

# MARRIAGE STABILITY AND LAW ON DIVORCE (1)

by

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In the mind of the American public, the topic of divorce has come to play a conspicuous role. The present symposium constitutes a part of an extensive debate which is being carried on not only among experts but in which also the general public has shown a lively interest. The matter touches upon the lives of large numbers of people and it excites widespread curiosity and emotional reactions. The common attitude is one of uneasiness. The feeling is widespread that we have too many divorces, that the stability of family life has seriously declined, and that something ought to be done about it. The steady rise of the divorce rate which appeared to be spectacular especially in the periods immediately following the cessation of hostilities in the two World Wars,<sup>2</sup> has induced many people to view the situation with alarm. In this country this uneasiness has resulted not only in extensive public

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1) This article is based upon research currently pursued at the University of Chicago Comparative Law Research Center. A comprehensive presentation containing full documentation is in the course of preparation.

2) For a survey covering a number of significant countries, see **Kingsley Davis**, *Statistical Perspectives on Marriage and Divorce* [1950] *The Annals* 9; for the United States, see **Jacobs and Goebel**, *Cases on Domestic Relations* (3rd ed., 1952) 385; **R. S. Cavan**, *The American Family* (1953) 645. In the United States the number of divorces per 100 marriages occurring in the same year was estimated in 1867 to be 2.8, in 1890: 5.8, in 1910 : 8.18, in 1930 : 17.4, in 1949 : 25.1, and in 1950 : 23.1.

preoccupation with the topic but also in legislative plans and reforms, in resolutions and actions of ecclesiastical bodies, and in a vigorous growth of marriage counseling and services for education in family living.

In England several Royal Commissions were appointed to investigate the problem and propose legislative action<sup>4</sup>. In Germany a special cabinet ministry has been established to deal with the problem of how family stability might be protected and strengthened<sup>5</sup>. In a similar way, as well as through the establishment of a whole network of private organizations, France has undertaken to deal with the matter<sup>6</sup>. In the Scandinavian countries divorce has continued to constitute a topic of lively public debate<sup>7</sup>. On an international scale the Union des Associations Familiales<sup>8</sup> has been established to coordinate the work of those national organizations which regard it as their aim to strengthen the institution of the family and its role in society.

In the United States divorce has also come to attract the special attention of members of the legal profession who feel concern about the widespread use of collusive practices in divorce cases. It is common knowledge that in a vast number of divorce cases fabricated evidence is presented to the courts and true evi-

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4) Matrimonial Causes (Trial in the Provinces) Committee (Chairman : Sir Ralph Wedgwood), 1943; Committee on Procedure in Matrimonial Causes (Chairman: Mr. Justice Denning), 1946/47; Departmental Committee on Grants for the Development of Marriage Guidance, 1948; Royal Commission on Marriage and Divorce (Chairman: Lord Morton of Henryton), report not yet delivered.

5) Bundesministerium fuer Familienfragen, established in 1954.

6) Ministère de la Santé Publique et de la Population; on the French Family Associations, see **R. Boudet** (Director of the International Union of Family Organizations, Paris), *Some Aspects of Security and of Responsibilities of Families* (1955) 17 *Marriage and Family Living* 221.

7) Cf. **Alva Myrdal**, *Nation and Family*, 1941; **K. Svalastoga**, *The Family in Scandinavia* (1954) 16 *Marriage and Family Living* 374, and literature cited there.

8) International Union of Family Organizations; the quarterly periodical "Familles dans le monde" has been published by it since 1948; see also "Organisations familiales dans le monde" (1947).



dence is withheld from them in violation of the principle that in matters of divorce all relevant facts are to be truthfully presented. Perjured oaths are sworn not only by witnesses testifying to fabricated acts of adultery, cruelty or desertion, but also by plaintiffs who depose under oath that they have always conducted themselves as good and faithful husbands or wives, as the case may be, or that they have come into the forum state with the intention of establishing there a residence. The prevalence of such practices is felt to endanger the integrity and reputation of the bar, to bring into disrespect the law and its administrators, and to create an undemocratic discrimination between those who can, and those who cannot, pay for the services of a divorce specialist.

Although marriage and divorce are topics of exclusive legislative jurisdiction of the states, the topic is being discussed on a nationwide scale. Divorce laws diverge widely from state to state. The laws of those states which, like New York, insist upon strictness, can easily be avoided or evaded by real or fictitious migration. Divorce by mutual agreement, which is not foreseen in the official law of any state, has been made available by the Supreme Court to practically all couples of whom one at least is willing to pay for the expense of the trip to Reno and commit perjury as to the intent of staying there indefinitely<sup>9</sup>. Proposals by constitutional amendment to create federal regulatory power over divorce were made as long ago as the 1880's. The chances of such an amendment appear today to be slimmer than ever. Equally unavailing have been the repeated efforts at uniform state legislation. Futile also seems to have been the attempt of the American Bar Association by sponsoring the establishment of an Interprofessional Commission on Marriage and Divorce to stimulate the drafting of a model law. When that Commission was established in 1950, it was greeted with great expectations. But it has not

9) *Coe v. Coe* (1948) 334 U.S. 378, 68 S. Ct. 1097, 1 A.L.R. 2d 1376; *Sherrer v. Sherrer* (1948) 334 U.S. 378, 68 S. Ct. 1087, 1 A.L.R. 2d 1355; *Johnson v. Muelberger* (1951) 340 U.S. 351, 71 S. Ct. 444. An attempt to eliminate the requirement of committing perjury has been frustrated, at least for the time being, by the Supreme Court of the United States. *Granville - Smith v. Granville - Smith* (1955), 349 U.S. 1.

produced any model law of even any recommendations. In strange contradiction to the excited public interest in the problem of divorce, the Commission has been unable in this country of wealthy foundations to secure even those small funds which would be necessary to make possible meetings of its members. In spite of this handicap some of the commissioners managed to meet on several occasions. Short though their discussions were, they resulted in an important insight, viz. the insight that the problem is more complex than it is commonly assumed to be, and that it cannot be profitably tackled without the acquisition of considerably more knowledge of facts than we have presently available. To obtain this knowledge extensive research thus came to appear indispensable before any agreement about proposals could be achieved. Such research has been undertaken by the University of Chicago Comparative Law Research Center, the director of which is a member of the Commission. In these investigations the Center has benefited from cooperation of the University of Chicago Family Research Center, directed by Professor Nelson Foote. Through the support of the Chicago - Frankfurt Exchange Project, it was also possible to establish cooperation with the Faculty of Law of the University of Frankfurt and with that University's Institute of Social Research<sup>10</sup>. The investigations carried on by these organizations are far from being completed, but they have sufficiently progressed to allow a tentative statement of at least those aspects the clarification of which has come to appear necessary for a productive approach to the problem of divorce<sup>11</sup>. To the author of

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10) The Frankfurt participants in the project are Professor Dr. Ernst Wolf, Dr. Gerhard Lueke, Dr. Gerhard Baumert, Dr. Hermann Kraus, Mr. Jochem von Heeringen, and Mr. Hax.

11) Of the investigations undertaken so far, the following have reached the stage of tentative drafts: History and Present State of Divorce in France, (Dr. Stoljar); History and Present State of Divorce in Sweden, (Mr. N. Beckman); History and Present State of Divorce in Switzerland, (Mr. von Fischer); Marriage Stability in England between 1680 and 1857, (Mr. Mueller, Dr. Kraus, and Mr. von Heeringen); Marriage Stability in Germany from 1500 to 1900, (Prof. E. Wolf, Dr. Lueke, and Mr. Hax); Public Attitudes Toward Divorce in Germany, (Dr. Baumert).



this article, it seems, that the investigations have also proceeded far enough to indicate the impracticability of certain plans which have been advocated with great hopes and enthusiasm.

## I

The proposal which seems to be regarded with the greatest hopes in the United States is that which has become known as the therapeutic approach. Its principal advocate has been the chairman of the Interprofessional Commission on Marriage and Divorce, Judge Paul Alexander of the Domestic Relations Court at Toledo, Ohio. In the present symposium it is presented in a particularly far reaching way by Professor John Bradway of Duke University<sup>12</sup>.

The therapeutic approach starts out with the observation that people who appear in the divorce court are people in trouble. What they need is sympathetic help and expert therapy. Since such help will often come too late when it is not commenced until the troubled marriage has reached the divorce court, matters of divorce are to be handled in the same court which deals with every other kind of family trouble including juvenile delinquency, which is in many cases a telling symptom of discord in the home. This new "family court" is thus to deal with those intra-family quarrels which are presently handled by several different courts as criminal matters under the headings of assault and battery, non-support or abandonment, as litigious civil causes such as suits for separate maintenance or divorce, or as matters which are presently handled in the non-litigious proceedings of guardianship and adoption or in proceedings concerning neglected, dependent or delinquent children. This non-litigious procedure of causes of the latter kind is generally to be that of the new style family court. Rather than mete out punishment or decide a controversy between litigants, the court is to diagnose what is wrong with a particular marriage and to provide the therapy for the ill so discovered. These diagnostic and therapeutic activities are to be carried on, under the responsibility of the judge, by a staff of experts skilled in psy-

chology, psychiatry, education, child welfare and counseling. While he may occasionally have to engage in the traditional judicial activity of rendering decisions upon the basis of the law, the judge is practically the director of a welfare agency engaged in diagnostic and therapeutic rather than strictly "judicial" pursuits<sup>13</sup>.

In matters of divorce this approach offers the possibility that those marital troubles which, if they remain undiscovered, may ultimately result in a petition for divorce, can be discovered at a stage at which successful treatment is still possible. Where no such early discovery has been made and a petition for divorce has already been filed, it would not be treated as an action, really or fictitiously brought by one party against the other, but as an attempt to have the cause of the marital discord diagnosed and to cure it whenever possible, through the efforts of the experts on the staff of the court. Only where, in the judgment of the experts, the attempted cure has failed or appears completely hopeless at the outset, will the judge grant a divorce, in which case he would also undertake, again with the help of his staff, to work out a plan of adjustment to their new situation for the parties as well as for their children.

Unquestionably, this plan is attractive. It seems that it may at one stroke reduce the number of divorces, present to the courts the full state of facts, and thus prevent the practices of collusion and perjury<sup>14</sup>. Indeed, it presents a number of serious difficulties.

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13) On the family court-therapeutic approach, see, especially, P. Alexander, *A Therapeutic Approach*, University of Chicago Law School, Conference Series, No. 9. Conference on Divorce, p. 51; same, *The Family Court of the Future* (( (1952) 36 J. Am. Judic. Soc. 38; Q. Johnstone, *Family Courts* (1953) 22 University of Kansas City Law Review 18; same, *Die Entwicklung der Familiengerichte in den Vereinigten Staaten* (1955) 154 Archiv fuer die civilistische Praxis 34; Symposium - *A Family Court for Connecticut* (1952) 26 Conn. B. J. No. 3 (articles by P. Alexander, W. Bruce-Cobb, F. L. Roth, and S. Glanz); P. Alexander, *The Follies of Divorce - a therapeutic approach to the problem* (1949), University of Illinois Law Forum, 695.

14) See Johnstone, l. c. note 13, supra.



The least serious of the objections is that which refers to the high cost of maintaining the large staff of experts which a family court requires. If the court achieves what it is said it will, the cost of running it will easily be overbalanced by the saving of the cost of juvenile delinquency, alcoholism, and general dependency of abandoned wives and children.

Not too weighty either is the reference to the fact that we do not presently have enough trained psychologists and psychiatrists to staff a considerable number of family courts. The demand which would be created by the establishment of a network of such courts is likely to attract a sufficiently large number of young men and women to undergo the necessary training, provided of course, that the salaries offered will be sufficiently alluring.

Serious, however, are two other arguments which are both connected with the fact that under the therapeutic approach a divorce could no longer be obtained as a matter of right but rather as a favor to be granted or withheld in the discretion of an individual judge and his staff.

Under the present law of the overwhelming majority of the American states the court must issue its decree of divorce if the petitioner has proved those facts which in the divorce act of the state are stated as grounds for divorce. If in the divorce and adultery, extreme and repeated cruelty, and desertion for a certain number of years are listed as grounds of divorce; if the petitioner has, by credible evidence, proved the occurrence of those facts which are necessary to constitute adultery, extreme and repeated cruelty, or desertion; and if there has not been discovered the existence of facts constituting condonation, recrimination or connivance, the court must issue its decree of divorce, without delay and irrespective of the court's opinion as to whether through proper counseling or psychiatric treatment the marriage of the parties might have been saved. Under the therapeutic approach no divorce is supposed to be granted unless and until the court has been satisfied that a cure is hopeless at the outset or that the continuation of a cure will be futile. If this approach is to be



carried out consistently, it means that statutory catalogues of grounds for divorce have to be abolished and that there will be enacted in their stead an omnibus clause which directs the court to grant a divorce if and only if a marriage has been found to be so completely disrupted that a therapeutic effort, or the continuation of a therapeutic effort, cannot be expected to result in the resumption of a normal marital life of the parties.

Any such formula necessarily implies a prediction which, at the present state of psychological knowledge, cannot be made with certainty. It must rather be expected to be colored not only by the state of knowledge of the individual judge or some influential member of his staff, but also by their personal predilections and general attitudes toward religion and public morality. Although in this country a powerful tradition demands that the government be one of laws rather than of men, it has, of course, been necessary in many fields to grant a more or less ample sphere of discretion to judicial or administrative decision makers. But can legislatures be expected consciously to turn over to judicial discretion decision in a matter in which it has so far been dependent upon clear-cut rules of law ?

If the prediction is to be made with any measure of correctness, it will, of course, be necessary for the family court's staff in every case to discover the true cause of the marital discord. It has long been one of the principal criticisms of the present law that its statutory grounds for divorce hardly ever coincide with the real grounds which impel a petitioner to apply for a decree of divorce. The discovery of the true cause may not be too difficult in a good many cases, but there are others where it cannot be discovered without probing into the depth of the personalities of the parties concerned, especially if a cure is sought to be achieved by means of depth psychology. The "true" cause of a couple's marital discord may be of a delicate nature, especially when it is connected with sexual maladjustment. Shall a citizen who is trying to be freed from a tie of marriage be compelled to submit to such a probing into his mind as a necessary condition for his petition to be considered ? Shall such compulsion be exercised upon the



other spouse? What, incidentally, shall be done if the other spouse refuses to submit to such a diagnostic trial? The questions raise the far reaching problem of what constitutes the proper limits of governmental power as against individual freedom. Again, in the United States the tradition has been that of keeping governmental interference at a minimum.

The problem is presented in an even more acute form with respect to the therapeutic aspect of the family court's activities. If it is to be effective it will in many, if not most cases have to aim at the re-formation of the party's character and personality. We concede to the state the right to attempt a personality transformation in the case of the convicted criminal. Re-education is one of the generally recognized ends of criminal punishment. Re-education is also the avowed end of those curative measures which are applied by the juvenile court to the delinquent juvenile. Are we ready to concede to the state that same power of transforming the personality structure of a citizen simply because he has failed to make success out of a marriage with some other individual? Do we have enough confidence in the present state of psychiatry to regard it as able to achieve such a task? If it is, we are confronted with the even more profound problem of the image in which we wish the patient's personality to be reformed. Are we certain that society is better served if all men are turned into "good" husbands and all women into "good" wives? Are we sure that in the process we may not perhaps kill creative abilities, for instance in the arts, by which society might be enriched more greatly than by the marital harmony of the patient's (or shall we say "victim's") home? If psychiatry really can do what the advocates of the therapeutic approach expect it to do, it holds such frightful possibilities that one should hesitate to impose it as an indispensable condition upon any one who seeks to be freed from a tie of marriage.

In the setting of a divorce case it is not very probable, however, that treatment will have such a profound effect. It must be doubted, indeed, whether it is likely to have much effect at all. No petition for divorce can be filed before the parties have



separated. Once one of them or both have taken this grave step of dissolving the marriage in fact it will not be easy to influence the parties so that they will be ready to restore it. It is, of course, one of the arguments of the advocates of the family court that it will deal with the parties at some time prior to the occurrence of the separation and the filing of the petition for divorce. But will it? Or, at least, will it do so in all cases? The family court will deal with a troubled family if one spouse has committed upon the other an assault or a battery, or if one of the children has become delinquent, neglected or dependent, or, perhaps, also if one of the spouses has been picked up by the police as a drunkard or a drug addict. Apart from the last named, such family trouble is unlikely to come before a court in families other than those of the lower classes. Here the family court may, indeed, learn of the family's troubled state, but it is precisely in families of such kind that treatment is most unlikely to be successful. Among their ranks are the migrants and the uneducated and, generally those who are least interested in turning a factual separation into a "legal" divorce. Middle class and upper class families do not frequently appear in court before a separation has taken place. Experts in counseling have also questioned the chance of success of treatment and counseling in general if it has to be undergone without the patient's own desire. Under the therapeutic approach a petition for divorce is not to be taken under judicial advisement until the petitioner has submitted to treatment. Under such circumstances he is not likely to be in that receptive state of mind without which treatment and counseling cannot succeed. He is more likely to desire the failure of the treatment so that the petition which he has addressed to the court can at long last be acted upon. Whether the other party will be in a more receptive mood, must also be doubted. The requirement of diagnosis and attempted treatment is thus likely to result in no more than a postponement in the granting of the divorce. To some who are alarmed by the present state of affairs, such delay may appear to be a desirable achievement; by others it may rather be regarded as a denial of that right to a speedy remedy which is proclaimed as a fundamental right in many state constitutions.



There exists, of course, another likelihood, viz. that after enough failures the attempted diagnosis and therapy will degenerate into an empty formality.

The therapeutic approach plan is thus endangered in two opposite respects. The diagnostic-therapeutic efforts either constitute a compulsory attempt at psychoanalytical exploration and personality transformation, or they are at, or approach, the stage at which they are meaningless. In all probability, they will be both, viz. the former in one place and the latter in another. Local differences must also be expected, as we have already indicated, with respect to the attitudes which will be displayed by different judges in the evaluation of a particular marital rift as being curable or hopeless. In other words, it will turn out that in one court a divorce can be obtained easily and speedily, and in another only with difficulty and delay. Such a situation will inevitably give rise to the development of what has been called in Germany divorce geography, a practice of migratory divorce which appears to have developed almost everywhere where the law allows the grant or denial of a divorce to depend upon the discretion of individual judges.

In Germany the marriage chapter of the Civil Code of 1896, which took effect in 1900 and was replaced by a new marriage law in 1939, contained both a catalogue of specific grounds for divorce and an omnibus clause. A divorce could be obtained as a matter of right when it was proved that the defendant spouse had committed adultery,<sup>15</sup> or had wrongfully deserted the other for three years<sup>16</sup>, or had made an attempt upon the plaintiff's life<sup>17</sup>, or was suffering from a mental disease which has existed uninterruptedly for three years and has reached such a stage of gravity that the marital community has ceased to exist between the spouses and its reconstitution appears to be out of the question<sup>18</sup>. Under the omnibus clause a spouse could obtain a divorce if the other, by

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15) 1565

16) 1567

17) 1566, No. 1.

18) 1569



a grave violation of his marital duties or by his ignominious or immoral conduct, has caused such a deep rift of the parties' marital relationship that the other cannot in fairness be expected to continue the marriage<sup>19</sup>. What is the meaning of the term of "rift so deep... that the other party cannot in fairness be expected to continue the marriage"?<sup>20</sup> To all practical effects that term meant what a particular court said it meant. Certain limits were set to the freedom of judicial interpretation by the Supreme Court, but they were so broad that wide divergencies could develop between different courts. The shifting patterns of these divergencies were carefully observed by those lawyers who specialized in divorce cases, and they accordingly advised their clients to avoid the "hard" and to seek out the "easy" court by means of appropriately establishing or, at least, "proving", residence.

This German practice appears to constitute but one instance of what may be called the application of Gresham's law to divorce. Gresham's law is that proposition of the science of economics which states that in a region in which a hard and a soft currency are circulating simultaneously, the soft currency will always drive the hard one out of circulation. In the field of divorce it can be said with equal certainty that whenever it is possible for divorce seekers to obtain divorces with some difficulty in one place and with greater ease or speed in another, cases tend to accumulate in the place of easy, and to dry up in the place of hard divorce. This law of experience can, of course, operate only where the effect of the divorce, i. e. the divorce seeker's restoration to the freedom of the marriage market, takes place in the hard divorce district even though the divorce was granted in the easy district. Such was the case, for instance, in the relationship between Sweden and Denmark during the period within which it was easier to obtain a divorce in Denmark than in Sweden. At that time the "Copenhagen divorce" was a well known institution of divorce practice of Swedes<sup>21</sup>. In France, where the principal

19) 1568

20) "When... die Ehe so zerrüttet ist, dass ihre Fortsetzung dem anderen Gatten nicht zugemutet werden kann."

21) Cf. Strindberg's, *A Fool's Defence* (1893), Ch. 24 et s.



ground of divorce is defined by the omnibus term of "grave injury" inflicted by one spouse upon another, and where judicial interpretation of this term varies from court to court, divorce geography and other practices are also said to flourish.<sup>22</sup> Migratory divorce has occurred even in situations in which the decree obtained in the easy district is not, or not fully, recognized in the hard district. In Brazil, the institution of divorce does not exist at all. The secular law follows the doctrine of the Roman Catholic Church under which marriage is indissoluble during the joint life time of the parties. A divorce obtained by a Brazilian in neighboring Uruguay, where divorces can be obtained easily, is of no legal effect whatever in Brasil. But Montevideo divorces are nevertheless sought and obtained by Brasilians because of their significance in social life. An upperclass Brazilian who separates from his wife and lives with another woman, risks social ostracism, unless he has gone through a Montevideo divorce, in which case his new relationship seems to be socially accepted.<sup>23</sup>

Migration can be observed also to occur in a non-literal sense, viz. migration within the same jurisdiction from a more difficult to an easier and speedier ground for divorce. In Denmark a divorce can be obtained either upon the ground of adultery or upon the fact that the parties have separated, that such separation has been officially noted by the decree of a court or an administrative agency, and that it has lasted for two years. No specific ground has to be shown where a divorce is sought on their second ground. While the total number of divorces annually obtained in Denmark has remained fairly stable, the number of adultery divorces has steadily increased while that of separation divorces has decreased in the same proportion. The reason is, of course, not that adultery

22) Cf. 1 Jösserand, *Cours de droit civil positif* (1938) 499; Durkheim, "Le divorce par consentement mutuel" (1906) 1 *La revue bleu* 553.

23) Cf. D. Person, *The Family in Brazil* (1954) 16 "Marriage and Family Living" 308, 311. The extremely liberal divorce law of Ecuador has been used in a similar way by citizens of Peru and Columbia. Apparently yielding to pressure, Ecuador has recently found it necessary to close its divorce courts to foreigners. See M. A. Schwind, *Ecuador: New Conflict of Laws Rules in Divorce Cases* (1955), 4 *Amer. J. Comp. L.* 603.



would be on the increase in Denmark, but simply - lies in the fact that an adultery divorce can be had immediately, while a separation divorce requires a waiting period of two years. The speedier divorce has proved to be more attractive, and the by-product of this development seems to be that the official certification of the commission of adultery is losing its terror as a social stigma.<sup>24</sup>

Migratory divorce, we can see, does not constitute a specifically American phenomenon. Only, in this country its availability is greatly facilitated through the federal structure of the nation, especially since the Supreme Court of the United States has given to the full faith and credit clause of the Constitution an application which makes the recognition of consent divorces collusively obtained in one state compulsory on all others.<sup>25</sup> It would be unrealistic to expect that all states of the Union will be eager to adopt the family court-therapeutic approach plan, including those in which divorcing constitutes a major branch of the tourist business. They will welcome the increased flow of business from those states in which the plan will have been adopted.

This apprehension might be declared to be imaginary or exaggerated by reference to the statistics which indicate that at present the number of migratory divorces obtained in divorce mill states appears not to be large. The cost of a trip to, and six weeks stay in, Reno is considerable, and in most states a collusive divorce can presently be obtained without much difficulty. If the therapeutic approach plan is adopted in a state, it will promote this migratory divorce of the intrastate variety, as induced by those differences which, as we have seen, the plan will produce between the several courts of the same state. Such intrastate migration, real or fictitious, will be less expensive than the journey to Reno, it will also be more easily available in many other respects.

## II

The widespread feeling that something ought to be done

24) H. Moeller-Hansen, Er, det for let at blive skildt? [1950] Ugeskrift for Retsvaesen 105.

25) See supra, No. 9.



about divorce originates in the widely, if not generally, held opinion that the number of cases of marriage breakup has greatly increased in recent times and that correspondingly the stability of marriages has seriously declined. Is this opinion correct? At the present time only one answer is possible, viz. We do not know. All we know is that the rate of divorce has steadily and considerably increased, increased that is not only in absolute numbers but in a proportion far greater than the increase of the population figures. But nevertheless we maintain that this increase does not *necessarily* allow the conclusion that there has also occurred a corresponding, or even any, increase in the number of cases of marriage breakup.

If statistics on divorce would reflect the actual occurrence of marital breakup, marriage stability would be perfect in all those countries in which the divorce rate is zero, i.e. in those countries which do not have the institution of divorce at all. Italy, Spain, or Brazil, for instance, do not have divorce. Their divorce rates are zero. Does this fact indicate, however, that no Italian, Spanish or Brazilian husband ever abandons his wife, that no wife ever runs away from her husband, that no couples in these countries ever separate, that no married man maintains a mistress and no married woman ever has a lover? Anyone who has even a fleeting acquaintance with the social structures of these countries will make no such allegation. Some Italian husbands do abandon their wives, some Spanish wives have gone away from their husbands, some Brazilian couples have separated more or less amicably, and mistresses and lovers occur not only in the novels of these countries.

In the United States the divorce rate seems to have risen more steeply among Northern Negroes than among the population at large. If this observation is correct,<sup>26</sup> does it indicate that

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26) See the figures given by W. J. Goode, *After Divorce* (1956) 49. The discovery that at the time of the 1920 census the number of divorced persons among the adult population of certain key regions was higher among negroes than among whites, was made by Groves and Ogburn [*American Marriage and Family Relationships* (1928) 371]. The data



marriage stability is specially endangered among the colored people of the United States? It would rather seem to be indicative of a strengthening of the stability of Negro marriages. For a long time the sociol-economic position of the colored part of the population has been such that the general standards of sexual and family morality were not fully accepted. The solemnization of a marriage ceremony has not been universally regarded as an indispensable preliminary to the establishment of a common household, and the obtaining of a decree of divorce has not been universally necessary to be interposed between the factual termination of one sexual union and the initiation of another.<sup>27</sup> These statements do not mean that family unions among Negroes would have been generally less stable than those among whites or, at least, among white groups of comparable socio-economic status. As far as we can see without statistics, the over-whelming majority of sexual unions has been of the lifelong kind of the regular marriage even where it was commenced without benefit of clergy; and such informal commencement was bound to be frequent among a section of the population to whom the institution of marriage was denied as a legal institution as long as it was kept in slavery, to whom even the modest amounts charged by the license issuer and the clergyman would often be beyond their economic means, and among whom the establishment of a common household without previous wedding ceremony was not regarded with that abhorrence with which it is looked upon among American middle class whites. Since marriage has never been hundred per cent stable even among the latter, the corresponding relationship can, of course, not be expected to be hundred per cent stable among Negroes. Abandonments and separations occur among them as among whites; whether with more or less or equal frequency, we do not know, because there are no full statistics. However, as, by definition, there can be no divorce unless there has been a marriage,

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presently available are spotty and uncertain and their interpretation is controversial; see E. F. Frazier, *The Negro Family in the United States* (1939) 380; same, *The Negro in the United States* (1949) 634.

27) Cf. G. Myrdal, *An American Dilemma* (1944) 930; E. F. Frazier, *The Negro Family in the United States* (1939) 376 et. s.



the number of divorces will naturally be lower among a group among which marriages (in the legal sense) are less frequent than among the population at large. The number of divorces will be kept down even more if, in contrast to the population at large, the group in question does not regard a divorce as an indispensable step between the termination of a sex relation which has been a (legal) marriage and the initiation of a new relationship.

Among the most important social developments in the United States has been the steady rise of the colored part of the population or, at least of sizeable parts of it, from lowest lower class to upper lower and middle class levels of life. With this rise in social standing has come a corresponding change of mores in the sense of adaptation to and acceptance of general American middle class mores.

For the man or woman who is concerned about maintaining respectability in Negro middle class society or even in upper lower class circles it has become necessary to initiate the founding of a home and sexual union with a regular ceremony of marriage. It has also become necessary to interpose a divorce between the termination of one and the initiation of another union. As a consequence of this development there has been a considerable increase of the cases in which Negroes apply to a court for a formal decree of divorce.<sup>28</sup> This increase in the number of divorces and, consequently, in the divorce rate does in no way indicate a corresponding increase in the number of factual family unions ending in factual breakup. On the contrary, the general rise in socio-economic status and the accompanying acceptance of general middle class mores would seem to indicate that the number of such factual breakup cases has decreased while family stability has increased, and this in spite of a rising divorce rate.

We thus see that statistics of divorce do not allow us to draw ready conclusions as to the state of a society's family stability or the trends of its development. In spite of their frequent identification

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28) An additional motive seems to be constituted by the pressure exerted by private and public relief agencies.

not only in popular opinion but also in learned writing, marriage breakup and divorce are two different phenomena. The former belongs to the world of fact, the latter to that of law.

The factual term of marriage breakup is not easy to define. What is meant here is that event which spells out the end of the efforts of a couple to live together in the relationship of husband and wife and to make a common home for themselves and the children whom they may have or expect to have. While in a sense it may be justified to speak of marriage breakup were no external split has occurred but internal dissension has robbed the home of its inner meaning, it would be impractical to include such situation in our definition, because there is no effective way of reliably ascertaining their existence. On the other hand, we must exclude from our definition of marriage breakup those situations in which a husband does not presently live with his wife for other than dissension. Where the husband is away from home because of military duty, imprisonment, institutionalization, or the necessities of his professional work as a ship captain, explorer or oil engineer, we have a situation essentially different from that which exists when a husband has deserted his wife, or a wife has walked out on her husband, or where spouses have found that their marital life has become so intolerable or distasteful that they agree to disagree and to live separate and apart from each other. It is kind of situation which constitutes the social evil which we have in mind when we speak of marriage breakup and the too frequent occurrence of which we regard as a danger for the preservation of our social system and our civilization. It is this situation which turns the children into "orphans", which is likely to turn them and perhaps the wife too into a public charge on the taxpayers, which creates the psychological problems of loneliness and injects a general element of instability into the fabric of social life.

Divorce, on the other hand, has none of these characteristics. It is an event occurring not in the world of social living but in the universe of formal law. It can be varyingly defined as the pronouncement of a court, the paper on which this pronouncement is recorded, or the legal situation which arises from the pronouncement.



ment. This situation is characterized by one single aspect viz. that the parties (or, occasionally only one of them) are now free to do something which they could not do before the decree of divorce was handed down, viz. enter upon new relationships capable of being recognized as legally valid marriages.<sup>29</sup> Apart from that one aspect the decree of divorce does not bring about any significant change in that position of the parties which has resulted from the factual breakup of their marriage, a factual event which by legal necessity must precede the legal event of the divorce. The decree of divorce may, of course, contain judicial dispositions concerning the payment of alimony to the wife and support for the children, the settlement of the parties' relations with respect to property, and the custody of the parties, children. But all such dispositions could also be, and frequently will have been, made, prior to and independent of, divorce proceedings. The problem of maintenance can be raised in a suit for separate maintenance, a prosecution for non-support, or an action upon a separation agreement or for the payment of the value of necessaries. A property settlement can be brought about by means of such proceeding as a suit for partition, or for a declaratory judgment, or to clear title, or an action of trespass or ejectment. Custody of the children can always be regulated by a court of law in an action of habeas corpus or by the chancellor in proceedings in equity or, in certain cases, by the juvenile court. Even the wife's maiden name may be assumed by her without going through the divorce court. At least factually each party may also find it possible to establish a new relationship and a new home with another partner without benefit of formal divorce and marriage. If the irregularity of the relationship becomes known it may expose the parties to social ostracism and, in some states, to punishment for some such crime as "living in open adultery". But the social stigma does not apply in all groups of the population, and prosecution for crimes of the kind are rare. Of course, the irregular relationship will mean that the children are illegitimate and that none of the property and other legal ef-

29) On state laws restricting freedom of remarriage even in connection with divorce, see, Note, *Interlocutory Decrees of Divorce* (1956) 56 Col. L. Rev. 228, and literature cited there.

fects of marriage applies between the parties or as to their issue. But if there is no issue or no property, the parties may not care. If they care about the social, religious or legal characteristics of their status, it will be indispensable that the new relationship be initiated by a proper marriage ceremony, and for that purpose it is necessary that a divorce be obtained by that party or those, who are bound by the tie of an earlier marriage.

This and only this aspect of restoration to the freedom of the marriage market is the essential characteristic of divorce. It is an effect within the realm of law and, perhaps, also in those of religion and morals, but not in that of actual living. Quite particularly, the decree of divorce is not that event which turns a woman into an abandoned wife, or a couple into one whose home is broken. While we may legitimately speak of orphans of separation or abandonment, it is misleading to speak of orphans of divorce. No decree of a divorce court has ever thrown a child into that position in which it is deprived of a home and of the love and care of his two parents. That deprivation is the effect of the factual breakup of the parents' marriage, but not of that decree of the divorce court by which the factual breakup of the marriage may not be followed.

If we are interested in family stability, the trends of its development, and the ways by which it might be protected or promoted, we must, therefore, look at the cases of actual marriage breakup rather than at decrees of divorce. Unfortunately we have no statistics of trends of marriage breakup.<sup>30</sup> The fact of

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30) In the United States in the census of 1940 and 1950, a distinction is made between persons "married, spouse present", and persons "married, spouse absent." "A person was classified as 'married, spouse present', if the husband or wife was reported as a member of the household, even though he or she may have been temporarily absent on business or on vacation, visiting, in a hospital, etc., at the time of the enumeration. The group 'married, spouse absent' includes married persons employed and living for several months at a considerable distance from their homes, those whose spouses were absent in the armed forces, separated persons (those living apart because of marital discord but not divorced), immigrants whose spouses remained in other areas, husbands or wives of inmates of institutions, and all other married persons whose



issuance of a decree of divorce can be easily observed and counted. The occurrence of a family breakup is difficult to observe and thus not easily susceptible to statistical treatment. Yet, no significant statements about trends in family stability can be made without such statistics. Since we do not have them, we cannot but confess our ignorance, and be careful not to draw from statistics of divorce conclusions which cannot be elicited from them.

Theoretically it would be possible that the large increase of the divorce rate between 1850 and 1950 does not reflect any increase at all in the rate of marriage breakup. It is conceivable that the rate of the latter has remained unchanged or even decrease in the number of those cases in which the factual marriage breakup has been subsequently formalized by the taking out of the parties or the other. It is not probable that the true state of affairs actually corresponds to this theoretical possibility. For reasons still to be discussed it is probable that the rate of marriage breakup has indeed increased between 1850 and 1950, but to what extent it has increased, we do not know. Just as improbable as it is that the marriage breakup rate has not increased at all, it is also improbable that it has increased in exactly the same measure as the divorce rate. With the general rise of the common

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place of residence was not the same as that of their spouses." (U. S. Dept. of Health, Education and Welfare. Public Health Service. Nat'l. Office of Vital Statistics. Vital Statistics, Special Reports. Selected Studies. Vol. 39, Nr. 3: Demographic Characteristics of Recently Married Persons. U. S., April 1953 (Oct. 12, 1954), (p. 104). In the rubric "married, spouse absent" persons whose marriages have been broken up, are thus lumped together with persons whose spouses are in the armed forces or in prison, or are employed in a different place, or are absent for a variety of other reasons. The figures can thus not serve as a basis for propositions on marriage breakup. For the same reason, the statistical data collected in the Federal Republic of Germany cannot be used for our purposes, although they, too, distinguish between married persons whose spouses are present, and those whose spouses are not present.

Efforts to utilize available data on prosecutions for non-support, suits for separate maintenance and similar proceedings, as well as to obtain additional data on marriage breakup are presently made at the University of Chicago Comparative Law Research Center.



man from lower lower to upper lower or middle class standards, which has been so characteristic of at least the last three or four decades of development in the United States (and in other industrial countries, too), we know that middle class mores are now observed by a portion of the population larger than that by which they were observed in 1850. This fact implies that a larger portion of those whose marriages have been broken up factually must now find it necessary to formalize such breakup by the taking out of a decree of divorce. How large that section is today and how large it was in 1850 or at any time between these dates, we do not know, just as we do not know how many marriages in fact are broken up today or were broken up in 1850. It would be wrong, however, to assume that in 1850, or at any time before or after that date that number would have been insignificant. On the contrary, we have good evidence that the 19th century, or the 18th, were not at all the "good days" as which they seem so often to be regarded by romanticists. In these days marriage breakup did occur and it seems to have occurred in a significantly high number of cases in this country, in England, and elsewhere.<sup>31</sup>

The situation in England is particularly instructive because the institution of divorce did not exist there before 1857. The fact that family breakup occurred there before that date, just as it occurs today in Spain, Italy and other divorceless countries, should be an additional warning against that identification of family breakup and divorce which is so common in present-day discussions. Just as we have no contemporary statistics of factual marriage breakup, we have, of course, none for 18th or 19th century England. We have other evidence, however, which, while it does not give exact figures, clearly indicates that marriage breakup actually occurred at a significantly large rate. This evidence is contained in the documents which have been left behind by contemporaries as well as in writings in which use of such documents has been made. Strangely enough nobody seems as yet to have expressly investigated the problem of the stability of the English

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31) A scrutiny of historical sources for England is in progress at the University of Chicago Comparative Law Research Center.



family of the 18th and 19th centuries. When we became interested in this problem at the University of Chicago Comparative Law Study Center, we had to try meticulously to cull information from modern biographies and historical works as well as from such contemporary sources as diaries, autobiographies, parliamentary debates, letters, reports of foreign travelers, etc. The mass of the material that ought to be explored, is immense. Attention should be paid particularly to such primary sources as court records, reports of factory inspectors, newspapers, police and court records, moral tracts, but also plays, novels and popular literature. We can only hope that some competent historian will undertake this enormous task. In our own work we could do no more than look over a small fraction of the material that should be explored. But it is believed that the investigation has been sufficiently extensive to allow the statement of at least some tentative conclusions.

The impression which emerges from this study of some of the sources is, first of all, that of a great variety of different standards of mores among the various groups and layers of English society. The image of monogamous, lifelong, and faithful marriage appears to have approximated reality most closely among the middle class, especially insofar as its members belong to dissenter churches. Significantly different mores are found, however, both in the top and the bottom layers of society. Among the former the number of separations seems not to have been insignificant. Even more frequent, however, seems to have been the marriage in which the outside facade of the common home was maintained and, perhaps, a measure of common marital life, too, although the husband kept a mistress or frequented prostitutes. Among the bottom groups irregular unions, abandonment and informal switching were anything but unknown. In all layers of society, except, perhaps, the very top, the maritally dissatisfied male and, to a considerable lesser extent, the female, could avail himself of a freedom which has almost disappeared in present society, viz. the freedom of disappearance. The police was poorly organized and services for the tracing of missing persons were all but unknown. For a workman, a rural laborer, an industrial "mechanic," or even an improverished clerk, it was easy, under a newly



assumed name, to submerge among the teeming proletarian masses of the East end of London or the worker's quarters of Lancashire. If a man, or a woman, could disappear in these crowds, he could also establish there a new union with or without ceremony of marriage. If he wanted to have a ceremony, it was not difficult to find a Fleet parson, at least before the enactment of Lord Hardwick's Act in 1753. That the new "marriage" might be bigamous was no serious threat in a society in which discovery was improbable. If Whitechapel or Manchester were too close to home, there were the wilds of Australia, New Zealand, Canada, and, above all, America, where a new life could be started not only in the economic but also the marital sense. Immigration to the United States was unrestricted until 1917 and the chance of punishment or other embarrassment because of bigamy was minimal for the man who had run away, with or without mistress, from his European wife and family. It was, incidentally, small too, for the American husband, who had run away from his family in the East and established a new one at the frontier. For the protection of such men and new "wives" and children American courts fashioned a special legal institution, the all but irrebuttable presumption of the legal validity of a second marriage.<sup>32</sup> In the pre-telegraph, pre-airplane, pre-photography, pre-fingerprinting and pre-social service agency age it was anything but easy for an abandoned English, Polish, or, at that, Massachusetts, wife to trace the whereabouts of a husband who had gone away and perhaps assumed a new name. But even if she succeeded and, after he had died, attempted in competition with the new "wife" to share in the property which he had acquired in the New World, she had little chance of success. The court at the place where the husband had settled, became a respected fellow citizen, married a woman of the community and raised a family, was little inclined to let the American acquired wealth be taken away from the American family for the benefit of some woman in Europe or on the Atlantic seaboard. If such woman

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32) See Note. The Conflict of Presumptions on Successive Marriages of the Same Person (1919) 30 Harv. L. Rev. 500, repr. Ass. of Amer. Law Schools. Selected Essays on Family Law (1950) 287.



would claim her share as the "widow", let her prove that the man who had once been her husband, had never had his marriage to her dissolved by a decree of divorce. As American law allowed, and still allows in many cases, that a divorce may be validly obtained in the country of the plaintiffs' residence, and without personal service of process upon the out-of-state defendant, the claimant would be required to trace all the peregrinations of her run-away husband and to search for the entry of an ex-parte decree of divorce the records of every court in which the left-behind wife would succeed in this herculean task, she had to expect that she would now be asked to prove that her husband had not perhaps somewhere obtained an annulment,<sup>33</sup> and if that proof were made, that the decedent had not at the time of his marriage to the claimant already had a prior wife living,<sup>34</sup> or that his alleged marriage to the claimant had not been invalid at the outset for some other ground.

To this protection of the American "family" of the run-away husband was added the protection of that husband himself against claims of support that might be brought against him by his abandoned wife and children. The rules on jurisdiction for claims of family support and on the enforcement of foreign judgments of support were an immigrant husband, or one who had migrated within the United States, could be seriously embarrassed by his abandoned family.<sup>35</sup> Why should under such circumstances a man bother with taking out a divorce which might be either entirely unobtainable in his home country or at least involve him in considerable expense? Figures of immigration into such countries as Australia, Canada, or, particularly the United States, ran into the hundred thousands per year: Internal migration was and.

33) *Lazarowicz, v. Lazarowicz* (1915) 91 Misc. 116, 154 N.Y.S. 107.

34) *In re Biersack* (1916) 96 Misc. 161, 159 N.Y.S. 519.

35) On the difficulties encountered under traditional American law by one who attempts to prosecute a claim for family support from abroad or across a state line, see **W. H. Baldwin**, *The Present Status of Family Desertion and Non-Support Laws* (1911) 38 National Conference of Charities and Corrections, Proceedings 406; See also **J. C. Colecord**, *Family Desertion and Non-Support* (1932) 6 Enc. Soc. Sci. 78.

incidentally, still is high in the United States. Nobody, of course, knows to what extent that migration has been the substitute for divorce. It is no far fetched speculation, however, to suspect that it served this end more frequently in 1850 than in 1950 and that in 1850 the number of such cases was anything but insignificant. There are no statistics of undiscovered cases of bigamy or even of migration abandonment followed neither by a divorce nor a bigamous marriage.

The point we are trying to make here is not that the number of cases of factual marriage breakup was higher in 1850 or 1900 than it is today, or that it was the same, but only that we do not know the number, and that its possible increase cannot be deduced from the statistically ascertainable increase of divorce. It is possible or, indeed, probable, that with the almost complete disappearance of the once existing freedom of disappearance,<sup>36</sup> a formal

36) That freedom of disappearance has not completely disappeared, is shown by the following item, which is reprinted in its entirety from the Chicago Daily News of March 3, 1956.

### Nearly a Million Disappear Annually

#### WHERE THE MISSING GO

Where do people go when they disappear? Into rural retreats? Not at all. They'd be much too conspicuous in the small places.

It is the great, glittering Meccas that lure the nearly 1 million people who disappear yearly in the United States for one reason or another.

New York, Los Angeles and Miami vie with each other as competitive lures for those who are running away from wives, husbands, mothers-in-law, marital and non-marital confusion, the burden of money or the lack of it, parental harness and what not.

TRACERS CO. OF AMERICA of New York City, specialists in tracing missing persons for 32 years, says that few are criminals and most return meekly to their homes after a few weeks, ashamed of having made tracks and sometimes unable to explain why they did it.

Why they do it?

Tracers Co. concludes from its case histories that the urge to flee reality motivates nearly everybody some time or another.

How much greener are those fantasy pastures in Miami and Los Angeles — some think. And some escape from one fantasy to another, until caught up with.



divorce and thus a legalization of a subsequent marriage is sought to be obtained in many cases of factual marriage breakup in which such formalization would not have been obtained in a period in which it was both easy to disappear and in which a larger percentage of the population belonged to those bottom layers of society in which the lack of a formal divorce and remarriage constitutes less of a stigma than it does among the middle classes. In the absence of statistics we simply cannot know to what extent the rise of the divorce rate indicates a rise in marriage instability, or a shift from informal to formalized marriage termination due to changed social conditions and mores.

That such a shift from informal to formalized marriage breakup has been responsible for at least a part of the increase of the divorce rate, appears to be highly probable in view of the facts just stated. It also seems probable, however, that there has also occurred an increase of the cases of factual marriage breakup. To what extent the increase in the divorce rate is due to the for-

TRACERS CO. has prepared a breakdown on disappearance cases they have handled in 32 years:

HUSBANDS	79,620	Wanted for support	51,205
		Mother-in-Law trouble	17,222
		Left with other women	11,193
WIVES	4,806	Abandoned children	216
		Mother-in-Law trouble	4,437
		Left with other men	153
TEEN-AGERS	17,644	Boys	12,609
		Girls	5,035
		9% under 15 years old.	
DEBTORS	139,038	Hotel	16,885
		Commercial	45,842
		Retail and loan	76,311
HEIRS	13,662	Estate over \$100,000	1,054
		\$50,000 to \$100,000	3,263
		Under \$50,000	9,345
WITNESSES	8,298	To wills	6,098
		Accident cases	1,565
		Other transactions	635
LOVE SWINDLERS	9,795	Men	7,266
		Women	1,597
		Bigamists	932

mer, to what extent to the latter factor, is, let it be repeated, unknown. It would be unrealistic to assume, however, that there would not have occurred at least some increase in the number of cases of factual marriage breakup. This assumption would be unrealistic because there have occurred several developments which must inevitably have brought about an increased desire to breakup certain marriages, and a greater ease to carry out such a desire. Among these developments two appear to have played a particularly important role, viz. the decreased financial and personal dependance of women upon their husbands,<sup>37</sup> and, in partial connection with this phenomenon, the changed image of the institution of marriage.

The possibilities of escaping from a distasteful or intolerable marriage situation of which we have spoken above were available but hardly to women. In the pre-modern world it was difficult enough for a spinster to find her place in society. There simply was no place for the woman who had left her husband. Unless she had parents living who were willing to receive her, or a lover with whom she might run away and disappear, the wife of even the most tyrannical, cruel, or profligate husband had little choice but bearing her lot in patience or enter a house of prostitution. The law made it impossible for a married woman to have an income of her own, unless her family had had the means and the foresight to make her and her children the beneficiaries of a settlement inequity. Society had no place for an unattached woman to earn a decent living. It was difficult enough to eke out a living for the widow of a husband who did not leave her assets sufficient to yield a comfortable income. If loneliness and lack of income were combined with the stigma of being a deserter, the woman's fate was intolerable. The economic and social facts which stood in the way of a wife's shaking off even the worst abuse, were aggravated by the educational system which, insofar as it provided for a woman any education at all, did not aim at endowing her with a training that would enable her to live a life of independence.

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37) The literature is immense; for a good survey see C. Kirkpatrick, *The Family as Progress and Institution* (1955) ch. 7.



We need not relate here the details of the profound change which has taken place. Perhaps, women have not yet attained in the United States that almost full position of equality with men which they have come to occupy in the Scandinavian countries or Germany, but it certainly has become possible for an American woman to live her own life and to occupy a respected place in society if she remains unmarried, if she is a widow or if she has factually broken off a marriage which has become intolerable to her or simply distasteful. The law not only allows her to have her own property and income, but is also ready in most cases to give her and her children claims for maintenance or alimony and support. The economy provides her with ample opportunity to find an independent place of work and an income of her own. The schools have prepared her for such a role; and the social stigma that once attached to the situation has all but disappeared.

It would be miraculous if the newly won freedom of one half of the population would not be used and if none of those who were once barred from factually terminating a marriage and now can do so, would not actually do it. Although we do not know the figures, we can and must assume that the great event of female emancipation has brought with it an increase in the number and rate of factual marriage breakup. Since it is probable that at least some of these cases have been followed by formalization through divorce, we are justified in assuming that to some extent the rise in the number and rate of divorce is connected with the change in the social position of the female half of the population.

The other development of which we are justified to assume that it has brought about an increase in the number and rate of cases of factual marriage breakup and, consequently, of divorce, too, is that transformation of the image and pattern of marriage which has taken place during the last two or three generations. It has been intensively observed and extensively described by the sociologists<sup>38</sup>. Ernest Burgess has labeled his development as that

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38). See esp. E. W. Burgess and H. J. Locke, *The Family From Institution to Companionship* (1950) 483 et s., and literature cited there; R.S.



from institutional to companionship marriage. These terms describe the situation well, although they have sometimes been misinterpreted. The terminology does not mean to say that "modern" marriage is not an institution in the sense of a configuration of set patterns and expectations of social behavior. It is also not implied that companionship and love would not have played important roles in "old-time" marriage. What is meant is a short-hand reference to the fact that in our present society of urban living and industrial mass production the institution of marriage has lost some of the functions which it had to fulfill in "old-times" society and has assumed certain new ones which it did not have to fulfill to the same extent before.

Marriage has, of course, retained that function which may be called its basic one, viz. that of providing the cradle and home for the newly born members of society. In a large measure, marriage has also remained the basic unit of consumption, although it has to share this role with the plant canteen, the school room, the luncheon, club, and the cafeteria.

But the roles of unit of education and recreation have been largely, although not entirely, transferred to the schools and the public places of entertainment. The role of constituting an important unit of production is still played in some measure by the family on the farm or the corner grocery store, but it has disappeared for the overwhelming mass of the population. But in inverse ratio to this change there has increased the significance of marriage, as the haven of rest, in which the city dweller can find the understanding and companionship for which he craves. He craves for it more, indeed, than his forebears, who lived in closer proximity with nature, had closer contacts with brothers, uncles, nephews, or sisters, aunts or grandmothers, and who could find more easily congenial friends in the more homogenous small towns and villages of the past. Above all, his more extrinsic education has made him more aware of his psychological needs and has, perhaps, increased

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Cavan, *The American Family* (1952); K. N. Llewellyn, *Behind the Law of Marriage and Divorce* (1933) 32 Col.

1. Rev. 1292; (1934) 33 Col. L. Rev. 249.



their intensity. In consequence, there has increased the difficulty of finding the mate by whom the new needs will be satisfied. It is comparatively easier to find a wife who is a good housekeeper, an efficient helper on the farm, and a good mother to a flock of children, or a husband who is a good provider, than a mate who is an ever ready congenial companion, who shares not only our sorrows and troubles, but also our tastes and interests, and our circle of acquaintances and who remains congenial in all these respects and many more not only in the youthful years of early love and bliss but through all the vicissitudes and transformations of a lifetime with its growth in body, mind and soul. In all these more subtle aspects of marriage we need more, we expect more, and we are more easily disappointed. Of course, this transformation has not taken place at an equal measure in all groups of the population. The old patterns continue to exist alongside the new ones, and the innumerable transitions which are possible in between. The image and pattern of marriage is not the same among Wisconsin farmers, college professors, automobile workers, recent immigrants from Sicily, big city white collar employees, Southern Baptist clergymen, or Hollywood stars, not to speak of Hopi Indians, Mexican fruit pickers and Catfish Row Negroes. But there has been a transformation of the marriage pattern among what we may call the great American middle class, that class which represents America to us as well as to the world at large. This transformation has been one of refinement, of greater emphasis upon the spiritual as against the physiological and economic aspects of the marriage relation.<sup>39</sup> Its concomitant has been a greater risk of failure and disappointment, which, in conjunction with the newly won freedom of the female half of the population, is likely to constitute a cause of cases of marriage breakup which would not have occurred in the olden days. Again we must emphasize, however, that we have no figures.

To what extent, if any, we are inclined to regard the changes as an improvement, largely depends upon the place on which we stand in the kaleidoscop of the social structure and upon the

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<sup>39</sup> Cf Llewellyn, 1. c. supra, note 38.

extent to which we are free from the tendency of idealizing the past. To us it seems that the transformation of marriage constitutes an improvement, especially if we consider that it has been accompanied by a spectacular decline in America of not only the mistress system, which at one time played a significant role here, too, as well as of what was once called the social vice as such, prostitution. These developments may be well worth the price of an increased incidence of marriage breakup. We must also consider that the very development of industrialization and urbanization which seems to have brought about that not exactly determinable increase of cases of family breakup above the unknown but by no means inconsiderable rate at which it occurred before, may well carry within itself the possibility that in the long run the incidence of marriage breakup may decrease, perhaps even beyond its former rate of incidence. This possibility is indicated by recent investigations which point in the direction that among all groups of the population the rate of family breakup is smallest among that very group which appears as the one most typically representing the new age, i.e. that of the college and university graduates. If the facts found by Goode<sup>40</sup> and other investigators really justify this conclusion, it might indicate that the top level of that kind of education which our society has developed may develop not only the new demands on marriage but also the abilities to fulfill them.<sup>41</sup>

Among the causes which seem to contribute presently to bring about the unknown number of cases of family breakup, it thus seems that we can find that significant roles are played by the following:

*first:* those permanent attributes of human nature and Western civilization which have caused a not insignificant number

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40) After Divorce (1956) 33 et s.; Hajnal, J., Analysis of Changes in the Marriage Pattern by Economic Groups (1954) 19.3 Amer. Rev. 295.

41) See Nelson Foote, Matching of Husband and Wife in Phases of Development. Third World Congress of Sociology. Amsterdam, 1956 (in the press).



of cases of family breakup to happen before the typically modern social trends had begun to operate ;

*second:* the emancipation of the female half of the population;  
and

*third:* the development of the new image of marriage.

Assuming that there has been a considerable rise in the rate of marriage breakup, we should like to know whether any additional factors have played a significant role in bringing it about. The opinion seems to be widely held that there have been at work at least two such factors, viz.

1. a decline of morals resulting in an attitude of callousness toward the obligations of marriage and towards social duties in general ; and

2. the ease with which divorces are obtainable.

We must observe at the outset that with respect to the former we have no evidence whatever one way or another. As to the second, we have very little evidence, and the little we have does not seem to bear out the contention. Both statements are based upon an idealization of the past and the identification of divorce with marriage breakup. The fact that before 1857 the divorce rate in England was zero is as little evidence of the absence of family breakup as it is in present-day Spain, Italy or Brazil.

Whether morals have declined over the last one hundred years is a matter of opinion. Our own opinion is that they have not. We can prove this contention as little as the proponents of the other view can prove theirs. But we can say, at least, that our opinion has not been refuted by that investigation of the historical evidence which we have undertaken.<sup>42</sup> If present day observers are fascinated by the spectacle of Hollywood we should compare it with English court society of the days of Charles II or William IV or of the circles of Pepys and Boswell rather than with the sexual

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42) See supra, note 31.

morals of Quakers or of Lancashire shopkeepers, Yorkshire farmers or Scottish crofters.

That the most important factor in bringing about divorce as divorce has recently been stated by no less an authority than the Archbishop of Canterbury,<sup>43</sup> who, of course, does not stand alone with this opinion. On the contrary, the view that "divorce breeds divorce" appears to be held by a great many people. What is meant by this proposition is apparently that divorce and factual marriage breakup is furthered by the easy availability of divorce, marriage breakup are identical, and that the occurrence of factual marriage breakup is furthered by the easy availability of divorce, i.e. of a procedure by which the breakup can be formalized and following which a new union can be formed.

When the proposition is stated in this form it loses much of the convincingness which derives from the rhetoric appeal of its elliptic formulation. It also indicates, however, that there may indeed be some cause and effect relationship between the ease with which the formal restoration to the freedom of the marriage market is available, and the ease with which the decision factually to breakup an existing marriage may be reached by a party who has come to be dissatisfied with it.

Arguing a priori one might be inclined to assume that such a psychological cause-effect relationship does exist. Where it is known that a divorce is difficult to obtain or not obtainable at all it seems likely that hasty marriages may be less readily concluded than in a country in which it is known, or believed, that a divorce can be had for the asking. It also seems to be likely that in a country of difficult or non-existing divorce a party considering the advisability of a marriage breakup may be less inclined to carry

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43) Royal Commission on Marriage and Divorce. Minutes of Evidence. Sixth Day, No. 1191 : Pointing out that the extension of divorce facilities through the enactment of the Herbert Act in 1937 was not followed by a drop on the number of separation orders, His Grace stated : " That does suggest that there are real grounds for our very serious contention, on which a good deal of scorn has been poured in some quarters, that extended facilities for divorce tend to breed conditions for divorce and broken homes. "



out such thought than in a country of easy divorce. But do such expectations correspond to the facts? Those by whom they are asserted have no evidence. Proof is, indeed, difficult to obtain. The main obstacle is again the non-existence of statistics of marriage breakup. If we had such statistics, we could try to ascertain the influence of changes in the divorce laws of a country, or we could compare the breakup rate of a country with a strict divorce law with that of a country of easy divorce. Such comparisons would, of course, be usable for our purpose only if we could isolate the influence of all other factors. Such isolation can perhaps be achieved to some extent; in some measure we may also neglect the other factors if the comparison is made between periods of regions of essentially the same social, economic and cultural conditions. At the University of Chicago Comparative Law Research Center efforts are under way to design such comparisons. Some comparison have also been undertaken already to find out what effects if any can be found to have been brought about through the change of the divorce laws which took effect in Germany at midnight of December 31, 1899. In some parts of that country the divorce law of the new uniform code was stricter, in other more liberal than the previous local law. The figures show that indeed the divorce rate dropped in those regions in which the old law had been more liberal, and rose in those in which it had been more strict. The regional differences disappear, however, after a few years, when the divorce rate began to take a sharp rise all over Germany. In evaluating these figures one must consider first of all that they do not refer to cases of factual marriage breakup but only to divorces. A certain corrective can be achieved when instead of the number of divorces one considers that of divorce suits commenced. Work to ascertain the trend of these figures is in progress and the result will be interesting. More significant, however, appears to be the fact that from 1910 on the divorce rate has been rising in all parts of Germany and that this rise continued until it reached a peak in 1948, i.e. at about the same time at which the divorce rate reached its peak in this country and in the United Kingdom. Shortly before 1910 the Supreme Court had rendered a number of decisions which

indicated that under the new Code, especially its 1568.<sup>44</sup> divorces might be granted quite liberally and that the Code left a wide room of discretion to the trial courts.

Insofar as any conclusion can be drawn from the German figures at all, they seem to indicate that the attempt of a part of the country to tighten the divorce law reduced the divorce rate only modestly and for a short time, and could not prevent the development of a long range, continuous rise of the divorce rate. To what extent the shifts of the divorce rate reflect any shifts in the rate of actual breakup, we do not know.

That the expectations concerning the influence of the divorce law on parties' decisions to marry or not, and to break up or preserve the marital home, may not be too significant, can also be deduced by an a priori argument. Not even the strictest law can prevent a party factually to break up his marriage if he is determined to do so. All it can do is make it impossible or difficult that a newly established union be constituted as a legitimate marriage. A priori it might be possible to argue that a law which renders it impossible or extremely difficult to constitute a new union as a legitimate marriage may have the effect of reducing the horror and stigma of illegitimate unions, and that this effect may balance or even overbalance that of deterrence. Observations of countries in which divorce does not exist create the suspicion that such a relation may indeed exist. But, again, strict proof is not possible. The proposition that the absence of divorce breeds concubinage can be proved as little as its opposite that "divorce breeds divorce."

### III

What then are the causes of marriage breakup ?

First of all it seems that the postulate of indissoluble faithful, monogamous marriage has never been perfectly satisfied. It states an ideal, and the achievement of its approximation has been one of the basic pillars of Western civilization. If that civilization is to

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44) See supra, note 19.



continue, that ideal has to be maintained. But it can be maintained as an ideal only, i.e. as a postulate which will always fall short of achievement. This is not the place to analyze the reasons. For the Christian believer the explanation lies in man's fall and sinful nature. For our purposes it may suffice to refer to the observed facts of the past. There has been marriage breakup and there always will be.

Whether or not we have a higher rate of marriage breakup to day than we had in 1850 or 1900, we do not know. Probably we have, and if that is the case, the rise appears, at least in part to have been caused by the changes that have occurred in the social status of women and in the dominant image and pattern of marriage. The only effective way to undo that increase from a rate unknown to another rate equally unknown would be by undoing these two changes, which, of course, is impossible.

Hopes by any realistically available means to reduce the rate of marriage breakup in a large way thus seem to be un-realistic. Nevertheless, some reduction may, and should be sought to, be achieved. As we have tried to show, it seems neither to be probable nor, in a free society, admissible to achieve this end by compelling everyone who seeks to formalize the breakup of his marriage and to regain his freedom of marriage, as a preliminary to submit to treatment aimed at changing his personality. If the family court-therapeutic approach plan is understood in such a way, it can not be supported. It ought to be welcomed, however, if it is understood in a less radical way.

We must not conclude, however, that nothing can be done at all about the problem of divorce. We must rather see the problem in its real rather than in an exaggerated proportion, and, insofar as it is real, we must not try to cure it by tampering with the substantive law of divorce. But we ought to look for more appropriate means to reduce the number of cases of marriage breakup or even, insofar as it can be done at all, to undo a marriage breakup which has already occurred.

Prevention appears to be achievable to some extent by two

means; marriage counseling, and education for family living. In the case of a marriage in which difficulties have appeared to arise, in which both parties are in some measure willing to maintain their relationship, counseling may well result in preventing the split and even in helping the parties to improve their relationship. In many cases mother, grandfather, uncle, or friend may be the natural and most effective counselors; or the role may be assumed by the minister of the parties' congregation, or the family doctor. In cases of serious immaturity a personality change may have to be undertaken by a psychotherapist. In the present age such help will not always be obtainable. To take care of this need organized agencies for marriage counseling or, as it is called in Great Britain, marriage guidance, have sprung into existence.<sup>45</sup> In this country we can even observe the rise of the marriage counselor as a new profession. Marriage counseling is no cure-all, but it has proved itself as a valuable preventive of marriage breakup in certain cases. Its promotion appears to be a legitimate and rewarding use of public funds. While it may be preferable to keep marriage counseling basically within the hands of private individuals and agencies, no fundamental objections stand in the way that it might occasionally be exercised by public agencies, or that resort to a private counseling agency be suggested by a public agency, for instance a court.

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45) The literature on marriage counseling is vast. As to its problems in general and its organization in the United States, information may be found in **S. E. Goldstein**, *Marriage and Family Counseling* (1945); **Carl R. Rogers**, *Counseling and Psychotherapy* (1942); **L. R. Steiner**, *Where People Take Their Troubles* (1945); **Th. M. French** *Contribution to a Therapeutic Solution to the Divorce Problem; Psychiatry*. University of Chicago Law School. Conference Series, No. 9. Conference on Divorce (1952), 62; **E. H. Mudd**, *Contribution to a Therapeutic Solution of the Divorce Problem: Social Work and Marriage Counseling*, ed. 1. 65; see also **Burgess and Locke**, *The Family* (1950) 737 et s.

On "marriage guidance" in the United Kingdom, see the Annual Reports of the National Marriage Guidance Council (78, Duke Street, London, W. 1.) and its monthly bulletin, entitled "Marriage Guidance."

On Germany, cf. **G. Blau**, *Die Einschaltung der Eheberatungsstellen in das Scheidungsverfahren* [1952] *Juristenzeitung* 711.

On Sweden, see **A. L. Kaelvesten**, *Family Policy in Sweden* (1955) 17 "Marriage and Family Living" 250, 254.



It is in this connection that the unified family court may be useful. By dealing with all legal troubles arising within a family the judge of such a court, or his assistants, may spot trouble that, if unchecked, may lead to a marriage breakup, and refer the parties to a counseling service. In a place where no other good service is available, it may well be established in connection with the court itself. Whether or not it should be located in the same building with the court, is a question which will require careful consideration in every case. Under all circumstances care must be taken, however, that the resort to the counselor remains with the party's own free decision. Compulsory referral is self-defeating.<sup>46</sup> Resort to the counseling service must never, therefore, be made a compulsory requirement for judicial action of any kind.

As a second means of prevention, education for family living appears to hold a promise of success. Education for family living has in recent years found entrance into the curricula of American high schools and colleges.<sup>47</sup> While it may, and perhaps should, include a certain measure of sex education, education for family living means a great deal more. In order to fulfill its purpose, it must prepare the student for those difficulties which must be overcome in a marriage if it is to be a success. That means that, first of all, the student must be awakened to the fact that even in the best of all marriages moments of irritation, friction and even of serious dissension must be expected. There must be counteracted the romantic expectations that a good marriage is a life of perpetual bliss and that the appearance of annoyance, boredom or friction necessarily indicates that the marriage is a failure and that nothing can be done except recognize the failure and bring about the seemingly inevitable break. Education for family living must then go on to show how such inevitable troubles can be overcome and that a deeper harmony is likely to grow out of the spouses' mutual efforts through honest striving and recognition of their responsibilities. Quite recently promising techniques have been deve-

46) Cf. Mudd, *l. c.*, supra, note 45.

47) See J. A. Peterson, *Education for Marriage* (1956), App. III, 'Trends in Family Life Education'; H. A. Bowman, *Marriage Education in the Colleges* [1949] *J. of Social Hygiene* 405.



loped even to strengthen those "interpersonal competences" of intelligence, empathy, judgment, creativity and autonomy, which are necessary in partners to a marriage for successful family living.<sup>48</sup> Courses in which these new techniques are applied should be provided as a widely accessible part of adult education.

More difficult than prevention of marriage splits are curative attempts to heal a split which has already occurred. In that case the task is no longer that of showing and helping parties how the breakup of their home may be avoided. At least one of them has already not only decided to terminate the marital community but has also acted upon that decision. It is no easy task to induce party or parties to undo that step which has but rarely been taken rashly and without deliberation. This is precisely the situation when a court has been invoked in a prosecution for abandonment or in a suit for separate maintenance or divorce. In all such cases the task is no longer one of prevention but that of bringing about the re-establishment of a home which has already been broken up. Experience seems to indicate that even in such cases efforts at "reconciliation" are not necessarily futile in all cases.<sup>49</sup> But we must not expect too much and we must be careful not so to tie up reconciliation efforts with the judicial proceedings that they mutually defeat their purposes. Under no circumstances should resort to reconciliation be constituted a compulsory preliminary to the initiation of a prosecution for non-support, a suit for separate maintenance, or a motion for the grant of temporary alimony and support. Such a condition might result in starvation. Nothing seems to stand in the way, however, of requiring the petitioner for a decree of formalization of marriage breakup (divorce) first to make an honest attempt at reconciliation. For the reasons stated above such requirement must not mean that the petitioner would have to submit to a lengthy and delicate probing of his personality or

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48) N. N. Foote and L. S. Cottrell, Jr. *Identity and Interpersonal Competence* (1955).

49) See G. Lueke, *Erfolglosigkeit des Suehneverfahrens in Ehesachen?* (1955) 2 *Ehe und Familie* 342. The data for this critical evaluation were collected at the University of Chicago Comparative Law Research Center.



to efforts by psychotherapy to change his personality. The attempt at reconciliation must also be so organized that it will not jeopardize the right which may have accrued to the petitioner to have the breakup of his marriage formalized by a decree of divorce. Whatever may be revealed during the course of reconciliation proceedings, must not be used in the divorce proceedings. Also, if a reconciliation turns out to be only seeming and temporary, it must not be allowed to defeat a right to a divorce under the heading of condonation. For the former reason it would seem to be desirable that reconciliation proceedings should be separated from the divorce court. Such a separation also will avoid that reconciliation proceedings either degenerate into that kind of meaningless formality which they are likely to be where the divorce court's docket is overcrowded, or that the parties are bullied into a "reconciliation" which they do not really intend and which is unlikely to last. Reconciliation proceedings, irrespective of whether or not they are required as a preliminary for a divorce, ought to be entrusted to persons who are qualified to render such services by training and experience. The judge better limit himself to those legal activities to which he is specially qualified by his training and experience.<sup>50</sup>

By establishing an effective system of education for family living in all our high schools and colleges, an easily accessible network of counseling services, and machinery of reconciliation by experts outside of the courts, we may really succeed to strengthen the stability of marriages. The concentration of all "family cases" in one single family court may help in the timely discovery of those cases in which through counseling by outside agencies a marriage breakup may occasionally be prevented. Tampering with the substantive law of divorce in the sense of rendering the formalization of cases of marriage breakup a matter of judicial discretion and make it depend upon the parties' willingness to submit to extensive diagnostic or personality changing treatment would either be futile, however, or unacceptable.

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50) In England it is a universally recognized principle that attempts at reconciliation are not to be undertaken by a judge or magistrate, but to be referred to a probation officer or a counselor of the local Marriage Guidance Council.