

PROPOSED NEW TECHNIQUES IN THE LAW OF DIVORCE

I. FAMILY DISSOLUTION-LIMITS OF THE PRESENT LITIGIOUS METHOD

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DIVORCE procedure in the United States has been the subject of extensive criticism. Admittedly, many of the objections to the method now generally employed are well-founded and could be avoided by a revision of divorce procedure and a modification of the concept of divorce. To say that one plans to test the social desirability of a legal concept such as divorce procedure merely puts the question one step further off. There may be different standards of social desirability depending upon the point of departure, the fundamental assumptions, and the viewpoint of the inquirer. The critic has a right to knowledge of the base of operations because only thus may he make allowance for bias, appraise blind spots, and evaluate both methods of inquiry and conclusions. The inquirer by such an orientation process is encouraged to realize that his mind may have been warped by training and experience, or lack of it. It is to his advantage to be careful in his approach, conservative in his recommendations, and patient with those who disagree with him.

THE POINT OF DEPARTURE

If we assume that divorce procedure is socially desirable provided it satisfies the wishes of at least one of the interested spouses,¹ the critic may complain that such a point of departure

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¹ 2 VERNIER, AMERICAN FAMILY LAWS (1932) 65: "Finally, the lay reader should note that, despite any impression to the contrary which he may have received from the reading of novels and newspapers, no statute now existing names incompatibility of temper as a cause for absolute divorce." Seven states do this in effect by providing for a divorce where the parties live apart even voluntarily for a fixed period. *But see* 1938 Supp. *id.* at 46: "Of particular interest are the new provisions in Alaska and New Mexico allowing divorce for incompatibility of temper. Also of interest are the amendments in five jurisdictions making voluntary separation for a period of years a ground for divorce."

is too individualistic and too impermanent to justify the inevitable changes in the legal system. The emotional reactions of the parties do not improve the situation. The advice to the lovelorn column in the daily newspapers² is some evidence of the interest of individuals in domestic problems. The inquirer cannot afford to ignore this factor, but neither should he unreservedly or exclusively accept it.

If we assume that divorce procedure is socially desirable provided it satisfies the wishes of a substantial majority of the general public, we are faced with the task of ascertaining the facts. The present keynote of public interest in divorce may be said to be discord.³ Other questions are inevitably dragged into the discussion: whether divorce itself is socially desirable and, therefore, to be made easier; or a menace to the solidarity of the traditional American family and, therefore, to be repressed. A poll might reveal individual preferences, but it seems unfortunate to involve the entire project in an old controversy if another approach promises improvement. The inquirer should be careful not to give too much credence to an impression that members of the lay public are competent without special training to "diagnose" and "prescribe for" their own legal difficulties. In medical matters we have left such ideas far behind. Various campaign programs have taught most of us who are educable to take our health and accident problems to a competent physician, rather than to select on our own initiative some patent medicine or an even less orthodox panacea.⁴ A series of "legal first aid" courses might bring home to the general public the corresponding advantages of taking legal problems promptly to a good lawyer.

Having cast doubt upon the value of the individual spouse and the general public to provide us with a suitable base of operations, we turn to a more likely source. Much may be said in favor of a divorce procedure which has been pronounced so-

² Jensen, *Doris Blake Advises the Lovelorn* (1941) 11 LIFE 65; Palmer, *Did I Go Wrong? Advice to the Lovelorn and Perplexed, a Thriving American Industry* (1939) 48 AM. MERCURY 197.

³ "Anyone making a comparative reading of our American divorce statutes for the first time is astounded by the unnecessary variation and vagueness of this legislative output.

"From a purely theoretical standpoint we need a simple uniform law. But our present divorce statutes represent such divergent views upon fundamental points that agreement does not seem attainable except in the distant future." 2 VERNIER, *op. cit. supra* note 1, at 7.

⁴ For one approach to the public health program, see Maslow, *The Background of the Wagner National Health Bill* (1939) 6 LAW & CONTEMP. PROB. 606.

cially desirable by the various professional groups interested in handling and attempting to solve domestic relations problems.⁵ There is a chance here for an impersonal scientific approach. But candor requires us to state that before any progress can be made from an interprofessional viewpoint much work must be done in creating such a viewpoint. The water-tight compartment theory of the social sciences must be abandoned, and men from different fields, each with his own technical skills and vocabulary, each trained by a different discipline, must learn to work harmoniously together on particular cases to achieve a common, rather than an individual, objective.

The present paper, then, views the subject of divorce procedure through the eyes of the lawyer as a social engineer. It suggests a plan for modifying the system with a hope of ultimate interprofessional cooperation. Along such lines a real advance may be possible. It is helpful to distinguish between the two aspects of the lawyer. As a skilled technician, he receives in his office clients with domestic difficulties, attempts reconciliations, and procures from the court decrees setting forth mutual rights and duties. As a social engineer, he, like other professional people, is interested in the quantity and quality of the specialized service which his group furnishes to the client public.⁶ He wants to know whether all the human problems he is able to solve are brought to him.⁷ To this end he has borrowed a phrase from the physicians and speaks of "preventive law." He is also concerned that each human problem should be solved as well as possible. Lack of machinery for adequate interprofessional cooperation makes for overlapping in some matters and interstitial gaps in others. This condition, characteristic of a frontier stage, makes it doubtful whether the public is receiving all or the best care it deserves. When the complete remedy must combine resources from several professional fields, much remains to be done.

⁵ The activity of the most recent professional group, the marriage counselor, is indicated by the existence of the National Conference on Family Relations. For a collection of literature on the subject, see *Marriage and Family Living*, a publication of the National Conference on Family Relations.

⁶ Committee on Professional Ethics and Grievances of the American Bar Association, Opinion 82: "An attorney is obligated to advise his client as to the best interests of the client as seen by the attorney."

⁷ "In any consideration of the legal profession, three separate standards or, as I prefer to put it, levels of criticism and effort, should be distinguished:

"First, the level which accepts existing society and the present standards of the profession, and seeks merely to enforce or to induce adherence to those standards.

The lawyer as a technician is well acquainted with the good and bad points of divorce procedure in his jurisdiction. As a social engineer he may find it profitable to examine the records of agencies such as domestic relations courts, juvenile courts, and legal aid societies to secure a fair picture.³ From this point of departure we shall list several criticisms.

OBJECTIONS TO THE MEANS BY WHICH DIVORCES ARE SECURED

Attention will be limited to three questions: What should be the goal of a divorce proceeding; what may be done in a preliminary way to improve the quality and quantity of interprofessional service in such cases; and is litigation necessarily the most effective device for presenting the contentions of the parties and producing a suitable decision? To the critic who complains that such matters are imponderable, opinion, and not susceptible of statistical proof, it may be answered that we are drawing ourselves up by our own boot straps. We must set up and test many tentative standards before we are prepared to recommend a permanent measuring rod. These are initial steps to be undertaken with humility.

A. *What Should Be the Goal of Divorce Proceedings?*

The individualistic plaintiff in divorce proceedings may have a variety of goals ranging perhaps from a bona fide desire to obtain relief from an intolerable domestic situation to a spiteful wish to use the process to humiliate publicly the defendant. The number of reported appellate cases in which the questions of support or property settlement or custody of children occur suggests that the real issues between the parties are in the material⁴ rather than the spiritual field. Still other plaintiffs are intent

³Second, the level which accepts existing society and its organization, but seeks to make the profession conform the better to its functions and purposes in that society.

⁴Third, the level which accepts neither existing society nor existing standards of the profession, and seeks to transform society and the profession as a part of it into a new social order." Cheatham, *What the Law Schools Can Do to Raise the Standards of the Legal Profession* (1933) 7 AM. L. SCHOOL REV. 716, 717.

⁵Records of The National Probation Association, The Family Welfare Association of America, and The National Association of Legal Aid Organizations will lead the inquirer to a fund of information.

⁶"In practice, then, the controversial matters in divorce litigation are not concerned with the termination of the marital status; they are concerned with financial and property arrangements, and upon occasion with custody of minor children." MARSHALL AND MAY, *THE DIVORCE COURT—OHIO* (1933) 23.

upon the divorce decree as signaling the right to marry someone else, or as a springboard to accumulate public sympathy. The interprofessional inquirer must look further for a socially desirable goal.

The goal of the general public is indicated by the legislature. The statutes designating "grounds" or "causes" for divorce present the issues to be determined by the courts. While one may assume that the effect of this mass of legal rules is to relieve the legally innocent spouse from an intolerable domestic situation caused by the legally guilty spouse, the real question is still unanswered. What are tests by which to determine the "intolerable" condition? For the bona fide plaintiff tests are of comparatively minor importance. But if the "grounds" become in the public mind merely pegs on which to hang manufactured evidence, the judicial scrutiny required to prevent plaintiffs from imposing upon the court may become a substantial burden.¹⁰ A trial in which each spouse is trying to jockey the other into an unfavorable position may lead to such an emphasis on technicalities as temporarily, at least, to obscure the real merits of the case. Some awareness by the legislature of the dangers implicit in such a situation is indicated by provisions for a decree *nisi* or a definite limitation upon the freedom to remarry after a final decree.¹¹ The plaintiff who goes across a state line to achieve what is not within his reach at home contributes to the complexity of the present problem.

The lawyer as a social engineer may see another possible goal. Some critics have adopted a hostile attitude toward certain aspects of professional functioning.¹² It would seem that in an increasingly complex civilization professions inevitably are set up on the basis of public confidence that they will provide expert means of solving human problems. In this view of a case a profession is valuable depending upon how well it handles human problems and how alert it is to increase the quantity and quality of its service to the public. It would follow that the goal of the law, or any other profession, in divorce procedure is not the signing of a final decree—that is merely a means to an end—but the solving of as many as possible of the human

¹⁰ 2 VERNIER, *op. cit. supra* note 1, at 92.

¹¹ *Id.* at 172.

¹² United States v. American Medical Ass'n, 110 F.(2d) 703 (1940); RODELL, WOE UNTO YOU, LAWYERS (1939); see also Raub, *The Anti-Trust Prosecution Against the American Medical Association* (1939) 6 LAW & CONTEMP. PROB. 595.

problems involved in the domestic catastrophe. Such a goal does no violence to the wishes of a bona fide plaintiff. Neither does it lessen the interest of the state in the preservation of the family. Rather it is a challenge to lawyers and other professional groups to do their best. It holds out a hope that a way may be found to distinguish the complainant who is not proceeding in good faith. Such a goal, by the very nature of its realistic approach, forces upon our attention the next question.

B. *What May Be Done in a Preliminary Way to Improve the Quality and Quantity of Interprofessional Service in Divorce Cases?*

This question may be phrased simply, what human problems are we going to try to solve in the course of a divorce case? The legislatures have declared that the issues should be the doing or not doing of certain acts such as adultery, cruelty, and desertion. Legal writers have recognized that these are only a part of the problems involved.¹³ There is no value in attempting here a complete catalogue, but three classifications which will help us in our present inquiry deserve mention. With respect to the time they arise, there are matters originating prior to the divorce proceedings, those which develop while the case is being litigated, and those which come into being after the divorce decree is signed. At present, divorce procedure makes substantial provision for only a few of the problems falling within the first group. There are social, economic, medical, and, of great importance, spiritual matters which merit recognition and consideration. But such items have to a considerable extent been ignored in divorce procedure.

The relief afforded by the present legal process is limited. The successful spouse may secure a decree, the judicial approval of a property settlement, and the custody of children. Valuable as these remedies are, they do not go far enough, nor can their range and effectiveness be greatly increased as long as lawyers alone are permitted to participate. By considering the court proceeding as a hub around which the various professions may circulate in the cooperative endeavor, it may be possible not only to solve more human problems but to do a better piece of work.

¹³ JACOBS AND ANGELL, *A RESEARCH IN FAMILY LAW* (1930), lists a large number of these problems.

It is not contended that every human problem can, or even should, be dealt with. But the critic is asked to consider the significance of the process if the issues to be tried were similar to the following:

Why are these particular spouses unable to live amicably together as normal married people do?

Will the parties be sufficiently better off in any demonstrable fashion after the divorce than they were before?

How will the process of granting a divorce affect the security to which other members of the group may be morally entitled?

Will some other solution than a divorce decree be more adequate to the particular problems?

Juvenile and domestic relations courts are constantly concerned with questions which do not differ greatly from those listed above, except that the consequences there are not as serious as in divorce.¹⁴ The proposed change appears, therefore, not so much a blind plunge into the unknown as an effort to remove a handicap from the divorce court so that it may do its work more successfully than in the past. Neither should the critic assume that undue or undesirable regimentation is intended. The state has long announced its interest in marriage, the family, and divorce. It is regarded as proper to deny certain persons the right to marry because of physical or mental unfitness.¹⁵ The members of the select group, who are entitled to marriage licenses, have entire freedom to function in family groups so long as they are able to care for their own relationships. When, however, the marriage bonds are so strained that one spouse applies for a divorce, an abnormal situation is presented. The law is accustomed to making provision for abnormal situations or individuals in the criminal field,¹⁶ and the process of rehabilitation is not usually regarded as an undue regimentation.

If in like fashion the procedure of the divorce court were designed to see to it that the parties emerged at least as well off as they were before, the plan might have social desirability.

It is urged that responsibility for experimenting in this field of domestic relations should be at the lawyer's door. He is in a position to know the facts and perhaps to do something

¹⁴ Seagle, *Domestic Relations Courts* (1931) 5 ENCYC. SOC. SCIENCES 194 *et seq.*

¹⁵ *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 966 (1914).

¹⁶ Sellin, *Probation and Parole* (1934) 12 ENCYC. SOC. SCIENCES 435 *et seq.*

about them. Failure to act may entail no unfavorable consequences. On the other hand, in a dynamic period of the history of our civilization like the present, the profession which is content to remain passive may well find the initiative passing into the hands of others. Lost public leadership is hard to regain, and the lay criticism of the bar today is such as to justify an alertness on the part of agencies like public relations committees of bar associations¹⁷ with respect to any field of law which may appear to lag. Tradition is not a complete answer to modern demands for improved service.

C. *Is Litigation in Divorce Cases Necessarily the Best Device for Shaping the Contentions of the Parties and Providing a Decision?*

Litigation is a respected, traditional legal tool.¹⁸ It has served many purposes. In American frontier history, it was something of a community spectacle.¹⁹ To many a successful suitor it offers an effective remedy for such of his problems as lie within the field of law. Where he wishes to reimburse himself for damage inflicted by the defendant or where his purpose is accomplished by restraining the person of the defendant temporarily or permanently, litigation gives the successful plaintiff a fair chance. But in divorce, the benefits of litigation are not as clear.

This may be because historically we have mistaken the nature and goal of a divorce proceeding and have attempted to put the square peg of the most intimate sort of human misery into the round hole of a procedure designed to settle disputes between persons dealing at arm's length. If the wife desires to put the husband in jail because he is guilty of adultery, cruelty, or desertion, litigation would raise the issues and provide a remedy as effective as that available in any other criminal proceeding. If the husband desires to sue his wife for damages for assault

¹⁷ For example, *The Report of the Special Committee on Public Relations of the American Bar Association* (1941) 66 A. B. A. REP. 337,338, states: "Finally, the state and local bar associations believe it to be the obligation of the American Bar Association to correct misrepresentations and expose unfair criticisms which are carried on upon a broad or national scale."

¹⁸ 2 POLLOCK AND MATLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1899) 558 *et seq.*

¹⁹ "Many of its [American procedure] features are more appropriate to rural agricultural communities, where in intervals of work, the farmer, remote from the distractions of city life, found his theatre in the courthouse and looked to politics and litigation for amusement, than to modern urban communities." POUND, *THE SPIRIT OF THE COMMON LAW* (1921) 124.

and battery, slander, libel, acting outside the scope of her agency, or for some other wrongful act (assuming that such an action were legally possible),²⁰ litigation would provide as effective a procedure as is available against any other tortfeasor.

But argument has already been made in this article that the wishes of the parties and the opinion of a majority of the general public are of doubtful value as objects for divorce. If we agree that the real purpose is to relieve a legally innocent spouse from an intolerable domestic situation, or if we go further and contend that the goal is to solve as many human problems as possible, the inadequacy of the present court routine is clearer.

The most obvious difficulty lies in the fact that marriage, while sometimes spoken of as a contract, is distinguishable as a matter of law from the ordinary commercial contract.²¹ Therefore, a procedure designed to deal with a breach of contract is not always adequate for the more complicated task of unraveling the tangled threads of the marriage bonds and adjusting the respective relationships so that each spouse may continue to live a useful life. Marriage creates a status.²² We might well expect that the dissolution of a status would call for a different procedure.

Another difficulty lies in the contentious character of litigation. By the time a divorce case comes to court, there is enough difference of opinion between the parties to satisfy most litigious individuals. The plaintiff in order to succeed must prove that the defendant has been guilty of one or more

²⁰ 3 VERNIER, *op. cit. supra* note 1, at 268.

²¹ McCURDY, *CASES ON DOMESTIC RELATIONS* (3d ed. 1939) 63 *et seq.*

²² The following material suggests the background against which the legal concept of marriage was developed. Stern, *Women, Position in Society* (1935) 15 ENCYC. SOC. SCIENCES 442, 444: "Canon Law institutionalized male dominance, reflecting the influence of the strongly patriarchal family law of the Old Testament and of Germanic Law. The wife became completely subject to her husband's authority, deprived of legal rights and independent existence. As marriage was held to be a sacrament, she could have no recourse to divorce." Hankins, *Divorce* (1931) 5 ENCYC. SOC. SCIENCES 177: "If [divorce] is designed primarily to relieve the hardships imposed in individual cases by the customary marriage rules." "The western Christian church made both marriage and divorce difficult because of its doctrine that sex is inherently sinful. Marriage was made a sacrament and under the influence of St. Augustine became indissoluble. But the impossibility of forcing people to live together in the intimacy of marriage compelled the church to authorize separation from bed and board. Moreover, the numerous impediments to marriage enabled the church lawyers to find grounds for declaring any marriage invalid from the beginning provided plausible reasons whether personal, political or pecuniary could be brought forward." *Id.* at 79. 3 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1927) c. 4, lists as examples of status in medieval law: the king, the incorporate person, the villian, the infant, the married woman.

acts which are frowned upon by orthodox society. Even when the alleged "grounds" are some unrevealing phrase such as "two-year separation" or "mental cruelty," the inquirer may infer that other disreputable behavior is frequently concealed behind the label. It would seem that the inability of the parties to live together in normal fashion should be sufficiently shocking without making the black mark of a crime on the public record of the defendant. But the irritating factors do not stop here. The allegations in the divorce complaint may be unanswered while the fight centers around how much the husband is to pay the wife or who is to have custody of the children. It is, perhaps, impossible of proof, but one may imagine that litigation has a hand in barring at least some reconciliations.

Litigation, therefore, falls short of a perfect solution because marriage is a status, and the resulting dissolution of the family is too complex a task. There is reason to inquire whether other solutions exist in our modern world. If they do, an examination of them is justified. If they promise better results, there is reason to experiment with them.

Many sincere persons feel that litigation should not be attacked or criticised. Here, however, we are recognizing that it has a definite place, but the inquiry is as to how far its effectiveness extends. The public seems to have been asking itself the same question. Studies of court records during the last ten years in some sections of the country indicate a steady decline in litigated cases.²³ At the same time procedures such as conciliation, arbitration, and mediation have found favor. For example, the increasing interest in pre-trial procedure is significant.²⁴ In criminal, juvenile, and domestic relations courts the orthodox processes of litigation have been modified by the use of procedures such as probation and parole and the introduction of people from other professional fields—social service case workers, psychiatrists, and physicians working cooperatively toward the solution of more human problems.²⁵ But during this

²³ Garrison, *The Problem of Over-crowding* (1941) 16 TENN. L. REV. 658, 666.

²⁴ On pre-trial procedure see *Report of the Committee on Pre-trial Procedure* (1938) 63 A. B. A. REP. 534. As one example of other types of administrative proceeding, see Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review* (1942) 9 LAW & CONTEMP. PROB. 60.

²⁵ "I for one am wholly satisfied that some time within the next hundred years there will be a general acceptance of the conviction that the court should have less control over the process of correctional treatment." Bates, *The Next Hundred Years* (1941) PROB. & PAROLE PROG. 75,82. "... the plan for a treatment board merely sets up our belief that within the last hundred

period of transition the most serious of the domestic problems, divorce, is still shackled to a traditional procedure.

If we are able to achieve an objectively impersonal viewpoint as social engineers, we may come to question whether the present final decree is an appropriate point at which the courts should cease to take an interest in the case. An analogy from the medical field may creep into our thinking. A patient faced with a serious operation is able to have the benefit of a whole battery of medical experts from the general practitioner to the specialists and the surgeon. After the operation, days or weeks of treatment and convalescence are regarded as the ordinary course of events. If the surgeon operated and then let the patient walk out of the operating room to find his way home and recover or die as fate decreed, public criticism would be heard. A divorce trial for many clients causes as much social and economic dislocation and distress as an operation, but with the signing of a decree, *nisi* or final, the court has performed its function. It is not the court which is to blame, but ourselves, for allowing the unexamined system to continue year after year. The use of probation officers, social case workers, and other experts after the decree would help the parties to regain a condition which might be described as "legally healthy," or at least an approximation of normality.

In reviewing the objections to the means by which divorces now are secured, it may be said that their goal is set by the general public and fails to include many community resources available from other professional fields. Only a few human problems are solved, while it is likely that others are created. Procedures other than litigation are available, and there is reason to explore some of the possibilities.

SUGGESTIONS FOR A REMEDY

If the proposed remedy is to meet the foregoing criticisms, it should adopt an interprofessional goal in which the views of the spouses, the public, and the interested professional groups are all given recognition. It should be designed to solve more human problems and create less new ones. It should be based

years we have discovered much that is new with reference to psychiatric treatment, behaviorism and the etiology of crime and delinquency; and that we are determined within the next hundred years to put our communities in the position where these new discoveries can be applied more efficiently and definitely in the correctional field." *Id.* at 83.

on some procedure other than orthodox litigation. The inquirer cannot hope that these suggestions constitute a final answer. They do serve, however, to open up lines of speculation.

1. Divorce should be rather a conciliatory than a contentious proceeding.

2. The parties in interest should include the spouses and the members of the family.

3. The goal should be to work out whatever plan is best for the family as a whole.

4. The divorce court should be supplied with interprofessional personnel, tools, and sanctions to enable it to cope with this most serious of domestic problems.

1. *Conciliatory proceeding.* A conciliatory proceeding is to be preferred in our suggested solution because we are to deal with both legal and nonlegal problems, and at the same time we are to use both legal and extralegal professional resources. Further, it is important that the clients should be kept as peaceful as possible throughout the proceeding so as not to create new problems.

In such a proceeding we may develop a new set of issues. Instead of quarreling over whether B's conduct does or does not amount to cruelty according to law, we can ask the legislature to declare that a divorce shall be granted when it appears to the satisfaction of the court that, as a matter of fact, the members of the family are no longer able to live together in normal harmony. The court should determine this question in the light of all information available through the various resources of the community and interpreted by whatever professional experts may be needed. Naturally, every reasonable effort should be made for rehabilitation, and if it appears that part of the family must be broken down, no more damage should be done than is actually necessary.

There is no reason to ignore cruelty, or adultery, or desertion, but the court should be interested in the reasons creating the difficulty, just as a criminal court wants to know as much as possible about the background of the accused before imposing sentence. Perhaps a physician can deal effectually with the inclination toward adultery. A psychiatrist may discover the cause of cruelty. Desertion may come about because of economic pressure, and an employment agency may provide the answer. Similar problems are thus dealt with in domestic relations and juvenile courts. The proposal here is merely to ex-

tend the well-tried techniques to divorce cases. At present many questions may arise which, for lack of information, cannot be answered. Under the proposal every divorce would be justified as a socially desirable act, and the ruling of the judge would be buttressed by the considered opinions of experts. The form of the proceeding would tend to hold the family situation in a static condition while a study is made and all possible preventives are applied.

2. *The dissolution of the family.* The controversy between husband and wife in the present procedure is thrust so sharply into the foreground that we tend to think of the case as involving a personal disagreement between them. Actually the procedure inevitably involves the dissolution of a family group. The court is breaking up a status.²⁶ This complicates the picture and gives added reason for inviting other professions to cooperate.

The object with which we are dealing may be described as a "sick" or abnormal family. The goal, as in the medical field, is its rehabilitation to a condition approximately normal. The legally abnormal person has been recognized as deserving peculiar care. Children, married women, aliens, and mentally unbalanced persons are favored by special legislation, and provision is made for their entry into the class of legally responsible persons. But these rules of law deal with rights and duties between such individuals and others. The proposed plan would be designed to improve or terminate relationships among members of a family so that the group might continue with as little damage as possible. Children, aged persons, and family dependents may be more seriously inconvenienced by a divorce than the warring spouses. One may argue a moral right in every member of a family to have that group continue until its further existence is harmful. The proposal is to make this something more than a moral right so that in a democracy the family may

²⁶ The process of dissolution of the marital status in the Middle Ages was a matter for the ecclesiastical courts with their peculiar procedures and sanctions. "The ecclesiastical courts had, certainly from the twelfth century, undisputed jurisdiction in matrimonial causes. Questions as to the celebration of marriage, as to the capacity of the parties to marry, as to the legitimacy of the issue, as to the dissolution of marriage, were decided by the ecclesiastical courts administering the canon law." 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 621. See also 2 BISHOP, NEW COMMENTARIES ON THE LAW OF MARRIAGE, DIVORCE, AND SEPARATION (1891) 447 *et seq.*

³ HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. rewritten 1923) 489, 496, mentions a somewhat analogous procedure with respect to the dissolution of an incorporate person.

continue to perform functions which under other forms of political control are prerogatives of the State."

As evidence of this change it might be well to change the captions of divorce cases so that they will no longer read "..... v.," but rather "*In re* the dissolution of the Family."

3. *The welfare of the family.* In the juvenile court the slogan, "what is best for the child," is well recognized as a guiding principle for the individualized treatment of cases and the solution of problems. By analogy the divorce court might well measure the effectiveness of its work in terms of the ultimate welfare of the family. To relieve the distress of the complaining spouses would then be not an end in itself but a step toward making the family, or what is properly left of it, function normally. In some instances, family breakdown could be entirely avoided. In others, comparable to limited divorce, temporary "treatment" under expert supervision might result in eventual reconciliation. If a divorce were granted, it would be because the remainder of the family could function better with one member permanently excluded than in any other way.

4. *The process of family dissolution.* Legal analogies to family dissolution may be found in the settlement of a bankrupt's estate and the untangling of the affairs of a partnership or a corporation. The mention of such proceedings suggests a series of steps: the determination of the need for dissolution, the notice to all interested parties, the taking over of assets to be applied in a particular manner, the plan for distribution of assets, and the final accounting. The suggested plan in the domestic field would follow a similar set of steps.

The conciliatory proceeding would begin upon application to the divorce court. Some question might be raised as to who should be eligible to make such an application. In juvenile and domestic relations courts considerable latitude is allowed. To

The nature of the process of excommunication is described in Hagetine, *Excommunication* (1931) 5 ENCYC. SOC. SCIENCES 671, in which *excommunicatio major*, *excommunicatio minor*, *interdictum*, and *suspensio* were mentioned as medicinal punishments in contrast with *poenae indicativae*. See also Brown, *The Canon Law of Marriage* (1939) 26 VA. L. REV. 70.

²⁷ For a reference to the German concept of marriage as a "service to the folk community," see Mankiewicz, *The German View of Alimony Before and Under National Socialism* (Fuller trans.) (1939) 6 LAW & CONTEMP. PROB. 301.

allow any member of the family to make the request might raise criticism. To recognize the complaints of neighbors, friends, and others would be even more objectionable.

The application would be in the name of "The Family." Whether it should be for a specific object, like divorce, or for general equitable relief might require further consideration. The latter would give the court more freedom in handling such problems as come to light with a view to serving the ultimate welfare of the family.

The application itself need not be complicated in form, but it should contain such information and be couched in such language as would permit a thorough interprofessional investigation of the problems. An analogy might be the assembling of assets and filing of claims by parties in the settlement of a bankrupt's estate.

Jurisdiction over the spouses would be acquired as at present. Just which other members of the family should be treated as parties in interest would depend upon the circumstances of the particular case, but notice should be given to all whose rights might appear to be affected—either through personal service or publication. It is unlikely that the situation would be appreciably more complicated than it is at present. As the case proceeded others might be permitted to intervene.

The court would then direct a thoroughgoing interprofessional examination of the family relationships with recommendations from the experts as to what the problems were and what could and should be done about them.

Hearings might be held to satisfy the constitutional promise to each person of a day in court. But the method employed need not be litigation. The interest of the legal profession in pre-trial procedure has been noted. A court with authority to make rules covering the situation should be able to employ this alternative device with good results. The eventual finding of facts by the court should be subject to review on appeal for those who insist on their rights.

Instead of the present decree *nisi* a plan would be made either for rehabilitation or dissolution. It would be similar in some respects to a composition agreement of creditors or a proposal of a committee of stockholders in a liquidation process. The future of the family would be worked out with a view to preserving as much as may be retained. The plan might require modification. It might fail of its purpose, but it would be an individualized program for a particular family at a particu-

lar time and in the presence of a particular set of problems, rather than a general rule laid down by the legislature for all members of a more or less arbitrarily selected class. The extent of control exercised by the court would depend in large measure on the facts of the individual case, and an appeal from the court order promulgating this plan would be permitted.

The carrying out of the plan under supervision of the members of the family or of the court officers and the filing of a final report would bring the case to the point where a final decree might be entered.

To put into effect such a procedure as has been outlined above would require substantial statutory changes as well as new habits of cooperation among the professions. The old law of divorce would have to be repealed and a new law, embodying the dissolution concept, substituted for it. This new law would work a substantive change by setting up issues which would go to the heart of the problem. It would work a procedural change by giving the court great freedom in the rule-making power so that the hearings might be individualized and the knowledge of experts utilized. It would make available the sanctions of parole and probation, so long familiar and effective in juvenile and domestic relations courts. Outside the courtrooms it would be necessary that the need for closer interprofessional cooperation be recognized so that confidence in professional leadership may be retained. The creation in each community of a council of professional workers similar to existing councils of social agencies but wider in scope to plan for better service to the public might be justified. It is to be noted that though the collection of a suitable staff of professional and clerical workers might involve some additional expense, if the results were beneficial, the cost would be a minor item.

CONCLUSION

The proposal to make divorce a conciliatory matter of family dissolution rather than of contentious litigation between the spouses is a change in legal concept. It is not suggested that the plan is a perfect solution but merely that it promises enough advantages over the present system to warrant a fair trial. It is not designed to meet such controversial questions as whether divorce should be made easier or harder. It deals rather with method. It proposes to change the issues and thus direct attention to more realistic and socially justifiable ends.

The position of the lawyer under the proposal will be much the same as it is now. He and the other professional workers interested in the problem will continue their efforts to untangle the lives of the members of "ailing" families and rehabilitate them or remedy what can be cured. The court has need for increased powers and somewhat broadened duties. The public will benefit from more adequate interprofessional service.

Progress in dealing with domestic troubles has been retarded largely because the thinking of the general public on the subject is in confusion. One of the privileges of the professional groups which are interested in divorce and its attendant problems would seem to be to provide leadership in finding better solutions. Social pioneering is somewhat hazardous for the inquirer, but it is challenging and for that reason alone should attract the professional groups. The lawyer as a social engineer will necessarily be one member of any competent exploring party. Particularly is his guidance needed where it is proposed to reexamine the concepts upon which some of our legal institutions are based. There is no more important task in a democracy than keeping the tools of the law continually adjusted to accomplish effectively their share of the task of solving human problems. There are few human problems of more general interest than those which relate to the conditions under which a man lives with the other members of his family.

II. MODERN DIVORCE LAW—THE COMPROMISE SOLUTION

Robert Neuner†

A LEGAL institution can be a compromise or a hotchpot. It is a compromise if its purpose is to adjust conflicting interests upon an evaluation of their merits and to reconcile them as much as that is possible under the circumstances. It is a hotchpot if it is a combination of rules without a clear understanding of the embodied principles of policy or without a view of an ultimate goal. Which type of legal institution is our divorce law? Most persons will answer that it is a compromise

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between the idea that marriage is indissoluble and the principle of freedom of divorce. This view is supposed to be the reason why divorce is allowed only upon a limited number of specific grounds. There is little doubt that the legislatures which enacted the divorce laws believed that they were making this sort of a compromise, but there is much doubt whether they achieved their purpose and whether the result reached is a compromise in the sense above mentioned.

If the purpose of divorce statutes is to effect a compromise, they have achieved this purpose only to a very limited extent. Such laws do not prevent a couple who have agreed upon a divorce from securing it. This is due to the fact that rules which have been developed in order to make divorce by agreement impossible—that is, the rules on collusion, on corroboration of evidence, and even the rules on the participation of a public official, a proctor, or a similar officer¹—have proved to be ineffective in divorce suits. The use of an officer no doubt has more effect than the others, but even an officer is rarely capable of piercing the veil of a case if it is cleverly presented to the court.

Less known is the psychological effect of the divorce laws. The spouse who wants a divorce is able to secure it. By alternating tortures and promises, one spouse softens the other up until the other spouse finally is forced to agree to a divorce. Whether this strategy succeeds or not is only a matter of tenacity. Strangely enough, this result is in keeping with the law. In these cases there is almost always a ground for divorce in the sense of the law, such as adultery or cruelty. The difficulty is that the spouse who was not willing to avail himself of the remedies of the law has been unduly forced to make use of them. Unfortunately, there seems to be no way of formulating a legal rule which would prevent this misuse. Sociological and psychological forces have proved to be stronger than the will of the legislator. While the legislator allows divorce only if certain specific grounds are given, in fact divorce is granted if both parties or even one alone wants it with sufficient energy and if they are advised by capable but dishonest counsel.

HYBRID CHARACTER OF THE DIVORCE GROUNDS

The main reason for this state of affairs is the hybrid character of the statutory grounds for divorce which are the

¹ 2 VERNIER, AMERICAN FAMILY LAWS (1935) 92.

resultant of very different ideas and policies. The supposition that divorce is allowed only for a limited number of specific grounds so as to effect a compromise is fallacious because the coincidence of history played much too large a part in its composition. The main characteristics of our modern divorce system, *i.e.*, the system which allows absolute divorce if certain specific grounds which are enumerated in a statute are proven, were created by Luther, Calvin, and the later reformers. These reformers did not create their marriage laws and principles out of nothing. They used many of the traditional concepts of the canon law. This was only proper from their point of view because they wanted to purify the Church from the abuses.

By the time of the Reformation, canon law had developed the principle that a limited divorce could be granted upon two specific grounds, adultery and cruelty. The innovation introduced by the reform was that these grounds were now regarded as grounds for absolute divorce, whereas canon law had treated them as grounds for perpetual or temporary separation only, and that out of the Pauline privilege (I Corinthians III, 12-15) the divorce ground of desertion was developed. Curiously enough, the same procedure was repeated in the nineteenth century when English and American judges applied the doctrines which Lord Stowell² had expressed for separation *a mensa et thoro* to cases of absolute divorce.

The transfer made by both the reformers and the judges should not have been made unless prior thereto they had inquired whether the purpose and the function of the rules to be transferred would be consonant with the proposed principles of policy. This raises the whole question as to the sensibility of transferring rules developed for a system of limited divorce into a system of absolute divorce. The suspicion arises that the unsatisfactory state of the divorce law is partly caused by the application of rules which originally were framed for a different purpose. This suspicion is strengthened by the fact that an analysis of the most important grounds for divorce shows that the rules of canon law on the grounds for separation have been blended with ideas of very different origin and purpose. The resulting mixture hardly represents the fruit of mature deliberation or of sound compromise.

The most important ground for divorce is adultery which

² Lord Stowell often cites the classic authors of canon law, especially Sanchez.

is found in all legal systems which allow divorce at all. If adultery is committed, divorce is granted quite independently of the consequences upon the human relations between the spouses. The innocent spouse has an absolute right to get the divorce.³ When adultery is the only ground for divorce, it is difficult to understand why only this violation of the marital duties should be penalized in this way.

The other important ground for obtaining a divorce is that of cruelty. Canon law realized that the duty to lead a common life with the other spouse can come into conflict with the right and the duty to conserve one's own bodily and spiritual existence and health. It, therefore, subordinated the former duty to the latter.⁴ This is the origin of the rule, which we still find in so many statutes, that cruelty is a ground for divorce only if it endangers the life of the other spouse. In a system of limited divorce this adjustment of conflicting interests seems to be reasonable, especially if cruelty is given as broad a definition as by some writers on canon law.⁵ But whether cruelty can be applied in a system of absolute divorce depends on a different consideration. In this system the question to be asked is not when should a spouse be allowed to leave the other spouse, but when should both parties be permitted to separate and to look for a new companion. This question cannot be answered by simply stating that every spouse has the right not to be endangered or harassed by the other. Many other interests must be taken into account, especially the interest which supposedly the state has in upholding marriages. Since cruelty is only a symptom of marriage discord, the real problem which must be solved is under what conditions should spouses who cannot get along together be allowed to divorce. Most jurisdictions have greatly expanded the old notion of cruelty because many more

³ The force of this tradition is so strong that the Germans, too, under National Socialism followed it. See GROSSDEUTSCHES EHEGESETZ (July 6, 1938) § 47.

⁴ This idea has been expressed with particular clarity by SANCHEZ, DE SANCTO MATRIMONII SACRAMENTO (1550-1610) Lib. X, Disp. 17, No. 5. The starting point is a decretal of Alexander III. DE RESTITUTIONE SPOLIATORUM 2, 13. See DAUVILLIER, LE MARIAGE DANS LE DROIT CLASSIQUE DE L'EGLISE (1933) 350; ESMEIN, LE MARIAGE EN DROIT CANONIQUE (2d ed. 1935) 2, 110, where it is shown that the development was very slow.

⁵ SANCHEZ, *op. cit. supra* note 4, at Lib. X, Disp. 18, No. 3: "*Integrum est conjugum divertere ob alterius saevitiam tantum, ut absque gravis damni periculo non possit cum illo habitare.*" *Id.* at No. 11: "*Hinc deducitur, justum huius divortii rationem saevitiae causam esse, molestam cohabitacionem, discordias et iurgia gravia frequentia inter conjuges.*"

circumstances had to be considered.⁶ The principle which had guided the canon law interpretation of cruelty has lost much of its force, but a new policy has not yet been formulated.

It is widely believed that divorce is the sanction of a violation of the marital duties. The innocent spouse is no longer bound by the promises made when contracting marriage if the other spouse has himself broken his promises. Under this principle two important limitations developed: A violation of the marital duties justifies a divorce only if (1) the violation is committed with fault,⁷ and (2) the plaintiff is not guilty of an offense constituting a ground for divorce. Under the first limitation a single case of adultery is a ground for divorce if committed intentionally, but an uninterrupted series of adulterous acts by a nymphomaniac wife is not.⁸ Similarly, cruelty if committed by an irresponsible person does not justify a divorce,⁹ although it is evident that the innocent spouse needs quite as much protection from an irresponsible partner as from a responsible one.

The second limitation refers to the doctrine of recrimination.¹⁰ The history of this doctrine is another instance of an inconsiderate transfer of a rule from one setting into another which entails irrational and unjust results.¹¹ Roman law had allowed a *compensatio criminum* in two situations: (1) The

⁶ Dickason v. Dickason, 40 Ariz. 377, 12 P.(2d) 280 (1932); Blazek v. Blazek 216 Iowa 775, 249 N. W. 199 (1933); Tschida v. Tschida, 170 Minn. 335, 212 N. W. 196 (1927); Chippenfield v. Chippenfield, 121 Neb. 204, 236 N. W. 440 (1931); Sabot v. Sabot, 97 Wash. 395, 166 Pac. 624 (1917); Kingsley, *Cruelty as a Ground for Divorce in Iowa* (1929) 14 IOWA L. REV. 266, 275, 282; Moran, *Divorce for Incompatibility of Temperament* (1941) 9 DUKE B. A. J. 49, 52.

⁷ The classic canon law denied divorce for adultery in single instances where the wife was faultless, e.g., if she had been raped. DAUVILLER, *op. cit. supra* note 4, at 345; ESMEIN, *op. cit. supra* note 4, at 108. If the defendant is at fault, the later canon-law doctrine allows divorce for adultery only. See LIGORIO, *THEOLOGIA MORALS* (1900) 700.

⁸ Wray v. Wray, 19 Ala. 522 (1851).

⁹ Tiffany v. Tiffany, 84 Iowa 122, 50 N. W. 554 (1891); Wertz v. Wertz, 43 Iowa 534 (1876). This is now the English rule too. Astle v. Astle, 3 All Eng. Rep. 967 (1939); Kellock v. Kellock, 3 All Eng. Rep. 972 (1939). Nevertheless the divorce was granted in both cases upon a narrow interpretation of the notion of fault. Lord Stowell seems to have taken the view of the canon law. Kirkman v. Kirkman, 1 Hag. Con. 409, 161 Eng. Rep. 598 (1807).

¹⁰ There are many ways of explaining this doctrine. See JACOBS, *CASES ON DOMESTIC RELATIONS* (2d ed. 1934) 461. MADDEN, *PERSONS AND DOMESTIC RELATIONS* (1931) 306, explains that the doctrine "has its foundation in the principle that one who asks relief must come into court with clean hands." To the same effect is KEEZER, *MARRIAGE AND DIVORCE* (2d ed. 1923) 301.

¹¹ Note, *Divorce-Recrimination as a Defense* (1930) 29 MICH. L. REV. 232, gives a good survey but is incorrect as to its statement on Roman law.

husband could not obtain his wife's conviction for adultery¹² if he himself had violated the marital duties,¹³ and neither party could invoke the benefits granted to the innocent spouse by Augustus' statute on adultery if both had been at fault.¹⁴ However, it seems that in such a situation the husband could be punished. (2) Whereas generally in the case of divorce the husband was obliged to return the *dos*¹⁵ to the wife, he could retain a part of it if the wife had violated her marital duties (*retentio propter mores*). But this right was denied if he himself was also guilty of a breach of the marital duties.

These rules were perfectly sensible as originally used, but they were transferred into the wholly different field of canon divorce law. It is possible that the Bible influenced this reception of the Roman law rule into the canon law, but the words used by Pope Innocent III in his decretal of 1208¹⁶ are so similar to those used by Papinian that the decisive influence of the Roman rule upon the canon-law rule can hardly be questioned. Still more surprising is Lord Stowell's repetition of the view of the Pope. He again founded the doctrine of recrimination upon the same Roman texts.¹⁷ Since the unjust results of the doctrine of recrimination are generally recognized, it is hoped that an understanding of its historical origin will help to abolish it.

INFLUENCE OF LEGAL THEORIES ON DIVORCE GROUNDS

One of the reasons of the unsatisfactory state of the law is the superficial application of contract law to the divorce situa-

¹² So-called *judicium de moribus*, abolished by Justinian, C.5.17.11.2; C.5.13.1.5. This accounts for our scant knowledge of the relations between the *judicium de moribus* and the *retentio propter mores*.

¹³ Justinian, D.48.5.14.5. "*Ulpianus libro secundo de adulteriis. Iudex adulteri ante oculos habere debet et inquirere, an maritus pudice vivens mulieri quoque bonos mores colendi auctor fuerit; periniquum enim videtur esse, ut pudicitiam vir ab uxore esse quam ipse non exhibeat; quae res potest et virum damnare, non rem ob compensationem mutui criminis inter utrosque communicare.*"

¹⁴ *Id.* at D.24.3.39. "*Papinianus libro undecimo quaestionum: id ita accipi debet, ut ea lege quam ambo contempserunt neuter vindicetur: paria enim delicta mutua pensatione dissolvuntur.*"

¹⁵ The translation "dower" is misleading: "*Dos*" is a gift from the wife or from one of her friends or relatives to the husband.

¹⁶ *Quam matrimonii jus in utroque laesum consistat, et paria delicta mutua compensatione tollantur.*" The principle itself is already contained in a decretal of Alexander III (1159-1181). Another source is AUGUSTIN, DE SERMONE DOMINI IN MONTE, Lib. I, cap. 16, No. 47.

¹⁷ Proctor v. Proctor, 2 Hag. Con. 292, 161 Eng. Rep. 747 (1819); Forster v. Forster, 1 Hag. Con. 144, 161 Eng. Rep. 504 (1740). But Lord Stowell's remarks, *id.* at 147, 161 Eng. Rep. at 506, show that he knew that the principle of recrimination could not be applied to divorce in Roman law.

tion. The often repeated slogan that marriage is a status and not a contract, though worthless because of its generality, at least has had the merit of warning against rash analogies. The analogy is not permissible because the effect of a divorce differs from the effect of a rescission of a contract. In the case of a breach of contract the injured party is excused from his own performance and gets damages, so that he keeps the benefits of the contract and in that sense the breaching party is punished. But the spouse who obtains a divorce loses most of the benefits of the marriage even though the decree grants alimony. On the other hand, the divorce is very often regarded as a benefit by the guilty party.¹⁸ That the innocent party is not compelled to seek a divorce is true, but it is equally true that he never does get a real indemnification for the breach of the marital duty of the other party. In fact he only chooses the lesser evil or seizes a welcome opportunity to rid himself of a tie which has become burdensome. This indicates that divorce is not an adequate sanction of the marital duties.

Another idea which influences our divorce laws is the principle of frustration. Divorce is granted if the marriage cannot achieve its purpose.¹⁹ But what is the purpose of marriage? If it is the procreation of children, divorce because of impotency must be allowed, as it is in fact in many jurisdictions. If it is a happy and harmonious life, incompatibility of temper must be recognized as a ground for divorce as was done in some of the German Codes of the eighteenth century, *e.g.*, in the Prussian *Allgemeine Landrecht*.²⁰ Insanity, too, can be justified as a ground for divorce only by this consideration.

Tracing our divorce grounds back to these lines of reasoning does not mean that each ground is and can be interpreted only upon the principles underlying its origin. On the contrary, arguments which are appropriate for one group of divorce grounds have been applied to other groups. Canon-law doctrines are often applied to grounds of divorce which the canon law did not recognize because they were believed to be contrary to the spirit of the canon law. For example, recrimination is

¹⁸ *Separatio a mensa et thoro* can be regarded as a punishment with more justification especially if the defendant has to pay alimony.

¹⁹ One of the first who used this argument seems to be MILTON, *THE DOCTRINE AND DISCIPLINE OF DIVORCE*, bk. I, c. 2.

²⁰ § 718a.

allowed as a defense in a divorce suit based on cruelty.²¹ Moreover the breach of contract doctrine is being constantly mixed with the doctrine of frustration. Even the German marriage law of July 6, 1938, under National Socialism continues this tradition. It allows divorce for disorganization of the marriage (*Ehezerrüttung*) only if it is caused by the defendant and if the claimant has not himself contributed to it by his own fault.²²

PRACTICAL FUNCTIONING OF THE DIVORCE SYSTEM

The cumulation and mixture of divorce grounds which are derived from independent, if not contradictory, sets of ideas accounts for much of the uncertainty of our divorce law. But it is not sufficient to condemn the system upon this ground alone. Much more serious are the objections which can be raised upon an analysis of the practical functioning of the system. As to that two facts are known:

First, the number of divorces is not dependent upon the number and the definition of the divorce grounds.²³ This statement must be qualified however. If a jurisdiction recognizes only one or two narrowly defined divorce grounds—the best example is New York with adultery as the only ground—the number of divorces granted every year is much smaller than in those jurisdictions which adhere to the traditional scheme of divorce grounds. But if a system of various divorce grounds is adopted, it does not make much difference how they are defined; the legislator thereby loses control of the divorce situation.²⁴ This leads to the other point which, too, is generally accepted.

²¹ See the list in 2 VERNIER, *op. cit. supra* note 1, at 85. Canon law did not deny divorce in this situation upon the consideration that even a guilty spouse is allowed to protect his life. See SANCHEZ, *op. cit. supra* note 4, at Lib. X, Disp. 18, No. 5.

²² GROSSDEUTSCHES EHEGESETZ (July 6, 1938) § 49: "A spouse can ask for a divorce if through other grave violation of the marital duties or through dishonest or immoral conduct the other spouse has guiltily caused so deep a disorganization of the marriage that a restitution of a common life corresponding to the essence of marriage cannot be expected. Who himself has committed a violation cannot demand a divorce, if according to the kind of violation, especially because of the connection between the violation of the other spouse and his own fault, the claim for a divorce is morally not justified under a correct evaluation of the essence of marriage.

²³ CAHEN, STATISTICAL ANALYSIS OF AMERICAN DIVORCE (1932) 91, 92; LICHTENBERGER, DIVORCE A STUDY IN SOCIAL CAUSATION (1909) 5; WILCOX, THE DIVORCE PROBLEM, A STUDY IN STATISTICS (1891) 61.

²⁴ MOWRER, FAMILY DISORGANIZATION (2d ed. 1939) 274.

Second, the ground alleged in the complaint is often not the real ground for which divorce is sought.²⁵ It is picked out for reasons of procedural tactics. Assuming that "family disorganization" in the sociological sense can be defined with sufficient exactitude and that its factual realization can be ascertained,²⁶ in addition there must always be the decision of one or both parties to take recourse to divorce as the ultimate means provided by law. This decision is dependent on materialistic and moral considerations which have not much to do with the grounds of divorce.²⁷ The law influences this opinion through the provisions on alimony, and through the fact that divorce is granted in a more or less easy way. It is evident that many married couples would adjust themselves more readily if they did not look at divorce as the easiest way of settling their problems. While divorce is a symptom of family disorganization and one of its causes, it is also used as a tool to solve the problems. Thus it would be quite incorrect to say that divorce is merely the result of the family disorganization.

FUNCTION AND REGULATION OF MARRIAGE

Social realities set limits to the activity of the legislator, limits which are very narrow in the field of divorce law. Yet to be aware of these limits is not enough. Human activity as far as it is free must be directed toward a definite goal. No divorce statute can be drafted or even interpreted without a concept of the function of marriage and of the role which the state should play in its regulation. Strange as it may sound, our marriage and divorce laws are not based upon a decision of the basic issues which are here involved.

²⁵ CAHEN, *op. cit. supra* note 23, at 39; LEITENBERGER, *DIVORCE* (1931) 121; MORAN, *op. cit. supra* note 6, at 50; Mowrer, *The Variance Between Legal and Natural Causes for Divorce* (March 1924) *J. OF SOCIAL FORCES* 388.

²⁶ This seems to me doubtful. See MOWRER, *op. cit. supra* note 24, at 142. MOWRER, *PERSONALITY, ADJUSTMENT AND FAMILY DISCORD* (1935) 49: "Adjustment is after all, a very relative term."

²⁷ This is well illustrated by three Iowa cases which deal with a divorce sought by very old persons. In *Yetley v. Yetley*, 196 Iowa 314, 194 N. W. 88 (1923), a man 81 years old wanted to divorce a 64 year old wife. The motive apparently was the desire to deprive the wife of her right to take a part of his estate after his death and to give the whole estate to the children of the first marriage. This motive was also probably influential in the case of *Graham v. Graham*, 227 Iowa 223, 238 N. W. 78 (1939), though the wife seemed to be guilty of actual cruelty (here the husband was 84 years old, the wife, 44). The motive of the 66 year old wife who after a common life of 39 years sought a divorce from her 79 year old husband in *Walker v. Walker*, 205 Iowa 395, 217 N. W. 883 (1928), is not clear, but it is evident that in none of these cases was the dissolution of the marriage tie what the plaintiff really wanted.

If marriage life were merely a biological fact, the state would not need to interfere with marriage. The play of the forces of nature would determine the conduct of men in this respect. But human reason has interfered with the course of nature here as well as with respect to other primary facts of life, *e.g.*, nutrition as well as marriage has become the object of conscious social action and moral evaluation. There is no way back to the purely biological status of family life; therefore, a decision on the function of marriage in society and in its moral sense must be made. Then only can we know how far the organs of the state should interfere through the means which are their proper domain.

From an economic point of view, marriage as it exists today is a device for the distribution of income and for the care of persons who need to be supported. This is the economic function of the duties of supporting the other spouse and the children and connects marriage with the general economic system. Marxism clearly realized this connection; it saw that complete freedom of marriage and divorce cannot be obtained unless both spouses have equal opportunity to earn a living and a public institution takes care of the children. It is assumed, of course, that the state is responsible for the economic welfare of its citizens. Ancient Rome acknowledged this duty only to a very limited extent, and this is one of the reasons why Roman law allowed free divorce without regard for the economic consequences and without imposing a duty to pay alimony. But the modern state has assumed the duty of supporting its citizens and even its inhabitants and from this it follows that no regulation of divorce law is possible without taking into account the ways in which the population earns its livelihood.

If we assumed that these economic purposes were the only ones which the state should pursue in its regulation of divorce, this conclusion would follow: Divorce can be granted only if a wife has as good a chance to earn a living as a man, or if her support is otherwise assured. Soviet Russia pretends to have achieved this social ideal and consequently allows free divorce without imposing alimony. However, they allow one exception: The duty to support the other spouse who is incapable of work continues for one year after the divorce. This exception can be justified by the consideration that otherwise

many spouses would try to evade their duty of support by a divorce.²⁸

In our social and economic system a divorced wife, especially if she has attained an old age, has not much chance of finding a remuneratory position. The medicine applied by our divorce law is alimony,²⁹ but its curing effect is small. Furthermore, many jurisdictions now grant alimony even to a guilty wife.³⁰ They recognize in this way the economic realities³¹ but at the price of a violation of our sense of justice. For it is an imposition to force a man to support his adulterous wife after the divorce. But the most serious objection is that our alimony system ignores a fundamental economic reality, namely, that very few men earn enough to support two wives. What sense does it make to allow a man to remarry if he cannot feed his second wife without impairing the support of the first wife? This sort of financial bigamy is a luxury which the majority of the population can ill afford. It seems that the people at large have a better understanding of the situation than the legislator. Alimony is asked for in a surprisingly small number of cases.³² Under a purely economic point of view the right approach seems to be not to make alimony dependent upon divorce, but divorce upon alimony, *i.e.*, to grant an absolute divorce only if the economic situation of the spouse allows it.³³

²⁸ Even in a socialistic state the property relations of husband and wife must be regulated in divorce cases. This gives rise to rather complicated problems. See, *e.g.*, V. S., *Remarks on the Application of the Code of Laws on Marriage, Family, and Guardianship in the Village* (1929) 4 SOVYETSKAYA YUSTITSIA 85.

²⁹ As it is practiced in American courts, alimony has a double function: (1) to provide for the support of the spouse and (2) to divide property which has been accumulated by the common efforts of both spouses. It is interesting to observe that in the latter respect community property ideas appear in common-law jurisdictions. It might be asked whether the two functions of the alimony device should not be treated differently.

³⁰ *Neville v. Neville*, 220 Ala. 57, 124 So. 107 (1929); *Boylan v. Boylan*, 349 Ill. 471, 182 N. E. 614 (1932); *Blain v. Blain*, 200 Iowa 910, 205 N. W. 785 (1925); *Stiles v. Stiles*, 224 Ky. 526, 6 S. W.(2d) 679 (1928); *Morovec v. Morovec*, 123 Neb. 830, 244 N. W. 639 (1932); see *Cairns v. Lewis*, 169 Minn. 156, 161, 210 N. W. 885, 887 (1926). *Contra*: *Baker v. Baker*, 94 Fla. 1001, 114 So. 661 (1927); *Hendricks v. Hendricks*, 136 Kan. 69, 12 P.(2d) 804 (1932). All but the Nebraska decisions are the result of statute.

³¹ In *Dragish v. Dragish*, 241 Mich. 563, 217 N. W. 769 (1928), alimony was granted to the guilty wife as she had helped accumulate the property. However, the statement in the text is meant to refer primarily to the economic inability of the wife to make a living, especially if she has the care and burden of children or is aged.

³² CAHEN, *op. cit. supra* note 23, at 61.

³³ It is interesting to observe that in *Walker v. Walker*, 205 Iowa 395, 217 N. W. 883 (1928), one of the reasons why the court refused to grant a divorce to two old people was that such a decree would necessitate the

Analogous arguments can be used when the question is asked how far the interests of the children should influence the possibility of a divorce of their parents. As long as the parents have the duty to support their children, the most natural and economical way of doing it is to rear them in the common home. Of course the common home of the parents can be worse than no home, but that is not usually the case. The law should provide for these situations and should give the judge the discretion to deny the divorce if it is to the interest of the children. That divorce of parties with children should be treated differently from the dissolution of a childless marriage should be clear, but generally the legislatures have refused to recognize this. A California statute which prescribes an obligatory conciliation proceeding before a suit for divorce of a marriage with children can be tried³⁴ is a step in this direction.³⁵

The conclusions which follow from the significance of the marriage institution in the economic system are easily seen. But marriage is more than a part of the economic order. It is also based on the nature of man as a biological and a moral being; hence it is subject to moral principles. On this point, authors of so different views as G. K. Chesterton,³⁶ Bertrand Russell,³⁷ Herman Keyserling,³⁸ and Walter Lippmann³⁹ agree. It is denied by some sociologists, at least implicitly.⁴⁰ They inquire into the success of marriages and rate them according to the amount of personal happiness which the spouses find in their marriages.⁴¹ Such an inquiry is of course a legitimate

division of their common property, leaving both of them without home or friends.

³⁴ CAL. CODE CIV. PROC. (Deering, 1937) § 1771.

³⁵ Indiana makes remarriage dependent upon the capacity to support the children of former marriages. Ind. LAWS 1941, c. 31, § 2.

³⁶ CHESTERTON, *THE SUPERSTITION OF DIVORCE* (1920).

³⁷ RUSSELL, *MARRIAGE AND MORALS* (1929).

³⁸ KEYSERLING, *THE BOOK OF MARRIAGE* (1926).

³⁹ LIPPMAN, *A PREFACE TO MORALS* (1929) 284.

⁴⁰ Bernard, *An Instrument for the Measurement of Success in Marriage* (May 1933) PUB. AM. SOCIO. SOC. 94, 95. Here the author says: "The assumption is made, then, that in our culture a marriage which builds and stabilizes and integrates the personalities of its members is successful and one that disintegrates or represses their personalities or causes conflicts in them is unsuccessful. The degree of satisfaction which each spouse feels is taken as an index of the satisfaction his or her personality is receiving from the marriage." This attempt to connect hedonism with the moral idea of a culture of personality seems to me unsuccessful. See, however, TERMAN, *PSYCHOLOGICAL FACTORS IN MARITAL HAPPINESS* (1938) 2, who correctly says that an inquiry into marital happiness does not commit the author to a philosophy.

⁴¹ The difficulties of a definition of "happiness" are discussed by TERMAN, *op. cit. supra* note 40, at 3; BURGESS AND COTTRELL, *PREDICTING SUCCESS*

scientific enterprise and furnishes valuable information, but it will never enable us to formulate any moral or legal rule. The most it can do is to furnish future spouses with practical advice as to whether they should marry at all, what circumstances to take into account, and what they have to do in order to adjust themselves to each other. This advice is very valuable, but whether the spouses must adjust themselves cannot be answered upon the assumption that marriage is an instrument to achieve personal happiness. To deduce moral or legal rules from this assumption seems to be impossible.

Personal happiness is a function of the character as well as of external circumstances.¹² It is true, of course, that certain external circumstances, physical pain for example, make almost everyone unhappy, but whether a man is happy within the limits of what one may call the tolerable circumstances depends upon his character. That is the reason why the achievement of personal happiness can be the aim of purposeful action only to a limited extent. Further, what is happiness? Is it really possible to treat happiness over a successful fraud or the concealment of adultery in the same way as happiness over a scientific discovery? It is not necessary to go further into these problems of hedonism. So much is clear: Purely subjective hedonism makes assertions on moral or legal duties of married life impossible. Only if the notion of happiness is so much refined that it includes the satisfaction of having fulfilled one's moral duty is it a possible basis of normative deductions, but if we assume the existence of moral duties, then we are in fact at the other position.

CONCLUSION

The conclusion is inevitable. A rational solution of the legal divorce problem must be based on a clear concept of the moral principles governing marriage. The writer believes that

OR FAILURE IN MARRIAGE (1939) 30, 37. The problems of measuring happiness and the distinction between objective and subjective tests are analyzed by Buttenwieser, *TERMAN, op. cit. supra* note 40, at C. IV.

¹² This is the reason why husband and wife often rate the success of their marriage differently. *TERMAN, op. cit. supra* note 40, at 368. See *BURGESS AND COTTRELL, op. cit. supra* note 41, at 347: "In fact, the trait of personality which all our items are measuring may turn out to be *adjustability* or *socialization* that makes for adjustment in society, industry, and in marriage." This is indeed an interesting confession at the end of an objective scientific sociological analysis. See further Kelly, *Marital Compatibility as Related to Personality Traits of Husbands and Wives as Rated by Self and Spouse* (1941) 13 J. SOCIAL PSYCH. 193.

such a concept can be found, but he is aware that it can be made the basis of legislation only if it is accepted by a sufficiently large part of the population. Here lies the real problem of our divorce laws. The general moral disintegration which has beset the occidental world since 1919 has engulfed the institution of marriage too. The idea that marriage is a moral institution has been forgotten, and little agreement exists as to the nature of the moral duties which marriage imposes. In such a situation the legislator is more or less condemned to inactivity. He can and must enforce the rules which are dependent upon the economic structure of the social body. These rules have been mentioned above. Beyond that, his efforts to improve the divorce situation would be futile and lead to contradictory and undesired results. This leads to the conclusion that the state should not restrict the freedom of divorce except in so far as the economic system makes this necessary.

It is a great mistake to assume that legal freedom of divorce is a sign of moral laxity. The ancient Romans allowed free divorce while at the same time they manifested the deepest understanding of the moral nature of marriage. To a Roman jurist we owe the words which are still the best definition of marriage, "*consortium omnis vitae*," and Roman tombstones are eternal documents of ideal married life. Nor does freedom of legal divorce mean that a high number of divorces will actually be obtained. China does not lay legal obstacles in the way of spouses who seek divorce; yet there are many fewer divorces there than in the western countries. Now Russia, too, has introduced freedom of divorce; it will be worth-while to watch this experiment. It is still difficult to ascertain whether the number of divorces is greater in Russia than in other countries.⁴³ If not, the Roman and Chinese views are substantiated. The most important question which we should investigate in the Russian experiment is the following: Do the moral forces inherent in human nature create a moral concept of marriage if they are free from legislative interference?

⁴³ CALVERTON, *THE BANKRUPTCY OF MARRIAGE* (1928) 264, denies it, but as he himself acknowledges, upon an insufficient basis of induction.