

1967

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### Recommended Citation

Charles W. Tenney Jr., *Divorce without Fault: The Next Step*, 46 Neb. L. Rev. 24 (1967)

Available at: <https://digitalcommons.unl.edu/nlr/vol46/iss1/4>

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## DIVORCE WITHOUT FAULT: THE NEXT STEP

### A MODEL FOR CHANGE

Charles W. Tenney, Jr.\*

*A Roman divorced from his wife, being highly blamed by his friends, who demanded "Was she not chaste? Was she not fair? Was she not fruitful?" holding out his shoe asked them whether it was not new and well made. "Yet," added he, "none of you can tell where it pinches me."*

PLUTARCH, LIVES OF ILLUSTRIOUS MEN,  
Amelius Paulus.

### I. INTRODUCTION

The unchallenged view of the family as a basic and vital institution in the fabric of Western society has generated a continuing interest in legal questions concerning it. More particularly, an abiding concern has been manifested over whether and under what conditions a dissolution of the family unit ought to be permitted. Historically, we have moved from a period during which such questions were of exclusive ecclesiastical concern to one in which the civil law and its courts have undertaken the tasks of determining such issues.<sup>1</sup> Building upon the approach of its clerical predecessors, civil divorce law in Western countries has retained a basically fault-oriented approach, premised upon the commission of a specific "matrimonial offense." More recently, in the United States in particular, this traditional fault-orientation has been leavened by the introduction of so-called nonfault grounds for divorce, principal among which is that providing for a divorce to be granted following a specified period of separation.<sup>2</sup> The law of divorce appears to be subject to a continuing liberalizing trend of which such non-fault increments are one manifestation. This paper represents a modest effort at contributing to the discussion of this trend. It is, however, not intended as a comprehensive treatment of all facets of divorce, but only of divorce grounds. Thus, such important matters as

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<sup>1</sup> Rheinstein, *Trends in Marriage and Divorce Laws of Western Countries*, 18 LAW & CONTEMP. PROB. 3 (1953).

<sup>2</sup> For a roster of American jurisdictions which currently provide for divorce on this ground, see note 71 *infra*.

property and financial arrangements between parting spouses, migratory divorces, and child custody are not here considered.

Recent developments in family law in Nebraska suggest that there is today a climate of interest in the family into which a discussion of the present state of our divorce law may properly be introduced. The first such development was the passage in 1965 of legislation permitting the establishment of conciliation courts;<sup>3</sup> the second is the work of the Marriage and Divorce Revision Committee of the Nebraska Committee on Children and Youth. The work of this committee has extended over several years and will mature in the submission to the 1967 session of the Nebraska Legislature of a series of proposed revisions of the marriage and divorce statutes. Regardless of the fate of these proposals, they should serve as a catalyst to discussion of the problems they pose and the solutions they offer. The same is true with the thoughts advanced herein. If the public understanding of the nature of divorce is advanced through them, their purpose has been well served.

## II. NEBRASKA LAW

Viewed on a liberal-conservative continuum, present Nebraska divorce law appears to fall at somewhat beyond midpoint toward the liberal end of the scale. Divorce is permitted on the grounds of adultery by either spouse, habitual drunkenness, willful abandonment "without just cause," imprisonment, a husband's neglect to provide "suitable maintenance" for his wife, utter desertion for two years, and extreme cruelty.<sup>4</sup> Each of these grounds is based on the concept of fault. In addition to them, the Nebraska statute provides also for divorce when one of the spouses is "incurably insane" and has been confined in a hospital or asylum for at least five years.<sup>5</sup> This insanity ground is the one which is based more on the principle of marriage breakdown than on fault. Obviously, a spouse is not "guilty" of becoming insane.

Coupled with the divorce grounds are those traditional defenses which a spouse may raise in answer to a divorce petition: collusion, condonation and recrimination.<sup>6</sup> Where they are found

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<sup>3</sup> NEB. REV. STAT. §§ 42-801 to -823 (Supp. 1965).

<sup>4</sup> NEB. REV. STAT. § 42-301 (Reissue 1960); extreme cruelty is provided for in § 42-302 (Reissue 1960).

<sup>5</sup> NEB. REV. STAT. § 42-301(7) (Reissue 1960); and see NEB. REV. STAT. §§ 42-302.01, 42-302.02 (Reissue 1960).

<sup>6</sup> Collusion and recrimination are provided for generally by statute: NEB. REV. STAT. § 42-304 (Reissue 1960); condonation is a judicially developed defense. See Keller, *Terminating A Marriage in Nebraska*, 43 NEB. L. REV. 156 (1963). Defenses to a petition for divorce based

to exist, they constitute a bar to granting the divorce decree. Collusion generally is an agreement between the spouses to seek a divorce through some "imposition on the court."<sup>7</sup> Thus, an agreement that one of the spouses will seek the divorce for a cause which does not in fact exist, or *mutual agreement* to suppress relevant facts, or that one of the parties will commit an offense constituting grounds for divorce (commonly, adultery) in order to obtain it, constitutes collusion. In Nebraska collusion bars granting the divorce where the husband and wife have agreed to withhold facts to avoid recrimination or to testify falsely to the existence of grounds for divorce.<sup>8</sup>

Condonation as a defense to a divorce petition is the forgiveness by one spouse of the marital offense committed by the other.<sup>9</sup> It is conditional, however, upon the subsequent good behavior of the offending spouse. A repetition of the past offense will revive the wrong condoned.<sup>10</sup> In Nebraska it appears also that the repetition must be of an act which would itself constitute grounds for a divorce.<sup>11</sup>

Recrimination is that defense whereby it is alleged that the petitioning spouse has himself been guilty of an offense constituting grounds for a divorce.<sup>12</sup> The Nebraska statute provides that a divorce shall not be decreed "where the party complaining shall be guilty of *the same crime or misconduct* charged against the respondent."<sup>13</sup> On its face, the defense would therefore seem to be limited to those cases in which the petitioner alleging adultery is himself guilty of adultery, or of extreme cruelty where that ground is alleged. However, the Nebraska Supreme Court has "expanded" the defense by requiring that the petition be denied where the conduct of both parties has been such as to furnish grounds for

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on the ground of adultery are separately provided for in NEB. REV. STAT. § 42-336 (Reissue 1960) and include connivance, condonation, and a limitation of five years within which a spouse may petition after discovery of the "offense charged."

<sup>7</sup> MADDEN, DOMESTIC RELATIONS 298 (1940).

<sup>8</sup> See Keller, *supra* note 6, at 164 and cases there cited.

<sup>9</sup> Madden, *supra* note 7, at 300.

<sup>10</sup> ". . . the rule is that condonation is forgiveness for the past upon condition that the wrong shall not be repeated. It is dependent upon future conduct, and a repetition of the offense revives the wrong condoned. . . ." Gartside v. Gartside, 181 Neb. 46, 49, 146 N.W.2d 777, 779 (1966).

<sup>11</sup> Keller, *supra* note 6, at 165 and cases there cited.

<sup>12</sup> Madden, *supra* note 7, at 305.

<sup>13</sup> NEB. REV. STAT. § 42-304 (Reissue 1960). (Emphasis added.)

divorce, despite the fact that the conduct of one may be grossly more culpable than that of the other. The offense of which the respondent may be guilty may thus be one other than that alleged by the petitioner.<sup>14</sup>

Less frequently mentioned as "defenses" to a divorce petition (but no less determinative of the issue where they are found to have existed) are situations involving the insanity of the respondent at the time the offense is alleged to have taken place, the provocation of the offense by the petitioner, and the requirement of corroboration of the facts alleged in the petition. Although there are few cases in Nebraska discussing insanity as a defense, it would appear that it is available where it exists in gross form (probably to a degree sufficient to constitute a defense to a criminal charge).<sup>15</sup> Provocation, also in extreme form, may constitute a defense to the divorce petition.<sup>16</sup> Where it exists, however, the defense is more usually that of recrimination. Corroboration by "other satisfactory evidence" of the petitioner's allegations is required in all cases.<sup>17</sup>

Of the several grounds for divorce in Nebraska, it is apparent that that of "extreme cruelty, whether practiced by using personal violence, or by other means"<sup>18</sup> provides the most flexible standard for judging particular conduct and hence the widest discretion for the court to grant the petition or not. What constitutes cruelty will depend on the facts and circumstances of the particular case;<sup>19</sup> a single act of marital misconduct may be sufficient to constitute extreme cruelty.<sup>20</sup>

Nebraska cases dealing with extreme cruelty are replete with statements concerning the tendency of the conduct to destroy the "legitimate objects of matrimony."<sup>21</sup> Exactly what this means,

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<sup>14</sup> Gradwohl, Janice L., *The Doctrine of Recrimination In Nebraska*, 37 NEB. L. REV. 409 (1958). See also Keller, *supra* note 6, at 162, 163 and cases there cited.

<sup>15</sup> Keller, *supra* note 6, at 166 and cases there cited. See also Annot., 19 A.L.R. 2d 144 (1951).

<sup>16</sup> See Schalk v. Schalk, 168 Neb. 223, 234, 95 N.W.2d 545, 549 (1959).

<sup>17</sup> NEB. REV. STAT. § 42-335 (Reissue 1960).

<sup>18</sup> NEB. REV. STAT. § 42-302 (Reissue 1960).

<sup>19</sup> Vollbrecht v. Vollbrecht, 178 Neb. 31, 37, 131 N.W.2d 651, 655 (1964).

<sup>20</sup> Ross v. Ross, 174 Neb. 795, 119 N.W.2d 495 (1963).

<sup>21</sup> See, e.g., Thompson v. Thompson, 176 Neb. 852, 854, 127 N.W.2d 729, 730 (1964); Chipman v. Chipman, 174 Neb. 584, 587, 118 N.W.2d 761, 763 (1962); Waldbaum v. Waldbaum, 171 Neb. 625, 628, 107 N.W.2d 407, 410 (1961); Schalk v. Schalk, 168 Neb. 229, 232, 95 N.W.2d 545, 548 (1959).

however, is not altogether clear. One possibility is that the finding of cruelty is to be determined by measuring the conduct in question against this standard. Thus, the Nebraska Supreme Court has said, "the rule defining extreme cruelty is: 'Any unjustifiable conduct by either the husband or wife which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty as defined in section 42-302.'"<sup>22</sup> On the other hand, statements may be found in the cases to support the contention that the destruction of the legitimate ends and objects of matrimony is a factor in addition to and independent of conduct which would otherwise constitute extreme cruelty. In other words, conduct which on its face may not constitute cruelty may nevertheless be found to be such where it tends to the destruction of the objects of matrimony. Thus, it was said in *Waldbaum v. Waldbaum*:<sup>23</sup>

Any unjustifiable conduct on the part of either husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate objects of matrimony, constitutes "extreme cruelty. . . ."

While the latter view appears the more supportable (as well as preferable) one, there is nothing in the statute itself which requires either that cruelty be found only where it has destroyed the objects of matrimony or where such objects are destroyed notwithstanding the absence of cruel conduct judged independently. The question of which interpretation is the more accurate appears so far not to have been considered.<sup>24</sup>

While it is not the purpose of this paper to treat at length the ramifications of extreme cruelty as a divorce ground, it will be helpful in understanding the discussion which follows to describe briefly the events and result in several recent Nebraska cases in each of which a wife petitioned for divorce on this ground. In *Schalk v. Schalk*,<sup>25</sup> it appeared that the parties had been married

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<sup>22</sup> *Chipman v. Chipman*, 174 Neb. 584, 587, 118 N.W.2d 761, 763 (1962).

<sup>23</sup> 171 Neb. 625, 628, 107 N.W.2d 407, 410 (1961). (Emphasis added.)

<sup>24</sup> Further support for the latter view may be gleaned, however, from certain of the language in *Gartside v. Gartside*, 181 Neb. 46, 48, 146 N.W.2d 777, 779 (1966), viz., "Plaintiff also testified that the conduct of the defendant . . . generally had destroyed the legitimate objects of matrimony and she could not continue living with him." If the plaintiff's judgment as to whether the ends of matrimony have been destroyed is accepted, it would then seem that *any* conduct may have potentially that effect. Compare *Chipman v. Chipman*, 174 Neb. 584, 118 N.W.2d 761 (1962).

<sup>25</sup> 168 Neb. 229, 95 N.W.2d 545 (1959).

in 1936; in 1950 they moved to Nebraska City. Prior to that time, the husband had been a farmer. The Schalks purchased a home in Nebraska City for which they both were helping to pay. After their move, Mr. Schalk developed a blood clot on the brain which disabled him from working. Other problems developed; unpaid bills accumulated as a result of their straitened finances. Mrs. Schalk, over her husband's objection, obtained a job to help relieve the money problem. Her husband said he thought she merely wanted to get away from him. In time, he "recovered" from the brain ailment but gradually became impotent. The family relationship deteriorated further. Mr. Schalk became severely critical of himself and others. In particular, he berated his wife for the manner in which she disciplined the children. At times when angry or upset, he would tell his wife that she was "no good" and would, in the presence of their children or other individuals, call her vile names. At other times he threatened her, attempted to choke her, struck her on two occasions, and ordered her out of the house. On at least one occasion he locked her out. He also accused his wife of associating with other men.<sup>26</sup>

As a result of the accumulation of these problems, "plaintiff became so nervous, sleepless, and upset with emotional anxiety that she began taking aspirin, smoking cigarettes, and drinking a little, but never too much, in an effort to escape her anxiety."<sup>27</sup> She testified also that she became nervous and afraid as a result of her husband's threats. Finally, in 1957, Mrs. Schalk departed the marital household, taking her children with her; in 1958 her husband was ordered to pay support for his family. On these facts, the trial court denied the petition for divorce. The supreme court reversed, holding that "the evidence overwhelmingly supports plaintiff's contentions and sustains her right to the relief sought by her. We are convinced that the object of this marriage has been destroyed beyond repair by defendant's own *unexcusable* and *unjustifiable* conduct."<sup>28</sup>

In *Chipman v. Chipman*,<sup>29</sup> it appeared that Mr. Chipman, a veterinarian with offices in a town other than his residence, left his home for a vacation about eight years prior to the filing of the petition. He never returned to live at his home. Instead, he rented a room in the town where he had his veterinary practice. During

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<sup>26</sup> *Id.* at 240, 95 N.W.2d at 551.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Schalk v. Schalk*, 168 Neb. 229, 241-42, 95 N.W.2d 545, 553 (1959). (Emphasis added.)

<sup>29</sup> 174 Neb. 584, 118 N.W.2d 761 (1962).

the time between his departure and his wife's petition for divorce, however, Mr. Chipman continued to provide a home for his family. He bought and delivered the weekly groceries, made repairs and performed other chores around the home, and visited regularly with his children. He also took the family on occasional vacations; and he engaged his sons to work part time on his farm for which work he paid them. At the trial, one son testified that his mother worked and that the family was occasionally "short of money." On these facts the trial court granted the petition. The supreme court reversed. Although there is considerable language in the opinion discussing the need for corroboration and the lack of it in the testimony offered to support a finding of extreme cruelty, the apparent ground for reversal was the failure of the adduced facts themselves to support a finding of extreme cruelty.<sup>30</sup>

In the third case, *Conry v. Conry*,<sup>31</sup> the parties had been married for about twenty years. Mr. Conry (older than his wife by twelve years) was a school teacher who, shortly after the marriage in 1942, obtained a teaching position in Iowa. After about a year, he left teaching and moved his family onto an Iowa farm which he worked until 1957. At that time he obtained a teaching position in Nebraska. For the next three years he farmed in Iowa and taught school in Nebraska, returning on weekends to his farm, a distance of about eighty miles. In 1961, Mr. Conry secured a new teaching position in Nebraska and moved to the town in which he taught.

It appeared that the parties' difficulties commenced in about 1953. Many of them arose over financial matters. In addition, Mrs. Conry had a cancerous breast removed in 1954. At that time the couple quarreled and Mr. Conry told his wife that he wished she had died, that he wanted to be rid of her, and that he wanted a divorce. He reportedly struck his wife on other occasions during quarrels.

At the trial, Mrs. Conry offered as corroborative evidence of the acts of alleged cruelty the testimony of an acquaintance who had witnessed conversations between the parties in which Mr. Conry had told his wife that he was "very much finished with her"; that he desired a divorce; that if she didn't seek one, he would; that he was better off without her; and that he wanted his furniture back. The district court granted the petition; the supreme court reversed. The corroboration offered was not of evidence of extreme cruelty taking place in Nebraska. Moreover, the court

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<sup>30</sup> *Id.* at 587, 118 N.W.2d at 763.

<sup>31</sup> 176 Neb. 396, 126 N.W.2d 188 (1964).



pointed out that, "mere incompatibility of temper is not a ground for divorce in this state. . . . Nor does the fact that the defendant stated that he could not and would not live with the plaintiff entitle the plaintiff to a divorce."<sup>32</sup>

Certainly there is little that is unique in the facts of these cases or in the application of the law to those facts. Yet considering them even as within the degree of permissible discretion necessary in interpreting the meaning of "extreme cruelty," one is left with gnawing doubts as to the ultimate justifiability of the result. How realistic, in other words, is a law which withholds confirmation of the fact that a marriage obviously is dead, as with the Chipmans? How effective in promoting the marriage relationship is a law which permits the courts to overlook powerful factors over which one may have little or no control in determining whether the conduct which results from such factors constitutes the divorce ground of extreme cruelty? How "unexcusable" or "unjustifiable" was Mr. Schalk's conduct under the circumstances? Of what ultimate value is the law which denies a dissolution of a marriage in a situation where, although little doubt may be entertained as to the existence of a progressively worsening relationship which commenced in another state, the events corroborated in the state where the petition is filed are insufficient by themselves to constitute a ground for divorce?

Although, as the cases discussed above attest, divorce on grounds of extreme cruelty is not easy (in an absolute sense) to obtain, this ground is by far the most popular one in Nebraska. In 1964, sixty-one per cent and in 1965 sixty per cent of all divorces granted were on this ground.<sup>33</sup> The writer is advised that the high percentage of divorces granted on grounds of extreme cruelty results from the relative ease with which the ground may be proved and from the not infrequent unwillingness of the petitioning spouse to mention other factors which may supply the true motivation for the divorce but which are felt to be unnecessarily damaging to the respondent. Thus, in *Ross v. Ross*<sup>34</sup> the husband's petition on

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<sup>32</sup> *Id.* at 402, 126 N.W.2d at 192, citing *Brown v. Brown*, 130 Neb. 487, 265 N.W. 556 (1936).

<sup>33</sup> NEB. DEP'T OF HEALTH, STATISTICAL REPORT OF THE BUREAU OF VITAL STATISTICS 77 (1964); NEB. DEP'T OF HEALTH, STATISTICAL REPORT OF THE BUREAU OF VITAL STATISTICS 77 (1965), hereinafter cited as Statistical Report. Drunkenness, the second most common ground, accounted for 27% of all petitions granted in 1965; all other grounds accounted for the remaining 13% with non-support and desertion accounting for a majority of that number.

<sup>34</sup> *Ross v. Ross*, 174 Neb. 795, 119 N.W.2d 495 (1963).

grounds of extreme cruelty was granted where the proof was of a single act of "misconduct" which probably amounted to adultery.

Finally, mention should also be made of the prevalence in Nebraska (as in other states<sup>35</sup>) of the *ex parte* divorce; in 1964 and 1965 over eighty-seven per cent of the petitions granted were uncontested.<sup>36</sup> It may be added that a significant number of those few petitions which are contested are done so apparently because of the failure of the parties and their counsel to agree in advance on such matters as alimony, property distributions, and child custody.

### III. CRITICISM OF PRESENT LAW

Criticism of divorce legislation, and in particular the fault orientation which characterizes the various statutes in the United States, is no novelty. Until fairly recently, however, its practical impact on legislation has been slight. "Reform" usually has consisted of no more than tinkering with procedural requisites, or with matters involving alimony or property settlements.<sup>37</sup> Where consideration has been given to the grounds for divorce themselves, it has resulted usually in simply adding to them. It is noteworthy that the two most significant events in divorce legislation in this century have been the passage of a divorce statute in South Carolina in 1949, where previously divorce was not permitted at all,<sup>38</sup> and the adoption of a revised statute in New York in 1966 which added five new grounds to the previously exclusive one of adultery.<sup>39</sup>

Divorce law today has been labelled a "mockery"<sup>40</sup> tending to "demean and abase human relations."<sup>41</sup> Specific grounds for divorce are seen as "artificial,"<sup>42</sup> "unrealistic,"<sup>43</sup> and never really

<sup>35</sup> O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 22 (1963).

<sup>36</sup> Statistical Report, 1964 and 1965, *supra* note 33.

<sup>37</sup> For an interesting speculation that one reason for this circumstance is the superior organization of the forces of conservatism permitting those forces to dominate a democratic legislature, see Rheinstein, *Trends in Marriage and Divorce Laws of Western Countries*, 18 *LAW & CONTEMP. PROB.* 18 (1953).

<sup>38</sup> S.C. CODE ANN. § 20-101 (1962).

<sup>39</sup> N.Y. DOM. REL. LAW § 170 (McKinney Session Laws 1966).

<sup>40</sup> W. FRIEDMAN, *LAW IN A CHANGING SOCIETY* 223 (1959).

<sup>41</sup> Mead, *Anthropologist's Views . . .*, in "Divorce and Domestic Relations—A Compilation," 2 *VA. L. WEEKLY DICTA COMP.* 1, 7 (1949).

<sup>42</sup> CARVER, *Divorce: Statutory Abolition of Marital Fault*, 35 *CALIF. L. REV.* 99, 108 (1947).

<sup>43</sup> O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 27 (1963).

"quite right";<sup>44</sup> facts alleged in support of them tend often to be "trivial or fictitious."<sup>45</sup> Instead of appearing as an index to the actual reasons for family breakups, they are viewed as "legal fictions,"<sup>46</sup> often no more than symptomatic of marital disruption and usually merely the excuse for ending a meaningless marriage.<sup>47</sup> As a result of this unreality in divorce grounds, the divorce process, while remaining adversary in theory and in form, devolves into a "sham battle,"<sup>48</sup> a "silly comic melodrama"<sup>49</sup> which, because of its emphasis on technicalities dealing with effects rather than causes, breeds the "suppression of truth."<sup>50</sup> In sum, fault-based divorce procedure which "unrealistically purports to reward virtue and punish sin while ignoring the actual consequences to the family and society"<sup>51</sup> has been rendered a socially ineffective, "tragically imperfect remedy."<sup>52</sup>

Similar criticism is made of the defenses of connivance, collusion, condonation, and recrimination.<sup>53</sup> Not only are they harmful in themselves in that they also fail to reflect the realities of the marital relationship, but they require the spouses to conduct themselves as adversaries, both during the marriage and in the divorce proceedings.<sup>54</sup> Condonation, the conditional forgiveness of a marital "wrong," has the effect of forcing the parties apart if they wish to avoid the defense.<sup>55</sup> Recrimination also is seen as "patently un-

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<sup>44</sup> Redmount, *Analysis of Marriage Trends and Divorce Policies*, 10 VAND. L. REV. 513, 544 (1957).

<sup>45</sup> Sayre, *Divorce for the Unworthy: Specific Grounds for Divorce*, 18 LAW & CONTEMP. PROB. 26, 27 (1953).

<sup>46</sup> Elliott, *Divorce Legislation and Family Instability*, 272 ANNALS 134, 140 (1950).

<sup>47</sup> Editorial, *Suggest New Basis for Divorce*, 83 CHRISTIAN CENTURY 1023 (1966).

<sup>48</sup> Alexander, *Let's Get the Embattled Spouses out of the Trenches*, 18 LAW & CONTEMP. PROB. 98, 101 (1953) and see Cantor, *The Right of Divorce*, 218 ATLANTIC MONTHLY 67, 71 (1966).

<sup>49</sup> VIRTUE, FAMILY CASES IN COURT 230 (1956).

<sup>50</sup> Gradwohl, Janice L., *The Doctrine of Recrimination in Nebraska*, 37 NEB. L. REV. 409, 438 (1958).

<sup>51</sup> Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L.REV. 353, 381 (1966).

<sup>52</sup> Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 36 A.B.A.J. 105, 107 (1950); Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377, 383 (1937).

<sup>53</sup> Keller, *Terminating a Marriage in Nebraska*, 43 NEB. L. REV. 156 (1963).

<sup>54</sup> Johnson, *Suppressed, Delayed, Damaging and Avoided Divorces*, 18 LAW & CONTEMP. PROB. 72, 79 (1953).

<sup>55</sup> *Ibid.*

realistic,"<sup>56</sup> an "absurd foisting on divorce actions of a rule developed for different purposes and wholly ill-adapted to divorce."<sup>57</sup> It has been suggested that this defense be abolished altogether and that where mutual guilt is demonstrated it result in an award of divorce to both parties rather than neither.<sup>58</sup> Although the presence of one or another of the defenses may cast light on the extent of actual family deterioration, it is felt that they should not be used to perpetuate meaningless relationships.<sup>59</sup>

In contrast to critics of present law who see it as irrelevant and unrealistic and as therefore objectionable on that basis alone, are those who view current legislation as impotent to stem the rising tide of divorce. Although one may arrive at varying conclusions as to the actual incidence of divorce in the United States, depending on which criteria are used, it is apparent that the divorce rate is rising and has (with occasional dips such as during the Depression years) continued to rise steadily since the commencement of this century.<sup>60</sup> Today the United States has the highest rate of divorce of any nation of parallel culture and development in the world.<sup>61</sup> In view of these facts, our divorce laws are seen as in need of "tightening up";<sup>62</sup> divorce is too easily granted, if not in one state then certainly in another.<sup>63</sup> Divorce is seen as symptomatic

<sup>56</sup> BLAKE, *THE ROAD TO RENO* 237 (1962).

<sup>57</sup> Johnson, *supra* note 54.

<sup>58</sup> Gradwohl, *supra* note 50, at 438. For a recent vivid example of the frustration created by the recrimination defense, see *Fish v. Fish*, 4 Mich. Ct. App. 104, 143 N.W.2d 777 (1966) wherein the trial court, in denying the divorce petition because of the recrimination proved, felt nevertheless constrained to conclude that "these parties should not only be separated but should be compelled to live in different states but that doesn't make any difference, my opinion doesn't count for anything in this situation." *Ibid.*

<sup>59</sup> PLOSCOWE, *THE TRUTH ABOUT DIVORCE* 258 (1955).

<sup>60</sup> JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 90 (1959); BUREAU OF THE CENSUS, U. S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES*, Table No. 49, p. 52 (1963). A rising divorce rate is not necessarily a permanent phenomenon. It has been suggested that it may stabilize or even drop a bit by the middle of the next decade. Goode, *Family Disorganization*, in *CONTEMPORARY SOCIAL PROBLEMS*, 415 (Merton & Nisbet, eds. 1961).

<sup>61</sup> Pfaff, *Family Law and Marital Reconciliation Procedures in Europe* 6, ABA, Family Law Section, Monograph No. 3, March, 1966.

<sup>62</sup> Burgess, *Predictive Methods and Family Stability*, 272 *Annals* 47 (1950); cf., Alexander, *supra* note 52, at 169.

<sup>63</sup> Migratory divorce, federalism's major contribution to family law, often is the focus of attempts to discourage divorce and/or promote the effectiveness of a state's own laws. Thus, the Uniform Divorce Recognition Act [NEB. REV. STAT., § 42-341 (Reissue 1960)] provides that

of the disintegration of the family as an institution,<sup>64</sup> productive of emotional disturbance and delinquency,<sup>65</sup> and a costly drain on the public treasury of funds required to support dependent wives and children whose principal source of support has vanished.<sup>66</sup>

Proposals for divorce law reform vary, depending on which view one takes of the problem. For those who consider it as one of disparity between the idea and the reality of marriage and divorce, the suggested change usually is one of the following: 1) the addition of a provision for granting a divorce following a stated period of separation;<sup>67</sup> 2) the abolition altogether of all grounds for divorce and the substitution therefor of a concept of "marriage breakdown";<sup>68</sup> or 3) the substitution of divorce by consent of the parties.<sup>69</sup> None of these proposals is, of course, entirely discrete from

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a foreign divorce shall be of no force and effect in the state if both spouses were domiciled in the state at the time the proceeding was commenced.

Lawyers also are adjured to work toward the preservation of family units now being dissolved in large numbers. Ogburn, *The Role of Legal Services in Family Stability*, 272 ANNALS 127, 131 (1950).

<sup>64</sup> Alexander, *supra* note 52, *passim*.

<sup>65</sup> Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 UTAH L. REV. 443 (1961); Furlong, *Dual Divorce Decrees and Conciliation in Contemporary Family Law*, 2 WILLAMETTE L. J. 134, 137 (1962); Ralls, *The King County Family Court*, 28 WASH. L. REV. 22, 27 (1953).

<sup>66</sup> Bodenheimer, *supra* note 65. It has been estimated that nearly 80% of divorced mothers have been forced to turn to outside employment to adequately provide for themselves and their children. Ralls, *supra* note 65.

<sup>67</sup> Foster, *An "Honest Ground" for Divorce in Pennsylvania*, 34 PA. BAR A. Q. 646, 649 (1963); McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 685 (1956); Ploscowe, *supra* note 59, at 261; Wadlington, *Divorce without Fault without Perjury*, 52 VA. L. REV. 32, 68 (1966); Walher, *Our Present Divorce Muddle: A Suggested Solution*, 35 A.B. A.J. 457 (1949).

<sup>68</sup> Bradway, *Family Dissolution—Limits of the Present Litigations Method*, 20 IOWA L. REV. 256 (1943); Ploscowe, *supra* note 59, at 256 (Professor Ploscowe advocates granting a divorce either because of marital disruption or following a period of separation); Sayre, *Divorce for the Unworthy: Specific Grounds for Divorce*, 18 LAW & CONTEMP. PROB. 26 (1953); VIRTUE, *FAMILY CASES IN COURT* (1956).

<sup>69</sup> Cantor, *The Right of Divorce*, 218 ATLANTIC MONTHLY 67 (1966); Carver, *Divorce: Statutory Abolition of Marital Fault*, 35 CALIF. L. REV. 99 (1947); Lasch, *Divorce and the Family in America*, 218 ATLANTIC MONTHLY 57 (1966); Redmount, *Analysis of Marriage Trends and Divorce Policies*, 10 VAND. L. REV. 513 (1957); Silving, *Divorce without Fault*, 29 IOWA L. REV. 527 (1944). Divorce by consent is, of course,

the others. The separation provision is premised on the belief that remaining apart for the specified time is conclusive evidence of the fact of "marriage breakdown." It is, furthermore, not without its element of consent. Indeed, the decision to separate in order to achieve this ground may be evidenced by a bilateral agreement between the spouses.<sup>70</sup> Moreover, the suggestion to add a separation provision usually implies placing it in the context of the typical fault-oriented statute. It thus becomes an additional "ground" for awarding a divorce.

Twenty-two states, together with Puerto Rico and the District of Columbia, now provide for divorce on the ground of living separate and apart without cohabitation for periods ranging from two to ten years.<sup>71</sup> Five states require a two year separation,<sup>72</sup> five require five years,<sup>73</sup> and eight states require three years.<sup>74</sup> Only one state, Rhode Island, requires the period of separation to be for ten years. Although these separation statutes are for the most part silent with respect to the condition of the marriage during and at the termination of the period of separation, occasional language may be found requiring further demonstration that the separation is "beyond any reasonable expectation of reconciliation,"<sup>75</sup> or that the "resumption of marital relations is not reasonably probable."<sup>76</sup>

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neither a novel nor unique approach to marriage dissolution. See, e.g., Montesquieu, *The Spirit of the Laws* (Haffner ed., 1949) 260, 261.

<sup>70</sup> See, e.g., N. Y. DOM. REL. LAW § 170(6) (McKinney Session Laws 1966) which provides for granting a divorce following a two year period of separation evidenced by the parties' filing of a written agreement of separation with the clerk of the county wherein either party resides.

<sup>71</sup> ALA. CODE, tit. 34, § 22(1) (1958); ARIZ. REV. STAT. ANN. § 25-312 (West, 1956); ARK. STAT. ANN. § 34-1202 (Bobbs-Merrill, Replacement, 1962); COLO. REV. STAT. ANN. § 46-1-1(J) (Supp. 1960); DEL. CODE ANN., tit. 13, § 1522(11) (1957); D. C. CODE ANN. § 16-403 (1961); IDAHO CODE ANN. § 32-610 (1947); KY. REV. STAT. § 403.020(1)(b) (1955); LA. REV. STAT. ANN. § 9-301 (1950); MD. ANN. CODE art. 16, § 24(5) (1957); MINN. STAT. ANN. § 518.06(8) (1958); NEV. REV. STAT. § 125.010 (1957); N. H. REV. STAT. ANN. § 458.7 (Supp. 1957); N. Y. DOM. REL. LAW § 170 (McKinney Session Laws 1966); N. C. GEN. STAT. § 50-6 (1950); N. D. CENT. CODE § 14-06-5 (1943); P. R. LAWS ANN., tit. 31, § 321(9) (1955); R. I. GEN. LAWS ANN. § 15-5-3 (1956); TEX. REV. CIV. STAT., art. 4629(4) (1958); UTAH CODE ANN. § 30-3-1 (8) (Supp. 1963); VT. STAT. ANN., tit. 15, § 551 (1958); WASH. REV. CODE ANN. § 247.07(6) (Supp. 1965); WYO. STAT. ANN. § 20-47 (1957).

<sup>72</sup> Louisiana, Minnesota, New York, North Carolina and Wyoming.

<sup>73</sup> Arizona, Idaho, Kentucky, Washington and Wisconsin.

<sup>74</sup> Arkansas, Colorado, Delaware, Maryland, Nevada, New Hampshire, Utah and Vermont.

<sup>75</sup> DEL. CODE ANN., tit. 13, § 1522(11) (1957); see also, MD. ANN. CODE, art. 16, § 24(5) (1957). Cf., N.D. CENT. CODE § 14-06-5 (1943).

<sup>76</sup> VT. STAT. ANN., tit. 15, § 551 (1948).

Although a number of writers have suggested it as a substitution for present fault statutes, the concept of marriage breakdown has so far failed completely to gain legislative recognition in the United States. While the concept of incompatibility might on its face appear to be a substantially similar approach,<sup>77</sup> the history of the few statutes which codify this ground indicates that its application is liberally larded with the concept of fault.<sup>78</sup> Divorce based on consent of the parties without a confirmatory period of separation has likewise failed in this country (as well as most of the rest of the world)<sup>79</sup> to achieve any significant degree of acceptance among scholars, and has received none from the several state legislatures.

Where the divorce problem is seen as indicative of the deterioration of the family as an institution and/or as one productive of more problems than it solves, the leading proposal for legal reform has been the addition of conciliation parts to the divorce courts.<sup>80</sup> Such services are seen as means of decreasing the number of divorces through use usually of voluntary procedures designed to relieve at least the immediate causes of marital conflict. Although reports of experience in some courts having a conciliation part indicate that these good offices are sometimes used by couples neither of whom had yet petitioned for a divorce, more commonly they are employed only after a petition has been filed. It is worth noting here that the petition filed usually alleges one or another of the "matrimonial offenses" provided as grounds in the particular statute.

Despite impressive scholarly and judicial support for the institution of conciliation facilities, they exist presently in varying

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<sup>77</sup> See, e.g., Cantor, *supra* note 69, at 68: "The simple but apparently unappreciated fact that marriages succeed or fail on the question of compatibility should make it clear that incompatibility is the only logical ground for divorce. . . ."

<sup>78</sup> Wadlington, *supra* note 67, at 44. See also Rutman, *Departure from Fault*, 1 J. FAMILY LAW 181 (1961). Divorce on grounds of incompatibility is presently permitted in only three states (New Mexico, Oklahoma, and Alaska) and the Virgin Islands. ALASKA STAT. § 09.55.110 (5) (c) (1935); N.M. STAT. ANN. § 22-7-1 (1953); OKLA. STAT. ANN., tit. 12, § 1271 (1953); V.I. CODE, tit. 16, § 104(a) 8 (1964).

<sup>79</sup> Japan is today the principal nation in which divorce by consent is explicitly provided. See WATANABE (WITH MAX RHEINSTEIN), *The Family and the Law: The Individualistic Premise and Modern Japanese Family Law*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 364 (Von Mehren ed., 1963).

<sup>80</sup> See Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353 (1966); McIntyre, *Conciliation of Disrupted Marriages by or Through the Judiciary*, 4 J. FAMILY LAW 117 (1964).

forms in only about fifteen states.<sup>81</sup> Although Michigan, California and Wisconsin have long had such provisions, it was not until following the conclusion of World War II (and very probably as a result of the temporary rise in the number of divorces following the war) that they began to receive more widespread attention. Despite its growing popularity, the success of conciliation in its present context remains today a matter of speculation and some doubt. A satisfactory analysis of its effectiveness has yet to be conducted.<sup>82</sup> Periodic followups of couples "reconciled" are some indicia of success; yet it is not known (or stated) the number of these couples for whom the entire procedure of divorce petition and reconciliation were merely pleas for outside intervention in the first place.<sup>83</sup> It is probable that a significant number of such cases do occur.<sup>84</sup> Furthermore, conciliation efforts may reach only a small proportion of the total number of divorce litigants.<sup>85</sup>

Both the theory of fault elimination and the advent of conciliation services spring from a common and uncontroverted public interest in the family, and in a public policy aimed at aiding it to flourish.<sup>86</sup> They do, however, reflect contrasting attitudes as to ex-

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<sup>81</sup> McIntyre, *supra* note 80, at 118.

<sup>82</sup> *Id.* at 131. Shipman reports that although the first marriage counseling departments were established in Milwaukee, Wisconsin and Cincinnati, Ohio in 1933, the history of their services has never been written and an investigation of their effectiveness has never been conducted. Shipman, *A Proposal for Revising Marriage License Procedure*, 27 J. MARriage & FAMILY 281, 282 (1965).

In a study of the New Jersey experience with two specially appointed masters to hold reconciliation conferences throughout the state, it was reported that only 2.7% of the 2,293 cases heard over a thirty month period were reconciled. [1960] REPORT OF THE NEW JERSEY SUPREME COURT'S COMMITTEE ON RECONCILIATION.

<sup>83</sup> Ralls, *The King County Family Court*, 28 WASH. L. REV. 22, 26 (1953); Alexander, *The Family Court—An Obstacle Race?*, 19 U. PITT. L. REV. 602 (1958).

<sup>84</sup> See Johnstone, *Divorce Dismissals: A Field Study*, 1 KAN. L. REV. 245 (1953). Divorce lawyers not uncommonly are consulted by a husband or wife who has no real intention of filing for or obtaining a divorce. O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 97 (1963).

<sup>85</sup> Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353, 366, 377 (1966).

<sup>86</sup> The public's interest in the family and hence with questions concerning its dissolution has been no better stated than by Mr. Justice Traynor, speaking for the majority in *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 863-64, 250 P.2d 598, 601 (1952): "The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation



actly the nature and extent of this public interest and hence what approaches should be employed in implementing it. On the one hand, the theory of fault elimination is grounded in the belief that the public's interest is in preserving only those marriages which may be characterized generally as "going concerns," that to do otherwise may often work more harm than good, and that the viability of a marriage is not and cannot be gauged in terms of isolated events to which different individuals react differently. The cause of conciliation, on the other hand, appears to be premised on the conviction that divorce is destructive, that the public interest is therefore in the preservation of the family unit whenever it is at all possible to do so, and that ameliorative efforts even in the face of existing grounds and in the context of a fault-oriented, adversary divorce process will be efficient to this end. Each of these strategies tends to exist independently of the other. Both have sufficient basis in reality to commend them to the consideration of divorce law "improvers." Yet each is elliptical to the extent that considerations in favor of the other predominate. To that extent their co-existence represents a point of potential conflict in public policy towards divorce. Thus, voluntary separation for a period of months or years reflects the view that where such a condition exists, it is improbable that the marriage can or should be continued. Reconciliation, on the other hand, undertakes to revitalize such a marriage if it appears at all possible. Yet where the parties have been separated for any appreciable length of time, the prospects of effecting a reconciliation appear rather dim.<sup>87</sup>

Moreover, where both conciliation and fault grounds exist under the same judicial roof, it seems confusing to the spouse to be told on the one hand that she has grounds for divorce, and on the other that she ought to attempt to maintain the marriage. In other words, grounds are not so important that further effort to preserve the marriage should not be attempted; but grounds *are* the only method whereby one can dissolve the marriage.<sup>88</sup> Fur-

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to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage. But when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted."

<sup>87</sup> This was the conclusion of the New Jersey Supreme Court Committee on Reconciliation. See note 82 *supra*.

<sup>88</sup> Foster reports that the reconciliation practice in the Milwaukee County Family Court is to avoid specific allegations of misconduct in a complaint for divorce in an attempt to eliminate the impediment to reconciliation which results from "incendiary divorce pleadings." Foster, *supra* note 85, at 359.

thermore, we in essence forestall resort to the court at an earlier (and presumably more hopeful) stage by specifying grounds as one's ticket to court. Of course, grounds as such may accrue at any time during the marriage. As a practical matter, however, grounds which occur early in a marriage are often overlooked (condoned) and most grounds are the culmination of a period of deterioration in the marriage relationship which extends over months or even years.<sup>89</sup> For this reason, court-based conciliation efforts are seen as offering "too little, too late."<sup>90</sup>

From an analysis of the literature, it is apparent that both views of our present situation with respect to divorce have much to commend them. Indeed, they stand in relationship to one another not so much as contradictions as examples of special pleading based on elliptical premises. There is no doubt that our divorce rate is high and that we ought to bend every reasonable effort toward reducing it, or at least preventing it from rising even higher. On the other hand, a significant factor in causing this rate may be the unrealistic approach which our divorce law takes toward the matrimonial condition; unrealistic law may, in other words, actually be conducive of divorce in some cases.

If this analysis is accurate and if it is agreed that both conciliation and non-fault approaches to marital dissolution possess kernels of quality worth preserving, and if it is agreed also that these two phenomena existing independently of one another pose contrasting and at times conflictual policies with respect to dissolution, it would seem worthwhile to undertake some means whereby the best of both policies might be melded into one coherent whole. Such a system would at once recognize on the one hand the virtual impossibility of specifying in advance all of the factors which are and should be recognized as affecting the viability of a marriage; and on the other hand, it would reflect the public policy of encouraging maintenance of the marriage whenever it appears reasonably possible to do so. And if we could at the same time accomplish some diminution in the ill will, trauma, and hardship which so often accompany the divorce granted today, we would be well on the road to nirvana. The challenge to do so is a tantalizing one.

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<sup>89</sup> Goode estimates the average "deterioration" period at about two years. Goode, *Family Disorganization*, in CONTEMPORARY SOCIAL PROBLEMS 445 (Merton & Nisbet, eds. 1961).

<sup>90</sup> Compare Johnstone, *supra* note 84, at 255.

#### IV. AN INTEGRATIVE APPROACH TO MARITAL PROBLEM SOLVING

It is submitted that such a system is a practical possibility. Its core would be the elimination of all of the current categorical grounds for divorce, both "fault" and "non-fault," and the substitution therefor of a judicial determination simply of whether, considering all relevant facts and circumstances, the marriage ought to be dissolved. Such a proposal was made by the writer to the Marriage and Divorce Revision Committee of the Nebraska Committee on Children and Youth. Although the proposal was favorably received by the Revision Committee members, it will not appear as part of the package of proposed amendments to Nebraska law which that group will submit to the 1967 session of the state legislature. It was agreed, however, that the proposal merited further public dissemination and comment. This paper represents an effort to further these ends. To promote an understanding of the discussion which follows, the complete text of the proposal is herein set out:

#### DIVORCE

1. A petition for absolute divorce may be filed by either or both spouses to a marriage. The petition shall allege that the condition of the marriage is such that it ought to be dissolved. No further pleadings shall be required.

2. Upon the filing of a petition, the court may cause an investigation to be made into the facts and circumstances of the marriage and the condition of the family and a report thereon to be furnished the court. The court may in its discretion request the parties to submit to psychiatric, psychological, social, or physical examination as part of such investigation and may adjourn the proceedings from time to time for these purposes. The court may order the use of court-connected conciliation facilities, where available, for investigative purposes.

Reports furnished the court pursuant to this section shall be deemed confidential communications and no disclosure thereof or of information on which such reports are based shall be made to any person or agency, other than the court, save with the express consent of the court and the parties to the proceeding; provided, however, that the court may in its discretion disclose the nature or contents of such report or information to the parties or either of them, and to their counsel.

3. Following an investigation conducted pursuant to § 2 above, and after hearing, a decree of dissolution shall be granted the spouses, or either of them, where there is substantial evidence that, by virtue of deep-seated and irretrievable disruption of the matrimonial relationship a restitution of a community of life corresponding to the nature of marriage cannot reasonably be expected. In making its determination the court shall consider, where applicable, the following together with all other relevant factors:

- a) The degree of physical and emotional compatibility existing between the spouses;
- b) The present physical separation of the spouses, regardless of the length of such separation or the reasons therefor;
- c) The physical and emotional health of any minor children residing in the marital household;
- d) Habitual intemperance or use of narcotic drugs on the part of either spouse;
- e) Repeated acts of physical or emotional cruelty sufficient to constitute a course of conduct by either spouse;
- f) The mental illness of either spouse;
- g) Prolonged physical illness of either spouse;
- h) The length of the marriage;
- i) The number and ages of children of the marriage and their emotional relationship to each spouse;
- j) Relationships between either spouse and third parties;
- k) Prior efforts at reconciliation by either or both spouses;
- l) Other factors of like nature to those enumerated in (a) to (k) above and which appear relevant in determining the viability of the marriage.

Hearings conducted pursuant to this section shall be closed to all persons except the parties to the proceeding, members of their families, their counsel, and such other individuals as may to the court appear appropriate, considering the nature of the proceeding.

4. If, after investigation and hearing conducted pursuant to §§ 2 and 3 above, the court determines that the marriage should not be dissolved, it may in its discretion nevertheless recommend that the parties, or either of them, undertake, either at their own or the public expense, such counseling, medical or other treatment as may appear necessary to strengthen and reinforce the marriage and family relationship so as to prevent its further deterioration, or its dissolution.

5. The provisions of §§ 1 through 4 shall be construed to the end that the marriage relationship shall be preserved whenever it appears reasonably possible and appropriate to do so and shall be peaceably and amicably dissolved when it is not.

6. The defenses to a petition for divorce of condonation, recrimination, connivance, and collusion shall be and are hereby abolished.

Labels are at least useful as shorthand references. Denominating the above as an "integrative" approach seems most descriptive: the public policies reflected variously in non-fault grounds and in conciliation statutes are here integrated into one statute; the nature of marriage as an on-going, integrated enterprise is reflected as well.

An integrative statute would appear on first impression to represent a broad departure from "traditional" approaches to divorce. Given the widening development both of non-fault grounds and of

conciliation services, however, it is no more than the next step in the development of the policies on which each of those approaches is based. Moreover, even within the traditional fault concept there has developed the attitude that more than the occurrence of external events as such must be demonstrated before a divorce will be granted. This attitude is brilliantly reflected in Justice Traynor's discussion of the defense of recrimination in *DeBurgh v. DeBurgh*.<sup>91</sup> It has been acknowledged as well by the Nebraska Supreme Court in cases involving extreme cruelty, although it may be questioned whether the factor is not more a standard against which the quantum of cruelty necessary to suffice for granting the divorce is measured, rather than an independent, additional criterion.<sup>92</sup>

In addition, the integrative statute is not unlike certain provisions in the divorce statutes of several other countries.<sup>93</sup> The difference lies in the extent to which the court, as society's agent, will involve itself in determining independently the claims of the parties, the actual condition of the marriage and in prescribing a program of reconciliation where it appears productive. The laws of neither West Germany, Sweden, nor Switzerland provide for court investigation,<sup>94</sup> and Sweden stands alone among the three in its requirement that the parties appear before a "mediator" before the court acts on a joint petition of separation.<sup>95</sup> More analogous to these European approaches are the few incompatibility statutes in this country. But whatever rationale may once have existed for its use, it is now clear that attempts to incorporate an incompatibility provision into the traditionally fault-oriented statute are bound not to succeed, for either it will be given a gloss of fault by the courts or, if given a truly non-fault interpretation, it would rapidly become the exclusive allegation of the petition.<sup>96</sup> Moreover, the policy which such provisions reflect has been supplanted

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<sup>91</sup> *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 250 P.2d 548 (1952).

<sup>92</sup> See discussion *supra* at note 22 et seq.

<sup>93</sup> Notable among those countries including a "breakdown" provision in their divorce law are West Germany, Switzerland and Sweden (based on separation). The breakdown principle in general and the West German statute in particular are discussed in W. FRIEDMAN, *LAW IN A CHANGING SOCIETY* 211 (1959); the Swiss Code is discussed in RUSSOTTO AND SAMUEL, *SWISS FAMILY LAW* (1965); and Swedish divorce law is discussed in SCHMIDT & STRÖMHOLM, *LEGAL VALUES IN MODERN SWEDEN* 41 et seq. (1964).

<sup>94</sup> *Ibid.*

<sup>95</sup> Schmidt & Strömholm, *supra* note 93, at 44.

<sup>96</sup> Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 52 (1966).

by the emerging policy, reflected in conciliation statutes, of aiding in the preservation of the marriage.

The integrative statute does, however, possess certain unique features. "Grounds" as such are eliminated altogether. Where they are thought to represent a relevant condition in determining the state of the marriage, they are specified as such (e.g., intemperance, mental illness), not as determinative of the issue but as factors to consider. The statute also provides for an immediate investigation and hearing on the petition without any preliminary efforts (voluntary or mandatory) at reconciliation. Consultation with the husband and wife themselves may, of course, constitute a part of the investigation, and such consultations would almost necessarily include inquiry into the possibilities of a reconciliation. But by foregoing attempts at reconciliation prior to a hearing it is felt that feelings of ambivalence and frustration over the delay, and attempts which will prove futile despite an apparent willingness of one or both parties will be avoided.

Finally, where after a hearing on the present state of the marriage the court declines to award a decree of dissolution, it may only *advise* (based on the reports and evidence adduced at the hearing) that the parties undertake a program of reconciliation. Public facilities, or public funds to engage private facilities ought to be provided to support those individuals whose finances do not permit them feasibly to pay for such services themselves.

In light of these unique features and notwithstanding the analogies which the statute bears to law both in this and other countries, it does represent a major shift in divorce policy. As a result it is susceptible to misunderstanding and unfavorable comment. It would seem worthwhile, therefore, to undertake some prolepsis concerning the proposal, together with a discussion of its advantages and potential disadvantages.

Perhaps most serious of the criticisms by those individuals who have so far considered the integrative statute is that it is in substance divorce by consent. A fair reading of the statute as a whole would seem to belie this conclusion. Taken as a whole, the statute is designed to create the basis for an *independent* judicial determination that the marriage should be dissolved. The attitudes and desires of the parties are, of course, relevant to the issue of viability; but they are by no means conclusive of that issue. The chickens are not considered finally to be the best judges of the eggs; and even if they were, the public retains an interest which ought to be protected through judgments other than those of the parties themselves. In this sense, it may even be said that the inte-

grative statute represents a retreat from present divorce policy—certainly from present practice. It is hornbook knowledge that most divorces granted today are consented to by both spouses, that particularly where they are uncontested they are already a “joint venture” of the parties.<sup>97</sup> If the consent divorce is a problem, should we not eliminate the *ex parte* divorce?

In all candor it must be said, however, that under the integrative statutes there would eventually come a time when most petitions seeking dissolution would be granted. This is likely to occur, for example, as the public comes generally to recognize that isolated events are not per se sufficient to warrant granting a divorce. This should lead to greater efforts on couples' part to adapt to the specific conditions of their marriage, and to resort to the courts only when an honest effort has been made at making the marriage work. In turn the number of petitions should be reduced.

A second criticism, and one perhaps more difficult to respond to in advance, is that the standards established in the statute are vague and ambiguous. This is, of course, true; it is equally true of any statute which has not yet been applied to the facts of a particular case. In fact, however, it is doubtful whether the ambiguity of the statute would pose serious problems for a judge who, by the time he takes the bench, certainly will be sufficiently mature and have enough professional and personal experience to apply the flexible standard with sufficient precision. The judge is not required, however, to limit himself to this kind of “I know it when I see it” approach. Criteria believed to be important in aiding his judgment are provided. Indeed, he is directed to consider them where they are present. In addition, the court is provided with an investigation report as a further aid to his decision. The use of similar reports of pre-sentence investigations is required in the federal courts on criminal matters. Moreover, the use of such reports is presently provided for in Nebraska in divorce cases where the custody of minor children is involved.<sup>98</sup> The question addressed in such investigations is not entirely dissimilar to that posed by the integrative statute.

Legislation incorporating flexible standards is not without precedent in our law. In the juvenile courts, for example, the problem of standards has for years concerned lawyers and judges. In

<sup>97</sup> Cantor, *The Right of Divorce*, 218 ATLANTIC MONTHLY 67, 71 (1966); O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 27 (1963); Rheinstein, *Trends in Marriage and Divorce Laws of Western Countries*, 18 LAW & CONTEMP. PROB. 3, 18 (1953); Sayre, *Divorce for the Unworthy: Specific Grounds for Divorce*, 18 LAW & CONTEMP. PROB. 26, 27 (1953).

<sup>98</sup> NEB. REV. STAT. § 42-307 (Reissue 1960).

the present Nebraska statute dealing with neglect, a neglected child is defined in part as "any child under the age of eighteen years . . . (b) who *lacks proper parental care* by reason of the fault or habits of his parent . . . ."<sup>99</sup> With respect to the custody, care and maintenance of minor children following a divorce, the court is granted authority to make such "further decree as it shall deem *just and proper*. . . .";<sup>100</sup> and its decree may be later amended if it appears to be to the *best interests* of the children . . . ."<sup>101</sup> What constitutes "proper parental care?"; When is a decree "just and proper," or in the "best interests of the child?" These standards are, it is submitted, fraught with vagueness and ambiguity. Yet judges, while admitting the difficulty of the application in many cases, nevertheless have not shied away from interpreting and applying them. Couching the mandate to act in such terms appears to be no more than an implicit recognition that decisions in specific cases will depend on considerably more factors and circumstances than can reasonably be expected to be incorporated in a statute. What constitutes a prescription for a child's "best interests" in one case may well spell disaster in another. And so it is with marriage. The Brown's may weather vicissitudes of married life that for the Smith's would cause disintegration of the relationship.

No legislative standard is without some ambiguity. The very fact that language is symbolic dictates this circumstance. The amount of permissible ambiguity would seem to depend, first, on the possible results of misapplication; second, on the likelihood of such misapplication; and third, on the goals sought to be achieved by the particular provision. Where the goal is important to the social order and the results of misapplication are neither serious nor irreversible, the possibility of some misapplication of the standard may be more tolerated than where the goal is less important or the result of error serious. The goal that the integrative statute reflects is that of preserving a marriage where it appears reasonably possible to do so; the result of misapplication would in most cases mean only a temporary continuation of an unfortunate situation. The possibility of some misapplication should therefore be condoned.

A third criticism is that judges are not competent to make such judgments in the first place. This objection appears bottomed on a mechanistic view of the judicial function which, if accurate, would mean that we might immediately proceed to eliminate human judges altogether and substitute in their place electronic computers, very

<sup>99</sup> NEB. REV. STAT. § 43-201(3) (Supp. 1965). (Emphasis added.)

<sup>100</sup> NEB. REV. STAT. § 42-311 (Reissue 1960). (Emphasis added.)

<sup>101</sup> NEB. REV. STAT. § 42-312 (Reissue 1960). (Emphasis added.)



probably with a considerable saving to the county and state both in time and money.<sup>102</sup> The proposal is not entirely without merit. There are, of course, many areas of the law in which a less flexible approach might represent some improvement. Family law has, however, never been thought to be one of them—and for good reason. Decision-making in this area with respect both to adjudication and disposition has always been thought to require a refined balancing of the interests of the individual and of society as a whole. Again we may look to the juvenile courts for models.

From its inception at the turn of the century, both the proponents and opponents of a separate, treatment-oriented juvenile court have agreed that a key figure in the system is the judge. It is the judge who in the last analysis must apply the principles of "individualized justice" to rehabilitate rather than punish the young offender. Necessarily, therefore, it is the judge who must possess an insight and understanding of the complexities of childhood and adolescent behavior—indeed, of human behavior generally—beyond that thought to be required of judges generally. Unfortunately, selection of the juvenile court judge has not always been made with such considerations in mind. To a remarkable extent, however, juvenile court judges, especially in the larger metropolitan areas throughout the country, have been men of remarkable insight and sensitivity to their tasks. Some judges possess professional training not only in law but in one or another of the behavioral sciences (characteristically, social work) as well. Even where they have not, however, careful judicial selection has produced a corps of judges who for the most part are *prima facie* competent to fulfill their specialized role.

The specialized domestic relations judge thought to be necessary to man the suggested procedure<sup>103</sup> under the integrative approach thus is not without his paradigm in present practice. In addition, however, increasing attention is being devoted to judicial training. While it has more than once been said that the law schools do better at training students to be appellate court judges than practicing members of the bar, it is in any event true that they do little to train students in the fine art of judgment at the trial level. A landmark among recent efforts attempting to rem-

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<sup>102</sup> "Victims of neophobia" appear to be particularly susceptible to this view. Alexander, *Introduction to VIRTUE, FAMILY CASES IN COURT* at xxxiv (1956).

<sup>103</sup> Chute, *Divorce and the Family Court*, 18 LAW & CONTEMP. PROB. 49, 50 (1953); Ogburn, *The Role of Legal Services in Family Stability*, 272 ANNALS 127, 131 (1950); compare Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 663 (1956).

edy this lack of training is the National College of Trial Judges. The National Council of Juvenile Court Judges, building on the pioneering efforts of the National College, has recently completed a three year demonstration training program for juvenile court judges designed to enhance their interdisciplinary skills. Care in judicial selection coupled with provision for post-graduate training should prove an effective combination in providing domestic relations judges competent to meet the test established in an integrative statute.

As pointed out earlier in this paper, some writers have suggested that the problem to be met in our divorce legislation is that of a rising divorce rate which is seen as posing a threat to the family as a fundamental social institution. The breakup of a particular family is thought also to create serious problems where children are involved in establishing the conditions which produce delinquent conduct or emotional disturbance. It is argued that the abolition of all grounds for divorce will render divorces easier to obtain. Hence there will be more of them and more of the problems they are thought to generate. The apprehension is similar to that generated by a consent divorce approach.

It ought to be sufficient answer to this argument to point out once more that, admitting the validity of these suppositions, the situation would under an integrative statute differ very little from our present one. Provided one's ethics are "situational" enough, divorce currently is not at all difficult to obtain. The argument that the divorce rate will increase does, however, provide the opportunity for discussing certain additional facets of the problem which deserve attention in order to advance an understanding of the merits of the integrative approach.

The nature of the modern marriage contrasts markedly with the marriage of one hundred or even sixty years ago. Whereas the family at an earlier period functioned in large measure as an economic unit with income producing roles assigned to all but its youngest (and perhaps oldest) members, this task is today the primary (and still usually exclusive) function of the husband and father. Additionally, this activity is today usually performed outside the home. The differential roles of husband and wife, income production on the one hand, housekeeping and child-rearing on the other, are thus separated both in time and place. Functions such as food preparation, education of children, and recreation, previously assigned the family, now are performed for the most part outside the home. The role of the family as an economic and social unit of society thus has diminished over what it was in the

past.<sup>104</sup>

Accompanying this shift in the family role, there has been an increase in the impersonality of economic and social relationships outside the home. As the size of most communities has expanded, business and social relationships have tended to be carried on at a less personal level. Technological advance (e.g., substitution of the dictating machine for the secretary) has contributed to this development. The increase in leisure time available has meant less contact with business and professional associates.

These developments (there are others) are seen as dictating the creation of new roles for the modern family—ones in which considerably more importance is attached to the fulfillment of satisfying interpersonal needs of its members. Emphasis not so much on what is done but how and with whom thus becomes intensified. Particular roles within the family—the expectations placed upon its several members—have thus become less clear. Consciously or otherwise, they seek “satisfying” relationships with one another. As Goode has pointed out in describing the significance of the substitution of the independent conjugal family system for that of the extended family of an earlier day:

This type of family system, characteristic of the West for several generations . . . requires that husband and wife obtain most of their emotional solace within the small family unit made up of husband, wife and children . . . . The conjugal family unit causes a heavier emotional burden when it exists independently than when it is a small unit within a larger kin fabric. As a consequence, this unit is relatively fragile. When husband or wife fails to find emotional satisfaction within this unit, there are few other sources of satisfaction and few other bases for common living.<sup>105</sup>

It may be expected, therefore, that the increased demands placed upon the marriage partners will result in some increase in their lack of attainment and hence an increase in the desire to terminate the relationship. The current divorce rate thus becomes, in part, “an index of the new demands made upon marriage for sociability and leisure,” demands which not only begin high but include the “expectation that each partner grow and develop at approximately the same rate as himself.”<sup>106</sup> It is plain, however,

<sup>104</sup> Goode, *Family Disorganization* in CONTEMPORARY SOCIAL PROBLEMS (Merton & Nisbet, eds. 1961).

<sup>105</sup> *Id.* at 409.

<sup>106</sup> RESMAN, GLAZER & DENNEY, *THE LONELY CROWD* 320 (Anchor Abr., 1953). It has been suggested that one reason for the higher divorce rate of Americans compared with Australians is that the latter expect less from their marriage. “[T]he Australian ‘would prefer to reduce his needs in order that they may be fulfilled.’” Day, *Patterns of Divorce*

that the conditions generally established by law for the dissolution of a marriage may be, when viewed in the total context of modern marriage, irrelevant, incidental, or at most symptomatic of a considerably more complex underlying problem.

Another factor to be considered in evaluating the criticism of an increasing divorce rate is the fact that while that rate itself has increased in the last century, the rate of family dissolution as a result of all causes has not increased. The death of a marriage partner previously accounted for a larger proportion of marital dissolutions than today. Divorce today appears, therefore, only to be accomplishing what earlier transpired in the course of natural events.<sup>107</sup>

In evaluating the significance of a rising divorce rate, it is also important to distinguish between its significance for a *particular* family and its significance with respect to the family as an *institution*. It cannot seriously be doubted that divorce for a particular family may be a regrettable event for its members. Indeed, that such is often the case is a major theme of this paper. On the other hand, there seems to be no reliable evidence to support the belief that increased divorce threatens the institutions of marriage and the family. The rate of marriage tends to remain relatively constant in proportion to the population; and a large majority of men and women who do divorce eventually remarry.<sup>108</sup>

Contrary to the assumption that divorce threatens the family as an institution is the assertion that divorce actually vindicates it. Despite the facts that considerably greater demands are today placed upon the marriage partner, this has not resulted in any measurable discouraging of those even who have experienced dissatisfaction and disappointment. Marriage remains an attractive status for most individuals. And for those who experience dis-

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*in Australia and the United States*, 29 AMERICAN SOCIOLOGICAL REV. 509, 521 (1964).

<sup>107</sup> Shaffer, *Divorce Law Reform*, 2 EDITORIAL RESEARCH REPORTS, 865, 866 (1963). Furthermore, the divorce rate appears to have been declining since the 1950's. *Ibid*.

<sup>108</sup> The probabilities that a divorce partner will remarry are in general about three out of four. Davis, *Statistical Perspective on Marriage and Divorce*, 272 ANNALS 9, 19 (1950); ERNST & LOTH, *FOR BETTER OR WORSE* 2 (1952); Glick, *American Families* 135 (1957); Jacobson, *American Marriage and Divorce* 82 (1959). These probabilities are somewhat greater for men and decline with age for both sexes. *Ibid*. In Nebraska in 1965, 25% of all marriages performed in the state were ones in which one or both of the parties had previously been divorced. NEB. DEP'T OF HEALTH, *STATISTICAL REPORT OF THE BUREAU OF VITAL STATISTICS* 69 (1965).

satisfaction and disappointment in a particular marriage, divorce provides an opportunity to attempt once again the achievement of the goals available only or primarily through marriage and the family. Divorce thus becomes a form of "social insurance" the cost of which should not be made unreasonably high.<sup>109</sup>

Very little study has been made of the relationship between divorce grounds and divorce rate. Those few inquiries that have been made, however, indicate that there is no significant correlation between the two phenomena. Among the leading treatments of the subject is Wolf, Luke, and Hax's discussion of the differential impact on divorce rates of changes in the divorce laws in effect in Germany before and after 1900.<sup>110</sup> Prior to 1900, several different laws were in force. In Prussia, for example, divorce was permitted not only on the ground of "misconduct," but generally also by marital agreement as well as on the unilateral petition of one spouse based upon the "insuperable aversion" to the other. The German common law prohibited altogether divorces by Catholics, and only on grounds of adultery, cruelty, or desertion by Protestants. Under the third system, the Code Napoleon, divorce was permitted only on grounds of cruelty, which was, however, defined more liberally than under German common law.

Under the Civil Code of 1896 (which became effective in 1900), "guilty misconduct" was made the exclusive grounds for divorce. The law thus was liberalized with respect to prior German common law and constricted with respect to the earlier Prussian Code. Comparing the numbers of petitions for conciliation in the several regions and the divorce rate per 100,000 population before and after 1900, the authors conclude that the change in the law had no significant impact either in promoting or discouraging divorce. In fact, in some districts where the change represented a restriction of prior law, the upward curve of divorce was even steeper than before. In 1939 the divorce law was considerably liberalized. Again, however, there seems to have been no significant impact on the divorce rate. Based on these findings, the authors conclude that:

The experiment made by the makers of the Civil Code refutes the notice [sic] that a limitation of the statutory catalogues of grounds

<sup>109</sup> Lasch, *Divorce and the Family in America*, 218 ATLANTIC MONTHLY 57, 60 (1966). And see Goode, *supra* note 104, at 410: "... the blanket term 'disorganization' does not seem to be applicable." It appears also that second marriages are in many cases happier than first ones. Goode, *Compulsory Counseling—in Divorce and Domestic Relations—A Compilation*, 2 VA. L. WEEKLY DICTA COMP. 76 (1949).

<sup>110</sup> WOLF, LUKE & HAX, *DIVORCE AND DIVORCE LAW: BASIC PROBLEMS OF DIVORCE IN GERMANY* (1959), reviewed in Rheinstein, *Divorce and the Law in Germany: A Review*, 65 AMERICAN J. OF SOCIOLOGY 489 (1960).

for divorce to situations of guilt could result in a reduction of the number of divorces or even in their rate of increase. On the other hand, the present marriage law has refuted the apprehension that the introduction of the disruption principle [in 1938] would materially result in an increase of divorce. No causal or even statistical connection exists in one direction or the other.<sup>111</sup>

A study<sup>112</sup> conducted by the Metropolitan Life Insurance Company for the years 1910 to 1948 reflects similar results with respect to divorce rates in England and Wales where, under the same law, divorce rose from 2.2 per 1,000 marriages in 1911 to a rate of 12.9 in 1936, an increase of nearly 600 per cent. Particularly relevant with respect to the proposals made by this writer for revision of Nebraska divorce law is a study comparing divorces in Nebraska for the years 1940-1950 with those of the preceding decade,<sup>113</sup> in which it was found not only that divorces in the later decade had increased by over one-third, but also that the divorce rates in Nebraska counties appear to increase in proportion to the urbanization of the county. In a later inquiry undertaken to determine which factors appeared to contribute most to this difference, it was concluded that the percentage of "foreign population" and "income level" were both significant variables.<sup>114</sup>

While it may be an overstatement to conclude on this sparse data that the immediate, direct and measurable influence of legislation is unimportant or imperceptible,<sup>115</sup> it does seem apparent that forces other than the law itself are at work in determining the incidence of divorce at a given time and place.

It has been suggested in this paper that the design of an integrative divorce statute is promotion of the maintenance of healthy, viable marriages. This is in contrast to efforts at preserving marriages indiscriminately—in an approach which simply discourages

<sup>111</sup> Quoted in Rheinstein, *supra* note 110, at 498. (Emphasis added.)

<sup>112</sup> Reported in Elliott, *Divorce Legislation and Family Instability* 272 Annals 134, 140 (1950).

<sup>113</sup> Cannon, *An Analysis of Divorce in Nebraska* (Neb. Agriculture Experimental Station, Research Bull. No. 174, 1954).

<sup>114</sup> Cannon & Gingles, *Social Factors Related to Divorce Rates for Urban Counties in Nebraska*, 21 RURAL SOCIOLOGY 34 (1956).

<sup>115</sup> A positive correlation between the law's "permissiveness" and the incidence of divorce has been suggested by one writer, but with respect only to urban areas. BROEL-PLATERIS, *Associations Between Marriage Disruption, Permissiveness of Divorce Laws, and Selected Social Variables*, in CONTRIBUTIONS TO URBAN SOCIOLOGY 512, 524 (Burgess & Bogue, eds. 1964). It has been suggested also that where divorce is easy to obtain in one jurisdiction and more difficult in another, the cases will accumulate in the former and "dry up" in the latter. Rheinstein, *supra* note 103, at 641.

divorce. The implication is that some marriages should be dissolved. This assertion is in need of some support. However, as with determination of the impact of divorce statutes on divorce rates, so also with questions involving the benefits from dissolution (or detriments from preservation) of the marriage, supporting empirical data is scarce. There seems to be common agreement, however, among professionals who have worked with disturbed spouses, parents and children that many of their problems have been caused by the failure of members of the family unit to fulfill fundamental psychological needs of the individual.<sup>116</sup> More especially, in the present state of affairs, a process of deterioration in the marriage extending sometimes over months or even years precedes the eventual resort to the divorce court. Often in such cases, the process has continued too long for it to be reversed. In such circumstances, divorce is seen as a relief from the pathological environment of the marriage, the healthiest course of action then available.<sup>117</sup> For children of the marriage, especially, the quality of their childhood experience is the controlling factor, not whether they have experienced a divorce in the family.<sup>118</sup> And a child may be damaged or destroyed in many ways in a bad home.<sup>119</sup>

It is perhaps worth reiterating here what has been said above concerning the doubtful effect of divorce on deviant conduct subsequently, particularly by the children involved. In a study<sup>120</sup> analyzing a self-report questionnaire completed by 700 high school students in grades nine through twelve to determine "whether children are better adjusted in homes psychologically broken but legally and physically intact compared with legally broken homes," the conclusion was that, as a group, the adolescents from the broken homes demonstrated less delinquent behavior, less psychosomatic illness, and better adjustment to parents than did those

<sup>116</sup> See, e.g., Johnson, *Suppressed, Delayed, Damaging and Avoided Divorces*, 18 LAW & CONTEMP. PROB. 72 (1953); Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807 (1944); Sarnoff, *Society with Tears* (1966).

<sup>117</sup> Plant, *supra* note 116, at 813.

<sup>118</sup> Goode, *supra* note 104, at 455.

<sup>119</sup> One psychiatrist has listed eleven different ways in which the child being raised in a pathological home environment may be emotionally (as well as physically) damaged. Johnson, *Suppressed, Delayed, Damaging and Avoided Divorces*, 18 LAW & CONTEMP. PROB. 72, 77 (1953).

<sup>120</sup> Nye, *Child Adjustment in Broken and in Unhappy, Unbroken Homes*, 19 MARR. & FAM. LIV. 356 (1957). Similar findings have been reported by others. See Burchinal, *Characteristics of Adolescents from Unbroken, Broken, and Reconstituted Families*, 26 J. MARRIAGE & FAMILY 44 (1964). Compare, STERNE, *DELINQUENT CONDUCT AND BROKEN HOMES: A STUDY OF 1,050 BOYS* (1964).

from unhappy, unbroken homes. Similar conclusions were reached with respect to the children of "solo" parents.<sup>121</sup> Furthermore, the adjustment (measured as satisfying "parental interaction") of parents individually and to their spouses was, for those who were products of broken homes, superior to those spouses from unhappy, unbroken homes.<sup>122</sup>

Despite the fact, therefore, that the personalities of some marriage partners are such as to require a pathological balance in their marital relationships which for normal individuals would dictate release from the situation,<sup>123</sup> the conclusion seems inescapable that some marriages ought to be dissolved for the benefit of all concerned. It is simply not true as a general statement that the children and spouses of a marriage are always better off remaining together despite the quality of their relationships. The goal of the law should therefore not be simply to preserve the marriage, but to preserve the family. And while it is, as noted above, problematical, the impact the law has on the divorce rate as such, there should be no cause for alarm even if it rises. Obviously, more is at stake in considering questions of divorce than their sheer number.

No change in law is wholly unaccompanied by uncertainty; certainly a statute such as the one herein proposed is no exception. It is felt that the larger share of reservations, doubts, and objections have, however, been met in the foregoing discussion. Still, no proposed change in law should be forced to depend for support wholly on its unobjectional quality. There ought to be positive reasons why it is to be preferred over existing law. What follows is an attempt to enumerate some of these reasons, all of which may properly be subsumed under the major heading "realism."

Realism, however, is an elusive concept with respect especially to the interactive relationship between law and social behavior generally. We are wont to believe that law exerts a force on the conduct of the community, but the questions of how much force it in fact exerts and under what conditions have so far defied accurate assessment. Moreover, it is unlikely that completely accurate answers to these questions may ever be given. The studies discussed above indicate that factors other than law alone are influential in controlling and determining human behavior, but they consider neither the extent to which the law itself is a product of

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<sup>121</sup> Nye, *supra* note 120, at 359.

<sup>122</sup> *Id.* at 361.

<sup>123</sup> See, e.g., Snell, Rosenwald & Robey, *The Wifebeater's Wife*, 11 ARCHIVES OF GENERAL PSYCHIATRY 107 (1964).



other factors nor the interactive nature of the law and other social conditions. It seems, nevertheless, reasonable to assume that, "law is instrumental in making choices and in organizing value systems. Searches for immutable connections between legal institutions and other cultural elements have not been successful, but the evidence at least seems capable of supporting the conclusion that *law and other cultural elements influence each other*."<sup>124</sup>

In the field of sanctions law generally, we presume that proscribing certain conduct will in most situations result in its abandonment. Thus, prohibition against speeding, or driving on the left side of the street results usually (although not always) in their relinquishment. Such laws are obviously necessary for the orderly flow of traffic in any volume. In addition to the results which they achieve based on their apparent necessity, however, such rules seem to emanate a kind of ethical quality, quite apart from and in addition to their need to achieve the primary goal for which they are intended.<sup>125</sup> This emanation we may call "law-abidingness." It carries an ethical quality about it similar to that which accompanies morally as well as legally sanctioned conduct. It is that quality of law which results in adherence to it even in the absence of necessity.

Law-abidingness as an independent referent of either prescribed or proscribed conduct results in an adherence to the rule for its own sake. By infusing the rule with an ethical or moral quality, a course of conduct which adheres to the rules may be concluded to be "right" conduct. Correlatively, a violation of the rules may be concluded to be not merely "illegal" but "wrong" as well. Stated somewhat differently, conduct which is not determined to be "wrong" may be concluded to be "right."

Applying these generalizations to a fault-oriented divorce statute, we may reason that the non-violation of the proscriptions embodied in the several grounds for divorce will be viewed as right conduct. Divorce grounds specify what must *not* be done within the framework of the marriage. The inference is, of course, that

<sup>124</sup> DAVIS, FOSTER, JEFFERY & DAVIS, *SOCIETY AND THE LAW* 55 (1962). See also, TIMASHEFF, *THE SOCIOLOGY OF LAW* 355 (1939). For a discussion of the problems involved in undertaking an assessment of the effect of law on the conduct of individuals, see Lemert, *Strategies of Research Design in the Legal Impact Study*, 1 *LAW & SOCIETY REV.* 111 (1966).

<sup>125</sup> "... [O]ur ethical principles are in great measure the product of positive law; and . . . positive law itself provides principles of ethics, indeed, in a great many cases, no extra-legal ethical principle exists." HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 341 (2d ed., 1960). Compare SHKLAR, *LEGALISM* (1964).

the marriage is in the eyes of the law a successful one—necessary of preservation. What may realistically be termed as the legal minima for marital preservation thus becomes the maxima as well—or at least insofar as the law is concerned.

The results of such a perception of marriage—viewed through the lens of the traditional divorce statute—are not difficult to imagine. The husband who remains faithful to his wife, avoids beating her, and pays the bills is led to believe that his marriage is "successful." Despite doubts which gnaw at this belief and which may be reinforced by conflicts which emerge from time to time within the relationship, he is permitted to continue in his belief that his law-abidingness will emerge victorious in the end.<sup>126</sup> Without more, such hopes are a mere chimera. As a result, the relationship is permitted to deteriorate to the point where either legally recognized grounds occur, or the situation becomes so intolerable that grounds are created or fabricated. At this point, the spouses make their first contact with the courts.

On the other hand, the individual who views the marriage as a process of abiding by the rules may himself sooner or later fall "victim" to their violation.<sup>127</sup> While the isolated instance of rule infraction (e.g., adultery) is less apt to lead to the conclusion that the marriage is ripe for dissolution,<sup>128</sup> the very fact that a rule has been violated may nevertheless so color and affect the marriage relationship as to commence that process of deterioration which leads ultimately to the courthouse door in the same manner as that described above and with the same result.

Where the deterioration of the marriage has been permitted to extend over months or years, there is very little that can be done to rebuild it into an ongoing enterprise. Judge Paul Alexander summed up the situation by describing his function in a divorce suit as analogous to that of a high priced mortician presiding at the funeral and burial of a dead marriage.<sup>129</sup> Where one of the spouses seeks a divorce "merely" because one of the rules has been broken there would seem to be more hope for resuscitation. Yet even here the courts provide little more than judicial first aid.

<sup>126</sup> See Cantor, *The Right of Divorce*, 218 *Atlantic Monthly* 67, 68 (1966).

<sup>127</sup> "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." Bradway, *The Myth of The Innocent Spouse*, 11 *TUL. L. REV.* 377, 384 (1937).

<sup>128</sup> *Suggest New Basis for Divorce*, 83 *CHRISTIAN CENTURY* 1023 (1966).

<sup>129</sup> University of Chicago Conference on Divorce 51 (1952); quoted in PLOSCOWE, *THE TRUTH ABOUT DIVORCE* 248 (1955).

The integrative divorce statute is designed to deal more effectively with each of these situations. It is submitted that by eliminating the grounds for divorce as such we may hope to eliminate the notion that marriage is a set of rules failing in the transgression of which one may be successful at it. We cannot, of course, possibly attempt to enumerate every feature of a successful marriage relationship. We can, on the other hand, undertake to eliminate the misguided belief that success is determined by obedience to rules and failure by the lack of it.

It is submitted further that by curing such false impressions of the nature of marriage, we may also promote earlier resort to the courts. Without grounds, the spouses are denied specific standards against which to measure the nature and quality of their marriage. They are reduced to relying exclusively on their own feelings. Hence, they are neither deterred from seeking judicial intervention because they lack grounds nor are they encouraged to eschew it for the same reasons. Although it may be argued that, given the ease with which most grounds now may be "proved," the law currently offers little deterrent, the difference under the integrative statute is seen as avoiding the lengthy period of deterioration which now usually transpires before a couple gets to court. "Fundamentally, the change in the point of view of the court from an instrument of punishing sin . . . to an institution for the rehabilitation of the family, should in time encourage people to bring their family troubles voluntarily to the tribunal . . . long before they reach the breaking point."<sup>130</sup> The situation may be likened to a patient with tuberculosis. Diagnosis and treatment are not made to await the arrival of unbearable chest pain or blood in the sputum. Symptoms which occur much earlier and which at that point may be ambiguous with respect to potential pathological conditions are inquired into immediately; and if upon inquiry it is found to be necessary, treatment is commenced promptly. Similarly, there need be no reason for a marriage to become moribund before any action is taken.

Promoting an earlier resort to the courts should result in enhancing the prospects for rehabilitation by reaching the problem before it becomes hopelessly impacted. Where the divorce is finally granted, the result should also be less traumatic on all of the parties involved. This feature of an earlier resort to the courts is especially important where children are involved. Not only is the situation less threatening to them because elimination of divorce grounds as such spares the child the knowledge he now acquires of

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<sup>130</sup> Bradway, *supra* note 127, at 398.

his parents' misdeeds;<sup>131</sup> but also intervention is achieved at a time when there has been less exposure to the deteriorative factors within the marriage.<sup>132</sup> Without attempting to minimize the serious consequences of divorce for young children under any system, it should nevertheless be mentioned that what is commonly viewed as the negative consequence of the divorce itself is usually more the result of the manner in which the divorce comes about.<sup>133</sup>

The confusion which appears where the fault based divorce statute and conciliation procedures exist side by side has been discussed above. It needs to be added here that the elimination of grounds for divorce will prove of little value without provision for voluntary conciliatory procedures as well. It is submitted that this is the principal shortcoming of those statutes now in existence which are premised on the breakdown principle. What should the nature of the court's conciliation function be under the proposed integrative statute?

In the original draft statute submitted by the writer to the revision committee, it was provided that the court might order the parties to submit to psychiatric or other counseling in cases where a decree of dissolution was denied. The rationale for the provision was to enhance the prospects for eliminating positively whatever psycho-social factors underlay the original decision to seek dissolution. This feature of the integrative statute was seen as a key-stone in the entire program of eliminating fault-oriented divorce. It is now apparent that while the motives for such a provision may be laudable, objections to its coerciveness far outweigh such considerations.

Central in the decision to revise this aspect of the original draft was the belief that the prospects for lasting rehabilitation of a marriage in trouble can occur only where the parties themselves manifest a willingness to participate in new strategies designed to achieve that goal. This would seem particularly true where the strategies include individual psychotherapy. Requiring the marriage partner to undergo such treatment may produce, temporarily, positive results; but the prospects of lasting results are minimized by the fact that the individual is provided with no real choice. His participation in the decision-making with respect to therapeutic alternatives is apparent only, if indeed he is permitted to participate at all. Hence his commitment to a program of relief is op-

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<sup>131</sup> Cantor, *supra* note 126, at 70.

<sup>132</sup> Johnson, *supra* note 119, at 76; Plant, *supra* note 116, at 813.

<sup>133</sup> Goode, *Family Disorganization* in CONTEMPORARY SOCIAL PROBLEMS 455 (Merton & Nisbet eds. 1961).

tional and minimal. On the other hand, where the proposed strategies for change rest entirely on a consensual basis, commitment to it is enlarged and the prospects for success are enhanced. The need, therefore, appears to be not only for the consent of the parties to whatever programming the court and its aides may develop for rehabilitating a particular marriage but participation in the development of the program as well. What has been said with respect to change in a correctional setting seems equally appropriate in this context:

. . . [It is doubtful that] any single person can be totally responsible for a program of change which affects others if it is to be effective. If the needs of both change agents, as individuals, as well as agents of the organization, and changes are equally important determinants of the direction and success of attempted change, ultimately the responsibility for change needs to be shared as well. It should be stressed that the principle of shared responsibility is applicable to a greater or lesser degree to all phases of activity, but it is particularly important to those areas in which the internalization of new attitudes and behaviors on the part of changes is especially valued.<sup>134</sup>

In the context of the divorce court such an approach necessarily implies participation in the process by both spouses. Where minor children are involved consideration should be given to including them also, depending on their maturity.

In a thoughtful and perceptive article,<sup>135</sup> Professor Rheinstein has raised some serious doubts and objections to the therapeutic approach to marital problems in a judicial setting. He stresses the fact that most proposed programs include a compulsion factor which, as indicated above, may produce only temporary hoped for results. Moreover, most such proposals imply a requirement that the individual submit to deep personality analysis, even personality change. Such approaches contradict the principles of freedom and integrity of the individual which are basic to a democratic society. These objections would seem to be overcome by eliminating the compulsory features of the proposed integrative statute. Furthermore, where the marital disharmony appears to spring from deep-seated personality factors, it is doubtful whether any emphasis ought to be placed on their treatment other than perhaps suggesting to the individual their need for attention. Certainly it would be an unwarranted extension of judicial discretion to base decisions as to whether a marriage ought to be dissolved on whether

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<sup>134</sup> Hall & Williams, *The Correctional Worker as an Agent of Change* 6 (mimeograph, undated).

<sup>135</sup> Rheinstein, *The Law of Divorce and The Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956).

or not the individual has sought or undergone such treatment.<sup>136</sup> On the other hand, that therapy in the form of counseling which undertakes to move the parties toward a better understanding of themselves and each other need not involve this "lengthy and delicate probing of . . . [the] personality. . . ." <sup>137</sup> If it is concluded that a significant number of divorces arise primarily from misunderstandings and misapprehensions brought about because of a lack of objectivity in the situation, then it would seem worthwhile to attempt therapy at this level. Indeed, Professor Rheinstein suggests the use of marriage counseling, both public and private, in cases where "difficulties have appeared to arise, in which no separation has as yet occurred, and in which both parties are in some measure willing to maintain their relationship. . . ." <sup>138</sup>

It is open to debate whether such counseling should be provided by a court connected facility or by a public or private agency elsewhere in the community. Certainly it is true that some communities are better equipped to provide such services than are other, smaller ones. Where no other agency exists, it seems reasonable to suggest that it be placed under the aegis of the court. Even where other facilities do exist, however, a court connected facility may be warranted to serve as a referral agent for the parties and to provide reserve support for other agencies to insure against the development of time lags in processing cases. A court based facility has also the advantage of providing the authoritarian framework which may be needed to achieve positive results in some situations.<sup>139</sup> Since the integrative statute provides the court with a social investigation capability, this function might easily be combined with that of counseling.

Whenever counseling and conciliation services are provided, however, it is important to keep in mind that resort to them arises under the integrative statute only *after* an investigation and hearing on the merits of the petition. The parties have thus been accorded

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<sup>136</sup> It has been proposed that, preliminary to petitioning for a divorce, a party file a notice of intention to divorce, after which no petition for divorce could be filed for six months. During the interim period, the parties would be required to undergo "guided reconciliation." Keller, *Terminating a Marriage in Nebraska*, 43 NEB. L. REV. 156, 173 (1963).

<sup>137</sup> Rheinstein, *supra* note 135, at 663.

<sup>138</sup> *Id.* at 661.

<sup>139</sup> It has been suggested that the judge should have no part in the conciliation effort. Ogburn, *The Role of Legal Services in Family Stability*, 272 ANNALS 127, 131 (1950). Certainly this is unobjectionable with respect to whatever counseling takes place. As to the development of a counseling program, however, the judge is, in the writer's opinion, the central figure.

their "day in court" in a hearing which is based on all the facts and circumstances of the marriage. Only then, it is submitted, can reasonable judgments be made on the prospects for conciliation and rehabilitation. Only then can we expect the parties to willingly undertake whatever change may be necessary to help their marriage to succeed.

Finally, the comparative advantages of the integrative statute over its leading non-fault competitors, separation and consent divorce, should be mentioned. A separation provision, of course, foregoes any attempt at reconciling the parties. Even where court connected conciliation facilities are provided and their services imposed on the parties, there seems to be little prospect of succeeding with individuals who already have established living patterns independently of one another.<sup>140</sup> In addition, the separation provision is available only to those who can financially afford to maintain two households. In this respect it is not unlike the availability of the migratory divorce. This excludes the lower income families among whom it appears that marital problems are more prevalent than among middle and higher income groups.<sup>141</sup> The separation statute is therefore practically unavailable to those for whom the likelihood of its need is greatest.

The argument that the separation is objective, confirmatory evidence of a marital breakdown<sup>142</sup> is persuasive only to the extent that one is able to overlook the rather obvious fact that the separation itself may cause and certainly does promote the breakdown. And the response, to those who object that separation is no more than a form of consent divorce,<sup>143</sup> that in any event it is no worse than the consent divorces we now have in fact,<sup>144</sup> evidences a kind of resigned attitude that the most we may hope to accomplish is to render divorce more honest. Honesty is, of course, the best policy but certainly not the only consideration where questions of family dissolution are raised. The question is not whether the present

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<sup>140</sup> Foster, *An "Honest Ground" for Divorce in Pennsylvania*, 34 PA. BAR ASS'N 2, 646, 649 (1963). In Sweden, it appears that a substantial number of separated couples are reconciled as a result of the requirement that, before a judicial separation is granted one spouse against the wishes of the other, the plaintiff must demonstrate his willingness to accept the services of a mediator. SCHMIDT & STRÖMHOLM, *LEGAL VALUES IN MODERN SWEDEN* 44 (1964).

<sup>141</sup> O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* 22 (1963).

<sup>142</sup> Foster, *supra* note 140, at 649; McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 685 (1956).

<sup>143</sup> *E.g.*, Rutman, *Departure from Fault*, 1 FAMILY LAW 181, 192 (1961).

<sup>144</sup> Foster, *supra* note 140, at 650.

sham should be eliminated; to this the positive response is virtually unanimous, and if this were the only question, consent divorce would be the only logical answer. But the question is, rather, how to eliminate the sham while at the same time protecting and promoting society's interest in the family, an interest which is difficult to protect where divorce either by consent or separation is permitted.<sup>145</sup>

## V. CONCLUSION

This paper has undertaken to consider the nature of our present divorce laws, the problems which they are seen as creating (or ignoring), and how these problems might more effectively be dealt with through the law. Our present law is seen as irrelevant in light of the realities of marriage, harmful in the methodologies it employs for curing marital ills, and as encouraging divorce in some instances and promoting popular unrealism as to the nature of marriage in others. Positioned against this current situation is one model for improvement. The assumptions have been that the family unit is an institution basic to our society, that the quality of the marriage relationship is in turn vital to the maintenance of effective family units, and that withal the social system generally has an abiding interest which it may promote through its law.

It may be, of course, that our present legal strategies for dealing with marital problems are so deeply rooted in our social soil that any attempt at reform is a dangerous exercise in futility.<sup>146</sup> Certainly there is evidence to support the conclusion that while public attitudes toward divorce may have grown more liberal, attitudes toward divorce law itself have remained conservative.<sup>147</sup> We may be encouraged, however, by Justice Cardozo's precept that, "the final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence";<sup>148</sup> and by his admonition therefore to "remake the molds," to "seek a concep-

<sup>145</sup> It has been argued that since we don't regulate marriage we shouldn't regulate divorce. Cantor, *The Right of Divorce*, 218 ATLANTIC MONTHLY 67, 68 (1966). The answer is that we *do* regulate marriage.

<sup>146</sup> See ROUSSEAU, *THE SOCIAL CONTRACT* 64 (Gateway ed., 1954).

<sup>147</sup> O'Gorman, *supra* note 141, at 18. On the other hand, it has been argued that the public "... are likely to less give weight to the desire that the law be consistent with the past ... and are more likely to feel that the law should be consistent with the views gained as a result of their own personal experience. ..." COHEN, ROBESON, AND BATES, *PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW* 195 (1958).

<sup>148</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (Yale Paperbound ed., 1960). Cardozo was referring to the judicial role, but the remark seems apt as well to statute law.



tion of law which realism can accept as true."<sup>149</sup> Surely, the final cause of family law must be the welfare of the family in society. A divorce law which misses this aim can no longer justify its existence.

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<sup>149</sup> *Id.* at 127.