

THE FAMILY WATCHDOG

JOHN S. BRADWAY †

The modern family, like other human institutions, is subject to the constantly varying pressures of social, economic and psychological conditions, among them being the age old conflict between individualism and regimentation. Interest in reaching a stable equilibrium is shown by the principals, their respective kin, the church and the state.¹ The tide of controversy sways presently back and forth.² The proponents of individualism³ are interested in experiments such as those in Russia.⁴ Their point of view, in this country, is suggested by such principles and policies of the law as: disapproval of agreements in restraint of marriage;⁵ the general requirement of extreme provocation as an element in annulments of marriage on the ground of fraud, duress or mistake;⁶ the tendency to construe

† A. B., 1911, A. M., 1915, Haverford College; LL. B., 1914, University of Pennsylvania; Professor of Law and Director of the Legal Aid Clinic at Duke University Law School; author of *LAW AND SOCIAL WORK* (1929), *THE BAR AND PUBLIC RELATIONS* (1934), and of numerous articles on legal aid.

The writer wishes to acknowledge his indebtedness to Mr. Edward W. Cooley of the class of 1938 of the Duke University Law School for aid in the preparation of the footnotes to this article.

1. May and Blinn, *Legislative Trends in Family Law* (1937) 2 AM. SOC. REV. 696.

2. Folsom, *Changing Values in Sex and Family Relations* (1937) 2 *id.* at 717; *The Modern American Family* (1932) 160 ANNALS 1-222 (a collection of some 25 articles on the family).

3. CALVERTON, *THE BANKRUPTCY OF MARRIAGE* (1928); ELLIS, *LITTLE ESSAYS OF LOVE AND VIRTUE* (1922); ELLIS, *MORE ESSAYS OF LOVE AND VIRTUE* (1931); KIRCHWEY (ed.), *OUR CHANGING MORALITY* (1930) (a symposium); SCHMALHAUSEN AND CALVERTON (ed.), *WOMAN'S COMING OF AGE* (1931) (a symposium); RUSSELL, *MARRIAGE AND MORALS* (1929).

4. Fairchild, *The Status of the Family in the Soviet Union Today* (1937) 2 AM. SOC. REV. 619.

5. I VERNIER, *AMERICAN FAMILY LAWS* (1931) 52, 53: "Restraint of marriage was generally disfavored at common law, being opposed to the public policy of encouraging matrimony.

"Statutes relating to restraint of marriage are found in seven states only. . . . Five in identical words enact that 'every contract in restraint of the marriage of any person other than a minor is void'."

6. I VERNIER, *AMERICAN FAMILY LAWS* 223-229: "The most important remaining grounds upon the basis of which marriage is prohibited are force or duress, and fraud, occurring at the time of the marriage and as an inducing factor in its procurement. The existence of either force or fraud obviously prevents there being such free consent as is necessary for a fully valid marriage.

"Forty-two jurisdictions have either civil or criminal statutes, or both upon the effect of force or fraud upon the marriage contract. Nineteen expressly state that a marriage induced by force, coercion, or duress is voidable at the suit of the innocent party, while twenty-three jurisdictions enact that marriages where fraud has been present may be annulled."

In *Zeigler v. Zeigler*, 174 Miss. 302, 164 So. 768 (1935), 70 U. S. L. REV. 175 (1936), a bill was filed by the plaintiff against her husband, who was living apart from her, for the separate maintenance of herself and her baby. In affirming a decree for the plaintiff directing provision for her support and that of the child, the court said: ". . . a marriage is not only a contract affecting the rights of the immediate parties but is a legal status affecting materially the public, and where it is sought to annul a marriage contract on the ground of duress, it must be shown by clear, satisfactory, and convincing evidence that the duress was

marriage statutes as directory rather than mandatory⁷ and relationships purporting to be marriages as voidable rather than void;⁸ the recognition of common law marriages;⁹ the hesitation in declaring a formal marriage invalid because of irregularities.¹⁰

The Anglo-Saxon legal tradition,¹¹ affected by the influence of the frontier,¹² calls for a modified control by the state over the family.¹³ At the other extreme are experiments in Germany and Italy.¹⁴

The present article is thrown into the scales on the side of modified regimentation. It views with alarm statistics showing an increase in family

dominating throughout the transaction and to the extent of destroying freedom of action." *Id.* at 307, 164 So. at 769. See also Note, *Duress—Whether It Makes Marriage Void or Voidable* (1907) 7 COL. L. REV. 128.

Concerning annulment because of misrepresentation, see *Wetstine v. Wetstine*, 114 Conn. 7, 157 Atl. 418 (1931). Defendant deceived plaintiff as to name, nationality, age and parentage, object being to conceal parentage of illegitimate child. Wife had lived with a married man in illegal cohabitation prior to marriage. Plaintiff had intercourse with defendant prior to their marriage. After the marriage plaintiff learned of the illegitimate child, but continued to live with defendant for four months. Held: Plaintiff condoned her prenuptial unchastity, and having had prenuptial intimacy with her cannot claim divorce for deceit as to her chastity. Misrepresentations as to age and nationality are not enough to justify a divorce.

7. I VERNIER, AMERICAN FAMILY LAWS 104: "The courts have very generally adopted the principle that a statute will not be construed to abolish common law marriages unless there are express words of nullity present. The application of this principle in various jurisdictions by different courts has resulted in no little confusion. There has been no agreement upon the question, what constitutes 'words of nullity' in a statute? nor upon the question, When are the requirements of marriage solemnization and license law merely directory and when are they mandatory? For if the statute is mandatory, then common law marriage must be considered abolished where the statutes themselves contain no very clear statement that the one and only way in which a valid marriage may be contracted is as declared by the legislature, the validity of the common law marriage has generally been sustained. . . ."

8. See recent case note, *Marriage—Necessity of Procuring a License to Render a Ceremonial Marriage Valid* (1931) 20 CALIF. L. REV. 90.

9. I VERNIER, AMERICAN FAMILY LAWS 102-103: "So far as America is concerned it is clear that informal marriages based on mutual assent, without ceremony or officiant, have been considered valid as common law marriages by a majority of the states. . . . They have been expressly repudiated by statute in very few states; and in many states such marriages have been held to survive even in the fact of elaborate regulations governing licensing and solemnization of marriages."

See also KOEGEL, COMMON LAW MARRIAGE IN THE UNITED STATES (1922); Black, *Common Law Marriage* (1928) 2 U. OF CINN. L. REV. L. REV. 113, 133; Brickwell, *Common Law Marriage* (1910) 44 AM. L. REV. 256-68.

10. 38 C. J. 1279, 1280: "To constitute a valid marriage the essentials common to all contracts, capacity and consent must be present. Moreover the general rule is that these are the only indispensable requisites to the creation of a valid marriage; and while in practically all jurisdictions the statutes prescribe additional requirements, it is well settled that such statutes are to be construed as directory merely, unless they expressly declare that a marriage contrary to their provisions shall be invalid."

11. NIMKOFF, THE FAMILY (1934) 153-154.

12. ADAMS, PROVINCIAL SOCIETY, 1690-1763 (1928) 10 *et seq.*; POUND, THE SPIRIT OF THE COMMON LAW (1921) 35-36.

13. (1937) 6 ENCYC. SOC. SCI. 65.

14. Clifford Kirkpatrick, *Recent Changes in the Status of Women and the Family in Germany* (1937) 2 AM. SOC. REV. 650; *Taxing German Bachelors* (July 19, 1930) 106 LITERARY DIGEST 14; *Dictatorships of Europe Strive to Build Up Their Populations*, N. Y. Times, Aug. 30, 1936, § 4, p. 5, col. 6; *4412 Italians Wed in Day to Obtain Fascist Award*, N. Y. Times, April 23, 1935, p. 5, col. 4; *German Marriage Funds*, N. Y. Times, March 23, 1934, p. 22, col. 4; *Italy Pushes Marriages*, N. Y. Times, May 16, 1935, p. 25, col. 3.

dissolution.¹⁵ It is based on the idea that extreme individualism is unwise and dangerous because it assumes that a layman is capable of acting as his own social diagnostician. Various professional groups have spent time and effort educating the public to believe that, in modern civilization, any self diagnosis, unless checked against an expert's judgment, is unscientific.¹⁶

The particular segment of the field of family relations to be considered here is the breakdown caused by annulments. So much attention has been directed to the more spectacular problem of divorce and its associated items of alimony and custody of children, that the catastrophic results of an annulment are too often forgotten or unnoticed. The present article will consider, against an historical background, the social ineffectiveness of the present machinery for administering the law of annulment and will make certain remedial proposals.

I. *An Historical Note*

The problem of annulment may be considered from the standpoint of releasing for legal cause from the technical bonds of matrimony one person or two people whose future happiness requires freedom. It may also be regarded as a belated and often frantic effort to correct a mistake. Adopting arbitrarily the second of these positions one inquires where to lay the blame. It may be upon the principals, their respective kin, the church or the state. If blame can be laid at a particular door, the first step in achieving a remedy may have been taken.

In primitive civilizations the preliminaries to marriage were primarily in the hands of the respective kin. Emphasis was placed on economic values

15. LICHTENBERGER, *DIVORCE* 105-107: ". . . during this period of 63 years, 1867-1929, a total of 4,324,245 divorces were granted in continental United States. There were 9,937 granted in 1867, and 201,468 in 1929. . . ."

"From these figures it is perceived readily that the increase in the number of divorces is both persistent and rapid. . . ."

"The divorce rate is the most significant index we have to marriage instability. It is a fair measure of the amount of marriage dissolution which is legally sanctioned. It is by no means, however, a complete or satisfactory index. . . ."

"Divorce . . . is not synonymous with marriage breakdown. It is, on the contrary, merely the legal recognition of the fact that the marriage relation ended at some time in the past. A divorce cannot be secured unless and until this fact has been established. Many married persons have terminated their marital relations in fact, but have felt content to live apart without obtaining a divorce. . . ."

"It frequently is remarked that 'desertion is the poor man's divorce'. . . . Professor Earl E. Eubank explains: 'The poorer classes . . . carry their troubles to the divorce court less frequently. First of all, the expense is well nigh prohibitive for the very poor. Second, the prohibition of the Roman Catholic Church is particularly influential among the masses of poor in cities who, owing largely to European parentage are predominantly Catholic. Third, there is among those classes, particularly among the immigrants, an ignorance of the procedure necessary to secure divorce. . . .'"

See also MARSHALL AND MAY, *THE DIVORCE COURT* (1933); Hankins, *Divorce* (1931) 5 *ENCYC. SOC. SCI.* 182-184.

16. CRAMP (ed.), *NOSTRUMS AND QUACKERY* (2d ed. 1912) (articles on the nostrum evil, quackery, and allied matters affecting the public health; reprinted from the *Journal of the American Medical Association*).

and family prestige.¹⁷ The father of the bride, or a member of her family, often engaged in commercial bargaining in the course of which he determined whom she should marry. The Roman *paterfamilias*, during the Republic, supervised a different sort of ceremony,¹⁸ but he too had the final word as to his prospective son-in-law.¹⁹ During the Empire a degree of individualism, or, if one prefers, laxness, prevailed, approximating modern conditions.²⁰ While the family was the watchdog of the road to matrimony, its effectiveness did not remain constant from one era to the next and blame for mistakes may be properly laid at its door. There is historical evidence of wide fluctuation from severe regimentation to a freedom in which the watchdog reminds one of the famous descriptions by Petronius.²¹

The Medieval Church later assumed a large responsibility for the protection of family life. It provided the concept of marriage as a sacrament and therefore indissoluble. It created, inter alia, two administrative devices: the banns,²² which gave desirable publicity to the proposal to create the relationship;²³ and annulment,²⁴ a convenient way of escape.²⁵ It took an

17. GOODSSELL, *PROBLEMS OF THE FAMILY* (1928) 63; 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (3d ed. 1923) 87-88; 1 WESTERMARCK, *HISTORY OF HUMAN MARRIAGE* (5th ed. 1921) 51. For a discussion of marriage by purchase, see 1 WESTERMARCK, *op. cit. supra* (3d ed. 1903) 392-397.

18. CORBETT, *Forms of Marriage* in *THE ROMAN LAW OF MARRIAGE* (1930) 68.

19. RADIN, *HANDBOOK OF ROMAN LAW* (1927) 116: "While the spousalia created no legal duty, there was a powerful moral duty, and since the *lex Ulia* of Augustus, even a legal compulsion on the father's part to seek, and certainly not unreasonably to prevent, the marriage of his son or daughter. Celibacy entailed disabilities which no one willingly assumed, and which irrational opposition on her father's part might easily force on his children.

"If marriage was simple and informal, divorce was almost equally so, not only the couple itself, but their *paterfamilias*, could end the marriage by repudiation."

For the power of the *paterfamilias*, see *id.* at 106-110; and WALTON, *HISTORICAL INTRODUCTION TO ROMAN LAW* (4th ed. 1920) 70-74, n. 30.

20. 3 WESTERMARCK, *op. cit. supra* note 17, at 319-323. See also, LICHTENBERGER, *DIVORCE* 55-56.

21. PETRONIUS, *SATYRICON* (Heseltine's trans. 1913) 41.

22. See 2 *CATHOLIC ENCYC.* (1936) 256, for a discussion of the purpose and operations of this device.

23. AYRINHAC, *MARRIAGE LEGISLATION IN THE CODE OF CANON LAW* (1932) 73-85: "It is an axiom in common law that all men have from nature the right to marry. . . .

"This right, however, is not absolute, nor absolutely free in its exercise. Marriage established primarily for the good of the race, and only secondarily for that of the individual, must be under the control of the social authority; it is a contract and, like any other contract, it must be subject to certain regulations which may render it unlawful or invalid. Obstacles to a valid or lawful marriage are called impediments. . . .

"Impediments are divided into *major* and *minor*. The *minor* impediments are:

1. Consanguinity in the third degree of the collateral line.
2. Affinity in the second degree of the collateral line.
3. Public decency in the second degree.
4. Spiritual relationship.
5. The impediment of crime arising from adultery with a promise of, or an attempt at, marriage, even by a merely civil contract.

"The *major* impediments are all the others."

24. See 16 *ENCYC. BRIT.* (14th ed. 1929) 595; see also 1 VERNIER, *AMERICAN FAMILY LAWS* 237-238: "Suits for annulment are closely akin to those for divorce. From a practical point of view they partake of certain common characteristics. (1) The purpose of both is

aggressive stand against irregular unions.²⁶ As a family watchdog, the ecclesiastical establishment, in coöperation with the medieval family, was a powerful force for regimentation.²⁷ It prevented rash and ill-advised partnership and remedied its mistakes in a more orderly fashion than could be done by the parties themselves.

The Protestant reformation signaled the advance of greater individualism in marital affairs.²⁸ The hold of the ecclesiastical establishment was weakened.²⁹ The disciplinary and protective power of the family declined in the presence of such social, economic and psychological forces as the industrial revolution³⁰ and the Women's Rights Movement.³¹ The conflict of underlying philosophies and the attempts at compromise of a bewildered public increased.

The state has been forced into the role of family watchdog. For this function it has few qualifications. It could hardly borrow from the family

judicially to terminate the marriage, restoring the parties to the full legal status of single persons. (2) The same grounds may entitle parties to an annulment, a divorce, or either, depending on the jurisdiction. . . . (3) There ought to be provided in each case a sane solution of the property rights of the parties, the support and maintenance of wife and children. . . . (4) The essential nature of the actions being the same, it would seem that similar procedure, service of process, rules of jurisdiction, and other details might well be followed, although in fact, they more often are not.

"But in theory, the actions of annulment and divorce are distinguished by important differences. (1) The decree of annulment, barring legislation to the contrary, is a judicial declaration that no valid marriage ever existed between the parties. (2) Proceeding upon that basis, neither party acquired the usual marital rights, so that only a return to the status quo at the time of the marriage would seem to be required. This involves a return of the property of each, but does not necessarily entitle the wife to any further rights by way of maintenance, alimony, or property division. (3) If there were, theoretically, no marriage at all between the parties, the decree of nullity results in the bastardizing of any children of the marriage, unless they are otherwise protected by statute. In these and other less significant ways the two actions are distinguishable, and the legislation governing them has as often been motivated by these theoretical considerations as it has been by more practical reasons of policy."

25. 16 HALSBURY, LAWS OF ENGLAND (2d ed. 1935) 496, 499; 27 THE ENGLISH AND EMPIRE DIGEST (1926) 264-272.

26. AYRINHAU, *op. cit. supra* note 23, at 51-52.

27. GOODSSELL, *op. cit. supra* note 17, at 69, 71.

28. *Protestantism* (1937) 6 ENCYC. SOC. SCI. 571-575.

29. *Ibid.*; see also CARTER, A HISTORY OF THE ENGLISH COURTS (5th ed. 1927) 148.

30. BOSSARD, SOCIAL CHANGE AND SOCIAL PROBLEMS (1934) 560-566, discusses the changes in family life resulting from the Industrial Revolution. "The social cohesion of the earlier form of the family cemented by joint participation in various common enterprises, is passing. Particularly has the passing of the economic function of the home removed the bond which formerly knit the family together. As a result, its individual members have been 'liberated' each to pursue first his or her own work, and, subsequently and increasingly, other aspects of their individual lives." *Id.* at 566. See also, ELLIOT AND MERRILL, *The Changing Family* in SOCIAL DISORGANIZATION (1934) 425-426.

31. BOOTH, WOMAN AND SOCIETY (1929) 220: "Thus the general trend of the movement [Woman's Movement], in spite of the unquestionable sincerity of its claim to be an agent of moral betterment is (by virtue of a historical logic) such as to encourage a type of education and occupation and a mental attitude toward life and toward the opposite sex, which works steadily against marriage and against the home." See also, FISKE, THE CHANGING FAMILY (1928) 79-98.

the primitive disciplinary sanctions of ostracism and death.³² Such action would represent too extreme regimentation. The patriarchal household was still too much of a quasi-independent state³³ to permit such an invasion. It did borrow from the church the concepts of publicity, registration and annulment; but these procedures were torn from their medieval background of a lifelong ecclesiastical probation enforced by confessional, penance and excommunication.

In such a period of change the compromise concepts, which we employ today in annulment cases, were developed. They may have been useful when formulated. The present test of social utility is whether they remained flexible enough to adjust to changing social economic and psychological conditions. One need not labor the point that conditions have changed. It is, therefore, justifiable today to subject these concepts and their attendant administrative machinery to careful scrutiny and evaluation. Sociologists declare that the functions of the modern family are comparatively few and its power slight.³⁴ In England the control of the church has passed to the civil courts³⁵ which grant decrees of nullity with restraint.³⁶ In the United States compulsory church authority and traditions did not survive the impact with the frontier.

Increasingly, marriages took place which resulted in difficulties, disillusionment and disintegration. The community came to the conclusion that some of the causes of breakdown arose prior to the marriage and that principles of law should be laid down to express public policy in such cases. Where a person presented an appropriate set of facts to the court, a decree would issue proclaiming either that there never had been a marriage or that none existed from the time of the decree. The concepts and administrative machinery were decreed by the various state legislatures beginning with

32. RADIN, *Father and Child* in *op. cit. supra* note 19, at 106-109; WALTON, *op. cit. supra* note 19, at 70-74.

33. SOHM, *INSTITUTES OF ROMAN LAW* (3d ed. 1907) 459. See also, GOODSSELL, *THE FAMILY AS A SOCIAL AND EDUCATIONAL INSTITUTION* (1915) 327-332.

34. JACOBS AND ANGELL, *A RESEARCH IN FAMILY LAW* (1930) 37-38: "The great loss of function has made the family institution shrink; about the only functions left are the bearing and early care of the young, affection between the spouses and as to children, and as a property holding and disposing unit."

35. 10 HALSBURY, *op. cit. supra* note 25, at 631: "Complete divorce by judicial process in England first came into operation in 1858 by virtue of the Act of 1857 (Matrimonial Causes Act); this act perpetuated the old ecclesiastical practice with regard to nullity and judicial separation (divorce a mensa et thoro). A series of amending and supplemental acts have been consolidated in the Supreme Court of Judicature (Consolidation) Act, 1925, which now embodies the code of law governing matrimonial causes."

Citations to these statutes are: MATRIMONIAL CAUSES ACT, 1857, 20 & 21 VICT. c. 85; SUPREME COURT OF JUDICATURE ACT, 1925, 15 & 16 GEO. V, c. 49.

36. 10 HALSBURY, *op. cit. supra* note 25, at 639-645: "Marriage is void *ab initio* in cases of: (1) bigamy . . . ; (2) where the marriage has been induced by duress, or mistake; (3) insanity of one spouse at the time of the ceremony; (4) the prohibited degrees of consanguinity or affinity; (5) marriage not solemnized in due form; and (6) non-age, marriage is only voidable where one of the parties is incapable of consummating it."

the special formalities for marriage,³⁷ and marriage licensing acts.³⁸ The presence of common-law marriage³⁹ in many jurisdictions reminds one that here is still a compromise.

It is not easy to say who is the modern family watchdog. It may be the individual contemplating matrimony, the marriage license clerk, the judge of the annulment court or some one else. The statement of the situation indicates either confused thinking or a compromise open to criticism. If one picks upon the marriage license clerk, he may reply that his functions are too limited to enable him to do such work.⁴⁰ Some statutes continue to impose obligations upon clergymen⁴¹ and other public officials.⁴² They speak in terms of punishing officials who perform marriage ceremonies of ineligible. This decentralization of responsibility makes administration difficult. The regulatory provisions speak in terms of registration, a legal concept of value in property transactions rather than in the

37. EVERSLEY, *LAW OF THE DOMESTIC RELATIONS* (4th ed. 1926) 15-19, discussing Lord Hardwicke's Marriage Act of 1753, and the Marriage Acts of 1823, 1836, and 1898. See also, HALSBURY, *op. cit. supra* note 25: on the definition of marriage, 6 *id.* at 252-253, 16 *id.* 263; on banns, 11 *id.* at 698, 16 *id.* at 286; on capacity to marry, 16 *id.* at 281; on civil marriage, 16 *id.* at 305; on solemnization of marriage, 16 *id.* at 299.

38. I VERNIER, *AMERICAN FAMILY LAWS* 59: "All of the states as well as Alaska, the District of Columbia, and Hawaii now have marriage license laws. These laws differ widely in their numerous details. No two are exactly alike. They are, however, all the result of a common motive: the desire of the states to require that persons who intend to marry must first secure the formal permission of the state."

39. I *id.* at 59, 60: "Although all of the American Jurisdictions have marriage license laws, that does not mean that a license is in all cases essential to the validity of marriages. License statutes are sometimes merely directory, not mandatory in their terms, or are so construed by the courts. . . . Some of the states specifically provide that non-compliance with the license law does not invalidate an otherwise lawful marriage; in others the same result has been reached by judicial construction.

"Three of the states, Georgia, Maryland and Ohio allow banns to be published as a substitute for a license." (See I *id.* at 102-103, n. 11.)

See also: Black, *supra* note 9; Braxton, *Resumption of Cohabitation after Divorce as Constituting Common Law Marriage* (1932) 36 *LAW NOTES* 50; Buckell, *Common Law Marriage* (1910) 44 *AM. L. REV.* 256; Gilkes, *Validity of Common Law Marriage* (1933) 3 *ORE. L. REV.* 28; Hall, *Common Law Marriage in New York State* (1930) 30 *COL. L. REV.* 1; Lightner, *Common Law Marriage in Wisconsin* (1923) 6 *MARQ. L. REV.* 82; Note, *Common Law Marriage Again Abolished in New York State* (1933) 67 *U. S. L. REV.* 275.

40. I VERNIER, *AMERICAN FAMILY LAWS* 128, 129: "Facts concerning the parties to a marriage contract which must be ascertained in some way are of two main classes: First are those which are required primarily for purposes of complete and accurate records . . . ; second . . . are the facts which must be proved in order that the legality of a contemplated marriage may be established. . . .

"Since in all American jurisdictions the parties are generally required to secure a marriage license, and since this represents in effect the official stamp of approval of the state upon a proposed marriage, it is apparent that all essential facts should be ascertained prior to the issuance of the license. Also it is proper and practicable under the circumstances, that the duty of securing such facts should be placed upon the officer who is authorized to issue marriage licenses. As a matter of fact, in all of the states this burden, in part at least, is imposed upon him. The only other person who shares in the task at all is the solemnizing officer, who in six states has some positive duties in this regard. Forty-four of the fifty-one jurisdictions considered have positive and specific legislation on the ascertainment of facts pertinent to the marriage contract. Thirty-seven of these place the enforcement responsibility entirely on the licensing officers, while in the remaining six, officiants share that burden."

41. *Ibid.*

42. *Ibid.*

protection of the individual. In a period when the public is expecting many things from government, it is reasonable to inquire what can be done here. It is recognized that the state by various criminal laws attempts to discourage and deter the commission of particular offenses against the family. The present inquiry is in the civil field. The problem appears to be one of leaving the "welcome" mat before the door of marriage, but placing beside it a single discriminating public watchdog which will growl and show his teeth when certain persons who, as a matter of policy are already forbidden the house, attempt either through grievance or malice to gain entry.

II. *The Present Situation Is Ineffective*

There is nothing to be gained in an article such as this by an effort to demonstrate statistically or estimate the number of annulments per year in the United States.⁴³ It is assumed that there are too many; that people, who are prohibited from marrying under penalty of annulment, continually disregard long established principles of public policy; that this practice swells the already alarming number of broken homes; that the social, economic and psychological consequences to the individual who innocently becomes involved in a void or voidable marriage are sufficiently serious to warrant a focusing of public attention. A critic may complain of the modern social inadequacy of a compromise concept which endeavors to encourage formal marriage by limiting the obstacles at the threshold largely to publicity and registration and yet recognizes and voids certain marriages as against public policy. Such a procedure casts too much responsibility upon the individual. Criticism of the administrative machinery may be based upon the ineffectiveness of attempting to solve modern annulable marital problems by a device borrowed without its supporting background from the ecclesiastical law of the middle ages. The present system is remedial and not preventive; it drags the most intimate domestic relations through the ordeal of litigation; it solves only a limited number of the less serious problems confronting the parties; and fails to assert a reasonable interest by the state in its fundamental task of helping to build stable families.

43. JACOBS, *CASES ON DOMESTIC RELATIONS* (1933) 170-355; MADDEN, *CASES ON DOMESTIC RELATIONS* (1928) 572-627; McCABE, *CASES AND OTHER MATERIALS ON PERSONS AND DOMESTIC RELATIONS* (1936) 161-264; McCURDY, *CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS* (2d ed. 1927) 45-151.

Brown, *Duress and Fraud as Grounds for the Annulment of Marriage* (1935) 10 IND. L. J. 473; Crouch *Annulment of Marriage for Fraud in New York* (1921) 6 CORN. L. Q. 401; Emmerglick, *Nullity of Marriage for Fraud* (1931) 19 KY. L. J. 295; Vanneman, *The Annulment of Marriage for Fraud* (1925) 9 MINN. L. REV. 497. Notes: *Validity of Marriage Entered in Jest* (1921) 11 A. L. R. 215; *The Nature of Fraud Required to Annul a Marriage* (1922) 22 COL. L. REV. 662; *The Annulment of Marriage on the Ground of Fraud* (1925) 73 U. OF PA. L. REV. 195. See also recent case notes: (1934) 14 B. U. L. REV. 837; (1918) 6 CALIF. L. REV. 224; (1874) 1 CENT. L. J. 235; (1907) 7 COL. L. REV. 128; (1920) 20 COL. L. REV. 708; (1921) 21 COL. L. REV. 194; (1917) 3 CORN. L. Q. 51; (1930) 64 U. S. L. REV. 617; (1922) 29 W. VA. L. Q. 60.

Preventive law is as important in the handling of human problems as is preventive medicine. At the present time, well recognized principles of law have decreed that certain persons should not marry; and if they do, an annulment is granted the innocent spouse as a matter of right. In the prohibited group are people who go through a ceremony lacking mutual assent;⁴⁴ the scoundrel who uses fraud or force to accomplish his fell purposes;⁴⁵ children under a certain age;⁴⁶ a person whose mental or physical health is not up to the standard of the particular jurisdiction;⁴⁷ individuals whose nuptials would violate laws against miscegenation, incest and consanguinity;⁴⁸ the ignorant or malicious person who, with one undissolved marriage to his credit, contracts another.⁴⁹ Reports of appellate tribunals,

44. 2 SCHOULER, MARRIAGE, DIVORCE, SEPARATION, AND DOMESTIC RELATIONS (1921) 1411: "The element of imperfect consent is readily associated with cases of the present class. Thus, if a person is unwittingly entrapped into a marriage ceremony, not meaning nor affording reason for the other party to believe that it should be binding, this marriage may be repudiated. And in general a mock marriage in jest is no marriage."

On the general subject of the effect of marriage in jest, see Note, *Validity of Marriage Entered in Jest* (1921) 11 A. L. R. 215. See also the following recent case notes: (1931) 11 B. U. L. REV. 296; (1921) 21 COL. L. REV. 194; (1931) 19 GEO. L. J. 239; (1930) 9 N. C. L. REV. 96; (1922) 29 W. VA. L. Q. 60. Cases dealing with the problem are: *Hand v. Berry*, 170 Ga. 743, 154 S. E. 239 (1930), 64 U. S. L. REV. 619; *Reszel v. Reszel*, 73 Mich. 133, 40 N. W. 858 (1883); *McClurg v. Terry*, 21 N. J. Eq. 225 (1870); *Crouch v. Wartenburg*, 86 W. Va. 664, 104 S. E. 117 (1920).

45. *Supra* note 8. See also: *Baker v. Baker*, 13 Cal. 87 (1859); *Reynolds v. Reynolds*, 3 Allen 605 (Mass. 1862); *Smith v. Smith*, 61 Mich. 607, 17 N. W. 79 (1883); *Harrison v. Harrison*, 94 Mich. 559, 54 N. W. 275 (1893); *Ferlat v. Gojon*, 1 Hopk. Ch. 478 (N. Y. 1825); *Scott v. Sebright*, L. R. 12 P. 21 (1886); *Moss v. Moss*, [1897] P. 263. See also references cited *supra* note 43.

46. 1 VERNIER, AMERICAN FAMILY LAWS 115: "According to the common law, males of fourteen years of age and females of twelve could make a binding contract of marriage. In the United States today all but twelve states have by statute changed the common law rule by providing for higher age limits. But there is still a wide discrepancy between the age qualifications for entering marriage contracts and that required for other contracts. . . ."

See also, RICHMOND AND HALL, CHILD MARRIAGES (1925); MARRIAGE AND THE STATE (1929); Bossard, *The Age Factor in Marriage—A Philosophical Study* (1931) 38 AM. J. OF SOC. 536.

47. 1 VERNIER, AMERICAN FAMILY LAWS 199-206: "The most modern development in the field of prohibited marriage is undoubtedly the prohibition of marriages on account of disease. Although only a half of the American jurisdictions have, as yet, adopted such legislation, there would seem to be little basis for questioning the wisdom of prohibiting the marriage of persons who are . . . afflicted with any serious transmissible disease."

For the status of legislation governing marriages prohibited because of disease, see Table XIV. 1 *id.* at 200.

Similar problems with respect to mental deficiency are discussed in 1 *id.* at 188-196, where the author indicates that all but eight states have legislation on this subject. See also Table XIII, 1 *id.* at 191 *et seq.*

48. Marriage between those within the "prohibited degrees" was barred by the statute of 32 HEN. VIII, c. 38 (1540). What those degrees were was determined by reference, not to the Bible, but to certain prior statutes; namely, 25 HEN. VIII, c. 22 (1533), and 28 HEN. VIII, c. 7 (1536). These degrees are set forth in chart form in 2 CO. INST. *683.

See 1 VERNIER, AMERICAN FAMILY LAWS 183: "Upon the subject of marriages prohibited because of consanguinity all fifty-one of the American jurisdictions have statutes. Moreover, surprising as it may seem there is, up to a certain point, a laudable degree of uniformity in the statutes." Table XI, 1 *id.* at 176-181, shows the relationships by consanguinity within which marriage is prohibited. See also Brown, *Consanguinous Marriages—A Scientific Approach* (1930) 15 ST. LOUIS L. REV. 175.

49. See recent case notes: (1934) 6 MISS. L. J. 443; (1931) 4 SO. CAL. L. REV. 244; (1931) 80 U. OF PA. L. REV. 309.

records of trial courts, domestic relations courts,⁵⁰ information available in law offices, legal aid societies,⁵¹ and social agencies,⁵² indicate that such persons are constantly marrying and that the annulment process is being used to untangle distressing situations. In a substantial number of such cases, if the facts were available in advance, the innocent misinformed party never would go through with the ceremony. In other cases protection is necessary to prevent the headstrong, reckless individual from bringing about a situation contrary to public policy and which, if completed, will require expense, time and energy on the part of other people to untangle. What practical social benefit is served by a policy of the law in domestic cases which waits until the horse is stolen before locking the door? A fact finding study of the number and condition of the innocent victims of the present individualistic policy of watchful waiting might reveal circumstances to outweigh, in the mind of an impartial reasonable man, the desires of another group to have the road to marriage open to all. A man with nothing to hide might be more willing than the rascal to accept a preliminary public investigation into the facts as to whether his marriage would be legal. The declaratory judgment device is useful in other fields of law. Why not here?

The consequences of the present remedial policy are more serious to the wronged spouse than would be the case in a property problem. Annulment may declare that a form of marriage is a nullity and thereby wipe the legal record clean; but it does not, and, in the nature of things, cannot return the plaintiff to the social, economic and psychological status quo.

Preventive professional care is not a novelty. Physicians,⁵³ social workers,⁵⁴ clergymen have employed it with substantial success. In other

50. Charles Zunzer, *Crime and the Broken Home*, an address before the U. S. Subcommittee on Racketeering.

51. Zunzer, *Family Desertion* (1929) 145 ANNALS 98-104 (report on a study of 423 cases). The National Association of Legal Aid Organizations publishes each year detailed statistics showing the source, nature and disposition of the cases handled by its member organizations.

52. Bucklin, *Studies in Breakdowns in Family Incomes: Broken Families* (Mar. 1930) 2 THE FAMILY 3-13; Mowrer, *The Study of Family Disorganization* (May, 1927) 8 THE FAMILY 83-87.

53. MEDICAL CARE FOR THE AMERICAN PEOPLE (1932) (final report of the Committee on the Costs of Medical Care).

54. WARNER, QUEEN AND HARPER, AMERICAN CHARITIES AND SOCIAL WORK (4th ed. 1930) 25-26. See I VERNIER, AMERICAN FAMILY LAWS 266-267:

"Second only in importance to the termination of the marriage itself is the problem of the property rights of the parties. The property of the wife which the husband has received by virtue of the marriage must ordinarily be restored, and at common law the wife might bring an action for its recovery. The nature of annulment being a restoration of the parties to their former status, their rights of property existent at the time of marriage must be protected. But the mere restoration of rights would, in many cases, not guarantee justice to the parties. The marriage, although voidable, may have given rise to effects that cannot be equitably eradicated by a mere revival of the pre-marital status. Broadly speaking, the same consideration may be present in marriages terminated by annulment as though divorce, and the same rights and remedies would seem to be applicable. Therefore, it is not surprising to find in connection with annulment action, provisions for temporary and permanent alimony, as well as for restitution and division of the property of the parties. . . .

branches of the law⁵⁵ it has been found useful. The state already protects the small borrower by a small loans law, the inexperienced investor in securities by a blue sky law, the purchaser of insurance by a state insurance commissioner. It might do more good than harm if it gave timely rather than belated aid to the individual who honestly and sincerely desires to marry and establish a stable family.

A second criticism of the present procedure is the requirement that the wronged individual secure his remedy by submitting to the litigation process. To many lay people this is a serious mental hazard. The law student reading his case book may find it convenient to think of the parties to a case as symbols *X* and *Y* so that he may concentrate his attention upon the functioning of the judicial process with its more or less abstract concepts. The lawyer, accustomed to the din of judicial clashes, the routine of a trial, the traditions⁵⁶ of the profession which view litigation as a distinct improvement over trial by battle or ordeal, may have difficulty in seeing the matter through the client's eyes. Exhibitionistic and litigious persons may enjoy the publicity and excitement of the witness chair. There is a record of an earlier day in this country when a term of court was a social event⁵⁷ and much relished by some of our hardy forefathers.⁵⁸

But the trend of legal history is against litigation. The common law offenses of maintenance and champerty were designed to discourage undue controversy. In England the expense is an added deterrent. Early groups in this country sought substitutes.⁵⁹

Many modern litigants do not press their legitimate claims to an adjudication because they are aware of the delay, expense and complexity of litigation and the uncertainty of the result.⁶⁰ Sensitive and perfectly honest

"Eleven states provide for permanent alimony to the wife, but some of them do so only under expressly specified situations or when the annulment is upon a particular ground; only four provide for temporary alimony. As to property, six states enact the common law rule for the return to the wife of her real property, seven make provision for the wife's recovery of her personality, while five provide in general terms for an equitable adjustment of property rights. . . ."

On the effect of judgment on nullity, see Table XXII, 1 *id.* at 267-272.

55. See the Annual Proceedings of the National Probation Association.

56. See the constitutions of the various states in which provisions such as the following taken from the Pennsylvania Bill of Rights occur: "All courts shall be open." INDEX OF STATE CONSTITUTIONS (1915) (prepared for the N. Y. State Constitutional Convention by the Legislative Drafting Research Fund of Columbia University).

57. I BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1919) 284.

58. BRYCE, *THE AMERICAN COMMONWEALTH* (5th ed. 1923) 665 *et seq.*

59. Lewis, *The Courts of Pennsylvania in the 17th Century* (1895) 1 PA. B. A. REP. 353.

60. I VERNIER, *AMERICAN FAMILY LAWS* 273-274; 1 *id.* at 230-231:

"The care, custody, and maintenance of the children of a marriage present essentially the same practical problems whether the dissolution has been by device or by annulment; the same moral obligations of parents toward their children are present, and the same practical necessities demand attention. . . ."

". . . The fact remains, however, that only twenty-six of the fifty-one jurisdictions have statutes on the subject; and of these, only nineteen have all-inclusive statutes providing definitely for the care, custody, and maintenance of the children of all annulled marriages. These statutes usually give the court discretion to make such orders as may be just and

individuals dread the shock of conflict, the publicity, the torture of cross-examination.⁶¹ Whether out of consideration for such people or for other reasons, the law has shown a disposition to acknowledge its obligation to personalities as well as events.⁶² The domestic relations court⁶³ and the trial of domestic matters in the privacy of a master's office⁶⁴ are examples.

At one time surgical operations were a horror to all concerned. Anesthetics, disinfectants, expert diagnosis, improved nursing and hospital facilities have accomplished a desirable improvement. It may be too much to expect a legal anesthetic in the litigation process but one may take an intelligent interest in building a system under which the innocent spouse does not have to seek redress for domestic injury by the embarrassing task of washing his dirty linen in public.⁶⁵

A third criticism of the existing situation is the limited number of problems which it can solve. Betrothal, and to a greater extent, marriage, involves both parties in relations from which at any time the legal elements of rights, property, legitimacy, support, alimony may arise. The annulment may solve these purely legal problems but it can hardly hope to touch the extra-legal matters. Social, medical, economic, psychological changes occur of as much importance to the parties as if the field of law recognized them. The failure to know in advance the facts which justify an annulment and to prevent the fatal step often results in irreparable damage.

A decree of nullity is of limited value to a respectable woman who, without legal fault, finds too late that she has married: a man afflicted with venereal disease; a member of another race, in a community where miscegenation is disapproved by society; the man who enjoys marrying several ladies in turn, without the formality of an intervening divorce; a man who

proper and for the best interests of the children, with power to modify such orders as circumstances may require. . . ."

As early as 1906 leaders in the legal field were recognizing this condition. See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906) 29 A. B. A. REP. 395. See also SMITH, *JUSTICE AND THE POOR* 13-36.

61. See Griswold, *How Many Times Have you Been in Jail?* (Nov. 1937) 124 AMERICAN MAGAZINE 28; Pearson, *What is Evidence?* (Dec. 1937) 102 SCRIBNER'S 26.

62. Bruno, *Social Work and the Law* (1937) 72 NAT. ASS'N OF LEGAL AID ORGANIZATION BULL. 29; *Maniacal Wives* (July 26, 1934) 26 TIMES, No. 4; Turano, *Alimony Racket* (June, 1933) 29 AM. MERCURY, No. 114, 237.

63. Flexner, Oppenheimer and Lenroot, *The Child, The Family and The Court* (U. S. Dep't of Labor, Children's Bureau, Pub. No. 193) (1933).

64. PA. STAT. ANN. (Purdon, 1930) tit. 23, § 36, provides: "When neither of the parties takes a rule for a jury trial, or when after hearing, the rule is discharged the court may proceed to hear the cause or may, upon motion of either party, appoint a master to take testimony and return the same to the court." To the same effect, see W. VA. CODE ANN. (1932) § 4726.

65. See, e. g., Durham Morning Herald, Nov. 2, 1937, p. 1: "The marriage of Mary Lee Williams and Ben Yocum was annulled at Mountain Grove, Mo., when it was discovered that they were brother and sister. Twenty years ago their parents died. The brother and sister were placed in an orphanage. The girl was adopted by Ben Williams of Chilhowee, Missouri, and the boy by a farmer named Yocum. He got a job recently on the Williams farm, fell in love with Mary, married her in secret. A chance remark by Mrs. Williams resulted in the discovery of their relationship."

is mentally unstable; a man who thought it was all a joke and never intended marriage.

Much is said in legal education of the importance of a social viewpoint. Here is a field for its practical application. If the fundamental policy of the state is to build stable marriages, it can hardly afford to ignore factors which may make for instability. To require a gathering of the facts in advance by the impersonal state would be an improvement.

The final criticism of the present situation lies in the ineffectiveness with which the state is enforcing its long asserted interest in marriage and the family. In civil cases the state has no standing as a party in interest. It must wait for an individual who is legally innocent to start the proceeding. In criminal cases the state is a party in interest but its effectiveness is in punishing the wrongdoer rather than untangling a domestic difficulty. If the state, of its own motion, could inquire into marriages of questionable legality, the existing prohibitions might be regarded as of greater significance by those planning to evade them.

An annulment process in general is, at least theoretically, a contest between two persons who have gone through a marriage ceremony. The one who initiates it must be legally innocent. The adverse party must have invaded some right and be legally at fault. If both are at fault the court is likely to leave them where they are.⁶⁶ If the court does act it is usually a bare decree without reimbursement for damages. An improvement, but not the whole answer, would be a statute giving the court discretion to act after weighing all the circumstances.⁶⁷

A criminal process in this field results in a fine or imprisonment for the defendant. Perhaps he needs the services of a physician or a psychiatrist. Perhaps others need to be warned not to marry him.

The state asserts an interest in marriage and the family, but it is not a party to the dissolution proceedings. It can not initiate them but must rely upon criminal prosecution. Such methods are an improvement over trial by battle but do not compare with the progress made by other professional groups in dealing with personalities as well as events.

In the light of the foregoing criticisms it is desirable to propose certain remedies.

III. *A Proposal for a Remedy*

The criticisms of the existing situation refer to the fact that the concepts and administrative machinery are remedial, require solution by litigation, solve only a limited number of the inevitable problems confronting the parties and fail to clarify the interest of the state in the stable family. A remedy should include a change from a remedial to a preventive approach;

66. Wood v. Wood, 2 Paige 108 (N. Y. 1830); Beeby v. Beeby, 162 Eng. Rep. 755 (1799).

67. See N. Y. CONSOL. LAWS (Cahill, 1930) c. 14, § 7 (1).

solution by non-litigation methods as well as the time honored ones; provide for some consideration of the social, economic and psychological problems confronting the parties and clarify the interest of the state.

In particular, the present proposal suggests: a new statute and an educational campaign to inform the community of the advantages and disadvantages of the change; to gather the factual background necessary to support the program; and to check up on the functioning of the proposal with a view to its improvement.

The statute might provide for the following:

1. The marriage license clerk would add to his existing tasks of publicity and registration, duties of a quasi-judicial nature in determining *in limine* whether any legal impediment existed to the particular marriage. His status would become more like other administrative officials, commissions and boards. An appeal from his decision should be to the regular trial courts.

2. To enable him to make his decision, two devices would be necessary: (a) the determination of the facts which he would need, and (b) the establishment of new and coordination of existing fact gathering agencies to this particular end.

3. Assumption by the state of responsibility for the correctness of the decision by public reimbursement to individuals for certain damages suffered in cases where the marriage has been permitted by the license clerk and is later declared void by the annulment court.

4. Assumption by the state of responsibility, coordinate with that of the party, for the inauguration of civil annulment proceedings in certain cases.

IV. *An Illustration*

The workings of the plan will be clearer through the medium of a comparison of the present procedure with that proposed.

1. At Present

An applicant for a marriage license, as a matter of law, must at his own peril ascertain the facts significant to him. In most instances, if he fails to uncover data as to all but the essentials,⁶⁸ the courts will not free him from his bonds no matter how personally distasteful. For collecting the facts he may depend upon himself,⁶⁹ his family, a credit rating bureau or a detective. Consider the expense, delay and impracticability of attempting by one's self to make a thorough check on another person as to such

68. Vanneman, *supra* note 43.

69. Marshall v. Marshall, 217 Cal. 736, 300 Pac. 816 (1931); Wetstine v. Wetstine, 114 Conn. 7, 157 Atl. 418 (1931); Wier v. Still, 31 Iowa 107 (1870); Oswald v. Oswald, 146 Md. 313, 126 Atl. 81 (1924); Robertson v. Roth, 163 Minn. 501, 204 N. W. 329 (1925); Keyes v. Keyes, 6 Misc. 355, 26 N. Y. Supp. 910 (Super. Ct. 1893).

matters as age, health,⁷⁰ present or previous marital experience, race, existing criminal record. Assuming that inquiries could be made locally, an effort to secure a correct answer requires statewide, nationwide and sometimes international investigation. Consider also the psychological obstacles;⁷¹ the emotional condition of engaged persons; natural delicacy of sentiment or shyness; ignorance as to where to go or what to look for in the public records; the difficulty, in most jurisdictions, of requiring a physical or psychiatric examination.

The modern family is almost equally impotent as a fact gathering and evaluating agency. In a settled community where both parties and their families were well acquainted the task should be comparatively simple. But urbanization, the desire of young people to choose their own friends, the ease of transportation and other factors are creating a screen behind which the scoundrel successfully may hide. The credit agency⁷² and the detective are too expensive for the average person. In practice the system of individual responsibility for fact gathering and evaluation breaks down.

2. Under the Proposal

Under the proposal there would be five stages in the process: the initial application, fact gathering, giving the applicant certain items for personal use, deciding whether or not to issue the license and caring for the occasional case in which an annulment may be necessary.

A conveniently located marriage license bureau, with provisions for privacy and a reasonably courteous staff would not cost much more than at present. The application would be made on a form which experience indicated was adequate and would contain such data as the applicant might have gathered or surmised as a basis for the public study. It would be a matter of common sense for both parties to apply. The fee should be sufficient to cover the cost of investigation and, if desired, the premium on the insurance policy later described.

A telephone call to the bureau of vital statistics, a fingerprint bureau,⁷³ a clerk of court, a police department would reveal quickly and inexpensively such data as was found by experience to be desirable as to identification, birth, marital condition, criminal record. A public doctor, with duties similar to those now performed by physicians in applications for life insur-

70. *Brown v. Scott*, 140 Md. 258, 117 Atl. 114 (1922); *Shonfeld v. Shonfeld*, 236 App. Div. 271, 258 N. Y. Supp. 338 (1st Dep't, 1932). See Notes, *Annulment of Marriage for Fraudulent Misrepresentation* (1933) 1 U. OF CHI. L. REV. 123; *The New York Rule of Annulment of Marriage for Misrepresentation as to Wealth or Financial Status* (1934) 68 U. S. L. REV. 449.

71. The present arrangement bears a remarkable resemblance to the time honored doctrine of *caveat emptor*. 8 HOLDSWORTH, *op. cit. supra* note 17, at 69.

72. *More and Better Credit Bureaus Guide Retailers* (Oct. 5, 1932) BUSINESS WEEK 8.

73. *Making Their Marks* (Oct. 12, 1935) 120 LITERARY DIGEST 38: "Have you had your fingerprints taken? The question does not imply that you ever have been charged with a crime. Today thousands are voluntarily having their fingerprints taken and filed."

ance, could supply the necessary data on race and mental and physical health. Honesty of intention or plans to defraud and coerce would be revealed incidentally in a number of cases; but the present proposal does not purport to solve all problems of fraud and duress. A statewide bureau organized like a social service index⁷⁴ and a national bureau similar to many already gathering other types of data in Washington, would enable the researcher to extend the scope of his study.⁷⁵

When the facts are gathered—and this may take only a few moments or a day or two—the applicant would receive a document similar to a title certificate⁷⁶ now issued by title insurance companies for the purpose of advising vendor and vendee of objections on the record. The applicant could then determine whether he wished to proceed. If he did, the license clerk would then decide whether the record showed any facts which might be the basis for annulment. If they were present and could not be removed as by medical treatment, the procurement of a divorce, delay for a year or two until the parties came of age, the application for a license would be refused, subject to appeal to the courts.⁷⁷

If the decision was to grant the application, the applicant would receive two documents, the license and a policy of insurance by which the state would guarantee the accuracy of the facts set forth in the earlier certificate as being the only legal obstacles to marriage. These would vary depending upon local conditions and points of view as to the fitness of things. If a significant fact turned out to be other than as recited or a new one came to light, the holder of the policy would be entitled to make a claim for damages.

After the parties were married, if an annulment was requested by one of them or by the state, the claimant might receive according to the provisions of the policy such compensation as the amount necessary to defray the expense of annulment proceedings, the cost of medical care, as where disease has been communicated, damages for the loss of a lucrative position abandoned in good faith in reliance upon the validity of the marriage,

74. WARNER, QUEEN AND HARPER, *op. cit. supra* note 54, at 297: "One important device for inter-agency teamwork, the social service exchange, was long ago developed by the charity organization societies. This is an office in which are kept cards showing names, addresses, other identifying data concerning clients, and the names of agencies inquiring about them, with dates. By calling the exchange the worker can quickly discover whether any other organization is dealing with a given family or has served it in the past."

75. UNITED STATES GOVERNMENT MANUAL (Nat. Emergency Council, 1937) 110: "The Bureau of the Census is continuously engaged in the collection and compilation of statistics covering wide and diversified fields of human welfare and economic activity. It takes the decennial census of the United States which covers population, unemployment, agriculture, mines, manufacturers and distribution."

See also, *Vital Statistics*, Special Reports, Dept. of Commerce, Bureau of the Census, Vol. 3, No. 2, Feb. 1, 1937, at 3.

76. NIBLACK, AN ANALYSIS OF THE TORRENS SYSTEM OF CONVEYING LAND (1912); NORTH AND VAN BUREN, REAL ESTATE TITLES AND CONVEYANCING (1927); THOMPSON, EXAMINATION OF TITLES (1929); WARVELLE, A PRACTICAL TREATISE ON ABSTRACTS AND EXAMINATIONS OF TITLE TO REAL PROPERTY (4th ed. 1921).

77. See *Report of Committee on Administrative Law of American Bar Association* (1936) 61 A. B. A. REP. 720.

provision for the expense of rearing and educating any children, treatment for bona fide psychological shock. The insurance agencies are sufficiently resourceful to supply a variety of policies to suit individual needs.

V. Discussion of the Proposal

Since the present article is admittedly on the side of regimentation, all the criticisms of the individualists apply. Beyond them are objections which deserve more particular answers. Some of them are: how much regimentation will the public accept, what is to become of these persons who are refused a license, how will the proposal affect children under the legal age who desire to marry, how is the money to be secured for necessary operating expenses, how are people to be kept from developing a racket.

Business, as well as romance, is an element in marriage. A reasonable degree of security will appeal to the prudent man. For this reason if the proposal is made optional rather than compulsory it should appeal to a fair percentage of the population as a shrewd business move. After such people have accepted, it will be time enough to consider making it compulsory so as to protect some impetuous, heedless individual from doing himself an injury. It is an argument in favor of the proposal that the elements are not new. It is merely a combination of well tried factors to meet a situation which heretofore has not received such treatment. The King's Proctor in England⁷⁸ and similar agencies in this country⁷⁹ are precedents. A public insurance fund has many examples to guide those who desire to set it up.⁸⁰ The theory of reimbursing people who have suffered from mistakes by the state is also no novelty.⁸¹ It is not a vain hope that an enlightened public will accept the proposal as an improvement over the existing method.

A person who has been refused a license under this plan is in no worse position than he would be after an annulment.⁸² If he proceeds to form an illicit relationship, the same criminal laws, which now exist, are available to deter and punish him.⁸³ Since the proposal does not include increasing the causes for which annulment is granted, the problem would be the same as today except that the state would come into it at an earlier stage before

78. 10 HALSBURY, *op. cit. supra* note 25, § 1212 *et seq.*

79. 3 MICH. COMP. LAWS (1929) § 12783.

80. EMPLOYEES COMPENSATION ACT, 39 STAT. 742 (1916), 5 U. S. C. A. 751 *et seq.* (1927); WAR RISK INSURANCE ACT, 43 STAT. 624 (1924), *as amended*, 43 STAT. 1309 (1925), 38 U. S. C. A. §§ 511, 512; Federal Deposit Insurance Corporation, created by the BANKING ACT OF 1933, 48 STAT. 168 (1933), 12 U. S. C. A. § 264 (1935); SOCIAL SECURITY ACT, 49 STAT. 620 (1935), 42 U. S. C. A. § 301 *et seq.* (Supp. 1937).

81. BORCHARD, *State Indemnity for Errors of Criminal Justice* in CONVICTING THE INNOCENT (1932) 375.

82. See recent case note, *Marriage—Annulment, Equitable Disabilities—Requisite of Clean Hands* (1931) 80 U. OF PA. L. REV. 309.

See also: *Stoneburner v. Stoneburner*, 11 Idaho 603, 83 Pac. 938 (1905); *Day v. Day*, 71 Kan. 385, 80 Pac. 974 (1905); *Smith v. Smith*, 181 Ky. 55, 203 S. W. 884 (1918); *Carmichael v. Carmichael*, 106 Ore. 198, 211 Pac. 916 (1923).

83. MILLER, CRIMINAL LAW (1924) c. 16.

irreparable injury had been done. There may be wear and tear and shock for the innocent applicant who is refused a license to marry, but this will hardly compare to the distress and suffering arising in connection with an annulment.

Children under the marriageable age present a peculiar problem today. The proposal may be adapted to their needs by making statutory changes so that a social or medical finding of marriageability will be the test rather than a certain number of birthdays.⁸⁴ The clerk may be invested with authority, subject to appeal to the juvenile court, to refuse or grant the application in the interest of the minor. Such a balancing of the authorities of parents and state,⁸⁵ not in itself a novelty,⁸⁶ when employed in conjunction with aid from child welfare agencies or domestic advice clinics,⁸⁷ will cushion the shock of refusal to the child applicant and permit the inauguration of an adequate probationary period. Such a plan making use of existing community agencies would cost little.

The expense of the plan might be met from initial deposits and insurance premiums, from fines imposed criminally upon the rascals, or from the public treasury. Perhaps a combination would prove desirable. It would certainly be a good investment for the individual to pay the expenses himself rather than be put to the problem of raising the cost of an annulment. To know that in the last analysis one will receive a stated sum from an impersonal and solvent estate rather than be required to face the perils of the litigation process with another individual should be worth something.

If there is a temptation to develop a racket, the answer is to fight the racket and punish the racketeers rather than not to attempt the plan. One relies upon the ingenuity of insurance experts. The uniform marriage law⁸⁸ and the uniform marriage evasion act⁸⁹ should stop one sort of evasion.

VI. Conclusion

Here is a problem and a suggested solution. The solution should be of value to the individual and to the state. The former benefits from the stabilizing of a business matter inextricably bound up in marriage; from

84. I VERNIER, *AMERICAN FAMILY LAWS* 115-119, 119-128, treats of the age of the parties and parental consent. See also Table V, 1 *id.* at 116-117 (age of the parties); and Table VI, 1 *id.* at 121-124 (parental consent).

85. Carlisle, *Compulsory Attendance Law in the United States; Historical Background* (1936) 4 *EDUCATIONAL LAW AND ADMINISTRATION* 35, Part II, p. 78; 31 *ELEMENTARY SCHOOL JOURNAL* (1931) 504-513. In the exercise of the police power of the state, the legislature may authorize boards of health to exclude from school all unvaccinated pupils even though no smallpox may exist in the community at the time. A Texas case is in point. *Zucht v. King*, 225 S. W. 267 (Tex. Civ. App. 1920).

86. *In re Vasco*, 238 App. Div. 128, 263 N. Y. Supp. 552 (2d Dep't, 1933), 14 B. U. L. REV. 196 (1934), 28 ILL. L. REV. 556 (1934), 12 TENN. L. REV. 59 (1934).

87. Popenoe, *The Marriage Clinic* (April, 1932) 7 *PARENTS MAGAZINE* 15; see also Groves, *Teaching Marriage at the University of North Carolina* (1937) 16 *SOCIAL FORCES* 87.

88. UNIFORM MARRIAGE AND MARRIAGE LICENSE ACT, 9 U. L. A. (1932) 251-274.

89. UNIFORM MARRIAGE EVASION ACT, 9 *id.* at 275-280.

an emphasis upon preventive rather than remedial law; from the necessity of forcing a series of racial, economic, psychological and legal problems in advance of the marriage, instead of before the annulment courts. The latter will profit by having its position with regard to marriage clarified; by impressing the public that marriage is a privilege available to those who have achieved a certain excellence rather than a catchall; and by obtaining more accurate data on those planning to marry which may be used as a basis for further improvements in the law. There are disadvantages but it is urged that they are outweighed.