Proposed Changes in the Law of Divorce

Noah Weinstein
PROPOSED CHANGES IN THE LAW OF DIVORCE

NOAH WEINSTEIN*

In 1822 the Governor of the State of Missouri signed the bill which established the great seal of the State. It is inscribed with the motto Salus Populi Suprema Lex Esto, which is generally translated, "The Welfare of the People Shall Be the Supreme Law."

But it was not until shortly before the beginning of the present century that jurists started to think in terms of human wants, desires, and expectations rather than of human wills. Legal rules began to be measured by the extent to which they achieved the ends for which law exists rather than by the older method of judging law by criteria drawn from itself. Dean Pound would consider law as a social institution to satisfy social wants, and sees in "legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests."1

Although it is understandable that some lag in time should exist before the law reflects the generally accepted opinions of society, in the history of divorce law it has become apparent that, at least as far as the State of Missouri is concerned, the law has not developed, in spite of the recognized changes in the complexities of the marital relationship. Divorce law, rather than making an effort to satisfy existing social wants and thereby achieving the end for which law exists, subjects itself to the criticism of Justice Holmes that:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.2

Any critical examination of the fundamentals underlying laws regulating divorce must start with a consideration of the social problem in-
volved, and in particular, the changes that have come about through the years. Marriage failure in the United States has received much attention. That the stability of our family life is threatened has been characterized a "trite understatement."\(^3\) The serious nature of the crisis in the family system due to the act of divorce has been recognized by sociologists who have devoted their professional lives to its study.\(^4\)

Of concern is the upswing of the divorce rate, with few exceptions, during the past hundred years. In 1860, immediately prior to the Civil War, the rate of divorce was 1.2 divorces annually per 1,000 existing marriages. By 1900 this rate had increased to 4 per 1,000 existing marriages, and thereafter steadily increased, with the exception of the depression years, 1930-1935, until it reached a peak in 1946 of 18.2 per 1,000. Since the unusually high peak of 1946, the rate has leveled off at approximately 9 divorces annually per 1,000 existing marriages.\(^5\)

It is interesting to note that although the divorce rate has been generally upward, there have been four breaks in this trend: immediately after the Civil War and the two World Wars, the divorce rate increased sharply and then fell off to the prewar level; and during the depression of the 1930's, beginning with the stock market crash on October 29, 1929, the divorce rate dropped dramatically, reversing the uptrend of the preceding years of prosperity.\(^6\)

Numerically, the number of divorces granted by courts throughout the United States stood at 7,380 in 1860, reached an all-time high of 610,000 in 1946, dropped to 377,000 in 1955 and thereafter increased to 395,000 in 1959. The provisional figures for 1960 indicate an increase of approximately 4.8 per cent.\(^7\)

An attempt to compare the divorce rate in our country with other nations of course is rather difficult, but from available reports it is indicated that for comparable time periods the divorce rate in the United States is

---


http://scholarship.law.missouri.edu/mlr/vol27/iss3/1
about 50 per cent greater than in England and Wales, 50 per cent greater than Denmark, and 100 per cent greater than Sweden.\textsuperscript{8}

The divorce courts in Missouri have contributed at least their fair share to the national total. Starting in 1940 with slightly more than 11,000 decrees, the high was reached in 1946, in accordance with the national trend, with approximately 26,000. In the following years, the rate leveled off at 11,000 to 12,000 per annum. In 1960, the total of 11,320 was slightly less than the 1959 total of 11,695.\textsuperscript{9}

A comparison of the divorce rate in Missouri with the national rate is possible by two methods. First, considering the number of divorces per 1,000 population, the divorce rate in Missouri was 50 per cent greater than the national rate in the years 1940-1946. Thereafter the comparative rate in Missouri declined to a point where it was 40 per cent greater than the national rate in the years 1947-1950. In the period 1951-1953, it was approximately 30 per cent greater. In 1954 and 1955, it dropped to 20 per cent over the nation's, to 10 per cent in 1956, rose again to 20 per cent in 1957 and 1958, and in 1959 it had increased to 30 per cent over the national rate.\textsuperscript{10}

A second available method of comparison is based on the number of marriages and divorces in the same year. In 1959, the total number of marriages in the United States was 1,494,000 and the number of divorces was 395,000.\textsuperscript{11} This represents a current national dissolution rate of 26.4 per cent. In Missouri, in 1959, marriages totaled 34,352 and court dissolutions 11,695,\textsuperscript{12} giving a current dissolution rate of 34 per cent which was 30 per cent greater than the national rate of 26.4 per cent. This result is the same as that arrived at by the first method used above.

It is impossible to carry this comparison between state and nation into 1960 because at this writing final figures for the national divorce rate are not available. However, Missouri reports 35,368 marriages and 11,320 divorces which represents a current dissolution rate of 32 per cent (compared

\begin{itemize}
  \item \textsuperscript{8} 1958 United Nations Dept't of Economic & Social Affairs, Demographic Yearbook 472-74 (1958).
  \item \textsuperscript{11} U.S. Dept' of Health, Educ. & Welfare, op. cit. supra note 7, at 2-1, 2-11.
  \item \textsuperscript{12} 1960 Mo. Dept' of Pub. Health & Welfare, op. cit. supra note 9, at 15.
\end{itemize}
to 34 per cent for 1959). There were 375 fewer divorces and 1,016 more marriages in Missouri in 1960 than in 1959, or the equivalent of a decrease in divorce from 2.8 to 2.6 per 1,000 population and an increase in marriages from 8.1 to 8.2 per 1,000 population.13

Comparatively, the provisional estimate of United States marriages in 1960 was 1,527,000 or 8.5 per 1,000 population, as it was in 1959, Missouri's rate being slightly less. The national provisional divorce rate in 1960 was probably 4.8 per cent larger than in 1959. Thus it appears Missouri is not following the national trend for at least the moment, but this is not indicative of any firm movement in the direction of reducing the abnormally high divorce rate in Missouri as compared to the national rate.14

The immediate involvement of children in divorce throughout the United States is dramatically illustrated by available statistics. Since 1953 over 330,000 children each year are affected by the divorce of their parents. The increase in the number of divorces with children involved is startling. In 1953, 45.5 per cent of all divorces in the nation involved children. This rate increased until 1959 when 64.4 per cent of the cases dealt with children. In each 100 divorces, 85 children were involved in 1953 with a steady increase over the years until 1957 when the ratio was 1 child for each divorce. In that year, 50 per cent of the divorce cases involved no children but the other 50 per cent averaged 2 children per divorce.15 Accordingly, in 1957 with a total of 381,000 divorces reported, it follows that 381,000 children were involved.16

Children in Missouri are affected in great numbers by legal termination of marriage. In 1960, a total of 11,607 children were involved in 11,107 cases (213 cases did not report the number involved). In 5,307 cases no children were involved, representing 47.7 per cent of the total reporting. In 5,800 cases reported there were a total of 11,607 children or an average of 2 children in each family. It is thus indicated that in Missouri, 104 children are involved in each 100 divorces. Specifically in Missouri in 1960, 2,505 cases involved 1 child each; 1,814, 2 children each; 854, 3 children each; 373,

13. Ibid.
One result of the large involvement of children in divorce and separation of parents without benefit of law, is the increase in cost to government by reason of payments made by the Social Security Administration in the form of aid to dependent children. That agency of the government reported in 1960 that 45 per cent of all families receiving relief for needy children involved divorced or separated parents.¹⁸

Many who have delved into the far-reaching results of divorce and the broken home report some apparent causal connection with juvenile delinquency.¹⁹ One authority states that the broken home is an etiological factor of importance in that it produces emotional instability.²⁰ Juvenile court authorities are impressed by the fact that 40 per cent or more of delinquent children come from broken homes, and that disintegrated families furnish four or five times their proportion of the reformatory population of the United States.²¹ Some investigators have estimated that broken homes proportionately contribute twice as many children to the ranks of delinquency as unbroken homes.²²

These investigations have been extended to cover the history of delinquents for a period of 15 years—from their juvenile court experience at an average age of 14 through the years up to an average age of 29. The result indicates that the efforts of delinquents to mend their ways and achieve a normal life were "significantly" less successful among the products of broken homes.²³

The effect of the broken home has also been considered in relation to

---

17. 1960 Mo. DEP'T OF PUB. HEALTH & WELFARE, op. cit. supra note 9, at 55.
22. Shideler, op. cit. supra note 21; GLUECK, op. cit. supra note 20, at 88-91, 122:
Children of broken homes are over-represented in state institutions for delinquent children. As a category they commit slightly more delinquent behavior in high school than those from unbroken homes. Their chances of being sent to an institution are, however, more than twice as great as is the case for children from unbroken homes. This suggests differential reaction to their delinquent behavior by law enforcement and judicial agencies, and perhaps by parents and the general public as well. NYE, FAMILY RELATIONSHIPS AND DELINQUENT BEHAVIOR 47-48 (1958).
23. GLUECK, JUVENILE DELINQUENTS GROWN UP 174 (1940).
the criminal offender. One authority has flatly concluded that those who live with a wife are less frequently imprisoned than those who are single, separated, or divorced; that stable and satisfying marriages tend to prevent or reduce criminality and may be largely responsible for terminating criminal careers.\textsuperscript{24}

After conviction, a similar result was observed among those placed on probation; that is, those probationers who were married succeeded more frequently than those who were single, separated, divorced, or widowed.\textsuperscript{25}

Research into the marital history of former juvenile delinquents has revealed that their divorce rate was three times as great as a comparable non-delinquent group. In addition, 10 per cent of the delinquent group had 2 or more divorces and 4 per cent 3 or more, whereas among the non-delinquent group those who had been divorced had been divorced only once.\textsuperscript{26}

Although we do not suggest a cause and effect theory, the strange parallel between divorce and suicide is at least worthy of sober consideration and further investigation. The frequency of suicide among divorced persons is slightly more than three times as great as among married couples.\textsuperscript{27}

The statistical background that has been presented makes it readily apparent that changes in the family system have occurred during the past one hundred years; that intra-family relationships have become more complex just as inter-family relationships have become more involved. This should be a completely acceptable conclusion when we consider the bare facts of population changes in the United States. In 1850, the nation had a population of approximately 23 million. By 1900, it had increased to approximately 76 million, to 105 million in 1920, to 150 million by 1950, and to 180 million by 1960.\textsuperscript{28} During the first half of this century while the population of the nation doubled, the number of households tripled. Of great significance is the increased work activity of married women. Almost 40 per cent of all women whose children are of school age are employed.\textsuperscript{29}

\textsuperscript{24} TAPPAN, CRIME, JUSTICE AND CORRUPTION 197 (1960).
\textsuperscript{25} MONACHESI, PREDICTION FACTORS IN PROBATION (1932).
\textsuperscript{26} Robins & O'Neal, The Marital History of Former Problem Children, 5 SOCIAL PROBLEMS 346, 349 (1958).
\textsuperscript{27} U.S. DEP'T OF HEALTH, EDUC. & WELFARE, MORTALITY FROM SELECTED CAUSES BY MARITAL STATUS [1949-51], 39 VITAL STATISTICS, SPECIAL REPORTS 426 (1956).
\textsuperscript{28} U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1959).
\textsuperscript{29} THE NAT'L MANPOWER COUNCIL, WOMANPOWER 3 (1957).

In both rural and urban samples, delinquent behavior is greater in families in which the mother is employed .... NYE, op. cit. supra note 22, at 57.
A fundamental change in the character of our population was first indicated by the 1920 census, which reported more than half of the population of the United States as living in cities. We no longer can consider ourselves as a "folk society" integrated by the force of tradition and convention. The increase in the size and density of population has produced a mutation in social structure, social process, and interpersonal relations. Problems both new and acute that result from urban living did not exist in rural America.

The household has been losing its disciplinary effectiveness under the conditions of urban life. Juvenile courts and courts of domestic relations have taken over much of what was once the jurisdiction of the head of the family.

What has been the history of the law in its recognition of the vital changes in the family structure and what developments have occurred within the law that provide a more effective securing of social interests?

It is proper in common law jurisdictions to attempt to demonstrate the orderly development and growth of legal concepts upon a basis of reason and human experience. And in many branches of our law the step by step growth of these concepts is plainly traceable through the judicial pronouncements or legislative acts of English and American judges and lawmaking bodies. But occasionally efforts to show the purported reasonable development of a legal concept run afoul of a hiatus or an inexplicable hybrid which defies any attempt at logical dissection. We find islands of legal doctrine that are for the most part arbitrarily anchored in the historical past, sheltered by a mystical aura of infallibility, abandoned by reason and experience but kept alive by judges and legislators who appear reluctant to recognize, in the particular area, the facts of life.

Since we propose to propound the obvious—that our current laws governing divorce are urgently in need of change—it might be well to review the origin and development of the customs and laws regulating the marital status. Of particular concern is the modification and change of these laws and their development or regression to meet the generally accepted social reaction to the status popular from time to time—a course which for the most part has been vital and responsive in England until the present, but which in most American states has remained static since the time of their adoption into American law.

"What therefore God hath joined together, let no man put asunder."

is followed, with two verses intervening, by an exception that the man may "put away his wife" for fornication.\textsuperscript{32}

A further exception was applied in those situations in which a believer is married to an unbeliever and the latter departs, the believer (husband or wife) "[not being] under bondage in such cases."\textsuperscript{33}

What of the status of the wife "put away" by the husband for fornication? "And whoso marrieth her which is put away doth commit adultery."\textsuperscript{34}

And the husband who "put away his wife"? "Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery."\textsuperscript{35}

Is this an intended indication that the innocent husband of an adulterous wife might remarry? It could not be so construed by the church which denied the dissolubility of a valid church marriage.\textsuperscript{36} But a marriage to be valid in the eyes of the church and consequently indissoluble had to be consummated, and if not consummated, it might be dissolved.

It would appear that the church maintained the indissolubility of a valid consummated marriage but recognized a \textit{divortium imperfectum} or \textit{separatio quoad thorum et mensam} (a "separation from bed and board"), in which the parties are separated and forbidden to live or cohabit together for a determinate or indeterminate period, but this did not otherwise affect the marriage itself and left the spouses unable to marry any other person.

The grounds for maintaining such proceedings for a partial divorce or separation of the spouses was primarily adultery or other equivalent carnal sin,\textsuperscript{37} and the separation could be for a definite or indeterminate period.

The church also acted on the husband-wife relationship in another way. It could and would dissolve a marriage which may have appeared perfectly valid through the process denominated a \textit{divorce a vinculo matrimonii}.\textsuperscript{38} In this situation the church declared the marriage unlawful from its inception because of some canonical impediment such as consanguinity of the parties.

This ecclesiastical proceeding implied that a marriage which never had

\begin{itemize}
\item \textsuperscript{32} \textit{St. Matthew} 19:9.
\item \textsuperscript{33} \textit{1 Corinthians} 7:15.
\item \textsuperscript{34} \textit{St. Matthew} 19:9.
\item \textsuperscript{35} \textit{Ibid}.
\item \textsuperscript{36} \textit{The Canons and Decrees, Council of Trent} 195 [Canon 7] (Waterworth transl. 1848).
\item \textsuperscript{37} \textit{Id.} at 195 [Canon 8].
\item \textsuperscript{38} As we use legal terms today, we would consider such proceedings an annulment of the marriage contract rather than a "divorce from the bond of marriage." See 2 \textit{Morgan, The Doctrine of Law and Marriage} 220-23 (1826).
\end{itemize}
been valid would remain invalid. However, in its application, the rules designating “impediments” (impedimenta dirimentia) to a valid marriage became so numerous that the decree of nullity often served the purpose of a true divorce. “Spouses who had quarrelled began to investigate their pedigrees and were unlucky if they could discover no impedimentum dirimens.”8 (It permitted the dissolution of many marriages which theoretically were indissoluble.)

In England in the early part of the seventeenth century there developed a revival of the old canon law and for several generations it was said that the gates of exit from true matrimony had all been closed with the exception of death. In effect, the reformation had demolished the machinery for annulling marriages on fictitious grounds so that it became impossible for a man to escape matrimonial bondage by swearing he was his wife’s distant cousin.

This stern attitude in England towards divorce relented to some degree toward the latter part of the seventeenth century. Although a valid English marriage could not be dissolved by judicial authority, a husband who had obtained from the ecclesiastical court a divorce a mensa et thoro might thereafter dissolve his marriage by a special Act of Parliament. But such parliamentary divorce was granted only for adultery. A wife might also dissolve the marriage, but apparently a greater burden was placed upon her, for her husband’s adulterous action had to be of an aggravated nature, such as incestuous intercourse by her husband with some of her relatives.9

Proceedings ending in a divorce by the Act of Parliament route were so costly41 and difficult42 that up to 1857, when the Matrimonial Causes

40. “It was not until 1923 that the sexes were put on a footing of equality as to the grounds for divorce.” RADCLIFFE & CROSS, THE ENGLISH LEGAL SYSTEM 228 n.1 (1st ed. 1937).
41. That these proceedings existed for the wealthy is rather dramatically illustrated by the words credited to Maule, J., in a bigamy case styled R v. Hall, tried at Warwick Assizes on April 1, 1845:

Prisoner, you have been convicted of the grave crime of bigamy. The evidence is clear that your wife left you and your children to live in adultery with another man, and that you then intermarried with another woman, your wife being still alive. You say that this prosecution is an instrument of extortion on the part of the adulterer. Be it so; yet you had no right to take the law into your own hands. I will tell you what you
Act created the English Divorce Court, only 317 divorce bills passed parliament, and the first women got a parliamentary divorce in 1801—130 years after this procedure was adopted.

When the American Colonies separated from England, domestic affairs in the mother country were handled exclusively by the ecclesiastical courts; ecclesiastical law did not recognize the dissolution of a valid marriage; divorces *a mensa et thoro* were allowed only for adultery and cruelty; and the right to contract a valid second marriage was the costly privilege of the few who could obtain a special Act of Parliament after an ecclesiastical court decree of divorce *a mensa et thoro*.

Ecclesiastical courts were never established in the Colonies, and for a

ought to have done; and, if you say you did not know, I must tell you that the law conclusively presumes that you did. You ought to have instructed your attorney to bring an action against the seducer of your wife for criminal conversation. That would have cost you about a hundred pounds. When you had recovered (though not necessarily actually obtained) substantial damages against him, you should have instructed your proctor to sue in the Ecclesiastical Courts for a divorce *a mensa et thoro*. That would have cost you two hundred or three hundred pounds more. When you had obtained a divorce *a mensa et thoro*, you should have appeared by counsel before the House of Lords in order to obtain a private Act of Parliament for a divorce *a vinculo matrinmoui* which would have rendered you free and legally competent to marry the person whom you have taken on yourself to marry with no such sanction. The Bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether you would have had to spend about a thousand or twelve hundred pounds. You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no difference. Sitting here as an English judge, it is my duty to tell you that this is not a country in which there is one law for the rich, and another for the poor. You will be imprisoned for one day, which period has already been exceeded as you have been in custody since the commencement of the Assizes.


42. More than 100 years ago, when divorce in the modern sense was possible only by Act of Parliament, an unhappily married Town Clerk was promoting a Waterworks Bill for his town; and in clause 64, mingled with something technical about filter beds and stopcocks, appeared the innocent little phrase, "and the Town Clerk's marriage is hereby dissolved." Nobody could explain how these words got there, and, in fact, nobody ever noticed them while the Bill was going through Parliament, for everyone was fast asleep long before they got to that clause. In due course the Royal Assent was given, and the Town Clerk lived happily ever after.

At a ripe old age he died, still in harness, and a successor had to be found. The question then arose whether this particular provision was personal to the deceased Town Clerk or whether unhappily married members of the local government service could regard this particular town clerkship as a sort of Chiltem Hundreds. *Megarry, op. cit. supra* note 41, at 345.

43. Matrimonial Causes Act 1857, 20 & 21 Vict. ch. 85, § 6. This act created the Divorce Court and gave it the powers previously exercised by the Ecclesiastical Court, and also the power to dissolve a marriage, a divorce *a vinculo matrinmoui*.
number of years divorce law was not administered for want of a tribunal. There were no divorces in the colony of New York during more than 100 years preceding the time when the colony became a state, and the only divorces ever recorded in the colony were the four granted by Governor Lovelace in 1670 and 1672. The laws of England concerning divorce were never adopted in that colony. The New York courts recognized that the English law of divorce was the ecclesiastical law and not the common law of England, administered by judges and courts whose jurisdiction never existed either in the State or Colony of New York, and it was regarded as no part of the common law which the State of New York adopted.44

Divorce in the territory which included that area later to become the State of Missouri began with the provisions contained in the Laws of the Territory of Louisiana, Chapter 31, page 90 (May 13, 1807). Incidentally, provision was made for a jury trial when requested by either party. Substantially the same provisions relating to divorce were reenacted in the Laws of the Territory of Missouri, Chapter 196, page 80 (Jan. 29, 1817).

After admission of the State of Missouri into the Union, the legislature provided that the circuit court had jurisdiction in all causes of divorce, alimony, or maintenance, and that the practice and proceedings should be as in equitable causes.45

Missouri courts did not, like New York, reject ecclesiastical law as a part of the common law of England but on the contrary adopted the law of the English ecclesiastical courts as a part of the body of the common law which established precedents for divorce actions except as modified, changed, or supplanted by statute.46

That Missouri also endeavored to follow the English practice of divorce by legislative act is indicated by an examination of the session acts. Although this practice was declared unconstitutional in 1835 as an invasion of the powers delegated to the judicial branch of government,47 it continued for many years thereafter.48

Accordingly, although ecclesiastical courts were never established in the American colonies, Missouri in effect adopted the substantive law of

44. Burtis v. Burtis, 1 Hopkins 557 (N.Y. 1825); 2 Vernier, American Family Laws § 81 (1931).
45. Divorce & Alimony § 3, at 330, RSMo 1825.
47. State ex rel. Gentry v. Fry, 4 Mo. 120 (1835).
48. Richeson v. Simmons, 47 Mo. 20 (1870). See also Mo. Const. art. 3, § 40(2), prohibiting the granting of divorces by the general assembly.
that court by considering it a part of the common law and empowered the circuit court to act under the decisions of the ecclesiastical courts except as modified, changed, or supplanted by statute.49

In this manner we have inherited a whole body of law which controls absolute divorce from the bonds of matrimony from the English ecclesiastical court, which itself never admitted to having the power to dissolve a valid consummated marriage except through the arbitrary process of declaring a marriage invalid because of the violation of its rules designating "impediments" to a valid marriage.

Inherent in this body of law is a concept which is commonly designated the "fault" doctrine. Although it became a basic principle in ecclesiastical law, it in turn represents an artificial and inaccurate transference from Roman Law, principally through the activity of one judge presiding in the Consistory Court of London. This judge, Sir William Scott, better known as Lord Stowell, in 1790 heard a husband's petition for a divorce a mensa et thoro charging the wife's adultery. The wife, in opposing her husband's petition, pleaded "I have not committed adultery; but if I have, you have barred yourself from the remedy you pray, by your own misconduct of the same species, for though adultery cannot be justified in itself, it may be legally justified against you, by the proof that you have produced the evil of which you pretend to complain."50

The judge upon hearing the evidence was completely convinced of the wife's adultery, and of the husband's adultery as well, and dismissed the petition. Then, for the first time as far as recorded decisions in divorce cases are concerned, he announced the principle of law which withholds from a guilty husband the remedy against a guilty wife. In support of this rule the judge declared that it was a principle founded in Roman law. A Roman magistrate had power to determine a wife's application for restitution of her dower. When the husband pleaded that the wife's adultery barred her demand, the wife could in reply successfully plead the husband's adultery in bar of his objection. The opinion admits, however, that this principle of adjudicating property rights between husband and wife did not apply directly to divorce since Roman divorce was a matter wholly within the authority of the husband himself and not in the jurisdiction of the Roman magistrate. But the judge, in his attempt to justify the adoption of a non-existent principle, asserted that if the Roman magistrate had had jurisdiction


http://scholarship.law.missouri.edu/mlr/vol27/iss3/1
over divorce, the same principles which applied to property would apply to divorce!

How fanciful Stowell's groping was, is made more evident when we consider that his ecclesiastical court, unlike the Roman magistrate, could not adjudicate property rights or the right to support. Such rights were determined only in the English common law courts, which refused to be coerced by the ecclesiastical courts into a recognition of the claim to support of the adulterous wife by the equally adulterous husband. Thus Lord Stowell, by refusing the adulterous husband a divorce a mensa et thoro, plainly intended to achieve the primary result of forcing the husband to support the wife, but failed in his purpose since his court lacked jurisdiction over such matters, and the common law courts, which did have jurisdiction over support and property matters, refused to recognize his position.

Accordingly, the artificial ecclesiastical doctrine of recrimination, having failed in its indirect attempt to protect the property rights of an equally guilty wife, was repudiated by the Divorce Court, established by the 1857 Matrimonial Causes Act, as an absolute bar to divorce. It should be noted that the 1857 act for the first time established absolute divorce from the bonds of matrimony as a judicial process in England. This act did recognize recrimination as a discretionary bar, but that was established as a matter for judicial discretion. The court in exercising this discretion must take into consideration, among other things: (1) the interest of the children of the marriage; (2) the prospect of reconciliation between the parties; and (3) the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. If the court finds a divorce to be the proper result, it may grant one to an equally guilty husband. On the other hand, if the court determines that the ends of justice require it, a divorce could be denied.

This then is the development of a doctrine which as we will see pervades all divorce law in the United States. It is based on a pronouncement by a single judge, in an ecclesiastical trial court (Consistory Court of London) which had no jurisdiction to grant an absolute divorce from the bonds of matrimony, made for the primary purpose of compelling a guilty husband to support a guilty wife, which was a matter not in that court's jurisdiction

but was exclusively in the jurisdiction of the separate common law courts. It is a doctrine which the common law courts refused to recognize in those matters in their jurisdiction, and a doctrine which the only political agency having power to grant an absolute divorce (Parliament) refused to recognize. Finally, with the establishment of a Divorce Court in England with the power to decree absolute divorce, the inclusion of the doctrine in the statute law was so modified as to change completely its character from that of an absolute bar to a permissive defense which the courts could use or reject in their discretion if the best interest of the spouses, the children, and the community required it.

That this doctrine was not recognized as common law in England is made abundantly clear by the refusal of the common law courts of that land to follow it. In the United States some courts adopted the ecclesiastical decisions as common law and others rejected them. In any event, the defense of recrimination and the general fault doctrine in divorce cases is firmly entrenched in Missouri statute and case law. Statute law has prohibited the courts in Missouri from granting a divorce where both parties have been guilty of adultery. As to the matter of the petitioner proving he is without fault or is innocent of any wrongdoing: the courts have at least pretended to demand this badge of purity of spouses requesting a decree, but in varying shades of pure white, depending upon the circumstances of each case, and have ultimately resolved the problem by drawing the legal conclusion that the conduct of the petitioner does or does not constitute grounds for divorce.

53. MACQUEEN, A PRACTICAL TREATISE ON THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS 574 (1842).
54. § 452.030, RSMo 1959.
55. § 452.020, RSMo 1959. Simon v. Simon, 248 S.W.2d 560, 563 (Mo. 1952): An "innocent" party is not required to conclusively prove freedom from all fault, or such exemplary conduct as excludes any misconduct or all unwise or uncalled-for acts. He or she need show only that, under all the circumstances of a particular case, he or she has not been guilty of conduct constituting a ground or grounds for divorce.

Paxton v. Paxton, 319 S.W.2d 280, 287 (K.C. Ct. App. 1958), in which the appellate court considered the innocence of the successful husband-plaintiff and made the following observations:

It seems possible that some of plaintiff's explanations—for example that one woman came to his hotel room to "brush her hair"—might have strained the credulity of the trial judge. Certainly as we have read and studied this record, we have been unable to visualize plaintiff in a white robe, and have listened in vain to hear the rustle of a wing. However, as previously pointed out, an appellate court usually defers to the finding of the trial judge, especially as the credibility of witnesses. Moreover, this marital ship has run hard aground on reefs and rocks. Probably the time...
The courts currently attempt to rely on one of two analogous legal propositions to justify recrimination. The first is the so-called “clean hands” maxim of equity. Plaintiff seeking a divorce must be without fault. But equity relaxes this principle for many reasons and particularly for reasons of sound and compelling social policy when the parties are not in pari delicto or even when they are in pari delicto.

The other popular analogy sometimes attempted is the contract theory. Marriage, it is said, is a contract with mutually dependent covenants and since both have breached the contract, the court will not aid either. But with recrimination, courts generally do not consider it determinative whether plaintiff’s misconduct precedes or follows that of the defendant’s. And, in any event, courts, when the occasion demands, have no difficulty in distinguishing marriage contracts from commercial contracts.

Perhaps the only historically exact basis for the rule lies in the words of the fabricator of the rule, Lord Stowell: “It was a par delictum, subject to the same rules of compensation, which leaves the parties to find their common remedy in common humiliation, and mutual forgiveness.”

Developments in alleviating the hardship imposed by the doctrine include statutory provisions similar to the English statute allowing judicial discretion in applying the bar and permitting divorce if considered in the best interest of the parties concerned and the public generally. Likewise the principle of comparative rectitude which authorizes granting a divorce to the party least at fault when the best interests of the family members and the state require it has received approval in some jurisdictions.

For an interesting review of the career of Lord Stowell, see Townsend, Twelve Eminent Judges 279 (1846): It would have been well for Sir Walter Scott (Lord Stowell), if, whilst he thus sportively handled those dangerous playthings, marriage engagements and their possibilities, he had himself learned caution from the admirable lessons which he taught: but when did physician heal himself . . . . As if to show the fallibility of human wisdom . . . he, the most pure and correct of men both in his judicial and domestic relations, was doomed to suffer much uneasiness from a single act of rashness in both. Townsend, op. cit. supra at 327.

The injection of the whole theory of recrimination in divorce in addition to being historically inaccurate is fundamentally unsound and incompatible with the interest of society in maintaining the basic family status. The adoption of a theory of marital wrongdoing or fault as a basis for divorce which not only requires the court to find that the defending spouse has been guilty of some recognized statutory offense to the complaining spouse but also that the complaining spouse has been free from such offense requires a court to determine that which in most instances is not susceptible to accurate determination. So long as law was theologically influenced, the mysteries of the human mind and their evaluation were assumed to be equally accessible. But with the secularization of the law, the law as an order of external human conduct has become aware of its inability to probe the depths of the human mind, and the emphasis has been shifted from imposing adequate punishment for moral wrongdoing to protecting social and public interests. Modern law has constantly restricted the principle of fault or guilt and has substituted the idea of social purpose and advocated procedures for determining proper methods of preventing injurious occurrences.

In evaluating the enigma of divorce, it would seem to be unnecessary to be reminded that the problem is not whether divorce should or should not be permitted—but under what circumstances it should be permitted. Every state in the United States now authorizes a divorce decree under some circumstances. This unanimous acceptance of possible legal termination of the marriage relationship occurred in 1949 when South Carolina, under the prodding of its local bar associations, enacted a set of divorce statutes thereby putting an end to the recognized practice of migratory divorce or plural (though not legal) wives.

We are thus confronted with the realistic premise that divorce is recognized as possible under a varying number of factual and legal circumstances. We should then consider what ought to be done to protect the interest of the parties affected, the spouses, their children, and society generally in the form of the state.

Efforts to increase artificially the legal barriers in the way of divorce have resulted in morally, if not legally, collusive subterfuges to avoid them, or in shifting the litigation to a "more favorable" state.62 Tightening the rules in one or more states thus cannot be effective without a uniform di-

Divorce law in all states, and this is something that even if desirable is not realizable. Certainly those states which make substantial profits in attracting divorce business from other states would look with favor on "stricter" divorce laws in all states but their own, and federal regulation in this area of law is not now constitutionally possible.

It has been suggested that in this area of law the spirit of controversy and contest should not be the dominant motive. In its essentials, a divorce action is made up of several different parts which may be labeled: (1) the interest of the state or the public in the stability of marriage and the family; (2) the interest of each spouse in the marriage and its effect upon their future happiness and well-being, moral, physical, mental and spiritual; (3) the interest of children of the marriage; (4) property rights of the members of the family covering the division of property, support of the wife, support and education of the children; and (5) criminal aspects such as adultery, cruelty, desertion or failure to support. In applying the procedure of litigation to a divorce case, we are in effect using the statutory grounds of divorce—adultery, cruelty, general indignities and others—to determine in substance the victor in all the multi-phased issues in the five different categories. In divorce procedure as it is almost universally applied, we must have one successful and one unsuccessful litigant (except for the successful recrimination cases in which both parties are ejected by the court with the injunction to live together and "find sources of mutual forgiveness in the humiliation of mutual guilt"). Yet it is doubtful that victory is the normal outcome of divorce litigations. Most would agree that divorce should not be considered by the courts as a suit for damages for breach of contract. At least one could hardly assert that when a couple assume the obligations of matrimony with all its most intimate personal relations, the parties are contracting at "arms length." This is inconsistent with physical and biological fact. Why should the law be shackled to historical precedents which, if they ever were precedents, applied to social conditions which have long since ceased to exist. It is more in keeping with the theory of law as founded on "reason and experience," and with the law's obligation to keep its approaches, procedures, and operation continually alert and adjusted to the solution of human problems, that appropriate action be taken to sever the ties of the law with an archaic and unreasoning approach to one of the great social problems of our day, while a proper consideration of the binding sanctity of marriage is maintained and that important institution strengthened in a real way.63

The public has a right to expect from the profession of law something more than moral myopia in human relations and something more than the unreasoning "bread and precedent" diet of some of its judges.

A proper and adequate initial approach to the divorce problem may be made within the framework of existing statutes with some slight modifications and additions. We would substitute first a change in judicial attitude. The judge would not referee a battle between the spouses. Rather, he would preside at a hearing having as its objective the termination or perpetuation of the marriage relationship with all its diverse legal, financial, and social problems. The "day in court" would be preserved inviolate and each party would have the right to present his evidence. But the real issue would be: should the marriage status be dissolved? The mere fact that one spouse has applied for a divorce indicates an abnormal situation exists. The issues to be resolved are the reasons that these two spouses are unable to live together in as mutually satisfactory a relationship as most normal married couples; whether the situation so far as it affects each family member will be improved or worsened by a divorce; and whether adjustments short of a divorce decree can solve the problems that the parties conceive to exist.

Such an approach to the solution of social problems is not an unwarranted or unusual projection of the law into private affairs. Nor may it be reasonably considered an improper invasion of the individual's rights to privacy. The state has always since modern times maintained its interest in marriage by regulating the right to marry by forbidding those under a certain age or under mental disabilities to enter into the marriage state. Those qualified to marry have complete freedom to function within their own family groups unless and until they have developed a situation which they or at least one spouse feels cannot be controlled within the family unit. This situation then calls for the injection of the state, acting through its courts, into the family problem. The creation of this condition is not too unlike the impact of the juvenile court upon a family, acting through one of the children of the family group who has committed certain acts which the pertinent law proscribes and denominates delinquent behaviour. In this situation, a properly oriented and equipped juvenile court will not necessarily abruptly terminate the relationships within the family unit by forthwith committing the child to an institution, but will make every effort to strengthen the family in an attempt to correct, wherever possible, those influences and conditions which may have contributed to

64. §§ 451.010, .090, RSMo 1959.
the improper actions of the child. This period of probation and supervision by the juvenile court in its effort to rehabilitate the juvenile has long been accepted as a proper sphere of activity by government and its juvenile courts.

Similarly, in the criminal field, the proper administration of modern criminal justice regards as one of its essential and most valuable tools the services of a trained staff to supply the court with reports of presentence investigations and adequate supervision for probation and parole.65

The activity of government and the courts in insisting that their impact upon the individual does not abruptly end upon a finding of delinquency or of guilt is not only passively received as a proper function of government well within proper and acceptable constitutional and legal limits, but is within the area of required action by government which it must supply to the governed.

The idea that the responsibility of society, the state acting through its courts, is not restricted to a formal hearing of charges and countercharges in the divorce hearing is not novel. At least some courts in our land have so construed their responsibility. These courts recognize that there is much more to the marital difficulties of the spouses than is made apparent by the recital of the symptoms of problems by the parties, and have injected the idea of a conciliatory process in the usually contentious proceedings. They have called upon the skills of other professions (as have the criminal and juvenile courts) to aid in seeking a possible solution to marital problems. The recognition of the primary fact that the court is dealing with people with problems which for the most part may be solved without a divisive decree terminating the marriage, and not necessarily with a plaintiff and defendant in an adversary proceeding in which one must emerge “victorious” and the other a “loser,” is the basic difference in the attitude of those courts which are successfully reducing the number of divorces in their jurisdictions.66

65. TAPPAN, op. cit. supra note 24, at 529-84.
66. In the Domestic Relations Division of the Court of Common Pleas of Lucas County, Ohio, Paul W. Alexander, Judge, 41% of all divorce actions were dismissed in 1960. This compares with a national average of 30%. Annual report of Family Court of Lucas County (Toledo, Ohio) at 2 (1960). This favorable result was accomplished primarily by the use of family and marriage counseling offered by the court and by community agencies. Judge Alexander advised the writer in a recent communication that “The pre-litigation marriage counseling effort shows a 62% success result. That is ... of all pre-litigation counseling efforts (situations where divorce is definitely threatening) only 38% go on to filing.”

In Los Angeles County, California, the Conciliation Court (which is a part of the Court of Domestic Relations) indicated that of all cases filed in 1959
The use of conciliation and family and marriage counseling does not mean that litigation is or should be eliminated in divorce. But the question involved is the effectiveness of litigation used exclusively. The vast majority of divorce cases are uncontested. Statistics compiled for the entire nation indicate that approximately 85 per cent of the cases are not contested. In Missouri, uncontested divorce cases constitute over 91 per cent of the total. Any argument that the conciliation method would restrict the use of the adversary process would seem to be almost moot. Matters of disagreement in 91 per cent of the divorce cases heard in the courts of Missouri are adjusted before the hearing. This obviously is done in the lawyer's office. And it is suggested that the prime motivating factor that produces these office settlements is the remarkable theory of recrimination that "if both parties have the right to a divorce, neither party has." Thus the threat of using the defense of recrimination to bar plaintiff's action forces the disposition of the real issues outside of the supervision and control of the courts. The adjustment of the problems is a matter of negotiation between the parties, quite possibly in a climate in which the more guilty but financially stronger spouse has a whip hand. It is this very process, fostered by the continuing adherence of the courts to the unreasonable and arbitrary recrimination theory, which eliminates judicial supervision in 91 per cent of the divorce cases in Missouri. The court does not have before it the case in all its particulars but is presented only with bare formal compliance with the law for its stamp of approval on a default case that has been arranged by the parties through their lawyers. This pre-arranged presentation may well have the reluctant approval of the parties, but they are motivated by the idea of securing the best bargain they can under the circumstances, having uppermost in mind the fear of the use of recrimination and economic pressure. This may be good "horse trading," but it fails to take into consideration the real issues which are of importance to society, the best interests of the spouses and their children in continuing or terminating the marriage, and the interest of the state in preserving the family unit.

In many cases, it may be argued that the default device smacks of

48.8% resulted in reconciliations, and for the first half of 1960 over 50% were reconciled. For a five year period prior to 1959, it is reported that the average number of reconciliations has been 43%, and a check made after one year indicates that 75% have remained reconciled. See "The Conciliation Court of Los Angeles County," a report issued July 15, 1960.

collusion. This may be true, but the court is unable to determine that fact. Thus the cases which are more likely to be heard by the court as contested matters are those in which a spouse resorts to recrimination for malice or greed because he has failed to bargain successfully outside of court, and not from a sincere desire to preserve the marriage.

The elimination of the bargaining club of recrimination as an absolute bar to divorce would induce both parties to present the relevant facts fully. But the court in order to function properly must not be limited to the alternatives of divorce or dismissal of the case but should be empowered to apply the preventive and remedial resources of the entire community—social service case workers, psychiatrists, physicians, marriage counsellors, and other professional services—in a cooperative effort to solve the problems of the family. Thereby the court would be in a better position to determine what the best interests of the family require. Many families are dead sociologically when they come to court, and on these the court can only perform a judicial autopsy. Others, and perhaps this is true of a majority, are merely ill, and it is this vast group which may be rehabilitated through the individualized treatment which the court can provide in cooperation with other professions.

In dealing with each family on this highly personalized basis, where the facts indicate to the court that such action may be helpful to the family, the court must be authorized to enter preliminary orders from time to time to meet such changing situations that may arise. The family during this period would be aided or supervised either by a court-attached worker or a community resource cooperating with the court, much as the juvenile court retains jurisdiction and supervision over a child within its jurisdiction. The final decree of dismissal or divorce would be in effect the determination of the court that in the best interest of all parties concerned, as well as the state, the marriage should continue or end.

The basic stability of the family unit should not be impaired by unreal grounds for dissolution or by procedures that are formal, hasty, and unable to deal with the problems that are involved. At the other extreme and to be equally condemned are artificial and rigid restrictions on the dissolution of the family that may result in meretricious relations which are damaging to the institution of marriage.70

70. Prior to the enactment of a divorce code in South Carolina in 1949, there evolved in that state a “common law” that included both social and legal recognition of extramarital family relationships which prescribed the proportionate share of property which a married man could give to the woman who was not his lawful wife. Jacobson, op. cit. supra note 67, at 110.
In each case a searching appraisal must be made of the advantages or harm to family members in the continuance or termination of the marriage, and consideration must be given to the interest of society in marriage generally. Pragmatically this may be approached by a declaration that divorce should be decreed only for permanent marital disruption. This can be achieved by discarding the concept of fault within existing laws. It can be facilitated by adding non-fault grounds for divorce primarily in the form of a "living apart" statute. The removal of recrimination as a bar would reduce marital stalemates and, to a great extent, would eliminate the potential fraud, both upon one of the parties as well as the court, of prearranged non-contested dispositions. Living apart statutes as constituting in themselves a basis for divorce have been adopted in twenty states and Puerto Rico and the District of Columbia in varying forms.\textsuperscript{71} Generally, in most of these jurisdictions the doctrines of fault and recrimination do not apply. The period of separation varies from two to ten years. A reasonable period of continuous disruption of the family's living together would appear to be a sound indication of its permanence and should be a condition precedent to its final termination by judicial decree, provided of course, that the living apart is caused by marital discord.

The fault concept is carried out in penal form in a statute\textsuperscript{72} which requires the forfeiture by the "guilty party" of all rights and claims under the marriage. The financial status of the spouses, their needs in relation to their ages and economic and social status, their contribution to the family estate, their health, earning ability or capacity and all other valid considerations in determining the right to alimony are totally eliminated if the party in want is, under the rule of decisions, determined to be the "guilty party." Public policy would be better served if alimony were determined on the basis of actual need rather than as a punishment for "guilt" as defined in an adversary proceeding for the termination of the marital status.

Implicit in eliminating the fault concept in divorce proceedings and its adversary nature would be legal recognition of the fact that the termination of the marital status by a decree of divorce with its doubtful implications is not an award to a successful litigant. The decree would terminate the marital status for both parties equally as a decree of a court of equity would terminate a partnership.


\textsuperscript{72} § 452.090, RSMo 1959.
Since we have lived for so many years with the false concept that the legal grounds for divorce represent the true causes of marriage failure, and have failed to recognize the truth that divorce is but the formal and legal recognition of marriage failure, one cannot be overly optimistic about a general public and legal acceptance of a complete change in the approach to a solution of this problem. The concept of guilt or innocence in marriage failure cannot be evaluated on any proper basis. In the highly intimate relationship of family status, conflicts of personality almost inevitably develop. These conflicts are resolved for most families, within their own family circle. For others who think they are unable to cope with them, the escape hatch through divorce appears as their only solution. But this is only an illusion, for divorce seldom solves problems. In fact the divorce route is sometimes labeled an emotional disease leading the victim from one apparently impossible situation into another.

Again, public policy dictates that before a court pronounces a marriage ended by pinning a label of guilt or innocence on one or the other of the spouses, a reasonable effort be exerted to determine whether or not the marriage is in fact terminated. If the marriage is one in legal form only, it should be terminated. But, if the marriage does exist validly but is suffering from the innumerable problems that the parties themselves are incapable of resolving, assistance should be given to revitalize the relationship.

Although building upon a foundation that is as unsound as we believe our divorce laws to be may not appear to be good policy, it is nevertheless impractical to suppose that the legislature in one fell swoop will abandon the existing pattern of divorce laws. Accordingly, it is submitted that the adoption of a statute that would permit divorce courts to apply the skills of other professionals in an attempt to resolve marital problems would be an appropriate step. It would not do violence to the existing pattern of divorce actions and would establish a proving ground to demonstrate the effectiveness of this approach to the problem.73

73. Such legislation was considered by the Missouri 71st General Assembly in the following form as House Committee Substitute for House Bill No. 201:

Section 1. Each circuit court of the respective judicial circuits while sitting in matters of divorce, annulment, separate maintenance, child custody in connection therewith and child custody in habeas corpus proceedings, alimony and support, may exercise the family counseling powers conferred by this act.

Section 2. 1. In each of the several judicial circuits, or in such combination of circuits as shall be agreed upon by the judges thereof, the judge or judges or such circuit or combination of circuits may appoint one or more domestic relations counselors and such other persons as assist-
A ready-made gauge is available to measure the validity of this proposal statistically. The present divorce rate in Missouri having been consistently higher than the national average, the impact of the proposed procedure, if
successful, should tend to reduce this discrepancy even though, it is recognized, many other factors may be involved in such a decline.

The success of such an experiment would greatly improve the receptiveness of the public and the legislature towards a complete elimination of the fault doctrine in divorce.

Section 7. 1. Nothing contained in this act shall be construed as in any way affecting the court’s power to make allowances for support, maintenance and attorney’s fees pending the litigation.

2. If after a reasonable time it appears that the use of counseling hereunder is not effective the court shall, upon application of either party, set the cause for hearing on its trial docket.

Section 8. In order to assist the court in making equitable orders in relation to the support and custody of children, the domestic relations counselor, in all cases involving minor children when so directed by the court, shall make a study of the family relations, earning ability, and financial status of the parties and other factors pertinent to the custody, support and general welfare of the children, and shall file a verified report of such study not later than ten days before the date set for the divorce or separate maintenance hearing unless the time be shortened by order of the court. The report of the domestic relations counselor shall be made available to either party or his counsel; and the domestic relations counselor who made the report may be examined by either or both parties at the hearing. The judge may call the domestic relations counselor, the parties, and other persons as witnesses. The report or any portion thereof may be received in evidence if no objection is raised to the relevancy, competency, or materiality thereof by either party or his counsel. The report shall be kept in a confidential file not open to inspection except by the court, the parties and their attorneys of record.

Section 9. 1. The benefits of the provisions contained in these sections may be invoked by either spouse upon the filing in the office of the clerk of the circuit court a petition designating the filing spouse as plaintiff and the other spouse as defendant, setting forth the fact that the parties were married, the date of such marriage, the names and ages of the children born of such marriage, and that jurisdictional and statutory grounds for divorce, annulment or separate maintenance exist under the laws of Missouri.

2. In the event marriage counseling is successful the court may dismiss said petition. If marriage counseling is not successful said petition may be considered sufficient in form for the court to decree a divorce, separate maintenance, or annulment and to enter all such further orders and have the same jurisdiction as though said petition had been filed under the other provisions of the laws relating to divorce, separate maintenance or annulment, subject to the right of the court, or either party to require the filing of an amended petition which would meet all requirements of a divorce, separate maintenance or annulment petition filed under the other provisions of the laws relating to such proceedings.