

# THE MYTH OF THE VOID DIVORCE

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## I

Rules of jurisdiction are regarded as the foundation of a legal system. The conception indicates the extent to which the action of a tribunal is official in character.<sup>1</sup> In the common law system, rules of jurisdiction constitute, of course, a self-imposed restraint upon the action of the courts. These rules are for the most part crystallized in reasonably intelligible formulae. Certain facts must exist before the action of the court is judicial in character. In the absence of these essential facts, action is supposed to be unofficial and hence non-legal. A jurisdictional defect is such a defect as will induce a court to regard the subsequent action as nonjudicial and, therefore, legally impotent.<sup>2</sup> The theory is that a judgment or decree rendered under such circumstances has no effect. As courts frequently say, it is utterly void. Other courts will, upon discovery of the defect, disregard the judgment as an adjudication of legal relations. This situation is frequently described by the statement that such a judgment is subject to "collateral" attack whenever and however it is relied upon as an adjudication. A "void judgment" is, of course, a contradiction in terms. If the purported adjudication is void, it is not a judgment; and if it is a judgment, it is not void. Lawyers, however, understand the meaning of the expression which is quite analogous to the similar expression "void contract." A void judgment is one which has been rendered by a court which lacked jurisdiction and, by hypothesis, is one which has no legal effect whatever. On the other hand, a valid judgment is one which has been rendered by a court under circumstances which conform to the rules of jurisdiction, and, by hypothesis, represents a binding adjudication between the parties. The judgment may be an erroneous application of a rule of law but, until reversed or modified in a direct proceeding brought for the purpose, it is effective.

In the United States, the rules of jurisdiction are of somewhat greater significance than in other common law countries for the reason that the Constitution of the

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<sup>1</sup> See Harper, *Collateral Attack Upon Foreign Judgments* (1931) 29 MICH. L. REV. 661, 669.

<sup>2</sup> RESTATEMENT, CONFLICT OF LAWS (1935) §429.

United States makes it imperative that such rules be observed.<sup>3</sup> On the other hand, the Constitution requires the recognition of a judgment or decree which has been rendered in conformity with the rules pertaining to jurisdiction.<sup>4</sup> Thus, as between the states of the United States, a decree of divorce rendered by a Nevada court must be recognized as valid by the other forty-seven states if the court which rendered the decree had jurisdiction.<sup>5</sup> If, however, the Nevada court did not have jurisdiction to render the decree, the theory is that not only will other states decline to recognize it, but it is invalid even in Nevada.<sup>6</sup>

There are two aspects to the jurisdictional problem, jurisdiction over the person and jurisdiction over the subject matter of the action. According to orthodox legal rules, any judgment which adjudicates personal relations as, for example, contract liability or tort liability, requires that the parties be "in court." This is accomplished, of course, on the part of the plaintiff by the very bringing of his action. The fact that he has invoked the judicial powers of the tribunal is enough to subject him to the jurisdiction of the court of the state in which he brings the action. A defendant is "in court" if, (1) he is personally served with process within the state, (2) if, being domiciled therein, some other method of service is employed which is reasonably calculated to give him notice of the proceeding and an opportunity to appear and defend his interests, or (3) although neither of the foregoing conditions are satisfied, he voluntarily appears in the proceeding and thereby consents to the exercise of jurisdiction over his person.<sup>7</sup>

When an adjudication purports to fix or determine the legal relations of the parties with respect to third persons or relations which affect the public, it is necessary that the court have jurisdiction over the subject matter of the action. This is the case of adjudication of the title to tangible property, whether land or chattels, and the determination of marital or other domestic status. If the court has jurisdiction over the subject matter of the action in such a case, it is unnecessary for the

<sup>3</sup> RESTATEMENT, CONFLICT OF LAWS, §43. "If a State attempts to exercise power by creating interests with respect to persons or things which it has no jurisdiction to create, its action is in violation of the Fourteenth Amendment to the Constitution and is void in the State itself. The Supreme Court of the United States may review all cases whether from a lower Federal Court or from a State Court of last resort which involve a question of the exercise of power on the part of a State when it has no jurisdiction." §43, Comment a.

<sup>4</sup> *Atherton v. Atherton*, 181 U. S. 155 (1901).

<sup>5</sup> RESTATEMENT, CONFLICT OF LAWS, §8, Comment d.

<sup>6</sup> While the effect of the Constitution of the United States is now thought to be as stated, there is still some doubt so far as its application to divorce decrees is concerned. Thus the much discussed decision of the Supreme Court in *Haddock v. Haddock*, 201 U. S. 562 (1906), decided that it was unnecessary for New York to recognize a divorce obtained by a husband in Connecticut upon service by publication after he had deserted his wife at their matrimonial domicile in New York. The court, however, seemed to concede that the divorce might be effective in Connecticut inasmuch as the husband had actually acquired a domicile there before the decree. See GOODRICH, CONFLICT OF LAWS (1927) 295, 296. The effects of such a situation on public morality is obvious. Of all the difficulties involved in the problem of migratory divorce, it would seem that the worst possible situation is one in which a party may be single in one state and married in another, a marriage lawful in one state and adulterous in another, children legitimate on one side of an imaginary political line but bastards on the other side of the line.

<sup>7</sup> RESTATEMENT, CONFLICT OF LAWS, §§71, 73, 75.

persons whose interests are thus determined to be "in court." The Constitution of the United States, however, requires that jurisdiction be exercised in a reasonable manner, and this calls for some kind of notice and opportunity to be heard.<sup>8</sup>

As applied to divorce, these principles require the existence of facts which, according to common law rules, give the court jurisdiction over the subject of divorce. If such conditions exist, it is unnecessary for the court to have personal jurisdiction over the defendant in the action. These principles, however, will not permit the court to render a money judgment for alimony in connection with the divorce unless it also has jurisdiction over the person of the defendant against whom the alimony decree is given since such a judgment is regarded as "personal," rather than "*in rem*."<sup>9</sup> The generally accepted formula for jurisdiction over the subject of divorce is as follows: The courts of a state in which both the husband and wife are domiciled may divorce them,<sup>10</sup> and when both spouses are thus domiciled in the same state, no other state has jurisdiction to render such a decree.<sup>11</sup> When the spouses are domiciled in different states, the rule is somewhat complicated. An authoritative formulation of it attributes jurisdiction to the courts of a state in which one spouse is domiciled if the spouse who is domiciled elsewhere has consented to the separate homes or by his misconduct has forfeited his right to object thereto or is personally subject to the jurisdiction of the courts of the state, or if the state is the last state in which the spouses were domiciled together as man and wife.<sup>12</sup> This insistence upon domicil of at least one of the parties as a jurisdictional prerequisite proceeds from the idea that the state of domicil is the state most concerned with the marital status of the parties.<sup>13</sup> Marriage is regarded as the foundation of modern society, and the state whose public policy is thus involved is the only appropriate state to change or modify the marital status.

When, as was formerly the case in the United States and is still the case in England,<sup>14</sup> the spouses were incapable of having separate domicils, no jurisdictional problem of complexity existed. The wife's domicil was always that of her husband, and that domicil was the only state in which the courts had jurisdiction to divorce the parties. In recent years, however, the emancipation of the wife has proceeded to the point where she may obtain a separate domicil under certain circumstances, at least for purposes of divorce.<sup>15</sup> There is presumably still one important limitation upon the acquisition by a married woman of a separate domicil. She may do so

<sup>8</sup> RESTATEMENT, CONFLICT OF LAWS, §109. See *McDonald v. Mabce*, 243 U. S. 90 (1917).

<sup>9</sup> *Middleworth v. McDowell*, 49 Ind. 386 (1875); *Rigney v. Rigney*, 127 N. Y. 408, 28 N. E. 405 (1891).

<sup>10</sup> RESTATEMENT, CONFLICT OF LAWS, §110.

<sup>11</sup> *Andrews v. Andrews*, 188 U. S. 14 (1903).

<sup>12</sup> RESTATEMENT, CONFLICT OF LAWS, §113. See Beale, *Haddock Revisited* (1926) 39 HARV. L. REV.

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<sup>13</sup> See GOODRICH, CONFLICT OF LAWS, §122, p. 284.

<sup>14</sup> See *Lord Advocate v. Jaffrey* [1921] A. C. 146.

<sup>15</sup> *Cheever v. Wilson*, 76 U. S. 108 (1869); *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806 (1889); *Kline v. Kline*, 57 Iowa 386, 10 N. W. 825 (1881). See also RESTATEMENT, CONFLICT OF LAWS, §28 and *Caveat thereto*.

only when the fact of her living apart from her husband does not constitute desertion according to the rules of law at his domicile. No such limitation, of course, restricts the husband's power to change his domicile. Thus, a husband may abandon his wife in North Carolina and acquire a domicile in Nevada although the wife can acquire a Nevada domicile only if, by reason of her husband's consent thereto or his misconduct, her action in so doing does not constitute desertion.

Domicil being thus the all important point of contact to determine the existence of jurisdiction, it is desirable that the rules determining what constitutes a domicile be definite and certain. Unfortunately, this is not the case in common-law states. The clue to domicile is home.<sup>16</sup> Except in cases in which the law arbitrarily assigns to a person a domicile, the domicile is the place where the home is. Home, however, is an extremely flexible and nebulous conception. It is defined by the Restatement of Conflict of Laws as "a dwelling place, distinguished from other dwelling places by the intimacy of the relation between the person and the place."<sup>17</sup> This is not very helpful. The development of the thought, however, indicates that the determination of home is primarily a matter of judgment rather than one of fact finding. In determining whether a dwelling place is a person's home, a number of factors are to be considered and weighed, namely, the physical character of the place, the time which the person spends there, the things that he does there, the persons and things which are found there, the person's mental and emotional attitude toward the place, his intention when absent to return, and the existence of other dwelling places in which he spends a part of his time.<sup>18</sup> The vague character of the idea of home is particularly unfortunate in problems of migratory divorce for the reason that there is always a question of a change of domicile. The touchstone here is to determine whether or not the person whose domicile is in question had removed to a new dwelling place with the intention of making the new dwelling place his home.<sup>19</sup> The difficulty is thus increased because of the further subjective element. It is not necessary for the person to intend to make a permanent home in the new dwelling place, but it is necessary that his intention be such as to make the new dwelling place something other than a mere transient place of abode. Certainly, if the person intends to remain only a short time and plans a definite and permanent removal to another dwelling place thereafter, it would be extraordinary to designate as his home the place where he makes his brief sojourn. A state to which the plaintiff, or the defendant, or both, has moved immediately prior to the divorce and from which he removes immediately afterwards, is uniformly held not to be the domicile of the party in question. Thus, the ordinary Reno or Mexican divorce is in contemplation of orthodox legal theory void because rendered in a state which was the domicile of neither party to the proceedings.<sup>20</sup>

<sup>16</sup> See GOODRICH, *CONFLICT OF LAWS*, §14.

<sup>17</sup> §13.

<sup>18</sup> *RESTATEMENT, CONFLICT OF LAWS*, §13, Comment c.

<sup>19</sup> *RESTATEMENT, CONFLICT OF LAWS*, §18.

<sup>20</sup> *State v. Cooke*, 110 Conn. 348, 148 Atl. 385; (1930); *Andrews v. Andrews*, 188 U. S. 14 (1903); *Lister v. Lister*, 86 N. J. Eq. 30, 97 Atl. 170 (1916).

The above rules set forth accepted principles by which are determined the jurisdiction of the courts of any state to render a divorce. By hypothesis, a divorce rendered by any other state will not be recognized by common-law courts. Conversely, it seems clear that if a divorce decree is recognized generally by other states, the state in which it was rendered must have had jurisdiction so to do. Surprising as it may seem, however, this is not the case. One would expect, for example, that if a divorce is obtained in a state under conditions which do not conform to the rules of jurisdiction, the following results would necessarily follow: a subsequent annulment or divorce action between the same parties should not fail by reason of the former "void" divorce; in proceedings for letters of administration or probate on the death of one of the spouses, the first husband or wife should be recognized as against a spouse by a subsequent marriage; in bills for a widow's allowance or for admeasurement of dower or partition of lands, the first spouse should prevail as against a subsequent one; in an action for alienation of affection which occurred after the "void" divorce, such divorce should not be a valid defense; in actions for ejectment or specific performance between grantees or heirs of the principals to the divorce action, the divorce should be ignored as affecting the rights of the parties; in a criminal prosecution for bigamy, the "void" divorce should not constitute a defense. These results are all implied in the very notion and definition of jurisdiction and obviously follow from the major premise established by the word "void." Oddly enough, it is only in the case of a prosecution for bigamy that one can be certain that such results will follow, and prosecutions for bigamy after anything which resembles an effort to obtain a divorce are so rare that, for practical purposes, they may be and are ignored.<sup>21</sup>

The anomalous character of this situation is evidenced by the variety of legal doctrines which courts have attempted to develop. Thus, the doctrine of "estoppel," a fiction of the first magnitude, is invoked in situations in which both parties appear in the action and the divorce is not seriously contested.<sup>22</sup> So too, although the defendant does not enter an appearance, the plaintiff is estopped to deny the jurisdiction which he has thus invoked.<sup>23</sup> Again, if either party subsequently avails himself of the divorce by remarrying, he is said to have put himself in a position in which it would be unfair for him to deny the validity of the divorce. Solicitation for the second spouse and the children of the second marriage has driven the courts thus to treat the "void" divorce as if it were valid.<sup>24</sup> In actions between the first and second

<sup>21</sup> See Harper, *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158.

<sup>22</sup> See *Loud v. Loud*, 129 Mass. 14 (1880); *Chapman v. Chapman*, 224 Mass. 427, 113 N. E. 359 (1916); *In re Ellis' Estate*, 55 Minn. 401, 56 N. W. 1056 (1893); *Ferry v. Troy Laundry*, 238 Fed. 867 (D. Ore. 1917).

<sup>23</sup> *Shrady v. Shrady*, 47 Misc. 333, 95 N. Y. Supp. 991 (1905); *Starbuck v. Starbuck* 173 N. Y. 503, 66 N. E. 193 (1903).

<sup>24</sup> "He may publish his own shame to the world for a money consideration; but this court will not aid him to stigmatize his second wife as living an adulterous life, nor hold her child is a bastard." *Marvin v. Foster*, 61 Minn. 154, 160, 63 N. W. 484, 486 (1895). Similarly on appeal on direct attack to vacate the decree, marriage by the person attacking the divorce is fatal to the successful prosecution of

wife for a share of the husband's property, the first spouse will not be permitted to raise the question of jurisdiction if she herself had remarried or if, by consenting to the divorce, she had thus made possible the embarrassing position of the second wife.<sup>25</sup> Something akin to this doctrine is applied in favor of third persons as, for example, in the case in which the first wife sues another woman for alienating her husband's affections by conduct subsequent to a "void" divorce.<sup>26</sup>

It would seem that the doctrine of estoppel should be applicable only to the party or parties who consented to the procurement of the invalid decree. Such a doctrine is not available to a person who entered an appearance and defended a divorce action in a state which lacked jurisdiction to render it. Here, however, another doctrine is available, namely, that of *res judicata*. It was formerly supposed that a collateral attack upon any judgment could be made by either of the parties thereto upon any jurisdictional ground.<sup>27</sup> It is clear today, however, that this can be done only by a person against whom a default decree has been rendered if the defect relied upon pertained to jurisdiction over the person.<sup>28</sup> While it is not yet clear that a similar rule always prevails as to defects pertaining to jurisdiction over the subject matter,<sup>29</sup> such a rule has been applied in a divorce action.<sup>30</sup> If this is sound law, it develops that whenever the husband and a wife appear in a court and a divorce is subsequently rendered, neither party can attack the decree in a collateral proceeding on the grounds that the court did not have jurisdiction to divorce them. This means that for practical purposes, any state has jurisdiction to divorce a man and wife who desire to obtain such a decree there. Neither can ever raise the question as to its validity. Property rights are determined quite as though the situation fell within the orthodox rules governing jurisdiction. Children of subsequent marriages will, for economic purposes at least, be legitimate quite as though their parents were not "bigamists." Indeed, to call such subsequent marriages bigamous is completely misleading.<sup>31</sup> They are bigamous only in the rare event that some zealous prosecu-

the proceedings. *Cummings v. Huddleston*, 99 Okla. 195, 226 Pac. 104 (1924); *Butts v. Butts*, 152 Ark. 399, 238 S. W. 600 (1922). This is true although the court lacks jurisdiction over the person who seeks to avoid the decree. *Cummings v. Huddleston*, *supra*. A marriage by the adverse party, of course, does not so affect such proceedings. *Glover v. Glover*, 193 Mo. App. 648, 187 S. W. 278 (1916).

<sup>25</sup> See *Arthur v. Israel*, 15 Col. 147, 25 Pac. 81 (1890).

<sup>26</sup> *Bledsoe v. Seaman*, 77 Kan. 679, 95 Pac. 576 (1908).

<sup>27</sup> See TENTATIVE DRAFT No. 5, RESTATEMENT, CONFLICT OF LAWS, §490.

<sup>28</sup> *Baldwin v. American Surety Co.*, 287 U. S. 156 (1932); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U. S. 522 (1931).

<sup>29</sup> RESTATEMENT, CONFLICT OF LAWS, §451, Caveat.

<sup>30</sup> *Blakeslee v. Blakeslee*, 213 Ill. App. 163 (1919).

<sup>31</sup> Moreover, where the party remarrying takes the precaution to remarry in the state where the decree was rendered, he will not be guilty of the crime of bigamy, since in that state at least the divorce will be regarded as effective to dissolve the first marriage and since at common law bigamy is an offense only against the state in which the allegedly bigamous marriage took place. *State v. Cutshall*, 110 N. C. 538, 15 S. E. 261 (1892). However, he is technically open to prosecution for adultery in any state in which he subsequently cohabits with his second wife if that state does not recognize the validity of the divorce. And some states have by statute redefined bigamy to include cohabitation under such circumstances. See, e.g., N. C. Code (Michie, 1931) §4342. England has a similar statute. 24 & 25 Vic. c. 100, §57 (1861).

ing attorney desires to make himself so unpopular that it will be impossible for him again successfully to compete for public preferment. Such an eventuality is not sufficiently serious to deter people who find it otherwise desirable to obtain a divorce in a state other than their domicil.<sup>32</sup>

It is clear that to characterize a divorce decree as "void" when all of the legal effects thereof are identical with a decree which is valid with but one insignificant exception is to create a highly misleading impression. It is simply not true that a divorce rendered in a state to which both parties resorted solely for the purpose of obtaining the decree is without legal effect.<sup>32\*</sup> On the contrary, it has the precise effects which the parties desire. In view of these facts, it would seem that a frank and straightforward formulation of legal rules with respect to jurisdiction for divorce would be entirely at variance with the rules formulated in the books. And yet the most recent authoritative restatement of these rules sets forth the timeworn but false formulae as already indicated with but one reference to the important body of law heretofore discussed. This puts the legal profession very much in the position of telling the candidates for a divorce that they cannot legally go to Nevada or Paris or Mexico and obtain a decree, but, if they do so disregard the law, the judges will be astute to find a form of words which will put them in the same position as though they had conformed to orthodox legal precepts.

## II

The life of the law is its ability to adjust itself to changing social needs. Periods of social and economic development therefore give rise to a corresponding period of growth in the law. The law must necessarily conform, to a large extent, to prevailing community standards.<sup>33</sup> The breach between legal rules and accepted criteria of conduct measures the efficacy of law as an instrument for social control. This adaptation of the law to changing *mores* is an essential factor in the maintenance of that respect for law and order upon which the culture of western civilization is supposed to depend. At the same time, this change must be orderly and predictable. The very formulation of the ends of law reveals the anomalous function which it performs. It is, on the one hand, the guarantee of certainty and uniformity in the basic affairs of life. It must, on the other hand, be sufficiently elastic to admit of desirable changes in the social order and not afford an obstacle to the gradual evolution of social institutions. The paradoxical character of this

<sup>32</sup> On the contrary, divorce statistics indicate that persons resorting to Nevada have been careful to take advantage of the protection accorded them by the doctrine of *res judicata*. In 1931, the proportion of "contested" cases in that state ran almost five times the national average, one of the chief purposes of the "contest" (which consists ordinarily in nothing more than the filing of an answer) being to establish consent to the jurisdiction of the court. For the nation, contests in that year were 13.8 per cent of all decrees granted; for Nevada, they were 63.3 per cent. See U. S. BUREAU OF THE CENSUS, MARRIAGE AND DIVORCE, 1931, table 35. The amicable character of these "contests" is indicated by the fact that they ran higher (71 per cent) in the case of decrees granted to wives. *Ibid.*

<sup>32\*</sup> Where, however, the defendant spouse neither is subject to the jurisdiction of the court nor subsequently remarries, it is true that the divorce decree thus rendered is open to attack.

<sup>33</sup> See Harper, *Law in Action and Social Theory* (1930) 50 INT. J. OF ETHICS 305.

function has, as the testimony of a great judge bears witness, proved to be the source of unending spiritual and intellectual travail to those whose duty it is to determine the scope and application of law.<sup>34</sup>

The law should remain somewhat behind the frontier of social experimentation. It is not until opinion becomes crystallized that it should be formulated into rules of law. It is desirable that time, the one great test for truth, should at least characterize an idea as *prima facie* sound before it receive the compulsion of the legal sanction. On the other hand, it will not do for a legal system to become outmoded. It not only loses its usefulness but it becomes an obstacle to progress if it becomes too far out-distanced. It, too, must be capable of progressive evolution. In other words, it must follow the times. The problem, therefore, is to strike the balance between stability, on the one hand, and elasticity, on the other. At any given time and place the fundamental legal problem is to be close enough yet not too close to the current moral and social canons of desirable conduct.

The common law has developed its own technique in the solution of this great problem of legal science. It has for the most part preserved the appearance of certainty and stability while at the same time keeping reasonably abreast of change. It has accomplished this by devices of nomenclature and rationalization.<sup>35</sup> Fiction has played an important part in the process. Sophistry, too, has played its rôle. All these have come about largely from the fact that the lawyer is endowed with a fanatical zeal for symmetry and logical precision and at the same time with a strangely practical turn of mind. A *non sequitur* in legal reasoning confuses and shocks him. A wide deviation between law in the books and law in action bothers him not at all. On the contrary, it satisfies the anomalous character of his professional appetite. Thus it is that we find two distinct aspects to legal science, first, a rational formulation of abstract rules, symmetrical and logical in conception and in detail; second, an empirical science, illogical and inconsistent but for practical purposes workable and satisfactory.<sup>36</sup> In other words, there is one law for theoretical purposes; another for practical purposes. The mythical character of the void divorce is an example of this development.

While it is, of course, not possible to eat one's cake and have it still, much the same effect can be attained by creating a sufficiently strong illusion of the existence of that part of the alternative which is impossible in fact. The common law has in a measure solved the riddle of elasticity and stability by attaining the one and retaining the myth of the other.<sup>37</sup>

It is not equally clear, however, that the disadvantages of such a technique have been realized. It is not at all improbable that there are byproducts which command serious attention. For example, it is a fact that in America today the open defiance

<sup>34</sup> CARDOZO, *PARADOXES OF LEGAL SCIENCE* (1928).

<sup>35</sup> See Harper, *supra* note 33, at 317.

<sup>36</sup> Cf. Adler, *Law and the Modern Mind* (1931) 31 *COL. L. REV.* 91.

<sup>37</sup> FRANK, *LAW AND THE MODERN MIND* (1930).

and contempt for law is presenting a serious problem. Indeed there is little effort made to conceal this defiance and contempt in almost every community. Not all laws are violated, of course, but no law is observed or respected merely because it is law. That the situation is acute is evidenced not only by the number of crime commissions and law observance bodies, official and unofficial, but by the increased attention which the problem is receiving from the legal profession itself and from the press of the state and nation. Volumes have been filled with the reports of findings of enforcement groups and crime surveys and with recommendations and suggestions for meeting the evil. The one outstanding fact of all these reports is that the law as such is not taken seriously by the citizen. He is conscious of no social duty to observe the law because it is law.

This surprising state of affairs is not confined to any class of citizens. It has, without doubt, permeated the entire body politic and is characteristic of every level of society. If deliberate disobedience to law, without distinction or qualification, be the mark of the poor citizen, America has today no marked class of good citizens. This is due in part, it is quite probable, to the very obvious behavior of judicial tribunals in the administration of the law. A vast quantity of criminal statutes in America are simply not enforced at all, in certain communities. Some of them are not enforced in any community. This is because the communities do not desire them enforced. The pressure of social interest and community desire is so great that no local tribunal can be organized to apply the law as it is found in the books. If the judge pays lip service to it in the ritual and formulae of his charges, the jury will dispose of the case in its own way. The rarity of prosecution for bigamy is an instance of this state of affairs.

More surprising still is the behavior of other governmental officials who play an important rôle in the administration of justice. It is the commonest and most notorious fact that open assumptions are constantly made by citizens in many communities of behavior on the part of those officials charged with enforcement duties that is at variance with the duty imposed upon them by the written law. The assumptions are justified by the ensuing conduct of the officials. Thus, when the federal prohibition laws were nation-wide in scope, and reinforced by local laws in almost every state, numerous communities in all states, including citizens and officials, proceeded exactly as though no such laws were in force there.<sup>28</sup>

<sup>28</sup> NAT. COMM. ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON ENFORCEMENT OF THE PROHIBITION LAWS (1931) Pt. II, 2 (f).

"It is generally admitted and indeed has been demonstrated by experience that State cooperation is necessary to effective enforcement. In States which decline to cooperate and in those which give but a perfunctory or lukewarm cooperation, not only does local Federal enforcement fail, but these localities become serious points for infecting others. As things are at present, there is virtual local option. It seems to be admitted by the government and demonstrated by experience that it is substantially impracticable for the Federal Government alone to enforce the declared policy of the National Prohibition Act effectively as to home production. Obviously, nullification by failure of State cooperation and acquiesced-in nullification in homes have serious implications. Enforcement of a National law with a clearly announced

Now orthodox juristic theory regards the rational formulation of the rule as the law rather than the actual application of the rule in concrete cases. But when the citizen comes to realize that lawyer's law is one thing, whereas the law which he knows and to which he is actually subject is something very different, it is difficult for him to cultivate and retain that attitude toward the legal order which is characterized as "respect." If, on the other hand, the rules of law were formulated in realistic terms to the end that socially sanctioned conduct be honestly characterized as lawful, it might well be that what is now taken lightly as an hypocritical and insincere institution would receive that respect which is deemed essential to a peaceable and prosperous community.

Thus, when the respectable layman hears the legal profession denounce a Reno or a Mexican divorce as "void," but at the same time finds that persons who avail themselves of such decrees achieve legal results which are, for all practical purposes, identical with the results of a "valid" divorce, his respect for law is not apt to increase. It is not surprising, then, to discover the respectable layman himself content to do with a void divorce, convinced as he is that its invalidity is Pickwickian in character.

To characterize such persons as bigamists is to confuse legal theory with facts and to confound legal crime with anti-social conduct. They are bigamists only in the sense that millions of reputable persons are criminals because they indulge in conduct approved by public opinion but forbidden by an official formula. Indeed, whether such persons are law breakers depends solely on the major premise incorporated in one's definition of law. If we adhere to realities, we imply in the word law only that certain governmental functionaries will behave in a manner which conforms to a pattern represented by the content of legal rules. When, therefore, these officials, judges, juries, sheriffs, policemen and others, are confidently expected to act and do act in a manner contrary to a formula, it is in no real sense that the formula represents the "law."

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National policy, such as is set forth in Section 3 of the National Prohibition Act, cannot be pronounced satisfactory when gaps of such extent and far-reaching effect are left open." *Ibid.* Pt. III, 10.

"Whether public opinion at a given time and on a given subject is right or wrong is not a question which according to American ideas may be settled by the words, 'be it enacted.' Hence it is futile to argue what public opinion throughout the land among all classes of the community ought to be in view of the Eighteenth Amendment and the achieved benefits of National prohibition. So long as State cooperation is required to make the amendment and the statute enforcing it effectual, adverse public opinion in some States and lukewarm public opinion with strong hostile elements in other States are obstinate facts, which cannot be coerced by any measures of enforcement tolerable under our policy. It is therefore a serious impairment of the legal order to have a National law upon the books theoretically governing the whole land and announcing a policy for the whole land which public opinion in many important centers will not enforce and in many others will not suffer to be enforced effectively. . . ."

"It is axiomatic that under any system of reasonably free government a law will be observed and may be enforced only where and to the extent that it reflects or is an expression of the general opinion of the normally law-abiding elements of the community. To the extent that this is the case, the law will be observed by the great body of the people and may reasonably be enforced as to the remainder.

"The state of public opinion, certainly in many important portions of the community, presents a serious obstacle to the observance and enforcement of the National prohibition laws." *Ibid.*, Pt. III, 3.

It is not suggested that the criminal is the person only who is discovered, convicted and punished for his offense. It is suggested, however, that the criminal is one who so acts that there will be a reasonable public demand that he be brought to trial and that the penalty of the law be imposed upon him. The man whose conduct so far conforms to accepted standards of at least tolerable living that the danger of adverse action by public officials charged with the administration of law is negligible cannot properly be characterized as a criminal. This is true quite as much with respect to formulae embodied in legislative enactment as in judicial precedents. In other words, law is a prediction of what will happen in legal and other official circles and nothing more. It is a question of probabilities. When the probabilities preponderate overwhelmingly that a rule of conduct as found in a statute will not be applied by courts when the occasion is presented, and that this is consistent with the preponderance of what, for want of a better phrase, is called public opinion, the thorough-going empiricist can come to no other conclusion but that such statute is not the law at the given time and place. When officials and laymen *act* as if a statute were not law, the "as if" becomes the actuality. It is not what the statute *says*, any more than it is what the judge *says*, that constitutes law. In both cases, it is what the judge *does*. In the action of the judge and the reaction of the laymen lies the real revelation of the law.

One circumstance which makes it possible for much that is called law to be so far removed from the general level of public opinion that it is for practical purposes unenforceable is the political function of legislation.

The popular motif here is to legislate personal likes and dislikes, prejudices and bigotries, in or out of the law of the land. The conviction is almost universal in America that the law is the proper medium to make the world completely as one thinks he would like to have it. There is no limit to effective legal action. Not only questions of conduct, of morality, of belief, but physical and even historical facts as well may be made or changed by legislative fiat. All this results in an unspeakable multiplicity of laws representing the personal views of small groups of individuals, many of whom have been quite sincere in their efforts to impose rules of living upon their fellows which coincide with their own views. It also results in a vast quantity of laws which represents the views of certain persons and groups before the enactment, but who, having experienced the relief of conscience which accompanies virtuous public service, find their enthusiasm for the rule of conduct thus set up immediately waning.

This has inevitably led to a situation in which a great many fictitious laws are enacted. Neither legislator nor citizen finds it necessary actually to desire the conduct generalized in proposed statute law before advocating or voting therefor. Indeed it is not necessary that he have any serious intention of obeying it. The legislator or the voter is himself an exception to the rule of conduct enjoined by his own law. He may or may not, however, so lightly tolerate disobedience by others.

It is not necessary for him to form a serious and socially honest opinion as to the general desirability of the policy involved. Since he will enact a law that a majority of his fellows do not approve, he cultivates an attitude which will permit him to regard with indifference laws which others enact although he himself does not seriously indorse them. Thus the entire approach toward legislation is insincere and distorted. The result is that, to live at all, it is necessary to cultivate a technique of "selective lawbreaking."

These regrettable conditions, it seems, proceed largely from a failure to recognize the fact that there are definite limits to effective social control by law, and that one of the limitations is that law must represent an honest judgment as to the desires of the community in which the law is sought to be realized. Law as the behavior of men charged with the duty of administration of justice cannot for long vary from the pressure of social interests emanating from the desires of a major portion of society. The "consent" of the governed, to be sure, is for the most part a tacit acquiescence resting more upon "impalpable conjurings of hopes and fears" than upon any overt manifestation of consent. But the law, as it is decided by popular tribunals, is rooted in an indeterminate sovereignty in the sense that the scope of law and government is measured by the extent of obedience obtainable from the governed. For practical purposes, we must discount the formal conception of law as a categorical imperative quite as we disregard the "General Will" in our grappling with concrete and actual problems of politics. The behavioristic conception of law implicitly includes the "behavior" of the layman as well as that of the official. The moment law is regarded as the prediction of what judging tribunals will do, that moment it is perceived that it is a vicious practice to enact legislation which is directly at odds with what a substantial portion of the community desires and will not permit the judging tribunal to effect. Legislation cannot be substituted for intelligent reasoning, real compromise, education in social policy and actual public opinion. Law, in the sense of official behavior, will reflect the reasoning, the compromise, the education and the actual public opinion of the time and the place. This theory of lawmaking should control both common law and statute law. The judges seldom recognize it. The legislators almost never.

In defense of the legal profession, it may be observed that this situation is not of a type which is peculiar to the law. It represents a symptom which may be plausibly argued as characteristic of American life. It is by no means in law alone that conduct departs widely from profession. It is all too common a phenomenon to find systematic theory tenaciously held in the face of facts, a frank recognition of which would shatter the theory. It is so in religion, in ethics, in politics. Facts are explained away by question-begging fictions; inconsistencies are disposed of by sophistry and casuistry. Ideals are confused with rationalizing devices. The myth of the void divorce is but one aspect of a disease of wide prevalence.

Indeed, it may be because divorce has religious and ethical ramifications that we find so much cant and sham in connection therewith. Thinking about divorce and

marriage even by supposedly "tough-minded" realists still often proceeds from sentimental assumptions, the validity of which are highly dubious. There is presumed to be some great intangible value in the permanency of wedlock.<sup>39</sup> There is, in addition, for many the infinite value for marriage as a sacrament. It is assumed, therefore, that if divorce is not completely forbidden, it should at least be difficult to obtain. Consequently we find a legal theory which makes divorce available only upon certain fixed "grounds." But the practice both of laymen and of judicial tribunals belies the theory. Collusive divorces are the rule rather than the exception. In other words, consent divorces are the most common form in a steadily increasing divorce rate. A case investigation including a fair sampling of the grist of the divorce mills of one state has disclosed only three per cent of the divorces granted that were actually contested.<sup>40</sup> The same study revealed the highly dubious character of the evidence that is required to substantiate cause for divorce. In other words, the whole theory of divorce has very little relation to the decrees which actually sever the marital relation and which serve as a release from an unhappy marriage. The "void" divorce represents an analogous instance in which those who make and state law deliberately close their eyes to the rules which control the conduct of human beings.

It may be that lawyers and legislatures cannot fairly be accused of hypocrisy in these situations. The social effect of flagrant intellectual dishonesty, however, is apt to have quite as corroding an effect upon the ethical sensibilities of the community. There is no merit in clinging to a dogma long after it has ceased adequately to picture that phase of life to which it is pertinent or to serve as an ideal toward which human beings sincerely strive. Neither the theory of divorce nor of jurisdiction to render a divorce accurately portrays the legal phenomena to which it is relevant. Nor does it appear that any of these legal formulae represents a goal which either the legal profession or the community has any genuine desire to reach. It is obvious that under such circumstances legal theories should be revised to conform to legal facts even if it be at the expense of what, in the first instance, undoubtedly represented *bona fide* ideals after which social institutions were sought to be patterned.

<sup>39</sup> See Llewellyn, *Behind the Law of Divorce* (1933) 33 COL. L. REV. 249, 278: There is wisdom in the older ethic. It does not do to make a split-up over-easy. Men's ways and women's ways, at odds. Different conceptions of fairness, of what is cheating, of what one is entitled to expect. Take a single tiny but terrific source of strain: the man's view that you sit up till you are heavy-ripe for sleep, the woman's that only with lights out and the back at rest can things that need talking over really come up for speech. Divergent interests, different friends, clash on the measuring of discordant values. Over-idealization yielding place to brutal perception of pettiness or selfishness or domineering. Old habits broken, but old longings left. New habits, that must fit two, are still to be worked out, still to be made habitual, while parents, friends, and neighbors stir the pot. Income is never adequate to all demands, clothes versus car, address versus saving, food versus liquor, 'your extravagance' versus 'my money'. Amid all this, the steadying influence of the expectations of the group. But perhaps even more, and even when the expectations of the group diverge or are disregarded, there is the call of permanence: We have to work it out.—They want to, these young people, in the main. They want each other. They want each other not for today, but in a marriage. They want each other right."

<sup>40</sup> MARSHALL AND MAY, *THE DIVORCE COURT—MARYLAND* (1932) with which compare the similar study by the same authors in Ohio, *THE DIVORCE COURT—OHIO* (1933).