

LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

The purpose of this symposium is not to investigate all the details of the present law of marriage and divorce, but to attempt a re-examination of some of those basic concepts which now underlie this jurisprudence and to consider some proposed reforms which, although perhaps too drastic for immediate adoption generally, may contain the principles which in not too many years may be guiding and shaping our approach and philosophy in reworking this law.

In a sense, a study of divorce is fragmentary and illusory unless it includes the entire law of marriage and in particular the laws governing the formulation of the marriage contract and status. Obviously, if only we could, by guiding and controlling those about to enter into marriage, eliminate many unsuitable unions, we would at the same time be preventing a large amount of marital discord and many divorce actions. Better informed and better enforced legislation, strictly regulating who may marry, may therefore be desirable. This legislation might, however, create other social problems through increasing non-marital liaisons and even at best could never function so perfectly so as to eliminate all marital conflicts, some of which undoubtedly arise from changes and developments in the parties themselves and their environment occurring after the marriage ceremony.

As in the case of crime, so in the case of broken homes a powerful argument can be made that if we would cure substantially such widespread and deeply rooted social evils that underlie our society as poverty, war, and physical and mental disturbances, most of our family ills would doubtless disappear. Unfortunately, the likelihood of this happening very soon to a sufficient degree is too small to warrant our neglecting a concurrent primary attack on many of the distressing symptoms of marital problems.

The lawyer certainly should be both uneasy and humble as he contemplates his contemporary role and function in marital problems and divorces. His uneasiness stems from a realization of the superficial and even cynical, if not hypocritical, manner in which many courts and his colleagues, perhaps only reflecting the mores of their communities, function when called upon for help in these matters. His uneasiness must be intensified when he comprehends the way in which courts and lawyers often consciously appear to ignore all but what are the most trivial aspects of the difficult questions here raised. Perhaps he asks himself whether the lawyer has any real role here, and if so, what it is. Humility results as he appreciates all

too quickly his inability, through lack of training and of knowledge, to cope with the questions arising, even if he wishes to do so. No one would assert, I believe, that, generally speaking, our law schools, or the leaders of the bar, or the best minds of the legal profession have devoted anywhere near as much of their time and talents to working out solutions for these problems as they have in the last century to the legal questions resulting from increased taxation, government control of business, and the financing of operations of corporate and other forms of business enterprises. Yet we face in the law of marriage and divorce issues critical for our society and for all societies.

As in the criminal law field, one still unsolved problem in family law to which lawyers might contribute much is how the techniques and knowledge of sciences and disciplines other than law can best be brought to bear on marital troubles within a suitable legal framework whenever the family is in or near our courts. The social caseworker, the clergyman, the physician, the psychiatrist, the marriage counselor, and others undoubtedly have much to offer the family and the courts in handling family troubles. Perhaps they may even to a large extent eventually displace the lawyer here, unless the bar changes many of its present attitudes. Yet these specialists are still far from having such skills and exact knowledge in this subject as will result in their agreeing upon and setting forth concrete detailed proposals promising the solution of the marital problems which now face our courts. In fact, today sufficiently trained personnel are not available nor do sufficient facilities exist for the training of such personnel, assuming that our courts desired to utilize their services. Moreover, the lawyers willing and eager for the help of these other disciplines in improving family law cannot ignore the many serious difficulties that must be faced in utilizing in our law the frequently still tentative if not argumentative ideas of many of them. In this respect and others, our adversary system, however well it may work in other civil and criminal court cases, particularly where the litigation involves property, appears unsuitable for handling divorce and other family conflicts. One promising solution, perhaps, is the unified, specialized family court.

Whatever our solution, it is quite possible that the time has or shortly will come when the legislature may be wise to reorganize this entire legal pattern. Perhaps, instead of attempting to accomplish this difficult task itself in a piecemeal, patchwork fashion, subject to the pressures of powerful prejudices and organized minorities, the legislature might do well to give the courts themselves, by rules of court, the powers needed to reorganize and to reshape, in cooperation with appropriate specialists in other fields, the law of the family and of marriage and divorce.

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