COMMENTS

NO-FAULT DIVORCE: MODERNIZATION LONG OVERDUE FOR NEW JERSEY

INTRODUCTION

Divorce[1] American style has become an emotional tragedy and financial nightmare. Rather than fostering solutions to the crucial problems of family disputes, it has proven itself to be a destructive mechanism. Triggered by antiquated laws and ruled by anachronistic practices, it is a deeply rooted tradition that the partners be punished for ending the marriage.[2] Because of this American reluctance to permit divorce, many a calm marital dissolution has turned into a vicious courtroom battle.

Until recent years, there had been a hesitancy on the part of state legislatures to touch the substantive law of divorce.[3] Instead, they had remained content to supplement the adversary process and only slightly alter the procedure.[4] In fact, it has been stated that the courts, not the legislature, have the opportunity and duty to "render affirmative and constructive assistance to families in difficulty."[5] Most states which follow the Anglo-American jurisprudential system have recognized the need for wholesale reform of outdated systems, and have thus prompted the inauguration of countless commission studies on the divorce problems which beset our society. This overnight demand for fundamental changes has had significant results. Among the most noteworthy have been the passage of divorce legislation in South Carolina in 1949, where previously divorce was not permitted at all;[6]

1 Unless otherwise stated, the term "divorce" as applied to this comment shall mean divorce *a vinculo matrimonii* (absolute divorce from the bonds of matrimony) as opposed to a divorce *a mensa et thoro* (from bed and board).

2 TIME, Jan. 12, 1970, at 8.

3 Legislatures have recognized a potential conflict in public policy and have done only the necessary minimum in the hope of appeasing both sides. One theory—that of fault elimination—views the public's interest as being served by saving only those marriages which are still functioning relationships. A contrasting attitude strives to preserve the family unit whenever possible. Viewing divorce as destructive, proponents of this latter theory endeavor to keep the marriage together without regard to why it had failed. *See* Tenny, *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 38-39 (1967).

4 Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 184-85 (1968).

5 Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353 (1966).

6 S.C. CODE ANN. § 20-101 (1962).

the adoption of a revised statute in New York in 1966, liberalizing the law for the first time since 1787 and adding five new grounds to the previously exclusive one of adultery;[7] and the radical departure of the new California law which abolished all fault grounds.[8] The Commission on Uniform State Laws decided that now is the time for a comprehensive overhauling of our national laws on divorce to set the foundation for a uniform system throughout the country.[9] Change in divorce laws is also imminent in other nations.[10]

Progress has been made, but it has been a mere stitch in the cloak of justice. To meet the needs of today, judges and lawyers have wrought changes themselves. Circumventing the statutes whenever possible by making their own interpretations rule through case law, the judiciary has attempted to accomplish that which the legislature has been hesitant to tackle. In light of this, it is reasonable to ask why change is needed if the current law is responsive to the marital needs of our times. The answer, of course, is simple. The function of the judiciary is to rule, not to promulgate. Subject to each judge's interpretation of the needs of the parties before him, and the laws of the individual states, the law's responsiveness becomes uneven and purely arbitrary. While no problems arise if the divorce is uncontested, a number of barriers loom high before a complainant in a suit in which there is some material disagreement as to grounds, defenses, or settlements, and a few jurisdictions make it almost impossible to obtain a divorce decree even if the marriage has irreparably broken down.[11]

As a result of this synthetic flexibility, the incidence of divorce has little to do with divorce statutes.[12] While New Jersey has one of the most restrictive divorce laws in the country, there is no proof that New Jersey residents enter into fewer marital dissolutions than citizens of other states.[13] Denied the opportunity to legally remedy the marital ills

7 N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1969).

8 CAL. CIV. CODE §§ 4500 *et seq.* (West 1970).

9 ABA NEWS, Feb. 15, 1967, at 1.

10 GROUP APPOINTED BY ARCHBISHOP OF CANTERBURY: A DIVORCE LAW FOR CONTEMPORARY SOCIETY (1966) (Eng.) [hereinafter cited as PUTTING ASUNDER]; Divorce Act, CAN. REV. STAT. c. 24 (1968).

11 *See* Foster, *Divorce Law Reform: The Choices for the States*, 42 STATE GOV'T 112, 113 (Spring 1969).

12 *See* STATE OF NEW JERSEY DIVORCE LAW STUDY COMMISSION, FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 9 (1970) [hereinafter cited as the REPORT].

13 The number of matrimonial complaints filed in the court year of 1968-69 continued to rise for the eighth consecutive year, with 12,185 being filed. The number of divorce judgments granted during the year jumped from 7,641 to 8,831. *See* 93 N.J.L.J. 510 (July 9, 1970).

which beset them, many residents seek other methods, including migratory divorce and illicit cohabitation.[14]

This comment does not attempt to be a panacea to all our ills. It proposes instead merely to awaken the public to an inexorable situation, so that change may be effectuated. New Jersey is in the process of drafting new divorce legislation. While the new proposals are a major step in the right direction, the hope here is to try to offer some guides for further improvement. We recognize that the toll on human suffering and accompanying waste of knowledge and resources, which now exists, cannot continue. While it is unrealistic to assume that any new proposals will completely "eliminate the searing hurt or prevent the abrasion of divorce," they can at least "seek not to exacerbate the harm."[15] We cannot afford to remain in the dichotomy of appreciating the need of divorce reform on the one hand, and yet continue to maintain our totally destructive procedures on the other.

THE FAULT APPROACH—AN HISTORICAL PERSPECTIVE

Our American system of jurisprudence was derived from the English common law, and while this basis set a foundation upon which many of our laws in other areas could be promulgated, "it left considerable gaps in the area of domestic relations, particularly with regard to divorce."[16]

Theoretically, England experienced a divorceless society from the seventeenth century until 1857.[17] There was no real divorce problem because there were many other avenues of marital escape. For the extremely wealthy, their method of marital dissolution lay primarily in the hands of the ecclesiastical courts.[18] These courts had jurisdiction over marriages which were void *ab initio*, and could also grant a divorce *a mensa et thoro* by reason of adultery or cruelty,[19] but they had no power to pronounce a divorce *a vinculo* if there had been a valid marriage.[20] In 1857, Parliament transferred

14 REPORT, *supra* note 12, at 9.

15 Gough, *Divorce Without Squalor*, THE NATION, Jan. 12, 1970, at 17, 18.

16 Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 35 (1966).

17 Foster, *Divorce: The Public Concern and the Private Interest*, 7 W. ONT. L. REV. 18, 20 (1968).

18 *Id.* at 20.

19 Davies, *Matrimonial Relief in English Law*, in A CENTURY OF FAMILY LAW 311, 315 (Graveson and Crane ed. 1957).

20 2 W. HOLDSWORTH, THE ECCLESIASTICAL COURTS AND THEIR JURISDICTION, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 299 (1908).

the ecclesiastical courts' divorce jurisdiction to the statutorily-created divorce courts.[21]

Since there was no place in emerging America's judiciary system for ecclesiastical courts, "there was, practically speaking, no established mechanism for obtaining a divorce."[22] Under the tenth amendment,[23] the Constitution reserved matters of marriage to the individual states, each state being left with the problem of how to cope with the question of divorce. One of the first solutions attempted was the enactment of special legislation divorces.[24] Gradually, however, these special acts became fraught with inequities and abuse[25] and hence were regarded as an unsatisfactory medium for dissolving marriage.[26] Finally, most states outlawed such practices by constitutionally prohibiting legislative divorces.[27] The result of this was to place general divorce jurisdiction in the courts.

As greater pressure was brought to bear on the judiciary, new statutes were passed to remedy the situation. Generally, these statutes allowed divorce to be granted only on proof of one of the faults specifically enumerated therein, and solely at the instance of the innocent spouse. While the ground most frequently used was adultery, numerous others were soon added,[28] among them cruelty, incarceration, and desertion.[29]

The grounds for divorce in New Jersey have remained virtually unchanged since 1820, when an act[30] provided that an absolute di-

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21 Matrimonial Causes Act, 20 & 21 Vict., c. 85 (1857).

22 Wadlington, *supra* note 16, at 35, 36.

23 U.S. CONST. amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

24 For an example of a typical legislative divorce, *see* N. BLAKE, THE ROAD TO RENO 48-63 (1962).

25 1 W. NELSON, DIVORCE AND ANNULMENT 1-5 (2d ed. 1945).

26 President Andrew Jackson found it necessary to obtain a divorce from his putative wife and then remarry her after it was discovered that her first husband had failed to procure a legislative divorce as she had believed. M. JAMES, THE LIFE OF ANDREW JACKSON 75-77 (1938).

27 For a summary of the various state constitutional provisions prohibiting special divorce legislation, *see* II C. VERNIER, AMERICAN FAMILY LAWS 14-18 (1932).

28 The number of grounds for divorce had reached such proportions at the turn of the century that James (later Lord) Bryce was moved to comment on the sad state of affairs. The resulting divorce law created by our state legislatures, he felt, was "the largest and strangest, and perhaps the saddest, body of legislative experiments in the sphere of family law which free, self-governing Communities have ever tried." 2 J. BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 830 (1901).

29 Wadlington, *supra* note 16, at 36-37.

30 Law of February 16, 1820, pamphlet 43, § 4, N.J. Laws 667 (1821). Section 12 of this act repealed a previous Divorce Act of 1794, as well as a supplement passed in 1795, and the Divorce Act of 1818.

vorce might be decreed for adultery and for willful, continued, and obstinate desertion for the term of five years (reduced from the earlier seven year requirement). In 1857, the statutory period for desertion was shortened to three years,[31] and reduced again in 1902 to the present two years.[32]

In the 176 years of statutory enforcement of these grounds of divorce, New Jersey has made only one addition to the list. With passage of the Blackwell Act of 1923,[33] New Jersey abandoned its strict adherence to the English ecclesiastical rule[34] and permitted extreme cruelty as a ground for absolute dissolution of marriage. "Prior to that Act, extreme cruelty was utilized as a back door entrance to the divorce court,"[35] and could only be achieved by establishing a basis for constructive desertion. The Blackwell Act extended the previous doctrine and finally made it applicable to both sexes.

REASONS FOR THE PROPOSED CHANGE

Sociological

As our traditions change, and our stalwart institutions are exposed and degraded, we evidence a wide gap between statutory and case law. It becomes obvious that our legal system has not reflected the tremendous changes that the twentieth century has seen. The concept of marriage has undergone drastic alterations[36] and the family institution is not what it was when our original system of divorce law was created.[37]

Prior to the Civil War, our national economy rested on small units of rural families, the government needing to conserve the stability of the family unit to protect the country.[38] For example, in *Maynard v. Hill*,[39] the Court stated that "[Marriage] is an institution,

31 Law of March 20, 1857, ch. 143, § 1, N.J. Laws 399 (1857).

32 Law of April 3, 1902, ch. 157, § 2, N.J. Laws 502 (1902). *See also* Levenson, *Imprisonment as a Ground for Divorce—"Statutory Desertion," Judicial Improvisation, and a Call for Reform*, 23 RUTGERS L. REV. 389, 402 (1969).

33 Law of March 23, 1923, ch. 187, § 1, N.J. Laws 494 (1923).

34 While under the classical canon law, extreme cruelty was not a ground for absolute divorce, the English ecclesiastical courts did eventually permit it as a ground for divorce *a mensa et thoro*.
REPORT, *supra* note 12, at 30.

35 *Id.* at 31.

36 Bodenheimer, *supra* note 4, at 189.

37 *See* Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633-35 (1956).

38 *See* Rose, *Non-Fault Divorce in Ohio*, 31 OHIO S.L.J. 52 (1970).

39 125 U.S. 190 (1887). In this case, plaintiffs' parents married in Vermont in 1828 and moved to Ohio in 1850. In the same year, the plaintiffs' father left to go West,

in the maintenance of which in its purity the public is deeply interested . . . ."[40] Since then, our life styles have changed. People have become more urbanized. Increased education means a more intellectually stimulating atmosphere, and increased mobility makes relationships more impersonal. Faster transportation and communication enable members of a family to live apart and still visit and converse. The improvement in trade facilities allows families to purchase what they need, no longer having to remain together to provide for their own needs. Most important, the ability to move away often keeps the divorce out of the public's view and allows the parties to shield themselves from the adverse public opinion which generally surrounds divorce.[41]

A theory once prevailed that if a marriage endured a certain length of time, the odds were great that it would not end in divorce. Today, the "twenty year itch" is a growing problem.[42] Our society has become more child-oriented, many parents' lives completely revolving around their children. As the child grows and departs from the home, guilt is relieved, and there may be no reason to keep up the façade of a happy marriage. A great void may ensue, many parents finding it impossible to readjust to each other or rekindle the feelings which once existed. The new found freedom—and divorce—is viewed as a way out of a frustrating trap.

The new liberation is also experienced in the field of women's rights. As the status of women increases, they no longer need or desire the protection of an indissoluble marriage.[43] Women are demanding "legal recognition of changed attitudes towards personal freedom and independence."[44] In his latest book, Dr. Bernard Steinzor points out that divorce has become an expression of this freedom.[45] In spite of this, however, the majority of women still confine themselves to seeking their personal freedom within the framework of marriage.[46]

promising to return or send for the family. Instead he settled upon land in Oregon, which he claimed as a married man and obtained a legislative divorce from his wife who had no knowledge of it. The father then remarried and when he died intestate, the plaintiffs and his second wife both claimed a right to the land. While the court did not allow plaintiffs the land for other reasons, it upheld the validity of the Act even though the wife had no knowledge of the Act and did not appear.

40 *Id.* at 211.

41 Rose, *supra* note 38, at 53.

42 NEWSWEEK, Feb. 24, 1969, at 81-82.

43 Rose, *supra* note 38, at 53.

44 Foster, *supra* note 11, at 113. The author's referral to both sexes leads to an assumption that he includes women.

45 B. STEINZOR, WHEN PARENTS DIVORCE (1969).

46 Otto, *Has Monogamy Failed*, SATURDAY REVIEW, April 25, 1970, at 23. The author generally refers to the "average citizen" rather than women in specific.

Faced with these problems of change, the American family of the 1970's is reappraising its structure and seeking new options on life. There is an abandonment taking place of the monogamous ideal of sexual fidelity.[47] Our society permits more than one husband or wife, but not at the same time. Perhaps this transformation of monogamy into "serial polygamy" explains the rising rate of divorce and remarriage. The emergence of "serial polygamy" has produced experimentation with other alternative structures.[48] Extra-marital involvements are becoming more flagrant, and the number of illegitimate children through premarital affairs continues to rise. "Free-love" is attracting more and more of those people on the radical fringe, and hippie groups have established community living, with some communes even having their own journals.[49]

This liberalized public feeling concerning change in the divorce laws is reflected by the softening approach taken by some of our courts. The Supreme Court of California, consistently a forerunner in expanding modern judicial thought, has 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."[50] This is a great jump from the original philosophy of *Maynard v. Hill*.[51]

Religious

Traditionally, our divorce legislation has been based on ecclesiastical foundations. The religious courts, from which it evolved, refused to debase the solemnity of marriage and merely granted spouses permission to live apart from each other. Viewing marriage as a penance, exit was granted only to the innocent. When both spouses were guilty of marital transgressions, they were required to "live together and find sources of mutual forgiveness in the humiliation of mutual guilt."[52]

Today there is a divergence of opinion on the subject of divorce. The Catholic Church still refuses to abandon its strict position against

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47 Brothers, *Marriage is a Limitation but also a Liberation*, Sunday Star Ledger (Newark), May 31, 1970, § 1, at 50, col. 6.

48 Otto, *supra* note 46.

49 One such publication, MODERN UTOPIAN, issued by the Alternatives Foundation of Berkeley, California, is now in its fourth year of publication.

50 Hill v. Hill, 23 Cal. 2d 82, 93, 142 P.2d 417, 422 (1943).

51 125 U.S. 190 (1888).

52 Gough, *supra* note 15, at 18.

the evils of divorce.[53] The American majority continues to complain, but still accepts the harsh fate the legal system has carved out for it. Extremists claim an absolute right to divorce.[54]

The effect, however, of the unprecedented changes our society has undergone has had its toll on the traditionally conservative view of our religious institutions. Organized religion no longer stands as a bar to reformation of our divorce system.[55] Protestant and Jewish leaders have long favored a program of realistic divorce reform. No-fault divorce law was recently approved by a group appointed by the Archbishop of Canterbury and headed by Bishop Mortimer.[56] Even the conservative Catholic bishops are relenting and no longer show active opposition to a modernization of the law. During the recent Canadian attempts to liberalize its divorce laws, 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.[57]

The primary reason for this changing attitude in clergical tolerance to divorce reform is a recognition that present divorce laws are based on sixteenth century principles, while our social institutions are geared toward twentieth century existence.[58] Religious leaders have become conscious of the problems which confront the followers of their faiths, and they are aware that if religion does not adapt to reflect the needs of their members, the congregations will break away and seek solace elsewhere. Their congregations are not content to wait for the peace and harmony promised in the Hereafter; it must be provided them in the world of the living.

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53 See P. RYAN & D. GRANFIELD, DOMESTIC RELATIONS, CIVIL AND CANON LAW 317-25, 569-73 (1963).

54 Their view is that marriage is really a contract, entered into by two parties, aware of all the responsibilities and consequences which go along with it. Thus, each party should have the right to break it if he is willing to suffer the penalties for doing so. But can alimony and property settlements be compared to liquidated contractual damages?

55 Foster, *supra* note 11, at 112.

56 PUTTING ASUNDER, *supra* note 10.

57 CANADIAN CATHOLIC CONFERENCE, REPORT ON DIVORCE REFORM (1966).

58 Foster, *supra* note 11, at 113.

Legislative

Corresponding legislative adjustments have consistently failed to harmonize with the modern concepts of matrimonial justice favored by the overwhelming majority of our population.[59] The state legislatures have long labored under mistaken impressions. Creating absurd measures and procedures to be followed, they have tried to compel families to remain together, in spirit as well as in substance, long after there has ceased to be a viable family relationship. They refuse to recognize that, when the spark of life in the marriage finally wanes, it should be buried efficiently and peacefully.[60] This pronounced imbalance between legislative goals and social desires has in turn led to many undesirable acts and inimical conduct in order to achieve the end result of divorce.

Perhaps the most damaging aspect occasioned by the continuing use of such an obsolete divorce system is the inevitable disrespect for law such a system engenders.[61] In the process, both the legal profession and the total judicial system is debased. Even the most aggressive supporters of the present fault-oriented system recognize this shameful situation.[62] Antiquated laws and archaic principles create a hypocritical game where parties who desperately seek a way out, but who fall short of the statutory requisites, find themselve forced to procure divorces on sham grounds and residences by creating perjured testimony.[63] These deceptive subterfuge practices which have created fraud and collusion[64] and fostered disrespect for the administration of justice,[65] have evolved from judicial recognition and acceptance that the "marital-offenses approach" sets an unworkable and unjudicious standard.[66] Only by abandoning such legal fictions

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59 Studies show that 75 to 80% of the population favors simple proceedings to dissolve defunct marriages. *See* REPORT, *supra* note 12, at 98-99.

60 Comment, *A Comparative Approach: The Divergent Paths of English and American Divorce Reform—To Take the Step from Fault to Breakdown?*, 22 U. FLA. L. REV. 101, 126 (1969).

61 Foster, *supra* note 11, at 114.

62 Wadlington, *supra* note 16, at 81.

63 Goldstein & Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAM. L.Q. 75, 80 (1969).

64 Foster, *supra* note 11, at 114.

65 Foster, *supra* note 17, at 25.

66 Goldstein & Gitter, *supra* note 63, at 80. Although more punitive than therapeutic, our divorce laws still provide for separation where a complete breakdown is proven. The problem is that the legislature presumes that such breakdown can occur only upon the occurrence of certain pre-determined events. They fail to take into account every other

will we insure each individual his fundamental right to be free from governmental interference, and leave the decision to separate where it belongs: in the hands of the "adult parties who must live with it."[67]

It must be admitted that to transfer the emphasis from a fault to a breakdown approach will take major persuasion. Despite recent gains in the related fields previously discussed, strong emotional arguments still present formidable obstacles to gathering legislative support.[68] The burden thus falls upon both the lay population and the legal profession to convince the lawmakers that the best interests of society override any counteraction to the proposals.

INHERENT WEAKNESSES IN THE PRESENT SYSTEM

Fault Grounds and Defenses

Modern society permits the termination of intolerable marriages only upon proof of the occurrence of events which the law still considers grounds, but which behavioral scientists have long ceased to appraise as such. The major causes of divorce—adultery, extreme cruelty and desertion,—have been proven to be less the cause of divorce than the actual symptoms of a relationship that has soured. Yet we still accord divorce the same treatment as any other legal problem. Dissolution of a marriage encounters the same procedures as does a criminal act or a breach of contract.[69] This includes the traditional adversary process of each side having to prove its own case. This needless polarization has been the major flaw in the system. Under these "state-sponsored battles," the family's marital stability erodes even faster. Vital resources are dissipated at a time when they are most needed. Loyalties are divided. In preparation for the ensuing battle, each parent strives to ally the children to his cause, the objective being to destroy any relations between the child and the other parent.[70] As the battle lines are drawn, almost all possibility of reconciliation is destroyed.

The most notorious feature of our presently inadequate divorce law is its reliance upon a defense system to counteract allegations of fault. This has led to the development of the absurd and

intangible element which goes into making and/or breaking a marriage. *See* Wadlington, *supra* note 16, at 82.

67 Goldstein & Gitter, *supra* note 63, at 83.

68 Wadlington, *supra* note 16, at 83. The image of the middle-aged wife-mother being replaced by a younger bride is hard to disregard and forget.

69 Gough, *supra* note 15, at 18.

70 Goldstein & Gitter, *supra* note 63, at 81.

cruel concepts of marital defenses. Harshest among these are recrimination and condonation.

Recrimination in New Jersey is controlled by equitable principles. The matrimonial court's jurisdiction lies in Chancery. Consequently, justice is meted out in accordance with the judge's discretion as to what each party deserves. Since "clean hands" are demanded, if both parties contribute to the marital downfall, then neither party has a cause of action.[71] Recrimination is thus used as a "legal foil."[72] The defendant can admit even the worst accusations presented and still prevent the plaintiff from securing a divorce.

Some states ease the harsh rules applicable to recrimination by applying comparative rectitude.[73] By this doctrine, divorce is granted to the party least at fault. While an attempt to abolish the traditional burdens of defense, it retains most of the inequities found in the present fault system. Moreover, since reconciliation is unlikely when one party is at fault, it seems even more improbable when both are guilty.[74]

Under condonation, an unsuccessful good faith effort by one spouse to save the marriage precludes divorce. It is consonant with reason that such an act necessarily implies forgiveness. But condonation is almost always conditional. Yet, if the innocent spouse takes a step toward conciliating the marriage, he immediately shuts the door to any escape.

An important corollary inherent in this defense system is the need for corroboration of testimony. Marriage is basically a private institution, yet, because of the requirements of truth, it is necessary to bring another party into the act. Often, an unwilling relative or friend must be dragged into court, in a suit based on extreme cruelty, to testify that he saw one spouse hit the other. Many times he is a stranger to the situation, knowing only the *immediate* cause of the anger. But unless he lived with the parties, he will not be aware of all the long smoldering ashes which suddenly gave rise to the extreme

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71 The doctrine of "unclean hands" in equity matters has been stated in 30 C.J.S. *Equity* § 99, at 1048-59 (1965). *See also* 2 J. POMEROY, EQUITY JURISPRUDENCE § 397, at 90 (5th ed. 1941).

72 Pavletich v. Pavletich, 50 N.M. 224, 231, 174 P.2d 826, 830 (1946).

73 The doctrine has been adopted by the court in Ayers v. Ayers, 226 Ark. 394, 290 S.W.2d 24 (1956); Stewart v. Stewart, 158 Fla. 326, 29 So. 2d 247 (1946); Randle v. Gallagher, 169 So. 2d 224 (La. App. 1964); Hendricks v. Hendricks, 123 Utah 178, 257 P.2d 366 (1953); and construed in Herrick v. Herrick, 55 Nev. 59, 25 P.2d 378 (1933), as having been adopted by the Nevada legislature. *See also* 27A C.J.S. *Divorce* § 67, at 229 (1959); 24 AM. JUR. 2d *Divorce* § 228, at 384 (1966).

74 Moore, *A Critique of the Recrimination Doctrine*, 68 DICK. L. REV. 157 (1963).

action. Moreover, since the witness must testify, he must necessarily side with one of the spouses. As a result, he may in effect contribute to widening the gap toward possible reconciliation.

Retention of the fault system has in some cases even promoted divorce. Unhappy people denied an exit must seek some outside diversion. Many times they turn to alcoholism, adultery, and abusive conduct, all in themselves grounds for divorce in many states.[75] It is ironic that the family is ultimately destroyed by the last valiant attempt to save itself.

Alimony and Property Settlements

Along with the effort to abolish fault as a basis of divorce must come its elimination as a determinant of the consequences resulting from the separation. The fault-offense concept is still prominent in the areas of property division and support of the former spouse. Unhappily, the apportionment still depends on where the guilt is placed.

Until now, the typical woman and her attorney based their expectations on the notion that alimony is a "divine right and privilege of marriage."[76] The courts have encouraged these unjust ideas through misplaced judicial chivalry.[77] Awards of money are used as a punishment for matrimonial transgressions. This has in turn produced an ever increasing number of embittered husbands, who are convinced more than ever that the Married Woman's Act amended equal protection under the law to exclude them.

As noted previously, these misnomers arise from a failure to change the system. Alimony is a creation of statute.[78] As the basis on which our laws are predicated changes, so must our statutes. The predominant image of the recently separated woman has been stereotyped. She is seen as haggard from her latest legal battle. Burdened with her family, she is unable to accept immediate employment. Even when no children are present, adjustments are difficult. For years she may have depended on her husband. Her daily activities may have consisted of nothing more than shopping, cooking, and cleaning. Never contemplating anything more mentally taxing than helping her child with second grade homework, she may have forsaken further education for marriage. Her skills may be too stale for the keen competition she faces in the outside world. Thus, she finds her-

75 Note, *Trends in Divorce Reform: Mitigation of the Fault Concept*, 19 DRAKE L. REV. 139, 141 (1969).

76 J. RODELL, HOW TO AVOID ALIMONY: A SURVIVAL KIT FOR HUSBANDS (1969).

77 Gough, *supra* note 15, at 19.

78 Taft, *Tax Implications of Divorce and Separation*, 3 FAM. L.Q. 144, 147 (1969).

self ill-equipped to seek gainful employment.[79] When this view is justified, separation does present its problems for the suddenly separated wife.

Yet a real problem occurs when the reverse is true. For years the husband might have depended on his wife's salary for support, or she might be the mainstay of his business, without whom the business may fall apart. Suddenly placed in an unaccustomed position where he must become the major breadwinner, he finds himself having to pay a large portion of his meager earnings to a former wife whose financial capacity is double his.

Furthermore, where the fault approach is used, the parties face a forced choice. Typically, there is a disparity between the bargaining positions of the parties. Hoping to secure a speedy and uncomplicated separation, the spouses may argue and compromise to reach their own financial settlement. Since the only alternative involves long litigation to determine fault,[80] a wife who is anxious to get out must agree to receive little or no alimony. She then becomes a possible charge on welfare.

Another problem is the application of the alimony money. Even when the alimony and child support is properly awarded, there is no control as to how the money is appropriated. Since the ex-wife is not held accountable, money provided as child support often turns into hidden alimony.

Fortunately, in recent years increasing weight has been accorded the other factors which create financial stability. The earning capacities and the private estates of the couples have also been taken into account. Enactment of no-fault divorce will place more emphasis on the needs of the parties. The principle of disallowing unconscionable advantage will be protected only when the reasons for such practices are abandoned.

Custody

When the total effects of the fault proceedings are analyzed, it is the children who suffer most. While their interest in the outcome of the litigation is the greatest, it is apparent that they are afforded the least protection.[81] Both parents have the right to trained counsel;

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79 *Id.* at 148.

80 *See, e.g.*, Jolliffe v. Jolliffe, 76 Idaho 95, 278 P.2d 200 (1954); Sachse v. Sachse, 150 So. 2d 772 (La. App. 1963).

81 Hawke, *Divorce Procedure: A Fraud on Children, Spouses and Society*, 3 FAM. L.Q. 240, 245 (1969).

society is represented by the courts.[82] Yet rarely is anyone appointed to preserve the well-being of the child. As a result, the children of divorces are often left with "poisonous memories of their parents' parting."[83] They have already gone through the harrowing experience of their parents' splitting up and have seen their allegiances torn. Their panic and insecurity changes them physically and psychologically.

The judge's soothing effect and air of reassurance is vital and mandatory in this area. Yet, the court seems hopelessly entrapped in its own moral web, sometimes disposing of cases in both a shocking and tragic manner.[84] Judges rarely have the time to make any outside investigation. When the divorce is uncontested, the judge must rely on the word of the parents that adequate arrangements have been made for the children. Nothing prevents the children from being used as a "bargaining tool."[85] Many parents consent to letting the other spouse take custody in a barter for divorce. The situation thus boils down to a determination of what means more: the love and responsibility of caring for the child, or the freedom and release from an intolerable situation.

Historically, the father wielded the power over the child while the mother had little control.[86] Generally the courts awarded custody to the mother only if the father was unfit, on the ground that the father was the only one who could support and keep the family.[87] As the social and economic climate changed, so did the legislation in the various states. The courts allowed either parent to obtain custody, providing he was capable of doing so. Where this was not the case, the state came in and usurped the parental power for the benefit of the child.[88]

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82 Pollino v. Pollino, 39 N.J. Super. 294, 302-03, 121 A.2d 62, 67 (Ch. 1956), held that "[d]ivorce proceedings are regarded in this State as *sui generis*: the State is represented by the 'conscience of the Court' . . . ."; *accord*, Fink v. Fink, 30 N.J. Super. 531, 533, 105 A.2d 451, 452 (Ch. 1954):

> The state is a party to every divorce for, as a public policy, divorces are frowned upon and can only be obtained upon sound and convincing proofs that the requirements of the statutes and the law are met.

83 TIME, Jan. 12, 1970, at 18.

84 Bregman, *Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism*, 2 FAM. L.Q. 384 (1968).

85 Hawke, *supra* note 81, at 251.

86 W. HUNTER, INTRODUCTION TO ROMAN LAW 30 (9th ed. 1950).

87 *See* Schnuck v. Schnuck, 163 Ky. 133, 173 S.W. 347 (1915).

88 The love of a good mother is the holiest thing this side of heaven. The natural ties of motherhood are not to be destroyed or disregarded, save for some sound reason . . . . [Y]et where people form society and establish a government for their mutual welfare and protection, they must yield something of their

Various jurisdictions applied custody rules spanning the entire spectrum.[89] At the most liberal end, immoral conduct of the parent was disregarded, providing it was irrelevant to the relationship with the child.[90] At the other end, custody, where there was immoral conduct, was strictly against the child's best interest. The results of this dichotomy produced a middle ground which framed its views by subjective standards. Two tests evolved to fill this criteria.

Most modern jurisdictions developed the "best interest" test. Generally used to determine custody between the parents, the welfare of the child was the paramount fact in determining care and custody.[91] The child's interests with respect to its "temporal, mental, and moral welfare" governed.[92]

The second test for determining custody was that of "fitness." This was used to decide custody questions between parents and third parties. In the contest between parents and nonparents, the parent's right was supreme unless dominion over the child had been abandoned. This could be done through actual desertion, or impliedly, as when the mother was deemed unable to assume the duties of parenthood.[93]

An injustice often results when the parent seeking custody is deemed incapable of rearing the child. Ostensibly, the court has attempted to shield the child from the evil ways of the parent by placing custody in the hands of a more responsible adult. The objective was to prevent the parent's irreverent attitudes from infecting the child's morality.[94] The result achieved, however, often punished the parent by barring him or her from custody and deprived the child of the natural love it could not receive elsewhere. A single indiscretion does not make the parent unqualified, and in most instances, the child is unaware that any marital indiscretion has occurred. The child is harmed more by the loss of the parent than by the single indiscretion.

The custody award, therefore, has consistently failed to meet its original concepts. Because of its punitive nature, it focuses on the parent. Only secondary, if at all, does it adequately reflect the

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> individual rights for the common good . . . . [The state] will look to the protection of the children from suffering or degradation.

Moore v. Dozier, 128 Ga. 90, 92, 57 S.E. 110, 111 (1907).

89 For an excellent delineation of custody standards used when the wife has been guilty of immoral conduct, *see* Bregman, *supra* note 84.

90 *Id.* at 387.

91 Dumais v. Dumais, 152 Me. 24, 122 A.2d 322 (1956).

92 Cory v. Cory, 70 Cal. App. 2d 563, 573, 161 P.2d 385, 392 (Dist. Ct. App. 1945).

93 *See* People *ex rel.* Kropp v. Shepsky, 305 N.Y. 465, 113 N.E.2d 801 (1953).

94 Bregman, *supra* note 84, at 402.

needs of the child.[95] Thus, it is erroneous to assume that such a system is primarily devoted to the child's best interest.

The evidently needed change in rules of custody should occur when a system of no-fault divorce is oriented into a sophisticated program of legal conciliation and family courts.[96] With the abolishment of all grounds and defenses, no fault for the marital decay being placed, each parent would be deemed equally capable of raising the child. The best interest of the child would truly be effected by awarding custody to the most suited parent.

Migratory Divorce

A system of no-fault divorce widely adopted throughout the country would have enormous ramifications upon the migratory divorce problem. If dissolution of marriage was easily obtainable by all persons, there would be less of a temptation to flee to a "divorce mill" state and assume a temporary "domicile" until the state requirements were met.[97]

There is an economic barrier created by imposition of long and costly separations. Divorce is a commodity for sale. If it is unobtainable at one place, the consumer will go to another, and another, until he finds what he wants. The persons punished most are those who cannot escape.

The rich can easily obtain a divorce by leaving the state. Six weeks in Reno[98] or six hours in Mexico[99] and divorce is granted. The process

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95 *Id.*

96 *See* Family Court Proposals, *infra*, § VIII b.

97 Wadlington, *supra* note 16, at 85.

98 NEV. REV. STAT. § 125.020(2) (1969) provides:

> Unless the cause of action shall have accrued within the county while plaintiff and defendant were actually domiciled therein, no court shall have jurisdiction to grant a divorce unless either the plaintiff or defendant shall have been resident of the state for a period of not less than 6 weeks preceding the commencement of the action.

99 Mexican President Gustavo Diaz Ordaz is planning to clamp down on the "quickie-divorce mills" along the Mexican-United States border. He thinks they "contradict the respect the people of Mexico have for the family as an institution."

While the present divorce law requires a three-month waiting period for Mexican nationals and foreign legal residents filing for an uncontested divorce, other foreigners can obtain uncontested divorces in one day. Diaz Ordaz wants a congressional amendment to permit divorce only to those foreigners with certificates of legal residence from the Interior Ministry.

The Juarez divorce has taken on increasing popularity since the New York courts ruled that they were valid. Another reason appears to be that the high cost of many United States divorces is about the same as that involved in a trip to Mexico, and that there is no waiting period there.

Last year the Juarez divorce system terminated at least 45,000 marriages of foreign-

is simple; Mexican lawyers are only too eager to be of service. Working through their legal counterparts in the States, their fees provide airport pickup, translators, and certification of the papers through the secretary in the United States Embassy. A "quickie divorce" is within the reach of every wealthy person.

The poor man cannot afford an extended junket. Yet, he also has a practical remedy: desertion. Since his job is generally unskilled, and his responsibilities few, he can leave his wife, go somewhere else, and still find gainful employment.

But the middle class man sustains the harshest effects. His employment depends on experience and is secured through recommendations. He is tied to his job and environment and his movement is restricted.[100] Divorce is beyond his grasp if it entails extended absences. As a result he must suffer the most under the antiquated system established by the wealthy lawmakers who cannot understand his problems.

PREVIOUS PROPOSALS

Modification of the Fault System

The Todas of South India came closest to formulating a sensible divorce law by recognizing two instances where a husband could divorce a wife: "She is a fool, or, she won't work."[101] The procedure was simple and accommodated everything from the husband's vantage point. Since that time, countless variations have been initiated in the hope of discovering the ideal system.

Recent efforts have produced poor results. In place of eliminating or trying to mitigate the fault-offense system, legislative emphasis has been placed on increasing the number of grounds. This has been marked by a corresponding failure to decrease the number of fault-oriented mechanisms which have been the root of the evil.

From their standpoint, the choice has not been easy. The daring have urged that all fault be abandoned and irreparable breakdown be

ers. More than half of these divorces involved couples from New York. The penalties on the new amendment would carry loss of public employment, and a jail sentence of up to six months, or an $800 fine, for any state or local official involved in granting a divorce to a foreigner without the federal residence certificate.

Along with the foreigners, hardest hit by this new move will be the Mexican economy. Last year, the divorce business involved at least $50 million in lawyers' fees and airline fares, in addition to major expenditures in hotels, restaurants and shops in Mexico. The N.Y. Times, Aug. 12, 1970, at 1, col. 6; and The Evening News (Newark), Aug. 11, 1970 at 8, col. 3.

100 Foster, *supra* note 11, at 113.

101 Quoted by Foster, *supra* note 17, at 36.

the sole ground for divorce.[102] The controlling majority, however, has been more cautious. While anxious to modernize the law, they have felt their best chance lies in amending the existing structure by adding more grounds. Revision, rather than recodification, has proven to be their functional approach.

It has been suggested that we take an integrated approach to solving marital disputes, leading to an abolishment of all grounds of divorce, both fault and no-fault. Substituted would be a judicial determination, in light of all facts and circumstances pertinent to the case, that the marriage was beyond repair and should be ended.[103] The pitfall in this theory, and one of the strongest criticisms of the current fault system, is that the court, rather than the parties, would decide that a marriage was, or was not, workable. There would always be the chance that the court could find that there was no cause to dissolve the marriage, resulting in the family being kept together against their wills.

Separation Statutes. In spite of its flaws, the first legislative attempts in divorce reform have been to incorporate no-fault procedures into an existing fault framework.[104] This has been the most accepted approach. Centered around separation statutes, twenty-eight states and most European countries have provided their citizens with some form of living apart as a no-fault ground for divorce.[105] These statutes fall into two main areas, each having time limitations attached as a requirement, either prior or subsequent to the action.

Separation or living apart statutes,[106] as their titles indicate, provide a ground of dissolution when the parties have ceased to cohabit. The general requirement is that the separation be continuous and immediately precede commencement of the divorce action. Generally, during this time, both parties must try to resolve differences or prove that separation is best both for their interests and that of the children.

Conversion statutes, on the other hand, take effect after court process has already been instituted. Generally, either party has the right

102 One proposal, delivered to the American Bar Association at their annual meeting, Aug. 1-7, 1970, was as follows:

> 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.

REPORT OF THE SPECIAL COMMITTEE ON DIVORCE TO THE COMMITTEE OF THE WHOLE, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW.

103 Tenny, *supra* note 3, at 41.

104 Comment, *supra* note 60, at 101.

105 *See* REPORT, *supra* note 12, at 113.

106 *See* Goldstein & Gitter, *supra* note 63, at 76.

to convert a judicial decree of separation into absolute divorce after a certain period of time.

Basically, the theory behind each of these statutes are quite similar. Their principle distinguishing factor lies in the cause of separation and the degree of fault to be considered.

1. Voluntary Separation Statutes. Statutes requiring both parties to agree to the separation without a change of attitude until the prescribed time period is met are viewed as basic no-fault grounds since the parties themselves make the decision to separate.[107] The cause of the separation is irrelevant. Even when one party is at fault, as long as both mutually agree to split up, the requirement that the separation be voluntary is met.

This appears to be objectionable for three reasons. New York's newly enacted separation ground can be used as an example.[108] Since it requires a two year waiting period before action is allowed,[109] it impliedly urges the participants to effect a quicker settlement under the available fault grounds. Presumably, if separation is amicable to the parties, they could agree not to contest an action based on fault. Secondly, the statute requires the parties to sign a separation agreement, thus tending to dissuade nonconsenting couples from using this ground. Most important, an element of proof is necessary that is not evident in a no-fault system. It is incumbent upon the parties to convince the court that the separation was voluntary and not coerced. Further, they must prove that this mutual feeling extended the length of the separation and that neither party was desirous of reconciliation.

Statutes requiring both parties to agree to separation but which allow it even if one party wishes to reconcile before the prescribed time is met are basically the same as the above statute, and also fall short of a true no-fault ground. The distinguishing feature is that the parties do not have to allege and prove that the separation remained willful throughout the period. The theory is that the harm is caused by the absence. Irrespective of whether the separation remains mutually desirous, divorce is allowed.

2. Non-Voluntary Separation Statutes. Statutes allowing divorce to the partner not at fault after the spouses have cohabited separate

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107 *See* DEL. CODE ANN. tit. 13, § 1522 (11), (12) (Supp. 1968); MD. ANN. CODE art. 16, § 24 (Supp. 1969).

108 N.Y. DOM. REL. LAW § 170(5) (McKinney Supp. 1970).

109 Governor Rockefeller, himself divorced, has just signed a new bill making it easier to obtain a divorce. The new provision, when it goes into effect September 1, 1970, will shorten from two years to one year the period of legal separation or abandonment required as a ground for divorce. N.Y. Times, May 18, 1970, at 41, col. 8.

and apart for a given period of time have become a compromise between breakdown and fault approaches.[110] It has been the easy way out for states which wish to show the public their willingness to modernize, but which take the cautious approach and opt out for semi-fault additions rather than a complete recodification of their divorce laws. The grounds for separation need not be the traditional grounds for divorce. Generally, fault becomes important only when one party specifically raises it as a defense.

It remains to be seen, however, whether this type of statute suits the purpose for which it was designed. It is very similar to the desertion grounds which are now in existence. Since such a statute does not require that the separation be voluntary, the fault of a deserting party can cause it. Secondly, such a statute leaves the judge much liberality in awarding divorce. Thus it is possible that the courts in the states which enact this type of legislation will interpret the applicable statutes to require the petitioning spouse to be completely devoid of fault.

Statutes which allow either party to file for a divorce after living separate and apart following a marital breakdown regardless of who was at fault or whether or not the separation was voluntary, comprise the grouping which applies to the greatest number of states.[111] Despite minor variations, all traditional defenses are abolished, and the determining factor becomes the probability of reconciliation.

It may be argued that even this most liberal approach falls short of its aims. Legislatures have been hesitant to provide these new proposals with guidelines for fear of dating them so soon. Most statutes of this type specifically allow the judge wide discretion in the award of divorce without establishing guidelines to control them.[112] Courts traditionally geared to fault-oriented grounds still try to circumvent the statutes. They often deny divorce based on separation. Holding that abandonment is a criminal offense, they feel that such a man should not be allowed to benefit through his own bad acts.

3. Constructive Living Apart. Although there are no applicable statutes, there are a number of cases which hold that constructive separation is a desertion ground for divorce. A New Jersey court has stated that constructive desertion has been proved where "an existing cohabitation is put to an end by the misconduct of one of the parties, providing such misconduct is itself a ground for divorce. . . ."[113] Courts

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110 *See* VT. STAT. ANN. tit. 15, § 551(7) (1970); WYO. STAT. ANN. § 20-47 (1959).

111 *See, e.g.*, N.C. GEN. STAT. § 50-6 (Supp. 1969).

112 *See* NEV. REV. STAT. § 125.010 (1967); R.I. GEN. LAWS ANN. § 15-5-3 (1969).

113 Gutmann v. Gutmann, 70 N.J. Super. 266, 272, 175 A.2d 470, 473 (App. Div. 1961).

generally find that when there is, for all intents and purposes, a cessation of the marital relationship,[114] the parties should not be precluded from divorce solely because economic circumstances compel them to live together.

4. Balancing of Views. Grounds for divorce based on separation have received mixed reactions. Separation for a statutorily fixed period of time allows the parties to live apart, each going their separate way, while at the same time legally binding them together. It creates undue hardship on the poor, requiring them to maintain two households at one time, or worse yet, to live together, in spite of differences, due to economic necessity and thus produce even more harm with the chance of a violent act increasing.

It is acknowledged, however, that some improvement is better than none. Where lawmakers have refused to enact a no-fault system, grounds for separation are far better than the unmanageable fault-oriented framework. A workable separation statute makes an impact in reducing the migratory divorce rate. It makes a practical method of divorce available to families in their own backyard.

Conversion Statutes. In thirteen jurisdictions, judicial separation may be converted into an absolute divorce after a stated period.[115] Either party can generally petition the court to substitute a finalized divorce for a legal separation. While the time varies, they generally range from immediately subsequent to the issuance of the degree of separation[116] to five years.[117] The constitutionality of such statutes has been upheld even though they deprive the rights of those spouses who have a change of heart.[118]

Revised Grounds for Divorce

The policy considerations which prompt a court to grant a divorce when one of the parties has been guilty of some marital transgression are doubly important to dissolve the relationship when both spouses have been guilty.[119] This current thinking has led many states

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114 For refusal to have intercourse as grounds for constructive desertion, *see* Rains v. Rains, 127 N.J. Eq. 328, 12 A.2d 857 (Ct. Err. & App. 1940); Sabia v. Sabia, 16 N.J. Super. 273, 84 A.2d 559 (App. Div. 1951); Raymond v. Raymond, 79 A. 430 (N.J. Ch. 1909).

115 Alabama, Colorado, Connecticut, District of Columbia, Hawaii, Louisiana, Minnesota, New York, North Dakota, Tennessee, Utah, Virginia, and Wisconsin. REPORT, *supra* note 12, at 130.

116 *See* CONN. GEN. STAT. ANN. § 46-30 (1960).

117 *See* WIS. STAT. ANN. § 247.07(6) (Supp. 1969).

118 *See* Gleason v. Gleason, 32 App. Div. 402, 256 N.E.2d 513, 302 N.Y.S.2d 857 (1970).

119 *See* Deburgh v. Deburgh, 39 Cal. 2d 858, 872-73, 250 P.2d 598, 606 (1952).

to revise their grounds[120] and allow a divorce to both parties for reciprocal guilt if the misconduct of each amounted to grounds for divorce under the state law.[121]

Incompatibility is present as a ground in some form in six jurisdictions,[122] and irreconcilable differences in one.[123] While the terms are easily susceptible to too broad a range of definitions, the courts have narrowed their interpretations in accordance with legislative intent. It is pointed out that this ground does not refer to petty quarrels, but to severe conflicts in personality which render the spouses incapable of harmonious combination.[124]

Family Arbitration

Arbitration has enjoyed wide acceptance as a method of reaching accord on commercial and labor disagreements,[125] and is now increasingly used to settle marital disputes. Voluntary conciliation of family disputes is not a new idea. Religious organizations have long recognized its potential. In New York City, for example, the Jewish Conciliation Court of America has been in existence for many years. Composed of a board of three judges—a rabbi, a lawyer, and a layman —it is best used to work out agreements in the area of property, custody, choice of school, medical expenses, trips and vacations.[126]

NEW JERSEY'S PROPOSED SYSTEM: TOO LITTLE, TOO LATE

> Today New Jersey is famous as being, if not the most archaic state in the field of divorce, then surely one of the most archaic . . . .[127]

120 Many states have granted a divorce to both parties for reciprocal guilt if the misconduct of each amounted to grounds for divorce under the state law. *See, e.g.*, Mueller v. Mueller, 44 Cal. 2d 527, 282 P.2d 869 (1955); Hendricks v. Hendricks, 125 Cal. App. 2d 239, 270 P.2d 80 (Dist. Ct. App. 1954); Simmons v. Simmons, 122 Fla. 325, 165 So. 45 (1936); Farmer v. Farmer, 81 Idaho 251, 340 P.2d 441 (1959); Hathaway v. Hathaway, 23 Wash. 2d 237, 160 P.2d 632 (1945).

121 The Virgin Islands achieved similar results through case law. In Burch v. Burch, 195 F.2d 799 (3d Cir. 1952), both husband and wife sued for divorce. The statute provided that divorce could only be granted to the injured spouse. The court, in its decision, held that while only the injured party could be granted a divorce, the statute did not require that the suit be brought by the innocent and injured spouse.

122 ALASKA STAT. § 09.55.110(5)(c) (1962); N.M. STAT. ANN. § 22-7-1(8) (1953); NEV. REV. STAT. § 125.010(10) (1969); OKLA. STAT. ANN. tit. 12, § 1271(7) (1961); V.I. CODE tit. 16, § 104(a)(8) (1964). The most recent statute which makes incompatibility a ground for divorce is DEL. CODE ANN. tit. 13, § 1522(12) (Supp. 1968).

123 CAL. CIV. CODE § 4506 (West 1970).

124 *See* Burch v. Burch, 195 F.2d 799 (3d Cir. 1952); Chappell v. Chappell, 298 P.2d 768 (Okla. 1956).

125 Coulson, *Family Arbitration—An Exercise in Sensitivity*, 3 FAM. L.Q. 22 (1969).

126 *Id.* at 23.

127 REPORT, *supra* note 12, at 1. This statement was taken from the testimony of

This feeling, and countless excerpts like it, were constantly reiterated to the recent Commission on divorce reform in New Jersey. The hopelessness, turmoil and frustration which these statements evidenced were indications of the absurdity of a state legislature which refuses to promote laws which adequately reflect the changing times. Afraid to offend the public on whom their support so much depends, and having failed to find the broad-based support behind them, these ostrich-imitating legislators have buried their heads in the sands of oblivion, refusing to accept the challenge before them.

Presently, New Jersey has the traditional archaic system of divorce, and although fewer grounds are permitted, it is basically similar to that of the majority of states.[128] These grounds do not include any specific concept of marital breakdown. Instead, by imposing various set grounds and defenses, they strive to forestall divorce litigation in the hopes that the parties will be able to solve their differences. Because of these restrictions, the parties often find it difficult to secure divorces, even when the marriage is lifeless. The tragedy with this theory is that it has never worked well.

In light of this, the objective of the REPORT is to legally facilitate the dissolution of defunct marriages. However, the model which emerges stops short of recommending the complete elimination of fault as a consideration in marriage termination.[129] Instead, it tries, where others have failed, to combine in the same program both fault and no-fault grounds. The notion of divorce as a reward for virtue and a punishment for sin is not accepted by the Commission.[130] The major accomplishment which evolves is the addition of new grounds and the abolishment of defenses.

Proposed Changes[131]

2A:34-2. *Causes for divorce from bond of matrimony*

Divorce from the bond of matrimony may be adjudged for the following causes:

Bernard Hellring, a member of the New Jersey Bar and the Conference of Commissioners on Uniform Laws.

128 Present New Jersey law allows divorce on only three grounds: adultery; willful, continued and obstinate desertion for two years; and extreme cruelty. *See* N.J. STAT. ANN. § 2A:34-2 (1952).

129 REPORT, *supra* note 12, at 6-7.

130 *Id.* at 15-16.

131 This section seeks to analyze the efforts of the STATE OF NEW JERSEY DIVORCE LAW STUDY COMMISSION [hereinafter cited as the COMMISSION] and the results of its REPORT as it effects divorce litigation. The author recognizes the other areas covered by the REPORT, such as annulment and divorce from bed and board. However, the limited breadth of this paper does not allow time to fully delve into these areas. For a complete analysis, *see* REPORT, *supra* note 12.

> a. Adultery, *which is defined to include sexual or deviant sexual intercourse voluntarily performed by the defendant without the consent of the plaintiff with a person other than the plaintiff after the marriage of the plaintiff and defendant;*[132]

A definition of adultery was proposed to make it clear just what marital infidelity includes. The Commission's language requires the intercourse to be voluntary and with consent, hence excluding such acts caused by rape or insanity. Copying from the New York provisions,[133] most types of deviant sexual intercourse, with other than one's spouse, would be equated with adultery. Thus it finally recognizes sodomy, and includes for the first time overt homosexuality as a ground. Other deviant behavior though, such as bestiality, is excluded.

There are some noticeable shortcomings in the proposals. Since adultery is defined in terms of sexual intercourse, indiscreet conduct short of copulation is not included, although it might qualify as proof of cruelty. It is difficult to understand how such action, which stops just short of intercourse, can be any less damaging to the marital relationship than would be the completed act. Moreover, the proposed definition does not include artificial insemination by a third party donor. Studies recognize that it would be "prudent to anticipate such cases"[134] but the Commission nonetheless relegates later change to its proposed continuing Family Commission.[135]

> b. Willful[,] *and* continued [and obstinate] desertion for the term of [2 years] *six or more months, which may be established by satisfactory proof that the parties have ceased to cohabit as man and wife despite the willingness of the plaintiff to continue or to resume such cohabitation;*[136]

Since a separate ground is included in the report to cover most instances of separation, desertion is "limited to the situation of the recalcitrant spouse who separates despite the wishes of the other party, or refuses to return despite the latter's willingness to resume cohabitation."[137] The recommended period is reduced from two years to six months, recognizing that six months deprivation is long enough to endure. Obstinacy is abolished, but the proposed law still retains a requirement for continuation. The Commission is trying to avoid

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132 REPORT, *supra* note 12, at 61 (proposed deletions hereinafter indicated by brackets, proposed changes by italics).

133 N.Y. DOM. REL. LAW § 170(4) (McKinney Supp. 1969).

134 REPORT, *supra* note 12, at 62.

135 *See Commission Recommendations, infra.*

136 REPORT, *supra* note 12, at 105-06.

137 *Id.* at 64.

"desertion by day, copulation by night . . . ."[138] Thus, to a limited extent, it is still entwined with the defense of condonation. The Commission refuses to recognize that satisfaction of a biological urge does not negate daily wrongdoing.[139]

It is important to distinguish between desertion and separation because of economic reasons. Desertion remains a fault ground, whereas separation is no-fault. The revision permits the fault of the parties to be considered in awarding alimony for desertion, but excludes it as a basis when separation is used as the divorce ground.

> c. Extreme cruelty, whether the acts of cruelty have been heretofore or are hereafter committed; provided, that [no complaint for divorce on the ground of extreme cruelty shall be filed until after 6 months from the date of the last act of cruelty complained of in the complaint, but this proviso shall not be held to apply to any counterclaim] *extreme cruelty is defined as including any physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant.*[140]

The provision for extreme cruelty was not drastically altered, but the definition was expanded to permit the courts to adapt the old law to present needs. The definition is broad enough to constitute a true effort to modernize the concept of cruelty. Additional phrases are purposely left vague so the courts will be able to adapt the law to varying community standards or changing social views.

An effort is made to focus upon the consequences of the action, rather than its cause. The extreme cruelty ground considers the effects the act has upon the plaintiff, "rather than on the defendant's *mens rea* or intent to inflict pain."[141] The six month cooling off period is also eliminated. There was no evidence that the period accomplished any social good. To the contrary, it "arbitrarily suspend[ed] legal remedies without any compensating public good."[142]

> d. *Separation, provided that the husband and wife have lived separate and apart in different habitations for a period of at least one year and there is no reasonable prospect of reconciliation;*[143]

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138 *Id.* at 66.

139 The COMMISSION must recognize that the sexual act is performed for needs other than love. This is well attested to by the continuance of the "oldest profession" which has yet ceased to exist after many centuries.

140 REPORT, *supra* note 12, at 67.

141 *Id.* at 69.

142 *Id.* at 68.

143 *Id.* at 71.

This subsection is a new and somewhat novel approach for New Jersey's divorce laws, and is the major reform proposed for immediate enactment. The suggested measure is a cautious and moderate approach to no-fault divorce. The new ground takes a qualified objective rather than subjective approach. "The court must find that there is 'no reasonable prospect of reconciliation.' "[144] Parties must live separate and apart. Unlike desertion, the cessation of cohabitation while the parties are living under the same roof cannot exist under the separation ground.

Under the proposed measure, the suggested period of separation is one year, and the separation does not have to be voluntary. Yet, if it is not voluntary, it is difficult to understand why the forsaken spouse would not claim abandonment under the shorter desertion period of six months and thereby be entitled to alimony based on fault, rather than need.

> e. *Drug addiction, alcoholism, or institutionalization for mental illness, for a period of one or more years next preceding the filing of the complaint;*[145]

The provision for drug addiction, alcoholism, and mental illness may be superfluous due to subsection d's provision based on separation for whatever cause, but it seems necessary in the face of the courts' narrow interpretations in this area. In an attempt to make the proposed ground functional, the Commission extends the no-fault concept of subsection d, recognizing fault to be immaterial. In accord with today's consensus, mental illness, drug addiction and alcoholism are linked together and equated as an illness and a medical problem.

Red tape has been eliminated in making this proposal one of the most liberal in the country. Imposing a mere one year's separation,[146] the Commission feels that the estrangement, for whatever reason, is the true cause of the family disruption. Failing, however, to carry this logic one step further, the Commission neglects to account for the possible family demoralization created by other long term

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144 *Id.* at 72.

145 *Id.* at 74.

146 Many states require that the insanity be incurable, *e.g.*, Alabama, Arkansas, California, Delaware, Georgia, Kansas, Minnesota, Nebraska, Washington. Others require that the defendant be confined in a mental institution, *e.g.*, Alabama, California, Connecticut, Delaware, Georgia, Minnesota, Nebraska, North Carolina. Still others require that the defendant be examined and certified as insane by several doctors, *e.g.*, Kansas, New York. Institutionalization must be continuous for a period of five years in Alabama, Delaware, and Minnesota, and for three years in Arkansas, Colorado and Georgia. *Id.* at 75-76.

illnesses, such as tuberculosis. Being precluded from divorce on this ground, the wife would then find it necessary to circumvent the intent of the statute by seeking her consolation upon other grounds.[147]

> f. *Imprisonment of the defendant for one or more years after marriage, provided that where the action is not commenced until after the defendant's release the parties have not resumed cohabitation following such imprisonment.*[148]

New Jersey's new imprisonment ground codifies what the courts have been doing through case law for some time. In most jurisdictions of the United States, conviction of a serious crime and/or imprisonment for it is an independent statutory grounds for divorce.[149] New Jersey does not recognize such grounds. However, a recent New Jersey case, *Brady v. Brady*,[150] granted a divorce under the concept of willful desertion to the wife of a man convicted of armed robbery and imprisoned for two years. This was the first application of the willful desertion statute[151] to allow a convict's spouse a divorce.[152]

In formulating a ground for imprisonment, the Commission is trying to remain consistent with the policy it expressed in the separation and institutionalization proposals. Based on the supposition that the paramount factor is the separation rather than the character of the criminal offense, it falls short of its goal by two steps. First, by requiring a waiting period of one year, it overrides the recent court decisions holding it to be willful desertion, which would carry only a six month period of separation. However, the statute would necessarily preempt all prior interpretations. Increasing the time period serves no purpose; rather it merely prolongs the futility of the marriage.[153] Children psychologically suffer from having a father in jail and the wife is prevented from leaving that environment and beginning a new life.

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147 Until now, the courts have used legal fictions to circumvent N.J. STAT. ANN. § 2A:34-2 (1964) and thus heroin addiction became a ground for divorce under the interpretation of extreme cruelty. *See* De Meo v. De Meo, 110 N.J. Super. 179, 264 A.2d 751 (Ch. 1970); Melia v. Melia, 94 N.J. Super. 47, 226 A.2d 745 (Ch. 1967).

148 REPORT, *supra* note 12, at 76.

149 Forty-five states and the District of Columbia include some form of incarceration as a ground for divorce. Those which exclude it are Florida, Maine, New Jersey, Rhode Island and South Carolina. Levenson, *supra* note 32.

150 98 N.J. Super. 600, 238 A.2d 201 (Ch. 1968).

151 N.J. STAT. ANN. § 2A:34-2(b) (1952).

152 The court in *Brady* held that the desertion commenced with the commission of the crime. The presumption was that the reasonable man committing armed robbery foresees imprisonment, and therefore, it is willful. 98 N.J. Super. at 601, 238 A.2d at 201.

153 Levenson, *supra* note 32, at 405.

More important, the new ground fails to distinguish between crimes involving moral turpitude and mere civil contempt. A killer who pleads guilty to murder and is sentenced to life is put into the same position as a lawyer who goes to jail on civil contempt charges. And what of the unfortunate possibility of convicting an innocent man, who at the same time loses both his freedom and his family?

The Commission provides us with only theory in this area. It fails to furnish a working enactment for instituting suits on this ground. These problems must be worked out in advance. The imprisonment provision fails to state when the divorce action could be brought. Would action for dissolution be allowed to commence upon conviction for a period of over one year, or only when one year of imprisonment has already elapsed? There is also no provision for appeals. Under the Commission's logic, the harm would be accomplished after the one year of imprisonment and only then could the action be brought. One must wonder, however, if an appeal were later granted and the earlier conviction reversed, whether this would lead to the repeal of the decree of divorce.

There is no doubt that the dissolution of the marriage might adversely affect the prisoner's rehabilitation.[154] Deprived of the opportunity to look forward to the day of being reunited with his family, his ambition to reform will decline. Nevertheless, the needs of the innocent family must be placed before those of the convicted husband. In the balance, "ideology must give way to reality."[155]

Yet, despite the many reasons impelling the spouse of a convict to procure a divorce, the wife can still remain faithful. The divorce provision is for her benefit, not her detriment. The statute allows divorce, but does not mandate it. The overriding goal of the state is to preserve the family's best interest.[156] If love was present, separation would not be a totally destructive influence. The marriage would still have a chance. The relationship would have to be failing prior to the incarceration before this ground would be used. Thus, this would be their marital court of last resort.

2A:34-7. *Defenses abolished; divorce decree to both; perjury*

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154 *Id.*

155 *Id.*

156 While this comment does not attempt to cover the rehabilitating aspects which must go along with incarceration, it is recognized that it is preferable that the parties remain loyal to each other. The state should encourage preservation of the relationship by a program of penal reform providing for conjugal visits and marriage counseling. This could be accomplished through the proposed family court system. For an excellent discussion of this area, *see id.*

[If it appear to the court that the adultery complained of shall have been occasioned by the collusion of the parties, and done with the intention to procure a divorce, or that the party complaining was consenting thereto, or that both parties have been guilty of adultery not condoned, no divorce shall be adjudged.]

Recrimination, condonation, connivance, collusion, and the clean hands doctrine are hereby abolished as defenses to divorce from the bonds of matrimony or from bed and board, and if both parties make out grounds for divorce, a decree may be granted to each; provided that nothing herein shall preclude or abrogate the responsibility of a party for the penalty provided by law for perjury or the subornation of perjury.[157]

The primary advancement embodied in the revision, in addition to the enactment of a no-fault ground of separation, is the recommendation that the traditional defenses to divorce be abolished. The Commission attempts to eliminate the tainted and perverted administration of divorce law.[158] The Commission "believes that equity is best achieved by a grant of discretionary power to award alimony"[159] and reserves the right to base such decrees on fault.

It must be noted, however, that deletion of the standard defenses does not completely eradicate the fault element. In desertion, the injured spouse must prove that there was "no consent to the separation, an element somewhat similar to condonation."[160] Mutual adultery presents another problem; proof that there was no consent, express or implied, is fundamental.

2A:34-8. *Jurisdiction of superior court over matrimonial actions*

[The superior court shall have jurisdiction of all causes of divorce or nullity and of alimony and maintenance by this chapter directed and allowed.

In any action under this chapter the superior court may afford incidental relief as in other cases of an equitable nature.]

The superior court shall have jurisdiction of all causes of divorce, bed and board divorce, or nullity when either party is and has been a resident of this state for a continuous period of one year next preceding commencement of a matrimonial action. The superior court shall have jurisdiction of an action for alimony and maintenance when the defendant is subject to the personal jurisdiction of the court, is a resident of this state, or has tangible or intangible real or personal property within the jurisdiction of the court. The superior court may afford incidental relief as in other

157 REPORT, *supra* note 12, at 80-81.

158 *Id.* at 86.

159 *Id.* at 82.

160 *Id.* at 82-83.

cases of an equitable nature and by rule of court may determine the venue of matrimonial actions.[161]

The jurisdictional time period for all matrimonial actions is established at one year, thus reducing the present requirement of two years prior residency for divorce, and bona fide residency in the case of adultery. An action for alimony and maintenance, however, may be brought without regard to any prior period of residency.

In choosing the one year requirement the Commission attempts to balance the arguments in favor of longer and shorter periods. The average family moves once every five years,[162] and must be availed of their new domicile's law if they move. On the other hand, the Commission wanted to establish a barrier against "divorce mills." The one year's prior residency requirement is deemed "long enough to preclude the attraction of migratory divorce in New Jersey."[163]

The major criticism of this proposed section is that the residency requirement is too long and will prolong undue suffering. Consider a family which has just moved to New Jersey from New York. Since the members of this family are no longer residents of New York, the courts of that state have no jurisdiction over them. They are bona fide residents of New Jersey, yet since they fail to meet the time requirements they are barred from pursuing their cause of action here. Where do they turn? Their only choice is to stay together and subject each other to further hostilities until the year passes. There is no reason why one who establishes a bona fide residence in New Jersey should not be accorded the full rights of a New Jersey citizen. To do otherwise should be unconstitutional.[164] Mitigation of migratory divorces will come when uniform laws are enacted throughout the country.[165]

2A:34-23. Alimony; maintenance; custody and maintenance of children; security; failure to obey order; sequestration; receiver; modification of orders; *factors to be considered in awarding alimony*

Pending any matrimonial action brought in this state or elsewhere, or after judgment of divorce or maintenance, whether obtained in this state or elsewhere, the court may make such order as to the alimony or maintenance of the [wife] *parties,* and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature

161 *Id.* at 86-87.

162 *Id.* at 88-89.

163 *Id.*

164 The one year prior residency requirement of the Hawaiian divorce law has been held unconstitutional. 93 N.J.L.J. 405 (June 4, 1970).

165 *See* 93 N.J.L.J. 501 (July 9, 1970).

of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may require.

In all actions brought for divorce, divorce from bed and board, or nullity the court may award alimony to either party and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just.[166]

The major policy change in the alimony statute is the granting of discretion to the court to award alimony where both parties are considered the cause of the marital breakdown.[167] Mutual guilt would not be an automatic bar to alimony recovery where there was actual need, but the court could consider fault in the exercise of its judicial discretion.

The objective of this proposed amendment is to adopt the trend of awarding alimony on need and not as punishment for fault. Toward this end, the husband, as well as the wife, may collect if the need be shown. Using the outdated logic that as long as fault grounds are retained, fault should affect judicial discretion in awarding alimony,[168] the Commission intends this section to be an interim measure until a substantial reform and modernization is put into effect.

Commission Recommendations

In preparing alterations in the matrimonial law, the Commission deemed it imperative to establish some type of guidelines. To accomplish this, it was necessary to distinguish between short term objectives and long term goals.[169] The short term targets would enable the Com-

166 REPORT, *supra* note 12, at 91-93.
167 *Id.* at 94-95.
168 *Id.* at 94.
169 *Id.* at 97.

mission to immediately enact long needed proposals. The new previously enumerated sections were thought to be of some comfort in this area, but long range enactments were needed to prevent divorce legislation from once again falling behind the times.

The search for such a system has led to the most important long range recommendation, that of creating and funding a Family Law Commission. This new body would coordinate all new inquiries in the area of matrimonial law, permit a continuing evaluation in New Jersey's family law, and provide for a constant updating and modernization of the work begun by the Commission.

Criticism of the New Jersey Commission

The Divorce Law Study Commission seems to be an interim measure designed to bring New Jersey divorce law up to the times, rather than trying to solve any of the future problems. The Commission recognizes the need to correct the inequities and resulting hardships of the existing laws.[170] The approach it takes, however, is cautious and moderate. The result of evading the problem is the failure to construct family laws capable of meeting the needs of the modern era.

The Commission constantly envisions future changes (*e.g.*, artificial insemination, and alimony laws based on need, not fault), but seems content to relegate future enactments to another proposal, a continuing divorce commission. It is one thing to look into a crystal ball and try to prophesize problems of the future which are too remote to take precedence over the urging problems of today.[171] But it is something else to recognize problems which will be encountered in the immediate future, and disregard them, hoping they will disappear. This approach is unrealistic and unwise. The Commission should step into the lead and attack the divorce problem now. It cannot wait until problems actually arise before rectifying them; it has taken them long enough to enact these small proposals.

Maintaining the status quo is too costly in terms of emotional tragedy and injustice.[172] The Commission has opted for the discredited fault approach; the new proposals move New Jersey well into the nineteenth century, but not yet into the twentieth.

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170 *Id.* at 100.

171 On this foundation, the continuing commission is a good idea for coping with unforeseeable new trends.

172 REPORT, *supra* note 12, at 100-01.

CALIFORNIA'S NEW LAW: A STEP TO THE FUTURE

The first major breakthrough in divorce legislation in the United States occurred in California in July, 1969, with the passage of a sweeping divorce law which took effect January 1, 1970.[173] Since it is the most progressive and original divorce legislation on the books, it will probably lay the foundation for a model for uniform divorce reform throughout the country.[174]

The new law attempts to make divorce less destructive, promising to eliminate a good deal of the unpleasantness and bitterness now common to such proceedings by abolishing the determination of guilt. Without establishing who is right or wrong, the court merely determines whether two people are incompatible. Rather than a divorce, it is a dissolution of marriage.

The proposal[175] stirred widespread interest in California. Before it was passed, the new law encountered turbulent opposition, especially from Governor Pat Brown, a Catholic. In the end, the legislators, a fourth of whom had been through the divorce mill themselves, enacted an only slightly watered down version of the bill.[176] Governor Ronald Reagan, himself divorced in 1948, lost no time in signing it into law. Reagan's hope was that the bill would remove the "sideshow element" from the area of divorce.[177]

Rather than adding no-fault grounds to a traditional system, as New Jersey has mistakenly proposed, California chose the alternative of accepting a basic no-fault approach.[178] The law provides that marriage may be terminated by death or dissolution.[179] No longer is a husband formally pitted against his wife; the adversary action is abolished. Complaints for marital dissolution are no longer captioned *"Jones v. Jones"*; in its place is substituted a neutral petition, *"In re the marriage of Jones and Jones"*.

Confidential questionnaires must be filed in those counties having a conciliation court.[180] These questions are subject to the discre-

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173 CAL. CIV. CODE §§ 4500 *et seq.* (West 1970), *repealing* CAL. CIV. CODE § 90 (West 1954).

174 *See* NEWSWEEK, Sept. 22, 1969, at 110.

175 THE CALIFORNIA GOVERNOR'S COMMISSION REPORT (1966).

176 California's bill started as Assembly Bill 230 and Senate Bill 86.

177 *See* NEWSWEEK, Sept. 22, 1969, at 110.

178 REPORT, *supra* note 12, at 138.

179 CAL. CIV. CODE § 4500 (West 1970).

180 CAL. CIV. CODE § 4505 (West 1970).

tion of each judicial council. Petitions for dissolution allege one of the grounds set forth in section 4506:

> A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:
>
> (1) Irreconcilable differences, which have caused the irremedial breakdown of the marriage.
>
> (2) Incurable insanity.

Factors constituting such breakdown will be under the discretion of the court. The sole statutory guideline is "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved."[181] If the court concludes that there are irreconcilable differences, it can order dissolution or legal separation. Stays of up to thirty days can be granted for reconciliation.[182] Except where custody is in issue, or where necessary to establish irreconcilable differences, pleadings will not allege evidence of misconduct or specific acts.[183]

The new provisions will not make divorce more quickly procurable and are a relief to those who feared a great influx of divorce-minded residents. A six month interlocutory judgment from the date of complaint is used in place of the former "cooling off period."[184] While the residency period is reduced to six months in the state and three months in the county where the action is prosecuted,[185] a foreigner must still remain in California at least a year before a divorce is procured. Thus, someone contemplating a migratory divorce would find it easier and quicker to take the shorter journey to Nevada or Mexico.

One of the more pronounced criticisms of the new law is that it preserves the waiting period before final divorce can be granted. Although somewhat shortened in time, this provision was adopted despite the recommendations of every study of divorce reform that it be eliminated. Few would dispute the necessity for a brief waiting period before the petition is filed in order to guard against hasty and premature actions. Yet once judicial intervention severs the relationship, any waiting period merely prolongs the suffering and increases the agony. Such action serves no useful function.

Much more important, the divorce commission's recommenda-

181 CAL. CIV. CODE § 4507 (West 1970).
182 CAL. CIV. CODE § 4508 (West 1970).
183 CAL. CIV. CODE § 4509 (West 1970).
184 CAL. CIV. CODE § 4514 (West 1970).
185 CAL. CIV. CODE § 4530 (West 1970).

tions that a family court division be created was ignored. The report envisioned an equipped professional staff to centralize family cases. Its function would have been to investigate custody matters, and to offer its services on a purely voluntary basis to the parties. At present, only fourteen counties have such a program, and their efforts are aimed at holding marriages together.[186] The commission wished to extend these services to people for whom dissolution was inevitable, but who needed help in preparing themselves for the new roles. The downfall was the cost of the system and the fear that "social work would dilute hard legal process."[187]

Balancing the proposals, however, it is apparent that the California law has established a foothold for the future. It emerges as a positive step toward modernizing court proceedings to conform with current needs. Its fundamental changes in the divorce process should have far reaching impact on the judicial thought of tomorrow.

OTHER PROPOSALS

Expansion of Legal Counseling

While the law in the last few centuries has concerned itself with the development of a divorce system, only in recent years has there emerged a new discipline aimed at utilizing the judicial process to effect reconciliations of couples with domestic difficulties.[188] This has come through an awareness of the changing social climate as it affects our judicial system. Yet, in the near future, it is unrealistic to expect that divorce will be ceded to sociologists or psychologists. Thus, the most natural choice to propel such programs are those persons whom the parties first seek out when they are troubled, their attorneys. No other calling has the professional skills necessary to negotiate, plan and settle the future of a broken family.[189]

Curiously, while lawyers and judges are traditionally held accountable for our plague of divorce, they have been the ones most instrumental in fostering change. Lawyers must continue to play a large part in the success of the marriage counseling program. The application of such proposals would be through adoption of the approach now successfully used in estate planning. Comprehensive

186 REPORT, *supra* note 12, at 139.

187 Gough, *supra* note 15, at 20.

188 Alexander, *The Lawyer in the Family Court*, 5 NAT'L PROBATION AND PAROLE ASS'N J., 172-86 (April, 1959).

189 Foster, *supra* note 17, at 27.

analysis of the total situation would be used to effect solutions. Their greatest problem and strongest goal would be to weed out those marriages which are still salvageable before the parties commit themselves to court action. Lawyers interested in their client's welfare would probe deeply into family troubles to ascertain whether there were any chances for reconciliation. Indeed, many times there are sufficient grounds for divorce, and yet dissolution is not the wisest remedy for the client.[190] A man may have trouble with his job and keep it solely to provide for his family. It may cause him to come home and "take it out" on his wife each night. Yet this would not mean the marriage is necessarily beyond repair. The solution lies elsewhere, but it takes skill and experience to determine this.

Before any realistic approach is attempted, we must insure that the lawyers shed their handicaps. While most lawyers are trained solely in law, many of these problems need the skill of someone trained in other areas. A lawyer who attempts such a conciliation program must be a specialist in his field. He must meet certain qualifications, such as a Master's degree in divorce law. His extra courses must include sociology, psychology, and even religion to understand how others view divorce. A high degree of competency is demanded.

As in every practical solution, there are also some problems which develop. The *Canons of Professional Ethics* of the American Bar Association prohibit a lawyer from representing both parties.[191] Such representation, however, would be permissible if their interests were not diametrically opposed. When the adversary system is abolished under no-fault divorce, the spouses are no longer opponents. The attorney will be able to separate his role of counselor from that of lawyer and thereby be capable of functioning in both roles.[192]

Another more serious problem with using counselor-investigators is that information imparted to them would not be confidential. By necessity, judges and clerks would have to know what was said. Perhaps this information would be no different than that related at the trial. But if the true purpose of these meetings is to obtain, the participants must feel free to open up and not be cautious of what they say. The idea of a non-confidential setting is totally alien to the concept conveyed by psychologists and clergy.

Possibly in the future, judges will no longer decide the end of marriage from a judicial standpoint. When divorce grounds are

190 See Harper & Harper, *Lawyers and Marriage Counselling*, 1 J. FAM. L. 73 (1961).
191 ABA CANONS OF PROFESSIONAL ETHICS No. 6.
192 Harper & Harper, *supra* note 190.

founded on a realistic sociological basis, the more qualified lawyer-psychologist will be able to adjudicate a marital separation. Rather than each party going to his separate attorney, they could go to one lawyer. He would be in a position to counsel, and if such counseling proved fruitless would then attempt to mediate. If all else failed, the lawyer could then arbitrate, with the court having appeal power.[193] This seems the only way to impart a professional, confidential atmosphere.

Family Courts and Conciliation

When our fault-oriented divorce law framework is viewed as a contributing cause of the deterioration of our family relationships or productive of more problems than it solves, the addition of a conciliation division to our family courts has been a leading reform proposal.[194] The responsibility of such family courts is to do more than merely preside over the amenities of the occasion. They must play an active role in determining the future of the parties.[195] Composed as specialized tribunals, they are designed to handle all interrelated family problems. Utilizing skills not obtainable through the traditional adversary process, they promote unity and adjust the conflicts with a minimum of harm to society and the persons involved.[196]

A growing number of states have recently enacted family courts or at least tried experimenting with such proposals.[197] Most require a cooling off period between the filing of a petition and the granting of the divorce, during which time the parties meet with court appointed officials and try to reconcile their differences. If these efforts fail, the counselor tries to conciliate collateral issues such as custody and visitation rights. The husband and wife agreement sets forth family budgets, finances, child rearing, and in-law problems, all of which are potential sources of trouble.

New Jersey first instituted an experimental conciliation program

193 An analogy is drawn to the system of bankruptcy referees. Appointed by judges, these referees have the power to work out settlements, with final appeal power reserved to the federal courts.

194 Tenny, *supra* note 3, at 37. *See also* Foster, *supra* note 5; McIntyre, *Conciliation of Disrupted Marriages by or Through the Judiciary*, 4 J. FAM. L. 117 (1964).

195 Morris N. Hartman, Chairman of the New Jersey Bar Association Committee that studied the 1957-60 pilot program, suggested a Conciliation Court system. For an excellent model which the legislature can follow in this area, *see* AMERICAN BAR ASSOCIATION, FAMILY LAW SECTION, REPORT OF THE SUBCOMMITTEE ON THE CONCILIATION COURT (1961), reproduced in M. PLOSCOWE & D. FREED, FAMILY LAW 646-50 (1963).

196 Virtue, *What is a Family Court?*, 37 MICH. STATE B.J. 14-18 (July 1958).

197 *See* OHIO REV. CODE ANN. § 3105.08 (1964); MICH. COMP. LAWS § 551.331-44 (Supp. 1965); R.I. GEN. LAWS ANN. § 8-10-3 (Supp. 1969).

in 1957. Established in ten counties, it made counseling mandatory, disregarding the recommendations of a state bar association committee that a voluntary system be established. After three years of ineffectiveness, the pilot program was finally abandoned.[198]

The failure of the judicial expectations does not necessarily prove that such a system cannot successfully function in New Jersey. Traditionally, New Jersey is a stringent divorce jurisdiction and requires strict proof in divorce actions. The bar is also strongly supervised. This may prevent most citizens from seeking divorce locally unless the family difficulties are too far advanced to be influenced by counseling. Consequently, reconciliation would be more difficult to achieve than in states where the procedures for divorce are more lax and the impulsive file complaints earlier.

The recent New Jersey Divorce Law Study Commission did not have time to consider family courts. The Commission was enjoined by law to

> study and review the statutes and court decisions concerning divorce and nullity of marriage and related matters . . . and to study the advisability and practicability of creating a family law court.[199]

Unfortunately, the legislature had created another commission[200] before the Divorce Law Study Commission began functioning.[201] Therefore it did not occupy itself with an area subsequently assigned elsewhere.

Most judicial enactments supported by this reconciliation theory have failed because of the controls imposed over the form and method. Conciliation is more difficult if pleadings precede the counseling,[202] and conciliation attempts have come too late to be worthwhile. Once the parties must devise grounds for divorce and commit them to action, their pride becomes involved. They become psychologically geared to follow through to dissolution. Help must be provided before

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198 From September 1, 1957, to February 29, 1960, 2,293 cases were heard by the two Masters. Success was achieved in only 2.7% of the cases. However, a follow-up on these 57 successful cases reveals that all but five were still together when the program ended. 1966 REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS TO THE LEGISLATURE OF THE STATE OF NEW YORK (1966) at 64 n.52.

199 Law of May 18, 1967, ch. 57, N.J. Laws 143 (1967).

200 J. Res. 12, N.J. Laws 1555 (1968). A commission was created to study and review the statutes and court decisions relating to the problem of establishing a family court.

201 The original Divorce Law Study Commission was created by chapter 57 of the Laws of 1967. However, since no appointments were made until late in 1968, the Commission could not organize and function until November, 1968.

202 1966 REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS TO THE LEGISLATURE OF THE STATE OF NEW YORK (1966) at 66.

the parties are further embittered by specific pleadings. Divorce is a psychological breakdown and must be afforded the same treatment as medical trauma.[203] Symptoms must be investigated at their earliest possible outbreaks. The surgical treatment which the legal system has devised for such marital failure has proven to be a drastic one: amputation, the remedy of divorce. There is no reason to wait until marital death occurs before any action is taken.

There is considerable disagreement as to whether counseling should be forced upon the parties against their will. Some argue that conciliation should be mandatory before an action for dissolution is allowed, especially when children are involved.[204] Others urge that greater success will occur if the parties feel free to seek help on their own. While there is no doubt that a reasonable cooling off period will lead many couples to achieve solutions on their own with a minimum amount of outside counseling, the majority of cases requires assistance to help them begin to solve their problems.[205]

Even where conciliation is not achieved and the marriage fails, more intensive counseling is needed. When a reunion is not in the family's or society's best interest,[206] court services can be valuable in reducing tension and minimizing friction. Understanding must be promoted and agreements concerning custody, visitation rights and child support must be formulated. The best interest for the future of the broken family must be provided for.

The opportunity for reconciliation is at its maximum before litigation commences. While controls must be established to prevent spouses from filing complaints even before they are positive they want a dissolution of their marriage, it is better to reach the parties at the first sign of discord. Fundamentally, the changing emphasis on the divorce system from one of punishing fault to one of rehabilitating the family should, in time, encourage many people to voluntarily seek the aid of a tribunal long before they reach the breaking point.[207]

While the success of our reconciliation efforts will not be known until a periodic follow-up of couples reconciled is actively undertaken, we must gamble on achieving our desired results. There are a significant percentage of litigants who do not really desire a divorce if

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203 *See* Tenny, *supra* note 3, at 57.

204 *See* Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 UTAH L. REV. 443 (1961).

205 Wadlington, *supra* note 16, at 86.

206 A good divorce is often better than a bad marriage. Harper & Harper, *supra* note 190, at 74.

207 *See* Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377 n.127 (1937).

a practical alternative is available.[208] Unless conciliation and counseling is provided, there are no redeeming features of a divorce system which functions to destroy, rather than assist, families in trouble.

Improving the Quality of Marriage

Perhaps the only way to alleviate divorce is to control the quality of marriage. While courts have held that the state cannot fully regulate marriage, the choice is still not completely free. One generally cannot marry a person who is insane, under age, or closely related. While objections have been raised to such "big brother" observations, they are overridden by the prospects for healthier and happier marriages.[209]

An effort must be extended to insure that those people uniting have a chance for their marriage to succeed. Increasingly liberal laws and acceptance of divorce, combined with more available contraception and greater premarital sexual permissiveness, has made marriage more enticing by removing the feelings of entrapment and lessening the need to merely obtain a sexual partner.

Emphasis has shifted to premarital education. The goal is to learn how to live together and solve problems before they develop and disintegrate the marriage. There has been recognition that hasty marriage breeds quick divorce. One suggested control has been to extend the licensing period.[210] Ideally, this period would be constructively utilized by a marriage counselor while working out ideas which, unattended, might later lead to problems.

Raising the minimum legal age for marriage is another factor.[211] Every state has some age limit. Studies show that the younger a person marries, the greater chance there is for divorce. Yet, this also presents obstacles. Many are ready for marriage as soon as they leave high school. Prohibiting marriage for too long places undue stress and frustration on the parties and leads to other problems. Premarital sex would increase, as would the rate of illegitimacy. Health risks would multiply if first pregnancies took place later in life. While the chances

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208 [In] a certain percentage of divorce cases the parties are willing, even without encouragement and expert guidance, to give their marriage another chance.

McIntyre, *supra* note 194, at 118.

209 Couch, *Marriage Law Reform—A Comment*, 44 TUL. L. REV. 251, 258 (1970).

210 New York has just passed a law to take effect September, 1972, that increases the present three day waiting period to get married to ten days. *See* N.Y. Times, May 18, 1970, at 41, col. 8.

211 Couch, *supra* note 209.

of a happy marriage would increase, the delay would create new problems considered even more serious.

Another attempted method has been to stop trial marriages by barring dissolution for a period of time. This supposedly encourages people to try to work out problems.

> (I) [N]o petition for divorce shall be presented to the court before the expiration of the period of three years from the date of marriage . . . .[212]

This is the present law in England, and is considered an effective deterrent of trial marriages.[213] There is a severe criticism in that once a couple is aware of the mistake of their marriage, compelling them to stay together only increases the hatred and bitterness. More important, there are chances of children being born into the situation. It is better to let the parties gracefully out of a bad situation before any permanent harm is done.

Conceivably, the state could absolutely prohibit marriage once the girl became pregnant. This, however, defeats the traditional striving to promote legitimacy,[214] and may also prove unconstitutional. Moreover, such a problem would add to the already prevalent welfare problems. Yet this could be combatted by a reconsideration of legal and social attitudes toward abortion. The couple, if really in love, could marry after the abortion and then have children legally.

CONCLUSION: THE NEED FOR PROMPT ENACTMENT

The United States Supreme Court, in recent years, in striking down statutes prohibiting miscegenous marriages[215] and dissemination of contraceptives[216] has come to view the privacy of the act of marriage. In setting this trend, it has realized that prohibitions should

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212 The Matrimonial Causes Act 1965, c. 72, § 2 (Eng.).

213 THE LAW COMMISSION REFORM OF THE GROUNDS OF DIVORCE, THE FIELD OF CHOICE, CMND NO. 3123, at 11 n.57 (1966).

214 Couch, *supra* note 209, at 258.

215 The Virginia statute prohibiting marriages between white and colored persons and making any violation of the statute a criminal offense was held invalid in Loving v. Virginia, 388 U.S. 1 (1967). The Court held the restriction on freedom to marry violated the central meaning of the equal protection clause and deprived defendants of liberty without the benefit of due process of law.

216 Griswold v. Connecticut, 381 U.S. 479 (1965), struck down a Connecticut statute prohibiting the use of contraceptives on the ground that the enforcement of the law against married couples would necessarily infringe upon the right of marital privacy protected by the penumbras of the first, third, fourth, fifth and ninth amendments as applied to the states by the fourteenth amendment.

not be attached by the state unless the need is absolute.[217] This interference is not necessary in most divorce situations. Still, somehow, we cannot candidly recognize that society's best interest is served by permitting the dissolution of dead marriages. We have therefore continued to allow the outcome of each case to depend on judicial philosophy rather than a determination of whether the marriage has irreparably failed. With all the skills and techniques available today, it is a horrible waste of human knowledge and resources to fail to offer constructive assistance to families in trouble.

Yet, it is entirely conceivable that a system of divorce law which adequately eases the burden of dissolution is impossible to establish. Divorce is a shattering experience even under the most ideal conditions.[218] A delicate scale is needed to balance the needs. The ideal system demands a procedure simple and effective enough to facilitate divorce when needed, but with enough inherent difficulty to forestall impetuous decisions.[219]

The desire for such change must emanate from the people. In order for a no-fault system of divorce to have a fair share of success, it is essential that there be broad based support for the plan. The judiciary must be consulted to see what is practical from an administrative point of view. Bar associations, religious organizations, and welfare groups must be enlisted to present sentiment for such plans to their respective groups. Moreover, there must be a campaign to educate the public to the need of such a system. It is essential that continuing support is received from all levels of the community.

We may be inspired by the late Justice Cardozo's maxim that only the law which continues to benefit society should be allowed to exist.[220] His warning was to "remake the molds" and to "seek a conception of law which realism can accept as true."[221]

New Jersey has a chance to recast the die and make its divorce jurisdiction the most modern in the country. The Commission has made necessary proposals, but it has not gone far enough. The ground work has already been laid out before them. There is no reason why

217 The State still attempts to maintain control over the most intimate of human relations. *See* State v. Barr, 110 N.J. Super. 365, 265 A.2d 817 (App. Div. 1970), where the court held that the fornication statute is not unconstitutional as interfering with rights of privacy protected by the due process clause.

218 A graphic description of the agony faced by most divorced persons after dissolutionment is presented in M. HUNT, THE WORLD OF THE FORMERLY MARRIED (1966).

219 Comment, *Grounds and Defenses to Divorce in Pennsylvania*, 15 VILL. L. REV. 155, 186 (1969).

220 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (Yale Paperbound ed. 1960).

221 *Id.* at 127.

it cannot study the numerous reports[222] and build upon the workable models already in existence. No one is asking the Commission to envision the unforeseen, but provisions must be made for the future. It is time New Jersey moved forward to a position of dominance rather than being relegated to a situation years behind the times.

An attempt has been made to summarize some of the American experience with recent divorce reform. As stated at the outset, this comment does not intend itself to be all inclusive. It seems inappropriate to deny all possible benefits to be derived from making additions to the existing system. It is possible, and quite probable, that various other proposals will come into the foreground and perhaps offer even a wider range of solutions. Nevertheless, it is reasonable to establish some other system to follow. We cannot exist forever waiting for Utopia; we must move ahead with what we have.

Recognizing the fallibility of man, and taking cognizance that an occasional battle of the sexes is as firmly entrenched in our existence as is death and taxes, our only hope for survival is to try to make a more conducive arrangement for coexistence. This will only be achieved when a realistic attitude of changing social conditions and religious thought causes divorce reform to override ancient anachronisms and face the times and its problems.

Mitchel R. Lubitz

222 *See* the various reports, *supra* notes 10, 57, 102, 202 and 213.