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## ABOLISH FAULT-ORIENTED DIVORCE IN OHIO—AS A SERVICE TO SOCIETY AND TO RESTORE DIGNITY TO THE DOMESTIC RELATIONS COURTS

*John D. Cannell\**

A PROMINENT COMMON PLEAS JUDGE, who for 10 years has been presiding in the Domestic Relations Division of the Court of Common Pleas of one of Ohio's more populated counties, was recently heard to say: "Ohio's divorce law is hypocritical, lousy and archaic." About Ohio's divorce laws it has also been said: "Perhaps there is no statute in Ohio more abused than the statute concerning 'divorce and alimony.' Perhaps there is no statute under which greater imposition is practiced upon the court and more injustice done to individuals." These were the words of Judge Hitchcock of the Ohio Supreme Court<sup>1</sup> in the year 1832.

In one hundred and thirty-eight years, we have retrogressed with divorce laws which, when Ohio was but an infant, were evaluated as an imposition on courts and unjust to litigants, to a current appraisal that they are "hypocritical, lousy and archaic." The impact of such laws upon society is not of little consequence. Judge Robert L. Hunter, Presiding Judge, Divorce Division, Circuit Court, Cook County, Illinois, wrote in his annual report for 1969:

Divorce litigation is probably the most serious litigation that people can engage in. It involves the breakup of their homes, the custody of their children, their support and maintenance, the division of their property and the education of their children. Every facet of human life is involved in divorce litigation. In many cases, the emotional, physical and financial well being of the litigants are involved. For these reasons divorce litigation must be handled carefully, patiently and with great consideration for minute detail. Judges hearing divorce cases are not determining property rights alone; they are determining human rights.

Yet, when Ohio divorce litigants are frequently most in need, the courts must deny them help. That's the precise quandary to

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<sup>1</sup> Harter v. Harter, 5 Ohio 318, 319 (1832).

which the trial courts of Ohio find themselves shackled by present divorce laws and decisions of the courts. Witness the husband and wife who, in obedience with the fault concept upon which our courts must predicate divorce, are forced into a muckraking contest which leaves them both tainted and scarred—and embittered to the point of hate. And upon having demonstrated beyond any doubt that each has valid grounds for divorce, that they do not want each other, that they cannot live together as man and wife, that they loathe each other (commonly the result of the trial), Ohio's courts say to these people, you must remain married.

When called upon to review a trial court's denial of a divorce predicated upon the rule of recrimination, the Summit County Court of Appeals<sup>2</sup> in 1952 courageously availed itself of the illogic of Ohio's case law, stating:

We have determined, however, that the conduct of each party is shown by the evidence to be such, as to furnish grounds for divorce under the statutes of this state, and therefore, neither should receive a decree.

These are hardly the qualifications our society demands for marriage.

### **I. Case Law in Ohio Breeds Chaos—The Family Most in Need is Most Abused!**

The fault concept in Ohio stems from statutory law, but this is not true of the doctrines of clean hands and recrimination which are rooted in case law. As early as 1826, the Ohio Supreme Court<sup>3</sup> was heard to say:

The complainant must come with clean hands and a chaste character, not stained with the same infamy and crime of which she complains.

That Court, reflecting the rigid customs and puritanically expressed attitudes of the era, admonished that the divorce statute was "intended for the relief of injured innocence" and not for "the convenience of that class of characters" who lack innocence. A precariously lofty position for the courts of Ohio to attain while shutting their eyes to the hypocrisy in which they indulge in the granting of the uncontested divorces.

<sup>2</sup> *Sandrene v. Sandrene*, 67 Ohio Abs. 481, 482 (Ohio App. 9th D. Summit Co., 1952).

<sup>3</sup> *Mattox v. Mattox*, 2 Ohio 234 (1826).

A learned trial judge in Lucas County<sup>4</sup> once expressed himself as follows:

I will say at the outset, that I am not very keen about keeping a man and woman together by the tie of marriage when love is dead. If love is dead there is nothing left of the marriage relation but the ashes of roses, and I can't see why they should be kept tied together, and it has been the policy of this court to establish legally what is already existing as a fact, that the man and woman have been separated and been living separate, and the evidence is that they will not live together again, and can't live together again. If anybody can give me any good and valid reason why the marriage tie should be regarded as binding upon those parties, I would like to know what it is. . . . I do not know why I should keep a man and woman tied together by so-called marriage ties when they are not living together, associating together, or having a word to say to one another, and the only time they can go out is at the risk of somebody's reputation.

But when it came their turn, the Court of Appeals (1929)<sup>5</sup> found their answer to this bit of daring in the language of Supreme Courts of Nebraska and Indiana. The Nebraska court had said "there is still a discernible interval between the statutes of this state and the right of free divorce, which needs to be bridged, if at all, by the legislature and not by the courts." The language of the Indiana Supreme Court<sup>6</sup> was no less confining on the trial courts:

A contract of marriage is not to be viewed by the courts as an ordinary contract, which the parties may at any time agree to rescind. Neither can the court itself, on learning that the parties have had petty quarrels, and have scolded and called one another hard names, come to the conclusion that they would be better apart. Before a divorce can be granted, there must be found an injured party and a guilty party. Society and the state are interested in upholding the marriage relation, and the statutory safeguards thrown around it will therefore be strictly insisted upon. No divorce will be granted except in the manner provided by law.

In 1933, the Court of Appeals for Lucas County<sup>7</sup> referred to a decision of the trial court as "anomalous" although it appeared to be predicated upon common sense and the strict application of

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<sup>4</sup> *Hanover v. Hanover*, 34 Ohio App. 483, 488 (1929).

<sup>5</sup> *Id.*

<sup>6</sup> *Alexander v. Alexander*, 140 Ind. 555, 38 N.E. 855, 856 (Indiana 1894).

<sup>7</sup> *Phillips v. Phillips*, 48 Ohio App. 322 (1933).

the divorce statutes (but avoiding the archaic case law of 1826 and 1832).<sup>8</sup> In elevating itself to the lofty perch of Ohio's earlier courts, it proceeded to state:<sup>9</sup>

The action of the trial court was contrary to the canons of ecclesiastical law as far back as reaches the memory of man. The relation of husband and wife is not merely one of contractual obligations. Marriage arises, of course, in the consent of the contracting parties, but when the marriage rite is consummated a legal status is created which can not be dissolved by the mere consent or agreement of the parties, but only in the manner provided by law. A trial court in a divorce case can dissolve the marriage where a legal ground for the annulment exists, and where the party seeking the decree is not barred by his own act or wrong. Whether the trial court thinks it would be better for the parties to have a decree of divorce is not a controlling consideration. There is involved in every divorce case a question of public policy arising out of the principle that the family relation is the basis of organized civilized society and should be preserved until such time as it appears to the court in a divorce proceeding that a legal right to a divorce has been established. Moreover, the doctrine of public policy is carried so far in its application that the courts hold a party has no vested right to a divorce merely because a legal ground therefor is made out against the adverse party. There must not only be an injured party and a guilty party, but the injured party must be free from fault amounting to a legal ground for divorce before the court is warranted in granting such party a decree of divorce. Of course, an action for divorce is not strictly a chancery proceeding, but the equitable maxim that no litigant will be given relief where he does not come into court with clean hands is applicable to a party seeking a divorce. This principle is the very foundation of the doctrine of recrimination, or *compensatio criminis*, which has come to us from the canon law. The vital legal tenet which this court seeks to emphasize is that the party awarded a divorce must be free from such fault or wrong as would amount to a ground for divorce.

When the parties to this divorce litigation attempted to gain relief under Ohio's divorce statute, the Lucas County Court of Appeals required that they must comply with church (canon and ecclesiastical) law, too—regardless of their own religious beliefs and practices.

<sup>8</sup> Harter v. Harter, *supra* note 1; Mattox v. Mattox, *supra* note 3.

<sup>9</sup> Phillips v. Phillips, *supra* note 7.

In 1935, the Court of Appeals for Ottawa County<sup>10</sup> acknowledged that the trial court "is vested with a rather wide discretion in the granting or refusing of divorce decrees" but then proceeded to narrow that discretion with these words:

The question of comparative guilt can not enter into the granting of divorces by the courts. A court can not find both parties guilty of acts of misconduct constituting a ground for divorce and then grant a divorce to the party the less guilty of the two. One party must be guilty and the other innocent of acts constituting a ground for divorce, before a court can enter a decree.

Two years later, the Court of Appeals for Mahoning County,<sup>11</sup> blind to any obligation to have case law reflect the mores of the times and steadfastly clinging to the laws of a society that passed on more than one hundred years earlier, ruled that "One who comes into court seeking a divorce must come with clean hands, and this doctrine is applicable to both parties to litigation."

In 1945, the Court of Appeals of Hancock County<sup>12</sup> traced the history of the equitable rule of clean hands and the similar canonical doctrine of recrimination and concluded that Ohio's courts have no general jurisdiction in equity and that Ohio statutes do not expressly confer any jurisdiction to employ or enforce either clean hands or recrimination. But this Court of Appeals, not to be denied a means by which it could cling to the case law of yesterday's society, proceeded to rule:

... [T]hat so far as this state is concerned the enforcement of such doctrine by the courts of this state rationally rests on the concept that he who seeks redress for the violation of contract resting on mutual and dependent covenants must himself have performed the obligation on his part, rather than on the equitable maxim of "clean hands."

And then, peculiarly, this Court of Appeals proceeded to find that the plaintiff had not committed any acts which would entitle the defendant to a divorce from her (plaintiff's keeping steady company with a man who was securing a divorce apparently was not such an act) and reversed an obedient trial judge who demanded innocence and thereupon the Appellate Court granted plaintiff the divorce.

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<sup>10</sup> *Veler v. Veler*, 57 Ohio App. 155, 156 (1935).

<sup>11</sup> *Morris v. Morris*, 27 Ohio Abs. 84, 85 (Ohio App. 7th D., Mahoning Co. 1938).

<sup>12</sup> *Opperman v. Opperman*, 77 Ohio App. 69, 74 and 75 (1945).

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However, in 1946, the Summit County Court of Appeals<sup>13</sup> reached back to the Supreme Court decision of 1826 to rule that divorce is only for the innocent, stating:

Unfortunate as it may be for the parties, this state has not adopted the doctrine of comparative rectitude, but has strictly adhered to the rule that if the conduct of both parties to a divorce action has been such as to furnish grounds for divorce, neither of the parties is entitled to relief. Logic cannot permit the weighing of the quantum of guilt and award the divorce to the one less guilty, for to do so would repudiate the principle that divorce is a remedy provided for the innocent.

As was previously indicated, this same Court of Appeals in 1952<sup>14</sup> ruled that where each party is entitled to a divorce neither party shall receive a divorce. This was the same year in which a California Appellate Court<sup>15</sup> failed to see any benefit to (a) the parties, (b) third persons (including children), (c) society in general, and (d) the foundation of all things good, the family, resulting from a court determination that man and wife must remain married, because each has established good and sufficient grounds for divorce. Thereafter, until 1970, California courts employed the less harsh doctrine of comparative rectitude.

In 1956, the Court of Appeals of Fayette County<sup>16</sup> referenced an Ohio Supreme Court decision earlier that year to the effect that a trial court in a divorce proceeding had full equity powers (pursuant to the 1951 amendment to Ohio Revised Code section 3105.20) and thereupon concluded, "We therefore are of the opinion that the 'clean hands' doctrine may again be applied in divorce and alimony cases." (In 1902, the Ohio Supreme Court denied equity powers to the divorce courts and for the next half century the various Courts of Appeal scurried to find other devices which could produce the same result as did the equitable rule of "clean hands.")

Actually, the clean hands rule had never been abandoned by the Ohio courts. With no consideration to the ever changing mores of a society which bore little resemblance to the society

<sup>13</sup> Keath v. Keath, 78 Ohio App. 517, 520 (1946).

<sup>14</sup> Sandrene v. Sandrene, *supra* note 2.

<sup>15</sup> Deburgh v. Deburgh, 39 Calif. 2d 858, 250 Pac. 2d 598 (Calif. 1952). In accord: Phillips v. Phillips, 41 Calif. 2d 869, 264 Pac. 2d 926 (Calif. 1953). Hendricks v. Hendricks, 125 Calif. App. 2d 239, 270 Pac. 2d 80 (Calif. 1954).

<sup>16</sup> Lewis v. Lewis, 103 Ohio App. 129, 132 (1956).

for whom the laws were first conceived, the Ohio appellate courts, resorting to every imaginable guise, have continued to deny a divorce except to an innocent party, with the possible exception of "abandonment or desertion" cases for which the Stark County Court of Appeals<sup>17</sup> suggested there might be relief available for the "welfare of the children and the best interest of the community."

Judge John R. Milligan correctly suggested in 1969<sup>18</sup> that public policy calling for the preservation of the family as the backbone of our society is nowise served by Ohio's divorce laws and observed further:

Denial of relief often condemns the parties to a lifetime of requitted (*sic*) terror. If there was ever any hope—in the public interest—of reconciliation, this hope is surely dimmed when the parties in a prolonged trial run all the dirty linen up the evidentiary flagpole.

With epigrammatic eloquence, Judge Milligan leveled a bold but logical attack against Ohio's fossilized laws stating: "In its current state, the Ohio law is diabolically contrary in both its result and its rationale."

And further along in his assault, Judge Milligan said he

. . . cannot see how public policy or the public image of the law is promoted by blind adherence to an archaic canon of common law and equity denying relief to wrongdoers, particularly where the result is contrary to the mature wishes of both parties and the best interests of third persons, especially children.

It should be noted that dismissal of such cases deprives the trial court of any jurisdiction to make protective orders controlling alienation of property, payment of marital bills, custody of children, visitation of children, support of dependents, or control of tortuous behavior. Such result is certainly not consonant with the public welfare or the exercise of equitable authority.

It is noteworthy that Judge Milligan's devastating assault was contained in an opinion in which he invited review and reversal by the Court of Appeals. And with the swiftest piece of broken field running since the days of Red Grange, the Court of Appeals<sup>19</sup> avoided the opportunity to update Ohio's case law and

<sup>17</sup> Newell v. Newell, 23 Ohio App. 2d 149, 261 N.E. 2d 278 (1970).

<sup>18</sup> Newell v. Newell, 21 Ohio Misc. 2d 239, 243 and 244 (Ohio C.P., Stark Co., 1969).

<sup>19</sup> Newell v. Newell, *supra*, note 17.



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resorted to a technicality—if you will, a distinction without a difference—to reverse the trial court because that court's denial of divorce is not "compelled" in the situation of "abandonment or desertion." The Court of Appeals, however, was careful not to order a decree of divorce; instead it remanded the cases (there were three involving the same question of law and similar facts) for further proceedings "according to law." This was the unfortunate result even though the reviewing court apparently had been carefully presented with tools for making a final disposition.

With the trial court presenting the cases in their most cynical gowns, the Court of Appeals skirted the numerous earlier decisions of its sister courts which had not been subjected to such sarcasm and offered this rejoinder:

In effect the trial court said it was prohibited by law from considering the welfare of the children or the best interests of the community, or anything other than "punishing" the mother of the illegitimate child.

We reverse that determination because there is no such law.

It matters little that its assessment of the trial court's presentation is fanciful—what matters is the failure to come to grips with the trial court's request that the Court of Appeals, "[U]sing their equity authority, discreetly and appropriately grant relief to either or both parties in those cases where it is clear that the marital relationship is severed and the best interests of the parties and their children would be served by granting the relief then asked."

We must disabuse ourselves of any thought that Ohio's trial courts are uniformly complying with the edicts of the Courts of Appeal. It is not an unfair observation that many trial courts often employ the doctrine of comparative rectitude to alleviate a punishment (requiring them to remain married) which would otherwise be inflicted upon divorce litigants and their children. The only uniform application of Ohio's case law which requires "innocence" for a spouse to be granted a divorce is that given by the several courts of appeal when called upon to review an errant trial judge who dares to consider the benefits to the family and community, or to affirm an obedient trial judge who has demanded "innocence."

## **II. Increasing Numbers of Lawyers Are Finding the Divorce Practice Insufferable—While Society's Need for Competent Family Lawyers Intensifies!**

The Ohio divorce laws have caused many competent lawyers to refrain from participating in divorce litigation, and, every day more lawyers are heard to announce that they will not "touch" divorce cases.

Not too long ago in the presence of a newly appointed United States District Judge who previously had served on the Court of Common Pleas, a lawyer opined that the only way we would ever attain truly uniform divorce laws throughout all fifty states was for the Congress to enact federal divorce legislation (which is what happened in Canada when over the years the several provinces failed to act). The Judge quickly retorted that he had had "enough of that garbage for several lifetimes—keep it in the state courts."

It is not to be suggested that this attitude among lawyers and judges is to be pardoned. On the contrary, it is suggested that there is a professional obligation to assist litigants in an area where help is most needed. But there can be no doubt as to why lawyers tend to avoid divorce litigation—simply because it is rampant with hypocrisy and is "lousy" as at least one judge has observed.

Judge Everette M. Porter<sup>20</sup> has said:

Family lawyers are challenged to become a composite of legal scholar, artful practitioner, tax specialist, social psychologist, and marriage counselor. They must be familiar with the language of the sociologist; they must have a knowledge of the emotional and psychiatric disabilities often suffered by members in an unhappy family. They must make use of experts in special disciplines to help them to accomplish best results for clients.

With the need for such expertise ever increasing, we undergo a mass exodus of lawyers from the practice of family law—a direct result of the ludicrous laws (statute and case) governing divorce in Ohio today!

The proper preparation of family lawyers by the bar and the law schools is a must in the opinion of I. David Marder of the

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<sup>20</sup> Judge of the Divorce Court of Los Angeles, Cal.; address to American Academy of Matrimonial Lawyers at its Seventh Annual Institute.

University of Connecticut<sup>21</sup> to offset the fact that there are not sufficient qualified lawyers engaged in the area of domestic relations. Mr. Marder believes that the expanded role for lawyers in divorce counseling invites many problems, particularly in serving the real need of a distraught spouse (*i.e.*, does she really want a divorce?):

A third common attitude is that the attorney's role is synonymous with an impending divorce. The facts, as they have developed in the area of divorce, do not refute this conclusion. The truth of the matter is, that the bar has contributed much to strengthening this belief. When a client talks to an attorney about matrimonial difficulties, very rarely does an attorney do anything more than ask the client whether he or she has considered conciliation? If the client answers affirmatively, but adds that he would not follow through, so far as the attorney is concerned, his ethical duty is fulfilled. From that point on the appropriate actions are taken so that his client will not jeopardize his or her position. This means that attachment proceedings are instituted, all contact between parties ceases, temporary alimony and support is worked out. All of these proceedings, once instituted, prove to be too difficult to halt in the ensuing period of time.

Another aspect is the fact that when a client comes into an attorney's office, a divorce in some cases is the last thing that he wants. There are many reasons why parties see an attorney. Some see him out of anger, while others are manipulators. In some cases parents or other third parties exercise some form of pressure. Still others are gold diggers while some are genuinely seeking a divorce. Whatever, their reason, the fulfillment of an attorney's present ethical duty falls far short of reflecting reality and the needs of the client.

But the clients' needs are not necessarily what the courts presently consider paramount which, of course, gives rise to a situation which for the lawyer is almost impossible. Many family lawyers believe that we must first effect a drastic reformation of our divorce laws with an emphasis towards grounds and conciliation—and thereafter we will witness a migration to the practice of family law by those competent and qualified to participate in the expanded role of lawyers in the area of domestic relations. All of this will hopefully result in "the institution of marriage

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<sup>21</sup> I. David Marder, University of Connecticut, West Hartford, Conn. Author of "The Need for an Expanded Role for the Attorney in Divorce Counseling" appearing in the American Bar Association's Section of Family Law publication *Family Law Quarterly*, September 1970, pp. 287 and 288.

being bolstered and those marriages preserved which have the slightest possible chance." <sup>22</sup>

While espousing their beliefs that Ohio needs more humane laws to facilitate the termination of broken marriages, many professionals (non-lawyers) appearing before the special Ohio General Assembly Joint Committee studying Ohio's domestic relations laws were also clamoring for divorce in whatever form the law might take to be removed from the hands of the courts and the lawyers. Their attack upon the legal profession is not without some merit; but in the main, their attack is predicated upon the false premise that the lawyers make the laws. While deserving no more blame than any other profession for the enactment of the divorce statutes, the lawyers are to be criticized for living all these years with a hypocritical procedure required of them by Ohio's divorce statutes. There is little logic to the clamor of the other professionals to take broken marriages from the lawyers because of the horrendous conditions stemming from the archaic divorce laws now on the books. If the statutes of Ohio are to undergo reform, the legal profession which for years has had its hands tied while trying to function in the area of domestic relations should be given the opportunity of working with the new laws—an opportunity to restore dignity to the divorce courts and to the legal profession. Devoid of the present day resort to hypocrisy, there is no reason to believe that the legal profession cannot out-perform any other profession in serving the needs of those involved in broken marriages.

### **III. Authorities May Differ on What is Best for Society— But They Share a Common Opinion That Divorce Laws Such as Ohio's Are an Abomination!**

Addressing the National Conference of Conciliation Courts at Los Angeles, California, in December 1969, Mr. Harry M. Fain, lawyer, author and lecturer on family law, made the following observations:

I reviewed from my files twenty of the most seriously contested cases in which I participated for the past several years that dealt with all aspects of our divorce procedure—especially where child custody and substantial property or financial interests were at stake. I found that in every single one of them, as much as 50% of our legal effort concentrated either on proving or disproving fault, in order to gain or re-

<sup>22</sup> *Id.*

sist a better settlement for our clients by reason of such contention. I found also that in these cases the retention of an adversary system with fault grounds created such an intolerable atmosphere for rational impartial or objective negotiation for settlement purposes, that months would go by before realistic expectations were acceptable answers to our clients. This is an area where we lawyers, as well as the law, have been severely criticized for perpetuating an antiquated system at tremendous emotional or financial expenses to our clients. I, for one, feel that once the status of the warring spouses can be resolved by a dissolution of the marriage with a measure of dignity and retention of self esteem, the lawyers will be required to concentrate on the merits of their clients' cases affecting property, support and custody of their children. This the Family Law Act encourages and facilitates and we must actively support and cooperate in such objectives.

Professor James M. Forkins of Loyola University School of Law<sup>23</sup> readily admits to being in favor of making divorce "a little difficult" suggesting that it would lend a "prophylactic effect," but he minces no words when he acknowledges that divorce laws such as Ohio's are being "administered with hypocrisy and perjury." While recognizing that the family is the keystone of our society and that its preservation best advances society, Professor Forkins also acknowledges that through the ages "always there has been a way to terminate a sick family" and that he considers this preferable over the continuation of a fractured marriage he leaves no doubt. Although his comments are most often directed to the divorce laws of the State of Illinois, they have equal application to those of Ohio which certainly are no better. He emphatically expresses and shares the opinion of lawyers, psychologists, penologists, social workers, marriage counselors and clergy throughout this country who clamor for divorce reform which will bring an end to the present practice of hypocrisy and perjury.

Professor Morris Ploscowe of New York University School of Law<sup>24</sup> traces the fault concept in divorce law to the canon law (Vatican), then to the Ecclesiastical Courts of England, and much later to the United States. He argues that the fault concept was

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<sup>24</sup> Attorney at law, New York, N.Y.; Fellow of the American Academy of Matrimonial Lawyers; Adjunct Professor of Law, New York University School of Law; contributor to the new New York Act.

devised for an entirely different setting than that to which it has been applied in this country. He suggests that ever since divorce came to this country there have been efforts to get away from the fault concept and that the continual expanding of grounds by the several states is evidence of the effort to avoid the fault concept. A mockery of justice is how Professor Ploscowe describes the requirement placed upon a trial court whether by legislative fiat or case law to deny a divorce to a man and wife when the evidence before the court is conclusive that the parties both have grounds for divorce, that they no longer love each other, no longer wish to be married and that they refuse to live together and haven't for some time.

Professor Max Rheinstein of the University of Chicago Law School<sup>25</sup> quickly dispels any suggestion that the no-fault divorce predicated on the irretrievable breakdown of the marriage will result in more divorces. Benefiting from years of research, Professor Rheinstein, while denying that the no-fault concept would or could make divorce any easier (except possibly in 2% or less of the cases filed), ardently maintains that the laws of divorce (whether meant to be easy or strict) have no bearing on the incidence of family breakups. He also disclaims any relationship between strict divorce laws and the solidity of marriage and points to the horrendous problem that infested Italy with an enormous and cancerous growth of "irregular unions."

Professor Rheinstein asserts that divorces are contested until such time as the issues of child custody and "dollar and cents" have been resolved and that it is "exceedingly rare that the contest is over the continuation of the marriage." He contends that in the United States today 97-98% of the divorce cases become uncontested when the custody and dollar issues are resolved (a large percentage are never contested) and that the only questionable impact of the no-fault concept will be on the remaining 2-3%. And of this very small percentage that enters the court room as contested, most are still involved with either a custody or dollar issue or both, and only an insignificant number have the preservation of the marriage as the issue. Professor Rheinstein suggests that this insignificant number can be further diminished when it is recognized that many of those who resist the termination of the marriage do so to preserve and protect pension

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<sup>25</sup> Fellow Emeritus of the Academy of Matrimonial Trial Lawyers; Emeritus Professor of Family Law, University of Chicago Law School.

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benefits. He suggests that loss of pension rights can be best handled by legislation and not by prolonging the broken marriage.

Referencing the small number of divorce litigants who steadfastly resist any effort to terminate their marriages, Professor Morris Ploscowe<sup>26</sup> contends that it is futile to attempt to shape divorce reform with such obstinate parties in mind. He suggests that confronted with two people with opposite desires (to be, and not to be divorced) no court can satisfy both parties with one solution—"it is an impossibility"!

Why should the courts cater to the party with the negative approach to divorce? If the parties to the marriage cannot themselves make the marriage succeed, certainly no court can do so. Such a marriage is broken and everyone benefits if it is put to rest in an orderly manner. But when, as in Ohio, the court is precluded from granting a divorce because of the "clean hands" rule or recrimination or any other shibboleth, a determined spouse can run to a foreign state or a foreign country for a quick divorce. How then can it be said that the Ohio court has best served the interests of the parties? Certainly the spouse left behind no longer thinks so. Would it not be better to dissolve such a marriage and have the custody, support, alimony and property division administered at one time by one court—the court where the parties reside?

Professor Josiah H. Blackmore of Capital University<sup>27</sup> observes that the time has come for legislatures to take a "new attitude towards divorce," explaining that the philosophy of the present Ohio divorce laws "hasn't worked." Professor Blackmore subscribes "to a reform based upon deleting the notion of fault from marriage" and the termination of marriages.

Judge John Moorhead of Hancock County<sup>28</sup> says "Most judges who handle domestic cases, would welcome indeed a change, if not the abolition, of the fault-doctrine."

Expressing the opinion of a dwindling minority, Professor Anthony R. Fiorette of Cleveland Marshall College of Law<sup>29</sup>

<sup>26</sup> See, *supra* note 24.

<sup>27</sup> Columbus, Ohio, addressing the special Ohio General Assembly Joint Committee studying Ohio's domestic relations laws, Columbus, Ohio.

<sup>28</sup> Judge, Court of Common Pleas of Hancock County, addressing the special Ohio General Assembly Joint Committee studying Ohio's domestic relations laws, Columbus, Ohio.

<sup>29</sup> Addressing the special Ohio General Assembly Joint Committee studying Ohio's domestic relations laws, Columbus, Ohio.

clings to the belief that there is a genuine need for maintaining the fault concept. But he nonetheless says "that the time has come for a reform in Ohio relating to divorce. . . ." Professor Fiorette further states "that the courts have, during the years, without benefit or the support of legislative action, adopted certain defenses which they permit to be raised . . . clean hands, recrimination and collusion" and claiming that the Legislature never intended this practice by the courts, Professor Fiorette advocates legislative action so that "the court in deciding should not be precluded from evaluating which of the parties is less at fault."

Judge John R. Milligan of Stark County<sup>30</sup> believes "that we ought to be more concerned about the status of the parties than we should about the cause or fault." Judge Milligan says "and the whole fault concept is wrapped up in most of our common law. It obviously is wrapped up with tragic consequences in the area of divorce . . . most judges today are searching along with legislators for ways to get away from the concept of fault."

#### **IV. The Canadian Parliament Acted Upon a Public Outcry for Divorce Reform**

With a deplorable divorce problem not unlike that of Italy, our neighbor to the north set out in 1968 to bring about a reformation which was aimed at effecting divorce laws more in line with social realities. The strictness of Canada's pre-1968 divorce laws had not served to solidify the family to any greater extent than in those countries which had already undergone reform—witness the estimate of more than 400,000 Canadians living in unrecognized "common law unions" sometimes, as in Italy, referred to as "irregular unions."

Led by Minister of Justice Pierre E. Trudeau (who soon thereafter ascended to the office of Prime Minister) and aided considerably by the recent New York divorce reform, the movement gained solid support from all quarters, including both the Roman Catholic Church and The United Church of Canada.

It is true that in its final form the Canadian Divorce Act gave only limited recognition to the no-fault concept of a marriage "breakdown" (i.e., parties must live separate and apart for three [3] years), but the change nonetheless was dramatically

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<sup>30</sup> Judge, Court of Common Pleas of Stark County, Ohio, addressing the special Ohio General Assembly Joint Committee studying Ohio's domestic relations laws, Columbus, Ohio.



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far reaching beyond the initial expectations of the members of the Parliament which made it law.

Numerous factors contributed to the reform, of which the most significant were the popular dissatisfaction with the abuses inherent in the old systems (differing from province to province) and the growing pressures from increasing numbers of spouses and illegitimate children caught up in "irregular unions."

In a move similar to the situation in Ohio today, both Houses of Canada's Parliament combined to establish a Special Joint Committee on Divorce "to inquire into and report upon divorce in Canada and the social and legal problems relating thereto." The Catholic Women's League of Canada declared that while they have their own beliefs in the matter of marriage they "do not wish to impose those beliefs on the entire Canadian society through the medium of civil law."<sup>31</sup>

The Catholic Bishops of Canada concluded that there was a distinction to be made between their rights and duties as citizens in the political community and their duties as members of the Church, stating that it is possible even for members of the Church "out of respect for freedom of conscience, to tolerate a revision of existing divorce legislation, with a view to obviating present abuses."<sup>32</sup> The Bishops further said,

The Church, when asked for her opinion by civil legislators, must look beyond her own legislation to see what best serves the common good of civil society.

The United Church of Canada,<sup>33</sup> with a membership exceeded only by the Roman Catholic Church, submitted an enthusiastic and well-documented brief and presented extensive testimony urging the enactment of the marital breakdown concept to replace the fault concept, and numerous other churches, individuals, lawyers, psychologists, social workers and various organizations agreed.

The hearings conducted by the Canadian Parliament's Joint Committee convinced the legislators that public opinion was solidly behind divorce reform and that the legislators had, in fact, lagged far behind in their appraisal of the public's reaction to the need for reform. The legislators were, actually, the last to recog-

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<sup>31</sup> Proceedings, Special Committee of the Senate and House of Commons on Divorce, Twenty-Seventh Parliament (Canada) 1966-67, 523.

<sup>32</sup> *Id.* at 1510-21.

<sup>33</sup> *Id.* at 349-410.

nize the urgency for a change. The Ohio General Assembly may soon have this identical experience.

### **V. The Sun is Made to Shine in the Western Hemisphere— Perhaps That is Why California is First**

If it can be said that the movement which led to the Canadian reform was a successful accomplishment, it must be said that California's reformation was a masterful achievement. In California, there was literally no opposition, and support was bountiful from organizations of every description and individuals from every walk of life.

I might say that what we did in California was something that was not done overnight or hastily. . . . We did a study in California, not for one year, but for three full years in the Assembly Judiciary Committee . . . it was the result of wide-spread study. . . . What we did in California was to eliminate the approach known as the "fault concept."

states Assemblyman James A. Hayes of California.<sup>34</sup>

Mr. Hayes says California "took away the idea of placing or fixing blame on one of the spouses for the failure of the marriage. The overwhelming amount of testimony we received was to the effect that marriages fail not so much because of the grounds in statutes but because behind those statutory grounds were grievances which led to the other spouse committing what was a statutory ground. It was a two-sided failure when you got right down to it. So placing the blame in today's society requires resort to the artificial."

Referencing the dignified court proceedings which California now experiences under the no-fault concept, Mr. Hayes said,<sup>35</sup>

. . . [S]ince a marriage flowered as a result of a very personal, delicate relationship, why should we turn it into a barbaric type of proceeding when it comes to terminating it. Certainly the state is interested in preserving marriages, in trying to keep them stable and enduring unions. But it should not be interested in turning the court room into a coliseum for a 'Christian being tossed to the lions' sort of display . . . so we accepted as fact that marriage flowered out of a deli-

<sup>34</sup> Member California Legislature, Thirty-ninth Assembly District, Chairman, Assembly Committee on Judiciary, testifying before the special Ohio General Assembly Joint Committee studying Ohio's domestic relations laws, Columbus, Ohio.

<sup>35</sup> *Id.*

cate relationship and we determined that there was no good purpose served by digging back into that delicate relationship to find out what caused it to deflower.

Mr. Hayes offers several additional comments on The Family Law Act enacted in California in 1969 which seem pertinent to Ohio's chaotic divorce situation:<sup>36</sup>

The basic objections (to the fault concept) were that it was necessary for the finger of blame to be pointed at somebody—that it actually was necessary for the errant spouse to be painted as the errant spouse . . . the old argument of King Henry VIII that he had to charge his spouse with fault before he got rid of her . . . this was the archaic approach. . . . For as you and I know as lawyers, that it is exceedingly rare where all of the blame is one way.

. . . [O]ur old procedures and our old grounds simply by the alleging of what we had to under the law, were promoting a greater devisiveness between the parties and promoting everlasting bitterness.

We have tried to remove ourselves from the adversary type of concept that has been the case in the past. Of course we are not completely taking away adversary proceedings because there must still be a determination of what is the value of the property. There must still be a determination of where the children should be placed—in whose custody—and that of course will result in some problems but only in a very few of the cases. We have taken away the need for the court to hear of each spouse's faults—the very personal private reasons—that led to, or contributed to, the failure of the marriage.

. . . So there is no question that this new law is making divorce easier—it isn't. It is making it much less traumatic. It is resulting in an unclogging of court calendars—cases that would have been dragging on for four to five days to exhibit the dirty linen of the parties are now taking maybe two to three hours to settle property rights . . . there are very very few custody battles now. Many times property division and the grounds and custody were all tied together, in the hassle between the parties . . . now they don't have the grounds to dispute about—to decide who did what to the other, now they are not using the children as pawns any more. And as a result everybody comes out a good deal more sensibly and realistically and untarnished. Actually those who are in our conciliation courts in California—and I might say the courts and lawyers totally support this—they say that what is happening under this new procedure—under the new law—is

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<sup>36</sup> *Id.*

that the parties are in an air of conciliation which was impossible under the old law.

... [T]hat you are not interested in making divorce easier. That was certainly our primary goal—that is, not to make divorce easier and indeed California has not made divorce easier, it could not have been easier to get a divorce than it was under the old law—and I understand that can be said of the present Ohio law.

... What impact has this new law had upon California? Well, the biggest impact . . . is that California is not becoming a divorce mill. This was a charge made by one of our Senators on the floor of the Senate as he opposed the bill, one of the few who voted against it, but it is not proving to be the case at all, gentlemen. The thing is, that although there is an increase in the filings of dissolution in California at this time, about an 18% increase, it is due to several contributing factors. One is that Californians are now staying in California to have their marriages terminated. We are surrounded by two divorce mills—Mexico and Nevada. Both of which jurisdictions are having severe declines in their marriage terminations. Nevada's rate is down 14% over last year, and . . . Mexico, in checking with the local officials across the border, is down 20%. Another two factors are significant—the nullity filing rate in California is down 17%. We retained, primarily for the benefit of church groups—the grounds for the judgment of nullity—so that it could be determined ab initio as was allowed under the old law, and we still retained the five or six grounds that allowed such termination by that means. As you know, some of those are rather harsh—fraud, impotence and this type of thing. We are finding that there is a severe decline in filing for these judgments of nullity now, and instead there are filings for dissolution. Likewise, the filings for legal separation are down 40%—so all of these factors—taken into account just about equalling the termination rate of California marriages as it existed in prior years.

So Californians are basically staying in California to have marriage problems settled because the law is proving to be satisfactory . . . and because they are not having to endure the problems and the trauma required under the old law.

... [M]arriage counselors and conciliatory court commissioners feel . . . in years to come, they believe that it is going to promote an air of conciliation and will work toward a slow-down in the dissolution rate in California.

... We also changed the nomenclature of almost everything in the law—we eliminated the word divorce, we now call it dissolution of marriage. We eliminated annulment, we call it a judgment of nullity. We eliminated the word alimony, we call it spousal support. We eliminated the word separate

maintenance, we call it legal separation. Now these are simply name changes—we know we are not kidding anybody with it. We decided as long as we were trying to remove the fault blame concept, that the best thing to do was to get a new set of words. We did it to cleanse ourselves of the old “fault concept.”

The apparent success of the no-fault concept in California is but a reflection of the experience of many foreign countries.

The Family Law Act of California has been enthusiastically received throughout that state by judges, lawyers, sociologists, psychologists, partners to broken marriages and the public at large. Judge Everette M. Porter applauds the action taken by the California Legislature and says:<sup>37</sup>

Even if I seem to have been excessively high in praise for California's new Family Law Act, you know it has limitations. You know the act did nothing to inoculate or treat the spreading contagion of family disharmony and marital breakup. Hopefully, that will be the next step in the California Law. The new act recognizes that a man and wife cannot be compelled to live together in the marital relation. It recognizes that the right to support, both temporary and permanent, should depend on relevant need and the circumstances of the parties. It decrees that when divorce and separation are inevitable, neither spouse shall be permitted to use the law or the court as an instrument for revenge. . . . It empowers the court to do whatever is necessary to protect the vital interest of minor children. There isn't a state in the union that shouldn't be using the provisions in the New Family Law Act of California.

Throughout the other forty-nine states and ever increasing number of professionals (lawyers and non-lawyers) serving the needs of partners to broken marriages share the opinion of Judge Porter.

## VI. Let's Abolish Divorce in Ohio

Marriage partners, their children and the community in which they live are deserving of more compassionate consideration—more humane proceedings and more nearly uniform processing—than that which is now afforded by the courts of Ohio and the statutes which are being applied and interpreted.

Fault oriented divorce is no better remedy for today's broken marriage than the bottle of “cure-all” once sold by quack doctors at medicine shows would be for today's illness. The medical pro-

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<sup>37</sup> *Supra*, note 20.

fession long ago put to rest such "cure-alls" and our sophisticated society looks forlornly to the legal profession to belatedly spare them of antiquated "divorce."

The people in Ohio are no less aware of the appalling conditions enveloping the termination of marriage by resort to present divorce laws than were the people of Canada and California. The Ohio General Assembly will learn that the demand for relief from the antiquated laws which have been permitted to remain unchanged for too many years exists in every area of the state, among people of every walk of life and at every economic level.

In recognition of our sorry plight, at least one trial court has attempted to inaugurate a change in Ohio's laws:<sup>38</sup>

It is submitted that the time has come for the trial and the appellate benches of the state of Ohio to take a new look at the doctrines of recrimination and "clean hands" and, using their equity authority, discreetly (sic) and appropriately grant relief to either or both parties in those cases where it is clear that the marital relationship is severed and the best interests of the parties and their children would be served by granting the relief they seek.

That the Stark County Court of Appeals, upon review, saw fit to engage in semantics as applied to old cases instead of taking a "new look" may to some be a disappointment. However, most authorities are of the opinion that the time has arrived when the legislature should step in and take charge and avoid any further need for courts to take "new looks."

The Ohio General Assembly should abolish "divorce" and the insalubrious fault system upon which it is predicated. Let it be replaced with "dissolution of marriage," and while tackling the problem let them also invalidate the word "alimony" for it, too, smacks of fault—in its stead let us use any expression which does not imply fault—California's resort to "spousal support" is but one possibility.

As Assemblyman Hayes said with reference to the Family Law Act of California, no one will be "kidded" by simply changing titles. But if we are to embark on a more merciful arrangement for terminating broken marriages—no longer ascribing fault—let us abolish forever resort to the word "divorce" which through the centuries has come to mean *one* marriage partner has fault.

<sup>38</sup> *Supra*, note 18.

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The courts and the lawyers merit an opportunity to demonstrate to the public that given something better than a set of archaic laws intended for a different society of more than a century past, and accorded a chance to work with well defined laws for the dissolution of marriage, they are well qualified and fully capable to extend uniform treatment to all partners in broken marriages and that they are competent and fitted to upgrade the domestic relations practice and to restore dignity to and gain respect for domestic relations courts and the lawyers who practice in such courts. When the legislature abolishes "divorce" the courts can abolish hypocrisy and perjury!