WHY DIVORCE?

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FAMILY dissolution is an all too familiar feature of the present-day American scene. In so far as it occurs as a result of death or physical or mental disability, the problems connected with it are thought to lie generally in the field of responsibility of the medical profession. But when the means employed to accomplish family dissolution are man-made, as in the case of divorce, we find the problem, in both its remedial and preventive aspects, lying at the door of the social sciences. One of these is the law. That these professional groups view statistics[1] of widespread disintegration with interest, not to say alarm, is obvious. The best evidence of this concern is the stream of proposals made to remedy the situation.[2] In this effort to find something to ameliorate the situation, if not to prevent it, the legal profession has made itself heard.

If we can bring ourselves to see the dissolution process through the eyes of the family which is facing the challenge, we shall probably

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[1] The basic statistics on the annual number of divorces granted in the United States are carried in U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES tables 80 and 81 (1956). Dissatisfaction with the nature and extent of data about divorces was voiced as long ago as 1932, when Marshall and May published their first book, *The Divorce Court*. The United States Committee on Vital and Health Statistics now has a subcommittee on National Divorce Statistics. Statistics on family dissolution are much more difficult to collect, however, because there is usually no official record until court action is taken.

[2] *E.g.*, various legal periodicals have selected the subject of divorce as the basis for a symposium. 28 IOWA L. REV. 179-340 (1943); 18 LAW & CONTEMP. PROB. 1-106 (1953); 9 VAND. L. REV. 633-707 (1956).

understand more clearly the task which confronts those who would reform existing institutions. Basically, it seems to be something like this: One spouse (possibly both), for reasons satisfactory to himself, finds his current domesticity intolerable. He feels he must do something about it. If he were less emotionally involved or better prepared to handle the difficulty, he would do well to take it at once to some person who was really qualified to help him. But, too often, he either does not realize the complexity of the problem, become aware of his own limitations, or acknowledge them until too late—if at all. Thinking in lay terms, he tends to view the matter superficially rather than getting to the core of it. In seeking a remedy, he looks not so much for an over-all solution as for an immediate way of escape for himself. He commits the cardinal error of making what one may call a "self-diagnosis" and comes up with something bearing a familiar label—divorce. His approach is somewhat comparable to that of a man suffering from some physical indisposition who ignores the professional aid doctors might give him and makes his way to the corner drug store. There, he purchases a bottle of patent medicine with a familiar label, looking for anticipated immediate relief and too often not realizing the far-reaching consequences of his act. To relieve himself of personal discomfort, the domestic sufferer often is content, consciously or otherwise, to "kill" his family. He tends to equate personal freedom and divorce. What follows is the normal result of his incompletely-considered action, of his underestimating the nature and complexity of the problem, of his believing that if one obvious portion of the difficulty is solved, all will be well.

The lawyer to whom the spouse takes his overripe domestic problem is often not so much asked for professional advice, as told what to do. There are many times when the client wants a divorce and is determined to have a divorce rather than the sound advice the lawyer would give him. He will go to any lawyer who will get him a divorce, whether or not it is good for him. The ensuing court proceeding, at least in orthodox divorce courts, is too often an extreme: perhaps a rugged domestic battle, with no holds barred; or a spiritless routine in which the spouses have settled their difficulties ahead of time and merely go through the required motions in the court room to satisfy either the meticulous judge or the legislature which originally laid down the basic rules of the contest.

In the present paper, we are not concerned with concocting a proposal to prevent family dissolution. It has been around for a long time; and whether or not it is here to stay, at least it is not likely to be removed from the scene at once by some magical formula being pronounced over it with proper arcane incantations. What we are concerned with is a more realistic, and, therefore, a better, means to accomplish this dissolution. Specifically, why divorce? Is it necessary that the legal concept which we describe by the label divorce be the means employed for an orderly and public dissolution of the family which has "died"? May there not be some other concept which will be more responsive to the situation actually presented by the restless spouse, more flexible in the hands of the administrators, more useful to the people involved, and, therefore, more acceptable and advantageous to all concerned?

I

What Is Wrong with Divorce?

Certainly, if divorce is already an effective and useful procedure, there is no reason to jettison it in calm weather. But if, as would appear, it has become a storm center[3] and a Jonah is sought, we should not shrink from the drastic act of replacing it with something more suitable. It is logical, therefore, to inquire at the outset, what is wrong with divorce.

The answer to this question depends, in some measure, upon the group to which it is addressed. For example, suppose that we address it to that vague and unorganized group which we are accustomed to speak of as the general public. The main characteristic of this group is that its members are probably not too well informed about divorce in the first place. What they know is second-hand, by way of hearsay, and may reflect the efforts of speakers and writers who have axes of their own to grind. To such people, divorce probably connotes an unedifying spectacle. What they are prone to notice is the "symptom" divorce, rather than the more fundamental and less obvious "disease"—whatever that may be. They see, at times, a dramatic and often lurid courtroom battle, so often portrayed on the front pages of the more sensational newspapers. They tend to find it easy to become partisan and take sides in the contest, to jump to conclusions without having all the facts before them. They do not always hear about the uncontested cases

[3] See John Bartlow Martin, *Divorce*, Saturday Evening Post, Nov. 1, 1958, p. 19.

which take two or three minutes to try. So, to the public, divorce is a misleading label. Too often, they look no further.

If the question is addressed to the spouses, we may expect to get a somewhat different answer. Divorce may appear in one light prospectively, and in another in retrospect. It promises and may provide freedom, but with so many loose hanging ends often the final result may be worse than the initial condition. In retrospect, too often it is not a thrilling prison-break, but a catastrophe in which a deceased family is given decent burial, while its members are afforded as quiet a respite as the public conscience respecting the tragedy allows. In retrospect, it is clearer that divorce is not merely the problem of a single discontented spouse or a pair of sparring partners. Rather, it is too often the problem of a whole family, in which the innocent bystanders are caught up by and become victims of forces not of their own making. To the spouses, therefore, divorce tends to be treacherous.

If the question is addressed to the State in a democratic society, the undesirable characteristics of divorce appear in the area of public relations. Divorce statistics advertise a civilization for better or for worse. Washing dirty personal linen in public may have value as a means of satisfying morbid curiosity. Whether it has other public advantages is debatable. It is doubtful if it is an aid to our side in any ideological war, such as that in which we are presently engaged. A persuasive argument may be advanced in support of the proposition that divorce has outlived whatever usefulness it may have had. As an exhibit *A* of the good American way of life, divorce is poor public relations.

There are many objections that may be lodged against divorce, but for our purposes, it will be sufficient to refer to these three: It is misleading to the general public. It is treacherous to the spouses. It is poor public relations for the State. Since it has these undesirable characteristics should we at least attempt to reform it, or to replace it with something better?

A program for reforming divorce does not appear very promising. For various reasons, the subject is so controversial that it is difficult to get any agreement on it. Discussion of the subject leads often to heat rather than light. The religious factors implicit in our conception of civilized family life necessarily come to the fore in any proposals and provide a basis for long and frequently fruitless argument. Supporters of states' rights principles sometime find the divorce laws of their own jurisdiction superior to those of alien commonwealths. Orthodox rem-

edies offer little promise. The idea of a unifying federal statute seems to be postponed until there is an enabling constitutional amendment. The Commissioners on Uniform State Laws have no recommendations.[4]

But the basic obstacle to such change would seem to be more fundamental than these. There are many people who would like to reform divorce. Each one of them, however, is a member of his own family. That family is largely unique. Life as a member of it has made an impression on him. Consciously or unconsciously, his experience has colored his point of view, and efforts to discuss divorce bring up in his mind elements in that background. Divorce comes home so close to the threshold of each one of us that it is very difficult to be impersonal about it. It will probably be easier, then, to replace divorce than to give it such a drastic face-lifting that its old acquaintances will not sooner or later recognize it.

If a replacement is in order, it is possible that the public will expect proposals for an improved alternative to come first from representatives of some of the other social sciences.[5] What should the law do about it? In one sense, it is easier for the bar to "let George do it." In another sense, however, the fact that the public is turning elsewhere for this sort of guidance means that the legal profession is challenged to keep pace with the interest and progress displayed by these other professional groups. At present, divorce is a legal concept. If there is to be a replacement from outside the field of law, the public may interpret the inaction of the bar as a retreat, a cession of territory previously occupied. In the past, the bar has ceded territory to various lay agencies, and in trying to recover lost ground, it has involved itself in the conflict of interests which we call unauthorized practice of law.[6] If lawyers have

[4] The annual report of the Commissioners for 1958, perhaps significantly, carries no Uniform or Standard Divorce Act. A proposed act prepared by the Women's Bar Association is still far from widely acceptable, and the Interprofessional Commission on Marriage and Divorce still has, after several years, no specific proposals in this area.

[5] The interest of social workers and marriage counsellors, not to mention psychiatrists, needs no emphasis here. For a comprehensive article giving the sociological point of view, see Elliott, *The Scope and Meaning of Divorce*, in BECKER AND HILL, FAMILY MARRIAGE AND PARENTHOOD 669 *et seq.* (2d ed. 1955).

[6] The reaction of the legal profession to this form of lay competition has been restrictive legislation accompanied by vigorous prosecution of "lay trespassers" on the exclusive domain of the bar. More promising are agreements concluded between the bar and representatives of interested lay groups. Still more recent is the emphasis on the Lawyers Referral Service and the Legal Aid movement, designed to acquaint the public with the value of a lawyer's services, rather than to try to legislate the man in

something to say about family dissolution, therefore, they should say it, for their own sakes. Participation and continued interest on the part of the lawyer should, moreover, make a favorable impression on the man in the street. There is also the possibility that what lawyers have to offer may turn out to be more useful in the long run than a solution proceding from those trained in different professional disciplines. One cannot be certain of this, but neither is there any reason supinely to assume that the bar's contribution inevitably will be so inferior in competition as not to merit careful consideration. Lawyer motives in this respect may be enlightened self-interest or idealism. In either event, if their proposal should be accepted, the public would be the ultimate and possibly the appreciative beneficiary.

The lawyer may find the existing concept of divorce unsatisfactory in many respects. For example, the court which handles the matter may be in need of modernization; the concept of family dissolution may call for complete re-examination; or the grounds on which the dissolution may be granted by law may be in need of re-orientation. In this context, the word "division" is critical and is the standard by which the existing court, concept, and grounds are to be judged. If they are found to be wanting, the argument will be strengthened that a replacement of divorce is indicated.

A. Divided Authority

The present judicial machinery for granting family dissolution is based on a division of responsibility. In an earlier day, divorce was granted by the legislature.[7] This approach may have been, and probably was, attacked by observers because it involved projecting the private lives of families into the arena of politics. It may have been obnoxious to the sensitive members of the families because it required a certain amount of invasion of family privacy. It may have been so expensive that family dissolution was, in fact, available only for those who had a great deal of money. Desertion was said to be the poor man's divorce.[8]

the street into the law office. In August 1958, the American Bar Association Section of Family Law came into existence.

[7] "The pre-1857 judicial divorce, known as divorce a mensa et thoro, was until the Matrimonial Causes Act, 1957, no more than a form of judicial separation and did not put an end to the marriage; only Parliament or death could do that." Graveson, *The Background of the Century*, in GRAVESON & CRANE, EDS., A CENTURY OF FAMILY LAW 5 (1957). See also COMPTON, CASES ON DOMESTIC RELATIONS 150 (1951).

[8] See PARRY, *Concerning Mr. Justice Maule*, in WHAT THE JUDGE THOUGHT 131 (1922).

But it had one good point—responsibility for handling the whole matter rested with a single department of government, the legislature, which could be held accountable.

At a later period, the legislature, for reasons satisfactory to itself, divided the task of family dissolution, delegating administration to the courts, but retaining basic control over policy. Today, the public cannot, therefore, easily pin down responsibility. The legislature, in considering proposals for reform, works necessarily by remote control. Its members, their attention distracted by hundreds of other items, are often too easily impressed by pressure groups, each of which has its own private objectives. The resulting statute may not, accordingly, be really generally acceptable.

The executive branch as the locus of responsibility in family dissolution is another distinct possibility. Administrative commissions staffed by experts have proliferated in recent years and have performed varied and difficult tasks with considerable eclat. But here, again, there is reason to proceed with caution. Even though we are dealing in part with the dissolution of a status in its human aspects, there are inevitably problems of property to be dealt with. Those property problems are not too different from property problems where the adversaries are not *H* and *W*. The parties with such interests deserve due process and equal protection. They are more likely to receive these guarantees in proceedings under judicial control. Add to this the reluctance of lawyers to make a complete break with the past, and the matter is shunted back to the judiciary.

There is no reason to believe that the judiciary desires the sole responsibility for the dissolution of families. But it may be argued persuasively that properly-established family courts[9] can do a better task of producing a satisfactory solution of the complex problems involved than can agencies of either of the other two branches of government. The judiciary can experiment. The common law is famous for its ability to proceed on a trial-and-error basis. There is no reason to assume that its ingenuity, resourcefulness, and ability to respond to a challenge have deteriorated during the years to the point at which such a burden as is presently proposed would crush or discourage its votaries. Rather, one would anticipate a spirited competition by adventurous young lawyers for places on such tribunals where there would be a chance to break trail.

[9] See Alexander, *The Family Court of the Future*, 36 J. AM. JUD. SOC. 38 (1952).

B. Adversary Proceeding

In retrospect, we have available for examination the experience of two groups of tribunals, civil and ecclesiastical, in dealing with family dissolution.[10] During the middle ages, the ecclesiastical courts operated with considerable effectiveness. They got along without the modern concept of divorce. As they viewed the matter, marriage was indissoluble. It was a sacrament. The third party was the Deity. The Church functioned in what amounted to a condition of life-long supervision over the members of families. The only comparable modern concept is probation. When domestic discord requiring litigation arose in the church courts, it was solved generally in one of two ways. If the domestic difficulty causing the litigation was of a certain sort and originated prior to the marriage ceremony, an annulment of the marriage bond was permitted, on the theory that the parties never, in fact, had been married; they had merely gone through a ceremony which of itself, because of an existing bar, was not presently effective to make them *H* and *W*. If the marriage originally was valid, the parties might have a judicial separation. One of the characteristics of ecclesiastical jurisdiction was that the sanctions[11] which might be imposed on litigants rested on the conscience of the litigant and were not limited to his economic and social personality. Specific performance of a decree of a church court might be expected to accomplish many desired domestic results.

In due course, the ecclesiastical establishment relinquished its control over domestic affairs, and the civil authority took control.[12] When the civil patterns and theories were being laid down by the legislatures, however, the framers did not look to the experience of the church courts. Particularly in the matter of theory, they developed something new—divorce, the gateway to a possible remarriage. Since they were civilians, they took their models from the traditions of the common law. There they saw trial by jury, but prior to that, perhaps, trial by combat,[13] and came up with an adversary process. There is no reason to decry completely this form of testing facts; on the other hand, there is no reason to overvalue it. Whatever its effectiveness elsewhere, when applied

[10] The contrasting methods of handling these cases in ecclesiastical and civil courts are discussed in Scott, *Nullity of Marriage in Canon Law and English Law*, 2 TORONTO L. REV. 319 (1938); VIRTUE, FAMILY CASES IN COURT (1956).

[11] See 3 BLACKSTONE, COMMENTARIES 101.

[12] See 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 621 *et seq.* (1922).

[13] See PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 111 *et seq.* (4th ed. 1948).

to the dissolution of families, it has limitations. In the light of our present discussion, one of those limitations is that it tends to foment "division."

The domestic relation is unique, because the parties to it essentially are not supposed to be dealing at arm's length. The adversary process is designed for conflicts between persons who are dealing at arm's length. If *H* and *W* both want freedom, they are in basic agreement as to a solution, even though they may be hostile to each other. To require them to submit to an adversary litigation is unrealistic. Moreover, if only one spouse wants a divorce, the statutory requirements of the adversary process make it necessary for him to prove some marital dereliction on the part of the other. This requirement subtly suggests building up a case before the matrimonial rift becomes an open break. The building-up process may involve jockeying for position. This tends to place a premium on discovering and remembering domestic differences and faults and, so, to exacerbate the normal factors of domestic friction—minutiae which if left to themselves might be forgiven and forgotten.

We shall get a clearer picture of what is happening if we look past the label—divorce—to the events which are actually taking place. These events are properly to be described by the word "dissolution," which is not the same as the word "battle." An adversary litigation is a battle, not a dissolution. But we should not stop merely by identifying divorce as a "dissolution." There are various sorts of legal dissolutions. They may be distinguished by what it is which is being dissolved. If that subject is a property interest, a business concern, the illustrations are: a decedent's estate, a bankrupt's estate, a defunct corporation. The issues are economic—who owns, who is entitled to, what? But there is another form of dissolution which is primarily not commercial, not property, not an arm's length matter. To this second class, we may apply the term fiduciary. Illustrations are: settlement of a trust estate, termination of a relationship between attorney and client, and finally a dissolution of a family for man-made reasons.

The use of the word "fiduciary" in this connection is correct, but not sufficiently precise. There are degrees of the fiduciary quality. A trust estate involves primarily property. An attorney-client relationship involves a professional relationship. A family relationship, it is submitted, has even a higher fiduciary quality. The Roman Catholic Church recognizes something of this distinction. It calls marriage

a sacrament.[14] In a lay context, the word "sacrament" is perhaps not appropriate. But whatever the word used, the family relationship is clearly *sui generis*—something very special. Its dissolution calls for something very special in nature.

Analysis should go beyond the nature of the concept to the remedy —what is the object of the proceeding? If divorce were a simple matter, like an ordinary civil action for damages, there might be more reason to supply it with an adversary setting. But it is not simple. The Supreme Court of the United States tells us that it is divisible.[15] The normal extension of that principle would require three different sorts of trial. Where the family property is to be divided, the procedure for settling a fiduciary estate would seem appropriate. When the custody of the children is at stake, the interest of the spouses is subordinate to what the State regards as the best interests of the children—a juvenile court concept. When one meets the fundamental question—shall the family be dissolved?—the remedy of an adversary action is used completely out of context. It is suggested that more suitable would be a proceeding in which the best interests of the "family" were to be determined impersonally by the State. A civil court may decide these interests in terms of the here and now; an ecclesiastical court would, no doubt, give much consideration to the family's welfare in the hereafter.

In a properly-planned domestic dissolution, the first issue should be—is this family "dead"? If the question is answered in the negative, then one would expect to see some efforts by qualified persons, among whom would be numbered nonlawyers, to revive it and set it functioning again under its own power. On the other hand, if the answer is in the affirmative, there is a very real problem remaining—what shall be done with the people, the members of the family? What is best for them?

[14] WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1948) defines "sacrament": "1. One of certain religious acts, ceremonies, or practices distinguished from all others in Christian rites as having been observed or recognized by Christ and given a certain character by him. According to some, sacraments were initiated by Christ . . . as the visible means by which Divine grace is sought and conferred; according to others, they are observed in memory of him as a sign, seal or symbol of a Christian experience or profession. In most cases a sacrament is administered by a clergyman and to those only who have fulfilled the conditions considered proper to its valid reception. The Roman Catholic and the Eastern churches recognize seven sacraments (or generally called 'Mysteries' in the latter) viz., baptism, confirmation, the Eucharist, penance, extreme unction, holy orders and matrimony. In general, Protestants accept only two sacraments, baptism, and the Lord's Supper. . . ."

[15] Estin v. Estin, 339 U.S. 541, 549 (1948): "The result in this situation is to make the divorce divisible. . . ."

Who shall decide what is best? The court signs the "death certificate," the social organism may have expired, but the individual members of the group have further to go. At least the law should help them on their way. The deceased family may deserve an appropriate funeral, but the members are entitled to as untraumatic a transition as can be devised. Divorce too often tends to place the corpse on a sort of barbaric pyre and to invite all the neighbors to view the ghastly show. It pours oil on the troubled flames. It is undesirable because it depends on a subordinate issue—the wish of the so-called "innocent" spouse.

C. Fault

The third aspect of divorce which is objectionable because of the presence of the element of division is the basis on which dissolution is judicially decreed.[16] If we believe the legislature, a family is to be considered "dead" because of committed fault. The theory seems to be that the spouses made certain allegations and commitments, either express or implied, at the time of the wedding. If the allegations proved untrue, an annulment might follow at the request of the innocent spouse. If the commitments or promises were not carried out after marriage, the innocent spouse might ask for a divorce. In other words, the basic theory was one of fault of one spouse against the other. This ground did not prove sufficiently inclusive. In the course of time, two other categories of grounds had to be added. One of these was misfortune, mental as well as physical.[17] The other, in some jurisdictions, was an agreement of the spouses to separate, persisted in for the statutory period.[18]

By making fault the basic ground for divorce, the legislature, no doubt unwittingly, has tended to encourage each spouse to assemble evidence of all matrimonial derelictions by the other. Such ammunition,

[16] MADDEN, PERSONS AND DOMESTIC RELATIONS 262 (1931): "An action for divorce, though a civil action, partakes of the character of neither an action ex contractu nor an action ex delicto. It is neither an action at law nor a suit in equity in the ordinary sense. Nevertheless, in exercising the jurisdiction conferred by statute, the courts are largely governed by the rules of the English Ecclesiastical Court, except in so far as that law has been modified by statute; and though a suit for divorce is not a suit in equity, and therefore not within the ordinary jurisdiction of the chancery court, yet, except as the procedure may be governed by statute, the courts will apply the rules and principles of equity. The ecclesiastical court, of course, functioned without a jury, and its decrees were mainly in personam, hence its procedure resembled that of equity much more than that of the law courts."

[17] Some 28 jurisdictions have statutes authorizing divorce on grounds of insanity.

[18] *E.g.*, N.C. GEN. STAT. § 50-6 (1957).

one supposes, should be carefully stored away in some secure place, because it may come in handy someday. Each spouse, to protect himself, should be encouraged to learn his legal rights promptly and stand on them. If he fails to do so, a series of rules such as recrimination,[19] condonation, connivance, may rise up to bar him when he finally gets around to asking for release from his "intolerable" situation. He is, in effect, to be penalized for not having insisted to the full upon his legal rights. He will find himself better off in a crisis if he learns continuously to jockey for legal position. There is no reason to labor the point that in such an atmosphere, the spouse who really wants to try to keep the family together has one, if not two, strikes against him from the start.

We take issue with fault, moreover, as a suitable ground for family dissolution. Fault may be a factor in a proceeding for a distribution of family property or in the awarding of alimony. But fault should occupy a very subordinate position when the court faces the responsibility of deciding whether a particular family is "dead" or attempts to give aid and comfort to the innocent victims of a broken home. There is some reason to wonder if there are really as many innocent spouses as the records in divorce cases would seem to suggest, although there certainly may be innocent children.[20] The main objection, however, to using fault as a ground for divorce seems to be that it oversimplifies the situation. Fault of one of the spouses against the other focuses attention on the relationship between the spouses. At the same time, it tends to obscure that other and equally significant relation which is created by ceremonial marriage and which exists, as a matter of law, between the two spouses and the State. The fact that *H* is cruel to *W* may or may not affect the nature of this second obligation.

Marriage is generally thought of as a three-party affair. The third party under civil law is the State. *H* and *W* assume private obligations to each other. The marriage ceremony or the common-law marriage meeting of the minds is the symbol of this relation. At the same time, when the two parties procure a marriage license and then use it, they become licensees of the State for certain public, as well as private, purposes. The nature of this second obligation has not been too clearly

[19] Some 30 jurisdictions have recognized recrimination by statute. See 170 A.L.R. 1076 (1947).

[20] *Law and Contemporary Problems* devoted an entire issue to "Children of Divorced Parents," 10 LAW & CONTEMP. PROB. 697-864 (1944). See also DESPERT, CHILDREN OF DIVORCE (1953).

defined, either by the legislature or by the courts. But it is obvious that it exists. Therefore, while a divorce seems directed primarily against one of these bonds, the dissolution of the family by judicial decree with privilege of starting a new family necessarily would seem to involve the severing of both of them. Whatever concept we use in the future in place of divorce, it should be clearly understood by the public as designed to accomplish these two objects.

These, then, are the three most compelling objections to the use of divorce as a means of dissolving the family: (1) It represents divided authority, split control, which, it may be argued, is fundamentally an unsound arrangement for something as important as that with which we are dealing. (2) Because it is adversary, it tends to aggravate any existing marital differences by offering inducements to the litigious-minded spouse and to blow sparks into flames. (3) It offers "fault" between *H* and *W* as a basic ground for dissolution, and thereby seriously oversimplifies the problem. By the continued use of divorce, the public may be misled, the spouses deceived, the interest of State slighted.

II

A Proposal for a Remedy

A possible remedy would eliminate the concept of divorce entirely. This would leave a gap which would have to be filled. Of course, there is always the possibility of just leaving the gap. This, however, does not seem realistic. Even the Roman Catholic Church does not go that far. It grants annulment and separation. An alternate concept, therefore, is necessary. What is to be? Unless it promises better results, there is not much use in attempting to implement it. Neither will the problem solve itself. There have been "dead" families, and no doubt for a long time to come they will continue to present a problem. The real alternative is whether to leave them unburied or see that they have decent interment and that their members are cared for.

Any alternative solution which is proposed should be the responsibility of and under the sole control of a single authority, which should have power to experiment, amend, and improve, as circumstances appear to require. It should offer the public not a battle between the spouses on the essential question, but a dissolution of a highly fiduciary status, something even more unique than the dissolution of a status between feudal lord and serf. It should provide due process and equal protection when

dealing with economic problems, but it should be directed primarily to considering the social and spiritual factors implicit in any family relationship. Finally, it should recognize clearly the presence of two bonds, both of which are to be severed, one of them private, the other public. The main advantage of this sort of approach to the problem of family dissolution is that it would wipe the slate clean and allow a fresh start. A clear, but not too drastic, break with the past, a new beginning in an untainted environment at least holds out a promise of success which may be sufficiently encouraging to sustain its proponents during the inevitable and trying period of trial and error until the new system is generally accepted.

A. A Family Court

The undivided responsibility for family dissolution under the present proposal should be lodged with the judiciary. The court should be given authority, by rule, to set up specialized tribunals to handle these matters, to determine the policy, and to work out the details of the administration. It should have available machinery to insure equal protection of the law and due process for the property interests of those who come before it. At the same time, it should operate in an individualized manner in its handling of the human factors, so that the public may feel that what is done is not so much *to* the litigant as *for* him. The proceeding should be nonadversary; if necessary, even therapeutic. The new tribunal should be staffed by specially-trained personnel. To supply a steady stream of qualified judicial officers, including lawyers, there should be a strengthening of the law school courses in family law.[21] In each community, there should be developed a "pool" of trained practitioners from among whom selection can be made for judge of the family court.

The court should deal with three major types of problems. In the first instance, it should determine whether or not the family is "dead." If it is, the court should sign the death certificate. It should next consider what is to be done for the members of the family. Finally, it should take up the task of untangling the property interests created by the family relationship. Thus, the family would be dissolved, and not battled, out of existence.

[21] An argument can be made that one reason why the law and administration in the domestic relations field has lagged is due in part to the failure of the law schools to emphasize the importance of this branch. Commercial and public law courses are emphasized, and progress in these fields of law is notable.

B. Annulment Concept

The legal concept to be used in place of divorce should be annulment. There are several persuasive reasons for suggesting this particular label. There is no need to institute an entirely new concept when there is a satisfactory one already in existence. An entirely new concept would take a long time to invent and shape. Annulment is a traditional, flexible, ecclesiastical concept. Divorce is a younger, comparatively more rigid child of the civil law. The ecclesiastical courts found that their device worked well. True, the setting in which the church courts functioned was different from that in which the new family court would operate; but there is still a considerable accumulation of experience behind annulment upon which the newer courts could draw.

Annulment is a flexible device.[22] It lends itself to judicial experimentation even more than does the fairly rigid statutory divorce. The ecclesiastical courts showed remarkable resourcefulness in molding it to accomplish practical results.[23] There is no reason to assume that the proposed civil courts would be staffed with less competent judges. In the present day, the experience of New York State in its use of annulment is promising.[24] Flexibility in the basic device is important, because we need not merely to bring our remedy up to date, but to maintain it constantly at peak efficiency in a rapidly-changing world.

If it be objected that traditionally annulment was used to correct difficulties which arose before marriage, while divorce was regarded as the appropriate remedy for subversive events arising after the ceremony, the answer is that the distinction is largely a matter of historical accident. The church courts did not allow what we speak of as divorce because to them, marriage was indissoluble except by death. They did allow separation. Today, separation is frequently used as a basis for securing a determination of the ancillary problems in a family dissolution—support, custody of children, and the like.[25] But there seems to be no basic reason other than custom which would prevent the pro-

[22] For a discussion of the historical growth of annulment in the United States, see SPECA, JURISDICTION IN CASES OF ANNULMENT OF MARRIAGE, PAST AND PRESENT (unpublished thesis in the Library of School of Law of Duke University 1952). See also Kingsley, *What Are the Proper Grounds for Granting Annulments?*, 18 LAW & CONTEMP. PROB. 39 (1953).

[23] See Davies, *Matrimonial Relief in English Law*, in A CENTURY OF FAMILY LAW 344 (1957).

[24] The statutes of the various states are collected in JACOBS AND GOEBEL, CASES AND MATERIALS ON DOMESTIC RELATIONS 1098 (3d ed. 1952).

[25] See JACOBS AND GOEBEL, *op. cit. supra* note 24, at 1118.

posed civil court from extending the concept of annulment to cover disruptive factors that arise after as well as before the marriage ceremony. The more important problems in a civil court are the nature and extent of the disruption, and not the time when it arose.

If the court were to adopt this concept of annulment, the change would not be a mere quibbling over words or a matter of semantics. Rather, the step would indicate a return to fundamentals and a re-examination of the proper basis for dissolving a family. It is suggested that when the family is found to be "dead," it is of secondary importance, in deciding upon the disposition of the particular remains, whether the death was caused by one or another reason. Statistically, we may be interested in adultery, cruelty, desertion, and all the other faults. Humanely, however, our concern is with the future of the present parties even more than their past—what is to become of them? Neither is it fatal to the proposal to suggest that various religious denominations associate the marriage relationship with peculiarly sacred concepts. The layman may find some support in the sort of reasoning which argues that if God hath really joined *H* and *W* together, no man will ever be able to put them asunder. We may temporally believe that the Deity has approved the union, but if the subsequent events disprove the assumption, we should be willing to recognize that we were the ones who were mistaken.

If it be objected that a strict construction of the annulment theory might bastardize children and deprive the supposed "wife" of support, the answer is that legislation or rule of court to avert this consequence is no novelty.

Annulment can accomplish for us all that is now secured through divorce, and more. With annulment as the concept, we are free to work out a modern approach to family dissolution.

C. Unfitness

We have noted the undesirability of fault between the spouses as a basis for granting a divorce. If we are to grant annulments, they need not follow this tradition. In fact, it would be better if they did not. In place of fault, the present proposal is to use the ground of "unfitness." This word requires some explanation.

Fault between the spouses may be appropriate when the point at issue is the distribution of family, or other property, as between the spouses. But where the matter to be determined is whether the family

is or is not "dead" and what is to be done for the members, we are also dealing with the loosening of the bond which relates the spouses to the State. This is a public matter and calls for public handling. Family dissolution represents the failure of the spouses to establish an enduring family. There is an indication of lack of fitness for the job.

The private relations of *H* and *W* are determined, so far as they can be, by certain allegations and promises, express and implied, which each makes to the other. The marriage ceremony becomes the symbol of this private bond, and we are not primarily concerned with it. Rather we are concerned with the public bond made between the spouses and the State. This bond is based on certain allegations and promises made by the spouses to the State. Its symbol is the marriage license. *H* and *W*, for this purpose, are to be considered as licensees, very special ones, to be sure, but licensees, nevertheless. In order to obtain the license, they are required to possess at least minimal standard qualifications. If the standard is not satisfied, the license is refused. If the allegations appear to be true but later turn out otherwise, at present, the aggrieved spouse can take action, but the deceived State presently would seem to have no remedy. Something should be done to provide the State with power to deal with such matters not by way of dissolving a family on its own initiative, but in the way of protecting itself and its institutions from those who are not of standard marriage calibre and who, in spite of unfitness, desire to try one marriage after another, only to wreck it.

The applicants for a marriage license expressly or impliedly allege to the license clerk that they are "fit" not only privately for marriage to each other, but publicly as licensees of the State in a most responsible relationship, and that they will remain "fit" for the responsibilities which a democratic society continues to expect of its families. The State holds them out as qualified. If there is obvious unfitness at the time of application or if latent unfitness develops later, the State, however the case arises, should have power to grant annulment.

Marriage is a high estate. It should be considered a privilege to be married. Those who achieve this estate should have reason to be proud of their standing in the community. They should feel some obligation to the State which licenses them as fit, as well as to the other partner with whom the experiment in family building is undertaken. If the State does not make clear that it regards the issuance of a marriage license as something of a franchise during good behavior, a privilege coupled with conditions, the issuance of the license will be effective for little more

than purposes of recording and establishing of property rights, or perhaps as another source of revenue.

The proposal of compulsory marital fitness is not entirely unique. It is in some ways comparable to the idea which supports the screening process affecting those who seek admission to the legal profession.[26] The license enables the lawyer to make a living. It also distinguishes the holder as a quasi-public official, with duties to public, court, client, and profession.[27] The right to practice law is not a property right. Rather, it is a privilege coupled with conditions.[28] The admission requirements are not merely a matter of licensing a man to perform a trade. Rather, they are an examination into the qualifications of applicants for membership in a profession.[29] Those who are granted the privilege are encouraged to maintain at all times a high standard of conduct. Courts insist that they have inherent power to determine who their officers shall be.[30] In a similar manner, the State may assume the task of granting a license to marry as an admission to a quasi-professional class and, if unfitness develops, of revoking the license—not for fault, but for unfitness.

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[26] See generally REPORTS OF CONSULTANT AND THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR (1952).

[27] DRINKER, LEGAL ETHICS 59 (1953): "By his admission to the Bar, the lawyer is granted the exclusive right: (1) to hold himself out as a lawyer; (2) as such to advise clients and to represent them as an advocate; (3) to appear for them in court proceedings." In recognition of these exclusive privileges the lawyer is charged with certain obligations to the public, to the courts, to his client, to other lawyers.

[28] "The practice of law is a privilege rather than a natural or vested right." *In re* Harrison, 231 Ind. 665, 667-68, 109 N.E.2d 722, 723 (1953). "This privilege is contingent upon the faithful performance of the duties imposed upon the attorney by the society which grants him the privilege. The first and continuing requirement of an attorney is that he be of good moral character. . . . Being of good moral character necessarily implies that he will conform to the moral standards of his profession as provided (1) by law, (2) by his oath of office, and (3) the coded ethics of the legal profession." Higginson v. State, 236 Ind. 617, 620, 142 N.E.2d 432, 434 (1957).

[29] *Report on Rules for Admission to the Bar*, 18 LAW. GUILD REV. 58 (1958).

[30] *In re* Rerat, 232 Minn. 1, 4, 44 N.W.2d 273, 275 (1950): "However, disciplinary proceedings are *sui generis*. The object of the proceeding is not to punish the offender, but to protect the court in the interest of the public good. *In re* Application for Discipline of Rerat, 224 Minn. 124, 127, 28 N.W.2d 168, 172. Its purpose is to guard the administration of justice, *In re* Application of Smith for Reinstatement, 220 Minn. 197, 19 N.W.2d 324; *In re* Disbarment of Greathouse, 189 Minn. 51, 248 N.W. 735, so that the judicial system does not fall into disrespect. Thus, the question before the court is the fitness of the attorney to continue as a member of the legal profession. . . ."

III

Conclusion

We have criticized divorce as a concept to be used in connection with the dissolution of families. We have suggested that in its place the older and more flexible concept of annulment should be used in a setting where the court has full authority to develop its implications and where the proceedings will be individualized and nonadversary. In this, we are switching from a civil law device to one which originated in the ecclesiastical law. Since we cannot bring back the context of the middle ages, it is necessary for us to create a setting of our own as near as possible to that in which annulment was originally developed and, at the same time, appropriate to modern changing conditions. The word "fiduciary" is acceptable as being descriptive, provided we recognize various grades of fiduciary relationships, with marriage at a higher level than that binding, for example, attorney and client.

In adopting this new concept, the individualized family court will play a substantial role. It should be a role of creation, of challenge, and, therefore, attractive to forward-looking lawyers. It should supplant the divorce concept of fault with another which, to a degree, at least equates marriage status with professional status. Under this proposal, the continuance of the family will depend upon fitness for the status. This means that in order to decree a family dissolution, the court will have intentionally to break two bonds. One of them will be a private bond between *H* and *W*, the other will be a public bond between the spouses and the State.

Adoption of this new proposal should enable us to short-circuit an unedifying past and, in effect, start from scratch with respect to family dissolution.