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AN ANALYSIS OF MARRIAGE TRENDS AND DIVORCE POLICIES

ROBERT S. REDMOUNT*

Divorce law, theoretically, is the embodiment of policies governing the dissolution of marriage. It is the legal expression of the values attached to marriage and implicitly states the law's understanding of the marital relationship, at least that part of it that reflects conflict and disturbance.

The analytic discourse which follows briefly assesses the roles and meanings of marriage, the sources and consequences of marital disharmony and the complications of marriage dissolution. The history and composition of divorce policies and laws is carefully savored and sharply scrutinized for fidelity to the reason and experience of marriage. The outcome of this analysis has the purpose of better orienting legal policy.

MARRIAGE TRENDS

From a legal perspective marriage is a mode for the organization and control of behavior in society. It has served to formalize patterns of sexual relationship and channelize the expression of biological needs so as to minimize the challenge to social order of incessant rivalry and strife. It has afforded a vehicle for the distribution of property and for the determination of privileges and responsibilities in its use. It has served as a unit for economic organization, exploitation and development. It has regularly been the primary tool for acculturation, for the social, moral and ethical development of the individual. It has provided the education and the tools necessary for assimilation into society. And, marriage has been an agreement, with God or with society, to regularize the function of procreation and insure the perpetuation of the human race.

Clearly, marriage has been more than, or something other than, romance. It has been an implicit social compact between people and the political order to undertake to share the burdens of living in a society.¹ Derivatively, it has been a means of private gratification, but mostly, it has been a matter of social responsibility.

The comprehensive social and legal function of marriage has been obscured by the pursuit of certain emphases in a particular epoch, and

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1. This formulation fits the philosophical frame of Rousseau. Indeed, developments in modern human behavior create an experimental laboratory in which the aptness of the "social contract" theory can be tested. See particularly pp. 524-26 *infra* and cf. ROUSSEAU, *THE SOCIAL CONTRACT* (1762).

by the failure to become sensitized to a pattern of change and evolution coursing over the length of time. The role of marriage has not been static in the midst of great upheavals and great change in patterns of societal development and social relationship.

Marriage and Property

Property is the classical concept for splitting or sharing resources and defining power and control.² It is hoary with a tradition extending back into the earliest testaments of civilization.³ Marriage has long been the medium for maintaining the integrity and perpetuating the ownership of property within a distinct and stable unit of social organization—the family. It has become part of an institutional process for the determination of successor interests and the planned utilization of property, helping to create social boundaries and social meanings. It is the children born of a marriage, or certain of them, who have had the benefit and the burden of perpetuating the ownership and use of property. They, as the successors in interest, were the surviving ego of the original owner and inherited his rights and powers. Marriage and the family provided the trustees for property,⁴ and the conditions of stability and regularity that enabled its organization and development. Indeed, families and marriage became the creatures of property.

However, the emphasis upon marriage as a vehicle of property has been epochal and transitional, not absolute and perhaps not permanent. In a societal form where there are no other well-developed social units such as the family, or where there has been deterioration in other social organization, the family may become, by default, the means and expression of many social objectives. Minimal technological development, and primitive and cumbersome modes of transportation and communication, necessitate the predominant localization of economic development and organization. The deterioration or non-existence of strong political and governmental units, geographically organized, also devolves upon a "family" concept the entire responsibility for the protection of wealth and property. The control and use of property in these circumstances is a preeminent function of a clan, or family-type grouping such as the medieval manor.⁵

2. The psychological function of property in defining relationships and developing identifications is the subject of a treatise by BEAGLEHOLE, *PROPERTY: A STUDY IN SOCIAL PSYCHOLOGY* (1932).

3. The evolution of property is traced through different cultures and forms of social organization by LETOURNEAU, *PROPERTY: ITS ORIGIN AND DEVELOPMENT* (1892). Letourneau reflects on its role in the life of lower animals, and traces it through ancient and modern civilizations.

4. The "trustee" concept of the family is evolved by Zimmerman in his analysis of the evolutionary development, or retrogression, of family structure and purpose. ZIMMERMAN, *FAMILY AND CIVILIZATION* (1947).

5. Property itself has been a vehicle in society with different meanings in different areas of political and economic experience. Hence, the role of family

The development of science and technology, of transportation and communication media, has resulted in a new epoch and a gradual redefinition of the role and function of property. Conceived in a new and changed set of social circumstances, the value attached to the ownership of property becomes subsidiary to the value attached to the development and use of property.⁶ Economic development and organization transcends the traditional family approach in the ownership and use of property, and may be unbounded by traditional geographic and political boundaries. Individual or family ownership does not sustain the burdens imposed by complex economic activity. An independent elite with technical and commercial skills substitutes its control of property. The institutionalization of the modern state as a powerful regulative force in social organization, stressing economic development as a means of societal development, also imposes limitations on the hitherto largely unqualified freedom of family ownership. The impersonal corporate form of ownership, coupled with political limitations on personal power and wealth, have served to modify the role and importance of marriage. It is no longer a hardy agglutinating agent for the implementation and perpetuation of property values.⁷ The increasing pressure and competition for space, and for developed and undeveloped economic resources, has resulted in a steady and seemingly irreversible trend in the direction of minimizing an independent family role in property ownership. There has been a sharp reduction in the top-seeded character of property ownership as a family value. Consequently, property has increasingly become a relatively insignificant and thoroughly compromised delineator of marriage.

in relation to property has necessarily depended upon the needs and circumstances of the total process of social evolution. Letourneau reflected on the differences in emphasis and experience with property in the course of history, citing a course of development from communal to individual ownership. LETOURNEAU, *op. cit. supra* note 3. Certainly Locke's identification of property as virtually a sacred characteristic of and for the individual, may be interpreted as a response and a contribution to the struggle of the individual for political freedom in the age in which Locke lived. Cf. LARKIN, *PROPERTY IN THE EIGHTEENTH CENTURY* (1930). St. Thomas, on the other hand, seeking to inculcate a communal feeling and an unselfish spiritual attitude in the age in which he lived, emphasized the social character of the private ownership of property. McDONALD, *SOCIAL VALUE OF PROPERTY ACCORDING TO ST. THOMAS* (1939).

6. The social and economic development, uses and rights of property are emphasized in a rather recent work by McDUGAL AND HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948).

7. The burdensome role of large family ownership in modern economic and social development has been analyzed by WEDGEWOOD, *THE ECONOMICS OF INHERITANCE* (1929). Though his thesis is that family inheritances in 1929 were still a burden to social and economic life in England, his evidence, with reference to both England and other countries, suggests that the significance of concentrated family ownership of economic resources has drastically diminished.

Marriage and Economic Activity

In earlier cultures and eras of recent Western civilization the tools of production were comparatively primitive and economic organization fairly simple. Agrarian enterprise was the primary vehicle of production, supplemented later by the creative contributions of free artisans and craft guilds. Economic endeavour, for those classes who endeavoured, was, from the point of view of production, feasible within very small units. Family hegemony in production and some family proprietorship in tools and products developed. There could be some interdependence and unity of economic enterprise within the family. In fact, in many instances, the processes of production, distribution and consumption could be split and shared entirely by and for the family itself. This was notably true in agriculture. The male members assumed responsibility for the development of primary resources and the production of much of the consumable goods. The female members converted resources and goods to finished products. Together with the males they organized and facilitated distribution and consumption within the household. In fact, marriage, in providing the form for procreation and the development of a family, contributed significantly to the manpower resources that facilitated the continuity and integration of economic activity within the unit. Economic activity was organized generally under patriarchal authority. Members of the family were interdependent for continued material existence.

The handling of the economic burden through family organization provided a great social convenience in many respects. Economic activity in society was thereby distributed and regulated. Manpower resources were created, developed and exploited in an orderly and simple manner. The processes of production and marketing were rendered comparatively simple in operation. And the provisions for and regulation of consumption had comparatively simple dimensions. The family, altogether, was an important and convenient fulcrum for the organization of economic enterprise.

The advent of industrialization, however, and the growth of the factory and impersonal corporate enterprise, resulted in a drastic revision of economic organization and management.⁸ Economic activity became largely separated from domestic enterprise and developed its own, independent hierarchy of work distribution and manpower control. The family could not sustain the burden of creating the compli-

8. The development of economic practices and their relationship to the social order over the course of Western history, is compactly presented by CHAPIN, *AN HISTORICAL INTRODUCTION TO SOCIAL ECONOMY* (1921) and by SINCLAIR, *A PREFACE TO ECONOMIC HISTORY* (1934). Chapin, in a mellowed fashion of reporting history, sees many economic events, at least until recently, as repetitions of earlier patterns in civilization. A comparative analysis of economic development and organization in primitive cultures is given by HERSKOVITS, *ECONOMIC ANTHROPOLOGY* (2d ed. 1952).

cated and esoteric tools necessary in a new age of economic enterprise. It did not have the resources to undertake the financial burdens of production and distribution, and it was not equipped to provide and train the manpower necessary in the diversification and professionalization of the newer practices and pursuits.

The individuation of economic function in the family logically resulted.⁹ The interdependence of economic striving within a family unit became more a matter of convenience and custom than a necessity. While some family economic organization is necessary in order to provide for minor children who lack the maturity and skills to sustain themselves, adult interdependence within the family to serve this purpose is no longer essential. The emancipation of women permitted and provided for the largely unrestrained development of their capacities and skills on an equal footing with men. Manpower needs have placed a premium on woman's skills, and she has become recognized and accepted in her own right in the economic world.¹⁰ She has been able to establish a degree of economic strength and self-sufficiency so that she is no longer quite so dependent, if at all, upon the material resources of the family. She can and, in fact, sometimes does carry the family economic burden on her own shoulders. Enfeebled individuals, too, are increasingly guaranteed the economic support of extra-familial governmental agencies and private groups. They need rely on the economic strengths and resources of the family much less than in the past.

Societal investment in marriage and the family as an essential economic resource and form of economic organization, has been largely dissipated or displaced. Political and legal instrumentalities have focused upon governmental and private commercial and professional units as the core of economic development and organization. Economic roles and functions are planned, implemented and adjusted with only incidental reference to the family as a vital factor, and then largely in terms of its passive role as consumer. The necessity to make marriage work, or to make adjustments in marriage, with a view to its precious

9. This movement from a conventional order of economic relationships, determined and cemented by the family group, to an order based on separation and independence from family roles is the basis for Maine's famous dictum that progressive societies move from "status to contract." "Starting, as from one terminus of history, from a condition of society in which all the relations of persons are summed up in the relations of Family, we seem to have steadily moved toward a phase of social order in which all these relations arise from the free agreement of individuals." MAINE, ANCIENT LAW 172-73 (10th ed. 1906). Engels also stresses the phenomenon of individual economic emancipation and the "free contract" in his discussion of the economic foundations of the family. See ENGELS, THE ORIGIN OF THE FAMILY-PRIVATE PROPERTY AND THE STATE (1902).

10. Cf. ENGELS, *op. cit. supra* note 9. Engels stressed that the predominant characteristic of the patriarchal family is its insistence and reliance upon the subjugation of women.

economic function, is much less a pressing legal and societal matter than formerly. There is slight sentiment¹¹ but no significant trend to suggest that the traditional organization of the family, and the family in the economic role of earlier tradition, is likely to be reinfused with significant economic life and meaning. In fact, with the increasing scientific and technological displacement of mass manpower there is a commensurate reduction in the work time and energy of the average individual. The perplexities induced by long periods of leisure may gradually shift the primary emphasis of marriage and the family even further away from the struggles for economic survival.¹²

Marriage and Procreation

Marital union for the purpose of procreation has become an indelible stamp on the conscience of Western society. Further, it is also an imprint of social practice and morality that marriage is the only proper form in which procreation can take place. Deviation from the practice has been consistently punished by legal and social sanctions. Periods of family upheaval and disorganization, most notably in times of war, have resulted in substantial reproduction outside the marital form. However, there has been an unflinching reversion and reinforced adherence to conventional practice upon the subsiding of the large scale crises.

A threat to procreation, and hence to the purpose of marriage, has been suggested in the implementation of birth control ideology and birth control devices. Birth control has been conceived as the frustration of the supreme purpose of marriage and, in fact, as a denial of the sacred character of marriage itself.¹³ Objections have not come from moralists and theologians alone. Some social analysts have envisaged in the application of birth control, not so much a frustration of marriage as a form of social development and organization, but the danger of a failure to maintain and replenish population in many parts of the Western world.¹⁴

11. It has been particularly suggested that the evils and dangers of size and overcentralization today can be mitigated by breaking up and concentrating economic practices in families and smaller communities of people, as in the past. COMFORT, *AUTHORITY AND DELINQUENCY IN THE MODERN STATE* (1950).

12. In fact, the problem of leisure has increasingly occupied the serious attention of scholars and analysts who are concerned with the implications of greater free time and even greater freedom for individuals. DODDS, *THE PROBLEM OF LEISURE IN AN INDUSTRIAL AGE* (1938). For a lighter treatment of the subject, there is FURNAS, *AMERICA'S TOMORROW, AN INFORMAL EXCURSION INTO THE TWO-HOUR WORKING DAY* (1938).

13. "Any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offence against the law of God and of nature, and those who indulge in such are branded with the guilt of a great sin." Pope Pius XI, *Encyclical Letter*, Jan. 8, 1931.

14. Charles, for instance, writing in 1934, perceives birth control practices as an important factor in stultifying population growth. He rejects Neo-Malthusian theories which advance the proposition that birth control and

Procreation through marriage, however, retains its resilient character. The increasing prevalence and use of birth control techniques has produced no sustained negative effects on birth rate.¹⁵ It may have contributed to exaggerated social class differences in birth rate.¹⁶ Insofar as middle and upper social classes may have greater familiarity with, greater access to and greater preference for the utilization of birth control devices, the birth rate of these classes may, for a time, have been detrimentally affected. But variations in birth rate appear to be more a matter of general economic circumstances and changing styles.¹⁷ Depression is associated with a lowered birth rate and high style may, from time to time, be associated with a high birth rate. Reproduction trends are much less a consequence of the frustration of the procreative purpose of marriage through mechanical preventatives or the disruption due to social and psychological discord. The instinctual character of procreation continues to assert itself in the marital form, supported by moral suasion. It demonstrates its vitality, notwithstanding the occasional ravages of invention and circumstance. Marriage continues its significance as the social structure within which procreation takes place. Increasing marriage and family disturbance has shown no trend to so disrupt the physical boundaries of the family, or discourage and prevent the consummation of new and subsequent marital unions, as to create a crisis in the procreative function in marriage.

Marriage and Individual Development

Property, economic and procreative functions as they have existed heretofore in marriage, have been served by the status of marriage alone. The status, that is, the appearance that marriage gives, creates the structure which facilitates an orderly pattern of relationships mostly between the family and the external world,

planned parenthood are essential instruments in preventing overpopulation and economic starvation. CHARLES, *THE TWILIGHT OF PARENTHOOD* (1934).

15. Birth rates in proportion to the total population have remained steadily high since the economic depression of the 1930's, both during and since the second World War. In fact, though the number of marriages has recently shown a tendency to decrease, birth rate has maintained its high level. Since illegitimate births have not significantly increased, it is evident that there has been a steady average increase in the number of children per family in the past few years. Cf. *STATISTICAL ABSTRACT OF THE UNITED STATES*, 1955, at 59-62.

16. A detailed evaluation of differential birth rates in relation to social class, and the connection of this phenomenon with birth control, is presented in GOODSSELL, *PROBLEMS OF THE FAMILY* (rev. ed. 1936).

17. The influence of wars and depressions, particularly, on changing birth rates and the size of population is analyzed by Hauser and Taeuber, *The Changing Population of the United States*, 237 *ANNALS* (1945). The recent change in style toward larger families for better educated and economically prosperous individuals is reflected in the comment of Science News Letter, *Baby Boom Continues Among College Grads*, June 19, 1954, p. 398. This trend is in sharp contrast to that of some earlier periods for similar socio-economic groups in the population. See note 16 *supra*.

and within the external world itself.¹⁸ The internal stability and characterization of social and personal relationships within the family has been relatively less important in the pursuit of a formal pattern through which property, economic activity and procreation could be safeguarded, developed or encouraged. The concept of marriage essentially as an organism with internal functions and properties has been placed in focus by the events of recent history, and has become a matter of public concern largely within the last century.

The economic revolution created by technological development resulted in an anachronism in the family institution. The value and purpose of family property diminished in importance, and economic activity was diluted as the core of family life and centered away from the family.¹⁹ There developed a need for the substitution of a different rationale, a different kind of force and a different emphasis in function to help sustain the conventional forms of marriage and family life. Having lost favor as an economic conduit the family could more emphatically become a social conduit. But the economic revolution also set in motion centrifugal forces that blighted the role of marriage and the family as a social agent. A concomitant of the developing technology of economic life was the development of communication means and media, and transportation. The physical and mental mobility of individuals became more characteristic. The greater accessibility of new worlds in thought and fact, and the intrusion of a belated awareness of the possibilities, whetted minds and nerve. New freedoms and new opportunities defied older traditions and older stabilities. The family, or individuals within it, sought to improve their economic status by uprooting themselves in response to a venturesome economic spirit. Land ownership receded as a condition of economic prosperity and activity. One or more individuals within the family worked outside the home, or the home itself moved to a more propitious location in relation to the new source of income. Individuals, in a world where darkness and distance receded, were emboldened to new adventure, new knowledge and new status for themselves, and this, too, resulted in the diffusion of family life. Political forms and activities also manifested a new spirit. They responded to the conversion of economic life to individualized relationships, and were

18. Cf. MAINE, *ANCIENT LAW* (10th ed. 1906); note 9 *supra*.

19. The deterioration of the family, as an economic and social unit, and the influences that brought it about, are described in detail in a number of sociological treatises. For example, TRUXAL AND MERRILL, *THE FAMILY IN AMERICAN CULTURE* (1947); GOODSELL, *A HISTORY OF MARRIAGE AND THE FAMILY* (1934), and *PROBLEMS OF THE FAMILY* (1936); LICHTENBERGER, *DIVORCE* (1931). A different interpretation of the economic role of the family in industrial society is presented by BOSANQUET, *THE FAMILY* (1906). Writing fifty years ago, she advocated the family as a continued instrument of economic cooperation in industrial life as well as in agriculture.

spurred on by secular ideologies now communicated with greater technical ease. There was a new respect and a new response for the individual and his welfare. His welfare, singly and collectively, increasingly became the idiom of a new age. It was the *individual* who was being reified, the individual as a member of a large society, often the individual as a member of an economic unit, or a political unit and, more rarely, as a member of the family unit.

The centrifugal forces were running counter to the family, preventing its effective social functioning just as it had disrupted its economic functioning. The emancipated woman, enjoying the flush of new roles and new activities, increasingly became a part time member of the family. She contracted out many of her family functions to other individuals,²⁰ hurriedly accomplished them with the technical assistance of automation, or let them pass by default. Except for procreation, which could be largely a mechanical matter and was perhaps a response to instinct, her personal resources and energies were increasingly consumed outside the home. They were absorbed in the fulfillment of her many and diverse capacities, or in status-producing and pleasure-contriving activities in which the family played no part.

The development and specialization of learning activities, newly available on an egalitarian basis, contributed and may have been a response to the abnegation of the family's historical educative role in child rearing. The presence of children was more frequently considered a happenstance. Socially accepted substitutes for family activity and plausible rationalizations for the avoidance of family responsibility became common-place. The impetus for the development of substitutive family processes became greater. Responsibility for the function of character development and education of the child has now largely been thrust upon educational institutions.²¹ It is placed there at an increasingly youthful period in the child's life.²² The health of the child has also become more of a public concern and responsibility. Its importance and need for attention has been dramatized by the advances in the biological and mental sciences, particularly within the last century.²³

20. The boon of baby-sitting today, verging on an extreme, may be the bane of psychological and social stability in family life. It is one manifestation of a large-scale trend toward substitution for many kinds of domestic activities.

21. The stress on character education and social experience has been a dominant theme and the major trend in American education at younger levels in this century. The influence of the educational philosophy of John Dewey has been pervasive on public school educational practices. Cf. BUTTS, *A CULTURAL HISTORY OF EDUCATION* (1st ed. 1947).

22. The growth and spread of the modern nursery school in urban and suburban areas today, is only a logical development of the principles and purposes of kindergarten education espoused by Froebel and influenced by Pestalozzi in nineteenth century Europe. Cf. BUTTS, *op. cit. supra* note 21 at 435-38.

23. Analytical concentration on the health and development of the child, is one more manifestation of the dominant educational and scientific interest

Increasing secularization and formalization of the child's education outside the home has also compromised the family's function in the moral and religious development of children. Churches and religious agencies have paralleled the expansion of secular education into the earlier life of the child. However, the infiltration of antipathetic practices and thought-ways have undermined the ties of church and family altogether. Predominant among these have been the ideas of evolution, the increasing urgency of material motives and satisfactions, and the greater mobility and lesser physical stability of the family. The strength and influence of the church has been undermined, and the reliance of the family upon the church dissipated. Traditional moral precepts have increasingly become a symbol system further removed from the pragmatic experiences of life.

Even the diversions and leisure time activities of the family and its members have become mobile and disengaged from the crumbling wheel of family life. Leisure time resources have become specialized and commercialized, marketed ready-made for the members of the family, generally outside of the home.

The gradual evolution and transfer of the child development functions of the family to specialized and professionalized agencies may yet succumb to an odd twist of experience. Ironically, the knowledge and experiences which these agencies have cataloged may bulwark the great significance of family life in the stabilization and adjustment of individuals. A more acute comprehension of the process of juvenile delinquency lays this difficult problem at the door of the family in a variety of theoretical guises.²⁴ Family disorganization is increasingly recognized as a prime etiological factor in emotional instability and mental illness.²⁵ A lack of taste or talent for family life, evidenced in family disharmony and the breakup of marriages, is also most significantly related to the failures of early family background.²⁶ The family

in personal welfare in this century. In this respect G. Stanley Hall's patient labors in the study of child development have great bearing and influence. HALL, *ADOLESCENCE* (1905) and other publications.

24. The contributions of the Gluecks, and the analyses of Aichhorn and others with psychoanalytic background, stress the importance of the role of the family in the development of anti-social behavior. GLUECK & GLUECK, *UNRAVELLING JUVENILE DELINQUENCY* (1950); *SEARCHLIGHTS ON DELINQUENCY* (Eissler ed. 1949).

25. A number of sociological and psychiatric treatises emphasize the various unpleasant and unhealthy psychological consequences of a lack of family organization and integrated family life. E. MOWRER, *FAMILY DISORGANIZATION* (rev. ed. 1929); GROVES, *THE AMERICAN FAMILY* (1934); H. MOWRER, *PERSONALITY ADJUSTMENT AND DOMESTIC DISCORD* (1935); ISAACS, *TROUBLES OF CHILDREN AND PARENTS* (1948); GREENACRE, *TRAUMA, GROWTH AND PERSONALITY* (1942). Koos has provided a very intimate portrayal of the effects of family conflicts and difficulties on family members. KOOS, *FAMILIES IN TROUBLE* (1946).

26. The relationship between spouses' estimates of their own marital happiness and their estimates of the happiness of the parents' marriage is shown to be significant. TERMAN, *PSYCHOLOGICAL FACTORS IN MARITAL HAPPINESS*

disorganization of one generation spawns the criminal behavior and social and personal disorganization that are the acute social and legal problems of a succeeding time. An adequate substitute has not yet been found for the critical formative influences of integrated family life on early personality development.

In consequence, society has developed forces which attempt to mitigate and resolve the breach in family social and psychological integration. Mental health and its development have increasingly become a matter of common consciousness, as a result of the constant stream of discovery and communication from the specialties of health and education. School and child development agencies, and the private resources of medical and educational specialists, are increasingly available. These provide substitutes for family experience, but this is less important than their assistance to the family in negotiating certain critical aspects of its responsibility for the development of children. Such counsel, though sometimes blundering and uncertain, has forged the beginnings of a new and more subtle concept of family responsibility in the upbringing of children. It finds its basis in psychosocial relationships. Problems of criminality, particularly those involving juvenile delinquency, are seen less as the machinations of the devil and more as a subject matter of the family and its influences. Legal policy and procedures are now geared to the treatment of the juvenile problem as a matter viable in the context of domestic relations.²⁷ The consciousness of family and family responsibility has been attended recently by an increase in the size of many families. There has been an upswing in procreation by those individuals and social classes who are in a more able social and economic position to raise children.²⁸ A related development is the resurgence of interest in family homes with a subsoil of their own, where family life can be nurtured somewhat better than it has been in the concrete molds within the urban center.²⁹ It may be that, after the first flush of free-

202-07 (1938). Some trends in the direction of this relationship, but with less conclusive results, have been demonstrated by HAMILTON & MACGOWAN, *WHAT IS WRONG WITH MARRIAGE* 180 (1929), and BURGESS & COTTRELL, *PREDICTING SUCCESS OR FAILURE IN MARRIAGE* 98-102 (1939). Chronic parental disagreement and disharmony may have most invidious effects upon the personal stability of offspring and may blight their later relationships. The connection of parental disharmony with a child's mental illness is being demonstrated by Lidz in yet unpublished studies at Yale University. Bergler has written extensively on unhappy marriage as a function of personal instability. BERGLER, *UNHAPPY MARRIAGE AND DIVORCE* (1946), *CONFLICT IN MARRIAGE* (1949), and *DIVORCE WON'T HELP* (1948).

27. The modern social and legal orientation in dealing with juvenile delinquency is described in *PREVENTING CRIME* (Glueck ed. 1936).

28. See notes 15 and 17 *supra*.

29. The exurbanites have outdistanced the suburbanites in their removal from the city, and have accentuated the modern quest for the quiet graces of country living. SPECTORSKY, *EXURBANITES* (1955). This shift in style may, by intent or indirection, produce some effect in the reintegration of some aspects of family life.

dom, the emancipated woman will find a more suitable integration and compromise between her destiny and responsibility as the bearer and protector of family life, and her need for the fulfillment of her other capacities.

In sum, there is strong evidence pointing to the substitution and even the disintegration of the social role of the family. The family, and hence marriage, has been failing as an agency for individual development. There are, however, some strong countervailing forces that seek to impede and even to reverse this trend.

Marriage, Love and Companionship

The emphasis on the direct societal functions of marriage over a period of centuries thoroughly submerged the phenomenological character of marriage and its role as an adjustment process between two individuals. The frustration or limitation of this purpose in marriage achieved vicarious expression in the imaginatively reported peccadilloes of various notables in history and literature. It can also be recognized in the prevalence of the institution of the paramour and the mistress, wherever the indulgence could be afforded and was factually, if not morally, tolerated. But it was the growth in personal freedoms, and the spur of communication and mobility, that trumpeted simultaneously the cause and the failures of marriage as a personal relationship. Freudian psychology, borne on a wave of resentment toward Victorian repression and anchored in the inevitable biology of human beings, brought to a crescendo the call for the fulfillment of the individual. Individual self-awareness, self-expression and self-indulgence became a matter of high fashion in paroxysms of reaction against frustration and self-containment. Sexual activity increasingly became a pervasive symbol for personal freedom and self-mastery. A fuller sexual expression became more candidly both a biological urge and a psychological necessity.³⁰ This first thunderous release and overreaction of the individual, breaking the chains of personal suppression, has not been without its backwash. The marriage institution, already weakened by the withdrawal and decompensation of many of its traditional functions, was buffeted even more severely in this full blast of unbridled individuality. The wreckage of families multiplied and the strains of interpersonal conflict became stronger.³¹

30. Cf. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948), and *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

31. That divorce has become a rather common social phenomenon and divorce rates are comparatively high is a matter of general knowledge. The rate in the last five years has been approximately two and one half divorces for every thousand existing marriages per year. *STATISTICAL ABSTRACT OF THE UNITED STATES 1955*, p. 59. Cahen presents a somewhat older but detailed analysis of the statistics of divorce. CAHEN, *STATISTICAL ANALYSIS OF AMERICAN DIVORCE* (1932).

But this uprooting of the individual from his traditional social climes produced its struggles and its contradictions for the human personality. The psychology so comprehensively conceived and richly detailed by Freud has within it the seeds of social salvation. The adjustment of people to one another and the psychological potentials for social organization have become important incidents in more penetrating studies of interpersonal relationships and social structure.³² Studies of the interpersonal process in marriage represent a comparatively new focus in the analysis of the marital institution.³³ Marriages are analyzed and treated in terms of their ability to reflect compatibility between the partners and to produce a sustaining state of happiness for each spouse. Definitions of compatibility and of marital happiness have been ephemeral and have been essentially a matter for self-determination by the spouses.³⁴ These definitions may or may not encompass procreation, or social status, or economic convenience, or platonic friendship, or sex. There may be multi-determinants or single determinants on which the foundation of the marriage and the anticipation of its success is based. There may be an agreement to conceive the marriage in terms of particular propositions and purposes, and to acknowledge the freedom of the individual in other respects. On the other hand, marriage may be used essentially to solemnize and publicize a bond of mutual affection, or an experiment in affection, and give it a concrete social form. It may be devoid of any tangible plan or purpose for the future.

As the nuances of interpersonal relationships, notably the marital relationship, are unfolded, it is evident that concepts and problems of marital adjustment operate on a treacherous base. Marriage is a process of intimate interpersonal relationship extended and complicated by many experiences over a course of time. Its prospects for a full life term must be measured in terms of the consistency and stability of personality organization and the motivational structure of both spouses. It must be measured in terms of the moderation of life ex-

32. This trend is documented by the growing social orientation of psychiatry. Of particular interest are the contributions of SULLIVAN, *THE INTERPERSONAL THEORY OF PSYCHIATRY* (1953); FROMM, *ESCAPE FROM FREEDOM* (1941); FROMM, *THE SANE SOCIETY* (1955); KARDINER, *THE PSYCHOLOGICAL FRONTIERS OF SOCIETY* (1945); LASSWELL & KAPLAN, *POWER AND PERSONALITY* (1952).

33. A recent theoretical formulation of family relationships in terms of the process of personal and social interaction has been effected by PARSONS AND BALES, *FAMILY: SOCIALIZATION AND INTERACTION PROCESS* (1955). A very elaborate connection between social role and personality need factors is propounded as a basis for personality action and relation, patterned upon some of the earlier work of Parsons.

34. The "subjective feeling of happiness" criterion of marriage success provided the basic reference point for acquiring and analyzing data in most recent studies of marriage. Cf. TERMAN, *PSYCHOLOGICAL FACTORS IN MARITAL HAPPINESS* (1938); BURGESS AND COTTRELL, *PREDICTING SUCCESS OR FAILURE IN MARRIAGE* (1939).

periences so that the personalities and the marriage may more surely accommodate themselves to change. Personalities must have the capacity for resiliency so as to attune themselves to the changes and stresses that operate almost imperviously and without simultaneous and commensurate effects on both parties. The perception of each spouse by the other that represents the ostensible basis for the marriage, must be reasonably sustaining or accurate. And it must be attended by a formidable conviction to make the marriage serve its purpose.

The success of marriage as a process of interpersonal adjustment is a matter of trial, not certainty. General predictions are hazardous and the evidences of failure are strong. It may be that adjustment conceived in terms of life-spans is an unreasonable demand on the awakened curiosity, insatiability and movement of many, if not most, human personalities. However, Western society has not seriously considered an alternative social form for heterosexual love and companionship.³⁵ It is dedicated, at least in its ideals, to the stabilization of the marital form. Most importantly, the need for a base of community behavior between spouses is essential to the proper fulfillment of parental roles and the role of marriage in child development. And, procreation as a civilized process is also in need of adequate social communication between the procreators.

Highly mobile concepts and practices in love and companionship along a broadening segment of society have introduced some radical applications of the concept of marriage.³⁶ Whether the institution of marriage is sufficiently viable to cope with a reformulation of its traditional frames of reference, or whether it is the practices and value systems of the population that are to be remolded, may be only the foreshadowing of a contest, if companionate marriage is to survive at all. The function of marriage in love and companionship has had an unfavorable course, but counteraction stemming from a deep sense of social necessity has bestirred itself. Given marriage in its traditional form with its traditional contemplations, the mental and social sciences are set the task. They must balance the keen individual expression which they have helped to unleash, with that accommodation to social adjustment of which the human personality is made capable, and which is so necessary for a healthy and satisfying personal and social life. A certain result is not yet clear.

35. In this respect, contrast the many modes of establishing social and sexual relationships and the structure of family life in other cultures and civilizations. WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* (5th ed. 1921) and HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* (1902). The organization and regulation of sexual relationships in different cultures has been particularly analyzed by FORD AND BEACH, *PATTERNS OF SEXUAL BEHAVIOR* (1951), and SEWARD, *SEX AND THE SOCIAL ORDER* (1946).

36. Lichtenberger details some of the incidents and characteristics of an individualistic orientation toward marriage today that have resulted in a changing concept of the institution. LICHTENBERGER, *DIVORCE* 334-50 (1931).

The Role of Marriage in Western Society Today

Marriage in Western society today is, as it always was, transitional. It is a mechanism interacting with other social mechanisms in the course of social change. It is both a cause and a consequence of this change. Property is still a characteristic of marriage, but it is no longer a dominant characteristic or a dominant concern in the large run of marriages. Social class discriminations that perpetuate property trusteeship as the great distinction of marriage continue to exist, but governmental policies and popular sentiments suggest an advanced state of moribundity in this distinction.³⁷ The family is no longer the social order's favored economic unit. In fact, from the point of view of historical comparison, it is hardly an economic unit at all. Breadwinning for self-support and the support of minors is an indefatigable condition of family life, but this is today mostly an individual and not a family responsibility. The economic function of marriage in a world of advanced technology and economic plenty, is today a peripheral consideration in marriage and divorce policy. So long as economic resources remain in good supply, this condition in the economic purpose of marriage is likely to prevail. Procreation and marriage reflect an indomitable mutual faith and sense of companionship. The relationship is permanently unrestrained by various catalysts of social change and upheaval. It seems a well-ingrained attachment that requires no extra social or legal advice today.

The role of marriage in love, companionship and in the social development of its younger family constituents, is more problematic. Trial and tribulation seem to be today's order. Older policies are more tenuous, newer policies quite tentative, as law and the social order come face to face with the more fully developed proclivities and the potentialities of the human personality. The setting of an enduring policy must first witness the outcome in the conflict between opposing capacities and wills in the individual. And this has not yet come to pass in a tangibly full and complete expression.

Given the meanings of marriage today, law's search for a realistic policy for marriage and divorce is narrowed and focused. It is a search for the policy to fit the surviving and changing concepts and uses of marriage. It must be in a key that is responsive to and consistent with the trends that develop in human experience. Marriage today, if it is anything, is a biological, social and psychological proposition. It has largely ceased to be an economic proposition, and a matter of wealth and property. The biological proposition nurtures and governs itself from the strengths it has acquired in time. The problem is: what should be the role and policy of law in the face of the ongoing metamorphosis of the social and psychological character of marriage?

37. See note 7 *supra*.

DIVORCE POLICIES

The Early Development of Modern Divorce Policies and Laws

The theoretical framework of modern divorce traces its evolution through two major streams of social experience. It is a demonstration and expression of historically-founded, deep-seated moral convictions, and it is an outgrowth of an intense struggle for political control.

The dissolute behavior of the Romans in the days of Christ engendered a depressive spirit from which a moral reaction was born. The reaction took expression in the form of a new morality. The virtues of the family were rededicated, in an age when the structure of family life was tottering and disintegrating. The great virtues of brotherhood and love were proclaimed and, in sanctified marriage and family, would find their greatest fulfillment. These new teachings were the teachings of Jesus Christ. Those relating to marriage were borne in the synoptic gospels of Mark, Matthew and Luke.³⁸ They endowed marriage with permanence. "What therefore God hath joined together, let not man put asunder,"³⁹ though Matthew granted an exception for adultery. "[W]hosoever shall put away his wife, except for fornication . . . committeth adultery."⁴⁰ The teachings were given literal meaning, and were the basis for an attempt to formulate a Christian law of marriage from the verbatim texts of the New Testament. Gradually, an effort developed to substitute this Christian legislation for the civil law of marriage which the new church inherited from the Roman Empire. The civil law of Rome at that time espoused free divorce.⁴¹

The later Christian fathers perpetuated and intensified the dominant conviction of the insolubility of marriage. The utterances of the disciple Paul strongly influenced a critical attitude toward any divorce, though they were not entirely unambiguous.⁴² The later fathers

38. MARK 10:11, 12; MATT. 5:31, 32; 19:3-9; LUKE 16:18.

39. MATT. 19:4-6.

40. MATT. 19:9.

41. A brief account of the later Roman laws and practices of divorce, and a detailed account of the development of Christian doctrines and practices in marriage and divorce will be found in 2 HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 14-85 (1904), (hereinafter cited as HOWARD), WORSLEY-BODEN, MISCHIEFS OF THE MARRIAGE LAW 38-119 (1932) (hereinafter cited as WORSLEY-BODEN), and WOOLSEY, DIVORCE AND DIVORCE LEGISLATION 34-193 (2d ed. 1882) (hereinafter cited as WOOLSEY). Howard gives the most matter-of-fact account, writing from the point of view of an historian and political and legal analyst. Worsley-Boden is clothed in the role of an advocate for the reform of English divorce law. He minutely analyzes and suggests fallacies in the literal interpretation of the scriptures for the purpose of church legislation. He also opposes the nearly exclusive influence of the church in matters of divorce. Woolsey takes the view of a Christian moralist who is concerned about the departures of secular divorce law from the traditional approaches that have been influenced and guided by the scriptures and the church.

42. 1 COR. 7:8-16. Paul appears to counsel against divorce, expressly forbidding the wife to "depart from her husband," but then adds, "if she depart, let her remain unmarried, or be reconciled to her husband." By this

congealed the attitude of the church. Augustine made indelible the theory of insolubility. Adultery was admitted as the only scriptural ground of separation, but even this did not destroy the marriage completely.⁴³

Converts to Christianity and Christian doctrine became increasingly legion. In time, a number of Roman emperors embraced and promoted Christianity. Among these was the great emperor, Justinian. He sought to apply ecclesiastical principles to the Roman laws of marriage and divorce, giving divine principles the added influence of temporal law.⁴⁴ He modified divorce by consent, permitting such divorce only if one of the parties was impotent and therefore unable to fulfill a divine purpose of marriage, procreation. He also permitted divorce where one of the parties joined a monastery, allowing the remaining party to remarry. And, sensitive to the real burdens of life and experience at the time, he allowed a divorce where one of the spouses was captured by an enemy. A political realist, Justinian later added treasonable behavior as a ground for divorce. Following in the path of the literal translation of Christian moral precepts, he permitted divorce where there was an inducement to commit adultery, where the wife was falsely accused of adultery, and where the husband consorted with another woman.

The radical restriction on Roman divorce did not permeate, however, and was partially rescinded. But, as the tides of Rome ebbed out, Christianity became stronger and more dominant. It became more firmly institutionalized as a religion and commanded gradually heightened power over secular affairs. Canon law grew into a great system of legislation which opposed, embraced and finally superseded civil law. The canon laws governing matrimony were particularly comprehensive, tacitly recognizing the supreme role of marriage and the family as a conduit for religious teachings and as a key instrumentality for moral development.

As the Christian church became supreme in the western world in both religious and secular activities, its focus shifted to an amplification and a consolidation of its completest power. At the Council of Trullo, in the year 692, laws governing affinity, and hence the eligibility of parties for marriage, were elaborated. The celibacy of priests was required, and marriage after divorce was proscribed. Finally, nearing the apex of its strength and glory, a great consumma-

latter counsel he apparently approved of separation, but within the bonds of marriage.

43. AUGUSTINE, *DE CONJUGIIS ADULTERINIS*. Augustine's contributions to the final shaping of the Christian laws of divorce are discussed in WOOLSEY 110-12 and HOWARD 26-27.

44. In particular, JUSTINIAN, *NOVELLAE* 117, 134. Worsley-Boden analyzes in detail the codifications and legislation of Justinian in relation to marriage and divorce. WORSLEY-BODEN 70-74.

tion was achieved by Gratian, who integrated and codified the Canon law.⁴⁵ As finally settled, the Canon law decreed that there could be no divorce *a vinculo*, no permanent and final divorce. Divorce *a mensa et thoro*, permanent separation but without the dissolution of the marital form, was permitted for reasons of adultery, cruelty and heresy or apostasy. And, in culmination, it was decreed that all matters governing marriage were to be ministered by the church. Secular marriage and divorce laws were synonymous with the laws of the church and were exclusively administered by the church. What began as the alleged legislation of the literal terms of the Gospels became, after an intense political struggle, the invariant law and doctrine for nearly all of Western civilization. It became widespread, and took hold through legions of Christian conquerors and Jesuit priests and monks throughout Europe. Eventually, it reached England with the invasion of William the Norman.⁴⁶

The power of the church was cemented in the doctrines of the church. The idealization of a life hereafter, and the equation of life on earth as a moral test for benediction in eternity, were gauntlets for qualification in true Christianity. Imposed in stentorian tones, and enforced with untempered cruelty and viciousness, the Christian ideals were blotched, if not perverted, by a wave of fear and suppression. Conformity and repression were dictates for the human personality, drowning the miseries and inequities of life in a strangular vise. There was no opposition. There was no enlightenment, and no realistic consideration of the morality, the justice or the compatibility of the laws of family life.

But, in Lord Acton's classical aphorism, "all power corrupts, and absolute power corrupts absolutely."⁴⁷ In time there became evident a divergence in the doctrines and the practices of the church. Taking a sanguine interest in the insulation of power through wealth, the church permitted special dispensations in regard to marriage laws—for a handsome fee. While divorce in name did not exist and could not be secured, annulments of marriages became increasingly attractive and increasingly available for those who could afford them. They became, in fact, a key instrument of monarchical policy for the princes and kings,⁴⁸ reaching to a dramatic climax in the remarkable marriage careers of Henry VIII.⁴⁹ The matter of annulment eventually con-

45. GRATIAN, *DECRETUM*. The work and influence of Gratian in solidifying the Christian laws of divorce is analyzed in WORSLEY-BODEN 79-87, and HOWARD 53-56.

46. WORSLEY-BODEN 94. The development and application of canon law in England is described in 1 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1903).

47. ACTON, *HISTORY OF FREEDOM* (1877).

48. See 2 HOWARD 57.

49. The matrimonial career of King Henry VIII is presented in detail and its political meaning is briefly analyzed in WORSLEY-BODEN 102-11.

tributed to his break with the church of Rome, when he was ultimately refused one for one of his marriages. Annulments were granted for a variety of convenient reasons that existed in fact or in fraud, inevitably wrapped in a cloak of piety. Complementing the special dispensations for annulment, there also developed, in like circumstances, special dispensations to remove impediments to marriage, such as affinity or consanguinity. Facts were adjusted to cope with the dilemma produced by doctrine, and pragmatic results were achieved which, in effect if not in theory, changed the marriage laws for some individuals.

While church practices in the administration of marriage were adjusting to the psychological and political realities of life, at least for the upper classes, church doctrines remained static and impassive. As the breach in theory and practice broadened, the power of the church gradually dissipated. Its waning influence and authority was first manifested most dramatically in the disillusionment and departure of some of its most able scholars. A wave of reason and enlightenment became a flood of reaction to the impiety and repression in the conduct of church affairs. The Reformation brought the new spiritual leadership of Luther and Calvin and Erasmus.⁵⁰ The Protestant movements split off from the Catholic Church of Rome. The break was a spiritual disillusionment, seeking not a repudiation of religion but an intensification of it through an enlightened respect for and adherence to the doctrines of the Bible. Luther acknowledged marriage, not as a sacrament but as a worldly event guided by the great moral precepts of the Bible. By his translation of scriptural authority, absolute divorce, divorce *a vinculo*, could be granted on grounds of adultery and malicious desertion, the latter ground incorporating the refusal of sexual intercourse by one spouse with the other.⁵¹ Other offenses were accepted as grounds for a temporary separation, generally in anticipation of possible reconciliation. These included anger or incompatibility, attempts by one spouse upon the life of the other, exile and incurable disease. The practice of granting dispensations to circumvent the new doctrines was discontinued.

A literal interpretation of the scriptures persisted, equating immorality with sexual misbehavior. However, the more excruciating circumstances and misfortunes of life were given some cognizance. They were a basis for the temporary doctrinal disestablishment of a marriage that had in fact been interrupted. But there was another group among the Reformationists, guided by the teachings of Erasmus.

50. The views of the early Protestant reformers are summarized in MILTON, *Tetrachordon*, 3 PROSE WORKS 423-33 (1697).

51. WORKS OF MARTIN LUTHER (Spaeth ed. 1915-32). The views of Luther are also briefly given in WOOLSEY 128-32 and summarized from secondary sources in 2 HOWARD 62-64.

This group opposed the literal interpretation of the scriptures. They asserted the doctrine that the scriptures, in admitting adultery as a ground for divorce, intended that divorce be permitted for this and all equally grave offenses.⁵²

The modification of the doctrines relating to marriage and divorce was part of a thorough-going rejection of many phases of the Canon law, including its dominance and control of civil power and secular affairs. Civil law was gradually reestablished in western Europe. Under Luther's influence, jurisdiction and authority in matters of marriage were reinvested in the state. Divorce procedure reverted to the later Roman practice. It provided for dissolution of marriage without ministerial authority. Judicial cognition became a matter of concern only where the prior fact of a divorce had to be established in order to consider permission for a remarriage. In time, however, judicial procedures for divorce became a formal requirement. Consistorial courts were set up under civil power. The practice of these courts in the granting of divorces had a still further liberalizing influence, notwithstanding religious dogmas.

But the geographic insulation and political arrangements of England caused a different course of events in matters of marriage and divorce.⁵³ The independent Church of England replaced the church of Rome as the supreme spiritual power. Church and state were not separated, as in many parts of western Europe, but united. The Church of England was the church of the state, and the jurisdiction of marital affairs remained a spiritual matter. At first Parliament followed the patterns of the Roman church in permitting divorce for special reasons. It allowed divorce to those rich enough to engage it and convincing enough to impel its authority. Ultimately, however, marriage and divorce were delivered to the domain of the ecclesiastical court, a court of the church. Canon law survived, absolute divorce was not allowed and judicial separation was permitted only for adultery, cruelty and heresy. Separation procedures were administered in the tradition of Canon law, with proofs of moral fault and shameful and disgraceful behavior required in a setting of uncompromising mutual antagonism and vindictiveness. From its earliest traditions, the affair involved the authority of the church and the honoring of its doctrines. The assignment of guilt was a matter of upholding moral rectitude and punishing the delinquent. It required dramatizing the trial and its outcome in order to effect an impression on the consciences of all Christian followers.

52. RICHTER, *Beitrage zur Gesch. des Ehescheidungsrechts in der evang. Kirche* 6, cited in 2 HOWARD 64.

53. The evolution of the laws of divorce in England from the time of the Reformation to the passage of the Matrimonial Causes Act in 1817 is described in WORSLEY-BODEN 101-19.

At the time that it occurred, the transfer of authority in marriage affairs from the church of Rome to the Church of England occasioned some fears that the excesses of the Dark Ages would persist. There was some church sentiment, buttressed by the views of reformers, that the laws regarding divorce ought to be relaxed. Parliament requested and considered a report of a commission suggesting reform in the divorce law. This report, the *Reformatio Legum* (1552),⁵⁴ advocated absolute divorce for a number of causes reflecting sexual misbehavior, for desertion or cruelty, for the implacable and irreconcilable hatred of one spouse toward the other, and for prolonged disappearance accompanied by an assumption of death. Jurisdiction was to be transferred from Parliament, where it then existed and where dispensations could be offered as in the Roman church, to the Ecclesiastical Court.

The recommendations were not accepted into the letter of the law, but they were reflected to some degree in practice. Remarriage was permitted even though preceded only by separation rather than absolute divorce. Ultimately, as a reaction to this kind of laxity in divorce matters, the spirit and the letter of Canon law was reinstated and remained until the nineteenth century. Despite the eloquence of John Milton,⁵⁵ who inveighed against a conception of marriage as moral when it fosters moral impropriety, and a conception of morality based on carnal behavior, the English law of divorce was unchanged until 1857. At that time, absolute divorce was permitted for one cause, adultery, and jurisdiction was transferred to a civil court.⁵⁶

54. The history of the *REFORMATIO LEGUM* and its provisions is the subject of a treatise, DIBDIN AND CHADWYCK-HEALEY, *ENGLISH CHURCH LAW AND DIVORCE* (1912). The immediate impact of the *REFORMATIO LEGUM* and subsequent developments in the application of the divorce laws is discussed in 2 HOWARD 77-85.

55. MILTON, *Doctrine and Discipline of Divorce*, 3 PROSE WORKS 169-273 (1931). *Tetrachordon*, *id.* at 274-314, *Colasterion*, *id.* at 434-61, *The Judgment of Martin Bucer*, *id.* at 274-314. Milton, himself a divorcé, provided the inspiration and, indeed, the thought and language for the modern exponents of free divorce. ". . . the absolute and final hindering of divorce cannot belong to any civil or earthly power against the will and consent of both parties . . ." *Doctrine and Discipline of Divorce*, Bk. II, c. 21. "[T]o interpose a jurisdictional power over the inward and irremediable disposition of man, to command love and sympathy, to forbid dislike against the guiltless instinct of nature, is not within the province of any law to reach; and were indeed an uncommodious rudeness, not a just power." *Ibid.* "So that which way soever we look, the law can to no rational purpose forbid divorce; it can only take care that the conditions of divorce be not injurious." *Ibid.*

56. The English divorce laws of today are, in their basic orientation and substance, unchanged. Before 1937, adultery was substantially the only ground for absolute divorce. In 1937, through the influence of Sir Alan Herbert, three additional grounds were added: wilful desertion, cruelty and incurable insanity. Matrimonial Causes Act, 1936-37, 1 EDW. 8 & 1 GEO. 6, c. 57, § 2. The recent report of the Royal Commission on Divorce and Matrimonial Causes (1956) failed to recommend any important changes. The commission, composed of six women and thirteen men from the legal, medical, sociological and teaching professions, equivocated on policy and refused to take a strong

Problems of marriage, in legal terms, persisted as problems of morality exclusively. Fidelity expressed primarily in carnal terms was the chief virtue in this morality. The economic, psychological and social delineators of marriage hardly ever systematically intruded in legal considerations. To the extent that they were recognized at all, they probably represented unarticulated premises on which the substance of decisions concerning marriage may in part have been based.

The Development of Divorce Policies and Laws in Colonial America and in the United States

The traditions of old world thought and morality were the partly indispensable and inevitable accompaniments of the migration to America. A similarity of experience bred a similarity of logic and the comfort of custom recreated established modes of life. The traditional molds of the motherland were interrupted and modified only where dispute had intervened. The spirit of Puritanism was the creation of such a dispute. It led to the rejection of the rigid and intolerant canonical observances and rules in the Church of England. The permissive Protestantism built on the revolt of the Reformation was substituted. In colonial New England the spirit of the *Reformatio Legum*, rejected in Britain in the sixteenth century, was put into partial practice by the Puritans and the Separatists.⁵⁷ Canonical decrees of separation, *divorce a mensa et thoro*, were practically though not entirely abandoned. A permanent dissolution of marriage was freely granted for various moral and factual ruptures, such as desertion, cruelty and adultery. The role of Canon law and the ecclesiastical court was further attenuated by the transfer of marital affairs to civil jurisdiction. Administration was imprecise at first because of the lack of any legislation to provide consistency in marriage and divorce laws and practices. The civil authority which assumed jurisdiction was generally the governor, or another executive official, and the town council. Matters were heard informally and dealt with summarily. Generally, the rigors of the frontier and the spartan character of life absorbed the attention and energy of the settlers. Standards of religious practice remained vigorous and social life continued largely in the ascetic traditions of the Catholic Church and the Church of England. Family disorganization and divorce did not protrude themselves on any significant scale so as to force any elaborate and detailed consideration of the problem.

stand. A brief description of the conclusions in the Royal Commission report and its place in the British laws of divorce is contained in N.Y. Times, March 25, 1956, § 4.

⁵⁷ 2 HOWARD at 330-66, using comprehensive reference materials, analyzes in intimate detail the grounds, cases and practices of divorce in Colonial New England.

In the Crown colonies of the middle and southern regions of the country, the colonists more directly inherited the laws of England that became the initial common law in the states.⁵⁸ True to canonical traditions only separation, not absolute divorce, was permitted, and then only for adultery and cruelty. But these colonies neither had nor were authorized any ecclesiastical court to implement any form of divorce. As a practical proposition, therefore, there was no legal divorce. There developed in consequence, as a matter of necessity and conscience, the unusual practice of granting the wife alimony without a divorce. This practice of the equity courts thus circuitously took cognizance of a factual disruption of a marital relationship, with its attendant social and economic complications.

Pennsylvania did in fact permit absolute divorce for the cause of adultery, but could not regularly administer this law for lack of a proper ecclesiastical court.⁵⁹ New York, under English domination, also held matters of divorce in abeyance for lack of a designated ministerial vehicle to execute any legal policies. The paternalistic influences of earlier Dutch settlement entirely disappeared. These granted to magistrates the prerogative of arbitration in marital conflict and, in fact, required such a procedure and a delay before granting any divorce.⁶⁰

After the Revolution, the state governments were thrust on their own responsibility. For the most part, they approached the legislative task in marriage and divorce belatedly. However, there ensued what Lord Bryce has termed "the largest and the strangest, and perhaps the saddest body of legislative experiments in the sphere of family law which free self-governing communities have ever tried."⁶¹ Divorce, from a legal point of view, became entirely a civil matter.⁶² But it drew its policy substance from an inherited concept of morality, and confined itself to this narrow frame of reference in its experimentation with laws and consideration of policy change. No larger frame of reference readily and articulately presented itself. Intense social, economic and psychological exploitation that irrevocably and radically changed the patterns and structure of social life, had yet to develop. In the main, a strong trend toward absolute divorce occurred throughout the country. But the expansion and diversification of life in this frontier country created a somewhat more libertarian or, at the very least, a more tolerant frame of mind as to the incidents of traditional morality. Divorce on the classical ground of carnal impro-

58. *Id.* at 366-87.

59. *Id.* at 385-86.

60. *Id.* at 376-85.

61. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 330 (1901). Concomitant developments in ecclesiastical divorce legislation in the United States are described in LICHTENBERGER, *DIVORCE* 210-46 (1909).

62. A detailed account of the development of divorce legislation, state by state, is given in 3 HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* (1904).

prieties was of course granted. It was given for adultery, physical cruelty and desertion. In addition, it was permitted for reasons of drunkenness, conviction of a crime, attempts upon the life of either spouse by the other, gross neglect, etc. In a few instances, an omnibus provision was inserted to provide grounds for divorce. For example, divorce was allowed, among other reasons, for "gross misbehavior and wickedness in either of the parties, repugnant to and in violation of the marriage covenant."⁶³ Omnibus provisions were most generally rescinded because of their lack of specificity and their unworkability. In summary, there developed a massive tinkering with and shifting of grounds for divorce. This process essentially reflected a recognition of the factual break-up of marriages for reasons having strong undertones of moral reprehensibility.

In many jurisdictions the divorce laws were first administered by the legislature. As this proved increasingly unwieldy, these jurisdictions joined the others in placing responsibility for the administration of marriage and divorce laws in various courts of law or equity. The procedure for divorce was unfailingly construed as adversary in nature. Civil law inherited the church's struggle of the moral against the immoral, the all pure against the all wicked. There could be no conciliation, no sympathetic understanding or indulgence, no charity and tolerance in resolving the moral problem. The law, which clearly has a vested interest in morality in its own right, was defining the issue in the traditional terms of the medieval church. The cloak of public authority and responsibility was broad enough to encompass only that structure and definition of the problem that the church expressed for its own political purposes and for its espousal of a narrowly defined morality.

The Laws of Divorce and the Realities of Marriage Today

The legal requirements for divorce today have been fashioned from the practices of a long tradition heavily influenced by ecclesiastical concepts of morality and psychology.⁶⁴ Moral culpability, expressed in dimensions of a single act or one person's acts of a particular sort, provides the stern conceptual criterion for divorce. A public contest to establish relatively unshaded properties of good and bad is the practical basis for legal decision in the matter. Divorce is almost universally granted in the United States for adultery and for manifest

63. R. I. Pub. Laws 1798, at 479.

64. "No other branch of ethics has been so largely determined by dogmatic theology as has the ethics of marriage and the family." 2 LECKY, *HISTORY OF EUROPEAN MORALS* 371-72 (1869).

"Both Protestants and Catholics have, in general, viewed divorce not from the point of view of the biological purpose of the family, but from the point of view of the theological conception of sin." RUSSELL, *MARRIAGE AND MORALS* 224 (1929).

acts of cruelty or desertion by one of the parties to a marriage.⁶⁵ Alcoholic indulgence, criminal behavior resulting in conviction or incarceration, and the failure to provide material support are also generally common causes for divorce. A variety of other morally reprehensible acts by either spouse have been sanctioned as a basis for marriage dissolution. Among these are drug addiction, fugitivity, venereal disease contagion and public defamation of the marital partner.

The urgency of social reality, mirrored by the dominant ethic of freedom and personal fulfillment, has forced some compromise in the moral foundation of divorce law. The bald fact that a marriage no longer maintains any physical or spiritual existence has provoked another set of legal causes for marriage dissolution. The importance of this later trend has been documented by the frequency with which insanity and the factual implementation of separate existences have become grounds for divorce. This conceptual root in the physical non-existence of a marriage also serves to broaden the rationale on which desertion, cruelty and non-support can be established. It may help to influence some decisions in favor of granting a divorce on these grounds.

A third set of legal causes reflects the legislative confusion between annulment and divorce. The voiding of marriage for reasons that existed at the time of its consummation has been confused with dissolving a marriage for reasons that were an outgrowth of the marriage and occurred after the nuptial agreement was concluded. The rationale for these annulments, legislatively termed divorces, is again to be found in the narrow construction of morality and in the denial of marital purpose as established in the early doctrines of the Christian church. Impotence at the time of marriage, and the wife's pregnancy by another at the time of her marriage, are common statutory causes for divorce today. Antenuptial unchastity, concealing a "loathesome" disease that existed at marriage and chronological immaturity, are other more occasional statutory bases for divorce whose factual circumstances already existed at the time of marriage.

The stipulation of conditions for a legal dissolution of marriage evidences the state's concern with marriage as an instrument of its policies. As a conserver of morality and of social stability, perhaps also as an instrument for the martialling of property and other economic resources, it has conceived the preservation of marriage as a cornerstone in its policy. Divorce in these circumstances must be sparingly granted and only under circumstances of great abomina-

65. For a concise chart indicating the long-standing grounds of divorce in all American jurisdictions, and the more recent statutory additions in each jurisdiction through 1951, see HARPER, PROBLEMS OF THE FAMILY 658-59 (1952).

tion.⁶⁶ Not only must there be substantial cause based on notions of fault—the existence of a fact or a set of facts to justify divorce—but there must be substantial proof.⁶⁷ Matters of proof are, in the great traditions of law, matters for a court. The instrument of proof is the adversary technique, that is, the juxtapositioning of facts and arguments that are opposed to one another, sharpening distinctions so as to facilitate judicial decisions. The display of proof, and decisions as to culpability in divorce, have become the property of a variety of civil courts in America. Some of these are courts of general civil jurisdiction, and a few have been specially created to handle domestic relations problems.⁶⁸ The procedure in the tradition of all contests of fact and law, is one of formal disputation. Relative circumstances become matters of indelicate precision and form the basis for the broadest consequences to the freedom of individuals, their rights to property and wealth, and their privileges and responsibilities for children. The whole drama unfolds as a modified medieval inquisition in which uncomplicated villainous characters are given uncompromising retribution to the assured social benefit of all. The process is charged to impose spiritual condemnation, material deprivation and social frustration on the morally delict. It draws on all the strengths and formidability of the old ecclesiastical courts, modified only slightly by relatively benign civil law practices.

It is not the rigors of practice but its deception, not so much the problem of practicality as the issue of the conceptual base that casts heavy doubts on divorce laws and procedures today. The intensive character of psychological and sociological findings, though still very far from an embodiment of knowledge about the human personality, provides some stable insights into marital disruption. Viewed from the perspectives of behavior study, any individual behavioral manifestation is a symptom of or an expression of a complex of events. Any meaningful conception of the behavior will not be found in the event itself, or in metaphysical adumbrations upon it, but in an understanding of a larger segment or interlocking seg-

66. One state has added and maintained a significant exception to causes for divorce based on the fault theory or, at least, the theory of the fault of one person. New Mexico law provides, as ground for divorce, incompatibility of temper. N.M. STAT. ANN. § 22-7-1 (1953).

67. A more enlightened legal perspective today is reflected in the recommendations approved by the American Bar Association for the elimination of the fault theory and the adversary approach in divorce. 73 REPORTS OF THE AM. BAR ASS'N (1948).

68. A complete summary of the courts who have jurisdiction in divorce cases is presented in 2 VERNIER, AMERICAN FAMILY LAWS 98-104 (1932), SUPP. 50 (1938). Vernier, in 1931, tabulated approximately fifty variously designated civil courts which handle petitions for divorce. Three jurisdictions assigned divorce petitions to courts of domestic relations or family courts. In two jurisdictions, divorce went before a probate court. In four counties in Texas, divorce was a matter for the criminal district court. BALDWIN, COMPLETE STATUTES 1925, COURTS OF CRIMINAL PROCEDURE, art. 52.

ments of an individual's life. Alcoholism, for example, may be an expression of a life full of frustrations and misfortunes which, for the purposes of characterization, may be termed a defect or disorder of development. It may, on the other hand, be more particularly an expression of marital discord fertilized in the defective and incompatible behaviors of either or both spouses. Or it may be a characteristic of the dominant business and social environments in which the individual lives to drink heavily, and this brings the propensity or trait more focally into the marital relationship. Extramarital sexual activity may reflect the pressures of the biological and psychological development of the individual. It may be a reaction to marital frustration caused in part by the misbehavior or inadequate behavior of the other spouse or both spouses in the home. It may be a manifestation of substantial or dominant patterns of marital behavior in the larger culture at any given time.

In the traditions of a narrow construction of moral responsibility, it may be relatively easy to equate long-standing defective character and development with immorality, and identify a given behavior such as crime as a product of that immorality. The difficulty arises in the denomination of moral responsibility where the delinquent behavior of one individual can in large part be ascribed to the deliberate or unintended subversion of another individual. This is today less a matter of speculative occurrence, in the light of our greater familiarity with and closer observance of human behavior. Certainly it is a disease of the conceptual process to consider, as the law does and as the church has always done, that the responsibility for the immorality of a given behavior should be ascribed entirely to the person who overtly expressed it and not at all to the person who covertly induced it. The trends in time reveal many sustained changes in attitudes and behavior, reflecting shifts in the associations of morality with thoughts and actions. Today's microscopic examinations of behavior can encourage more refined formulations about the relationships between law, morality and conduct.⁶⁹

In any event, the formulation of the problem of divorce in terms of the moral issue alone conceals the complicated and multi-dimensional character of the marital relationship. It provides, by itself, an unrealistic basis for the designation and operation of divorce laws. From both a conceptual and a practical standpoint, marriage is today predominantly a psychological and a social interaction. The

69. Cf. FLUGEL, *MAN, MORALS AND SOCIETY* (1945). Evolutionary and rational concepts of morality, at least, can comprehend a broader base for moral judgments in a better understanding of the conditions of behavior and the sources of ethics in the human personality. The controversy of free will vs. determinism may still be largely inevitable but it need not be so intense and fundamental. The points of view may not have to be diametric opposites.

chart of marriage is the day-to-day experiences of the spouses. It is not primarily consecrated in a sense of everlasting duty, of obligation to fulfill certain social responsibilities for family or property or economic well-being. It is an intended fulfillment of personal needs and preferences. Marriage based on psychological principles is not new, but psychological principles cast in isolation from a binding sense of social obligation presents many difficult problems. The pressures of tradition have been uprooted, in part by the modified and more inconsequential economic character of marriage and the family. Marriage has become more in the nature of an experiment in self-satisfaction.

Given an experimental frame of mind, the assumption of risk is made easier, and the fear of consequences is not sustained. Conventional social forms and social meanings weigh less heavily, or are modified. Marriage is a matter of present feeling and not importantly a matter for planning or implication into the future. It can, it is thought, be easily sustained by an emotional charge, or a limited purpose, or no purpose at all but simple adventure. The difficulty in this hedonistic view is in the deficiency of the conceptual premise. Marriage may well begin as an illusion, as an experience of one dimension, but it cannot remain so, even by choice. The relationship of one person to another is complicated by a variety of needs. It is also complicated by a variety of roles that force the inner doors of the marital relationship and insist upon recognition. The marital couple are caught up in a complicated series of relationships that even the best prepared do not fully anticipate. With the first recognition of the vastness of the relationship, of its complexities, the trial for the life of the marriage begins.

The struggle for stability and success is complicated by inconstancies and change. Personality needs and dispositions may change in the process of experience, sometimes within the experience of marriage itself. Old needs may be satiated, or intensified with each succeeding frustration; new needs may be created. The pressures and diversities of social living may bring into the marriage new and strange feelings and experiences. It may bring a host of outside contacts and activities, some of which may not be congenial to the intimacy and satisfaction of the marital relationship. Time intrudes to change outlooks and motives, and these may not correspond, quickly or completely enough, for the spouses. Marriage becomes an intensely human process built upon uncertain events.

Given the awakened self-awareness that the individual has been intensively experiencing in recent history, these problems have become the real and critical issues for marriage. They present the central frame of reference through which marriage conventionally

gains its meaning today. As a general rule, fortunately, the resilience and adaptive facility of the human personality permit it to overcome change and surprise. Individuals are elastic enough to accept discomfort and frustration, and not infrequently turn it to their ultimate advantage or satisfaction. But this is not always the case, certainly not the case often enough, so far as the institution of marriage is concerned. Unrealistic initial appraisals of the spouse are usually conditioned by a lack of mutual familiarity in a range of experiences. This inevitably results in some disillusionment with the marriage. Too skimpy a base in knowledge about the marital partner may make changes and adjustments in the marital process exceedingly difficult.⁷⁰ An inner lack of capacity or will for broad tolerances, or an unreasonable and perhaps unavoidable external pressure, can strain the bonds of marriage, the more so when it is weakly conceived in the first place.

Human experience and ingenuity is a fertile source for solutions to new and difficult problems. However, where experience has suffered from unpleasant distortions and maturity has not been reached, the solutions do not reflect wisdom.⁷¹ When antagonisms occur the logic of responses is reduced by the intensity of the negative emotion. The resultant is often a matter that forces itself into the view of policy makers, legal administrators and other protectors of the interests of society. Unsuccessful marriage is more than a simple misfortune. It is a pattern of misfortunes traced through a series of related persons and events. Failure of the marriage, that is, failure in the sufficient anticipation of its complexities and in the solution of its problems, gnaws at the personal stability of the marital partners. It spawns the conditions for aberrational behavior or intensifies the grounds on which manifest disturbance may occur. To forestall disaster, an element of added personal control and suppression may be introduced into the marriage. Behavior may generally become more guarded and stilted, with volatile emotions erupting only from time to time. But an even weaker solution may occur and raise issues of immorality as well as unhappiness. The home may be forsaken in favor of dissipative or anti-social expressions and outlets. Mental illness is also a not unlikely consequence where the stresses of marriage unduly tax the resources of the personalities. Desertion, separation and divorce

70. The significance of the relationship of pre-marital acquaintance to the happiness of marriage, as defined by the spouses, is documented in the research investigation of BURGESS AND COTTRELL, *PREDICTING SUCCESS OR FAILURE IN THE MARRIAGE* 164-71 (1939).

71. Marriage itself may be the product of immature attitudes and neurotic needs, and an anticipated solution for personal problems. Such a foundation in the marital relationship will sooner or later foster conflict and dissatisfaction with the union. This psychological point of view is elaborated by BERGLER, *UNHAPPY MARRIAGE AND DIVORCE* (1946), and *CONFLICT IN MARRIAGE* (1949).

may provide the last and sharpest thorn in the heavy wreath of disillusionment.

But the burden of divorce policy is not such a simple matter as freeing two miserable incompatibles from one another, charging them to seek a safer course, a safer experiment next time. This is so even if the problem is conceived as one of compatibility and distinguished from the problem of morality. Divorce may not always be the answer.⁷² It may be thrust out as a plea for help and not always as a demand for dissolution. And even though there is agreement that a couple divorce in their own best interests, there still remains the problem of the best interests of the children. The impact upon them of divorce and divorce arrangements or, alternatively, continued marriage, must be carefully considered. The children of an unhappy marriage have the most to lose and are the least protected from the consequences of incompatibility.⁷³ It is they who carry the scars of strife and unhappiness. Manipulated but unsupported, given solicitude but unloved, rejected or ignored by either or both parents, they carry on the family fight on their own terms. These are the terms that reflect themselves in juvenile delinquency statistics, and in serious social and psychological aberration.⁷⁴ They are the seeds that will create in fullest force the policy problems of the next generation. And they must course through the problems of divorce law today.

Each new edition of strife in an unhappy marriage sends out new waves of disillusionment. They go out into work, into play, into the various social, economic and political roles of the marriage parties. They are the carriers of the diseases of an unhappy marriage. If parties are given the strength of forbearance the problem may not be so serious from a societal point of view. But, given a few strategically located individuals falling victims to the pressures of dissatisfied marriage, the consequences may be felt by yet other individuals on an even broader plane of life.⁷⁵

72. Divorce may be analyzed as a symptom or a step in the internal struggles of an individual to cope with his problems. Cf. BERGLER, *DIVORCE WON'T HELP* (1948).

73. A careful analysis of the problems of children whose parents have divorced is given with poignant effect by DESPERT, *CHILDREN OF DIVORCE* (1953).

74. Psychiatric, psychological and sociological literature is today rich with materials demonstrating the relationship between family disorganization and the anti-social behavior and psychological problems of children. The disorganization is reflected in the attitudes and behavior of the parents, and in the maladministration of their own and the family's affairs. The response, the disturbed reactions of the children, becomes identified as a clinic or court problem. The process is forcefully presented and stated in many articles and treatises. GLUECK & GLUECK, *UNRAVELLING JUVENILE DELINQUENCY* (1950); *SEARCHLIGHTS ON DELINQUENCY* (Eissler ed. 1949); ISAACS, *TROUBLES OF CHILDREN AND PARENTS* (1948); GREENACRE, *TRAUMA, GROWTH AND PERSONALITY* (1952).

75. *E.g.*, the impact of personality factors in politics, grounded in drives, frustrations and satisfactions, was analyzed by LASSWELL, *PSYCHOPATHOLOGY*

To all of these complicated matters of profound social importance, the law today unfortunately provides but simple and stock answers. It holds: show who was at fault, a fault severe enough to incur moral disapprobation, and a divorce will be granted, or prove that the marriage—though not the family—is irrevocably dead and a divorce can follow. Judicial wisdom can temper the effects of an understated or overzealous law.⁷⁶ Conciliation may formally be encouraged.⁷⁷ Judgments may be sensitive and humane, within the limits of judicial knowledge. The law itself may allow separation and support.⁷⁸ It may proclaim a waiting period before it will recognize any finality to precipitate action.⁷⁹ It may insure the physical upkeep of spouses and children after a final divorce.⁸⁰

But the thrust of law, both on paper and in action, largely misses the essence of marriage and bypasses the problems of divorce. Though

AND POLITICS (1930), and COMFORT, AUTHORITY AND DELINQUENCY IN THE MODERN STATE (1950).

76. It is not uncommon for courts to construe desertion and cruelty so as to contemplate a wide range of behaviors. The broader definitions reflect the imagination and sensitivity of the courts, if not their fidelity to literal meanings. The conception of "constructive desertion," for example, contemplates that the spouse, who by his abuse or intolerable behavior has forced the other to leave the home, has committed desertion. Noteworthy as decisions based on this rationale are *Godfrey v. Godfrey*, 284 Ill. App. 297, 1 N.E.2d 777 (1936); *Kruse v. Kruse*, 179 Md. 657, 22 A.2d 475 (1941). The concept of cruelty has been judicially enlarged so as to encompass petitions based essentially on intemperance and incompatibility. *Harman v. Harman*, 198 Cal. 695, 247 Pac. 194 (1926), demonstrates an instance of intemperance judicially masqueraded as cruelty. *Griesen v. Griesen*, 146 Fla. 94, 200 So. 523 (1941), is a case where incompatibility has been glibly turned into cruelty in order to enable the court to grant a divorce.

77. In 1939, California passed a statute providing for compulsory conciliation efforts where a petition for divorce also involved minor children. However, the compulsion to conciliate existed only if either spouse chose this course, and thereby bound the other. CAL. CODE CIV. PROC. §§ 1730-72 (Deering 1953). A Children's Court of Conciliation was established for such a purpose, but it has apparently been active only in Los Angeles. Interest is developing in a few other jurisdictions to authorize conciliation efforts by statute or court rules, though there has been some suggestion that the procedure should be utilized only with the consent of both parties. These trends are reported by GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 358-59, 361-74 (1954). Informal persuasive efforts to conciliate are also available as a matter of court discretion. To give substance to the informal conciliation procedure, Judge Paul Alexander of the Toledo (Lucas County) Ohio Domestic Relations Court employs a staff of trained marriage counselors.

78. Divorce *a mensa et thoro* is still available in the majority of jurisdictions, according to the count of 2 VERNIER, AMERICAN FAMILY LAWS 342 (1932). Separation agreements are generally favored by statutes or court decisions. *Id.* at 467. These devices may be quite humane, and perhaps salutary as well, where absolute divorce is unavailable or undesired. Alimony for the wife and support for the wife and children, dating back to the days of the ecclesiastical courts, are commonplace statutory requirements. They are, in principle, the outstanding, if not the only, manifestations of humanity and compassion in the traditions of the laws of divorce.

79. A number, though less than a majority, of jurisdictions require that a temporary decree, termed an interlocutory decree or a decree *nisi*, first be issued. A final and absolute divorce will then be granted only after the lapse of a period of time, variously set by statutes between one month and one year. 2 VERNIER, *op. cit. supra* note 78, at 150-56.

80. See note 78 *supra*.

the original vindictive spirit of laws of divorce can be blunted and may be ignored, the literal requirements and plain words of statutes cannot be so easily cast aside. The authority and prestige of the law require that they be observed and followed. Nevertheless, the plain facts of experience indicate that they have been subverted time and again.⁸¹ Matters of proof to establish grounds for a divorce have become matters for illegal conspiracy. Rather than conform to a law that does not serve self-defined interests, many people have preferred to circumvent it. They have committed whatever improprieties the law requires in order to serve its conditions for a divorce.⁸² The law has legislated against such behavior to safeguard its prestige and its honor, but it has not prevented it. The multiplicity of laws governing conditions for divorce are seldom quite right. They offer unrestricted freedom where a focus on responsibility may be important. Or else, they demand rigid restrictions in freedom where responsibility and social order would better be served by a more tolerant and understanding outlook. Underlying these unfortunate extremes is a conceptual schema that sees the problem of divorce as a matter of complete right and vindication, or complete wrong and stigmatization.

Where the laws are more flexible, judicial tempering and discretion offer the possibility of enlightened decision about divorce, and enlightened divorce administration. Unfortunately here, too, there is a lack of a sufficiently fine sense of the problems involved, augmented by the tendency to resort to precedent and to ancient conceptions. There has resulted a standardization of judicial responses that falls

81. "There is very great difficulty in framing laws as regards divorce, because whatever the laws may be, judges and juries will be governed by their passions, while husbands and wives will do whatever may be necessary to circumvent the intentions of the legislators." RUSSELL, *MARRIAGE AND MORALS* 233 (1929).

82. The law has been ravaged time and again and, in *contratemps* to thought on ravishment, entirely to its own shame and disgrace. One or both spouses, desperately seeking to establish the grounds for divorce, have conspired to produce the necessary evidence. The law has countered with "collusion" and "connivance" as bars to divorce. Statutes, cases and treatises are replete with demonstrations of the conscientiousness with which the law has undertaken to regulate and restrict the emotions. But collusion and connivance must be proved, and the conspirators were least willing to give the evidence necessary to deprive themselves of the benefits of the law, even at the risk of prosecution for perjury. To provide assistance in the vain enterprise to safeguard the dignity and prestige of the law, the office of the King's proctor was established in 1860 by legislation. The task of the proctor was to see that the legal conditions necessary for a court decree were valid and free of illegal contrivance or suppression of evidence. The institution of the proctor was adopted in some jurisdictions in this country. But in most jurisdictions in the United States the proctor has essentially a nominal function. He represents the paternalistic interest of the state, or other parties vitally interested in the outcome of a divorce proceeding who are not represented. In effect, his role in divorce litigation is generally insubstantial today. Vernier presents data relating to the prevalence and use of the proctor system in the United States. 2 VERNIER, *op. cit. supra* note 78, at 92-98.

either far short of or far beyond the needs of the situation. Problems of alimony and custody are seen in oversimplified dimensions and tend to be resolved in a mechanical manner. The usual safeguard is provided in the technique of having adversary counsel assert each client's interests to the fullest, so that the court may have a more complete consideration of the issues. But it fails in this instance. Even where representation is not lacking—that is, even where the proceedings are not *ex parte*⁸³—lawyers generally lack the background and training to comprehend and hence to present the many essential facets of the divorce problem. They are frequently not so much the representatives of the interests of the clients as the prime movers in a mechanical assembly plant, grinding out artificial and frequently less than beneficial results. Their role and functions today are not consonant with personal or social needs.

The Search For An Enlightened Marriage And Divorce Policy

It is fairly evident that, in principle, present legal policy must support the institution of marriage. It provides necessary structure for the organization of personal relationships. It is the commonly accepted mode for purposes of procreation, and it is most essential for the preservation of the health and welfare of children. However, the physical fact of marriage cannot by itself sustain organization instead of disorganization in personal relationships. And it cannot create conditions of health and by itself avoid a diseased environment for children. The physical circumstance of marriage is an undependable criterion on which to base a prediction of emotional health and social stability. Legal policy, to be socially effective, must do more than certify a marriage practically at the simple request of the parties, or proclaim a state of divorce when one party produced evidence of another party's moral guilt. A co-ordinated program of prevention in matters of marriage and correction in matters of divorce must be undertaken.

Prevention in connection with marriage is the attempted prognostication of compatibility in the marriage relationship. It must be made along a course of subsequent events and preferably for a long span of years. Predictions of such a kind are admittedly largely beyond the scope of present resources of knowledge. They involve a

83. Estimates and studies suggest that over ninety percent of divorce actions are uncontested. Parties in fact negotiate for divorce as a matter of mutual consent or personal indifference. In these circumstances, the whole structure of divorce law, including its moralistic underpinnings, collapses. The spectacle of retribution does not take place; the controversy from which facts will develop and abound, does not exist. Real contests are infrequent and are more likely to be a consequence of disagreement, not over divorce, but over property settlements and the custody of children. Not only is there a lack of contest but, in many instances, in fact, there is collusion and connivance. 1 MARSHALL AND MAY, *THE DIVORCE COURT* (Maryland) (1932); 2 *id.* (Ohio) (1933). GELLHORN, *op. cit. supra* note 77, at 282-90, also discusses the problem in New York and its implications.

long-term program of research into patterns of experience in marriage, patterns of conflict and resolution, and accommodation and defeat for different combinations of personalities. Such research must contemplate the influences of the personal aging process, and changes in the views and conditions of social life over a span of one or more generations. The task is formidable. But present funds of psychological and sociological knowledge can be useful in assisting prospective couples to evaluate their present attitudes with regard to their marriage. It can help them in their own estimates of their prospects for success. Such self-disciplining in relation to the undertaking of marriage may not assure the success of the marriage in all or many of its future trials. It may, however, create a degree of awareness sufficient to test the initial will and tolerances of the parties in relation to their impending union. To this end, a compulsory period of waiting subsequent to the parties' notice of intent to marry and prior to their entering upon the formalities of marriage, would be essential.⁸⁴ The interval needs to be of sufficient length so as to permit a course of instruction and counseling during which an opportunity for reflection may be given. The difficulty of imposing counseling as a condition to be met preceding marriage, is that the legal institution does not have its own resources or its own staff or school to provide such services. Further, few other institutions are now presently equipped to offer such services on a regular and substantial basis.⁸⁵ The requirement can, however, be suggested as a voluntary commitment by the couple. The stipulation of a lapse in time, standing by itself, compromises the potential effectiveness and value of the waiting period. But time alone, and certainly time exposed to counseling, will prevent

84. Banns, or public proclamations of an intention to marry, have long been customary and, at times mandatory, in the history of Western marriage. 2 POLLOCK AND MATTLAND, *HISTORY OF ENGLISH LAW* 370 (2d ed. 1952). They served the purpose of preventing clandestine or illegal marriages. Today in the United States it is common to require that an application for marriage license be made and a waiting period of one or more days ensue before the license is issued. In some jurisdictions the waiting period is instead required after the marriage license is issued and before marriage takes place. In four states, the publication of banns serves in the place of a marriage license. 1 VERNIER, *AMERICAN FAMILY LAWS* 54-58 (1931), SUPP. 10-11 (1938).

85. Pre-marital counseling, however, is becoming an increasingly prevalent phenomenon on the American scene. Many colleges have courses on preparation for marriage, usually given by sociologists or home economists. Reputable manuals offering information and advice about problems relating to pre-marital and marital relationships are commonplace. Cf. STONE AND STONE, *A MARRIAGE MANUAL* (1939); HINES, *YOUR MARRIAGE: A GUIDE TO HAPPINESS* (1940). Marriage and family counseling have become an integral professional activity. The American Association of Marriage Counselors bands together psychiatrists, sociologists, lawyers, psychologists and others who specialize in counseling services for marriage and family problems. Special agencies and clinics provide education and extensive services in connection with marriage and family adjustment. The Marriage Council of Philadelphia, under the direction of Dr. Emily Mudd, is a prime example of an organization offering to marriage and family the services of physicians, social workers, psychiatrists and others. Cf. GOLDSTEIN, *MARRIAGE AND FAMILY COUNSELING* (1945).

the use and subversion of the marital form when the project of marriage is based on nothing more than a spontaneous set of impulses or a fleeting desire.

Pre-marital examination for evidence of disease or illness is another obvious form for the husbanding of marital success and the control of social health and heredity.⁸⁶ The common practice of examination for syphilitic disease is, in the light of medical advances in cure and prophylaxis, no more crucial than for other kinds of illness and disease. The detection of any disease process may be quite valuable in preventing a later strain and surprise in the marriage. The prevention of marriage on account of disease must be attuned to the advances of medicine. Where medical science has found a means of arresting disease and reversing the process, the eugenic, physical and psychological dangers in marriage may not be large enough to justify the deprivation of the freedom of marriage. Where, however, science has not made such advances, the safeguarding of social interests, the avoidance of highly probable social difficulties and the preservation of the biological species, may advise a formal proscription of marriage.

Examination may also serve an intermediate purpose. Temporary incapacity may reduce or for a time destroy a party's ability to estimate the risks and responsibilities of marriage. A psychotic or severe neurotic illness may be such an instance. A delay in the completion of marriage formalities pending a return to better health becomes necessary to effective social policy.

Measures of prevention in relation to marriage, particularly when maximized, pose the threat of a serious incursion upon personal and traditional freedoms. The uncertainties of knowledge may so limit predictive efficiency as to render a restriction of personal freedoms unwarrantable and unconscionable. This is particularly so in the light of current individualistic ethics. The predictive tests of marriage today have serious liabilities, with the possible exception of those dealing with the most obvious requirements of physical and psychological qualifications. Marriage qualifications by public mandate are largely a possibility for the future. It is to that time that a consideration of the relative values of freedom and control should be postponed. Legal policy today can best be set in the direction of enhancing knowledge of and for marriage. It can provide social services to the marriage institution by encouraging and exploiting the use of present resources for the better understanding of the marital relationship.

The correction of the illnesses of existing marriages cannot take such a tolerant view toward time. The preservation of personal and

86. In some states examination is required to establish qualifications for marriage under existing laws. The examinations, usually perfunctory, assess particularly evidence of venereal disease and, in addition, evidence of tuberculosis, feeble-mindedness or insanity. VERNIER, *op. cit. supra* note 84, at 128-39, SUPP. 19-20.

social stability requires a penetrating solution when the issue of divorce is presented. Clearly, in some instances the resources of the marriage are strong enough to support and perhaps sustain a process of reconciliation. This may be the most beneficial personal and social solution. It may frequently more nearly represent the preferences of the parties when the venom and vituperation that are a product of conflict are exhausted or dislodged. In other instances, where resources to sustain the marriage are weak or antagonistic, the continuation of the marriage only serves to intensify personal conflict and spawn greater personal and social disorder. Divorce may offer the better prospect for stability and morality in the future, where once these have been breached. The rationale of divorce is rehabilitative rather than retributive.

The choice of solutions to marital conflict may be a somewhat different matter for legal policy than it is for the parties. To the parties, solutions to marriage problems, particularly where they involve the disruption or destruction of the relationship, are a matter of strained emotion. Truths may be concealed and faults exaggerated. But in the policy and procedures of law, decisions about marital conflict can be somewhat more detached and more rational. The problem becomes one of prediction from information about the previous course of the marriage and sources of conflict. It is a matter of knowledge about the personal strengths and weaknesses and the attitudes, that parties bring to bear on the relationships. And it is a matter of balancing the assessments of risks and resources in relation to the imminent future trials and foreseeable events in the marriage. The information and prediction, to be useful and reliable, must reach the subtleties of understanding that usually come only with special training. And this training is both intensive and comprehensive in nature.

The challenge of such a legal policy is one that cannot realistically be met by legal administration today. Such adjunctive resources as clinics and consultants can supplement the limited and sometimes antagonistic resources that legal training provides. But these are not available on a uniform and large enough scale. They are not certain enough and not broad enough in their orientation to provide the best solution for coping with the pressures of both private and public need. The consequence, for the moment, is generally a rather heavy dependence upon the preferences and the judgments of the parties themselves. Their experiences become the measure of decision.

Until there evolves a more certain determination of the social adaptability of the emancipated human personality, and of its willingness to adapt to conditions of social organization and control, freedom to choose divorce where only two persons are immediately involved is

not unrealistic. It entails some sacrifice of social order. This, however, is mitigated by the reasonably strong and still well-ingrained traditions for the maintenance of the marital form. It is, further, a calculation that freedom in these matters, pending clarification as to the dispositions of man and the development of a thorough and successful program of marriage control, is preferable to restriction based on irrelevant criteria. The latter may coincidentally arrive at the most useful and satisfactory solution in some situations. But it has equal chance to complicate and intensify other situations of marital difficulty and create more extreme and disruptive social problems.⁸⁷

The policy dilemma is unmitigated where divorce is a matter of sought-after freedom for one party and unpleasant coercion for the other.⁸⁸ Similarly, unilateral or categorical solutions may not be sufficiently sensitive where the health and welfare of children are concerned.⁸⁹ They may not avoid with sufficient frequency the acute strife and the serious social misfortune that can befall error. The situation requires analysis of the experiences of the marriage, the potentialities of the parties and the incipient problems of the relationship as a precondition to any decision concerning divorce. It requires some probing forays into the possibilities for developing a change of attitude and better skills in adaptation. Such estimates represent a prognostication of the likely behavioral adjustments of the spouses and children. They are based on the implications of the present orientation and personality make-up of these individuals for responses to future conditions, to changes, intensifications or deprivation of relationship.

The responsibility for analysis is beyond the competence of an unaided court. It is a challenge to the skills of mental hygienists. It is a demand that they produce the fullest knowledge and the best predictions of which they are presently capable. Statutory prescription and judicial procedure should, as a matter of necessity and preference, invoke the services of clinics and encourage their development

87. Freedom in these matters, on the other hand, destroys the appearances and perhaps some of the substance of social stability. Cf. Lichtenberger's twofold composition on marriage as a static institution and a dynamic human relationship. LICHTENBERGER, *DIVORCE* 12 (1931). But it may free individuals from a disagreeable situation that disposes them to greater frustration and more frequent manifestations of personal and social disturbance. In a few instances, freedom may, of course, have the contrary effect of letting loose an unstable individual who is only likely to involve himself repetitiously in the kind of predicament from which he was released. Complete personal liberty as a basis for establishing the rights and benefits of divorce is by no means the ultimate solution. It is, under present circumstances, probably the preferable policy for couples without children who are agreed upon divorce. It is certainly a policy that is more consonant with the individualistic ethic of the present age.

88. A petition for divorce may be in many instances only an intermediate strategy in the marital struggle, calculated for its present effect and not its ultimate result. See note 72 and related text.

89. Consider again notes 73, 74 and related text.

in the service of the court.⁹⁰ This is quite necessary to produce the kinds of evaluations essential for sound decision. A mandatory requirement for such evaluations is probably not beyond the scope of presently and imminently available facilities,⁹¹ if its use is limited to contested petitions for divorce and divorce petitions where the welfare of children is a concern.

An unvarnished examination cannot hide the effects of stagnation in the legal study and handling of marriage over a period of many centuries. At a precipitous moment in the history of the family, dramatized by the circumstances of modern living, the skills and knowledge with which to cope with the problems of marriage are precariously short of the mark of necessity. Responsibility is clearly not uniquely in the legal domain. Law and legal policy have traditionally been a slow response to the evolution of patterns of behavior in society. In this transitional period for marriage and the family, legal policy and procedure can perhaps recline and await clearer developments and more tangible results. It can on the other hand, develop its resources for coping with probable developments as reflected in the trends of marriage and family life today. Courts handling domestic relations problems can evolve into family centers or agencies.⁹² Here legal, psychological and sociological skills and

90. There has been a noticeable trend, particularly in larger municipalities, for courts responsible for the administration of children's affairs to develop their own clinics and consultative services for children and parents. Gellhorn describes the structure and use of these facilities in the activities of the Children's Court in New York City. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 49-148 (1954). Unfortunately, the activities of the divorce court are generally considered as separate and independent, resulting in the lack of integration and coordination of evaluations of the family situation. The artificial and ineffectual separation of problems of the family, and delegation to different courts with different emphases, is nowhere more apparent than in New York City. Only a state Supreme Court has jurisdiction over divorce. The welfare of children is the assignment of the Children's Court, though the Supreme Court may also decide matters of custody. Matters of material family support come within the province of the Family Court, which, together with the Children's Court, forms the Court of Domestic Relations. Paternity proceedings are administered by the Court of Special Sessions, a court of criminal jurisdiction. Matters of criminal behavior of older youths may come under the administration of the Magistrates' Courts, the Court of Special Sessions or the County Courts, all of which have jurisdiction over crime. And there are a variety of additional subdivisions within some of these courts. GELLHORN, *passim*.

91. Mental hygiene and child guidance clinics are becoming increasingly commonplace and exist in strategic locations as part of the state mental health program in an increasing number of states. In addition, nearly every large community has a family welfare agency where some investigative facilities and the skills of social workers may be available. These can be developed as court resources. The distribution of clinic and agency facilities is uneven throughout the country, but these facilities may be exploited and perhaps enlarged to serve the court where they are presently available, and may come into being where they do not yet exist.

92. The plan for a comprehensive family center to deal in integrated fashion with the complex problems of domestic relations, is best approximated today in the philosophy and practices of the Domestic Relations Court in Toledo (Lucas County) Ohio, under the guidance of Judge Paul W. Alexander. Gellhorn advocates the idea of a comprehensive court for New York City as a

knowledge can simultaneously be developed and co-ordinated. Clinical and counseling services as a permanent component of the legal institution may provide the basis for sound practical decisions in issues of marriage. These services may also provide large increments in our knowledge of the purpose and experience of marriage. They thereby offer one important kind of source material for future policy decisions governing the regulation of marriage and divorce. The products of experience and knowledge will also provide the sources of learning for those who will be concerned with the administration of the marriage process. They will be assisted in the development and definition of more useful roles. In time, both the marrying justice of the peace and the trial judge in a conventional civil court may become only the momentos of an earlier and less sophisticated era in the handling of marriage and divorce. The practical adventures in learning at a family center may supplement a sensitive and sophisticated theoretical orientation to marriage and the family at the university. This in itself would be a marriage of enlightenment and social service. Sophisticated law and sensitively trained legal counselors and legal decision-makers, with more adequately defined functions, can be instrumental in more effectively bridging the gap that exists between the realities of social experience and the policies and practices of marriage and family law today.

recommendation based on his conclusions from his analysis of the operations of the present New York City system. GELLHORN, *op. cit. supra* note 90, at 382-91.

