

1967

Retreat from "Fault"? An English Lawyer's Views

J. Neville Turner

Supreme Court of Judicature (England)

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

J. Neville Turner, *Retreat from "Fault"? An English Lawyer's Views*, 46 Neb. L. Rev. 64 (1967)

Available at: <https://digitalcommons.unl.edu/nlr/vol46/iss1/5>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

RETREAT FROM "FAULT"?: AN ENGLISH LAWYER'S VIEWS

J. Neville Turner*

I. INTRODUCTION

It was with some hesitation that I agreed to contribute to a dialogue in an American law journal on an issue so contentious as this; particularly as the journal is that of a university at which I spent a delightful year. For, if the literature is representative, my thinking does not commend itself to most American scholars.¹ It would be understandable, therefore, if readers dismissed this paper, written by an Englishman residing in Australia, as irrelevant to an essentially American inquiry.

European scholars have in the past tended to look askance at the more permissive American divorce laws;² but of late influential voices have been heard advocating a change in the basis of

* LL.B. (Hons.) Manchester (England); Lecturer-in-Law, University of Adelaide; Solicitor of the Supreme Court of Judicature (England).

¹ See, e.g., Rutman, *Departure From Fault*, 1 J. FAMILY L. 181 (1961); Bradway, *Collusion and the Public Interest in the Law of Divorce*, 47 CORNELL L.Q. 374 (1962); *Symposium-Divorce: A Re-examination of Basic Concepts*, 18 LAW & CONTEMP. PROB. 1 (1953); Pound, *Foreword to a Symposium on Divorce*, 28 IOWA L. REV. 179 (1942) *SELECTED ESSAYS ON FAMILY LAW* 872 (1950); Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966); Foster, *Spadework for a Model Divorce Code*, 1 J. FAMILY L. 11 (1961); Bradway, *Myth of the Innocent Spouse*, 11 TUL. L. REV. 377 (1937); Gradwohl, Janice L., *The Doctrine of Recrimination in Nebraska*, 37 NEB. L. REV. 409 (1958); Morrow, *Divorce Reform in Texas—the Path of Reason*, 18 SW. L.J. 86 (1964); Comment, *Terminating a Marriage in Nebraska*, 43 NEB. L. REV. 156 (1963).

² English courts have persistently refused to recognize American divorce decrees to which sister American states would accord full faith and credit. Cf. *Gatty v. Attorney-General* [1951] P. 444, *Mountbatten v. Mountbatten* [1959] P. 43. But recently the President of the Probate, Divorce and Admiralty Division of the English High Court appears to have approved *Estin v. Estin*, 334 U.S. 541 (1947), and *Williams v. North Carolina*, 317 U.S. 287 (1942); *Lepre v. Lepre* [1965] P. 52, 62, 63. Consensual divorce has until very recently been considered anathema. Cf. *McCardie J. in Laidler v. Laidler* (1920) 36 Times L.R. 510: "The matrimonial relationship is the basis of national life. A rigorous law attends the formalities of that relationship. A strict and rigorous code safeguards the circumstances of its dissolution. *Divorce by mutual consent is remote from the contemplation of English law.*" (Emphasis added.) [This dictum may, however, be ironical.] Cf. Commission on Marriage and Divorce, *Report*, CMD. NO. 9678, ¶ 69 (1956).

divorce law.³ Some English commentators have, probably rightly, already perceived radical judicial departures from traditional attitudes.⁴ The present climate of opinion⁵ suggests that there is a real possibility of a "non-fault" statute being seriously canvassed in the United Kingdom Parliament in the immediate future, although an attempt to introduce non-culpable separation for seven years as a ground of divorce failed as recently as 1963.⁶ Recent articles suggest that English jurists too favour "departure from fault."⁷

The subject of this dialogue is thus a very live issue in England, as well as in some states of the United States⁸ and some provinces of Canada;⁹ limited "breakthroughs" have already been

³ E.g., Scarman J., *Family and Law Reform—a Public Lecture delivered at the University of Bristol, March 18, 1966*; Hon. Sir. Jocelyn Simon, President of the Probate, Divorce and Admiralty Division—*Report of a Speech*, 115 L. J. 363 (1965); Simon, *Seven Pillars of Divorce Reform*, 62 L. Soc'y Gazette 344 (1965).

⁴ Brown, *Cruelty without Culpability or Divorce Without Fault*, 26 MODERN L. REV. 625 (1963); Webb, *Breakdown versus Fault—Recent Changes in United Kingdom and New Zealand Divorce Law*, 14 INT'L & COMP. L.Q. 794 (1965); Eekelaar, *Crisis in Divorce Law: England and France*, 15 INT'L & COMP. L.Q. 875 (1966). The observations of these commentators are based to a large extent on two House of Lords cases, decided on the same day—*Gollins v. Gollins* [1964] A.C. 644; *Williams v. Williams* [1964] A.C. 698; see Comment, 112 U. PA. L. REV. 606 (1964).

⁵ A permanent Law Reform Commission, established by Lord Gardiner, the Lord Chancellor, has just published a report on family law, favouring the introduction of voluntary separation as an additional ground of divorce: Law Commission, *Report*, CMD. No. 3123 (1966). A few months previously, a report of the Anglican Church suggested that matrimonial offences should be "abolished," and a "breakdown" test substituted. "Putting Asunder (sic)—a Divorce Law for Contemporary Society"—Report to the Archbishop of Canterbury of a group under the chairmanship of the Bishop of Exeter (1966).

Such is the zeal for reform at present that no part of the common law is sacred. Amid the general approbation is felt occasional disquiet—Cf. KEETON, *THE NORMAN CONQUEST AND THE COMMON LAW* (1966).

⁶ See Stone, *The Matrimonial Causes and Reconciliation Bill*, 1963, 3 J. FAMILY L. 87 (1963); Stone, *The Matrimonial Causes Act*, 1963, 4 J. FAMILY L. 49 (1964).

⁷ Kahn-Freund, *Divorce Law Reform?* 19 MODERN L. REV. 573 (1956); Mostyn, *New Thinking on Divorce*, 116 NEW L. J. 49 (1965); Oerton, *Marriage Breakdown*, 60 L. Soc'y GAZETTE 655 (1963); Stone, *supra* note 6; Brown, *supra* note 4.

⁸ The present "non-fault" provisions of states are well set out in Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

⁹ In two provinces (Quebec and Ontario), divorce is granted only by Parliament; in the remaining eight provinces, adultery is the only

achieved in New Zealand¹⁰ and Australia;¹¹ and, among non-common law jurisdictions, peoples so diverse as Eastern Europeans,¹² Scandinavians,¹³ Germans¹⁴ and Frenchmen¹⁵ have shown a tend-

ground for divorce. For a criticism of the existing laws, see Fitch, *As Grounds for Divorce, Let's Abolish Matrimonial Offenses*, 9 CAN. B. REV. 78 (1966). See also Skelly, *A Comparative Survey of the Development of Matrimonial Relief*, 2 MAN. L.J. 29 (1966).

- ¹⁰ Matrimonial Proceedings Act, Act of 1963 (N.Z.). New Zealand, characteristically, was the first Commonwealth country to introduce non-culpable separation as a ground for divorce: Divorce and Matrimonial Causes Amendment Act, Act of 1920, § 4 (N.Z.). See Inglis, *Divorce Reform in New Zealand*, 43 CAN. B. REV. 519 (1965) for a guarded criticism of the liberal law and procedures. See also Inglis, *New Zealand Experiment in Divorce and Nullity Legislation*, 14 INT'L & COMP. L.Q. 654 (1964); Webb, *supra* note 4.
- ¹¹ Matrimonial Causes Act, Act of 1959, § 28(m) (Aust.). Accounts of the Australian law include: Nygh, *Family Law in Australia*, 4 J. FAMILY L. 185 (1964); Selby, *The Development of Divorce Law in Australia*, 29 MODERN L. REV. 473 (1966); Morris, *The Australian Matrimonial Causes Act, 1959*, 11 INT'L & COMP. L.Q. 641 (1962).
- ¹² Many Eastern European countries have adopted most permissive family laws since the Second World War. *E.g.*, the Family Codes of Poland, Czechoslovakia, and Eastern Germany. Ease of divorce is, of course, an essential doctrine of communism. For Soviet Russia, see *infra* note 17.
- ¹³ In Sweden, a divorce is available either (1) where both spouses, because of a profound and lasting disruption consider their cohabitation irreparable and have applied for a decree of separation, a decree of divorce is automatically available after one year, or (2) where one spouse alone applies, the other opposing—the applicant has an apparently not heavy burden of proving that profound and lasting disruption has been caused by disparity of temperament and outlook. CODE OF MARRIAGE, chap. 11, § 1 (Sweden 1915). Other Scandinavian countries have similar rules. See Schmidt, *The "Leniency" of the Scandinavian Divorce Laws* [ACTA UNIVERSITATIS STOCKHOLMIENSIS STUDIA JURIDICA STOCKHOLMIENSIA 18] 1963.
- ¹⁴ See B.G.B., Ehe. G. 48, which provides for divorce in the case of a three years' separation. This ground, however, appears to be far less utilized than the other grounds, particularly that contained in paragraph 43, based on fault: see WOLF, LUKE & HAX, *SCHIEDUNG UND SCHIEDUNGSRECHT* 471 (1949).
- ¹⁵ Cf. Freed, *Grounds for Divorce in French and American Law*, 1 J. FAMILY L. 241 (1961).

Strangely, "la doctrine" seems to be more cautious than "la Jurisprudence." Cf. II DAVID, *LE DROIT FRANCAIS*, 34 (1960):—"Dans les principes, notre droite est attache a la notion du divorce—sanction et les seules causes de divorce qu'il admet constituent des violations des devoirs et obligations du mariage." And Cf. VOIRIN, *MANUEL DE DROIT CIVIL* 83 (13th ed. 1963): "*Le divorce est-il necessaire?* . . . Quand il n'existe pas, les époux font l'effort nécessaire pour se supporter l'un l'autre, effort qu'ils ne fond plus lorsqu'ils savent pouvoir s'évader du mariage par le divorce. Surtout, le divorce est pernicieux pour les enfants qui en sont les principales victimes."

ency to relax their divorce laws.

As Professor Rheinstein has pointed out,¹⁶ the "liberals" have not had it all their own way, and in some jurisdictions there has been a decided retraction from previously permissive laws.¹⁷ But, on the whole, it cannot be denied that there is a cosmopolitan dissatisfaction with what one might call the "traditional" basis of granting or refusing relief.

The reasons for this dissatisfaction are not hard to find: the decline in power and authority of the Christian religions, the prevalence of "utilitarianism" as a social philosophy, the constant emphasis of the behavioural sciences on the artificiality of marital guilt, the more elastic morality of the age; there is much discontent too with traditional divorce machinery, and particularly with the doctrine of recrimination, which appears to epitomize the absurdity of divorce by "fault."¹⁸

The present article will seek to defend the matrimonial offense as the basis of divorce law, though admitting that some modification is necessary to eliminate undoubted anomalies and make the process more viable. Naturally, I shall present a view drawn substantially on experience in England and particularly in Australia, a country with ideals and values similar to those of the United States; but I hope, in all humility, that the argument will not be thought entirely irrelevant to the debate in Nebraska.

II. RECRIMINATION—IS IT NECESSARY TO "FAULT"?

Of the critics of traditional divorce law, the majority in the United States single out recrimination as its principal iniquity. The doctrine of recrimination has been vigorously disapproved by scholars,¹⁹ many of whom assume that it is a necessary element of a divorce law based on commission of a matrimonial offense.

Is this, however, so? Apart from a closely circumscribed ex-

¹⁶ Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 3 LAW & CONTEMP. PROB. 3 (1953).

¹⁷ Soviet Russia is the most notorious example. E.g., Wolff, *Aspects of Marriage and Divorce Laws in Soviet Russia*, 12 MODERN L. REV. 190 (1949); O'Connell, *Recent Developments in Soviet Domestic Relations Laws*, 5 CATHOLIC LAW. 271 (1959).

¹⁸ See *infra* note 19.

¹⁹ E.g., Raskin and Katz, *The Dying Doctrine of Recrimination in the United States of America*, 35 CAN. B. REV. 1047 (1957); Gradwohl, Janice L., *Doctrine of Recrimination in Nebraska*, 37 NEB. L. REV. 409 (1958); Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213 (1942).

ception, incurable insanity,²⁰ England, like most American jurisdictions, adopted and has retained specified grounds for divorce which all import some wrongdoing on the part of the respondent spouse.²¹

As in every state of the United States, the canon law applied by the ecclesiastical courts supplied the principles on which the law of divorce *a vinculo* has been based. But the "fons et origo" of modern English law is a statute.²² The drafters of the first Divorce Act perceived that the defence of recrimination was inappropriate to divorce *a vinculo* and did not incorporate it into the act. In English law, though it has been affixed squarely to the base of matrimonial offence, recrimination has never been a defence to an action in divorce.

The doctrine of recrimination received various explanations in the ecclesiastical courts.²³ The most persuasive rationale, however, is that of the monumental Lord Stowell, who in *Forster v. Forster*²⁴ emphasized its Roman Law origins:

Judex adulterii ante oculos habere debet et inquirere, an maritus pudicè vivens, mulieri quoque bonos mores colendi auctor fuerit. Periniquum enim videtur esse ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat (Dig. 48, 5 13, 5).

[The matrimonial judge must observe and enquire whether a husband has lived chastely and has also been responsible for the preservation of his wife's morality. For it would seem to be most unjust that a man should demand of his wife a virtue that he himself does not show.]

Lord Stowell pointed out that the doctrine was not applied in Roman Law to the immediate subject of divorce, for the court had no power to restrain a husband from repudiating his wife; but it was important in deciding whether she was entitled to dower.²⁵

²⁰ Introduced by (U.K.) MATRIMONIAL CAUSES ACT, 1937. [See now (U.K.) MATRIMONIAL CAUSES ACT, 1965, § 1(1)(a)(iv).].

²¹ The grounds are:—adultery, desertion, cruelty, rape, sodomy or bestiality: (U.K.) MATRIMONIAL CAUSES ACT, 1965, § 1(1). For a detailed discussion of these grounds, see Davies, *Some Aspects of Divorce Law and Practice in England*, 5 J. FAMILY L. 63 (1965).

²² Divorce & Matrimonial Causes, 1857, 20 & 21 Vict., c. 85. For a lively account of the history of this act, see Woodhouse, *Marriage and Divorce Bill of 1857*, 3 AM. J. LEGAL HIST. 260 (1959). Of course, prior to this act, a marriage could be dissolved by Parliament; the well-known procedure is described in Woodhouse, *ibid.*

²³ See Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213 (1942).

²⁴ *Forster v. Forster*, 1 Hag. Con. 144, 161 E.R. 504.

²⁵ *Id.* at 147, 161 E.R. at 506.

When the only remedy available to the petitioner was divorce *a mensa et thoro*, involving as it did not the slightest consolation to the respondent, then the doctrine of recrimination was eminently appropriate. The consequences of the severance of the marriage bond could be disastrous to the respondent, particularly if a marriage settlement had been effected,²⁶ so that it would have been quite unjust if a blameworthy petitioner should have obtained a decree.

The remedy of divorce *a vinculo*, however, is less one-sided. Except in a few jurisdictions,²⁷ it confers on both spouses an unrestricted right to re-marry; in many jurisdictions, the person against whom the decree is made may yet claim substantial ancillary relief.²⁸ The respondent rarely comes away empty-handed even when the petitioner is granted the decree.

Yet the petitioner's own wrong-doing must put the court on its enquiry. Elementary—platonic—justice demands that divorce should not be available as of right to a blatant wrongdoer, that divorce should not be peremptorily granted. This was foreseen in 1857 by the drafters of the first Divorce Act, which made the granting or refusing of the decree generally discretionary where the petitioner had himself been guilty of misconduct.²⁹ To this day, misconduct of the petitioner prevents a divorce from being peremptorily granted.³⁰ Other common law jurisdictions have followed the English pattern.³¹

²⁶ Cf. A CENTURY OF FAMILY LAWS, 1857-1957, 353 (Graveson & Crane eds. 1957).

²⁷ E.g., Pennsylvania, where a respondent guilty of adultery may not re-marry during the lifetime of the petitioner. PA. STAT. ANN. tit. 48, § 169 (1953).

Many jurisdictions, of course, require that some time elapse before remarriage; the time varies from two years [MASS. GEN. LAWS ANN. ch. 208, § 24 (1943)], to three months. Matrimonial Causes Act, Act of 1959, § 72 (Austl.). In both England and Australia, the initial decree is a decree nisi, which does not become absolute until the expiration of the statutory period, but leave to expedite the decree is available. See Kingsley, *Remarriage After Divorce*, 26 S. CAL. L. REV. 280 (1953).

²⁸ Alimony may be ordered to a guilty wife in some jurisdictions, e.g., *Hawkins v. Hawkins*, 187 Va. 595, 47 S.E.2d 436 (1948); *O'Neill v. O'Neill*, 18 N.J. Misc. 82, 11 A.2d 128 (Ch. Ct. 1939); *Trestrain v. Trestrain* [1950] P. 198.

Custody too is not infrequently awarded to the unsuccessful respondent: *Willoughby v. Willoughby* [1951] P. 184; *Hild v. Hild*, 221 Md. 349, 157 A.2d 442 (1960); *Beck v. Beck*, 175 Neb. 108, 120 N.W.2d 585 (1963).

²⁹ Divorce & Matrimonial Causes, 1857, 20 & 21 Vict., c. 85 § 31.

³⁰ See now (U.K.) MATRIMONIAL CAUSES ACT, 1965, § 5(4).

³¹ Cf. Matrimonial Causes Act, Act of 1959, § 41 (Austl.)

The considerations that the court should take into account in modern times were articulated by the House of Lords:³²

- (a) The position and interest of any children of the marriage.
- (b) The interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage.
- (c) The question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife.
- (d) The interest of the petitioner, and, in particular, the interest that the petitioner should be able to remarry and live respectably.
- (e) The interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.³³

Until recently, it was difficult to find fault with the operation of these principles. A balance was maintained between the interests of the parties and those of the public. But, of late, there has perhaps been a tendency too readily to exercise discretion in favour of the petitioner, even though he may be flagrantly the more guilty party; the appellate courts have supported this judicial tendency even to the extent of overriding the refusal of a trial judge to exercise his discretion against a very culpable petitioner.³⁴

Nevertheless, in this conception, it is suggested, lies a ready escape from the artificiality of recrimination. The strongest criticism of the discretionary principle, that it gives rise to decisions according to the "length of the judge's foot," is hardly available to those who advocate the "breakdown" principle, which must accord the widest possible latitude to a court.³⁵ But provided the principles on which discretion is to be exercised can be determined with sufficient clarity, judicial subjectivity can be avoided. Viable and realistic divorce laws can retain the "doctrine" of the matrimonial offence, recrimination no longer being a part of such laws.³⁶

³² *Blunt v. Blunt* [1943] A.C. 517.

³³ *Per Viscount Simon, L.C., id.* at 525.

³⁴ *Cf. Copps v. Copps*, *The Times*, June 18th, 1966.

³⁵ See *infra*, p. 79.

³⁶ The writer here for once does not subscribe to the opinion of authors of that most scholarly book, *JACOBS & GOEBEL, CASES ON DOMESTIC RELATIONS* (4th ed. 1961), who assert that "Adoption of the rule of comparative rectitude is but a first step in the abolition of the concept of fault in divorce law, another cherished sociological objective." *Id.* at 450.

III. A SUGGESTED "MODIFICATION" OF RECRIMINATION

The following scheme is presented tentatively as a starting point for revision:

- (a) Where both parties have committed matrimonial offences, the court ought to direct itself to ascertain *which of them*, if either, *has effectively caused the failure of the marriage*.³⁷
- (b) If the court finds that the petitioner is overwhelmingly to blame, then
 - (i) if there is a cross-petition, the respondent ought to be granted the decree;
 - (ii) if there is no cross-petition, the respondent ought to be invited to apply for a decree; if the respondent does not want a decree, then no decree ought to be pronounced.
- (c) If however, "the equities are equal," or substantially equal, or perhaps where the guilt of the petitioner does not exceed say thirty per cent of the total responsibility, then decrees ought to be granted to *both* parties.
- (d) A decree should, of course, be granted to the petitioner who is less than, say, thirty per cent responsible.
- (e) The findings of the court ought to be of high relevance in the award of ancillary relief.

It will be argued that to assess the respective quantity of wrongdoing is perhaps an impossible, and certainly an odious, enquiry. There is, however, a close precedent for such a proportional finding in the law of torts. As in a few American jurisdictions,³⁸ English courts are enjoined to determine the respective responsibility of the parties where both have been negligent.³⁹ Thereby the strict, recriminatory doctrine of contributory negligence has been mitigated.⁴⁰

³⁷ See *infra*, pp. 76-77, for a consideration of the mental element which, it is suggested, is essential to this enquiry.

³⁸ For an account of American jurisdictions, including Georgia, Arkansas, Mississippi, Wisconsin and Nebraska which adopt a modified form of comparative negligence, see PROSSER, *LAW OF TORTS*, 445 (3d ed. 1964).

³⁹ (U.K.) *LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT*, 1945, § 1(1).

⁴⁰ Many American jurisdictions have, of course, tried to mitigate the rigour of recrimination. Nevada's provisions [NEV. REV. STAT. § 125.120 (1960)] are dangerously lax, but those of Wisconsin [WIS. STAT. ANN. § 247.10 (1957)] come close to the scheme here suggested. See generally Annot., 159 A.L.R. 734 (1947).

The differences between assessment of liability for negligence and assessment of wrongdoing are no doubt stark, but, once it is accepted that the responsibility for the breakdown of a marriage is not attributable solely to one spouse, then it surely becomes no less than a duty of the courts to determine the respective responsibility of each spouse. The enquiry would be no more than an attempt to ascertain the true fact situation.

That such an investigation may be odious is undeniable. But, of course, courts perform much more distasteful functions. Judicial squeamishness is hardly a sound reason for judicial restraint. The object of this as of other enquiries would be to ascertain the truth, however unpleasant.

Litigation would be more lengthy and expensive, no doubt. But again, tribunals administering other branches of law occasion these inconveniences. I am convinced that relegation of divorce suits to second-class status, and a fortiori their reduction to a painless experience, are far more conducive to contempt for both the judicial process and the institution of marriage than are "archaic divorce laws."

IV. WHY THE "MATRIMONIAL OFFENCE" OUGHT TO BE RETAINED

There is very little in what follows which purports to be original, or indeed other than commonplace. I have, however, thought it helpful to the dialogue to present in a brief and rather undeveloped form some of the more important arguments in favour of the retention of the matrimonial offence. Needless to say, I do not pretend that each has equal cogency.

A. THE INCONVENIENCE OF CHANGE

It is a trite observation that today's jurisprudence does not regard antiquity as a justification *per se* of existing laws. Yet the existence of laws of long standing testifies, if not to their wisdom, at least to their efficacy. Excesses of judicial activism and legislative frenzy tend to destroy the law's "stability," which the most ardent of realists were yet concerned to emphasize.⁴¹ This is particularly so where a wholly new legal machinery is established.

There have, of course, been times in which the law was too static. To be radical in the eighteenth century involved no little moral courage. But today, the ease with which legislation can be

⁴¹ Cf. CARDOZO, *THE GROWTH OF THE LAW* (1924), *passim*; POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

passed and the readiness of the judiciary to discard inconvenient precedents create an atmosphere in which it is probably more demanding to resist than to advocate change.

Sweeping legislation of any kind involves several disadvantages, whatever the value of its substantive provisions, which at least place the onus firmly on those who advocate it. A substantial body of mature law and practice is rendered obsolete. Courts and litigants are faced with situations for which no precedents are available. Society thus renounces the advantages of historical maturity, and puts itself, as it were, in the position of a newly independent state. Of course, if it is proved that the law or machinery is clearly obsolete, a modern society ought not to tolerate it. But is this demonstrably so of divorce law?

A good deal of contempt is levelled at ecclesiastical law. Most of it supposes that "overtones" of ecclesiasticism have no part in our modern society—a far cry indeed from the days when it was thought that "Christianity was part of the common law."⁴² Yet an acquaintance with the reports of the consistory courts⁴³ would dispel any uninformed scorn. The judgments of the great ecclesiastical lawyers of the eighteenth and early nineteenth centuries are copious in wisdom, forthrightness, humour and humanity, and are generally lacking in doctrinaire rigidity. It is not without significance that a modern matrimonial statute, enacted only six years ago, provides that "a court exercising jurisdiction . . . in proceedings for a decree of nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage shall proceed and act and give relief as nearly as may be in conformity with the principles and rules applied in the ecclesiastical courts . . . before . . . 1857."⁴⁴

To render obsolete at one sweep the whole of two centuries of case-law of any branch of law would *prima facie* be unwise. Particularly is this so where its subject-matter—marital misconduct—is "as old as matrimony itself,"⁴⁵ in respect of which there has been "no alteration—no new development."⁴⁶

⁴² Cf. O'SULLIVAN, *THE SPIRIT OF THE COMMON LAW* (1965), who argues convincingly that this assertion was far from being mere "rhetoric."

⁴³ See particularly Vols. 161 to 164 of the *English Reports*, the most entertaining volumes in any common law library—with the possible exception of *Howell's State Trials*.

⁴⁴ Matrimonial Causes Act, Act of 1959, § 25(2) (Austl.).

⁴⁵ Per Lord Hershell in *Russell v. Russell* [1897] A.C. 395, 460—a passage which may confound those who think "social realism" to be a product of the twentieth century.

⁴⁶ *Ibid.*

B. COLLUSIVE PRACTICES REJECTED AS A VALID REASON FOR CHANGE

An argument of those who advocate "breakdown" is that fraud and deception are so encouraged by the present scheme of things that it is impossible to preserve it and still maintain the dignity of the legal process.⁴⁷ It is, of course, true that a great deal of collusion is practiced. Its extent and nature vary from jurisdiction to jurisdiction. Once upon a time, it used to be thought that a fraud on the courts was ipso facto an evil. But modern jurisprudence sometimes tempts us to think that socially desirable ends justify unprofessional means. With great respect, as long as the legal profession regards a decision such as *Rosenstiel v. Rosenstiel*,⁴⁸ in which a blatantly collusive Mexican decree was recognized by the New York Court of Appeals, as justified because it represents a social "safety valve,"⁴⁹ then one cannot expect practitioners to do other than practice collusion and fraud. Again, it is respectfully submitted that decisions such as *Sherrer v. Sherrer*⁵⁰ and *Coe v. Coe*,⁵¹ are conceptually indefensible; nor is it likely that they would be supported in any other branch of law, representing as they do an anarchic mandate to evade unpalatable laws.

Every divorce practitioner naturally feels more sympathy for his client's afflictions than for the "sanctity of the marriage bond." In such circumstances the integrity of the profession is all the more challenged. The way to remedy unprofessional conduct is surely not to accommodate the law to it, but to seek to eliminate it. Perhaps a greater emphasis on professional responsibility in the education of a lawyer would go a long way to reduce collusion and fraud.⁵²

Again, it might perhaps not be unwise to mitigate the wide application of the doctrine of collusion, so as to permit bona fide agreements to be sanctioned, and vent anger on clearly deceptive practices.⁵³ But to represent malpractice as a stimulus for reform is surely to allow wrong to triumph over right!

⁴⁷ See, e.g., *Bradway, Collusion and the Public Interest in the Law of Divorce*, 47 CORNELL L.Q. 374 (1962).

⁴⁸ 16 N.Y. 2d 64, 262 N.Y.S.2d 86, 204 N.E.2d 709 (1965).

⁴⁹ See Foster, *Divorce Reform*, 22 N.Y. COUNTY B. BULL. 165 (1965).

⁵⁰ 334 U.S. 343 (1948).

⁵¹ 344 U.S. 378 (1947).

⁵² Cf. *Introduction to SMEDLEY, PROFESSIONAL RESPONSIBILITY PROBLEMS IN FAMILY LAW* (1963).

⁵³ In England, collusion is now a discretionary bar. *Matrimonial Causes Act*, 1965, § (4) (a) (U.K.). In Australia, only collusion "with intent to cause a perversion of justice" constitutes a bar. *Matrimonial Causes Act*, Act of 1959, § 40 (Austl.).

C. CONCERN AT THE INCIDENCE OF DIVORCE

The incidence of divorce today is so high as to cause international concern. Should not society rather be seeking ways of limiting the availability of divorce? It surely is impossible to argue that a divorce law based on consent, or "marriage breakdown," or voluntary separation, would do other than increase the number of divorces.⁵⁴

The Australian experience is typical. Since non-culpable separation was introduced as a ground throughout Australia,⁵⁵ the number of divorces has steadily risen,⁵⁶ and separation has become the third most used ground.⁵⁷

D. CONCILIATION PROCEDURES

It is, unfortunately, naïve to suppose that the establishment of conciliation services will alone offset the increase. Again, what has happened in Australia is significant. The Commonwealth Matrimonial Causes Act, 1959, the first uniform divorce statute in Australia, incorporates a section empowering, indeed, commanding, counsel and trial judges to attempt to reconcile parties.⁵⁸ This section is a dead letter; it seems to be regarded as a political compromise, designed to appease those legislators who felt uneasy about the great extension of grounds, and particularly the introduction of voluntary separation.⁵⁹ The French experience is similar,⁶⁰ notwithstanding that the parties must appear before the court for this purpose "sans l'assistance d'avocats et avoués!"⁶¹ This is not to

⁵⁴ Though this argument was astonishingly made in Scarman J., *Family Law and Law Reform*, A Public Lecture p. 15 (1966). Scarman J. is the Chairman of the United Kingdom Law Commission, though he expressly stated that in the above paper he was putting forward his own personal views and not those of the commission. The commission, however, has since published a report favouring the introduction of separation as a ground. See *supra* note 5.

⁵⁵ *Supra* note 11.

⁵⁶ These statistics are the latest divorce statistics from the Commonwealth Bureau of Statistics (1966). In 1963, 3293 decrees were made absolute; in 1964, 3024; in 1965, 3440.

⁵⁷ 1495 in 1963; 1687 in 1964; 1706 in 1965. See note 56 *supra*.

⁵⁸ § 14.

⁵⁹ The opinion of the writer based on remarks by an Australian judge, is confirmed by Mr. Justice Selby, a judge of the Supreme Court of New South Wales: Selby, *The Development of Divorce Law in Australia*, 29 MODERN L. REV. 437, 482 (1966).

⁶⁰ See Commission on Marriage and Divorce, *Minutes of Evidence*, at 443 (Evidence of Maitre Allemes).

⁶¹ CODE CIVIL, art. 238.

overlook occasional judicial enlightenment, such as that of Judge Alexander⁶² of the Toledo Family Court and Judge Pfaff of the Los Angeles County Conciliation Court.⁶³

The idea of establishing conciliation proceedings as an adjunct of the court is highly commendable—indeed there is no reason that they should not accompany a “fault” statute—but experience shows that they cannot realistically be regarded as a *quid pro quo* for the greater availability of divorce.

E. THE NEED TO ASCERTAIN RESPONSIBILITY IN ORDER TO ADJUDICATE UPON “ANCILLARY” RELIEF⁶⁴

If a judicial enquiry into the respective faults of the parties could be eliminated altogether, the goal of those who want divorce to be a more “civilized” procedure might perhaps be realized. But the enquiry cannot be eliminated from the proceedings for it is highly relevant to questions of (a) alimony (b) custody (c) matrimonial property and (d) costs. Professor Tenney’s draft⁶⁵ is silent on these matters, but it can hardly be argued that the conduct of the parties is *irrelevant* in questions of custody, though it may properly not be regarded as conclusive. The other matters could in theory be adjudicated without regard to the parties’ conduct, but serious injustices would result. No matter how “civilized” a law is that permits a husband to divorce his wife in order to marry another, it would yet be an unjust law if it allowed him to do so without any compensation to his wife. Even those who hold the view that marriage is nothing more than a synallagmatic contract would be hard pressed to justify a breach, or a repudiation if you prefer, without damages.

F. THE REALITY OF “GUILT”

It is argued that it is artificial to attribute responsibility for the failure of a marriage to one or other of the parties. If by this is meant that in some marriages there are faults on both sides, this can hardly be disputed. But if it is asserted as an immutable

⁶² Cf. Alexander, *Let's Get The Embattled Spouses Out of the Trenches*, 18 LAW & CONTEMP. PROB. 98 (1953).

⁶³ See PFAFF, *THE CONCILIATION COURT OF LOS ANGELES COUNTY* (1960); Burke, *The Conciliation Court of Los Angeles County*, 40 CHICAGO B. RECORD 255 (1959).

⁶⁴ I use this term despite the well-merited criticism of Stone, *The Matrimonial Causes Act, 1963*, 4 J. FAMILY L. 496 (1964), that the matters referred to are all-important.

⁶⁵ Tenney, *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 41 (1967).

principle that there is no such thing as matrimonial wrongdoing, it is manifestly false.

A disillusioned marriage guidance worker once told me, "the annoying thing about married people is that they will keep on insisting about right and wrong—while I want to talk about 'adjustment'!" The fact is, surely, that most lay people are not given to distinguishing legality and morality. Nor is this to be deplored. The ordinary citizen has a keen appreciation of right conduct, though he may not always articulate it with the perception of Immanuel Kant. That the moral content of laws contributes to a large degree to that sense of right conduct is a truism that the most ardent positivist would not seriously dispute.

The delineation of that conduct which is considered a breach of the marital obligation so as to furnish one who suffers from it with an action in divorce establishes what amounts to right conduct in marriage.

Distinction must be made, of course, between that conduct which will constitute a matrimonial offence and that conduct which, though blameworthy, must be tolerated as "the rough and tumble" of married life—the *minima* about which the law does not care. The classic trilogy of matrimonial offences represents a practical compendium of that inexcusable conduct which most civilized societies at most times have found serious enough generally to destroy marital solidarity. They are, as it were, the *actus rei* of matrimonial guilt. Replacement of proscribed conduct by nebulous and amoral provisions would weaken the clarity of matrimonial obligations.

G. THE IMPOSSIBILITY OF CONTRACTING MARRIAGE FOR LIFE WHERE DIVORCE IS AVAILABLE WITHOUT PROOF OF AN OFFENCE

It used to be argued that opposition on religious grounds to civil divorce was unwarranted: for the civil laws do not prevent individuals from maintaining their own standards. The history of separation in Australia suggests that this argument is invalid. The Australian Divorce Act⁶⁶ lists a large number of grounds for divorce, most of them based on the fault of the respondent.⁶⁷ In

⁶⁶ Matrimonial Causes Act, Act of 1959, § 28 (Austl.).

⁶⁷ In addition to adultery, cruelty and desertion, the following are grounds: willful refusal to consummate the marriage; rape, sodomy or bestiality; habitual drunkenness or drug addiction; failure to pay maintenance; frequent convictions coupled with leaving the petitioner without reasonable means of support; conviction of a serious offence involving long term of imprisonment; failure to comply with decree

addition, either party to a marriage may petition where the parties have lived separate and apart for five years, regardless of which party was responsible for the separation.⁶⁸ But a number of provisions protect the respondent, one of which⁶⁹ reads: "Where, on the hearing of a petition for [divorce on the ground of separation], the court is satisfied that . . . it would . . . be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree, . . . the court shall refuse to make the decree sought."

The effect of decisions on this section⁷⁰ is undoubtedly that religious "scruples" will not generally be heeded by the civil court; yet the civil court has full jurisdiction over the marriage.

In Australia, it is now impossible to contract a marriage for life—notwithstanding the express provision of the Marriage Act,⁷¹ that "marriage, according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life."⁷² For even if a husband and wife were to go to

of restitution of conjugal rights; insanity, for a period of at least five years; separation; presumption of death.

⁶⁸ Matrimonial Causes Act, Act of 1959, § 28(m) (Austl.).

⁶⁹ Matrimonial Causes Act, Act of 1959, § 37(1) (Austl.).

⁷⁰ In *Taylor v. Taylor*, (1961) Federal L.R. 371, Nield, J., a judge of the Supreme Court of New South Wales, described this provision as "the most extraordinary sub-section that has ever been passed by any legislature in the world." *Id.* at 372. He took the view that "the very fact of the termination of the marriage without any fault whatsoever on the part of the respondent . . . would be harsh and oppressive to the respondent." *Ibid.*

The strictures of Nield, J., have not, however, been echoed by some other courts construing this section. For example, in *Painter v. Painter*, (1963) 4 Federal L.R. 216, the Full Court of the Supreme Court of South Australia stated that "Unless [the respondent] will be seriously and unjustly affected it cannot be said that the decree is harsh and oppressive." In that case, the respondent wife opposed the granting of a decree, *inter alia*, on religious grounds asserting her belief that divorce was contrary to the law of God. The Court attached no importance to this objection; adding that "it seems to us that, if the appellant is genuinely convinced that the marriage tie is indissoluble by human judgment, the decree will not alter her belief or her position. She can disregard it." *Ibid.*

On the whole, it would seem that the South Australian decision has been regarded as a correct approach to the legislation. See *McDonald v. McDonald*, (1964) 6 Federal L.R. 53; *Kearns v. Kearns*, (1963) 4 Federal L.R. 394; *Lamrock v. Lamrock*, (1963) 4 Federal L.R. 81; *Contra*, *Taylor v. Taylor*, (1961) 2 Federal L.R. 371; *Macrae v. Macrae*, (1964) 6 Federal L.R. 224; *Judd v. Judd*, (1961) 3 Federal L.R. 207.

⁷¹ Marriage Act, 1961, § 46(1) (Austl.).

⁷² An authorized celebrant, not being a minister of religion, is obliged to say these words to the parties at the marriage ceremony: Marriage Act, 1961, s. 46(1) (Austl.).

the length of covenanting by deed that they should remain married for life, the deed would probably be *ultra vires*, as constituting an attempt to ouster the jurisdiction of the courts or as contrary to legislation of the realm.

Legislation "liberalizing" divorce is, in fact, highly prejudicial to those who regard marriage as indissoluble. The argument to the contrary, always rather contemptuously advanced, has been shown by the Australian decisions to be specious.

H. THE EFFECT OF THE "BREAKDOWN" TEST ON THE INSTITUTION OF MARRIAGE

Divorce by consent, or by unilateral repudiation, must weaken the institution of marriage. The contrary argument, if advanced at all, presumably rests on a paradox. How can one seriously talk in terms of marriage as a "life-long" union, while literate citizens know that they can at any time without difficulty dissolve it? An English judge tartly described this astonishing double-talk as a "cynical jest."⁷³

I. DIVORCEES AS A MARRIAGE RISK

Lord Devlin has emphasized the double effect of a divorce decree—by which parties are not merely granted an absolution from their present marriage but are also given license to re-marry.⁷⁴ Apart from a few minor restrictions,⁷⁵ in most common law jurisdictions a divorcee has an absolute freedom to remarry. Yet the divorcee is clearly a *prima facie* marriage risk. While society advocates increasingly severe restrictions on freedom to marry,⁷⁶ yet in this most clear case of possible unsuitability, not merely are restrictions absent, but in some instances, where a second marriage is imminent, the decree is expedited to enable it to take place!⁷⁷

Where divorce is made freely available to all comers, not a small proportion of applicants, either will have already established another liaison or will be likely in the future to do so. No restric-

⁷³ Per Dankwerts, L.J., in *Hall v. Hall* [1962] 1 W.L.R. 1246, 1253.

⁷⁴ DEVLIN, *THE ENFORCEMENT OF MORALS*, chap. IV (1965). Lord Devlin points out that a petition for divorce is to be distinguished from a petition for a judicial separation (*divorce a mensa et thoro*) in that it embodies an application to re-marry. He advocates a separate process in respect of each enquiry. *Id.* at 74.

⁷⁵ See *supra* note 30.

⁷⁶ See, e.g., JACOBS & GOEBEL, *CASES ON DOMESTIC RELATIONS* (4th ed. 1961).

⁷⁷ *Bastian v. Bastian* [1966] So. Austl. St. 42 is a typical case.

tions will bar their re-marriage, and they will be able to embark on further obligations unhindered. Furthermore, of course, the undertaking of new obligations will prevent, or at least discourage, the meeting of old ones.

J. THE DANGER OF RESPECTABILITY OF DIVORCE

Lamentations are heard on behalf of those who have to reveal the painful experiences of an unhappy marriage; pleas are made that the process of divorce be made more "civilized"; public men now hold office, though well-known to be very guilty divorcees; actors and actresses make capital out of spectacular divorces.

Divorce is becoming respectable. Dare I suggest it is near to becoming fashionable? How much more accommodating must society's attitude become before people who remain married to one person are regarded as "bourgeois" and unadventurous?

Is there no longer merit in devotion and obligation to, in language which already sounds passé, the "keeping of vows"? Marriage imports duties and responsibilities, voluntarily undertaken. The happiness of many is directly or indirectly dependent on the success of a marriage. Where divorce is granted for breach of a marital obligation, ipso facto the obligations of marriage are honoured in their breach. Where divorce is available on unilateral repudiation, admittedly the "freedom" of each individual is vindicated—but the obligations and responsibilities of marriage are devalued.

One of the obligations, or terms of the marriage contract if you prefer, is that children of the marriage will have a stable, balanced upbringing—which surely imports no more nor less than the love, comfort and guidance of a mother and father; it may be thought that this is a "right" at least as deserving of legal protection as, for example, an illegitimate child's right to sue a putative father.⁷⁸ If this "right" is protected, and it is submitted that it ought to be, then by aiding parents unilaterally or consensually to renounce these obligations, courts would in effect be creating actionable wrongs.

It might be argued that the courts are already doing this. But, conceptually, they now grant a remedy for the breach of an obligation—if not identical, at least closely connected, with the obligation

⁷⁸ Cf. *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), where the court accepted such a course of action existed, but strangely refused to permit the plaintiff to maintain it; it seems only a matter of time before the action will be entertained. Cf. *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (Ct. Cl. 1965).

to provide a stable upbringing. If Professor Tenney's draft⁷⁹ were accepted, the courts themselves would sever the obligation.

V. AN INHUMANE ATTITUDE?

Most advocates of more liberal divorce laws at some stage advance the argument "if two people are incompatible, surely it is inhumane not to permit them to divorce in a civilized and painless way."

The charge of inhumanity is particularly hard to refute when one has had practical experience of clients with marital difficulties. The dispiritedness of an unhappy wife or husband is the most poignant antidote to aloofness in any but the most heartless practitioner. At least as much as in any other field success in a matrimonial cause is deeply satisfying, and "failure" is much more irritating.

Now I do not think it is sufficient to reply to accusations of inhumanity quite so blandly as did Lord Stowell:⁸⁰ "Humanity is the second virtue of courts, but undoubtedly the first is justice."

To this most human of problems, the law should, on the contrary, be ready to abandon artificiality, rigidity and olympian peremptoriness. How, then, is it possible to oppose what appears at first sight to be a most humane revision? In the first place, I think it should be clear that this paper does not oppose the legal sanctioning of a *de facto* separation. The law long since realized the fruitlessness of attempts to compel parties to cohabit.

What this paper fears and opposes is the likelihood that divorce will become a commonplace process, the panacea for all marital ills. Profoundly disturbing are proposals that divorce should become available as of right to guilty persons, and a *fortiori* persuasion that there is no such thing as marital guilt. These conceptions, I suggest, tend to destroy, rather than advance, human dignity, and I fear that they form the axis on which the liberal divorce laws will revolve. Perhaps there is some wisdom in G. B. Shaw's aphorism: "We have no more right to consume happiness without producing it than to consume wealth without producing it."⁸¹

VI. CRITICISM OF THE PROPOSALS OUTLINED BY PROFESSOR TENNEY

Professor Tenney kindly let me have a copy of his draft pro-

⁷⁹ Tenney, *supra* note 65, at 41.

⁸⁰ Evans v. Evans, 1 Hag. Con. 35, 161 E.R. 466.

⁸¹ Candida, I.

posals before I wrote this article. They are rather striking. They go further than any statute in common law countries to eliminate "fault" altogether. In this they contrast with the typical modern statute which adds "non-fault" grounds to a list of offences.⁸² The Australian act is an example.⁸³ It has been called a "compromise";⁸⁴ it is, rather, a betrayal of principles, providing for easier divorce without eliminating what is said to be abhorrent in the traditional approach.

Professor Tenney's proposals represent a skillful attempt to provide efficacious divorce laws with all elements of wrongdoing expurgated. Their fundamental philosophy is unacceptable to me, for reasons which have already been elaborated. But, with respect, I have doubts too as to their efficacy.

The most obvious criticism that the proposals invite is that they grant carte blanche power to the court.⁸⁵ The judge will have neither precedents nor statutory criteria to guide him. And, of course, the legal profession will be equally in the dark when clients seek to know their prospects of success. Much speculative litigation seems inevitable, and there is no less likelihood of blackmail and collusion than under the present system: the "innocent" spouse may well have to be induced to persuade the court that "a restitution of a community of life corresponding to the nature of marriage cannot reasonably be expected."⁸⁶

The use of social workers, psychiatrists, etc., as aids to the court is, in principle, not without merit. It has, however, dangers. The psychologists and sociologists may tend to dictate the result to the court, particularly if the judge is hard pressed or inexperienced; there will be a strong temptation for the judge with a wide discretion to delegate the responsibility of the decision to his acolytes. Moreover, justice will not seem to be done if, as is suggested,⁸⁷ the psychologists' reports are not available to the parties. There are, of course, precedents for similar practice, but they seem to offend the core of common law jurisprudence.⁸⁸

⁸² Which, of course, includes all the present American statutes which deviate in any way from "fault."

⁸³ Matrimonial Causes Act, Act of 1959 (Austl.).

⁸⁴ Barwick, *Some Aspects of the Matrimonial Causes Act*, 3 SYDNEY L. REV. 409, 420 (1961).

⁸⁵ Tenney, *supra* note 65, at 41-42.

⁸⁶ *Id.* § 3 at 41.

⁸⁷ *Id.* § 2 at 41.

⁸⁸ *Quaere*, do the provisions offend due process?

The draft expressly does not refer to ancillary relief, but many difficulties appear to confront the legislator who seeks to regulate these crucial matters without reference to the conduct of the parties.⁸⁹ Surely, some financial "consolation" should be given to a wife who is to be repudiated,⁹⁰ and it seems undeniably unjust to apply the same principles of assessment where the wife herself wants the divorce in order to re-marry.

Legislators will certainly be aware that the passage by one state of legislation of this kind may turn it into a divorce Mecca. Jurisdictional obstacles will, one hopes, thwart most potential petitioners, but if their situation is desperate enough, some petitioners may find it convenient to "establish" residence in the only jurisdiction which gives them a chance of "freedom."⁹¹

There are no provisions in the draft relating to undefended cases. The measures on their face seem to envisage personal presence of both parties—how else can the elaborate reconciliation procedures be put into effect? One fears that respondents will prefer to permit a decree to go undefended than to submit to psychiatric examination. Legislators will, it seems, be faced with a dilemma when they come to consider the circumstances in which *ex parte* decrees will be granted. If they are to be granted at all, then the reconciliation procedures⁹² will soon be obsolete; divorce will become an administrative procedure—the judge "rubber-stamping" a decision already taken. (This is, of course, proposed in any event in the draft where there is a separation for more than two years.)⁹³ If, however, *ex parte* divorces are not to be granted, then a deserted wife will find it impossible to obtain a divorce.

Some difficulties of construction are inevitable, unless the draft is amended. Paragraph 1(a) refers to separation with intent to discontinue the marriage relationship. Does this refer to joint intent or will the intent of one suffice? Suppose the separation has been initially involuntary. What does "separate and apart" mean? Does the word "apart" convey something other than "separateness"? Although the phraseology of paragraph 4 is eloquent, difficulties of

⁸⁹ See *supra*, p. 76.

⁹⁰ Cf. The effects of repudiation in Roman Law. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 117-18 (3d ed. Stein 1963).

⁹¹ Cases such as *Lauterbach v. Lauterbach*, 392 P. 2d 24 (1964), *Wheat v. Wheat*, 229 Ark. 842, 318 S.W.2d 793 (1958) suggest that residence may supplement domicile as the jurisdictional basis of divorce. In any event, as is well known, *animus manendi* is regarded tolerantly by courts in determining domicile.

⁹² Tenney, *supra* note 65, § 2 at 41.

⁹³ Tenney, Unpublished Draft of Divorce Law Proposal §§ 1(a), 2, March 30, 1966.

interpretation can easily be foreseen. "Substantial evidence" is not a happy phrase—will proof beyond reasonable doubt or proof on the balance of probabilities be required?

Surprisingly, the factors to be taken into account⁹⁴ appear to include two traditional "fault-oriented" grounds (three, if habitual intemperance⁹⁵ is regarded as a wrong). Is this compatible with the philosophy of the proposals?

That physical illness⁹⁶ should be suggested as a criterion epitomizes what some might call the "hedonism" of the proposals—surely, physical illness is a misfortune during which the sufferer is in special need of the comfort and compassion of his spouse. The same may, indeed, be said of mental illness,⁹⁷ at least if it is curable. Mental illness, incidentally, is a decidedly vague term.

It is not easy to see in what manner the length of the marriage will be taken into account.⁹⁸ On the one hand, if a marriage is of short duration, the court may find itself less able to be satisfied that the disruption is deep-seated.⁹⁹ Yet if the marriage has lasted for many years, it is less likely to be irretrievable!¹⁰⁰

The defences¹⁰¹ of condonation, recrimination and connivance are clearly inappropriate to a "breakdown" statute, but surely to abolish collusion is hasty. The scope of collusion might well perhaps be narrowed,¹⁰² or it might be made a discretionary bar;¹⁰³ but deception of the court is surely as possible under the draft statute, particularly with regard to ancillary relief, as under the traditional laws.

Finally, the reincarnation of the doctrine of restitution of conjugal rights *de rigueur*¹⁰⁴ contrasts strangely with the philosophy of the remaining proposals. It has overtones of a *quid pro quo*, and the same end is foreseen as has befallen the reconciliation procedures provided for by Australian and French legislation.¹⁰⁵ Judg-

⁹⁴ Tenney, note 65 *supra*, § 3 at 42.

⁹⁵ *Id.* § 3(d).

⁹⁶ *Id.* § 3(g).

⁹⁷ *Id.* § 3(f).

⁹⁸ *Id.* § 3(h).

⁹⁹ *Id.* § 3.

¹⁰⁰ *Id.* § 3.

¹⁰¹ *Id.* § 6.

¹⁰² See *supra*, p. 74.

¹⁰³ *Ibid.*

¹⁰⁴ Tenney, note 65 *supra*, § 4 at 42.

¹⁰⁵ *Supra*, pp. 75-76.

es will find it odious to enforce, and litigants will be uncooperative.

VII. CONCLUSION

Notwithstanding the widespread dissatisfaction with the *machinery* of divorce, I do not believe that the *philosophy* behind it is unsound. Most of the dissatisfaction is due to the high incidence of undefended cases, and the failure of the legal profession to act according to strict ethical standards. The laxity of the profession is, unfortunately, not discouraged by the connivance of the courts.

Although it is almost impossible, as long as cases in the tradition of *Sherrer v. Sherrer*,¹⁰⁶ *Vanderbilt v. Vanderbilt*,¹⁰⁷ *Estin v. Estin*¹⁰⁸ and *Williams v. North Carolina*¹⁰⁹ continue to sanction forum-shopping, to persuade a state legislature to enact stricter legislation, it is suggested, with the utmost respect, that a tightening of the divorce process would be a step in the right direction.

The undefended, and particularly the *ex parte*, divorce is the principal evil worthy of exercise. Is it not a perversion of values to insist on the appearance at court of a person who violates some trivial traffic law,¹¹⁰ while at the same time permitting marriages to be dissolved *ex parte*? Is the extension of extradition machinery to divorce suits wholly impracticable?

Certainly where the defendant resides in the same jurisdiction, he or she ought to be compelled to appear in court, if only to receive an oral *coup de grâce*. The unreality of present-day divorce practice will continue as long as courts are presented with only one side of the picture of a marriage.

It is suggested that a reform of the law of divorce should be concerned with ensuring that a careful enquiry into all the factors contributing to the breakdown of the marriage be made. Much more attention should be paid by courts to the mental element in matrimonial offences—indeed it is worth considering whether *mens rea*, perhaps in an attenuated form, ought to be proved in addition to the *actus reus* specified as a ground for divorce—at least where the grounds are nebulous ones such as “extreme cruelty.”¹¹¹

¹⁰⁶ 334 U.S. 343 (1948).

¹⁰⁷ 354 U.S. 416 (1957).

¹⁰⁸ 334 U.S. 541 (1948).

¹⁰⁹ 317 U.S. 287 (1942).

¹¹⁰ The writer well remembers a morning spent at the Lincoln Municipal Court for just such a violation, resulting in a fine of \$1!

¹¹¹ Cf. the very careful enquiry that French courts make, especially where

With great respect, I fear that a measure such as Professor Tenney's, superficially humane though it may be, is the first stage towards the acceptance of non-judicial divorce as of right. If this ever comes to pass, it will mean the end of marriage as an institution; it will be the end of the civilization built upon the basis of that institution. "[E]asy divorce, carries in its train disintegration of the family as a unit of society, and so ultimately of society itself!"¹¹²

the ground is a discretionary one. See GOURDON, *LA NOTION DE CAUSE DE DIVORCE ETUDIEE DANS SES RAPPORTS AVEC LA FAUTE* (1963).

¹¹² A CENTURY OF FAMILY LAW, 1857-1957, 412 (Graveson & Crane eds. 1957).