

6-1956

## Divorce Litigation and the Welfare of the Family

John B. Bradway

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Family Law Commons](#)

---

### Recommended Citation

John B. Bradway, *Divorce Litigation and the Welfare of the Family*, 9 *Vanderbilt Law Review* 665 (1956)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol9/iss4/3>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# DIVORCE LITIGATION AND THE WELFARE OF THE FAMILY

JOHN B. BRADWAY\*

## I. INTRODUCTION.

In a recent article Chief Justice Warren, writing on the topic "The Law and The Future," reminds us that "Some of the defects in our system are inherited; others keep creeping in. Justice, like freedom, needs constant vigilance."<sup>1</sup> There are some who believe that an inspection of the modern orthodox adversary divorce procedure will reveal one or more of those defects. It is the purpose of this article to attempt such an inspection.

There is nothing novel in the suggestion that divorce is a controversial subject. Its repercussions impinge on many of the social and physical sciences; but its contact with the law is an occasion for some people to view with what, one suspects, is alarm. In particular, criticism is directed against the procedural aspect of divorce litigation.<sup>2</sup> There is probably enough truth in some of the unfavorable comments to make the most enthusiastic supporter of the orthodox system hesitate to pronounce it unqualifiedly a show piece, an example of the best that courts and lawyers are capable of doing.<sup>3</sup>

Space is lacking for an all-out attack on divorce law administration. The present more modest rock is hurled against a smaller target: one which does not appear to have received too much attention in the past. This target is—the facts.<sup>4</sup> It is argued that the judge in the orthodox divorce court does not have facts in sufficient quantity, quality and variety to enable him to demonstrate to the general public the competence of which he is capable or the effectiveness of the legal system in solving private and public problems.

The reader at this preliminary point should be warned that this paper is not another log thrown on the eternal fire of policy controversy—shall we have more or less divorce. Rather, it is a plea: for a better quality of service to the public; for improving the public relations of

---

\*Professor of Law, Duke University.

1. Earl Warren, *The Law and the Future*, Fortune, Nov., 1955, p. 106.

2. See, NEWSWEEK CLUB BUREAU, DIVORCE IN AMERICA: WILL NEW THINKING CURE AN OLD EVIL (May, 1952). Symposium, *Divorce: A Re-examination of Basic Concepts*, 18 LAW & CONTEMP. PROB. 1-106 (1953).

3. The responsibility of the legal profession for improving the public relations of the judicial department of government in the United States is summarized in the preamble to the Canons of Professional Ethics of the American Bar Association.

4. The attention of the public to the scarcity of facts in the records of divorce proceedings was alerted on the national level as long ago as 1932. MARSHALL AND MAY, *THE DIVORCE COURT—MARYLAND*, app. 333 *et seq.* (1933).

lawmen serving in a lay community. If the recommendations of this article were all to be adopted there is no reason to assume that the quantity of divorce statistics would thereby be increased or decreased. There might, however, be an improvement in the public attitude toward the administration; and some of that might reach as far as the courts and the bar. With this caveat we proceed with the argument.

When one mentions facts with respect to litigation there arises in legally trained minds a customary slogan: "the truth, the whole truth and nothing but the truth." This is our present starting point. The argument will run that: the whole truth (to shorten the phrase) should be available to the divorce judge; presently, too often, he does not have the advantage of this basic commodity; and that something ought to be done about it. In keeping with this breakdown the article divides naturally in three sections: why should the whole truth be made available to the divorce judge; why is it not now being made available; and what may reasonably be done to remedy the matter.

## II. WHY SHOULD THE WHOLE TRUTH BE MADE AVAILABLE TO THE DIVORCE COURT?

Facts in litigation procedures may be gathered for many various purposes; for example: to enable the court itself to determine certain issues; to satisfy objecting litigants; to win the confidence of the general public in the machinery and in the legal profession which operates the machinery. The first two of these purposes are certainly desirable; but they lie beyond the scope of the present paper. Our concern is with the third. It is argued that one way to win public respect for the administration-of-justice-according-to-law is to supply the whole truth to the divorce court.

We cannot make much headway in a discussion of the need for facts, or the whole truth, until we agree on the matter of focus. The whole truth does not mean all the facts there are. Rather, the phrase is limited to those facts which are relevant to some objective. The correct phrase should be "the whole relevant truth." The first point at which the present argument comes into disagreement with the orthodox divorce case is in this matter of focus.<sup>5</sup> The traditional focus is—the plaintiff-spouse (or perhaps the two spouses). This concept may be appropriate for certain purposes but in aid of a public relations program its value is open to question.

The public relations focus should be appealing to the public. The divorce plaintiff may be, but often is not, an appealing figure. He would have us sympathize with the intolerable sufferings which require any reasonable person like himself to demand release. Some of

---

5. A thoughtful comment on the focus of divorce legislation is found in 2 VERNIER, *AMERICAN FAMILY LAW* 9 (1931).

us, no doubt, react with a feeling of commendable satisfaction that courts and lawyers exist able and willing to resolve the irreparable wrong by granting him a divorce. But there are other observers with a curiously unenlightened point of view who persist in wondering who the second wife may be. If again we pick as our public relations focus the warring spouses they are not much more appealing to the generality of mankind. Some of us rejoice that here at last according to law, righteousness, in the form of the "innocent spouse," will have a chance to triumph over the forces of evil, personified by the adversary. But in the background there will be the cynics who suspect that the whole matter is one of the comparative blackness between the pot and the kettle.

If courts and lawyers are identified too exclusively with either of these more or less equivocal abstract figures, the public, or a portion of it, may tend to confuse the character of the lawman with the spectacle of the client and the beneficial effect on the profession of the completed divorce case is clouded.

If neither of these personages will do as a focal point there is a possibility that the ailing family itself may have more public appeal.<sup>6</sup> Perhaps it will be possible to rally a substantial proportion of the public behind the concept that a divorced family is not a victory but a tragedy. Maybe someone will say—there but for the Grace of God go I, or my family. Then lawmen identified with divorce procedure may be considered not merely advocates paid to win for their side at all costs; but more realistically as social engineers doing their best for their clients, for the welfare of the family, and hence for the community. At least the idea looks promising enough to warrant a modest trial.

As an illustration of skillful use of facts and focus on the professional level one may instance the public relations program of the medical profession.<sup>7</sup> Doctors are sufficiently mature, professionally speaking that they are able to see not merely the disease or injury but the patient who is suffering from the disease or injury. In psychosomatic medicine the horizon of professional interest is even wider.<sup>8</sup> Within this elastic range of focus the doctor is insatiable for facts. He cannot get

---

6. The variety of lay interpretations of the significance of divorce is summarized by Elliott, *The Scope and Meaning of Divorce*, in BECKER AND HILL, *FAMILY, MARRIAGE AND PARENTHOOD* c. 23, at 669 (2d ed. 1955).

7. The public relations program of the medical profession occupies substantial space in the *Journal of the American Medical Association*. See e.g., Stearns, *Are Public Relations Programs Worth What They Cost?* 157 *A.M.A.J.* 591 (1955).

8. The growth of the concept of psychosomatic medicine needs no extensive documentation. See e.g., Alvarez, *Psychosomatic Medicine That Every Physician Should Know*, 135 *A.M.A.J.* 704 (1947); Stearns, *A New Aspect of Treatment in Psychosomatic Disorders*, 14 *HAWAII M.J.* 301 (1954).

too much information. He has succeeded in convincing a substantial portion of the general public that the patient should not be his own diagnostician; and the first sensible step toward cure is a full disclosure to a qualified professional person. The diagnostician or the surgeon can scarcely do his work without elaborate fact gathering apparatus in laboratory and clinic to supplement the story which the lay patient unfolds. In particular, one may call attention to the public relations value of the concepts of professional supervision during convalescence and the autopsy. The doctors see the patient as far as possible to restoration of health, not merely through the period of the operation or the administration of the treatment. If the patient does not recover, invaluable data may still be gained from the autopsy which is generally believed to be for the welfare of the general public.

By emphasis on the broader focus, medical men have convinced the public that they are engaged in a battle which is being fought for the benefit of the public. The facts are to be used beneficially, not as weapons against other people. In comparison the law has been conservative.<sup>9</sup> We lawmen, in divorce cases, allow the warring spouses to hold the spotlight. They do their own diagnosing. Popular sympathy, whether or not fully informed, may be with one or other of them but seldom with both at the same time. The lawyer is not always regarded as the champion of the public in a battle in which all are interested in the welfare of the family, but rather as a partisan for his own client against the world. The judge too often appears to lay eyes as the umpire in a sort of contest. The losing party too often fails to retain complete confidence in the umpire. If the law could be changed so that the focus of legal and public attention could be trained on the family rather than on the spouses, if the public could be convinced that the purpose for gathering facts was the welfare of the family,<sup>10</sup> if divorce courts believed in a different perspective, the public relations program of the lawmen should take a needed step forward.

---

9. If there were no other reason for a public relations program of the legal profession the challenge of literature of criticism of the lawyer would suffice. The traditional summary of this criticism of the courts is contained in Pound, *Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906). The survey of the legal profession presents a more recent comment. SMITH, MEMORANDUM CONCERNING COMPLAINTS AGAINST LAWYERS (1949).

The response of the organized bar to the challenge of this criticism may be gathered from such publications as: The annual reports of the Standing Committee on Public Relations of the American Bar Association; PHILLIPS AND MCCOY, CONDUCT OF LAWYERS AND JUDGES c. VIII (1952); WINTERS, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES (1954).

10. It is in the field of sociology and related areas of the social sciences that we find the greatest acceptance of the concept of the family as an entity, the welfare of which deserves consideration. See, e.g., GROVES, THE CONTEMPORARY AMERICAN FAMILY 467 (1947); Davis, *Children of Divorced Parents: Sociological and Statistical Analysis*, 10 LAW & CONTEMP. PROB. 700 (1944).

### III. WHY IS THE WHOLE RELEVANT TRUTH NOT AVAILABLE TO THE DIVORCE COURT?

It would appear that the legislature is the main reason why the orthodox adversary divorce procedure does not procure the whole relevant truth.<sup>11</sup> There is space presently to refer briefly to four reasons for this: there are certain limitations inherent in the effectiveness of the litigation process itself. The legislature has not insisted upon enough issues to enable the court to dispose of the actual problems which arise in many divorce cases and which ought to be solved. The legislature has not insisted upon the inclusion in the divorce case of all the parties who actually are in interest and who have issues to raise. The legislature has not provided the court with enough of the necessary specialized tools to enable it to deal acceptably with the facts even after they are gathered.

#### A. *Limitations in the Adversary Litigation Process.*

As a fact-gathering device the adversary litigation process is an honored tradition in Anglo-American jurisprudence.<sup>12</sup> Some of our approval of it may come from our tendency to prefer it to its predecessors—trial by battle and by ordeal and by compurgation.<sup>13</sup> We would be more realistic if we contrasted it with more modern alternatives. If we did, we might find need for improvements.

The fact-gathering process in litigation is based on direct and cross-examination. This process is rigidly circumscribed by rules of evidence appropriate to a contest but perhaps fatal to a cure. There are several limitations inherent in the nature of the device.

If the matter for judicial determination is one which has occurred in the past, the facts relating to it are more likely to be successfully gathered than if the problem has implications in the future. It is perhaps for this reason that equity as a matter of legal history made its way. So in divorce if all we lawmen are concerned with is what has happened between the spouses in the past, adversary litigation may be adequate. However, often there are problems to be solved which lie at least partly in the future. If the divorce court does not solve them in a professional manner, then they tend to remain to plague those most affected. To solve only some problems is not a tidy procedure in public relations.

---

11. "It is fundamental that all grounds for divorce and alimony and the rights of the parties in relation thereto are fixed by the statutory laws of this state." *Gage v. Gage*, 129 N.E.2d 486, 488 (Ohio App. 1955). See MADDEN, *PERSONS AND DOMESTIC RELATIONS* 262 (1931).

12. "LITIGATION. A Contest, authorized by law, in a court of justice, for the purpose of enforcing a right." BOUVIER, *LAW DICTIONARY* 731 (1946).

13. On the contrast between litigation and its predecessors see: HOLDSWORTH, *HISTORY OF ENGLISH LAW* 311 (3d ed. 1922); PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 111 (4th ed. 1948).

If the matter for trial occurs comparatively infrequently adversary litigation is, probably, as effective a general fact-gathering device as we can expect. But where the volume of problems in a particular field of law is great, there is reason to expect someone to come up with sufficient ingenuity to create a new and improved type of specialized procedure to produce desired data. It is this type of need which is, in part at least, responsible for the administrative agencies which have caused the organized bar so much concern in recent years.<sup>14</sup> For example, in workmen's compensation where the volume to be cared for is great, experience indicated a generalized procedure like ordinary litigation is not adapted to handle quantity on a quality basis.

If the motivation of the parties in interest is really adversary the orthodox litigation process may supply facts on the issues between them. But where, as in divorce, so many matters are non-contested, there is no reason to suppose that the facts will more or less automatically rise to the attention of the court.<sup>15</sup> There is reason to consider in this connection the better type statutory proceedings attending the adoption of a child, a task requiring individualized action.<sup>16</sup> Here also is a change of status with need for a large variety of facts relevant to the welfare of the child. Yet most of the statutes have predicated the proceeding on a non-controversial routine. Direct and cross-examination may be used but investigation by a team of professionally trained personnel produces much more. It seems to be working reasonably well and to be accepted by the public. An alternative might be adoption by deed of the parents.

Finally the field of substantive law in which the problem arises seems to have something to do with the effectiveness of the method, direct and cross-examination, of fact gathering. The facts which are necessary to dispose properly of a case in the substantive fields of property, torts, and contracts may be marshaled for the benefit of the trial judge and jury by competent advocates within the framework of adversary litigation. If this is not so, there has not been sufficient public complaint to warrant the legislature in making much of a change in the traditional routines of the law of evidence. But once we

---

14. The American Bar Association has been much interested in the growth of administrative tribunals: SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION* 219 (1953); see also, for a list of committees, 79 A.B.A. REP. 46-47 (1954).

15. Comment on the volume of noncontested divorce cases is made, for example, in: MARSHALL AND MAY, *THE DIVORCE COURT—MARYLAND* 2 (1933); Johnstone, *Divorce: The Place of the Legal System in Dealing with Marital Discord*, 31 ORE. L. REV. 297, 298-99 (1952); Sayre, *Divorce for the Unworthy*, 18 LAW & CONTEMP. PROB. 264 (1953).

16. On the general statutory background see, Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715 (1950); HARPER, *PROBLEMS OF THE FAMILY* 474 (1952); CHILDRESS, *ESSENTIALS OF ADOPTION LAW AND PROCEDURE* (U.S. Children's Bureau Pub. No. 331, 1949).

get a case where the facts lie in crimes or persons we find experiments which raise a reasonable presumption that many people have become dissatisfied with the original arrangement. In crimes, these improvements have taken the form of probation and parole where the facts to be gathered are often of a sort which often would not appear on the court record after an exchange of direct and cross-examination.<sup>17</sup> Similarly in persons we find specialized courts, juvenile and family courts,<sup>18</sup> which are distinguished, *inter alia*, by their ability to gather more and a greater variety of facts.

In a divorce case the orthodox adversary litigation framework may be adequate to provide the limited quantum of facts necessary for the court to decide the private issues between the spouses. These are basically economic in character, mostly lying in the past, and often limited to a few rather narrow points. But if we conceive of divorce on a larger canvas in terms of the welfare of the ailing family as including public problems, noneconomic in character and dealing with the relations between the family and the state, it is reasonable to argue that something more than direct and cross-examination is indicated. It is appropriate for the bar to urge the legislature to take the necessary steps.

#### *B. Insufficiency of Issues.*

A second reason why the whole relevant truth about the family is not always made available to the orthodox divorce court is that too often some of the really significant issues are not raised. Here again the legislature, as the policy making body in the state, is primarily responsible. Not only does it decree that adversary litigation with direct and cross-examination shall be the method of eliciting facts but it goes further. It indicates directly or indirectly what the major issues shall be.<sup>19</sup> The major issues to the legislature seem to include who shall be the parties, and about what matters they shall contest—what they shall ask by way of relief. Where the legislature breaks

---

17. An example of the process of examination of witnesses in transition is given in PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 117 *et seq.* (4th ed. 1948). "EXAMINATION. The interrogation of a witness in order to ascertain his knowledge as to the facts in dispute between parties." BOUVIER, *LAW DICTIONARY* 376 (1946). The probation technique is illustrated, for example, in: Trecker, *Social Work Principles in Probation*, *Fed. Prob.*, March 1955, p. 8. Boswell, *Probation in Non-Support Cases*, 1952 *YEAR BOOK NATIONAL PROBATION AND PAROLE ASSOCIATION* 156; Kogon, *The Family Agency in the Judicial Process*, *Fed. Prob.*, September 1955, p. 16.

18. For the principles involved consult: U.S. CHILDREN'S BUREAU, FEDERAL SECURITY AGENCY, PUB. No. 346, *STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN* (1954).

19. Dissatisfaction with this procedure is voiced in Alexander, *Family Life Conference Suggests New Judicial Procedures and Attitudes Toward Marriage and Divorce*, 32 *J. AM. JUD. Soc'y* 38 (1948).

trail the court generally follows. Modern traffic demands not a trail but a four-lane highway.

It is urged that too often the issues in a divorce case so labeled by the legislature are not really "major" at all. Rather they are no more than collateral. It may be well to explain the reorientation. The term "collateral" may more properly be applied to issues, which, in fact, are economic, private controversies between the spouses such as: alimony, support, property settlements.<sup>20</sup> Even the "grounds" turn out to be in effect private battlegrounds between the spouses. These "grounds" fall generally into three categories: fault, misfortune and agreement.<sup>21</sup> Those which are of most immediate interest to us are the "fault" grounds. They outline a plan of a set of issues in which an innocent spouse exposes intolerable conduct of a faulty spouse. At the end of the battle the wife expects economic benefits and the innocent spouse a decree.

The collateral issues have become familiar to us as of major importance because the legislature has emphasized them. But a little reflection will probably reveal that to the family and thus to the public this importance is more apparent than real. Consider, if the spouses were not married to each other, the grounds for which we now grant one a divorce from the other might in some, if not all, instances be compensated for by an ordinary tort judgment for damages.<sup>22</sup> Or if we were to look at these same grounds from the standpoint of the state, there is no overwhelming reason why the interest of the latter in the private row could not be disposed of by an orthodox indictment for crime.<sup>23</sup> It is just because the judgment of the divorce court is not a decree for money damages or a jail sentence, that one suspects that we have here an example of an abortive legal device. The thinking about the case begins to switch direction. It is logical to urge that the development be continued toward the traditional legal objective. If in addition a divorce is desired, let it be delivered in a setting appropriate to divorce.

A fair public relations argument can be made out that another group

---

20. The statutes dealing with these matters are collected in JACOBS AND GOEBEL, *DOMESTIC RELATIONS* 1116-17, Nos. 57-59 (3d ed. 1952).

21. The grounds are collected in HARPER, *PROBLEMS OF THE FAMILY* 657 *et seq.* (1952). The trend is summarized in: Rheinstein, *Trends in Marriage and Divorce Laws of Western Countries*, 18 *LAW & CONTEMP. PROB.* 3 (1953).

22. A trend in interspouse tort actions is suggested by cases such as: *Brand v. Keller*, 413 Ill. 503, 109 N.E.2d 729 (1952); *Welch v. Davis*, 410 Ill. 130, 101 N.E.2d 547 (1951); *Amsterdam v. Amsterdam*, 56 N.Y.S.2d 19 (Sup. Ct. 1945); *Morgan v. Leuck*, 137 W. Va. 546, 72 S.E.2d 825 (1952); *Taylor v. Patten*, 2 Utah 2d 404, 275 P.2d 696 (1954).

23. In England adultery was punished by the ecclesiastical, rather than common-law, courts. Assault and battery are common-law crimes. Desertion and abandonment are statutory crimes. MILLER, *CRIMINAL LAW* §§ 135, 98, 101 (1934). See JACOBS AND GOEBEL, *op. cit. supra* note 20, at 1102-03, No. 35.

of issues is the really major one; and that somehow along the way it has been lost sight of and now needs to be rediscovered and reinstated to its proper position. If we are to find a name for this group we might go all the way back to the ecclesiastical courts and pick one which would have been appropriate at that time, "spiritual matter."<sup>24</sup> This label with its religious connotations may not be proper to apply to the situation presented when the case is disposed of in the modern civil divorce court; but at least it suggests that we are speaking here of matters in another dimension than tort and crime. These major issues are matters of status. They are public rather than private, sociological rather than traditionally legal, human rather than abstract. They include: shall this family group before the court be dissolved or materially mutilated; shall either or both of the spouses be permitted to remarry;<sup>25</sup> what plan shall be made for the security needed by the other members of the family than the plaintiff.<sup>26</sup>

This group of issues affects the relationship between the family unit on the one hand and the licensing state on the other. The interest of the state, one may suggest, is not properly remedial in the sense of providing a verdict for damages, or penal as in the case of compensating for a crime; but rather in the nature of a revocation of a license because the licensees have not been able, or perhaps willing, to perform properly the acts for which they were licensed. This has a preventive implication. It is not a moral judgment of fault but merely an act for the welfare of the family and the public.

There is an element in the interest of the state in divorce which it is easy to describe as analogous to the dissolution of other legal entities<sup>27</sup> as the settlement of a decedent's estate, of a bankrupt's assets or of the dismemberment of a corporation. But the divorce

---

24. For a brief summary of the jurisdiction of the ecclesiastical courts see CARTER, *A HISTORY OF THE ENGLISH COURTS* 145 (5th ed. 1927). For a modern comment see *Brown v. Brown*, 42 Del. (3 Terry) 157, 163, 29 A.2d 149, 152 (1942): "The great weight of authority sustains the view that there is no Common Law jurisdiction as to divorce. The Ecclesiastical Courts never existed here, and their adjudication did not form any portion of the Common Law."

25. The statutes covering the right to remarry after divorce are collected in JACOBS AND GOEBEL, *op. cit. supra* note 20, at 1114-15, No. 56.

26. Some material tending in this direction is collected in JACOBS AND GOEBEL, *id.* at 1116-17, No. 57.

27. "In considering these issues, we keep in mind the well-settled law in Illinois that in divorce actions the state occupies the position of a third party. The state has an interest in maintaining the integrity and permanency of the marriage relation." *Nusser v. Nusser*, 4 Ill. App. 2d 538, 124 N.E.2d 549, 550 (1955); *Ollman v. Ollman*, 396 Ill. 176, 71 N.E.2d 50 (1947); *Floberg v. Floberg*, 358 Ill. 626, 193 N.E. 456 (1934). While the courts in some circumstances treat marriage as a contract, it has aspects which deserve the description of status. BOUVIER, *LAW DICTIONARY* 758 (1946), in referring to the contract aspect says, "[T]he better opinion appears to be that marriage is something more than a mere civil contract. It has been variously said by different writers to be a status, or a relation, or an institution."

catastrophe does not come to an end just because one disposes of the economic problems. Economic considerations suggest that it is sufficient if the rights of the persons involved are tagged with group names like creditors, stockholders, legatees, beneficiaries, or the spouses in their private wars. But in considering the revocation of the license to marry, we lawmen, for the benefit of the public, should also ask whether the family group is still willing and able to perform the three main left-to-the-family functions of today: engaging in marital intercourse in an orderly fashion, holding property in a unique fashion, and raising children in normal fashion. Perhaps the marriage license is not absolute but is really granted during a sort of good behavior—a conformity to reasonable standards of conduct, a point of view which involves contributing as well as getting.

We have a legal term to describe with some degree of accuracy the noneconomic bonds which in a civil sense unite the members of the family. "Consortium"<sup>28</sup> has been applied generally to this sort of bond but some courts limit it to relations between the spouses. It may serve to describe as well the larger family circle including children and others. What we need is a term explaining the link between the family group and the state.

The whole truth relevant to the war between the spouses is only part of the picture. The whole truth relevant to the family and its relation to the state should also be raised by appropriate issues in the divorce case. Otherwise there are too many loose ends left for all and sundry to trip over in the future. If we lawmen can be sure to raise *all* the issues relevant to the welfare of the family, the gathering of the relevant facts should not be too difficult. This does not mean depriving the spouses of their remedies against each other. Quite the contrary. Nor should the state be deprived of its rights to prosecute criminally spouses who commit offenses like adultery, cruelty and desertion. The present proposal is not to take away from but to add to the issues to

---

28. In Annot., 23 A.L.R.2d 1378, 1380 (1952), the commentator says, "[N]either the courts, nor the legal text writers are able to agree on a definition of consortium . . ." See *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), cert. denied, 340 U.S. 852 (1950). For one definition of consortium see *Riggs v. Smith*, 52 Idaho 42, 11 P.2d 358, 360 (1932): "[A] property right growing out of the marriage relation, for loss of which recovery may be had, and includes the exclusive right to the services of the spouse (which contemplate not so much services or reward earned as assistance and helpfulness in the relations of conjugal life according to their situation) and also the exclusive right to the society, companionship, and conjugal affection toward each other."

See also, Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930). "The services which the law had in contemplation were not so much those which resulted in wages earned, or from their mere performance of labor, as those which found their expression at the domestic fireside, and in all manner of aid, assistance and helpfulness in all the relations of domestic life." *Marri v. Stamford Street R.R.*, 84 Conn. 9, 78 Atl. 582, 583 (1911).

be decided. Even under the best divorce procedure there will be trouble enough in the future from the repercussions of the dismembered family without unnecessarily allowing any matters to slip through unattended. A divorce proceeding which solves only a few problems may appear to the lay mind as somewhat like the medical operation at the conclusion of which sponges are inadvertently sewed up in the body of the patient.

*C. Too Few Parties in Interest.*

The raising of facts in litigation is largely dependent upon issues. The raising of issues is similarly dependent upon who are recognized as parties in interest. To expect the court itself to play at the same time the role of judge and advocate or investigator is unreasonable and in the long run does not promise too much success. To expect *A* to represent the interests of *B* is unrealistic. Too often there is a conflict of interests.

As far as the parties to a divorce case are concerned the legislature has had its way. In most jurisdictions there are but three:<sup>29</sup> the state, whose interests have not been too clearly defined; the innocent plaintiff; and the faulty defendant. If one may judge from the divorce statutes, the issues which the state is supposed to raise include matters such as seeing that the plaintiff spouse is really innocent, guarding the court against collusion or perjured testimony, recording compliance with jurisdictional requirements, and insisting upon satisfactory evidence of one or more of the "grounds." After that the decree seems to follow as a matter of course.

It is submitted, however, that there are three other parties or groups of persons who have a more or less realistic interest in the sociol-legal problems incident to revocation of the marriage license. There are the children or other dependents who have been enjoying a type of economic and noneconomic family security, the family entity itself which faces judicial homicide, and those persons who in the future may at some time marry one of the present warring mates and who may be interested in the type of domestic relation in which they may one day find themselves.

By raising these people or groups as a matter of law from second class to first class participation in the divorce proceedings, new and often significant issues will be made available to the court. Thereafter the facts relevant to those issues will begin to accumulate. The value of adding these groups as parties in interest in the state-family aspect of the divorce may be demonstrated in terms of public relations.

As far as children are concerned there are historical reasons for their

---

29. JACOBS AND GOEBEL, *DOMESTIC RELATIONS* 1110-11, No. 50 (3d ed. 1952), suggests the limitation of parties in interests.

exclusion from litigation against their parents.<sup>30</sup> Whether the reasons are anything more than historical is not too clear. One will scarcely contend that children are a species of property of their parents like a horse or dog. They have *de facto* interests in the form of family security which deserve public attention. In juvenile court circles this matter of welfare of the child is taken seriously. The court acts as *parens patriae* or in some similar nonadversary overall protective capacity.<sup>31</sup> In divorce their economic interests are cared for second hand by support orders; and their custody is too often a matter for bitter parental conflict.<sup>32</sup> But it is suggested that both in juvenile courts and in divorce proceedings children as a matter of public relations should have a legal right to be protected against the beneficent interest of the court.<sup>33</sup> This moral might be raised to the position of a legal right. It is not always desirable to rely upon the court itself to be advocate and judge. If we allow the parents or one of them to represent the children, there is not infrequently a conflict of interests. In fact, unless one is careful the children may become pawns<sup>34</sup> in the quasi-chess-game the parents wage for a strategic advantage, or supposed advantage, over each other.

Some promise for a more enlightened attitude toward the children of divorce is foreshadowed by a late trend in the tort law field. A few recent cases actually allow the child to sue the parent for tort;<sup>35</sup> and others permit action against a third-party alienator of the affections of a parent.<sup>36</sup> The present suggestion of separate legal existence, therefore, is a realistic step forward.

To fail to include the family entity as a party in interest in a divorce proceeding is unwise in a public relations sense. The other social

30. The statutory materials are generally collected in JACOBS AND GOEBEL, *id.* at 1116-17, No. 57.

31. "PARENS PATRIAE (Lat.) Father of his country. In England the king; 3 Bla. Com. 427; 2 Steph. Com. 528; in the United States the state, as sovereign has power of guardianship over persons under disabilities. See 17 How. 393." BOUVIER, LAW DICTIONARY 889 (1946).

32. For a suggested improvement see Lemkin, *Orphans of Living Parents: A Comparative Legal and Sociological View*, 10 LAW & CONTEMP. PROB. 834, 840 (1944).

33. See statement of Roscoe Pound: "The Powers of the Star Chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations. . . . It is well known that too often the placing of a child in a home or even in a institution is done casually or perfunctorily or even arbitrarily. Even with the most superior personnel, these tribunals call for legal checks." U.S. CHILDREN'S BUREAU, FEDERAL SECURITY AGENCY, PUB. NO. 346, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN (1954).

34. "The second proposition of law is that a child is not in any sense like a horse or other chattel, subject matter for absolute and irrevocable gift or contract. . . . In this it differs from the gift of any article which is only property . . ." Commonwealth *ex rel.* Children's Aid Society v. Gard, 362 Pa. 85, 66 A.2d 300, 305 (1949).

35. The cases are collected in Annot., 19 A.L.R.2d 423 (1951). See also Cowgill v. Booch, 189 Ore. 282, 218 P.2d 445 (1950); Epstein v. Epstein, 124 N.Y.S.2d 867 (Sup. Ct. 1953).

36. The cases are collected in Annot., 12 A.L.R.2d 1178 (1950).

sciences recognize this group as the basis of society.<sup>37</sup> There are judicial pronouncements on the family.<sup>38</sup> The family, as a party, would function in various ways. As a fact-gathering agency it would have at least three tasks: to relieve the court of the responsibility for presenting issues which should be raised by some parties rather than by the judge, particularly issues which are in its own interest as a continuing functioning organization; to make sure that in uncontested or partially contested cases there was no vacuum with respect to the facts; and to gather statistics which might be used for remedial or preventive procedures, statistics as how the members of this family functioned or failed to function in their mutual association. The family then would fill a real gap in the present fact-gathering machinery; would become the real defendant in every divorce case in so far as the major issues were involved; and where it had to be dissolved would provide the sort of information which in the medical field is achieved by an autopsy and for the same sort of public relations purposes.

There are also non-fact-gathering functions for the family entity to perform as the perennial defendant. When the plaintiff spouse asks the court to dissolve it, the entity should resist and argue against the dissolution. When one of the spouses requests permission to be free to marry again, the more impersonal family, as well as the other spouse, perhaps emotionally aroused or indifferent, would be there to oppose or provide balance. If there are reasons for opposition from a public-relations viewpoint, it is the family primarily which should formulate them. If the family were admitted formally as a party in interest the practical relief to the court would be great; the spouses

---

37. For a discussion of the family as a sociological entity see, Kuhn, *American Families Today: Development and Differentiation of Families*, in BECKER & HILL, *FAMILY, MARRIAGE AND PARENTHOOD* c.5, at 131 (2d ed. 1955). "[A] marriage is more than the 'pre association' of two persons of the opposite sex. It is by analogy, a 'social organism.' It is an integrated complex of relations which represents no greater or lesser degree an assimilation of affections, of ideas, of attitudes, of behavior patterns. As a process of integration it begins in courtship, acquires social recognition in the nuptial ceremony, develops mutual coadaptation and establishes ideally a life long unit." LICHTENBERGER, *DIVORCE, A STUDY IN SOCIAL CAUSATION* 247 *et seq.* (1931). Distintegration is the reverse process in which tensions progressively destroy accord, and which when complete ends in separation and ultimately in divorce.

38. Whether or not these pronouncements are lip service deserves consideration. There are plenty of cases where the task of the court is to define the word "family," there are others where the issue relates to services gratuitously rendered by A to B. But perhaps the most important consists of the decisions in which the common-law concept of identity of husband and wife is under consideration. The legislatures in the married womans property statutes have gone a long way in destroying this concept. The courts in cases like *People v. Morton*, 308 N.Y. 96, 123 N.E.2d 790 (1954), have done their share. These legal rulings are understandable when the court is dealing with economic problems. When, however, as here the focus of attention is in the field of spiritual matter the concept of family unity deserves to be strengthened. For an article supporting this view see, MacKenzie, *Spiritual Values and the Family in Court*, 18 *LAW & CONTEMP. PROB.* 20 (1953).

would be free of entangling alliances and obligations to fight their own personal battles; and, the children would have somebody to side with in the event their interests were in conflict with those of either or both the parents.

Finally the possible prospective spouses of the present warring couple should be officially included as parties in interest.<sup>39</sup> To overlook them is to shut our eyes to the facts of life. It is also a situation where the alert lawman has a chance to convince the public that his activities are basically for the benefit of the public.

Existing legislation indicates that the public tends to take seriously the matter of creating a family unit. On the occasion of the first marriage there is an elaborate screening process obviously designed to keep out persons regarded as not qualified for the responsibilities of the status.<sup>40</sup> One applying for the first time for a marriage license finds himself somewhat in the position of the applicant for admission to the bar. The latter is required to prove affirmatively his good moral character. The bar examiners have little record on which to base a solid conclusion, so they have to proceed, to some extent at least, on faith and reasonable expectations.<sup>41</sup> Similarly in the first marriage, which is surely as important to the public as a standard legal profession, a license may be granted on faith and expectations. At present application for marriage is based on the possession of desired physical, mental and sociological rather than spiritual characteristics.

The application for a license for a second marriage after a previous divorce is something else again. If at this juncture the licensing authority is uninformed as to marital qualifications, and disaster strikes because of it, the fault is not to be imputed to abstract circumstances but to ourselves. If the public thinks it desirable to make the effort, we can get a great deal of information relevant to marriageability of the spouses by seeing that it goes into the records of the divorce proceeding. The data will be of interest to the public generally on the topic—why do marriages fail, and to a prospective spouse on the topic—what are my chances of a successful marriage with one who has already experienced a failure. There will be situations in which the divorce record will disclose that the particular spouse did and was all that could reasonably be expected; other cases where more should have been done; and still others where unsuitability for further marriage ventures is clearly demonstrated in terms accepted by professional people. The data should be collected and used. The applicant for

---

39. See note 25 *supra*.

40. For comment see HARPER, PROBLEMS OF THE FAMILY 226 (1952). The statutes are collected in JACOBS AND GOEBEL, DOMESTIC RELATIONS 1084-91, Nos. 2-14 (3d ed. 1952).

41. See BRENNER, REPORTS OF CONSULTANT AND THE ADVISORY AND EDITORIAL COMMITTEE ON BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR c. VI (1952).

a second marriage license after a divorce may be in somewhat the same position as a lawyer once disbarred now seeking reinstatement.<sup>42</sup> If the record is in his favor he has nothing to fear. But if it is against him some protection is due any subsequent prospective spouse. This suggestion, if adopted, does not mean necessarily that the second license would be refused. It does mean that there would be information, professionally marshaled, available for any who wanted it for a proper purpose. If a prospective spouse chose to ignore the opportunity to learn there would be less legal sympathy for him if, when and as the second venture went on the rocks.

The children, if admitted to first-class status as parties in interest would be represented not by their parents because of possible, sometimes even probable, conflicts in interest, but by a guardian or next friend. The possible prospective spouses would also be represented by a guardian. This would be in the accepted legal tradition of securing the legal rights of possible unborn children who may have an interest in an estate, and in the case of an escheat where there are possible unknown heirs.

The problem of arranging for representation of the family entity would be a little more complex. If there were actual members of the family (an unincorporated association), they might be permitted to appear for it in much the same manner as persons applying to administer the estate of a decedent. If no such person appeared there might readily be established an official with more authority than the king's proctor, perhaps someone like a public administrator. To prevent his office from falling into a comfortable, but spiritless, routine he would be assisted by an interprofessional panel of specialists: psychiatrists, physicians, psychologists, marriage counselors, social workers and others interested in various extra-legal aspects of marriage and the family. The guardian of the family entity should not, however, be a part of the court. He would be a party and not a quasi-judge. The funds necessary would be part of the court costs and would be well spent. Who can estimate in money the value of a family?

#### *D. Inadequate Judicial Tools.*

Even if we are successful in getting the whole truth relevant to the ailing family before the court, the procedural job is still incomplete until we provide the judge with the specialized tools necessary to enable him to handle and work with the data which at present are outside the usual area of judicial activity. The ecclesiastical courts had their specialized tools. There is no compelling reason to assume that they could be reactivated effectively for use by civil courts. But there is need for specialized tools. Two legislative steps seem to be in order:

---

42. PHILLIPS AND MCCOY, CONDUCT OF JUDGES AND LAWYERS 119 *et seq.* (1952).

(1) a thorough house-cleaning, and (2) installation of new tools.

A thorough house-cleaning is in order in the orthodox divorce court. There are, for example, four traditional tools which have come down to us from ecclesiastical times and which have outlasted both their period of maximum utility and their context. They are collusion, connivance, condonation, and recrimination.<sup>43</sup> Once, no doubt, they were of great value. Presently they deserve careful reappraisal. As between the spouses it may make some difference if the plaintiff is a liar, or has tricked defendant spouse into the commission of some matrimonial fault or has forgiven defendant and accepted him back, or has been guilty of similarly heinous offenses as those charged against the defendant. But if we switch our attention to the ailing family, matters of this sort viewed in a new perspective are not necessarily reasons for refusing to grant a divorce; they are just some more facts which tend to show inability to adjust to the minimum standards of marriageability. They may be used in mitigation or aggravation of tort damages in the disposal of the collateral issues between the spouses. But they tend to restrict rather than encourage the flow of information to the court on the main points.

At best these tools are negative in character. At their worst they are dangerous partisan weapons available to the defendant not only on the merits of the case but as part of pre-legal maneuvering for position.

#### IV. WHAT MIGHT BE DONE?

Here, then are four reasons why the orthodox divorce court, it is suggested, fails to obtain the whole truth relevant to the family. Adversary litigation is dependent upon the proper antagonistic motivation of the parties and where the spouses agree or agree in part or where one is maneuvered out of position by the superior strategic skill or shrewdness of the other, the trial may produce something not clearly foreseen by those who first applied the idea of adversary litigation to the concept of divorce. The legislature, by giving prominence to the private issues between the spouses, but in overlooking those of public importance, has presented a situation which calls for reconsideration if not refocusing. If the major issues are emphasized as major, whatever we do about collateral matters, the public may gain a more realistic perspective. To admit only the two spouses and the

---

43. The statutes are collected in JACOBS AND GOEBEL, *DOMESTIC RELATIONS* 1106-09, Nos. 42-46; (3d ed. 1952); some of these are already under attack. The cases on recrimination are collected in Annot., 170 A.L.R. 1076 (1947); Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213 (1942); Scott, *The Doctrine of Recrimination in Divorce Proceedings*, 21 ROCKY MT. L. REV. 407 (1949); Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121 (1936); Note, *A Survey of the Law of Condonation, Connivance and Collusion in New England*, 35 B.U.L. REV. 99 (1955).

state as parties in interest may or may not help the spouses is their personal duels but the beneficial effect of the practice on the ability of the court to raise and solve in the interest of family welfare the various problems according to law is open to argument. Finally, we have given the court boxing gloves as tools instead of specialized devices of the amazingly specialized type which have contributed so greatly to the public prestige of the members of our sister profession of medicine. Changes should be made in the interest of better public relations. It is suggested those changes center around the welfare of the family just as in juvenile courts the guiding principle is the welfare of the child.

#### V. HOW WOULD THE PROPOSED MACHINERY OPERATE?

A series of seven steps will illustrate briefly how the proposed machinery might be expected to function in a typical noncontested divorce case, assuming that there is such an object as a typical divorce case. The goal would be to find a way to produce the whole truth relevant to the family and its problems. The means proposed would be:

(1) An application to set in operation this new sort of divorce procedure might be made by any one of the parties in interest: either spouse, the children or any of them; the state; the family entity; or the prospective spouses. The purpose would be to get cases into the hands of the court as soon as possible. Since preventive as well as remedial treatment is expected it is clear that the sooner the patient family is in the hands of the doctor court, the sooner therapeutic efforts of professional quality may begin and the more likely a recovery.

(2) The pleadings would be very simple, consisting only of an application and a series of issues. There is no value at this stage in allowing the court record to contain any information as to the nature of the ailment. That procedure encourages self-diagnosis. The application would contain nothing more than the names and addresses of all the parties in interest, the bare facts necessary to satisfy jurisdictional requirements, and the prayer. The prayer would be merely that the court take the family under advisement and deal with it in its discretion. In other words, the analogy to the application of a patient for medical aid would be carried out as far as possible; when the patient goes to the physician he puts himself in the latter's hands.

(3) As soon as possible the formal proceedings to notify all parties and to set up guardians ad litem and other representation for those who need this aid would take place much in the orthodox fashion.

(4) Each party in interest would then be permitted to file the issues he wished the court to determine. The court would divide the issues into collateral and major groups. The collateral items might be

referred for trial; before a jury if the parties so desired; or might be handled by therapeutic procedure if no request to the contrary was presented. The important feature would be to provide "due process" for those who wanted protection of economic interests; but to give the court full authority as to public matters. It seems not unlikely that a preference for therapeutic treatment would depend upon the ability of the court gradually to win the confidence of the public.

(5) Where there were collateral issues tried before a jury in the ordinary tort procedure, the verdict would be in the customary form of money damages and would be treated as completely compensating the successful spouse for any and all damages of the adversary spouse to date. After this the spouses would have no economic claims against each other.

(6) The major issues would be resolved by therapeutic procedures. Here the court would have the advantage of the new tools. These would consist of the resources of the various social and physical sciences functioning through an interprofessional team. Investigation would be thorough and comprehensive and would depend not upon formal and restricted direct and cross-examination but upon the sort of inquisitorial probing and testing which physicians give their patients for the purpose of determining in professional fashion what is wrong, and why it is wrong as a prelude to determining what to do about it.

(7) The family entity would be given an opportunity to present issues and facts not on the basis of the customary official king's proctor<sup>44</sup> or friend of the court in aid of the court but as a separate party in interest. If it appeared the family could probably be saved, a plan for convalescence would be made. If dissolution appeared the only practicable step, then the court's interest would shift to providing a series of plans for the members of the dismembered family and for the protection of possible future spouses. In implementing these plans the court would make use of probation services in an analogy to convalescent supervision in the field of medicine. Only here the probation officers would be trained in the field of domestic difficulties rather than in the criminal field.

To put these changes into effect two steps would appear to be necessary.

(1) The legislature might find it convenient to pass an act containing two provisions: (a) The nature of marriage would be specifically declared—not a contract, not a sacrament but a privilege burdened with conditions granted by the state to those able and willing. The license then would be something granted during good behavior. The

---

44. See Connolly, *Divorce Proctors*, 34 B.U.L. REV. 1 (1954).

second marriage license after a divorce would be granted to those who on the record had shown sufficient respect for the institution of marriage and the family to make it worth while to give them this further opportunity. This is really not much of a step beyond some of our present marriage laws. (b) Divorce would be delegated entirely to the judicial department of government. The courts should have complete control of both its substantive and procedural aspects.

(2) The court would then proceed to work out realistically by rule the details of the program according to the spirit of the common law. The result might take some time but at least there would be experimentation and we may have confidence that the solution which eventually resulted which have more practical judicial experience to commend it than the present legislative attempts.

This is really a proposal to dignify the family and its welfare and those who in the courts try to solve its problems, as a step toward better public relations for lawmen. There would also be another advantage. By making divorce more a constructive force in the community we might expect to attract to the field a group of young members of the bar who have in mind a career as divorce court judge. If our divorce courts could be staffed more with men who wanted to handle divorce cases and less with those who too often merely accept the assignment cheerfully but not creatively or enthusiastically, the results might be impressive.

#### VI. CONCLUSION.

Here then is a program for providing more facts for the orthodox divorce court relevant to the family. Much of it is merely a rearrangement of existing materials. But the significance lies in the rearrangement. Attainment of the whole relevant truth may be difficult in the great majority of cases. But there are public relations reasons to aim at such a goal. The most important single step is the division between interests of spouses and state. Unless in a divorce case the two sets of issues, public and private, are kept separate the change of confusion and overlapping in administration is constantly present.

The plan, of course, has many and serious objections (of which the element of change is perhaps not the least), but it is not completely theoretical. There are several outstanding family courts<sup>45</sup> in which matters have developed in the direction of the present recommendations. The therapeutic approach already is recognized at law as a suitable means of dealing with individual family problems.

Certainly there is no field of law in which there is greater need to

---

45. For a description see Alexander, *The Family Court of the Future*, 36 J. AM. JUD. Soc'y 38 (1951); see also, Alexander, *Let's Get the Embattled Spouses Out of the Trenches*, 18 LAW & CONTEMP. PROB. 98 (1953).

make the challenge of improvement known to all and sundry who may be thought adventurous enough to accept it. There is no field in which even modest achievement will provide greater professional, if not material rewards.