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The Doctrine of Recrimination In Nebraska

Janice L. Gradwohl*

The American courts of equity and their predecessors, the English ecclesiastical courts, are the progenitors of a doctrine known as recrimination, which is, in essence, "a rule which precludes one spouse from obtaining a divorce from the other where the spouse seeking the divorce has himself or herself been guilty of conduct which would entitle the opposite spouse to a divorce."¹ In recent years, however, there has been a tendency in a few courts to modify this doctrine, or to abandon it completely. The Supreme Court of Nebraska, which has, through a somewhat erratic evolution, accepted the recrimination rule even beyond its statutory bounds, has recently shown some tendency to relax its application of the doctrine.² Whether this can be interpreted as an abandonment of the view shown by the weight of American authority, and a step toward a rejection of the doctrine of recrimination cannot be determined from the present cases. However, it does afford a timely opportunity for an analysis of the doctrine. The purpose of this study, therefore, is to examine the various manifestations of recrimination in the State of Nebraska as compared with its application in other jurisdictions, and to suggest a future legislative approach to the problem of mutual guilt in the divorce situation.

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¹ Nelson, *Divorce and Annulment* 10.01 (2d ed. 1945). For further definitions and discussions of the doctrine, see McCurdy, *Divorce—A Suggested Approach*, 9 Vand. L. Rev. 685, 694 (1956) ("Whatever its beginnings recrimination has tended to develop into a symmetrical formula whereby if the petitioner and respondent are each independently guilty of grounds for divorce, neither can obtain a divorce."); Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. Kan. City L. Rev. 213 (1942) (An excellent and often quoted analysis of the history and application of the doctrine.); Bradway, *The Myth of the Innocent Spouse*, 11 Tul. L. Rev. 377 (1937).

² See *Dwinnell v. Dwinnell*, 165 Neb. 566, 86 N.W.2d 579 (1957); and *Workman v. Workman*, 164 Neb. 642, 83 N.W.2d 368 (1957), discussed at p. 436 below.

I. HISTORICAL BACKGROUND

The doctrine of recrimination has not only gained substantial prominence in Anglo-American tribunals, but it is claimed that its history can be traced to early Mosaic law,³ and that it also appeared in Roman law.⁴ It is apparently not existent in the laws of certain oriental countries,⁵ nor is it present in French law.⁶ In Scotland, the doctrine was recognized at one time,⁷ but was later rejected.⁸

Although the basis for the present day application of the doc-

³ Deut. xxii, 13-19, which states that if man falsely accuses his wife of unchastity prior to their marriage and these allegations be proven to be false before the elders of the city, the husband "may not put her away all his days."

⁴ Sir William Scott, in *Forster v. Forster*, 1 Hag. Con. 144, 161 Eng. Rep. 504 (1790), cites two Roman cases, Digest 24.3.39 ("Viro atque uxore invicem accusantibus, causam repudii dedisse utrumque pronuntiatum est: id ita accipi debet, ut ea lege, quam ambo contempserunt, neuter vindicetur: paria enim delicta mutua pensatione dissolvuntur.") and Digest 48.5.13.5 ("Judex adulterii ante oculos habere debet et inquirere, an maritus pudice vivens, mulieri quoque bonos mores colendi auctor fuerit. Periniquum enim videtur esse ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat."). However, Beamer, 10 U. Kan. City L. Rev. 213, 216 (1942) feels that neither of these cases shows, in fact, an application of the doctrine of recrimination. He feels that the proper translation in the first case should be: "Since the husband and wife each accuse the other, it has been found that both of them have given cause for repudiation. This ought to be accepted thus: namely, that neither should be punished by that law which both have broken. For equal faults mutually compensate each other." (Note however, that Beamer also points out that the case was not one for divorce, but was an action to determine whether a husband is entitled to the right to refuse restitution of full dowry because of the wife's misconduct, when he, himself, was guilty of misconduct.) The statement in the second case, states Beamer, should be translated as follows: "The judge of the adulterer ought to keep in mind and to inquire as to whether the husband lived in decency and was an example of good conduct for the distressed wife."

⁵ For example, neither Hindu nor Burmese law indicates the use of such a doctrine. *Strange, Hindu Law* 47 (4th ed. 1864); 2 *Dig. of Burmese Law* 173 (1905).

⁶ *Forster v. Forster*, 1 Hag. Con. 144, 146, 161 Eng. Rep. 504, 506 (1790) (which in a footnote stated: "This may be connected with the principle in the French law, 'that adultery, committed by the husband, is not a ground of divorce or separation on the part of the wife.' Pothier, vol. 3, p. 177."). Cf. *Bradway*, 11 Tul. L. Rev. 377, 380 (1937).

⁷ 2 *Bishop, Marriage, Divorce and Separation* § 341 (1891).

⁸ *Erskine, Principles of the Law of Scotland*, 75, 77 (21st ed. 1911).

trine may be found in the ecclesiastical law of England,⁹ there its use was originally limited to a plea of adultery in bar of a similar plea of adultery,¹⁰ and a plea of adultery in bar of a plea of cruelty.¹¹ In the ecclesiastical courts of England an allegation of cruelty would not affect a plaintiff's cause of action founded on adultery,¹² and there is little foundation for the application of the rule when both parties alleged cruelty.¹³ The ecclesiastical courts were only vested with power to grant separation decrees and annulments,¹⁴ with only Parliament having authority to grant absolute divorces.¹⁵ Parliament seems to have gone both ways on the question of recrimination, in *Major Campbell's Case*¹⁶ granting an absolute divorce notwithstanding a recriminatory plea, but in *Major Bland's Case*¹⁷ denying a divorce on the basis of recrimination, despite a divorce *a mensa et thoro* previously awarded by the ecclesiastical court. The adoption of the Matrimonial Causes Act in 1857,¹⁸ establishing the matrimonial courts for the award of both separation and abso-

⁹ *Proctor v. Proctor*, 2 Hag. Con. 292, 161 Eng. Rep. 747 (1819); *Forster v. Forster*, 1 Hag. Con. 144, 161 Eng. Rep. 504 (1790); *Eldred v. Eldred*, 2 Curt. Ec. 376, 163 Eng. Rep. 445 (1840).

¹⁰ *Proctor v. Proctor*, 2 Hag. Con. 292, 161 Eng. Rep. 747, 751 (1819). There, although the court applied the doctrine of recrimination, the statement was made by Sir William Scott, that: "Taking this (application of the doctrine of recrimination), as I think I am compelled to do, as the rule of law binding upon the judgments of this Court, I cannot blind myself to the fact that the modern course of life and manners does not furnish those corrections of the mischiefs that may follow, which the canon law had anticipated in connexion with its rule. There is no return to cohabitation, nor are any means to be resorted to for the purpose of compelling it. In the state of separation, whether authorized or merely conventional, which usually takes place, there is certainly the increased danger of a spurious offspring, and, as the regulations of property exist amongst us, the danger of separate debts, to the great eventual injury of the husband and his legitimate family."

¹¹ *Watkins v. Watkins*, 2 Atk. 96, 26 Eng. Rep. 460 (1740) is the generally cited authority for this principle. However, it should be noted that the *Watkins* case was not an action for judicial separation, but for maintenance.

¹² *Eldred v. Eldred*, 2 Curt. Ec. 376, 382, 163 Eng. Rep. 445, 447 (1840), in which Sir Herbert Jenner stated the doctrine to be: "'... that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage bed.' That is no doubt the general rule, and founded upon reason and justice."

¹³ 2 Bishop, *Marriage Divorce and Separation* §. 353 (1891). However, this issue was never specifically before the courts.

¹⁴ Macqueen, *Marriage, Divorce and Legitimacy* 31 (2d ed. 1860).

¹⁵ *Ibid.*

¹⁶ Discussed *id.* at p. 92, and cited as Macq. H. of L. 591.

¹⁷ Discussed *id.* at p. 93, and cited as Macq. H. of L. 605.

lute divorces,¹⁹ left the matter of the enforcement of the doctrine, in the case of application for dissolution divorces, in the discretion of the court.²⁰

II. A COLLATERAL CONCEPT — COMPARATIVE RECTITUDE

Another approach to the problem of mutual guilt of the parties is the theory of comparative rectitude, which has been defined as "that power or discretion . . . to weigh the relative faults of the parties and grant a divorce to the one least at fault, notwithstanding the other has also been guilty of conduct which is ground for divorce."²¹ It is not the purpose nor within the scope of this paper to consider the comparative rectitude concept, but, although it is separate and distinct from the theory of recrimination, it is felt useful to examine the doctrine briefly for a more complete understanding of the treatment by English and American courts of the mutual guilt case. Some American courts today, in an effort to avoid the evil results of the impasse of recrimination, have resorted to weighing the misconduct of the parties and awarding a divorce to the party less at fault.²² In other jurisdictions this is achieved by the enactment of comparative rectitude statutes.²³ Unfortunately, at times this procedure has become more of a mathematical calculation than a weighing of equities.²⁴ The comparative rectitude approach is the antithesis of the concept of the "pure and innocent spouse," under which a petitioner's misconduct which would not be a ground for divorce will preclude the award of a decree.²⁵

III. RECRIMINATION IN NEBRASKA

A. THE STATUTE

In the State of Nebraska there is a statutory prescription for the applicability of the doctrine of recrimination, the law reading as follows:²⁶

¹⁸ 20 & 21 Vict., c. 85 (1857).

¹⁹ *Id.* §§ 2-6.

²⁰ *Id.* § 31.

²¹ 1 Nelson, Divorce and Annulment § 10.03 (2d ed. 1945).

²² *Ibid.*

²³ Keezer, Marriage and Divorce § 427 (2d ed. 1923).

²⁴ For a defense of the doctrine of comparative rectitude, see Davis, Mutual Misconduct in Arkansas Divorce, 3 Ark. L. Rev. 132 (1949).

²⁵ *Stiehr v. Stiehr*, 145 Mich. 297, 108 N.W. 684 (1906).

²⁶ Neb. Rev. Stat. § 42-304 (Reissue 1952).

Divorce; collusion; misconduct of petitioner; effect. No divorce shall be decreed in any case when it shall appear that the petition or bill therefor was founded in or exhibited by collusion between the parties, nor where the party complaining shall be guilty of the same crime or misconduct charged against the respondent.

The legislative history of this enactment gives little insight into the intent of the lawmakers in passing the statute. Two years after its organization as a territory,²⁷ Nebraska enacted a combination collusion and recrimination statute as a part of its divorce code, its provisions being identical to those in the present statute.²⁸ The Territorial lawmakers, either lacking in originality or desiring to profit from the experience of another area, apparently copied the bulk of the divorce code from that of Michigan.²⁹ This theory of statutory plagiarism is suggested in view of the fact that not only did most of the divorce code provisions under the Nebraska statute appear in identical form to those of Michigan, but also the same grammatical error was made in both.³⁰ Apparently this statutory chain can be traced back no farther than the Michigan law of 1842³¹ — the prior Michigan recrimination law, which was far different in its wording, being taken from the New York law.³² In later years, Wyoming also adopted the same provision,³³ probably taking it from Nebraska because of their proximity. It is interesting to note that through the years none of these three states has chosen to alter its recrimination statute substantially. In Nebraska the law remains intact as it was enacted in 1856.³⁴ Michigan has made a very slight change in its statutory provision, but its substance is the same,³⁵ while in Wyoming there has been no modification of the provision.³⁶

Before proceeding into the Nebraska cases, it should also be noted that in the State of Nebraska the grounds for divorce are adultery, physical incompetence at the time of the marriage,

²⁷ 16 Encyc. Brit. 182 (1955). The first Territorial Legislature met in 1855.

²⁸ Neb. Sess. Laws 1855-65, 278; Code of Terr. of Neb., c. 52, § 9 (1856).

²⁹ Mich. Rev. Stat. c. 84, § 10 (1846).

³⁰ See Mich. Comp. Laws § 3227 (1857); and Rev. Stat. of Terr. of Neb., c. 52, § 6 (1866).

³¹ Mich. Rev. Stat. c. 84, § 1 (1846).

³² 1 Mich. Terr. Laws 499.

³³ Comp. Laws Wyo. (Terr. Laws), c. 44, § 7 (1876).

³⁴ See Neb. Rev. Stat. § 42-304 (Reissue 1952), quoted in text at n. 26 above.

³⁵ Mich. Stat. Ann. § 25.90 (1937).

³⁶ Wyo. Comp. Stat. § 3-5908 (1945).

sentence of imprisonment for three years or more, abandonment, habitual drunkenness, sentence of imprisonment for life,³⁷ extreme cruelty, desertion,³⁸ and incurable insanity.³⁹

B. THE CASES

It is with this background in mind that the Nebraska Supreme Court cases regarding recrimination should be examined.⁴⁰ In the history of the State and the Territory, there have been ten cases in which recrimination has been considered as an issue by the Court. It should be noted, however, that there are numerous other cases in which recrimination might have been an issue, but was not considered by the Court, despite pleadings and evidence which showed mutual guilt.⁴¹ In two of the recrimination cases,⁴² the facts were not sufficient to bring the doctrine of recrimination into play. The other eight cases can be divided into four major groups, each group indicating a trend in the thinking of the Court. The Supreme Court of Nebraska, as will be shown by an examination of the cases, has failed to demonstrate any degree of consistency in its analysis of the doctrine of recrimination, or in its evaluation of the facts at bar in the various cases. Not only has its thinking been erratic, but it has failed to look at the statute existing in the State on the matter of recrimination. No pretense has been made at either justifying a possible deviation from the statutory provisions, or at developing a rationale consistent with such provisions — the Court has simply ignored the presence of the statute. It is toward a

³⁷ Neb. Rev. Stat. § 42-301 (Reissue 1952).

³⁸ Neb. Rev. Stat. § 42-302 (Reissue 1952).

³⁹ Neb. Rev. Stat. § 42-302.01 (Reissue 1952).

⁴⁰ Because of the large number of cases in which a recriminatory situation perhaps existed, the cases which are considered herein as "recrimination cases" are restricted to those in which recrimination was specifically alleged by one of the parties, or in which the doctrine of recrimination was considered by the courts. Of course, every case in which both parties enter pleas of misconduct on the part of the other presents a potential recrimination problem.

⁴¹ See discussion in text under VI, A.

⁴² *Judkins v. Judkins*, 76 Neb. 213, 107 N.W. 254 (1906) (The trial court denied a divorce to both parties on the basis of recrimination, and the Supreme Court reached the same result, but on the basis of lack of sufficient evidence to award a divorce to either party); *Stephens v. Stephens*, 143 Neb. 711, 10 N.W.2d 620 (1943) (Although the court quoted copiously from the Nebraska recrimination cases, it stated that the plaintiff had committed no act which would preclude the award of a decree to her so recrimination actually was not an issue.)

Careful analysis of the thinking of the Supreme Court of the State that the existing cases are divided into the following categories:

1. *The Comparative Rectitude Theory*

The earliest Nebraska recrimination case, *Walton v. Walton*,⁴³ went on appeal to the state Supreme Court in 1898. In that case, the plaintiff wife based her action for divorce *a vinculo matrimonii* on extreme cruelty practiced by the defendant; and the defendant husband cross-petitioned for an absolute divorce on the basis of his wife's cruelty and adultery, alleging that any misconduct of which he might be guilty was the result of his wife's cruelty toward him. The Court there affirmed an award of the trial court of an absolute divorce to the plaintiff on the basis that:⁴⁴

... the punishment inflicted by him [the defendant] was out of all proportion to her [the plaintiff's] offense and affords him no justification.

The basic principles of the comparative rectitude doctrine have been discussed above,⁴⁵ and the statements of the Court in this case indicate that at that early stage in the development of the law of recrimination in the State there was a persuasive inclination toward an acceptance of the comparative rectitude approach.⁴⁶ This tendency was short-lived, although a somewhat modified comparative rectitude idea was later employed. In still later years the doctrine was specifically repudiated.⁴⁷

2. *The Hybrid Comparative Rectitude-Recrimination Theory*

This hybrid approach was achieved by grafting the comparison of guilt characteristic of the comparative rectitude theory on the recrimination prohibition against awarding an absolute divorce — the result being an award of a divorce *a mensa et thoro* to the less

⁴³ 57 Neb. 102, 77 N.W. 392 (1898).

⁴⁴ Id. at 120.

⁴⁵ See text, Section II, *infra*.

⁴⁶ There is an indication in the opinion of this case that the wife's misconduct was not that which could be a ground for divorce. However, the Court proceeded to say that it was not material whether or not the wife's conduct would be a ground for divorce because her husband's improper acts were so patently disproportionate to any possible misconduct on her part.

⁴⁷ *Studley v. Studley*, 129 Neb. 784, 263 N.W. 139, 140 (1935). There the court stated, citing *Peyton v. Peyton*, 97 Neb. 663, 151 N.W. 150 (1915): "This court has held, however, that if the conduct of both parties to a divorce action has been such as to furnish grounds for a divorce, neither is entitled thereto although the conduct of one has been grossly more culpable than the other."

guilty party in the divorce situation. This concept was manifested in the following two ways:

a. The Blameless Party Approach

Rather than following the usual application of the doctrine of recrimination only to cases where the misconduct charged against both parties would be ground for divorce,⁴⁸ in 1904, the Nebraska Court, in *McKnight v. McKnight*,⁴⁹ chose to utilize the equitable clean hands doctrine in its strictest sense, by requiring that a party be *absolutely blameless* to be eligible for an absolute divorce.⁵⁰ Parties who were not "blameless," but whose guilt would not constitute a ground for divorce might be awarded a divorce *a mensa et thoro*. The Court used this language in explaining its theory:⁵¹

... the true rule which should govern the courts in the exercise of their discretion in this respect is this, that to entitle to a decree for absolute divorce from the bonds of matrimony, the applicant must be the innocent party—one who has faithfully discharged the obligations of the marriage relation, and seeks relief because really aggrieved or injured by the misconduct of the other; and, on the other hand, where there are circumstances showing a disregard of those obligations, though not carried to such a degree as to constitute itself a ground for divorce, the decree should be only for a divorce from bed and board. To obtain a release *a vinculo matrimonii*, the applicant must be without reproach, and however guilty the defendant, if the applicant is chargeable either with similar guilt, or of an offense to which the law attaches similar consequences, the relief must be denied; and if the applicant, though not thus guilty, is still not blameless, the relief must be limited to a divorce *a mensa et thoro*.

b. The Social Welfare Approach

On occasion, the Nebraska Supreme Court has nearly repeated the comparative rectitude concept shown in *Walton v. Walton*,⁵² but has muffled this strong stand by granting only a divorce *a mensa et thoro* rather than a divorce *a vinculo matrimonii* in such cases. In *Goings v. Goings*,⁵³ for example, the court recognized the fact that:

⁴⁸ See note 1 *supra*.

⁴⁹ 5 Neb. Unof. 260, 98 N.W. 62 (1904).

⁵⁰ It should be noted, however, that in the *McKnight* case an absolute divorce was granted to the plaintiff wife, the Court feeling that Mrs. *McKnight's* conduct had been spotless in all respects.

⁵¹ 5 Neb. Unof. 260, 267, 98 N.W. 62 (1904) quoting from *Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717 (1858).

⁵² 57 Neb. 102, 77 N.W. 392 (1898).

⁵³ 90 Neb. 148, 150, 133 N.W. 199, 200 (1911).

... a worse condition of domestic discord, and possibly of crime, could hardly be presented on paper. . . . Acts of lasciviousness, cruelty and inhumanity have been perpetrated by each of the parties toward the other. . . .

but yet went on to grant a divorce *a mensa et thoro*. It relied upon the *McKnight* case for authority, but obviously did not follow the strict reasoning in that decision. Interestingly enough, the Court explained in elaborate detail why it could not grant an absolute divorce to either party, but failed to explain the award of the divorce from bed and board. Such an explanation was given, however, in *Forburger v. Forburger*,⁵⁴ in which the fact situation closely paralleled that in the *Goings* case. Again the court carefully explained that neither party was entitled to an absolute divorce, but proceeded to grant a divorce *a mensa et thoro* on the basis that if the parties could not live together with any degree of happiness they should be "permitted to live apart."

3. *The Traditional View*

In still other cases, the Nebraska Supreme Court has adopted what might be called the "traditional view" toward the doctrine of recrimination, i.e., the application of the doctrine in all cases showing misconduct which would be a ground for divorce on the part of both parties. This title should perhaps be changed to "the traditional American view" inasmuch as the ecclesiastical courts of England were less generous with their application of the doctrine of recrimination than were their successors in the United States.

The case of *Wilson v. Wilson*⁵⁵ is the most prominent case of this type. In that case the plaintiff husband brought his action for divorce against his wife on the basis of her adultery, and the defendant wife cross-petitioned on the basis of her husband's cruelty. The trial court awarded a divorce to the plaintiff, but the Supreme Court reversed and ordered that the action be dismissed, charging that a decree could not be awarded in the recriminatory situation. The Court relied heavily upon earlier American cases and upon Bishop for authority, concluding its statement of the law with the somewhat speculative remark that:⁵⁶

The doctrine here stated is the acknowledged rule in nearly, if not quite, all the states of the Union.

Nowhere in the opinion was there any reference to the provisions of the Nebraska statute regarding recrimination, nor was there any acknowledgment of the existence of such a law. A similar view was taken in *Peyton v. Peyton*,⁵⁷ in which the plaintiff alleged

⁵⁴ 122 Neb. 705, 241 N.W. 279 (1932).

⁵⁵ 89 Neb. 749, 132 N.W. 401 (1911).

⁵⁶ *Id.* at 757.

extreme cruelty on the part of the defendant and the defendant countered with allegations of adultery and habitual drunkenness on the part of the plaintiff. There the Supreme Court affirmed the judgment of the lower court dismissing the action. There was no discussion of the law involved.

4. *The Statutory Approach*

The cases in this group are those in which the decisions conformed to the statutory provisions in their strictest sense. In *Studley v. Studley*,⁵⁸ for example, both the plaintiff's petition and defendant's answer pleaded the fact that the other party had been convicted of a felony and sentenced to a term in the penitentiary exceeding three years. The trial court dismissed the action, and the Supreme Court affirmed, on the basis that neither party could complain of the misconduct of the other when both of their arrests and convictions arose out of a robbery in which they participated together.⁵⁹ And in *Egbert v. Egbert*,⁶⁰ which, incidentally, is the first case in which the Supreme Court alluded to the recrimination statute, the Court reversed the award of the trial court and dismissed the action. There both parties had alleged extreme cruelty, and the Supreme Court held that this was within the terms of the statutory provisions regarding recrimination.⁶¹

IV. OTHER JURISDICTIONS

So that the Nebraska statute and decisions may be viewed in the light of the law in other jurisdictions, it is deemed desirable to take a brief look at the statutes and cases of other areas.

⁵⁷ 97 Neb. 663, 151 N.W. 150 (1915).

⁵⁸ 129 Neb. 784, 263 N.W. 139 (1935).

⁵⁹ Despite the fact of the jointly committed felony, the court based its decision on a denial of a decree of divorce under the doctrine of recrimination, and did not consider the element of collusion. In addition, there was an interesting point of law with regard to the sentences that the Studleys were serving. Mrs. Studley had received a sentence of 1-10 years, but only served 18 months of that time. She claimed, therefore, that her husband could not invoke a recriminatory defense inasmuch as her term of imprisonment did not exceed the three-year limit provided in § 42-301 Neb. Rev. Stat. (Reissue 1952). The court held, however, that in the case of an indeterminate sentence, the maximum limit of the sentence would govern.

⁶⁰ 149 Neb. 227, 30 N.W.2d 669 (1948).

⁶¹ Although in the Egbert case the grounds for divorce alleged by the parties were the same, and the Court relied upon the statutory provisions in denying a divorce on the basis of recrimination, it is interesting to note that the Court wrote the following syllabus point for the case: "Upon an application for a divorce where both parties are found guilty of *any of the enumerated offenses for which a divorce may be granted*, the court should dismiss the bill." (Emphasis supplied.)

A. STATUTORY PROVISIONS

Vernier⁶² states that thirty-two jurisdictions have recrimination statutes, recrimination being an absolute defense in twenty-nine of these jurisdictions. In the remaining three, Kansas, Oklahoma and Minnesota, the application of the doctrine rests in the discretion of the court.⁶³ According to Vernier's analysis, the statutes regarding recrimination may be grouped as follows: (1) adultery v. adultery—fifteen jurisdictions;⁶⁴ (2) any cause v. any cause—six jurisdictions;⁶⁵ (3) any cause v. same crime or misconduct—three jurisdictions;⁶⁶ (4) any cause v. adultery—three jurisdictions;⁶⁷ (5) adultery v. any cause—one jurisdiction;⁶⁸ (6) any cause v. adultery or like cause—one jurisdiction;⁶⁹ (7) any cause v. cause of equal wrong—two jurisdictions;⁷⁰ (8) desertion, cruelty, adultery, intoxication v. like conduct—one jurisdiction.⁷¹

The Georgia statute⁷² is the only one which approximates those of Nebraska, Michigan and Wyoming in the use of the term "like misconduct," the doctrine of recrimination applying in cases of adultery, cruel treatment, desertion or intoxication.⁷³ These, however, are not the only grounds for divorce in that state.⁷⁴ In Kentucky, the law provides that a wife may be granted a divorce under certain conditions "if not in like fault," and also provides

⁶² 2 Vernier, *American Family Laws* § 78 (1932).

⁶³ For a discussion of cases arising under the discretionary statutes, see text *infra* IV, B, 4.

⁶⁴ Ala., Alaska, Ariz., Fla., Ill., Ind., Me., Minn., Mo., N.J., N.Y., Ore., Pa., Tenn., Tex.

⁶⁵ Cal., Colo., Idaho, Mont., N.D., S.D.

⁶⁶ Mich., Neb., Wyo.

⁶⁷ Del., W. Va., Wis.

⁶⁸ Hawaii.

⁶⁹ Ark.

⁷⁰ Kan., Okla.

⁷¹ Ga.

⁷² Ga. Code Ann. § 30-109 (1952).

⁷³ *Ibid.* and Ga. Code Ann. § 30-102 (1952).

⁷⁴ Incestuous marriage; mental incapacity at the time of marriage; impotency at the time of marriage; force, menace, duress or fraud in obtaining the marriage; pregnancy of the wife at the time of the marriage by someone other than her husband; conviction of an offense involving moral turpitude and imprisonment therefor for two years or longer; incurable insanity and confinement therefor for three years are also grounds for an absolute divorce in Georgia. However, since some of these do not involve matters of offenses against the marriage, *quaere* as to whether they would be proper subjects of recrimination even if the statute were to cover them.

that a husband may be granted a divorce under slightly different conditions "if not in like fault."⁷⁵

A number of western states have rather precisely worded recrimination statutes. Both California and Montana, for example, have statutes providing that divorces shall be denied upon a showing of recrimination,⁷⁶ and then go on to define exactly what is meant by the term "recrimination."⁷⁷ Similarly, under the Colorado statute⁷⁸ it is provided that:

. . . if upon the trial of such action both parties shall be found guilty of any one or more of the causes of divorce, then a divorce shall not be granted to either of said parties.

In Iowa, as in other states, there is no specific recrimination statute, but the courts nevertheless read the doctrine of recrimination into the body of law by virtue of the general equitable powers granted by statutory provisions.⁷⁹

B. THE CASES

1. *The American Majority View*

Like Nebraska, most of the states having recrimination statutes do not look strictly to the statute for the proper method of applying the doctrine of recrimination. In Illinois, for example, the statute

⁷⁵ Ky. Rev. Stat. § 403.020 (1955). A comment in 41 Ky. L. J. 330 (1953), entitled, *Does Recrimination Remain in Kentucky?*, discusses the case of *Shofner v. Shofner*, 310 Ky. 869, 222 S.W.2d 933 (1949), which seemingly rejected the doctrine of recrimination. The author expresses the theory that this unusual decision was reached because of the indifference of the trial court, and the work load of the upper court. He then goes on to cite a later case, *Hartstern v. Hartstern*, 311 Ky. 564, 224 S.W.2d 447 (1949), which emphatically reaffirmed the doctrine of recrimination.

⁷⁶ Cal. Civ. Code § 111 (1949); Rev. Codes of Mont. § 21-118 (Supp. 1955).

⁷⁷ Both Cal. Civ. Code § 122 (1949) and Rev. Codes of Mont. § 21-128 (Supp. 1955) provide: "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce."

⁷⁸ Colo. Rev. Stats. § 46-1-4 (1953).

⁷⁹ Iowa Code Ann. § 598.2 (1950) provides: "An action for a divorce shall be by equitable proceedings. . . ." The Iowa courts have utilized these general equitable powers as a means for adopting the doctrine of recrimination. See *Paulsen v. Paulsen*, 243 Iowa 51, 50 N.W. 2d 567 (1951).

⁸⁰ Ill. Ann. Stats. c. 40, § 11 (Smith-Hurd 1956).

⁸¹ 266 Ill. App. 277 (1931). The court there stated, at 300: "The law of this state gives several reasons, each one of which it declares should be sufficient to sunder the marriage bond. A husband who breaks most of these and continues to break them through the years, cannot be said to come into court with clean hands. A court of equity is a court of conscience. Its arm is not shortened in such a case. A decree of divorce to this husband on these facts would offend the conscience and the sense of justice."

provides that the doctrine shall be applied in the adultery v. adultery situation.⁸⁰ However, the Illinois courts have gone far beyond this restriction and now have a full doctrine of recrimination. In *Grady v. Grady*⁸¹ the Illinois Appellate Court stated that it felt that it was within the "discretion" of the court to bar the award of a divorce in cases of mutual guilt where the grounds were misconduct other than adultery. The interesting factor is that in supporting this argument it relied upon the English Matrimonial Causes Act for authority, but reached a considerably different result than had most of the English courts under that act. The Court also ignored the fact that discretion is vested in the English matrimonial courts by the specific terms of the statute, while the Illinois statute contained no such provision.⁸² And in *Martin v. Martin*⁸³ the Appellate Court dismissed both the plaintiff's petition and the defendant's cross-petition on the basis that "... persons who are *in pari delicto* may not be granted divorce. . . ."⁸⁴ Probably one of the best statements of the application of the doctrine of recrimination by the Illinois courts is found in *Levy v. Levy*,⁸⁵ which carefully

⁸² Ill. Ann. Stats. c. 40, § 11 (Smith-Hurd 1956) provides: "If it shall appear, to the satisfaction of the court . . . that both parties have been guilty of adultery, when adultery is the ground of complaint, then no divorce shall be decreed."

⁸³ 327 Ill. App. 552, 64 N.E.2d 379 (1946).

⁸⁴ Id. at 552.

⁸⁵ 388 Ill. 179, 185, 57 N.E.2d 366, reversing 320 Ill. App. 608, 51 N.E.2d 829 (1944). There the Illinois Supreme Court stated: "Under such circumstances, the rule long ago announced in *Dubenstein v. Dubenstein*, 171 Ill. 133, is clearly applicable here. As in that case, the defendant asserted recrimination in defense of plaintiff's charges and thus we repeat: 'Divorce is a remedy provided for an innocent party* * *; so that, when each party has committed a cause for divorce, the causes being of the same statutory character, neither can complain of the other. Here, it cannot be said, in view of the testimony already quoted, that the appellee is an innocent party. * * * In discussing this subject Mr. Bishop in his work on Marriage, Divorce and Separation, says: "There is a rule which forbids redress to one for an injury done him by another if himself in the wrong about the same thing whereof he complains." This doctrine is applicable in the divorce law. * * * It is peculiarly applicable to the facts of this case. * * * the parties here are *in pari delicto* and therefore must be left to themselves.' The same principle was reaffirmed in *Garrett v. Garrett*, 252 Ill. 318, wherein the court said: 'It is the settled law that divorce is a remedy provided only for an innocent party, and when each party has cause for divorce against the other of the same statutory character neither can be granted a divorce; that a defendant charged with extreme and repeated cruelty may show in defense that the complainant was equally cruel.' The defense of recrimination thus bars a divorce to plaintiff upon the present record." Apparently by using the term "the same statutory character" the court meant conduct which would be grounds for divorce.

outlined the history of the doctrine in that state. The court there made it amply clear that the justification for the utilization of the principle of recrimination was to be found in the clean hands doctrine in equity. *Elston v. Elston*⁸⁶ gives much of the same indication, relying heavily on the *Levy* case for authority.

The absence of statutes defining recrimination or the bounds of its application does not act as a deterrent in the application of the principle. Maryland, for example, has no recrimination statute, but the courts have emphatically applied the doctrine.⁸⁷ And in Massachusetts a similar course has been followed, the court stating in *Reddington v. Reddington*,⁸⁸ for example:

After the statutes of this Commonwealth provided for judicial divorces, this court assumed, and the Legislature has long acquiesced in the assumption, that the doctrine of recrimination, though not mentioned in the statutes, had been adopted by implication.

In the case of *Blankenship v. Blankenship*,⁸⁹ the Nevada Supreme Court applied the doctrine of recrimination, and specifically renounced comparative rectitude as a solution to the mutual guilt problem in divorce. There the court states:⁹⁰

The rule of recrimination is, in our opinion, applicable to the case and operates as a bar to a decree of divorce. . . . Where each of the spouses has been guilty of misconduct which is cause for divorce, neither is entitled to this remedy. This rule is established by the decided weight of American authority [citing a long line of American cases]. . . . The rule rests upon the equitable principle that one who invokes the aid of a court must come into it with clean hands.

⁸⁶ 344 Ill. App. 233, 100 N.E.2d 635 (1951) (extreme cruelty v. extreme cruelty, adultery, bigamy).

⁸⁷ See *Appeltofft v. Appeltofft*, 147 Md. 603, 128 Atl. 273 (1925); *Geisselman v. Geisselman*, 134 Md. 453, 107 Atl. 185 (1919); *Green v. Green*, 125 Md. 141, 93 Atl. 400, L.R.A. 1915E, 972 Ann. Cas. 1917A, 175; *Fisher v. Fisher*, 93 Md. 298, 48 Atl. 833 (1901).

⁸⁸ 317 Mass. 760, 59 N.E.2d 775 (1945). There the court's statement was reminiscent of the philosophies of Lord Stowell and Chancellor Walworth (See 2 Bishop, Marriage, Divorce and Separation § 343 (1891) in which he quotes Lord Stowell as saying that guilty spouses can "find sources of mutual forgiveness in the humiliation of mutual guilt" and Chancellor Walworth as saying that they are "suitable and proper companions."). The Massachusetts Court stated, at p. 763: "The fact that a marriage has proved so unsuccessful that both spouses have broken their vows by giving cause for divorce, has the effect of riveting the legal bond and making it indissoluble except by death."

⁸⁹ 51 Nev. 356, 276 Pac. 9, 63 A.L.R. 1127 (1929).

⁹⁰ Id. at 359.

2. *The Michigan Cases*

Because of its identical statute, it appears worthwhile to examine the course of the cases in Michigan with particular care. In that state the Supreme Court, like the Supreme Court of Nebraska, has not restricted its application of the doctrine of recrimination to those cases where both parties claim the identical ground for divorce. In *Stiehr v. Stiehr*,⁹¹ for example, the plaintiff sought a divorce on the basis of the defendant's cruelty, and the defendant alleged the adultery of the plaintiff as a recriminatory defense. The court in that case, and in other similar cases,⁹² based its application of the doctrine of recrimination on the equitable theory of clean hands. Even in the cases which clearly come within the terms of the statute, i.e., those in which both parties allege misconduct which would constitute the same ground for divorce, the clean hands concept is still expressed. Mr. Justice Dooley, in *Hoff v. Hoff*,⁹³ stated:

And it is as true of divorce cases as any others, that a party must come into a court of equity with clean hands. Divorce laws are made to give relief to the innocent, not the guilty.

This view is echoed in a number of other cases.⁹⁴ In fact, like the Nebraska Court in *McKnight v. McKnight*,⁹⁵ the Michigan Court on occasion apparently has not concerned itself with whether or not the misconduct alleged was necessarily of the type that would be sufficient to support a cause of action for divorce.⁹⁶

A view slightly different in approach, but not in result, was taken in a group of cases in which the Michigan Court held that no decree could be awarded where the deterioration of the marriage had been through the mutual fault and neglect of both parties.⁹⁷ The improbability of a reconciliation was deemed not to be a proper consideration in a mutual guilt situation,⁹⁸ although in *Weiss v.*

⁹¹ 145 Mich. 297, 108 N.W. 684 (1906).

⁹² *Demorest v. Demorest*, 259 Mich. 156, 242 N.W. 873 (1932); *Melinn v. Melinn*, 329 Mich. 96, 44 N.W.2d 886 (1951).

⁹³ 48 Mich. 281, 12 N.W. 160 (1882).

⁹⁴ *Bennett v. Bennett*, 336 Mich. 133, 57 N.W.2d 323 (1953); *Hoffmann v. Hoffmann*, 329 Mich. 486, 45 N.W.2d 366 (1951); *Bradford v. Bradford*, 329 Mich. 328, 45 N.W.2d 305 (1951); *Kanka v. Kanka*, 318 Mich. 109, 27 N.W.2d 602 (1947); *Gill v. Gill*, 213 Mich. 384, 181 N.W. 996 (1921); *Root v. Root*, 164 Mich. 638, 130 N.W. 194, 32 L.R.A.(N.S.) 837 (1911).

⁹⁵ *McKnight v. McKnight*, 5 Neb. Unof. 260, 98 N.W. 62 (1904).

⁹⁶ *Weiss v. Weiss*, 174 Mich. 431, 140 N.W. 587 (1913).

⁹⁷ *Juda v. Juda*, 327 Mich. 321, 41 N.W.2d 883 (1950); *Kuhfal v. Kuhfal*, 318 Mich. 105, 27 N.W.2d 512 (1947); *Stafford v. Stafford*, 53 Mich. 522, 19 N.W. 201 (1884).

⁹⁸ *McGorkey v. McGorkey*, 366 Mich. 698, 58 N.W.2d 818 (1953).

Weiss,⁹⁹ the Court noted, in awarding a divorce to the defendant wife, that:

It is manifest, so far as human foresight can discern, that the enmity and bitterness which has developed precludes possibility of reconciliation.

In yet another case the duty to reconcile and the fact that the parties had small children were factors in the Court's preservation of the marriage.¹⁰⁰ As to the treatment of other factors in recrimination cases, the Michigan Court has held that condoned offenses against the marriage are not bars to subsequent actions for divorce;¹⁰¹ that the adultery of the plaintiff during the pendency of the action would invoke the doctrine of recrimination;¹⁰² and even though a plaintiff's misconduct during the period of the interlocutory decree was not discovered until after the decree had become final, the decree would be set aside.¹⁰³ However, a plaintiff's engagement during the pendency of a divorce action would not defeat such action, so long as there was no showing of moral depravity on her part.¹⁰⁴

The doctrine of comparative rectitude has been adopted to an extent by the Michigan Court. In *Weiss v. Weiss*,¹⁰⁵ for example, the court said:

It is a salutary and well-recognized elementary rule of equity jurisprudence that one seeking aid from a court of chancery must come with clean hands, and, if not, the court will decline to act, leaving the parties where it finds them. That rule, as applied to divorce, means that it is a remedy provided only for the innocent and injured party, and, if the evidence discloses that both have shown ground for divorce, neither is entitled to it. It must be conceded, however, that there is a growing tendency in divorce cases to at all times relax that rule, on grounds of public policy or the peculiar exigencies of the special case under consideration, and adopt one of comparative rectitude or turpitude. This record, taken

⁹⁹ 174 Mich. 431, 140 N.W. 587 (1913).

¹⁰⁰ *Garb v. Garb*, 328 Mich. 305, 43 N.W.2d 863 (1950).

¹⁰¹ *Kinek v. Kinek*, 331 Mich. 54, 49 N.W.2d 58 (1951); *Wieland v. Wieland*, 227 Mich. 395, 198 N.W. 921 (1924).

¹⁰² *Arix v. Arix*, 212 Mich. 438, 180 N.W. 463 (1920).

¹⁰³ *Linn v. Linn*, 341 Mich. 668, 69 N.W.2d 147 (1955). There the plaintiff became pregnant during the period of the interlocutory decree, the father of the child being one other than the defendant. Despite the fact that upon the decree's becoming final the plaintiff married the father of the child, the Michigan Court set aside the divorce decree on the basis that it was obtained by fraud.

¹⁰⁴ *Curtis v. Curtis*, 330 Mich. 63, 46 N.W.2d 460 (1951).

¹⁰⁵ 174 Mich. 431, 432, 140 N.W. 587, 589 (1913).

as a whole, breathes the suggestion that defendant's divorce comes more logically under the rule of comparison.

In other cases the Michigan Court specifically denied the idea that the *Weiss* case utilized the doctrine of comparative rectitude,¹⁰⁶ but in later cases comparisons of guilt of the parties were made, and divorces were awarded to the less guilty parties.¹⁰⁷

3. *The Wyoming Cases*

No cases have arisen under the Wyoming recrimination statute. Perhaps this is explainable in part by the fact that Wyoming has a "living apart" divorce statute,¹⁰⁸ so parties who have both broken their marriage vows may take this somewhat easier course in achieving a termination of the marriage.

4. *The English View*

Since the passage of the Matrimonial Causes Act,¹⁰⁹ the tendency in the English courts has been to gradually fail to apply the recrimination theory in mutual guilt cases.¹¹⁰ Under the present Matrimonial Causes Act, the grounds for divorce are adultery, cruelty, incurable insanity, and desertion,¹¹¹ and in practice the only offense necessitating a specific plea for the exercise of the judicial discretion to grant a decree in a mutual guilt case is that of adultery.¹¹² The procedure has been developed whereby at the time a petitioner files his action, he must also file a full statement of the facts regarding his own adultery. Unlike the situation in the courts in the United States, this "confession" does not necessarily operate to hinder the wrongdoing plaintiff's cause. Latey¹¹³ cites

¹⁰⁶ *Vardon v. Vardon*, 266 Mich. 341, 253 N.W. 320 (1934); *Hatfield v. Hatfield*, 213 Mich. 368, 181 N.W. 968 (1921).

¹⁰⁷ *Boter v. Boter*, 338 Mich. 187, 61 N.W.2d 64 (1953); *Trombley v. Trombley*, 313 Mich. 80, 20 N.W.2d 818 (1945).

¹⁰⁸ Wyo. Comp. Stats. § 3-5906 (1945). For a discussion on living apart statutes see *McCurdy*, 9 Vand. L. Rev. 685 (1956).

¹⁰⁹ 20 & 21 Vict., c. 85 (1857).

¹¹⁰ Latey, *Divorce* § 302 (14th ed. 1952).

¹¹¹ Matrimonial Causes Act, Geo. 6, c. 57, § 1 (1950).

¹¹² Keezer, *Marriage and Divorce* § 497 (3d ed. 1946).

¹¹³ Latey, *Divorce* § 302 (14th ed. 1952). He cites *Wilkinson v. Wilkinson and Seymour*, 37 T.L.R. 835 (1921) (where the plaintiff husband had committed adultery after becoming aware of his wife's adultery, and indicated a desire to marry the woman with whom he had engaged in the illicit acts); *Pointon v. Pointon and Sutton*, 38 T.L.R. 848 (1922) (where the plaintiff husband had lived in a state of adultery with his housekeeper for thirty years); *Grayson v. Grayson*, 43 T.L.R. 225 (1927) (where the plaintiff husband expressed a desire to marry the woman with whom he was living).

a number of instances in which the English courts have granted divorces to errant plaintiffs, particularly where there were indications that the adulterer would subsequently marry the person with whom he or she had been having the illicit relationship. There seem to be a number of reasons for this rather liberal view taken by the English courts. In *Blunt v. Blunt*,¹¹⁴ a case in which each party alleged adultery on the part of the other, the trial court awarded a divorce to both parties, and the Court of Appeal reversed the decision, awarding a divorce to the plaintiff wife. On appeal to the House of Lords, the judgment of the trial court was reinstated, Viscount Simon, L. C., explaining the holding in this manner:¹¹⁵

... it appears to me that cases may not infrequently arise in which each party, while proving the case for his or her petition, has been guilty of such conduct as by the terms of the statute entitles the court to dismiss the petition, where injustice may be done if discretion is exercised in favour of one of the parties only. There is no reason in principle why, where both sides are in mercy, if the judge decides to exercise his discretion, he should not exercise it in favour of both parties and pronounce the decree without drawing a distinction between them. If, for example, the blame for the breakdown of the marriage must be equally shared and the circumstances are such as do not justify a judicial preference for one party as compared with the other, serious injustice may be done if a decree of divorce is pronounced in favour of one party while the petition of the other party is dismissed.

It is significant that in the *Blunt* case there was no question as to whether or not a divorce should be awarded—the only question was to whom it should be granted.

5. *The American Minority View*

In the American jurisdictions, a few of the courts have also become considerably more liberal in their treatment of the mutual guilt problem. The states which have discretionary statutes are utilizing them to award divorces where there is evidence of guilt on the part of both parties. In Kansas, despite a previous holding to the contrary,¹¹⁶ the Supreme Court held that:¹¹⁷

... where both parties are in equal wrong the court may, in its discretion, grant or deny the divorce.

¹¹⁴ A.C. 517, All E.R. 76 (1943).

¹¹⁵ Id. at 81.

¹¹⁶ *Day v. Day*, 71 Kan. 385, 80 Pac. 974, 6 Ann. Cas. 169 (1905).

¹¹⁷ *Lassen v. Lassen*, 134 Kan. 436, 7 P.2d 120 (1932).

And in Oklahoma the Court stated:¹¹⁸

Under . . . our statute, the trial court is given discretion in the granting or refusal to grant a divorce when it appears that the parties are equally at fault, and the judgment of the trial court in such a case will not be set aside by this court on appeal in the absence of a showing that the said court abused its sound discretion.

In other jurisdictions as well, the courts have seized upon the opportunity to rid themselves of the doctrine of recrimination, at least as far as its mandatory application, even at the expense of overruling large groups of cases or of contravening existing statutes. In *Pavletich v. Pavletich*¹¹⁹ the New Mexico court overruled its strongest previous recrimination case¹²⁰ on the basis that a divorce should be granted in a mutual guilt situation when there is evidence that the parties are irreconcilable. A similar holding was shown in the California case of *DeBurgh v. DeBurgh*,¹²¹ which overruled the previous "landmark" case of *Conant v. Conant*¹²² despite the statute making recrimination a mandatory bar to divorce.¹²³ In the State of Washington, as early as 1915 the courts began rejecting the doctrine of recrimination. In *Schirmer v. Schirmer*¹²⁴ the Supreme Court of Washington affirmed an award of a divorce to both parties upon a showing of cruelty on the part of both. The federal courts have also rejected the mandatory application of the doctrine of recrimination. In *Vanderhuff v. Vanderhuff*¹²⁵ the Federal District Court for the District of Columbia, in citing an earlier similar decision,¹²⁶ favored the "liberalizing" of recrimination statutes and the interpretation thereof to permit the dissolution of marriages which "had ceased to exist in fact." And in *Burch v. Burch*,¹²⁷ the Third Circuit,

¹¹⁸ *Panther v. Panther*, 147 Okla. 131, 295 Pac. 219 (1931).

¹¹⁹ 50 N.M. 224, 174 P.2d 826 (1946). This case, however, was not one in which the question of recrimination was strictly at issue.

¹²⁰ *Chavez v. Chavez*, 39 N.M. 480, 50 P.2d 264, 101 A.L.R. 635 (1935).

¹²¹ 39 Cal. 2d 858, 250 P.2d 598 (1952). A note in 27 So. Calif. L. Rev. 219 (1954) discusses the DeBurgh decision, the author's conclusion being that while the holding may be an assumption of legislative function by the judiciary, it should be "praised as accomplishing a sociologically valid purpose."

¹²² 10 Cal. 249, 70 Am. Dec. 717 (1858).

¹²³ Cal. Civ. Code §§ 111, 122 (1949). § 111 provides: "Divorces must be denied upon showing . . . recrimination."

¹²⁴ 84 Wash. 1, 145 Pac. 981 (1915).

¹²⁵ 144 F.2d 509 (D.C. Cir. 1944).

¹²⁶ *Parks v. Parks*, 116 F.2d 556 (D.C. Cir. 1940).

¹²⁷ 195 F.2d 799 (3d Cir. 1952).

in a case of incompatibility¹²⁸ v. cruelty, refused to apply the doctrine of recrimination and granted a divorce to both parties.

V. A CRITICAL ANALYSIS OF THE DOCTRINE AND THE CASES

A. INCONSISTENT APPLICATION OF THE DOCTRINE

Aside from any consideration of the merits or faults of the doctrine of recrimination,¹²⁹ the courts and legislatures in this country have failed to apply the doctrine consistently. As Vernier stated:¹³⁰

An examination of the statutes existing in the . . . American jurisdiction is not calculated to give comfort to anyone who believes in the superiority of the written over the unwritten law. The statutes of a majority of these thirty-two jurisdictions, if read literally, are inconsistent with the theory of recrimination.

The point that Vernier is making is that if the doctrine of recrimination is interpreted as one under which the guilt of a party will preclude his release from the marital bond, then the statutes which restrict the application of the doctrine to certain given situations fail to live up to the avowed principles of recrimination. He might have gone one step farther and shown that despite the existence of specific statutory provisions, and despite the fact that in most jurisdictions the powers of the courts handling matters of divorce are restricted to those powers specifically granted by statute,¹³¹ a great many jurisdictions have extended the applicability of the doctrine of recrimination far beyond its statutory bounds.¹³² Because of the course its Supreme Court has taken, Nebraska is a typical example of this position. The Nebraska recrimination statute has, since its adoption, contained the provision that a divorce should be denied "where the party complaining shall be guilty of the same crime or misconduct¹³³ charged against the respondent."¹³⁴

¹²⁸ According to the Burch case, the Virgin Islands was the first American jurisdiction to adopt incompatibility as a ground for divorce (Code of Laws of the Municipality of St. Thomas and St. John, t. III, c. 44, § 7, subdiv. 8th), but that later New Mexico (N.M. Stats. § 25-701 [1941]) and Alaska (Alaska Comp. Laws Ann. § 56-5-7 [1949]) also enacted similar provisions.

¹²⁹ For an evaluation of the doctrine, see text, *infra* V, B, I.

¹³⁰ 2 Vernier, American Family Laws § 78 (1932).

¹³¹ Keezer, Marriage and Divorce § 196 (2d ed. 1923).

¹³² See text, *infra*, IV, B, I.

¹³³ Emphasis supplied by author.

¹³⁴ Neb. Rev. Stat. § 42-304 (Reissue 1952).

The following has long been the rule in Nebraska with regard to divorce actions:¹³⁵

... the courts, either of law or equity, possess no powers except such as are conferred by statute; and ... to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings or practice in it, or to the mode of enforcing the judgment or decree, authority therefor must be found in the statute, and cannot be looked for elsewhere or otherwise asserted or exercised.

Despite this rule, in hearing the recrimination appeals that came before it, the Nebraska Supreme Court failed to even attempt to interpret the recrimination statute until only recently, even though that statute had been in existence since 1856. Instead the Court looked to Bishop for his interpretations of the common law concept of recrimination,¹³⁶ and to cases from Wisconsin,¹³⁷ Missouri,¹³⁸ New Jersey¹³⁹ and Rhode Island,¹⁴⁰ for interpretations of the statutes of those jurisdictions, which differed substantially from the Nebraska law. There was no careful examination of the legislative history of the statute, nor an examination of the cases from the jurisdiction that had identical statutory provisions. The result of this haphazard jurisprudence was the decision in the *Wilson* case¹⁴¹—and once the Court had handed down that decision, it furnished the dubious precedent for other cases in the State. The *Wilson* decision in effect blanketed all mutual guilt divorce cases in the state with the doctrine of recrimination, ignoring the fact that the statute specifically provided that the doctrine should be applied in cases of the "same crime or misconduct."¹⁴²

¹³⁵ *Cizek v. Cizek*, 69 Neb. 800, 99 N.W. 28, *on reh'g* from 69 Neb. 797 (1904); *Wharton v. Jackson*, 107 Neb. 288, 185 N.W. 428 (1921). Both of these cases refer to an earlier Wisconsin decision, *Barker v. Dayton*, 28 Wis. 367, 378.

¹³⁶ *Wilson v. Wilson*, 89 Neb. 749, 132 N.W. 401 (1911).

¹³⁷ *Pease v. Pease*, 72 Wis. 136, 39 N.W. 133 (1888).

¹³⁸ *Nagel v. Nagel*, 12 Mo. 53 (1848).

¹³⁹ *Reading v. Reading*, 5 Atl. 721 (N.J. Chan. 1886).

¹⁴⁰ *Church v. Church*, 16 R.I. 667, 19 Atl. 224 (1890).

¹⁴¹ 89 Neb. 749, 132 N.W. 401 (1911).

¹⁴² It is not without possibility that in the *Wilson* case a careful interpretation of the statute would have had the same result as the random excursion into the case law of other jurisdictions. Tiffany (in his *Handbook on the Law of Persons and Domestic Relations* § 108 [1896]), for example, suggests that the wording of the statute could be construed to mean any crime or misconduct which would be a ground for divorce. It seems logical, however, that if the court had been making a concerted effort to understand the wording of the law it would have stated its beliefs as to the meaning of these very specific words—instead it failed to even acknowledge the existence of the statute.

Once the courts deviate from the exact statutory wording, they seem to have little difficulty in adapting the doctrine of recrimination to the particular situation at bar—a policy which accounts for a great deal of inconsistency in the administration of the divorce laws of this country. In Nebraska, for example, one month after the release of the opinion in the *Wilson* case—the case which is considered the landmark recrimination case in the State—the Court issued the opinion in *Goings v. Goings*,¹⁴³ which was the quasi comparative rectitude decision. The composition of the bench was the same in both cases, and both opinions were by Mr. Chief Justice Reese. This assumption by the courts of legislative tasks in extending the doctrine of recrimination beyond its statutory definitions is, in large part, responsible for the inconsistent decisions, not only in Nebraska, but in other jurisdictions as well.

In addition, the courts become so involved in the job of “law making” in the field of recrimination that they often cut out from under themselves the very ground upon which they are standing. For example, the purists would say that recrimination is a doctrine to be applied to ALL mutual guilt divorce cases meeting the requirement of statutory grounds for divorce—yet this was not so in the English ecclesiastical courts,¹⁴⁴ upon whose authority the American courts claim to be dependent. And, as the Nebraska Court did in *Goings v. Goings*¹⁴⁵ and *Forburger v. Forburger*,¹⁴⁶ when the courts award a divorce *a mensa et thoro* as a sort of consolation prize to the less guilty spouse, but deny an absolute divorce on the basis of recrimination, they overlook the fact that originally the doctrine of recrimination was applicable principally to separation decrees.¹⁴⁷ Thus, in purporting to apply the common law rule, the courts manage to enforce it where it had not been consistently applied under the English law, and fail to apply the doctrine in the area of its origin.

B. THE DOCTRINE ITSELF

The proponents of the doctrine of recrimination submit five principal arguments for its use, aside from the purely historical view of it as one of our legal traditions.

¹⁴³ 90 Neb. 148, 133 N.W. 199 (1911).

¹⁴⁴ See notes 10-13 *supra*.

¹⁴⁵ 90 Neb. 148, 133 N.W. 199 (1911).

¹⁴⁶ 122 Neb. 705, 241 N.W. 279 (1932).

¹⁴⁷ As has been shown in text *supra* I, the doctrine of recrimination developed largely in the ecclesiastical courts, which were empowered only to grant separation decrees. The doctrine, as illustrated there, was not considered to be uniformly enforced in the cases of Parliamentary bills for absolute divorce.

1. *Recrimination as a Facet of the Clean Hands Doctrine*

Probably the most frequently cited rationale for the doctrine of recrimination is that it is the matrimonial court counterpart of the doctrine of clean hands in other equity cases.¹⁴⁸ It should be remembered, first, that a divorce case cannot be blindly categorized as just another type of action at equity. Because of the human relationships involved, it is a separate and distinct sort of case which can be compared with no other field of the law. In addition, the strict supporters of the doctrine are faced with somewhat of a dilemma in arguing the applicability of the clean hands doctrine to this particular phase of the law, for the doctrine of recrimination evolved long before equity courts took jurisdiction of matters concerning marriage and divorce. Furthermore, even courts of equity themselves in dealing with other matters do not insist upon a strict adherence to the clean hands doctrine when the public interest will be better served by ignoring the doctrine. For example, the Supreme Court of Nebraska has stated:¹⁴⁹

The maxim [clean hands] quoted being founded on public policy, public policy may require its relaxation. Even when the parties have been found to be in *pari delicto*, relief has at times been awarded on the ground that in this particular case public policy has been found to be best conserved by that course. 21 C. J. 189, sec. 175. Rather, it would seem that the facts before us required the application of the well established principle: "Where equity has assumed to act, it must do complete justice, regardless of whether litigants originally came into court with unclean hands." *Wenzlaff v. Tripp State Bank*, 50 S. Dak. 6.

The late Zechariah Chaffee, Jr., in a series of lectures at the University of Michigan Law School, stated with regard to the application of the clean hands doctrine to divorce actions:¹⁵⁰

If the courts would forget the clean hands doctrine and consider only the policies involved, they might start asking how much actual good is accomplished by the substantive defense of recrimination.

And he went on to say:¹⁵¹

. . . the concentration of judges on the clean hands maxim sometimes does harm by distracting their attention from the basic policies which are applicable to the situation before them. The matrimonial suits are a notable example of this bad tendency.

¹⁴⁸ 1 Nelson, *Divorce and Annulment* § 10.02 (2d ed. 1945).

¹⁴⁹ *Weaverling v. McClennan*, 116 Neb. 466, 474, 217 N.W. 956 (1928). Cf. *Menzel v. Niles*, 86 Colo. 320, 326, 281 Pac. 364 (1929); and *Saylor v. Crocker*, 97 Kan. 624, 627, 156 Pac. 737 (1916).

¹⁵⁰ Chaffee, *Some Problems in Equity* 81 (1950).

¹⁵¹ *Id.* at 95.

It seems illogical, indeed, to presume that the perpetuation of a union which exists in name and not in spirit is in the interest of society and of the parties—and it should be remembered that the purpose of the courts of equity is not to rigidly enforce their own rules, but rather to remain flexible in the best interests of justice for all concerned.

2. *Recrimination in Relation to Marriage as a Contract*

There are those who would urge that the doctrine of recrimination be utilized under the principles of contract law—in other words, because marriage is contractual in nature, a party breaching the contract cannot then complain of a breach of that contract by the other party.¹⁵² This philosophy exhibits a rather amazing degree of naivete in its outlook toward the marital union. While there are certain elements of the contract in a marriage, and while most jurisdictions define the marital union as a contractual one in some sense,¹⁵³ to look upon it as an impersonal compact certainly ignores those elements which combine to make a happy marriage, or which meet head-on in the case of a discordant one. Mr. Justice Traynor, in *DeBurgh v. DeBurgh*,¹⁵⁴ expresses this theory in stating:

The descriptive analogy to contract law ignores the basic fact that marriage is a great deal more than a contract. It can be terminated only with the consent of the state. In a divorce proceeding the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. . . . 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. Public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been destroyed.

And in *Burch v. Burch*¹⁵⁵ Judge Maris stated:

The doctrine of recrimination has been rested . . . upon the theory that he who seeks redress for the violation of a contract resting on mutual and dependent covenants must himself have performed the obligations on his part. But the doctrine of recrimination in divorce has been much criticized in recent years. For it ignores the fact that marriage is not a mere private contract but rather a status of such basic importance in the social structure that the state has a vital interest in its proper continuance and appro-

¹⁵² 2 Bishop, *Marriage, Divorce and Separation* § 343 (1891), and Keezer, *Marriage and Divorce* § 55 (2d ed. 1923).

¹⁵³ 1 Nelson, *Divorce and Annulment* § 3 (1895). He feels that the tendency to regard marriage as a contractual relationship is an unfortunate one, and that it should be more properly considered a "status."

¹⁵⁴ 39 Cal. 2d 858, 250 P.2d 598 (1952).

priate termination. From a social point of view it is hard to defend the rule that recrimination is an absolute bar to the granting of a divorce for it requires that parties who are guilty of conduct which makes their marriage impossible of success shall continue their impossible marital relationship as a sort of punishment for their mutual guilt. For this reason the application of the doctrine has been relaxed as an absolute bar to divorce in a number of jurisdictions.

3. *Recrimination to Prevent Repetitive Divorces*

Some proponents of the doctrine of recrimination urge that the application of the doctrine is an effective means of checking the divorce "repeater," i.e., the person who appears in the divorce court more than once.¹⁵⁶ This was, in fact, apparently one of the points considered by the Nebraska Supreme Court in the *Forburger* case.¹⁵⁷ In that case both of the parties had had a previous spouse, but had obtained divorces from their previous spouses after meeting one another. There the Court stated:¹⁵⁸

Social welfare will best be conserved by compelling parties, with histories such as these, to remain bound by the marriage ties, but if their dispositions are such that they cannot live happily together they should be permitted to live apart.

And in *Goings v. Goings*¹⁵⁹ the Court said:

... neither one should be relieved from the restraint of the marriage relation and permitted to contract new alliances.

The concept of recrimination as a form of "habitual divorcee" mechanism is perhaps the most meritorious of the arguments in favor of the doctrine. However, there are two principal objections to such an approach: (a) it might cause grave harm by fettering a spouse who has no previous experience in the divorce courts to a "divorce repeater" and thus would accomplish its end on the one hand but work an injustice on the other; and (b) it would have the result of preventing many couples with no previous divorce

¹⁵⁵ 195 F.2d 799 (3d Cir. 1952).

¹⁵⁶ See *McCurdy*, 9 Vand. L. Rev. 685, 697 n. 78 (1956).

¹⁵⁷ 122 Neb. 705, 241 N.W. 279 (1932). It is worth noting, however, that the application of the doctrine does not always have such a deterrent effect. The parties in *Hoffman v. Hoffman*, 329 Mich. 486, 45 N.W.2d 366 (1951), for example, were apparently unaffected by the denial of a divorce, for the plaintiff in that case later filed a second suit for divorce, alleging additional acts of cruelty subsequent to the prior action. See *Hoffman v. Hoffman*, 341 Mich. 225, 67 N.W.2d 206 (1954). And the fact should not be overlooked that undoubtedly many cases in which recrimination was originally an issue are refiled on subsequently accrued grounds and never again reach the appellate level.

¹⁵⁸ *Id.* at 708.

¹⁵⁹ 90 Neb. 148, 133 N.W. 199 (1911).

records from seeking relief from their mutual unhappiness, unless the doctrine were applied only to those persons classified as "repeaters." If this were the only aim of a recrimination law, surely the same end could be reached by either preventing the award of more than X number of divorces to one person (which would still have the disadvantage stated in (a) above) or, more logically, by preventing the contracting of more than X number of marriages by any one person.

4. *Recrimination to Preserve the Marriage*

In these days of increased emphasis upon the sociological factors in the law, supporters of the doctrine of recrimination are quick to proclaim the doctrine (with its cohorts collusion, connivance and condonation) as one of the last bulwarks against the ever-increasing divorce rate—recrimination, they say, is the panacea for the broken home and the element which will force a reconciliation. This school of thought again overlooks the human factor inherent in the marriage as a legal entity. If the parties are so ill-mated that they have reached the divorce courts, a coercive "reconciliation" will be of little avail. The application of the recrimination rule, while failing to preserve the marriage, will probably succeed in either forcing the parties to seek a divorce by an uncontested case or through collusive means, or will result in a continuation of the offenses against the marriage. With respect to this, it was stated in the *DeBurgh* case:¹⁶⁰

It bears noting how frequently divorces are uncontested. In many cases neither spouse is "innocent" and yet by agreement one of them defaults to ensure a divorce. Thus a strict recrimination rule fails in its purpose of denying relief to the guilty. Moreover, it exerts a corrupting influence on the negotiations that precede the entry of such a default. The spouse who more desperately seeks an end to a hopeless union is penalized by the ability of the other spouse to prevent a divorce through the assertion of a recriminatory defense, and the more unscrupulous partner may obtain substantial financial concessions as the price of remaining silent. Were the clean hands doctrine properly applied, it would encourage estranged couples to bring their differences before the chancellor, where the interests of society as a whole can be given proper recognition and where settlement negotiations can be supervised and unfair advantage prevented.

In *Vanderhuff v. Vanderhuff*¹⁶¹ the court indicated a similar view by stating:

From a social point of view it is hard to defend a rule that recrimination is an absolute bar to the granting of a divorce. It

¹⁶⁰ 39 Cal. 2d. 858, 250 P.2d 598 (1952).

¹⁶¹ 144 F.2d 509 (D. C. Cir. 1944).

requires parties who are guilty of conduct which makes their marriage impossible of success to continue their marital relationship as a sort of punishment for their sins.

If the preservation of the marriage is to be a goal of the doctrine of recrimination, the courts would be well advised to investigate the possibility of reconciliation of the parties before insisting that they remain husband and wife. This step has not been taken by the Nebraska court in any of the recrimination cases, although it has been a consideration in a divorce action in which there was a cross-petition for annulment.¹⁶²

5. *Recrimination in the Interest of Issue of the Marriage*

It has also been suggested that children of a marriage are best protected when the doctrine of recrimination is invoked—that if for no other reason the doctrine can be justified because it is the cohesive element that maintains the family unit. It is in this area that the courts should examine the particular cases with close scrutiny. Unless there is a real possibility of a true reconciliation of the parties it seems as though the welfare of the issue of a marriage might be better protected if a divorce were awarded in the mutual guilt case. If the parents are so unhappy together that they have found it necessary to resort to the divorce courts, a forced reconciliation surely cannot afford a child a healthy family background. There is no guarantee that, upon the denial of a divorce decree, the parents will resume living together, nor is there any assurance that if they do resume cohabitation there will be any degree of tranquility in the home. One must realize that the existence of a marriage in name is not tantamount to the existence of a happy home.

In examining the Nebraska cases, no significant conclusions can be drawn as to the effect of the presence of small children in the family on the Court's thinking since there have been no issue in most of the cases involving the doctrine of recrimination. In the *Goings* case,¹⁶³ however, the parties had a twelve-year-old daughter.

¹⁶² *Hudson v. Hudson*, 151 Neb. 210, 36 N.W.2d 851 (1949). There the court stated, at 216: "In view of the ages of the parties, the circumstances under which the marriage occurred (the parties were married upon discovery of plaintiff's pregnancy), the brief period of its duration, the charges made in this litigation, the nature of the evidence produced, and the feeling between the families, we do not think a reconciliation will ever be possible. To leave these young people in a legal position where it will not be possible to rehabilitate themselves by establishing a home of their own without such a reconciliation does not seem desirable. We have come to the conclusion that the appellee's prayer for absolute divorce should be granted."

¹⁶³ 90 Neb. 148, 133 N.W. 199 (1911).

Although the court was unwilling to grant an absolute divorce, it did affirm the award of a divorce *a mensa et thoro* to the plaintiff wife, and, in discussing the matter of child custody, stated that the child's behavior was much improved since living with only her mother.

VI. A PROPOSED COURSE FOR THE NEBRASKA LAW

A. INTERPRETATION OF THE PRESENT LAW

If the Nebraska Supreme Court were inclined to favor an abandonment of the doctrine of recrimination, it would be faced with the question of how far it could proceed toward this end under the existing statute. By stating that "no divorce shall be decreed in any case where the party complaining shall be guilty. . . ." ¹⁶⁴ it would appear that the Legislature intended that the denial of a decree be mandatory in the cases specified, and that the courts should not possess any discretionary powers in determining whether or not the doctrine of recrimination should be applied. The courts would then have to turn to the specified conditions for the application of the doctrine, ascertaining how the term "the same crime or misconduct" should be interpreted. A great deal could be done toward rejecting recrimination by simply interpreting the statute as strictly as possible, invoking the statute only when the grounds for divorce pleaded by the parties were the same grounds (e.g., cruelty v. cruelty). One further step could be taken, narrowing the scope of the statute by applying it only when the same ground appeared in the same degree of severity. However, this course would be largely designed for the cruelty case, not being particularly adaptable to the other grounds for divorce;¹⁶⁵ and in addition would be, in effect, utilizing the doctrine of comparative rectitude, which would not necessarily be desirable.

Whether intentionally or not, the Nebraska Supreme Court, and no doubt the district courts as well, apparently closes its eyes to a potential recriminatory situation if the doctrine is not pleaded. An examination of the divorce cases reaching the Nebraska Supreme Court during the last few years reveals that in a substantial number the fact situations indicated that a consideration of the applicability of the doctrine of recrimination would have been

¹⁶⁴ Neb. Rev. Stat. § 42-304 (Reissue 1952).

¹⁶⁵ Although it would be a difficult matter to weigh, a distinction could be made between the person living in adultery and the person merely committing one adulterous act. However, compare this sort of an approach with the English attitude described in text, *supra*, IV, B, 4.

proper.¹⁶⁶ In *Cowan v. Cowan*,¹⁶⁷ for example, the trial court awarded a decree of divorce to the defendant on his cross-petition alleging extreme cruelty, but the Supreme Court reversed, ordering an award of an absolute divorce to the plaintiff on the basis of extreme cruelty. There was ample evidence of physical and verbal abuse on the part of both parties, but the Supreme Court explained its decision by this statement, which is not unlike a comparative rectitude view:¹⁶⁸

This physical abuse and cruelty by the defendant of the plaintiff transcends and outweighs the other alleged acts of the parties.

There was no mention of recrimination in the case. The most recent decisions of the Nebraska Supreme Court are the most striking examples of an inclination to abandon the doctrine of recrimination. In *Dwinnell v. Dwinnell*,¹⁶⁹ the matter of recrimination was not mentioned by the Supreme Court. However, although the Court upheld the trial court's award of an absolute divorce to the plaintiff wife, it also upheld the award of custody of the children to the husband on the basis of the unfitness of the wife. In describing this "unfitness" the wife's conduct was characterized as follows:¹⁷⁰

At one time she stabbed the defendant in the face with a table fork with such a force that it penetrated his nose. On another occasion, she threw a fruit jar in defendant's face with such force that it required several stitches to close the wound. On another occasion she kicked the defendant in the back with such force that he was hospitalized for several days. . . .

Yet, in view of such conduct, the doctrine of recrimination was not brought in as an issue. And in *Workman v. Workman*,¹⁷¹ the trial court denied a divorce to both parties on the basis of their mutual guilt, recrimination being one of the issues brought before the Supreme Court of Nebraska on appeal of the case; yet the Supreme Court awarded an absolute divorce to the plaintiff wife, and failed to even mention the applicability of the issue of recrimination. It would be difficult to estimate the number of cases which never pro-

¹⁶⁶ See *Schlueter v. Schlueter*, 158 Neb. 233, 62 N.W.2d 871 (1954); *Messer v. Messer*, 157 Neb. 312, 59 N.W.2d 395 (1953); *McNamee v. McNamee*, 154 Neb. 212, 47 N.W.2d 383 (1951).

¹⁶⁷ *Cowan v. Cowan*, 160 Neb. 74, 69 N.W.2d 300 (1955).

¹⁶⁸ *Id.* at 84.

¹⁶⁹ 165 Neb. 566, 86 N.W.2d 579 (1957).

¹⁷⁰ *Id.* at 570.

¹⁷¹ 164 Neb. 642, 83 N.W.2d 368 (1957).

ceeded beyond the trial level in which recrimination might have been an element.

While it is somewhat encouraging to see these indicia of the cessation of the application of the doctrine of recrimination, the ignoring either of evidence or of statutory provisions by the courts certainly is not a desirable judicial result. For this reason, it is suggested that a statutory overhaul is necessary if recrimination is to be forsaken in Nebraska.

B. A PROPOSED STATUTE

To reject recrimination, one must either entirely abandon the "fault" or "guilt" concept of divorce, or accept the "mutual fault" or "mutual guilt" idea. Probably the latter theory is more realistic, inasmuch as marital discord would not exist were it not for the fault of one or both of the parties. This does not, however, justify the predication of a divorce action upon the theory of statutory wrongdoing. If the legislatures and courts today are sincere in their desire to convert a divorce action from a purely adversary proceeding to an honest attempt at either preserving or dissolving the marriage bond, then they will have to readjust their approach to the entire concept of the marital entity.¹⁷² So long as a divorce action remains one depending upon the proof by one party of the "guilt" of the other party, not accompanied by a "mutual guilt," then it will remain a remedy which breeds the suppression of truth and the mushrooming of falsehoods. In order to restore the integrity to the divorce courts, large scale measures should be taken to remold the entire theory behind the divorce law.¹⁷³ In the meantime, however, it is possible to whittle away at the specific ills in the divorce system. To accomplish this with regard to the doc-

¹⁷² The Nebraska Supreme Court, however, has expressed a reluctance at granting divorces for "sociological reasons"—and no doubt this reticence is shared by a number of courts throughout the country. See *Robinson v. Robinson*, 164 Neb. 413, 82 N.W.2d 550 (1957); *Birth v. Birth*, 165 Neb. 11, 84 N.W.2d 204 (1957); and *Zych v. Zych*, 165 Neb. 586, 86 N.W.2d 611 (1957).

¹⁷³ Judge Paul W. Alexander stated, in the Supp. Report, National Conference on Family Life, Legal Section, American Bar Association, p. 2 (1948): "The marriage fails because of the *failure of the individuals* who married. The alleged grounds for divorce are merely the pegs—often artificial—upon which the decree is hung. The real grounds lie in the character defects of one or both of the spouses. The drunkenness, cruelty, neglect, desertion, infidelity, etc., which are the alleged cause of the wrecked marriage are merely symptoms or outward manifestations of such character defects. . . ." It is felt that, as expressed by Judge Alexander, that if the key to the divorce problem is to be found one must go beyond the present legal framework and examine the real causes of divorce.

trine of recrimination requires a complete reversal in the concept of the mutual guilt situation — in other words, instead of the mutual guilt of the parties resulting in a divorce to neither party, it should result in the award of a divorce to both.¹⁷⁴

Aside from objections on the matter of principle, there are two main stumbling blocks which the opponents of such a statute would envision:

1. *The Award of Child Custody*

In Nebraska, child custody is not determined by the fault or innocence of either of the parents,¹⁷⁵ so it would not be necessary to have a finding of "fault" before the placement of the child could be determined. Generally, all other things being equal, custody of a child is awarded to the mother,¹⁷⁶ although the recent tendency has been to place increasing emphasis on the welfare of the child in ascertaining to whom custody should be granted.¹⁷⁷ In a case in

¹⁷⁴Id. at p. 12, where this statement was made: "I would go further and abolish the defense of recrimination. . . . We still adhere to the early ecclesiastical court philosophy that divorce is only for the 'pure and the grudging.' * * * Under this doctrine, broadly speaking, no matter how guilty one party may be, the other party cannot have a divorce if he too is guilty, even though to a far lesser degree. As a practical matter, judges all over the country have told me that in contested cases they almost never encounter one where the guilt is wholly one-sided. So if the defense of recrimination is interposed the court is powerless to alleviate the situation by granting a divorce, yet often where both are guilty there is greater reason for divorce than when just one is at fault. It seems to me clear that this defense . . . should be abolished."

¹⁷⁵Neb. Rev. Stat. § 42-311 (Reissue 1952).

¹⁷⁶*Lichtenberg v. Lichtenberg*, 154 Neb. 278, 47 N.W.2d 575 (1951). See also *Meredith v. Meredith*, 148 Neb. 845, 29 N.W.2d 643 (1947), in which even the adultery of the mother did not preclude the award of the child to her. However, the child had been injured at birth and was permanently handicapped and the evidence showed that the mother was taking extremely good care of the child, so this may have influenced the court's decision. But cf. *Blid v. Blid*, 82 Neb. 294, 117 N.W. 700 (1908), in which the court refused to grant custody to the mother of a child because she was living with the child's grandparents, and their home was situated in the heart of a red light district. There was no evidence of bad character on the part of either the mother of the child or of the child's grandparents.

¹⁷⁷See *Speck v. Speck*, 164 Neb. 506, 82 N.W.2d 540 (1957), in which the original divorce decree awarding custody of five minor children was modified and the children were placed in the custody of their father in view of a showing of an improper relationship between the mother and another man after the rendition of the divorce decree; and *Smallcomb v. Smallcomb*, 165 Neb. 191, 84 N.W.2d 217 (1957), in which the Supreme Court refused to reverse a lower court award of custody of a minor child to the father on the basis that the welfare of the child would so best be

which both parties were awarded a divorce, the court would simply proceed as it does at the present time, granting custody with the proper diligence in ascertaining the fitness of the parents and the needs of the child.¹⁷⁸

2. *The Award of Alimony*

As is the case with child custody, in Nebraska the award of alimony is generally not predicated upon a showing of fault.¹⁷⁹ Adultery is the one exception to this rule,¹⁸⁰ and alimony may not be awarded to an adulterous wife.¹⁸¹ In a case in which both husband and wife had committed adultery it would probably be best to also

served. However, see also *Anderson v. Wilcox*, 163 Neb. 883, 81 N.W.2d 314 (1957), in which the Nebraska Court held that the fact that the father could provide a more comfortable home and could offer the children more advantages was not a proper basis for modification of the award of custody to the mother.

¹⁷⁸ *Campbell v. Campbell*, 156 Neb. 155, 55 N.W.2d 347 (1952); *Lichtenberg v. Lichtenberg*, 154 Neb. 278, 47 N.W.2d 575 (1951); *Hodges v. Hodges*, 154 Neb. 178, 47 N.W.2d 361 (1951).

¹⁷⁹ See *Messer v. Messer*, 157 Neb. 312, 59 N.W.2d 395 (1953); *Forburger v. Forburger*, 122 Neb. 705, 241 N.W. 279 (1932); and *Malone v. Malone*, 163 Neb. 517, 80 N.W.2d 294 (1957). The standard for determining the question of alimony was expressed as follows in the *Malone* case, at p. 520, quoting from *Nickerson v. Nickerson*, 152 Neb. 799, 42 N.W.2d 861 (1950): "In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just." In *Specht v. Specht*, 148 Neb. 325, 27 N.W.2d 390 (1947) and *Martin v. Martin*, 145 Neb. 655, 17 N.W.2d 625 (1945), the same standard was used.

¹⁸⁰ Although adultery is generally thought of as the only exception to the rule, in *Shafer v. Shafer*, 10 Neb. 468, 6 N.W. 768 (1880), the wife was precluded from receiving an alimony award because of her desertion of her husband.

¹⁸¹ Neb. Rev. Stat. § 42-318 (Reissue 1952); *Meredith v. Meredith*, 148 Neb. 845, 29 N.W.2d 643 (1947); *Pedersen v. Pedersen*, 88 Neb. 55, 128 N.W. 649 (1910); *Dickerson v. Dickerson*, 26 Neb. 318, 42 N.W. 9 (1889). But see *Bowman v. Bowman*, 163 Neb. 336, 79 N.W.2d 554 (1956), where the Court held that adultery by the "innocent" party in the divorce action after the

deny alimony.¹⁸² The division of property¹⁸³ should be determined with due regard to the property held by each of the parties prior to the marriage, and the efforts of each in building up the family property.¹⁸⁴

3. *The Statute*

It is with the background detailed above that the following statute is suggested for the State of Nebraska:¹⁸⁵

Divorce; mutual misconduct. When it appears to the court, upon the petitions of the parties or of either of them, that both of said parties have exhibited misconduct which would constitute a ground for divorce under the provisions of this Article, then the court shall award a divorce from the bonds of matrimony to both of said parties; *provided*, that in the event of such a decree the property held by the parties, or by either of them, be it real or personal, shall be divided in accordance with the order of the court, with due regard to the property held by each of the parties prior to the marriage, the diligence of each in assisting in the accumulation of such property, and the welfare of the parties and their issue. Matters of alimony and the custody and support of issue of the marriage shall be determined in accordance with the provisions of this Article applying to divorce actions.

issuance of the divorce decree was not a proper basis for revision or termination of the alimony paid to her even though she was living in a state of adultery.

¹⁸² While this might seem somewhat unfair because a wrongdoing husband would be required to pay nothing toward the support of his spouse, it would seem more inequitable to allow an adulteress to receive alimony in a recrimination situation while denying it where there was no recriminatory showing.

¹⁸³ Under the present Nebraska law, Neb. Rev. Stat. § 42-322 (Reissue 1952), the adultery of the wife will allow her husband to hold certain of her personal property, but no provision is made for the retention of real property in such a situation.

¹⁸⁴ See *DeBurgh v. DeBurgh*, 39 Cal.2d 858, 250 P.2d 598 (1952). Cf. *Beamer*, 10 U. Kan. City L. Rev. 213, 255 (1942). He would have the court dissolve the marriage on the petition of either party in a mutual guilt situation, but would use a comparative rectitude approach in the award of custody of children and of alimony, and of the division of property.

¹⁸⁵ Other provisions would, of course, be necessary for making other portions of the present divorce statutes consistent with this proposal, but since the purpose of this paper is to deal only with the matter of recrimination, such provisions will not be detailed here.