THE MYTH OF THE INNOCENT SPOUSE

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Lawyers as a class, in attempting to provide an effective administration of justice,1 conservatively have tended to apply established legal concepts to every problem. This attitude has, to a large extent, precluded testing the desirability of each rule of law by an inquiry as to its social usefulness.2 In this respect the legal profession seems to lag behind other professional groups. The medical profession, particularly in the public health field, collects statistics which show clearly the success of present remedies and preventive routine;3 if any particular device is unsuccessful, the profession is put on notice and something else may be substituted. The businessman constantly keeps check upon the viewpoint of the public by numberless devices ranging from daily market quotations and cost accounting systems to credit reports and complaint departments. The lawyer, except for routine data gathered by clerks of courts, reported decisions of courts, occasional bits of testimony in litigation, the production of the legislative mill and an infrequent book, newspaper or magazine article,

*Director, Legal Aid Clinic, Duke University. The writer wishes to acknowledge his indebtedness to Mr. Harland Leathers of the Class of 1937 of the Duke University Law School for aid in the preparation of the footnotes to this article. The material on page 378 of this article in regard to the necessity of a continuous statistical scrutiny of rules of law has been previously covered at length by the writer. Bradway, A National Bar Survey, 16 Boston Univ. L. Rev. 662 (1936).

1Sir Frederick Pollock: “Remember that it is your office as lawyers to give authentic form to the highest public morality of which you are capable as citizens and that this office belongs of right no less to the bar than to the bench.” Quoted by Henry M. Bates, address of May 9, 1931, to Albany Law School in the Hubbard Course on Legal Ethics, p. 23. See also People v. MacCabe, 18 Col. 186, 32 Pac. 280, 281 (1893); Am. Bar Ass’n Canons of Professional Ethics, #2; Jackson, The Lawyer, Leader or Mouthpiece? 19 Jour. Am. Jud. Soc. 70 (1935); see also Constitution of the American Bar Association, Article I: “Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation, throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American bar.”

2Marshall and May, The Divorce Court (1932) viii, speaking of the statistical material available from court records: “These studies obviously deal with no more than a fraction of the facts which it would be necessary to know in order to discuss intelligently a ‘reform’ of the judicial handling of divorce. In other words, the findings of fact in these studies are a necessary but by no means sufficient basis in and of themselves upon which to base possible reforms of our divorce law and procedure.”

3See Peebles, A Survey of Statistical Data on Medical Facilities in the United States, Committee on Costs of Medical Care, Bulletin #23 (1929) 48. See also Statistical Abstract of the United States (1935) 80-94.
has little statistical data to indicate the nature or the extent of fluctuations in public confidence in a rule of law. Consequently, each problem is solved in terms of some recognized legal maxim, the social usefulness of which the bench or bar has little chance of determining accurately. Public dissatisfaction with the laws, much of it inarticulate, does exist. So long as public confidence in the administration of justice is desired, there is reason for placing every rule of law under a comprehensive, continuous, sensitive, uniform statistical scrutiny. Perhaps this need and a suggested remedy can best be illustrated by a concrete examination of one “rule of law.”

Broadly, the concept which we shall examine is known as the doctrine of recrimination. This rule requires that the plaintiff in a divorce proceeding be “innocent,” if he is to prevail. It is one device for expressing the policy of the law against family disintegration and dissolution. Notoriously, its use in the litigation process often makes necessary perjury or collusion; in other words, litigants achieve a result which they desire not because of the rule, but in spite of it. Figures are lacking to show its effect in producing stable family life. Its value to the public is assumed rather than tested. Under a careful statistical scrutiny it should be possible to determine whether or not such a rule is beneficial, or whether the legal problems of modern families are of a sort to render it obsolete.

The defense of recrimination in a divorce proceeding bars the plaintiff. Lay approval of the doctrine may be gained by applying it to a set of facts on behalf of a woman defendant with several children, unable to provide for herself, where the unfeeling husband-plaintiff is endeavoring to evade marital obligations on some trivial legal ground. But its applica-

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4For example, see Laski, The Decline of the Professions, 171 Harpers’ 676 (1935); Atwood, The Law Lags Behind, 50 Christian Century 523 (1933).
5See 2 Schouler, Marriage, Divorce, Separation and Domestic Relations (6th ed. 1921) §§ 1732-1771, 1922, and cases cited; Spencer v. Spencer, 61 Fla. 777, 55 So. 71, 72 (1911). See also Perry v. Perry, 199 Iowa 685, 202 N. W. 572, 574 (1925), in which the court says: “Courts must recognize that society has an interest in the permanency and stability of the marriage relation and the severance of this relation must not be decreed except for just cause . . .”
62 Bishop, Marriage, Divorce and Separation (1891) 174, § 364. For a comprehensive treatment of recrimination in adultery cases, see Comment, 11 Tulane L. Rev. 95 (1936).
7See, for example, McDonald, Cruel and Inhuman Treatment as Grounds for Divorce, 10 Marq. L. Rev. 215 (1925); Notes, 14 Boston Univ. L. Rev. 172 (1934); 28 Mich. L. Rev. 937 (1930).
tion is less appealing in a case where two individualistic spouses, each capable of self support without the other, and both guilty of breaches of domestic duty, find life together intolerable. In an earlier day the court applied the rule inflexibly, and to justify it judges indulged in certain sociological assumptions, such as, for example, that erring spouses "are suitable and proper companions." In one case this idea was elaborated in the following language:

The doctrine ... has its foundation in reason and propriety: It would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to a charge of the same nature. It is not unfit, if he who is the guardian of the purity of his own house has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he who has first violated his marriage vow should be barred of his remedy. The parties may live together and find sources of mutual forgiveness in the humiliation of mutual guilt. Such assumptions may simplify the application of the rule, but, unless they are supported by the facts, they tend to bring it into disrepute. Many persons today will disagree with the conclusions of the court and will object that the rule, if tested, not on the basis of its history, but solely on the arguments advanced for and against it, is not socially useful. It is convenient to consider these tests. Examined on this basis the rule throws considerable light upon our legal practices.

**HISTORY OF THE RULE**

The obvious argument in support of the rule is its vitality for over two thousand years; one comes to think of it as something inevitably fundamental. It appeared in the Roman law. The English ecclesiastical courts employed it down to 1857, when it came under the influence of the English chan-

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10D.24.3.39.
11Originally domestic affairs were handled in England exclusively by the ecclesiastical courts. 2 Pollock and Maitland, History of English Law (1923) 336. Since the church did not recognize divorce prior to 1857, absolute divorce in England was procurable only by a special act of Parliament. The cost of such procedure was prohibitive. However, separations a mensa et thoro were granted by ecclesiastical courts. 1 Colquhoun, Roman Civil Law (1849) 626, § 644; 10 Halsbury's Laws of England (2d ed. 1933) 631, § 921. In actions for separation a mensa et thoro, the defense of recrimination was clearly recognized. Forster v.
cercy courts and there continued until 1873. Due in large measure to historical accidents, the American courts, deprived of the cooperation of ecclesiastical tribunals and drawing their inspiration from the English common law concepts, came to apply it as one of the rules of equity. Legislatures and courts in this country have accepted the rule unanimously.

Yet the historical survey is by no means conclusive as to the perennial usefulness of the rule; there are notable exceptions. In the Roman law the rule was used largely with regard to cases where property adjustments between the spouses, rather than divorce, were in issue. Divorce was a matter of mutual consent. In France and in Scotland at

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12 The Matrimonial Causes Act of 1857 (20 & 21 Vict., c. 85) consolidated matrimonial matters with the rest of the English judicial system and introduced a departure from the conventional concept of recrimination by leaving it within the discretion of the judge whether or not a divorce would be granted when the defense was recriminatory. See Matrimonial Causes Act of 1857, supra, §§ 2, 3, 6. The Matrimonial Causes Act of 1857 was supplemented by the Supreme Court of Judicature (Consolidation) Act of 1925 (15 & 16 Geo. V., c. 49) but left the rule as to recrimination unchanged.

Apparently, the transfer from the ecclesiastical courts to the courts of law and equity was not accomplished without a corresponding loss of interest in the human problems which the spiritual courts find in domestic causes. Carter, A History of the English Courts (5th ed. 1927) 146.

13 Since at the time of the separation of the colonies from Great Britain divorce was a matter for the ecclesiastical courts, and since ecclesiastical courts were never established in the colonies, for some time the law was not administered for want of a tribunal. Burris v. Burris, 1 Hopkins 557 (N. Y. 1825). Divorce jurisdiction was conferred by statute in the United States usually to courts of Equity or Probate courts. See 2 Vernier, American Family Laws (1931) 98, § 31. However, the doctrine of recrimination seems firmly imbedded in both statute and decision. See Note, 26 Col. L. Rev. 83 (1926).

14 Vernier, op. cit. supra note 13, at p. 82, § 78.

15 D.24.3.39; see Note, 13 Ore. L. Rev. 335 (1934). As an indication that the doctrine of recrimination was originally considered primarily in connection with property rights, see Proctor v. Proctor, 2 Hag. Con. 292, 297, 161 Eng. Rep. R. 747, 749 (1819): "It was a doctrine not peculiar to the common law that it looked with disfavor to a complaining party who was himself offender in the same way, for the civil law certainly did the same to the extent of not barring the wife's demand for dower against such a husband."

Property settlements such as dower were an important consideration in English divorces, even while controlled by ecclesiastics. See 2 Holdsworth, A History of English Law (1928) 394.

16 Westermark, The History of Human Marriage (1925) 321, et seq.

17 It is laid down broadly that the doctrine of recrimination was not recognized as a part of the civil law as applied in France. Planiol et Ripert, Droit Civil I (11e ed. 1928) no 1205, p. 409.

18 Although the doctrine of recrimination may formerly have been applied in Scotland, it is now repudiated. Erskine, Principles of the Law of Scotland (1911) 77.
certain periods the rule was definitely repudiated. In England, since 1857, it has been replaced by a discretion vested in the court. Modern Russia and Japan offer examples of legal systems in which the State makes little effort to limit free divorce when the parties desire it.

Even where the rule is applied in this country, situations have induced the courts to seek a more equitable principle. The doctrine of comparative rectitude and the theory requiring that the offense relied upon for recrimination be either the same as, or equally as serious as, the one charged against the defendant, have found supporters. But recrimination is firmly entrenched in legal thinking in the United States and will require a more fundamental analysis of the reasons for and against it.

**REASONS FOR THE RULE**

Modern courts are inclined to justify the rule on certain well recognized equity grounds. Ordinarily the judicial language will contain a reference to the maxim: “He who comes into

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19 Matrimonial Causes Act of 1857 (20 & 21 Vict., c. 85, § 3). See 10 Halsbury's Laws of England (2d ed. 1933) 690, § 1022: "... when the guilty (of adultery) petitioner is the husband and the Court is convinced of his bona fides it may consider: (1) the position and interests of his children; (2) the interest of the woman with whom he has misconducted himself ...; (3) the fact that the withholding of a decree would not be likely to reconcile husband and wife; and (4) the interest of the husband, that he might remarry and lead a respectable life.” See also 10 Halsbury's Laws of England (2d ed. 1933) 691, § 1026: “In suits for dissolution of marriage, the court may in its discretion, grant or refuse a decree to a husband so guilty.”


213 Westermarck, op. cit. supra note 16, at p. 304 et seq.

22 Keezer, Marriage and Divorce (1923) 303, n. 96; 2 Bishop, Marriage, Divorce and Separation (1891) 170 et seq.; McIntosh, Recrimination: Doctrine of Comparative Rectitude, 34 Law Notes (Am.) 145 (1930); Notes, 14 Minn. L. Rev. 94 (1929); 3 So. Cal. L. Rev. 127 (1929); 18 Iowa L. Rev. 391 (1933).

23 Some courts hold that recrimination may only be based upon the commission by the plaintiff of an act similar to that relied on for divorce. Bancroft v. Bancroft, 27 Del. 9, 85 Atl. 561 (1911) (adultery, cruelty no bar); Dillon v. Dillon, 32 La. Ann. 643 (1880) (extreme cruelty and attempt to kill, ill temper no bar); Staples v. Staples, 136 S. W. 120 (Tex. Civ. App. 1911) (cruelty, extravagance no bar).

Other courts say that grounds for limited divorce do not bar an action for absolute divorce. Griffin v. Griffin, 23 How. Pr. 138 (N. Y. 1862); Appeltoft v. Appeltoft, 147 Md. 603, 128 Atl. 273 (1925); Notes, 26 Col. L. Rev. 83 (1926); 15 Iowa L. Rev. 498 (1930).

242 Vernier, op. cit. supra note 13, at pp. 82, 379, §§ 78, 121; 2 Schouler, op. cit. supra note 5, at §§ 1721-1729; Tiffany, Persons and Domestic Relations (2d ed. 1909) 221, § 109; Notes, 17 Minn. L. Rev. 683 (1933); 25 Ill. L. Rev. 459 (1930); 29 Mich. L. Rev. 292 (1930); 15 St. L. L. Rev. 280 (1930).
Equity must come with clean hands."Yet it should be remembered that historically the ecclesiastical and not the chancery courts had control over the proceedings which led up to divorce by Act of Parliament, and, therefore, that in the transfer from ecclesiastical to equitable principles something may have been lost. Another ground frequently advanced is the well known rule applicable to commercial contracts that one who has himself breached a contract cannot complain of another's breach. Yet the courts, when occasion offered, have been quite ready to distinguish the marriage contract from the commercial contract. The language of the courts indicates that in applying or releasing these rules they regard them merely as legal formulae expressing the courts' concept of social justice.

ARGUMENTS AGAINST THE RULE

The first argument against the rule relates to the lack of uniformity in the subject matter. In general, a rule of law is designed to deal with a recurring situation amid certain surroundings. If the situation or the surroundings change, the rule is out of focus. A continuous statistical survey would indicate such changes and the consequent distortion of the rule. It is well recognized that the family, as a social organism (the subject of the instant rule), has undergone substantial readjustments. The term "family" has been used to describe a certain relationship but viewed as an economic unit, the family has ranged from a close knit, self regimented unit to a loosely bound group of individuals. The Roman family experienced substantial modifications. At the beginning of the historical era it was patriarchal—a state within

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26See supra note 11.

27See Conant v. Conant, 10 Cal. 249, 254 (1858); Tillison v. Tillison, 68 Vt. 411, 22 Atl. 531, 532 (1891); Richardson v. Richardson, 114 N. Y. S. 912, 917 (1906).

28"That rule (recrimination), as applied to divorce, means that it is a remedy provided for the innocent and injured party and if the evidence discloses that both have shown grounds for divorce, neither is entitled to it. It must be conceded, however, that there is a growing tendency in divorce cases to at times relax that rule on grounds of public policy or the peculiar exigencies of the special case under consideration and adopt one of comparative rectitude or turpitude." See Weiss v. Weiss, 174 Mich. 481, 487, 140 N. W. 587, 589 (1918). See also Rolfsen v. Rolfsen, 130 Ky. 395, 115 S. W. 218 (1909); Staples v. Staples, supra note 23.

29Jacobs, Cases and Materials on Domestic Relations (1933) 3.
itself, the *pater familias* its legal, religious and political ruler. The home was the center of industry and the group largely self sustaining. The family asserted its right to supervision over marriage and divorce as against the State which had only limited powers; divorce was almost unknown. But by the beginning of the Christian era divorce was a national scandal, the family ties were of the loosest sort and a rule of recrimination was applied in property transactions.\(^{30}\)

The medieval family, on the other hand, beginning with the early Christians and continuing for over a thousand years, developed increasing unity and self discipline.\(^{31}\) No divorce was available, but domestic difficulties and annulment were administered by the church as spiritual, as well as temporal matters; probably there has never been a stronger family unit than that in the later middle ages. Inevitably, there was a reaction. The Protestant movement encouraged the idea of individualism;\(^{32}\) ecclesiastical control over domestic matters gradually relaxed in favor of the State.\(^{33}\) In England\(^{34}\) the relaxation of the family ties was more uniform than in this country where frontier conditions for a long time required a highly effective social organism.\(^{35}\)

Today there is within the family itself a conflict of interest between individual desires, and what the State may think is best for the family.\(^{36}\) Until that conflict is resolved on the basis of a comprehensive and continuous factual survey, it may well be argued that the rule requiring an innocent plaintiff is not socially effective.

The second argument against the rule raises the cynical question whether there are in fact any innocent spouses. New legal diagnostic machinery is necessary to determine the facts

\(^{30}\)Frequent references have been made to the instability of the Roman family at this period. For example, see 31 Westermark, *op. cit. supra* note 16, at p. 323: “Almost all the well known ladies of the Ciceronian age were divorced at least once and Seneca said that some women counted their years, not by consuls, but by their husbands.” See also 1 Colquhoun, *op. cit. supra* note 11, at p. 532.

\(^{31}\)Goodsell, *The Family as a Social and Educational Institution* (1930) 207.

\(^{32}\)See, for example, Milton, *The Doctrine and Discipline of Divorce* (Preface) 16, 17; De Pomerai, *Marriage* (1930) 203 *et seq*.

\(^{33}\)See Lichtenberger, *Divorce* (1931) 98.

\(^{34}\)See Goodsell, *op. cit. supra* note 31, at p. 296 *et seq*.

\(^{35}\)See 1 Calhoun, *Social History of the American Family* (1917) cc. 4, 8.

but as matters stand a fair case may be made out that the innocent spouse is rapidly becoming a myth.

There are two processes by which such innocence is determined. In the legislative provisions of each State dealing with divorce there is enumerated a list of acts the commission of which by one spouse is ground for relief of the other. These same acts, if proved against the plaintiff, mark him a guilty spouse. So the more grounds there are for divorce, the fewer are the potentially innocent spouses. Where separation for a period is grounds for divorce there are cases holding that either party may ask relief. In such a situation guilt is no longer important. Where mental cruelty is a ground for divorce, any person who has been married for a year or longer has probably as a matter of fact passed out of the circle of innocent spouses.

In the courts the number is further reduced. Where the case is not contested, the judge, unless he has unusually effective means of investigating the facts and a desire to secure them, does not raise the defense. Even when it is raised it must be proved as a technical matter. There are cases where evidence is not available, and others where the defendant does not care, for reasons of his own, to press the issue. Where legislature and litigants unite to make divorce easier, it is difficult for the court alone, without adequate machinery, to sustain the burden of a traditional, social philosophy. An occasion is presented for gathering the facts and re-evaluating the legal processes.

A third argument against the rule is that the community sanctions which are necessary to sustain it are relaxed. The

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37Hurry v. Hurry, 141 La. 956, 76 So. 160 (1917); Phillips v. Phillips, 22 Wis. 246 (1867); Cole v. Cole, 27 Wis. 531 (1871); Daugherty v. Daugherty, 198 S. W. 985 (Tex. Civ. App. 1917); and see Cook v. Cook, 164 N. C. 272, 80 S. E. 178 (1913).

See also Feinsinger, Observations on Judicial Administration of Divorce Laws in Wisconsin, 8 Wis. L. Rev. 27 (1932).

38"As far as the severance of the marital bond is concerned the first volume of this study has indicated that the battle of the divorce court is in the main cinema warfare. The smoke and the noise are all parts of the picture conventionalized by many centuries of tradition; and aside from the controversies on incidental matters such as property, alimony or support money, there is not often a real contest before the court." 1 Marshall and May, op. cit. supra note 2, at p. 11.

39In Carmichael v. Carmichael, 106 Ore. 198, 211 Pac. 916, 918 (1923), the court quotes from 2 Schouler, op. cit. supra note 5, at § 1701: "'It is a general principle, applicable to all divorce proceedings, that the spouse petitioning must have been ... clear of blame. By clear of blame, we mean (1) without substantial fault in causing the offense complained of, and, furthermore (2) free from other misconduct equally reprehensible under the divorce laws.'"
family is no longer a compelling factor. The church does not exert its former influence in temporal affairs. Marriage is now a contract rather than a sacrament. Penalties for breach of marriage vows today are property considerations, money damages, alimony, deprivation of the right of consortium; at one time, they were spiritual—penance, excommunication. Neighbors and friends are less puritanical in their social ostracism of divorced persons and they use their own judgment rather than the decision of the court in determining with which spouse their sympathies shall go. Sociologists urge that of the many social and economic bonds which in pioneer days held the American family together, only two today are important—mutual affection and the responsibility for the raising of children.

Legal machinery is needed in such a case to measure public opinion. If the facts sustain the assumption that the public has little interest in the sanctions back of the rule, two alternatives are open: to attempt to re-awaken those sanctions, or to set up a new rule more in line with modern thought. It is probably easier to set up a new rule along the line of least resistance.

A fourth argument against the rule urges that it is a sign post directing the public, the court and the parties to a side issue instead of to the main issue. The rule is now employed in a litigation process where one party seeks redress from the other. Not infrequently the defense of recrimination is used to further the malice or greed of the individual defendant. Under such circumstances the public purpose of restraining the disintegration and dissolution of the family finds little opportunity for expression. There is reason to argue that the respective interests of the State and the litigant in the out-

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40 Niebuhr, Does Civilization Need Religion? (1928) 1.
41 See Deitzman v. Mullen, 108 Ky. 610, 57 S. W. 247 (1900).
42 See, generally, 2 Vernier, op. cit. supra note 13, at pp. 283-325, §§ 107-111.
43 Cf. Shelford, Marriage and Divorce (1841) 177.
44 See 3 Calhoun, op. cit. supra note 35, at p. 266. "A man that formally broke up his family or a woman that formally deserted her husband had to take into account the antagonism of the neighborhood and the bitterness of its frown. City life is a great solvent of custom; neighbors do not know each other, or if they do, they are tolerant, or the problem may be solved by moving. Hence one is free to follow fancy in matters of divorce." Id.
45 Jacobs and Angell, Research in Family Law (1930) 37-38.
46 For example, see Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587 (1913) (in which custody and support of children was the bone of contention); Blankenship v. Blankenship, 9 Nev. 356, 276 Pac. 9 (1929).
come of the case should be disentangled. Confused issues result in a justifiable basis for popular complaint. Because the family occupies a different place in the community; because in many States, on account of the liberality of the divorce laws, there are potentially no innocent spouses after the parties have lived together for a year; because the community sanctions sustaining it are relaxed; because there is no adequate administrative machinery; the existence of the rule today is due more to uncritical inertia, than to its public utility.

The foregoing arguments against the rule are unsatisfactory in that they are not supported by factual data. Interesting, but not conclusive, facts are available in the records of legal aid societies, social service agencies, domestic relations courts; the data from the divorce courts themselves are disappointing. In spite of the labor and expense involved

47See the detailed statistics showing the source, nature and disposition of cases handled by the Legal Aid Societies of the country and published annually by the National Association of Legal Aid Organizations.

48For material on the subject of statistics of social agencies, see, generally, Berry and Buell, The Statistical Base for Community Planning, 62 Proceedings of the National Conference of Social Work 424. As to statistics of Family Welfare Agencies, see, for example, Marcus, Case Work Interpretation: An Area of Professional Exploration, 17 The Family 169 (1936); A Study of 229 Cases Referred to Family Case Work Agencies by the Court of Domestic Relations of Brooklyn, 17 The Family 81 (1936).

49The records kept by domestic relations courts have hitherto been scanty. It has been recommended: "Every court should have a record system which provides for the necessary legal records and for social records covering the investigation of the case, and the work accomplished. The records of investigation should include all the facts necessary to a constructive plan of treatment. The records of supervision should show the constructive case work plan attempted and accomplished and should give a chronological history of the supervisory work." United States Department of Labor, Children's Bureau, Bulletin #193 (1929) 45. The authors hasten to add: "In the majority of the courts included in this study the social records did not meet the standard specified in either juvenile or adult cases. The records of supervision were as a rule less complete than the records of investigation." Id.

50Statutes requiring the keeping of a centralized record of all divorces are designed to aid in the accumulation of such data and also to give the parties a convenient way of proving the divorce just as birth and marriage certificates afford convenient means of proof of these important matters. Such statutes are found in fifteen states. They all follow a similar pattern requiring a local official, usually the clerk of the divorce court, to make a monthly or annual return to the state officer in charge of vital statistics giving the facts required by statute. For a summary of these statutes, see 2 Vernier, op. cit. supra note 13, at p. 326, §112.

In a recent survey, conducted by the author, as to the statistical data available regarding domestic problems in the court records in North Carolina, the material for which is as yet unpublished, it appeared that the only information available about the cases was the names of the parties involved, nature of the charge, and the disposition of the case by the court. Unless the observer goes directly to the warrant issued, there is no way of telling whether the case is in the domestic field or
in accumulating statistics, the very inadequacy of the present information stands as a challenge to the lawyer who feels that the legal profession should know everything that takes place in its own field. The balancing of the interests of the individual litigant and the welfare of the family, as seen through the eyes of the State, awaits the facts.

THE THEORY OF A REMEDY

The problem of the disintegrating family invites a solution more complex than the substitution of a single new or improved rule of law. Among the matters calling for attention are: (1) the establishment and maintenance of a process of legal diagnosis for disentangling the various interests involved in a domestic case; (2) a clarification of the public interest in marriage and the family; (3) a device for the continuous collection of statistical data.

Law is administered through four types of process: civil, criminal, equitable and miscellaneous. Disbarment proceedings fall into the fourth group as would the procedure in Ecclesiastical courts if such existed in this country. Because certain traditionally ecclesiastical procedures dealing with domestic relations were needed in the American colonies, they were more or less arbitrarily adopted as part of the equitable process. This historical accident tended to conceal their real nature and thus confuse litigants. Originally, they were devices for sustaining the contact between the church and the sacrament of the individual marriage. In civil law they became the means by which the State declared the end of a status. The interest of the church and later of the State in the family bulked large. Litigants, thinking as individuals along lines of contentious equitable proceedings, have tended to lose sight of the significance of the presence of the State as a party in the marriage contract. They see divorce not as a solemn impersonal decree of death for a socially useless family, but as a battle in which one individual victorious spouse gains the right to remarry and perhaps a substantial property settlement. The confusion would be somewhat the exclusively in the field of criminal law. The various magistrates, having probable cause jurisdiction over a number of these problems, estimate that from sixty to ninety per cent of the warrants issued are allowed to be withdrawn upon the payment of costs by the prosecuting witness. (There is no record of these cases except the cancelled warrant). No social investigations prior to or after trial are indicated except upon inquiries made to said agencies that had previous contacts with the family and which are no part of the court records.
same if civil claims were to be intermingled with criminal processes.

If a difficulty arises in a modern American family, there is an effort at self diagnosis. In some cases the circumstances constitute a statutory ground for divorce, such as adultery or cruelty, although the subject matter of the quarrel may be damages in tort or contract. The complaining spouse, thinking in terms of the popular solution, may demand a divorce, a remedy in which the State has an interest, although the injury, as between the parties, is one in which adequate money reimbursement may be made. There is a property element in domestic affairs. It needs expression in the law. There are cases where damages rather than divorce will adequately express the policy of the law. Where the whole matter comes to the court in the form of a divorce case with requests for alimony, disposition of children, as well as property settlements or support, the interests of the State in the family and the individual in his own concerns are tangled. The court could do much useful work if it had authority to separate the property problems and decide them apart from the question of dissolution of the family. In the property aspects of divorce recrimination is more useful than in the personal aspects because it relates more closely to the individual than to the family. To grant a divorce where money damages are legally adequate is an encroachment by civil process upon a separate field. Such practice confuses the public and may encourage divorce by placing the wrong goal before the plaintiff.

In other cases the circumstances may amount to a statutory ground for divorce, such as adultery or desertion, although the subject matter of the quarrel is a criminal offense. The complaining spouse, thinking in terms of a litigation process which will give him an individual satisfaction, may demand a divorce, which is a remedy in which the public has an interest, although the public injury is to the State and a civil action for damages would redress the personal injury.

At common law husband and wife were considered legally one person, so that no action could be maintained between them. Thus divorce was the wife’s only remedy in cases not giving rise to criminal action. In many States today the disabilities as between spouses are removed by statute or judicial decision. See 3 Vernier, op. cit. supra note 13, at p. 268, §180. Such a changed condition would seem to call for a new analysis of the divorce problem and a revision of the law to meet the new conditions.
There is a criminal element in domestic affairs which needs expression in the law. There are cases where a criminal penalty rather than divorce will adequately express the policy of the law. Where the untangled threads of such a proceeding are before the court, it could render useful service if it had power to separate the criminal element and dispose of it apart from the question of the dissolution of the family. Divorce is a device for expressing the interest of the State in the family as a social unit, while in criminal matters the concern is with the individual offender.

The first step toward reform is to disentangle divorce as a device for keeping the State in touch with the family from civil, criminal and equitable proceedings where the interest of the individual litigant is paramount. The next step is to clarify the public interest in this miscellaneous process.

From the standpoint of the State, there is one fundamental problem in a divorce proceeding—shall the family be broken up? All the other matters involving individual rights, property settlements, custody of children, and the like, are incidental thereto. The issues in this proceeding are not property damage or punishment. In an earlier day the church considered these issues in the light of sin; they were spiritual matters. Today, when the State rather than the church controls, the problems remain much the same though the nomenclature is different. The legislature has declared certain causes for divorce. The medical profession, the social workers, the psychiatrists, dealing with families, report that the legislative “causes” of divorce are only symptoms; that the real causes are such matters as unemployment, ill health, lack of self control, jealousy, selfishness. The litigation process, devised in a day when the “water-tight compartment” theory of the social sciences prevented effective cooperation among neighboring professional groups, serves fairly well to disclose symptoms—what the defendant did; it is unable to cope with the real causes. Litigation, a substitute for trial by battle,

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53Carter, op. cit. supra note 12, at p. 146, n.
54See, for example, Popenoe, The Conservation of the Family (1926) 47-137; Schmalhausen, Family Life, a Study in Pathology, The New Generation (1930) 275.
56Legal scholars have long insisted upon the symbolic character of our litigation processes, the trial representing a quarrel concerning the thing at litigation with the judge as an umpire between the contestants. In this picture the attorney is seen as analogous to the champion in the
provides an arena in which contending parties can settle claims of right and wrong. To employ this crude device, which in a proper case will lead to family dissolution at the request of one of the parties, as a means toward the rehabilitation of a domestic unit already shaken by dissension, is somewhat like taking a watch to be repaired by a blacksmith. A more sensitive institution is needed to deal with what are now legal imponderables.

The initial questions for the court in a divorce case should be, not only what the parties want, but what is for the best interests of the family. Some families when they come into court are already sociologically dead. As to them, the court, in the interests of legal science, may perform a judicial autopsy. Others are dying. As to them, treatment should be provided so that no individual may suffer unduly. There may be communicable or contagious situations in which legal quarantine should be employed. If the family is merely ill, highly individualized treatment and rehabilitation should be provided. The law should not be limited to the alternatives of divorce or a dismissal of the case. At present the resources of the law provide only for restraining persons and their property. A better plan would be to bring to bear upon the family and its members the preventive and remedial resources of the entire community. This will require some exploration in interstitial professional areas and the construction of appropriate machinery.

Much of this proposal is not novel. Already several divorce courts have set up special departments for the investigation of facts—in England, the King's Proctor, and in the United States, various public officials and some private agencies. The historical and analytical jurisprudence of the last century sought to exclude all social and economic problems as such from the domain of the science of law. They sought to set up a self-sufficient jurisprudence in which only authoritative legal matters, regarded as such, should come into consideration. The King's Proctor is a well established figure in actions involving matrimonial affairs in the English Courts. See 10 Halsbury's Laws of England (2d ed. 1933) 768, § 122 et seq. For a historical summary of the duties of the English Proctor and a table of statutes in the United States establishing a lay functionary, see 2 Vernier, op. cit. supra note 13, at p. 92, § 80.
Their specific function is the investigation not of the sociological health of the family, but as to whether there is collusion. A second group of agencies which have made progress are the domestic relations courts. They offer an inquisitorial procedure in addition to litigation, and specialized bureaus and clinics for the treatment of specific problems. Their limitations are, in general, inability to grant divorces, inferior jurisdiction, lack of facilities for statistical analysis of their records, and the fact that ordinarily service is rendered only to poor persons. Perhaps because divorce is seen more as a property than as a sociological or spiritual problem, the divorce courts hold aloof from such experimentation.

A third set of agencies operates in the field. These are widely separated in form and manner of service; for example,
social service agencies, newspaper advice to the lovelorn columns, special radio broadcasts, specialized magazines, matrimonial advice bureaus, eugenics and birth control clinics. These indicate something of the public interest in the problem. The proposed remedy requires a further development of these agencies, a closer coordination, a set of tests, and a device for gathering statistics.

The Practical Remedy

Practical machinery to accomplish the results suggested includes three steps: legislative, administrative, and educational. The initial legislative step is the creation of a specialized court which shall have authority to deal with all family problems. In some jurisdictions, this result can be accomplished by combining the work of an existing domestic relations court, and the court that grants divorces. Elsewhere, new powers must be granted the existing divorce court. The multiplicity of courts in this country negatives the idea of a new one. The court, in dealing with the family, should have authority to perform the following functions. First, the court should investigate, diagnose and analyze the problems of the family and allocate them for solution to such departments of the court, or of the rest of the judicial system as are best qualified to handle that type of problem. Tort and contract cases might be disposed of by civil suit, and criminal matters by criminal process, just as if the parties were not married. The problem of divorce, however, and the rehabilitation of the family should receive special consideration. Second, the court should control the persons and property of the members of the family pending the investigation and the subsequent treatment. The analogy in property matters would be to bankruptcy procedure; in matters of control of the person of the individual

large cities has practically come to signify a desertions court for the poor (and often the alien poor) ..." Id.


69Willoughby, Principles of Judicial Administration (1929) 254-263.

70Nine States have already by statute given a deserted wife power under court supervision to manage, sell and encumber the property of the absent husband for the support of the wife and children. See 2 Vernier, op. cit. supra note 13, at p. 492, § 143; Note 29 Col. L. Rev. 669 (1929).
member of the family, to the material witness,\textsuperscript{71} for as long as the family is the object of judicial consideration, the members of the family are necessarily material witnesses.

The second legislative project should be a declaration that divorce is no longer a matter of individual right, but purely of judicial discretion to be granted in the light of all the circumstances of the case.\textsuperscript{72} The statute should do away with all specific causes of divorce and announce that each case must stand on its own merits, the question for judicial determination being: is the family any longer a useful, living, sociological entity, or capable of rehabilitation?

Administrative steps to be taken relate to the setting up of an appropriate department of the court which shall deal with the spiritual and sociological problems of the marital status in somewhat the same fashion as the ecclesiastical establishment of an earlier day functioned. Such an administrative agency will require a staff of highly specialized experts, or such close contacts with other agencies in the community that the required service may be secured when needed. From this specialized department, and through its contacts, will come opinions of experts on the facts of the case, the desired treatment, and other matters. A question may be raised as to the degree of recognition to be accorded by the court to such opinions. The analogy to the matter of expert testimony has been noted.\textsuperscript{73}

The third step is a change in viewpoint through education. There are three objectives to be sought here. The first is the evolution of a principle of law in which the welfare of the family, as such, has a place. The ideal of what is for the best interests of the child is already accepted by juvenile courts as a guiding principle.\textsuperscript{74} Under this theory questions of fact and

\textsuperscript{71}4 Wigmore, A Treatise on Evidence (1905) 2959-2976, §§ 2190-2197.

\textsuperscript{72}There seems to be no fundamental reason why one would expect greater wisdom in the legislative than in the judicial department of government. The opportunities of checking abuse of judicial discretion are far simpler and less expensive than those involved in remedying legislative defects. Since the facts of each marriage are distinguishable from the facts of every other marriage, the task of laying down fundamental principles in a legislative enactment is bound to be unsatisfactory. Because the process of individualizing legal treatment has already advanced substantially in the fields of criminal and juvenile court law, there is reason to assume that similar advance will be made in the field of domestic relations if the machinery is given a chance.

\textsuperscript{73}See supra note 71. Cf. Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 56 (1901).

\textsuperscript{74}Tiffany, Domestic Relations (3d ed. 1921) 343 et seq.; Note 16 Ky. L. Jour. 66 (1927).
opinions of experts are received and dealt with. In the present case, the doctrine of what is best for the family may well be fully as important as the desires of the individual members. What is best in a particular case will depend upon the facts, the recommendations of the experts, and the shrewd discretion of the court, but unless this agency is staffed by judges who view sympathetically the experiment recommended here, it will fail. The machinery for providing such education lies in the law schools and the schools of social work. A department of Domestic Relations in the law school with opportunity for graduate study in sociology, criminology, and field work in legal aid societies or social case working agencies, should produce lawyers and judges who have an adequate understanding of the law and experience in social work techniques. Special education of this sort is essential because a lawyer, accustomed to the definite certainty of a legal matter concluded by court decree, contract, release, or other legal process, feels ill at ease in the presence of less obvious social work techniques. There is a tendency to overrate the effectiveness of one's own field and underrate that of a neighbor. With this background one might expect the court to look upon the family the way a physician looks at his patient, the way a probation or parole officer looks at a person accused of crime, the way a juvenile court worker looks at a child. The family has gone sociologically bankrupt, has evidenced its inability to run itself, has fallen below a reasonable standard of conduct. The unsolved problem of the domestic relations law is family rehabilitation, not the assertion of individual rights.

75See Lou, Juvenile Courts in the United States (1927) cc. 5, 6. See also bibliography in United States Department of Labor, Children's Bureau, Bulletin #193 (1929) 72, Appendix B.
76See Goodsell, op. cit. supra note 31, at p. 457.
77That domestic relations receive scant attention in most law school curricula is shown by the analysis of typical law school bulletins:

<table>
<thead>
<tr>
<th>Law School</th>
<th>Total of Undergrad. Courses</th>
<th>Property and Business</th>
<th>Criminal Law</th>
<th>Domestic Relations</th>
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<tr>
<td>University of California</td>
<td>30</td>
<td>18</td>
<td>1</td>
<td>0</td>
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<tr>
<td>University of Chicago</td>
<td>49</td>
<td>33</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Columbia University</td>
<td>42</td>
<td>20</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Duke University</td>
<td>52</td>
<td>25</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Harvard University</td>
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<td>19</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>University of Illinois</td>
<td>57</td>
<td>31</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>University of Michigan</td>
<td>43</td>
<td>26</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Tulane University</td>
<td>30</td>
<td>19</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Yale University</td>
<td>45</td>
<td>29</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

78As an example of the conflict in viewpoint, see Llewellyn, Behind the Law of Divorce (II), 33 Col. L. Rev. 249, 250 (1933).
"The battle over divorce is a joining of issue between those who see
A second item to be brought about by education should be the collection of complete continuous vital statistics as to the family. The law has lagged behind the medical profession in the gathering of adequate statistics as to the human problems with which the law must deal. Here is an unique opportunity to obtain a statistical motion picture of family dissolution in the most realistic terms. The medical profession uses its patients as a basis for scientific study. Even an autopsy may reveal facts and confirm theories. Medical societies devote a portion of their time to consideration of such material. If the court records and material from law offices were sufficiently detailed to provide the data, bar associations might include in their meetings a series of papers on how to improve the technique of the lawyer in dealing with human problems. The result would be increased prestige for the profession.

A third point of view may be expected to develop through education. At present a divorced individual, with certain exceptions as to time and person, is free to remarry and start a new family. The State is willing to issue the license without hesitation. The facts available from this proposed collection of statistics will show subject to court order, whether or not a person who has been a member of a family which has failed is a good risk as a member of a new family. Prospective spouses of the divorced person, reading the record of the divorcee's previous family life impartially compiled by disinterested experts, will be put on notice. One can only guess what will be the effect upon spouses of a knowledge that full disclosure will be required and a permanent record kept. Yet chiefly new and needed adjustment to be sought and those who see chiefly old values that may be imperilled by the changes. Each of the embattled follows deep truth; none grasps fully how much truth the other foots on; the development of objectives is emotion-bound, purblind, draws more on instinct than on eye." Id.

The recording of statistics in connection with divorce cases may be justified both as an aid to the State and a deterrent to the individual parties involved. The State may use such material as a basis for a scientific study of the problem leading to preventive action in accordance with the analogy supplied by the medical profession in tracing down disease. The court may also find it of value to gather the facts in specific cases so that the decrees of the court may be justified not merely as a matter of history and logic, but in accordance with the best modern sociological principles.

The gathering of statistics, because they are impersonal, should not affect in any way the individuals involved. The gathering of the facts in specific cases, however, may be the subject of considerable discussion. On the one hand, it may be urged that family affairs are of such a personal nature that it is contrary to the public morals to have them spread out on a public record where everyone may see. On the other hand, it is argued that if certain people see them, definite benefit may
it is arguable that a State may justifiably classify its citizens into three groups, those who have made a fair success in marriage, those who have failed, and those whose status is undetermined.

**OBJECTIONS TO THE PROPOSAL**

The ordinary objections to a proposal of this sort attack the novelty, the danger in establishing a precedent of the law cooperating with the other social sciences, the expense and similar matters. Two questions for brief consideration here are: Is the proposal legally possible? Is it socially wise? As to the suggestion to make divorce a matter of judicial discretion, it may be said: Divorce in this country from the beginning has been a creature of statute.\(^8\) Laws affecting divorce and marriage have been attacked unsuccessfully as violating the constitutional provisions against the impairment of the obligation of contracts.\(^9\) Judicial discretion over annulment is granted by the New York legislature.\(^10\) The English discretionary system has already been referred to.\(^11\) It would seem to follow that there is no constitutional objection to making divorce a matter of grace.

The establishment of an administrative agency to aid the court in the disposition of extra-legal problems would also seem constitutionally unobjectionable. Administrative tribunals are now functioning, and a reasonably expert draughtsman should be able, in writing the statute proposed here, to evade such pitfalls as deprivation of the right to a day in

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\(^8\) Jurisdiction to grant divorce is wholly statutory in the United States... hence until statutes or constitutional provisions granted power to decree divorces, the sole recourse of dissatisfied married persons was to petition the legislature for a dissolution of the marital bond, or to seek an annulment.” Vernier, op. cit. supra note 13, at p. 98, § 81.

\(^9\) That marriage is not considered a contract within the meaning of the impairment of contracts clause of the Federal Constitution has been undoubted since Marshall’s famous dictum in the case of Dartmouth College v. Woodward, 4 Wheat. 518, 627, 4 L. Ed. 629 (U. S. 1819).

\(^10\) See, for example, 14 N. Y. Cahill’s Consol. Laws (1930) § 7.

\(^11\) See supra note 12.
court, trial by jury and due process of law, and the use of expert witnesses. The addition of jurisdiction to an existing court or the combination of two courts would seem within the power of the legislature, although an exception might arise in South Carolina, where by constitutional mandate, no divorces are granted. Therefore, it appears that the proposal is legally possible.

The social wisdom of the proposal is predicated upon the adoption by the observer of certain assumptions. Today there is honest disagreement upon such fundamentals as whether the family has a social value worth protection by the State; whether the State should be given the right to interfere with the individual in his marriage; whether money and time spent in efforts at family rehabilitation are justified; whether the public will stand for family regimentation.

The interpretation and application of modern social and economic legislation has raised difficult problems for the court. Specialized knowledge is equally necessary in dealing with problems arising under laws regulating workmen's compensation; public health; production and sale of foods, etc. such functions can perhaps be best performed by administrative bodies. Aumann, The Change in Relationship of the Judicial and Executive Branches, 22 Ky. L. Jour. 246, 251 (1934). See also Pound, Constitutional Aspects of American Administrative Law, 9 Am. Bar Ass'n Jour. 409 (1923); Satterfield, A Discussion of the Extent to which the Constitution of the United States Authorizes a Judicial Review of the Decisions of Administrative Tribunals, 4 Miss. L. Jour. 184 (1932); Rosenberry, Administrative Law and the Constitution, 23 Amer. Pol. Sci. Rev. 23 (1929).

Several States seem to have found difficulties with constitutional obstacles. Waite, Courts of Domestic Relations, 5 Miss. L. Rev. 161 (1921). But these obstacles are not insurmountable. "As a matter of constitutional law there is no Federal requirement that the executive, legislative and judicial functions of the states be kept separate. The various state constitutions generally provide for a separation of function, but there is no clear legal demarcation and the question is generally one of policy rather than one of law." United States Department of Labor, Children's Bureau, Bulletin #193 (1929) 20.

Cf. Lichtenberger, op. cit. supra note 33, at p. 298. "As touching the rate of divorce, the influence of individualism results in a strong tendency to resort to marriage relations which promote individual welfare. When the union proves unfavorable in this regard there is destined to be facile and free recourse to the divorce courts. Divorce laws may remain unchanged; they may become even more stringent; legal sanctions may be backed up by specific group prejudices, but the divorce rate from this cause will tend to rise until conditions in marriage become more favorable to this end." Id.

There are still many whose conceptions of the family do not go beyond the legal and institutional aspects of relations between husband and wife." Mowrer, Domestic Discord (1928) 25. See also Reeves v. Reeves, 205 N. C. 792, 167 S. E. 129 (1933), where the court, dealing with a statute which allowed either party to sue for divorce after five years separation, read into the statute certain limitations that prevented the legally guilty party from securing a divorce.

See Brearly, A Note Upon Migratory Divorce of South Carolinians, 2 Law and Contemporary Problems 329 (1935).
present writer assumes tentatively an affirmative answer to these questions and argues that, therefore, machinery should be set up to provide the facts. With them it will also be possible to set up remedial machinery and clarify the viewpoint of the state.

Fundamentally, the change in the point of view of the court from an instrument of punishing sin, assessing damages, and castigating criminals, to an institution for the rehabilitation of the family, should in time encourage people to bring their family troubles voluntarily to the tribunal for solution long before they reach the breaking point. Physicians, public health officials and insurance associations for years have been educating the public to appreciate the importance of preventive medicine. Preventive legal processes are not doomed ab initio to public disapproval. The time may even come when the members of a family group may voluntarily entrust the solution of their mutual problems to a group of experts who have gained public confidence. By setting up the proposed machinery material will be made available for the educational process.

CONCLUSION

The present article has considered family dissolution and the effect upon it of existing legal procedure. As an example a specific rule of law has been chosen—the one requiring that the plaintiff in divorce proceedings be legally innocent. It has been urged that the particular rule serves no purpose that may not be better served by improved legal techniques in dealing with human problems. Proposals have been made as to the nature and operation of the machinery to support those improved legal techniques. Objections to those proposals have been considered. It is true the proposals are much broader than the application of the specific example, but they were necessarily involved. From the foregoing discussion, it is suggested that the rule of the innocent spouse has long since outlived its social usefulness, if in fact it ever had any, and that the time is at hand to substitute for this outmoded rule and its accompanying procedure a more efficient and satisfactory system of control of familial relations.