THE FAMILY COURT - AN OBSTACLE RACE?*

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COMPOSITION AND PURPOSE

The most easily distinguishable feature of the family court is the concentration of the handling of all justiciable family conflicts and problems in one court. The principal phases of family law embraced in its jurisdiction are: abandonment (of child, pregnant woman, spouse), abuse of child, adoption, alimony claims, annulment of marriage, assault and battery (intra-familial), bastardy, consent to marry, contributing (to delinquency, dependency or neglect), custody of children, declaratory judgments, dependency of children, divorce, filiation proceedings, neglect of children, non-support (of child, parent, spouse), parent and child, partition of real estate (intra-familial), separate maintenance, visitation of children.[1]

(*) Reprinted from The University of Pittsburgh Law Review, Vol. 19 Spring issue 1958.

(**) Judge Alexander is an eminent authority in the field of Domestic Relations and his remarks about the Family Court are based upon years of experience as a judge and practitioner.

Judge Alexander has written extensively on the subject of divorce and family discord and the Court on wich he now sits has become famous for its realistic approach to the resultant problems of marital disharmony.

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1) Most of these and a few others are listed in: **Alexander,** The Family Court of the Future, Yearbook of National Council of Juvenile Court Judges (1951); Yearbook of National Probation and Parole As-

Except in a comparative handful of cities, members of a family beset with a number of evils sounding in these different categories—and it is amazing how they manage to get themselves embroiled in so many difficulties at one time—would have to pursue their several remedies in several courts in several locations. The waste of time, effort and money, the working at cross purposes and other evils attendant upon this shopping around for help, have been sharply exposed.[2]

Quite a number of courts calling themselves family courts and domestic relations courts do not have as extensive a jurisdiction as outlined above. With a few exceptions they are juvenile courts enlarged to apply social service principles to other family members and matters. The most conspicuous omission from their jurisdiction is divorce which, next to juvenile delinquency, presents the greatest challenge to the integrated court.

The right of these courts to use the name "family court" is not questioned, but there are those who think that name should connote the fully integragrated court. In 1953 the late Charles L. Chute wrote :

"It would be well if all states would agree to apply the

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sociation (1951); Journal of the American Judicature Society, Aug. (1952); Federal Probation, Sept. (1952); Brief Case, National Legal Aid Association, Feb. (1953); **Gellhorn,** Children and Families in the Courts of New York City (1954); **4 Sheridan & Brewer,** the Family Court 68 (1957). Several, e.g., habeas corpus, partition, declaratory judgments, would hardly be listed in a family court statute. Where the family court is a division of the trial court of general jurisdiction as in Ohio and Oregon, it already has all the original trial jurisdiction there is, civil, equitable, and all cases involving peculiarly family problems are routinely referred to and docketed in the family court division. This avoidance of all jurisdictional problems is one of the reasons the American Bar Association's committee on family courts has always recommended there be a division of the trial court of general jurisdiction.

2) **Virtue,** Survey of Metropolitan Courts-Detrooit Area (1950). See also: **Alexander,** supra note 1; **Gellhorn,** op. cit. supra note 1; Community Service Society New York, A New Pattern for Family Justice, Mar. (1954).

3) **Chute,** Divorce and the family Court, 18 Law and Contemp. Prob. 49, 65 (1953).

name family court only to courts having complete family and juvenile jurisdiction, including divorce, and the more limited title, domestic relations court, to those having jurisdiction only in family matters other than divorce."[3]

The American Bar Association's Special Committee on Divorce and Marriage Laws and Family Courts since 1948 has considered the family court to be one in which complete family jurisdiction ,including juvenile delinquency and matrimonial actions, is integrated.

But it takes something more than a mere concentration of jurisdiction to make a true family court. The power must be undergirded by purpose and implemented by people. The purpose : to supplement legal science with other social sciences so as to help the court's clients with the kind of help they need. The power : ample legal jurisdiction and authorization. The people : a staff of specially trained and skilled experts in various social sciences and disciplines. A fourth "P" should be added : Plant. The place where the people have to work has a direct bearing on the results produced.[4]

This general philosophy is familiar to those who are acquainted with the juvenile court movement in the United States. There is little new in its application to most family cases. What is new and therefore appears to be of special interest to us at this time is the growing effort to apply it to the law of divorce in the family court.

JUVENILE COURT PHILOSOPHY APPLIED TO MATRIMONIAL ACTIONS

We had not been long in our court before it became painfully clear that the results it produced were a strange admixture of good and evil. Sitting one day in juvenile court, the next in a conventional, traditional divorce court, the contrast was appalling. In the former we were generally able to do a fairly respectable job on the wayward youngster and his family; in the latter we would only

4) For suggested steps to be taken toward developing the Family Court, see Id. at 62.

sit and stare stupidly at the senseless exhibition of shadow-boxing put on for our sole benefit, the sham battle against the little man who wasn't there. The one process was constructive, the other, destructive.

The notable difference between the results produced in juvenile and divorce cases was, of course, directly due to the almost antithetical differences in the philosophies, functions and facilities of the prototypes of the two courts. The youthful juvenile court, unfettered by tradition, unhampered by centuries of experience doing things the hard way or the wrong way, with freedom to employ the trial and error process (always within constitutional limits) had a simple and peculiarly Christian philosophy : to bestow upon the errant child the same treatment and discipline that would be afforded by wise and benevolent parents, which, of course, includes loving care and kindness and supplants punishment (hurting) with discipline (teaching). Its main function : to provide whatever course of action appears to be for the best interests of the child and society. Its facilities : a staff of probation officers, social caseworkers and others trained and experienced in various social sciences.

While sitting as a divorce judge about all we accomplished was the burial of a dead marriage—often of a marriage so long dead that its decomposition had become socially and morally malodorous. That in itself tended to protect the institution of marriage and would accomplish a useful purpose, although the method employed always did seem a little like taking a sledgehammer to crack a peanut. One trouble is that, as every divorce judge knows, there are far too many cases where he is morally certain he is being called upon to bury a live corpse.

The divorce court appears to have inherited from the ecclesiastical courts, Anglican as well as Roman, not the basic Christian philosophy of love and forgiveness but the ancient pagan doctrine of guilt and punishment. Perhaps the early bishops in granting their separations *a mensa et thoro* were impelled by considerations of theology to call down the wrath of God upon a spouse who broke his marriage vows and punish him by depriving him of his marital

status. There are only one or two things slightly wrong with that concept when applied to this day and age of absolute divorce: it is utterly ridiculous to call it punishment for the offending spouse when more times than not he too is anxious to be free from the hypothetically innocent spouse. And if there be such a thing as a truly innocent spouse, and if legal recognition that a marriage is defunct be indeed punishment, it would appear a little rough on the innocent spouse to punish him along with the guilty one. Ideally they should leave the innocent one married by divorcing only the wicked one !

Or, perhaps the early bishops simply found it less distasteful to grant a separation of what they believed God had joined together it they could blame it on some form of marital sin. At any rate they had plenty of precedent for putting a spouse away for cause, some of it dating back to the beginnings of history. And, of course, the bishops did not realize they were setting such an easy, withal paradoxical pattern for divorce *a vinculo* in the secular courts in the years to come.

Thus the divorce court's function became mainly to adjudge guilt and administer pseudo-punishment. It spurned the aid of social work and all the social sciences. In this atmosphere it had to take on the problems of child custody, support, etc., and look after the remains of the broken family as best it could.

Our Japanese brethren have clearly sensed the contrast between the approaches of the broken family as best it could.

Our Japanese brethren have clearly sensed the contrast between the approaches of the old divorce court and new family court and have expressed it so neatly and simply we can do no better than quote :

> "In regular court procedure, whether criminal or civil, it is the aim of the Court to establish a certain fact which happened in the past and apply laws thereto, while, in the procedure of the Family Court, whether it involves a family case or a juvenile, the Court attaches more importance upon how to maintain the peace and happiness of the family involved or

how to adapt juvenile delinquents to normal social life than upon how to simply establish a past fact. For this reason, its procedure has the following characteristics :

"(1) The procedure is held informally, those concerned sitting around a table and the whole procedure is conducted in a very free and congenial atmosphere.

"(2) The procedure, being held in closed session, is not open to the public and the private affairs of the parties and other persons are kept strictly secret.

"(3) The parties and other persons involved must personally appear in the court for this procedure. Most of the cases are handled without the intervention of attorneys.

"(4) It emphasizes social investigations and physical and mental examinations rather than legal technicalities."[5]

We have all had it dinned into our ears that juvenile delinquency is the product of broken families. So when we donned our judicial robes in 1937 each time a divorce case was set for hearing we had our juvenile records searched to learn if that family had had previous contact with the court. It soon became apparent that roughly one-thid of all divorce seekers were already known to the court, occasionally as juvenile delinquents, more often as the parents of delinquent, neglected or dependent children. One year it was nearly 40%.

These old records are, of course, made available to counsel and are not used to determine whether a divorce should be granted or denied. The attorney sees to it that sufficient evidence is adduced in open court to leave the judge no alternative in that respect. But the background facts revealed by the old records have saved both counsel and court many a grave mistake in disposing of the ancillary issues : Children, visitation, support, property, income, etc. Occasionally the reveal something very important, e.g., the existence of a child unknown to counsel and not mentioned in the

5) A Guide to the Japanese Family Court, General Secretariat, Supreme Court of Japan, Mar., 1953, p. 8.

divorce pleadings, a child whose support the parties would prefer to escape.

In more than 20 years and 40,000 cases, not a single objection has ever been voiced to this practice, which was really the start of the court's efforts better to understand the unhappy spouses before it.

Then in 1938, the second year of our tenure, Ohio enacted a law authorizing the court to investigate, among other things, the character, family relations and past conduct of the parties, in all divorce cases. Next morning a caseworker was assigned to the matrimonial department to make these investigations. Later, as the work developed, the workers came to be known as marriage counselors and the court to be known as a family court. In 1951 a new law made the investigations mandatory in all cases involving a child under 14.[6] This strengthened the hands of the fiscal autorities somewhat so that although we had been struggling along with one to three counselors, by 1956 we were enabled to finance six highly-trained counselors, still only about half enough.

This department lifted bodily the main features of the philosophy, methodology and procedure of the juvenile court and adapted them as far as possible to matrimonial actions. Among the specific services offered directly or by referral are medical, psychological, psychiatric, economic, educational, social casework and marriage counseling of both the non-directive and advice-guidance types. The family being a fictitious entity like a corporation, these services are offered as needed to the individual members thereof with a view to protecting and promoting the stability of the entity.

During the course of the divorce investigations it seems to happen with surprising frequency that a few innocent remarks about marriage counseling are dropped within hearing of a litigant. Often nothing happens but once in a while that bearish exterior will

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6) See **Brooks**, Mandatory Investigations in Divorce Cases, 24 Ohio Bar 581.

break down and the litigant will ask for an appointment—and what's more he will keep it ,and several more. Granted, it is only rarely that this gentle exposure to counseling gets through to the more hard-bitten clients, but when it does, the results may be expected to be positive.

POSTULATES FOR FAMILY COURTS

The genesis of most family courts has not been dissimilar to this. Most are based on rather simple enabling statutes.[7] Their policies and practices are governed by a number of informal but generally recognized postulates or guiding principles :

1. Persons scourged by domestic discord, whether or not involved in divorce litigation, an very apt to be in need of guidance and help of various kinds in addition to that available through the impersonal, judgmental and punitive processes of the law.

2. Such persons are almost never aware of the many varieties of help available, in court and out, and seldom have a clear idea of the particular kinds of help suited to their individual needs.

3. Many ostensible divorce-seeks, including a considerable portion of those who have filed actions for divorce, do not in the last analysis desire divorce.

4. The reuniting of an estranged couple, upon discovery and treatment of the true causal factors, is always a desirable goal. Even when unattainable, the insight gained by the parties may help them live at peace with their children, their communities and themselves.

5. Divorcing couples have usually had more than their share

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7) A number of caparatively elaborate bills to create new courts were introduced in several state legislatures early in 1957. We have not learned that any were enacted into law. Integrated courts have been functioning for some time in Ohio, Oregon, the Carolinas, Lousiana, Texas and elsewhere. For descriptions of a number of so-called family courts, many lacking divorce jurisdiction, see **Chute**, Divorce and the Family Court, 18 Law and Contemp. Prob., 49, (1953).

of the intra-familial warfare; the accusatory approach, the adversary procedure of the divorce court fans the flames and tends to nullify helpful efforts and should therefore be displaced as far as possible by the nonadversary,

6. The entire court must be on the alert to see that no person is permitted to profit by his own wrong and that no advantage is taken of the weak or helpless members of the family.

7. The position of the lawyer is protected by taking him completely into the court's confidence. The judge may see and hear nothing to which the lawyer does not have access. The lawyers may becme allies, invaluable to the court in working with some or all members of the family.

8. Persons seeking help before litigation is commenced should be referred to other proper agencies unless there is grave danger the client will not actually accept the referral. Post-litigation cases also may often be referred to the mutual advantage of client and court.

Some of these principles are simple and easy of application. They seem to fit with perfect ease and naturalness into the scheme of things. This is more easily realized of we bear in mind a few little verities of divorce that are more or less common-place to the court practitioner but seem to be less often brought to the attention of scholars, teachers and writers, through no fault of their own.

For example, in one American city of less than half a million where the court has been struggling to operate a marriage counseling service with what counselors it can obtain, the unhappy spoures have for the past five years been filing an average of 2100 divorce cases annually. Nearly twice that number of individuals it is claimed walked in voluntarily "to see the Judge" or anybody who will talk to them about their marital maladies. Added to that, approximately another 4,000 are said to telephone for appointments for the same purpose. Is it supposed they walk in or phone in for divorces ? Not at all. They are hoping to avoid divorce.

Another little phenomenon : Divorce courts in many parts of the United States report that approximately 30% of all cases filed

do not end in divorce. The petitions are dismissed voluntarily by the parties, or by the court for want of prosecution.[8] This 30% figure is remarkably common and in Ohio at least has remained fairly constant throughout the counties and throughout the years since 1875 (as far back as we have checked).

The natural inference would be that 30% of the divorce cases are hastly or ill advised. There is much truth in that. Bu there is little truth in the converse conclusion that all of the remaining 70% of divorces which are granted are proper or necessary.

Plaints of all sorts greet the judges of the family courts. Some are so common they seem to ring in our ears: "I didn't want no divorce, I was just trying to bring him to quit drinkin' and come home." "divorce won't do me no good, I want him to bring his pay check home;" "If you'd only make her quit that factory job we'd get along swell; " "Judge, will you help me get back my refrigerator?"

One or two things emerge rather clearly : Not everybody who appears to be demanding a divorce really wants one. You can't judge by how loudly they yell. Of those who think they want divorces, a great many would be better satisfied with some other form of relief. The overt acts, the superficial symptoms mostly fall into stereotyped patterns; the underlying problems, the causal factors, vary considerably. What is one litigant's meat is another's poison. Some hate bitterly, are bent on revenge. From that the range all the way to moderate indifference. One demands his divorce by two o'clock Tuesday. Another lets his case lie dormant for years in a lawyer's office or court files. Rigidity, hard and fast rules, give way to flexibility, finesse. Discretion is called for.

The " traditional psychological basis of law that man is a responsible being able to choose his own ends and make his own adjustments"[9] doesn't seem to hold up in a considerable proportion of family court cases. Perhaps the trauma of domestic dishar-

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8) See **Porkorny**, Amicus Curiae, 2 Va. L. Weekly Dicta Comp. 66, 71 (1949-50).

9) Ryan, Book Review, 2 Villanova Law Rev. 588 (1957).

mony so disturbs the emotions of the spouses that their judgment becomes unsettled and they are unable to think and decide rationally.[10]

The hasty divorce is as indefensible as the hasty marriage. The parties' notorious impatience may be overrated. It is far from inexorable. In a state which has a six weeks' waiting period, some judges by rule of court have extended it to six months and nothing has happened. Others have effectually countered the "quickie" divorce by being too busy to hear cases in less than six months, and there have never been riots or summonses in mandamus. As one lawyer has said : " It's simply in getting the people used to the idea it takes six months to get a divorce."

Some years ago the number of victims of marital discord seeking marriage counseling from a large private agency was compared with the number of divorce cases filed in that community and the ratio was found to be approximately one to thirty. This figure is not statistically valid but is cited as indicating that at that time probably many more people took their family troubles to the lawyers than to the private agencies.

THE ROLE OF THE LEGAL PRACTITIONER

It would appear unduly optimistic to look to the bar to screen out the unwanted, unnecessary and undesirable divorces. In contrast to members of the " divorce bar ", the scrupulous, conscientious lawyer is rarely besought for divorce. When he is, he brings to bear a world of common sense and sagacity along with his strategic and purely legal abilities. Above all when *he* is stymied he does not hesitate to call upon exponents of other social sciences. But sad to relate, most of the truly high grade lawyers disdain divorce ; even for the daughter of a wealthy client they prefer to leave it for one of the younger men to handle.

There is some evidence to indicate that about eight per cent

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10) For an interesting article on a possible solution to the impulsive divorce problem, see : **Starr**, Divorcees Anonymous, supra note 8 at 59.

of the lawyers handle about 80% of the divorce business in some cities. For them divorce is their rent, their stenographer's salary, their baby's shoes, sometimes their solid gold Cadillac. The simplest uncontested case is generally worth a couple of hundred dollars; a case involving even a moderately well-to-do husband accused (not necessarily guilty) of infidelity is ordinarily worth a few thousand to the lawyers. How unrealistic to expect them to forego anything like that for mere considerations of ethics or morals.

Is it equally unrealistic to expect to do anything about these unwanted, unnecessary and undesirable divorces through some avenue other than the attorneys? For example, through workers stationed in the court? Of course, we must expect our share of critics and conscientious objectors, given to finding fault, not with what the court is trying to do, but with the fact it is the court and not somebody else who is doing it.

Most social workers understand the family court's services are designed to supplement not to supplant the work of the family service and other agencies. They know there is more than enough business to go around. The fact that the great bulk of the court's work would be called non-judicial doesn't worry them. They know the great bulk of the standard juvenile court's work is non-judicial: that social work is the very heart and soul of the juvenile court. They know it is social work in the form of pre-sentence investigations and probation that has lifted more than one criminal court to a plane of eminent respectability.

No, it is not the social workers but some of the lawyers who profess to be bothered by the spectacle of social work in a court; mostly, some legalists, some ultra-learned judges and a few bar-association workers. As we have said elsewhere, " They seem to be equipped with a sort of built-in Geiger counter capable of detecting the slightest trace of social work anywhere in the scheme of things—and for them it spoils the whole do."[11]

The advantages of locating these services in the court seem to us sufficiently self-evident to require no laboring. Whether people

11) **Alexander**, A Section of Family Law, 42 A.B.A.J. 733 (1956).

come to court voluntarily or are brought there by summons, many of them are asking for bread. Would our brothers in the law have us give them stones? Yet a stone, divorce, is the only remedy legal science has contrived in all the centuries.

Law and courts are instruments of social control. Granted, at first blush it may seem anomalous to design and instrument for the sole purpose of administering the *coup de grace* to a defunct marriage, of cutting off the head after the heart and every other organ has gone permanently out of it, then turning around and authorizing and equipping that same instrument to try to discover and resuscitate a spark of viability and to render divers social services to members of the family.

OBSTACLES OF THE FAMILY COURT

Is it any less anomalous for the law and the judges or reviewing courts to proclaim their allegiance to the institution of the family, then turn around and place every conceivable obstacle in the way of those called upon to discharge these difficult and delicate duties involved in salvaging floundering families ? Yet that is exactly what legislatures and courts have done. They have set up an obstacle race. They have said, in effect : " Sure, help save all the families you can. Bu for old times' sake you will, of course, have to meet all the traditional obstacles to happy family life."

These traditional obstacles against which the family court must race are found in both the substantive and adjective law of divorce. Among them are the concept that divorce must be predicated upon fault or guilt; the accusatory approach; the adversary procedures from the caption of the original pleading, through the evidence and the final decree ; the doctrine of condonation; the doctrine of recrimination; the doctrine of collusion as so frequently misapplied ; and in places where the family court movement is not yet recognized, the denial of necessary jurisdiction and implementation. We shall revert to some of these later.

But obstacles or not, anomalies or no, it does seem shortsighted to ask the family court to make the same mistake some so-

cial workers have been known to make. We once heard a group of social workers bemoan their ill fate for preparing a feast, beating the dishpan and crying : " Here it is ! Come and get it !" Then they were disappointed because the very people most in need of it passed by on the other side of the street. They simply hadn't taken it where the people were.

Would anyone sugges that the court workers should go along the street pushing door-bells and saying to each housewife: "Good morning, are you having domestic trouble today? We would like to demonstrate our latest model in family service." Somehow we wonder if trying to keep social work out of the court isn't like trying to keep the Salvation Army out of the Bowery or keeping Travelers' Aid out of all the passenger stations.

Why not take the needed service where the people are who need it ? In the simplest military strategy, if the enemy must file through a narrow pass, that is where we concentrate our fire. The merchant with goods to sell doesn't hide them in a side street, but pays high rent to display them on the busy thoroughfare. The manufacturer doesn't post his advertisements in some secluded, out of the way spot, but beside the broad highway for all to see. And the State which honestly wants to pay more than lip service to the stability of family life will not sit silently in the side street and wait for the victims of marital malaise to find their way to the clinic; it will place its help where it will not be by-passed or side-stepped, to wit, right in the middle of that harrowing highway down which these unhappy victims are lugging their sick and moribund marriages for legal interment by the divorce court. Right in that court—where the people are—that is where the State will set up and offer its ameliorative services. Perhaps some day the people will learn to turn first to churches and private agencies for help Until that happy day arrives it looks as if the State were stuck with this obligation, and presented with this opportunity.

Reverberations still resound of *Dishonest Divorce*, Reginald Heber Smith's classic excoriation of the law of divorce.[12] This

12) Atlantic Monthly, Dec. 1947.

expose aroused the nation to the evils inherent in the law itself and led to numbers of books and articles and unnumbered speeches, all of similar tenor. These pretty well convinced people that the laws governing divorce are positively repugnant to the high purposes of the family court.

FUNDAMENTALS OF THE MARRIAGE STATUS

Since many feel the family court movement has possibilities for good and the law of divorce is fraught with evil which militates against the good, it might pay us to take a brief excursion back among the fundamentals to remind ourselves what the law is called upon to do, what it needs to do and how it does it.

And since the family is founded in marriage, and since it is the marriage failure which causes the broken family which, nearly half the time, may lead to the divorce popularly regarded as the greatest enemy of family life, let us start with a glance at marriage.

Essentially marriage is " the legal union of a man with a woman for life."[13] It is a union, a joining together. The State does not join the partie together. They join themselves together. The State licenses the union, the church blesses it. The State does not interfere with the religious aspects of any marriage ; it regulates only the civil aspects. Such regulation in the United States is generally accepted.

As Ibsen in *Love's Comedy*, Shaw in *Getting Married*, and many others have made clear, the spectacle of the male pursuing his mate seemed more and more unbeautiful as civilisation progressed. It was to counteract the supposedly ugly facts of life that the "doctrine" of romantic love grew up and flourished and now holds completesway over the minds of the people. How true that "All the world loves a lover!" If the parties are "in love," that alone is sufficient to sanction their marriage ! The slightest pebble put in their way is a sin and a shame.

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13) Century Dictionary.

But alas, the State would not recognize true love standing before it seeking a license to legalize a union. It has no way to distinguish between love and lust, and apparently has never felt the need to develop any. It seems not to care whether what it sanctions will prove to be a real marriage or merely licensed fornication. Even so, there could be no guarantee that the truest loves would endure for life, or would never degenerate into "unbearable" boredom or into malignant antipathy.

All the State requires, generally speaking, is such things as: the parties must be unmarried, of a certain age, not closely related to each other, free from insanity and syphilis, and syphilis, and must have two dollars to buy the license.

But along with such scant prerequisites Society imposes some definite post-requisites, or conditions subsequent. In effect it says to the contracting parties : " Regardless of how you may feel about it, Society expects you— from now on in—to perform certain functions. It expects you not only to dwell together but to live together, to eat together, to sleep together, to mate together and solely together, to procreate together, to rear and nurture children together, to work together (the husband mainly outside the home, the wife mainly within it, but at any rate toward common family goals), to maintain and suport each other and the family together to worship together (preferably), to play together, to socialize together ,to vacation together, to give together, to rejoice together, to suffer together, to develop and grow together."

Togetherness is the quintessence of marriage. These are the main functions of marriage. When *none* of these functions is functioning the marriage is defunct. When togetherness is permanently and totally terminated there is no longer any civil marriage. The fact ,the reality, the vitality of that marriage is extinct. All that is left is something intangible, invisible, impalpable, the *legal* bond of matrimony, the *legal* status. The marriage which bride and groom made into a living fact has become a purely legal fiction.

Of course the law, recognizing its own limitations, does not try to enforce specific performance of the marital obligations which the spouses undertook to each other or which society or religion

imposed on them.[14] It knows you can't make two people continue to love each other, or live together if they or either oof them no longer wants to. It can't compel them against their wills to live up to their ethical, spiritual or religious obligations. The law learned early that you may lead a horse to water but you can't make him drink.

Those obligations which the law does undertake to enforce are mainly of an economic nature. Their enforcement is provided for in independent actions (civil ,in personam or criminal) or as incidental to matrimonial actions. Even these are generally not enforced specifically but mainly through threat of punitive measures. For example, a husband abandons his family; he is not compelled to return to it but merely is liable to imprisonment for failure to support it.

Society generally adheres to the ideal that marriage should be a union for life and the books abound with pious pronouncements that the law abhors broken families and the often concomitant divorces; although the law has been strangely slow in acknowledging that the divorce is the effect, not the cause of the broken family. (In one sampling of 20,000 cases the parties had been separated, the families broken an average of over two years before coming into court for the divorce.)

At the same time American society, speaking through its state legislatures and the congress, recognizes something inherently evil in marriage which is no longer a marriage but a legal fiction. Whether out of considerations of equity and justice or just plain sympathy for the suffering spouses, or as a prophylactic against the socially septic mess generated by the defunct and decaying marriage—whether either or all, society has duly voted to clean up the domestic debacle and provide for the legal interment of the potentially infectious remains by the issuance of a burial certificate in the form of a divorce decree.

Although the State empowers some judges to issue marriage licenses and some to "marry" licensed couples, these functions are

14) Custody orders appear to be a notable exception.

administrative rather than judicial and have always been so regarded. But within the past century, more or less, the simple revocation of a marriage license, the unmarrying of a still legally married couple, has been transformed into a judicial function by our legislatures. Was their prototype civil contract ?

There is a crucial distinction between civil and marriage contracts. In the former there is no restriction upon voluntary rescission or modification; in the latter either is frankly forbidden. This Little item is mentioned to remind ourselves that, because of the inescapable differences between the two, the principles governing conventional actions for breach of contract do not lend themselves to divorce actions.

THE ANOMALIES OF THE GUILTY SPOUSE AND THE ACCUSATORY APPROACH

But whether we believe our legislatures intended divorce to follow more or less the established patterns of the law of contracts, torts, property, partnership or nothing at all, they have pretty well succeeded in making divorce a misbegotten action sounding in criminal law. All that is needed to win severance of the bare marriage bond is to prove the defendant *guilty* of a statutory ground for divorce, ordinarily something commonly regarded as another name for some form of sin.

One trouble with guilt as the criterion of divorce is that it virtually assures the mortally feared and hated "divorce by mutual consent." Few things are easier of proof than the fault of the other spouse—especially if he isn't there to answer the charge, as is true in 85% to 95% of cases. That is why it is proclaimed with such verisimilitude that we now have divorce by mutual consent in almost all jurisdictions.[15] Outside New York State (where there are said

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15) See Very Reverend **James P. Kelly**, J.C.D., long-time official of the Tribunal of the Roman Catholic Archdiocese of New York, Catholic Law, Va. L. Weekly Dicta Comp. at 17, wherein Monsignor Kelly writes :

"Now, at least in this country, divorce with the right to remarry has almost become the rule rather than the exception, and is granted for the most trivial reasons or in reality at the will of the parties."

to be 155 unofficially listed grounds of annulment to compensate for the single divorce ground of adultery) one almost never hears of an earnest divorce seeker being thwarted. Plaintiff usually has little trouble recalling a plethora of nasty things to say about defendant spouse, with witnesses to verify them, and if, as happens once in a great while, the vital vitriol is in short supply and the court is unconvinced ,plaintiff merely profits by the experience and comes back later to the same or another court, with the same or another lawyer, and this time loaded with enough evidence of atomic efficacy to divorce a whole regiment.

Not infrequently when the divorce is refused because the fault appears to lie with the plaintiff, the defendant comes in later seeking the divorce. When in a contest neither is guiltless, the less guilty party oftens waits or a short interval, then comes back with newly developed grounds and usually without an adversary. One court battle is bloody enough for both. If the court won't dispose of their differences they go out and settle their own. After spilling all that blood, "divorce is cheap at any price." So almost always in the end it turns out to be the dreaded divorce by mutual consent.

When domestic discord strikes at family life few things could be better calculated to intensify antagonism than the cruel and senseless system which requires one spouse to attack the other in pleadings open to the public press, to bring witnesses into court to expose sin and shame, and to air his own unsavory accumulation of dirty linen.

Adversary procedures mean that no spouse may with impunity neglect the slightest grievance or overlook the smallest offense. He must store them up in his memory and harbor them no matter how much they may fester ,for if worst comes to worst and his marriage turns out to be that one in four which is destined for the divorce court, he will fare ill unless he can dredge up from his storehouse of iniquities enough raw material to be worked over by a skillful lawyer into grounds for divorce. The minute they quit tearing at each other's throats and sit down to talk things over sensibly so as to settle the conflict, peaceably, they risk losing out entirely through the doctrine of collusion.

Of course, forgiveness may be fatal. The Christian principles of confession, repentance, forgiveness have no place in divorce court and their exercise in the interpersonal relationships which constitute the marriage may be fraught with risk. The husband who has strayed off the reservation and repented, and now wants to confess and seek forgiveness gets scant encouragement from the law. He would be furnishing his wife with a devastating weapon against himself simply because the law makes evidence of such guilt a ground for divorce. And on the other side of the picture the wife may be damaging her position by forgiving the husband, thus affording him the defense of condonation to use against her.

The instant either of them looks to the law for relief he must put aside all thought of confession, of making amends, of concession, of forgiveness. He must start out with accusation. Then he must maintain an attitude of antagonism. The stricter the law the more he must pile accusation on accusation.

Each fresh accusation drives the wedge deeper. But that is the only way to meet the law's demands. Guilt ! That is what the law wants to hear about, to ferret out and to punish. Sin! That is at once the cornerstone and the keystone of the structure of the conventional divorce court. It has no room for, indeed it penalizes such simple virtues as kindness, symapthy, magnanimity, understanding, mercy, considerateness, unselfishness, honesty. The more the evidence of guilt piles up the more fully is the law satisfied. And honest efforts at marriage mending or amicable adjustment will continue to be frustrated by the law itself as long as the criterion of guilt prevails with its [illegible] of the accusatory approach and the adversary procedures.

BIPARTISAN DIVORCE

Which is cause and which is effect is hard to say. Whether society or religion or both crave a worthy spouse to extol and a wicked spouse to condemn and therefore demand the guild test and the adversary proceeding ; or whether the law, being saddled with the same antiquated, adversary procedure and task of finding guilt, takes for granted that one spouse is innocent and the other

guilty—in any event there is no room for neutrality, impartiality. The law is bound to become *for* one and *against* the other. It must find one guilty and grant the divorce against him and in favor of the other whose innocence is not attacked.

Now, when they got their marriage license and were united in wedlock, Jane wasn't married to John a bit more than John was married to Jane. There was just one joinder, one union, each to the other. By what warrant must the disjoining, the disunion be otherwise? It so often happens there is little to choose between them.

Twenty-five years ago our predecessor on the bench was so vexed by a knotty case that he gave up in despair and granted the divorce to both parties. We recall with what wicked glee we seized upon that case in our election campaign against him and pointed out how our supreme court had roundly spanked him for such a comeuppance! Alas, we were old enough to know better, but were too inexperienced, too green to sense the wealth of wisdom that lay behind that poor judge's gesture.

According to the daily press the same idea has invaded Los Angeles. On July 31, 1957, a superior court judge, in a last ditch effort to settle a case which for the sake of all parties simply had to be settled, granted the divorce to both parties.[16] (We fervently hope he fares better than our poor predecessor!)

After all, why shouldn't he be allowed to do this? What virtue lies in preferring one over the other? In those few states where certain post-divorce rights depend upon a finding of innocence, one wonders how they dispose of the myth of the innocent spouse[17] and whether such complete "innocence" isn't more likely the fruit of superior strategy in the court room. And in a relationship where interaction is never-ending, where the dynamics of inter-personal relationships are in play constantly, what chance does the clumsy, adversary, litigious process have of distinguishing cause from effect and of arriving at the subtle truth?

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16) **Birnett Wolfson, J.**, in Fuhrman v. Id., unreported.

17) See **Bradway**, The Myth of the Innocent Spouse, 11 Tul. L. Rev. 377 (1937).

Even if for some obscure reason the practice of making emotionally bedraggled spouses into winner and loser be defensible, experience has shown that it often tends to increase the rivalry and hostility and thus to thwart bona fide efforts to protect the members of the family and preserve the family life.

Another item, in itself of no earth-chaking consequences : we were always instructed that an action for divorce was an actio in *rom*. The *res* was the marriage status; occasionally the vinculum was. The gist of the action was the dissolution of the status or ie status or the severance of the bond.

Divorce (without alimony, custody or other incidentals) did nothing to the person, issued no mandate or other form of personal judgment, but operated solely upon the *res*. This is the only hypothesis upon which we have ever heard constructive service justified. Yet in every case the law is false to this theory when it pits spouse against spouse in caption, in pleadings and throughout the proceedings. This is mentioned merely to remind ourselves how logical and natural it would be for the law to revert in fact to what it is supposed to be in theory.

CONCLUSION

There is little likelihood of supplanting the adversary procedures and the accusatory approach with something less contentious and more conciliatory so long as guilt or fault prevails as the criterion of divorce. What are the chances of basing divorce on something else, something more logical and less destructive, e.g., upon the total and permanent termination of all functions of the marriage?

Well, that idea is far from new. In a federal case we read of " the legal recognition of the proposition long established in the earlier Danish Law of the Virgin Islands that if the parties are so mismated that their marriage *has in fact ended* as the result of their hopeless disagreement and discord the courts should be empowered to terminate it as a matter of law."[18]

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18) Burch v. Burch, 195 F.2d (3d Cir. 1952). (Emphasis added.)

The same idea obtains in the Scandinavian countries, Belgium, Switzerland, Uruguay and formerly held in other European countries, where a factual separation for a given length of time was considered evidence the marriage had come to an end, so as to authorize divorce.[19]

And it has now pervaded at least 20 jurisdictions in this country where the laws consider that having lived apart for periods from two to ten years is sufficient to warrant the assumption that all functions of the marriage have been permanently and totally terminated : Alabama, Arizona, Arkansas, District of Columbia, Idaho, Kentucky, Louisiana, Maryland, Minnesota, Nevada, North Carolina, North Dakota, Puerto Rico, Rhode Island, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming. In each of the jurisdictions the fact of the separation without more, without alleging or proving any guilt or fault, is now sufficient to authorize granting divorce to either party (but not yet to both).

Substitution or something like this for the subsisting state of affairs is cogently championed by Professor William E. McCurdy of the Harvard Law School :

"The most serious defects in divorce law and administration stem from predicating dissolution on fault of one party, freedom from fault of the other, and, the concept of fault having been satisfied, in not requiring any objective assurance of irreparable disruption.

"Civil society in the interests of its basic family stability should not encourage impairment of marriage as an institution by sanctioning hasty dissolution grounds or by formalistic administration. Neither should it adopt too rigid policies that may result in meretricious relations, which would also be an impairment of the institution. A rational and realistic balance should be sought between the individual interest in a particular marriage and the interest of society in marriage in general. This balance can be reached, it is believed, by an insistence on dissolution divorce *only for per-*

19) See **Rheinstein**, Marriage and Divorce Law of Western Countries, 18 Law and Contemp. Prob. 3 (1953).

manent marital disruption. A discarding of the concept of fault, either within the framework of conventional grounds or by providing for non-fault grounds, would not only make the grounds more consistent with dissolution but together with the removal of the application of bars such as connivance and recrimination would also reduce marital stalemates, minimize the problem of noncontested disposition, and make collusion largely obsolete. A reasonable period of continuous disruption would be indicative of its permanence and should be a condition precedent."[20]

While waiting for that happy, lucid interval to descend upon us the family courts will continue to struggle against the obstacles. They will try to win the obstacle race. Since all marriages destined for ultimate burial and many merely sick ones are channeled through the courts they will continue to try to sift the utterly defunct marriages from the merely ailing, and when they discover the not too infrequent spark of viability they will go to work thereon. And even when they do not succeed in reuniting the disunited they may succeed in helping a party to learn to live with himself in spite of himself. They will try to help those in need of help with the kind of help they need.

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20) 9 Vand. L. Rev. 706 (1956). (Emphasis added.)