth rate is a sad reflection. Couples who have children but do not desire them have a 35% chance of good or fair adjustment, whereas couples who have children and desire them have an 80% chance of fair adjustment. Where there are no children 70% of the marriages fail. Where there are children only 8% of the marriages fail.[49]

It is not the purpose of this paper to analyze all of the causes of unsuccessful marriage.[50] Those enumerated indicate that the solution of marriage problems must be found in religion, philosophy, psychology, sociology and economics, rather than in civil law, but no one field holds a complete antidote for marriage failures. Some of these causes, how-

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[47] *Ibid.*

[48] This is basic. It was touched upon in a symposium conducted by The Reader's Digest in June, 1948. Parents, clergymen, doctors, editors, psychologists and authorities in many fields had made inquiries on love of man and woman, spiritual ideals of mating, fidelity and chastity, with particular reference to recent "scientific" surveys. These inquiries were submitted to a body of competent, scientific and intellectual leaders under the general question, "Must we change our sex standards?" The answers from those leaders were ten to one to the general effect that our conventions and moralities, which we have always held to be simple decency, are not outmoded by the findings of modern science or by the advocates of free love. The Reader's Digest, June, 1948, pp. 1 to 6, and September, 1948, pp. 129 to 132. The writer is convinced that such proportion of ten to one represents the sentiment and the attitude of the American people. However, as in other undesirable movements, the minority is active and the majority largely indifferent to the damage which the minority is doing to society.

[49] See note 46 *supra*.

[50] An analysis of these causes may be found in AN INTRODUCTORY STUDY OF THE FAMILY, EDGAR SCHMIEDELER, O.S.B., PH.D., D. Appleton-Century Company, Inc., New York, 1947, and the works of Carle C. Zimmerman and Pitirim A. Sorokin, Professors of Sociology, Harvard University, published by Harper & Brothers, New York.

ever, will be pertinent to a consideration of the relation of civil authority and civil law to marriage and the present state of that relationship.

It should be noted, however, that the most effective enemy of marriage is ignorance of its nature, its purposes, its essentials and of the contribution which both husband and wife must make to insure a happy and successful marriage. This ignorance has been fostered by "sexologists" and philosophers, who may have compiled statistics but have not acquired wisdom, and novelists and entertainers, who have dethroned love and enthroned sex. True romance has been perverted by them into "Romantic Fallacy." "Groves and Moore describe romantic love as the 'Romantic Fallacy' since it results in ideals which are 'certain to be frustrated in actual experience.' They define romantic love as 'the idea prevalent in America that marriage is a matter of rapturous intimacy between two young persons and the insistence that courtship and marriage be conducted on an emotional level above the highest reaches of most persons.' " [51]

"Hollywood" marriages and "Hollywood" divorces typify the false values presented to millions of young men and women. Ignorant of the true romance of marriage, innocent admirers easily succumb. Deep and beautiful love can be romantic without being sexually erotic.

It is not here suggested that knowledge of the basic laws of marriage alone is a cure-all. As many people steal although they know it is wrong, so many couples in courtship anticipate and spouses cheat although they know it is wrong. Almost hopeless, however, are the people whose lower nature is in control through ignorance or whose higher and nobler nature has atrophied. They are unhappy but do not know the reason. Nature rebels against a violation of its laws.

MARRIAGE LAWS AS FACTORS IN MARRIAGE FAILURES

Before discussing failures due to marriage laws, it should be stated that through our government and civil law,

[51] INTRODUCTORY SOCIOLOGY, RAYMOND W. MURRAY, C.S.C., Professor of Sociology, University of Notre Dame, F. S. Crofts & Company, 1946, p. 810, quoting ERNEST R. GROVES AND HARRY E. MOORE, AN INTRODUCTION TO SOCIOLOGY, Longmans, Green and Company, 1940, pp. 284-285.

local, state and federal, we have done much to counteract some of the causes of marriage failure. Some excellent statutes have been enacted and billions of dollars have been spent to improve working and living conditions (roads, streets, water supply, sanitation, travel and communication), to provide education and to improve health, comfort and social security. Probably no other people have done so much. On the other hand, it should be remembered that no other people have profited more materially from industrial and scientific progress and no other people are more indebted to those among them who have made this progress possible. Their homes and families should be the beneficiaries and not the victims of progress. It may well be said that civil authority in recent years has endeavored to promote economic freedom without which political freedom is at best a very limited blessing.

Paradoxically, however, civil authority has failed miserably in its obligation to preserve the family through marriage laws. In spite of the social importance of marriage to our nation and the unqualified recognition of the ends of marriage and the necessity for unity and permanence, civil authority's greatest "contribution" to the peace and prosperity of the family has been easy divorce legislation and its lax administration which have actually frustrated the ends of marriage, legalized successive polygamy and produced serious marriage instability.

While the present shocking impact of easy divorce laws and lax administration of strict laws gathered its momentum only in this twentieth century, divorce and easy marriage laws are actually the development of four hundred years. This development may be traced from the scourge of unaided private judgment of individuals initiated four centuries ago. It may be followed through the rejection of religion, of objective truth, or objective morality, of the natural law, or reason. It may be observed in the acceptance of unrestrained individualism which, in turn, has opened the door for the counteracting materialistic totalitarian philosophy of Hegel and Karl Marx, the father of Communism. Of course, it is not contended that everyone who believes in divorce necessarily subscribes to or accepts Communism. However, the

identical thought from which Communism was born in Europe is alive in this country today and has reached that point in its development where it contends that there is no law above the civil, man-made law, and that the only purpose of civil law should be to afford the individual the greatest measure of what he individually believes to be present material or sexual pleasure even to the exclusion of the general welfare and the common good. Clear concepts of moral principles governing marriage have been discarded when they interfere with the freedom or the desires of the individual. The attitude toward marriage and marriage laws is fast reaching the ultimate conclusion of so-called liberalism and private judgment, which is that marriage is not what religion, philosophy, sociology or law say marriage is, but that it is merely a private affair, a private contract and that all restraints should be abolished. The legal aspect is succinctly summarized by Professor Zimmerman, at page 7 in "Family and Civilization," as follows:

A fourth experiment in the private contractual conception of the family is being carried on today, chiefly in America. Here it is more or less understood by all concerned that unless one party in the marriage disagrees, or appears before the judge and fights the case, all the old legal family safeguards are discarded. It used to be understood that the public would refuse a divorce to a married couple if one of them had condoned the act (permitted conjugal relations after the act was known to be committed), recriminated the act (done the same thing or similarly violated the marriage bond), or colluded the act (agreed to permit the violation in order to make a divorce possible). Those safeguards have now disappeared and the public has left the family restrictions largely to the enforcement of judges far away from the actual jurisdiction of the couple. Unless the parties themselves bring the evidence into court, a judge in Arkansas, Nevada, or several other states grants divorces almost automatically to persons who may reside as far away as Maine, Alaska, or South Carolina. The private contractual marriage and family have become established in the United States, although winked at by public opinion and the law. With from $25 to $50 the partner's consent, or his inability or unwillingness to make a public scandal, and particularly in the absence of children, anyone can get a divorce at will in America now, after a few weeks' temporary residence under a false jurisdiction. Of course, if the lawyers learn

that the client can afford to pay more, the divorce will be more expensive.[52]

Except for the size of the initial attorney's fees, it is common knowledge that the same attitude exists and the same results are obtained in New York State every month between thousands of residents of the state, without the inconvenience of travel, in divorce cases, and also in the "more respectable" but equally reprehensible procedure of fraudulent or lax annulments.[53] Until the recent exposé,[54] which reduced the quantity of the scandal at least temporarily, "every month one thousand New Yorkers held up their hands in divorce courts and swore to ugly falsehoods. Most of the cases were based on phony triangles." [55] Ninety per cent. were undefended. "So cut and dried has the tragic business of divorce become that the County Clerk's office even supplies printed cards to lawyers, informing them as to what questions must be put and what the answers must be. . . . The dreary hearings rarely last more than fifteen minutes. A quarter of an hour in which to write finis to a marriage that may have endured for a quarter of a century." [56]

Civil law, by its easy matrimonial statutes or by its lax procedure, has made it possible for married couples to have their marriages dissolved for no cause or for any cause, and to remarry at will. Civil law, by its marriage legislation and administration, has betrayed marriage and the family, the foundation of human and civil society.

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[52] FAMILY AND CIVILIZATION, CARLE C. ZIMMERMAN, *op. cit. supra* note 45.

[53] *The Annulment Problem,* Charles S. Desmond, Associate Judge of the Court of Appeals, New York State Bar Association Bulletin, April, 1948, p. 59. "For one with a sufficiently elastic conscience, it is as easy to get an annulment in New York as a divorce anywhere in the United States." Wenzel, J., Taylor v. Taylor, 181 Misc. 306, 47 N. Y. S. 2d 401 (1943).

[54] New York newspapers, December 2, 3, 1948.

[55] Only a few current articles need be cited. *New York's Perjury Mills,* Justice Henry Clay Greenberg, Supreme Court, First Judicial District, The American Magazine, October, 1947; *The Blondes in the Black Silk Pajamas,* Alexander E. Fox, ESQUIRE, April, 1948; *Hidden Love Nest and the Unknown Women,* quoting Justice Morris Eder, World-Telegram, New York, January 16, 1947; *Divorce Muddle,* Fred Rodell, LIFE, September 3, 1945.

[56] Joseph Cohen, Journal American, December 2, 1948.

ATTITUDES OF LAWYERS

What is the attitude of lawyers toward this demoralizing and tragic relationship between legislation and judicial process on the one hand and marriage on the other? There is not one attitude; there are many. More than a majority of lawyers condemn it but few are articulate in their condemnation. Some who are outspoken suggest solutions, doubtful in content or impossible of attainment. Some condemn the abuses but cannot suggest how to improve the situation. On the other hand, a small group engaged or specializing in matrimonial practice oppose any change that will make it more difficult to obtain a divorce or an annulment and they advocate a further "modernization" of the laws. Another few want all restrictions on divorce abolished so that, except for some provisions as to children and property, marriage may be legally reduced to a private affair. The great majority plead for the innocent victim of unfortunate marriage. A few of these attitudes will be briefly discussed.

In a special newspaper article entitled, "Our Archaic Divorce Statutes—National Legislation Urged to Replace Patchwork Laws on Marital Dissolution," [57] Ralph Chapman presents a fine brief survey of the present state of the law but does not consider the basic causes of marriage failure, nor their possible elimination. He represents that attitude which is concerned only with the dissolution of marriage. He refers to the proposal of the National Association of Women Lawyers in which they suggest that, "Setting out grounds of divorce is unnecessary, since the finding of the court should not be that one party has committed a specific act, but that the marriage cannot be preserved with benefit to the parties, considering the situation as a whole." He refers to the hard battle for national legislation and concludes with these words: ". . . 'Ultimately, there should be legal provision for divorce by mutual consent, with proper safeguards to insure that every effort at reconciliation is made, that the final break is permitted only as a last resort.' " Regardless of the precautionary measures that may be pro-

[57] New York Herald Tribune, editorial page, February 18, 1949.

vided, this is an unqualified proposal "for legal provision for divorce by mutual consent." A reputable law review is cited as authority. Actually, the statement is taken from a "Note" by an unidentified law student.[58] There is certainly a lack of thought when the suggestion of a law student is quoted as authority. Surely lawyers, who will not consider causes of marriage failure, are not in a position to suggest good legislation. Any legislation which will not promote the peace and the prosperity of the nation is bad law. Legislation which promotes the breakdown of the home and family is destructive law.

In 1947, the Association of the Bar of the City of New York adopted the proposal of its Committee on Law Reform which reads as follows:

The dissolution of marriage in New York State has become a problem of major importance. There is, however, much misapprehension as to its real meaning and significance, which is calculated to prevent clear thinking and useful action. "When it is asserted," says a well-known sociologist, "that divorce is an evil, that divorce destroys marriages, there is revealed a confusion of thought which beclouds the issue and tends to obscure and distort the facts."

Divorce is an effect, not a cause. It is a symptom, not the disease. It is adultery, cruelty, desertion, failure to provide, drunkenness and incompatibility, etc., that destroy marriages. Divorce does not occur until after the marriage has been completely wrecked.

This being the case, it is not divorce that merits the disapproval and condemnation of those who seek to improve the situation. The real evils are those which destroy marriages. With those evils, we are not here concerned. They present problems of economics, morals, ethics and human relations which must be left to sociology.

Your Committee's purpose is to attempt to remedy some of the evils attendant upon divorce actions themselves. We submit no panacea but we urge a liberalization of the divorce laws under proper legal sanctions. We do so in the hope that we may thus eliminate what has come to be recognized as a scandal, growing out of widespread fraud, perjury, collusion and connivance which now per-

[58] *Annulments for Fraud—New York's Answer to Reno?* 48 COL. L. REV. 900-920 (1948). This note discusses decisions, including those of the writer. Its inaccuracies and unfairness were carefully analyzed and criticized by J. Hutton Hinch, LL.B., Columbia 1923, of the New York Bar, by an unpublished letter to the Review.

vade the dissolution of marriages in this State. We also aim to remove evils arising in actions for annulment on the ground of alleged fraud in the inducement of the marriage. Many such actions are themselves conceived in fraud, being designed to circumvent the requirements of actions for divorce. Finally we aim to remove the evils attendant upon migratory divorces. These entail many legal tangles, involving confusion with respect to property rights and affecting the interest and legitimacy of children.[59]

This represents the mature and studied judgment of an association of distinguished lawyers. It also represents their professional interest in the most vital problem facing our nation—the welfare of the family, the basic unity of society. Some parts of the report shall be briefly analyzed.

The well-known sociologist mentioned in the report is Professor J. P. Lichtenberger and the quotation is taken from his "A Social Interpretation" [1931].[60] The first two paragraphs and the first two sentences of the third paragraph are exactly or substantially what the sociologist said, but the quotation is not complete. Professor Lichtenberger was not realistic even in 1931 and was apparently unfamiliar with some divorce patterns in New York and elsewhere. It is true that divorce is an effect, but divorce is also a cause of marriage failure and easy divorce is one of the chief causes of marriage failure in the United States. When the Professor asserts that a divorce is not effective until after the marriage is wrecked or until after marital relations have already ceased, he apparently overlooks the cases where childbirth is prevented because divorce may be desired; and the cases where the spouses have actually cohabited even the night before the husband left for Reno without warning; and the cases where the lustful eye of the male or the fickle mind of the female was encouraged by the knowledge that a divorce from the present spouse was easily obtainable; and the cases where the thoughtless teen-agers went into

[59] The Association of the Bar of the City of New York, Committee on Law Reform, Report on the Proposal to Amend the Civil Practice Act by Providing for Grounds Additional to Adultery for Absolute Divorce, which also contains the proposed amendment to the Civil Practice Act to permit divorce for cruelty, misconduct, abandonment, non-support, felony conviction and habitual intemperance.

[60] McGraw-Hill Book Company, pp. 16-17.

marriage as a lark or knowing that if it did not work out, they could get a divorce; and the cases of the little quarrel in the early, crucial years of marriage that grew into a bitter encounter because the stubborn or selfish spouse knew he or she did not have to give in since a divorce was always available; and the cases of the spouse with extra-marital escapades, knowing that if he or she were caught, a divorce could be obtained and a "new start" made.

Certainly, in these cases and in many others divorce is at least a contributing cause of marriage failure. It is not true "that divorce never broke up a single marriage." Divorce begets divorce. Its easy availability has broken thousands of homes which could have survived the storms which almost every marriage must encounter.

In his work, at pages 16-17, the Professor states: "Divorce in effect is nothing more than the annulment of the legal bond upon proof that the marriage *de facto* has been dissolved." This may refer to the fact that the parties agreed to have it dissolved. There are, of course, many legitimate cases under existing laws. However, the evidence that is accepted as sufficient in most matrimonial courts can hardly be termed "proof." It is undoubtedly difficult to prove a wife guilty of adultery in a divorce action in New York State which is strenuously contested. On the other hand, in New York State and in most of the other states, when a husband and wife, for trivial reasons, agree to have a divorce or an annulment, there is no difficulty about "proof." It should be repeated that 90% of all divorce and annulment cases in New York are undefended. The barest prima facie evidence is sufficient. Credibility is frequently not a consideration at all.

In another part of the same work, Professor Lichtenberger makes a statement that conflicts with everything hereinbefore quoted as to the nature of marriage. He writes, at page 99, "Furthermore, in the event that specific marriages fail of their purpose and become in fact dissolved, legal divorce is the logical outcome, for the law can by due process sever the bond which it has created." Civil law never created the marriage bond any more than it created the relationship of father and son. A great many other errors could

be indicated in the works of the well-known sociologist upon whom the Association of the Bar of the City of New York relies.

The report of the Bar Association continues:

> The real evils are those which destroy marriages. With those evils we are not here concerned. They present problems of economics, morals, ethics and human relations which must be left to sociology.

Lawyers generally are not concerned with the real causes of marriage failure; nor are they concerned with divorce as a cause of marriage failure; yet they suggest ways to destroy or to complete the destruction of marriage without considering the whole problem or the conditions which give rise to it. Of course, as heretofore stated, marriage difficulties present problems in other fields of knowledge, and lawyers alone cannot hope, and should not attempt, to solve the problems without the aid of experts in those other fields. The reasonable way to solve marriage problems should be to eliminate the causes, and lawyers should cooperate and collaborate to the end that marriage failures may be decreased and not increased.

The substance of the proposal of this association of lawyers, which incidentally has been presented at two or three legislative sessions, may be restated as follows: "To obtain a divorce in New York State, the plaintiff must prove the defendant committed adultery. Many plaintiffs prove that defendants commit adultery by perjurious evidence and the collusion of the parties. Therefore, the law, which makes it necessary to prove adultery, should be abolished." Whether or not divorce should be permitted at all or adultery should be the only ground has not been reconsidered in the light of the growth of divorce. "Again, some plaintiffs do not like the odor of divorce actions, so they institute annulment actions and allege that the plaintiff's consent to the marriage was obtained by fraud. Of course, there was no fraud but the parties and plaintiff's witnesses connive and commit perjury to prove the false complaint. Therefore, the plaintiff should have a divorce for a trivial reason so that he or she will not be required to commit perjury in an annul-

ment action." There are legitimate annulment actions under the existing laws but there is, of course, no thought of strengthening the laws of evidence as to the proof of fraud in annulment actions. It might be asked: Have the states which permit divorce for less serious reasons eliminated perjury, collusion, connivance and disrespect for law and the courts?

By the same logic, the repeal of the penal laws should be sought because some people steal and are punishable for larceny, embezzlement and burglary. There should be no distinction between ill-gotten goods and ill-gotten divorce or annulment. Hardly less shocking than the divorce scandal is the proposed cure. It is almost unbelievable that serious lawyers would approve such a report. They were undoubtedly sincere, but they have not done the kind of thinking so necessary to find the roots of the unhealthy growth. A grass-cutter never removes weeds.

A distinguished jurist and educator, referring to questions of domestic relations, recently said:

> I do not think lawyers are particularly good authorities on that subject. . . . we have as much knowledge and opinion about it as a great many citizens. I do not think we have any particularly expert knowledge. . . . people who study relations of people in groups, who know about the inner and sometimes unexpressed urges which make people to do this, that or the other thing, may know more than we.[61]

THE INNOCENT VICTIM

Some reference should be made to the innocent victim of unfortunate marriage with whom people are naturally sympathetic. It should be observed, however, that the percentage of innocent victims who seek divorce or annulment is comparatively small. In the first place, many such people never seek a judicial determination or are satisfied with a separation. Probably the vast majority of husbands and

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[61] From address of Herbert F. Goodrich, Judge of the United States Circuit Court of Appeals, Third Circuit, and former Dean of the Law School of the University of Pennsylvania, at Judges and Lawyers Annual Meeting of New York State Bar Association, at New York, January 29, 1949.

wives who seek the drastic remedy of divorce are partners in a marriage to the failure of which both parties have contributed. Among them are those who enter marriage hastily, who disregard sound advice and ignore evident danger signs, who build trivial disputes into serious conflicts, who refuse to recognize the primary purposes of marriage and abuse, degrade or frustrate its high privileges. Such people could not cancel ordinary business contracts under such circumstances. They should not be permitted to destroy the status of marriage.

The innocent victim always has the remedy of legal separation which could be implemented so that it would afford all of the relief to the parties that is now possible by divorce, except remarriage. In most states, in a separation action, the court may provide for the support of the wife and child and the custody of the latter. There is no reason why property rights could not be determined in a separation as they are in a divorce.

Reference should be made to remarriage. Civil authority rendered a great disservice to marriage when it made divorce possible, but it did the greatest damage when it legalized remarriage, particularly without distinction between the innocent and the guilty. The waiting period for the latter is frequently overcome by remarriage in an adjoining state. The net result is that the unfaithful, the cruel, the drunkard, and the deserter, all who have degraded marriage and have done much to create the problem, are rewarded with the opportunity to repeat the damage to others and to society, while the innocent victim suffers in loneliness and without adequate support. It is the considered opinion of many people that if the right of remarriage were abolished, the divorce rate would be reduced by 75% in ten years, and divorce for trivial reasons would decline 90%.

Divorce was first introduced into our jurisprudence, allegedly, to help the innocent victim of unfortunate marriage. There was no divorce under the common law. The result has been the tragic story told by the statistics of marriage failures. Divorce itself has been a failure. It is not necessary to review in detail the history of broken homes,

broken hearts, neglected children, juvenile delinquency, shattered dreams of marital happiness, the loss of population, the disrespect for law and the degradation of our courts, for all of which divorce and remarriage are at least substantially responsible. If the evil of divorce can be eliminated or substantially reduced by abrogating the privilege of remarriage, the innocent victim of unfortunate marriage should be required to make the sacrifice. He and she may reasonably be expected to suffer for the common good and for the general welfare of society, which depends upon stable marriage. Temporary increased promiscuity would decline as marriage became more stable. Of course, to the innocent victim, who may have only a subjective view, this suggestion is not palatable.

Those of us who have lived through two World Wars have witnessed the sacrifice American manhood and American womanhood have made for our nation, for all of us. They prevented the conquest of the United States. The innocent victims of unfortunate marriage may reasonably be required to make a sacrifice to help to prevent the decline if not the disintegration of these United States. The imminence of that disaster is well described by Professor Zimmerman.[62]

Manifestly, we should be able to discover the errors of our ways as quickly as has the Union of Soviet Socialist Republics. More than ten years ago, that nation, founded upon a materialistic philosophy, realized the mistake of easy divorce and that marriage and the family had to be sustained and preserved for the welfare of the nation.[63] As between the general welfare and the expected, but frequently doubtful, happiness of remarriage or several remarriages for an innocent victim, the general welfare should prevail.

CONCLUSION

As stated at the outset, the writer does not pretend to know all of the answers. However, it is not difficult to sug-

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[62] ZIMMERMAN, *op. cit. supra* note 45 at 798.

[63] THE FAMILY OF TOMORROW, CARLE C. ZIMMERMAN, Harper & Bros., New York 1949, pp. 3-5.

gest a few reasons why the civil authority, through civil law, should give to the institution of marriage more favorable treatment. The State of New York and the City of New York expend the following sums annually: for education, $422,000,000; for general health, $166,000,000; for mental hygiene, $100,000,000, principally to maintain 100,000 patients; for correction, $25,000,000 to maintain 28,000 prisoners. The Division of Fish and Game of the State Conservation Department annually expends $3,000,000. If more education was provided in the way of practical, common-sense, conservative instruction on marriage and family living, if the conservation of family life received at least the care accorded to fish and game, to the end that family failures could be substantially prevented, the populations of our institutions for health, mental hygiene and correction could be considerably reduced. There would be a net budget saving.

A state program might include the following:

A survey by competent authority to ascertain the principal causes of so many marriage failures within its boundaries and the preparation of a program of prevention and cure. A sound plan would receive the wholehearted support of the majority of our people. An educational program should be provided, but not indiscriminate sex education. The State of New York should be a party to every matrimonial action. This has been used effectively in other states. The courts should not entertain matrimonial cases until the parties have submitted their problems to qualified persons—doctors, sociologists, psychologists and psychiatrists, without the aid of divorce lawyers. No matrimonial action should be started until a panel of such experts would certify the need for it. Appropriate provision could be made for temporary support of wife and children.

The abolition of divorce would not receive a favorable hearing at this time. It is too strongly entrenched and people do not fully realize the seemingly obvious evils of easy divorce and easy annulment. The proponents of easy divorce are articulate and aggressive but the defenders of marriage and the home are inactive. Possibly, Professor Zimmerman

is getting close to the solution when he calls for the organization of "The American Family Institute" to recreate family values.[64] Lawyers are probably more civic-minded and more generous with their time and effort than any other group. They are particularly qualified to help to organize such a movement on conservative lines and to enroll the support of experts and all thoughtful Americans. Such an organization could make studies and suggest to law-makers legislation for construction and progress and the elimination of destruction and chaos, all to the end that the nation may preserve its most valuable asset, the 37,000,000 American homes.

MICHAEL F. WALSH.

[64] The American Family Institute "will attempt to do for the family what the Farm Bureau Federation and the Farmers' Union do for agriculture, what the American Federation of Labor and the CIO do for labor and The American Chamber of Commerce and the American Manufacturers' Association do for business. It will co-ordinate, study and promote the interests of the family. As a matter of fact, much that it does will consist in getting these other six organizations, for farming, for labor, and for business, to come together in agreement and mutual facilitation of certain family matters common to the interests of the whole culture. How else can our family system get a hearing where it must have such to survive?"

THE FAMILY OF TOMORROW, CARLE C. ZIMMERMAN, Harper & Brothers, Inc., 1949, pp. 243-245.