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COLLUSION AND THE PUBLIC INTEREST IN THE LAW OF DIVORCE

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This article deals with the principle of law which frowns upon collusion in divorce proceedings.[1] Collusion is undesirable for several reasons.[2] It is a form of perjury or subornation and therefore has criminal implications for those who indulge in it. It is an affront to the dignity of the court and therefore in the nature of contempt. But presently we are interested in it because it obstructs the court representing the state in its legitimate efforts to get at the real facts in the case. This approach assumes that the court is an agent of the state and that divorce is a matter of public interest. The argument is that from the public viewpoint, while the objective of eradicating collusion may be laudable, the means presently employed are quite inadequate and should be replaced by a more modern concept.

A note on collusion alone is quite possible. However, the subject is more understandable if we consider it against a wider background of divorce litigation.[3] Thus, this article deals with the setting, what amounts to collusion at law, what is the interest of the state in the subject which entitles it to promulgate such rules, and some suggestions toward what may prove a more useful fact-gathering device.

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† See contributors' section, masthead p. 441 for biographical data.

1 The subject of collusion does not seem to have received much attention in the United States. The Index of Legal Periodicals from January 1926 through August 1960 has several notes on English cases. But in this country the topic has been noted in two cases: Campbell v. Campbell, 75 N.E.2d 698 (Ohio 1947), Note, 17 U. Cinc. L. Rev. 202 (1948); Matter of Vetter's Estate, 308 Pa. 447, 162 Atl. 303 (1932), Note, 19 Va. L. Rev. 278 (1933); and in several other notes: Note, 71 U.S.L. Rev. 1 (1937); Note, 36 Colum. L. Rev. 1121 (1926); Jacobs, "Attacks on Decrees of Divorce" in Selected Essays on Family Law, 87 et seq (1950). See also Annots., 2 A.L.R. 699 (1919) and 109 A.L.R. 832 (1937).

2 In general the courts dismiss a divorce case where they find collusion at the time of the trial. If collusion is discovered after entry of decree, the courts are likely to decline to proceed further. Consider the following cases: Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954 (1919); Bancroft v. Bancroft, 178 Cal. 359, 173 Pac. 579 (1918); Beard v. Beard, 65 Cal. 354, 4 Pac. 229 (1884); Bizik v. Bizik, 124 Ind. App. 146, 111 N.E.2d 823 (1953); Grush v. Grush, 90 Mount. 381, 3 P.2d 402 (1931); Riggle v. Riggle, 148 N.E.2d 72 (Ohio, 1957).

It is suggested that a policy of keeping hands off is more helpful to the court than to the parties in the family group. It might be more helpful to penalize the colluding spouses, as for perjury or contempt of court; but to make some constructive disposition of the family situation. Oberstein v. Oberstein, 217 Ark. 80, 228 S.W.2d 615 (1950); Fender v. Crosby, 209 Ga. 896, 76 S.E.2d 769 (1953); Allerdyce v. Allerdyce, 244 Mich. 290, 221 N.W. 153 (1928); Crosby v. Hatten, 213 Miss. 240, 56 So. 2d 705 (1952); Paffen v. Paffen, 94 N.J. Eq. 356, 120 Atl. 197 (1923); Perry v. Perry, 183 Tenn. 362, 192 S.W.2d 830 (1946).

3 Criticism of divorce procedure has been constructive. The family court is proposed as a realistic approach to a solution of many of the current difficulties. An interesting legislative proposal is The Standard Family Court Act, discussed at 5 Nat'l Probation and Parole Ass'n J. 97 (April 1959). The other articles in this same issue are also interesting.

THE SETTING

Realistic critics of modern family law in the United States can make much of the controversial area of divorce.[4] They may from the standpoint of the public view with amusement, regret, or even alarm, such manifestations as:

The hybrid character of the proceeding: one part lifted, perhaps, with a minimum of imagination from its traditional ecclesiastical context,[5] and forced, without too much ceremony, into a lay and therefore an uncomfortably alien framework; another part, including the right to remarry someone else, grafted on by popular demand.[6] Unsympathetic people may think of the law of divorce as an all too rigid square peg in a social and economic hole which is growing progressively rounder by the minute. To some, divorce may even appear too controversial for convenient handling.

The professional astygmatism in favor of adverse litigation which may be partly responsible for the traditional mental picture which too many of us see when the word "divorce" is used. In extreme form that picture resembles some old fashioned battle scene.[7] The fanciful observer may note in the foreground two contending heroic figures (perhaps resembling the good St. George and the evil dragon). Emotionally we hope the innocent spouse (assuming of course, that there is such a person) will triumph over his faulty or guilty adversary. It is not necessary to insist that justice float overhead bearing a wreath to reward the victor. Other less creatively minded people see quite a different scene. To them there is depicted a socio-legal public catastrophe. A family has died or is in danger of death; by accident, by "suicide," or by "murder." The courts supplied all too often, with no more than the legal tools appropriate to a blacksmith, are expected and are attempting to perform functions deserving the skills of an expert surgeon or a pathologist.[8] The figures in this second picture are not necessarily symbolic of good and evil. They are rather flesh and blood people—the distressed and sometimes confused spouses, the tragic children of the unstable marriage and perhaps other

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4 Divorce is statutory. The statutes are collected in the Appendix of Jacobs and Goebel, Cases on Domestic Relations (3d ed. 1952). For some critical comments on Divorce see: "Divorce: A Reexamination of Basic Concepts," 18 Law and Contemp. Prob. 1-106 (1953).

5 During the Middle Ages marriage and divorce were within the jurisdiction of the ecclesiastical courts. Carter, A History of the English Courts 143 (7th ed. 1944); II Pollock and Maitland, A History of English Law 364 (2d ed. 1923).

6 Maitland, "Magistri Vacarii Summa Matrimonio," in Selected Essays on Family Law 104 (1950). "Encyclical Letter of Pope Pius XI on Christian Marriage," in Selected Essays on Family Law 132 et seq. (1950).

7 The basis of the adversary system is described in Cheatham, "The Lawyer's Role and Surroundings," 25 Rocky Mt. L. Rev. 405, 408 (1953).

8 What actually does happen in the judicial handling of some domestic cases is described at first hand in Virtue, Family Cases in Court (1956).

peripheral even pathetic members of the disintegrating family group. The state is involved in a situation in which there is seldom a real winner. Everybody loses. The court is expected to clear up what viewed impersonally is all too often a "mess,"[9] due to incompetence and lack of training of the spouses or malice of third persons.

The somewhat surprising non sequitur that the spouses (in most states both of them) no matter which one was technically "at fault," having demonstrated publicly on the record their mutual inability to operate successfully family #1 are permitted in due course upon the signing of the final divorce decree[10] or shortly thereafter without any further showing of increased competence to take on the equally exacting responsibilities of operating family #2.

Closer to the immediate focus of the present article is a consideration of the customary defenses available in divorce proceedings. Since the emphasis is on the public aspect of divorce and the efforts of the courts to ascertain the real facts of the case before making any judicial pronouncements about it, the test of effectiveness is whether the particular defense contributes adequately to the framing of issues and otherwise forcing the relevant facts into the light of day. To the court the facts are most important. In common law *issue* pleading the object of the process was to channel the facts and reduce the points of controversy between John Doe and Richard Roe to one or a few major items which could then be disposed of by adversary trial.[11] Under the more modern theories of *fact* pleading it is perhaps not improper to suggest that the court wants to deal more inclusively with the various relevant matters in controversy between the parties so that the whole dispute may be settled once and for all.[12]

Pleading the *general issue* or general denial as a fact-gathering device properly places the plaintiff in the position in which he, unless he expects to lose, is required to prove his entire case.[13] Thus, as a matter of theory, a way is open for production in court of all the relevant data. But where the parties are John and Jane Doe, and where each desires the same result—to be separated legally from the other—it is much less costly for the defendant to allow a judgment by default. In such a situation the court decides the case on the basis of the evidence produced only by the plaintiff, too often uncontroverted, uncorrected, unclarified. So the

[9] These matters are informally discussed in Proceedings of the Institute of Family Law 174 et seq. (April 9-11, 1959).

[10] The statutes which prohibit remarriage after divorce are collected in Jacobs and Goebel, supra note 4, at app. 56.

[11] Freyer and Benson, Legal Method 268 (1949).

[12] Field and Kaplan, Materials on Civil Procedure 352 (1953).

[13] Scott and Simpson, Cases on Civil Procedure 459 (1951).

publicly desired facts are not necessarily produced and the court solves *a* problem rather than *the* problem.[14] Also, a persuasive argument can be made in support of the proposition that there are certain types of cases in which the general issue is ineffective in sharpening issues and raising facts.

Condonation,[15] on paper, has something to be said in its favor,[16] but in operation one wonders whether it is as effective as it may appear. It may be used by the court as a fact-gathering tool. However, perhaps it would be more accurate to say that it might be employed as a means of blotting from the record certain domestic facts. In this respect it may simplify matters for the court. But it does not necessarily follow that it will advance the solution of the actual public marital problems which ultimately boil over into the court room. There is another aspect of the situation. Suppose that condonation is used not as a tool but as a weapon. There probably are many marital skirmishes which precede actual litigation. Used as a weapon condonation may help the crafty spouse against his more trusting companion. The latter by condonation may be tricked into the loss of significant legal rights.

There is no need to labor the point that marriage assumes a degree of fiduciary relationship between the spouses. It is not easy to trust a spouse who may use condonation as a weapon. It is much safer for each marital

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[14] Looking at the matter from the standpoint of the parties, we can rationalize somewhat as follows: When H and W marry they create a status. Their rights and obligations toward each other are determined by custom rather than by the consent which introduces them to the status. Part of the obligations of each is to conduct himself toward the other in a manner recognized as suitable in a civilized society. To help the spouses recognize when they may get out of bounds the legislatures have set forth certain "grounds" for divorce. A spouse who commits one of the criminal or quasi-criminal acts mentioned as one of these grounds is at fault. The other, assuming clean hands, may apply for judicial relief from an intolerable situation.

Looking at the same situation from the standpoint of the state we may rationalize in somewhat different fashion. The problem is one of licensing. Not everybody is eligible for marriage. Not everybody who achieves a license may retain it irrespective of his subsequent conduct. If he fails or refuses to conform to the publicly prescribed limits, his license may be taken away from him.

From the standpoint of the parties the matter may be thought of in a "fault" framework. From the standpoint of the state it may not be inappropriate to use the word "noncompliance." If the state wishes to punish a spouse for misconduct which is both criminal and antimatrimonial, the criminal statutes are available. If, on the other hand, the state wishes to record its displeasure over the failure or inability of a spouse to live up to the minimum standards of marriage, the atmosphere is a trifle different.

In the present article emphasis is placed on the relation between the state and the nonconforming spouse, not on the state and the criminal and not on one spouse as against the other.

[15] The statutes providing for condonation as a defense are collected in Jacobs and Goebel, supra note 4, at app. 44.

[16] Bouvier defines condonation as "the conditional forgiveness or remission by a husband or wife, of a matrimonial offense which the other has committed." Bouvier's Law Dictionary, 205 (Baldwin's Ed. 1934).

Ballantine says: "The forgiveness either express or implied, by a husband of his wife, or by a wife of her husband, for a breach of marital duty with an implied condition that the offense shall not be repeated." Ballantine, Law Dictionary 258 (1930). See also Annots., 32 A.L.R.2d 107 (1953), and 109 A.L.R. 683 (1937).

partner, immediately after the wedding, to gird himself for a life of unremitting and stealthy conflict and to condone nothing. How else may a lawyer realistically advise his client? And at the same time, what an interesting sort of family life!

Recrimination[17] may also be used as a tool[18] or a weapon. As a tool it does not blot out areas of marital life from judicial inspection. It cancels them out. The court tends to look only at any balance remaining. As a weapon it presents a continuing threat to the legal rights of either spouse. It does not add facts, it subtracts them. A lawyer with recrimination in mind might conceivably urge his client directly upon marriage to employ a detective to shadow the other spouse, to keep a daily diary in a safe deposit box, and to secure the services of someone to perform the functions of a sort of marital bookkeeper. Under the type of menace presented by recrimination, the married person, who wants to stay married, might find it desirable to balance up each day the books of matrimonial offenses to see that neither he nor his partner, has outwronged the other during that twenty-four hours. What an interesting family life!

Connivance[19] also has dual uses.[20] It narrows the area in which the court need look for relevant facts and it does not exactly blot out or

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17 The statutes providing for recrimination as a defense are collected in Jacobs and Goebel, supra note 4, at app. 45.

18 Bouvier defines recrimination as: "In general Recrimination does not excuse the person accused nor diminish his punishment, because the guilt of another can never excuse him. But in applications to divorce on the ground of adultery, if the faulty defendant can prove that the plaintiff or complainant has been guilty of the same offense, the divorce will not be granted." Bouvier, supra note 16, at 1035.

Ballantine says: "A doctrine originally borrowed from the canon law, by which the defendant in divorce proceedings is permitted to contest the plaintiff's application on the ground of his own violation of the marriage contract—to set off, to use the language of the cases, the equal guilt of the plaintiff." Ballantine, supra note 16, at 1099.

For a collection of cases see Harper, Problems of the Family 700, Recrimination as a Defense (1952); Annots., 21 A.L.R.2d 1267 (1952), 170 A.L.R. 1076 (1947); 159 A.L.R. 734, 1453 (1945); 152 A.L.R. 336 (1944). For more recent developments in connection with the rejection of the principle of recrimination, see DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598 (1952), 27 So. Cal. L. Rev. 219 (1953).

19 The statutes providing for connivance as a defense are collected in Jacobs and Goebel, supra note 4, at app. 4.

20 Ballantine defined connivance as: "The corrupt consenting of a married party to the conduct of the other of which afterward complaint is made. It is a thing of the intent resting in the mind, and it may be the passive permitting of the misconduct, as well as the active procuring of its commission." Ballantine, supra note 16, at 263. Bouvier says: "An agreement, or consent, indirectly given, that something unlawful shall be done by another." Bouvier, supra note 16, at 211.

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the person who connives. Condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offense has been committed. Condonation is the result of a determination to forgive an injury which was not known until it was inflicted. Turton v. Turton, 3 Hagg. Ecc. 338, 350, 162 Eng. Rep. 1178, 1182 (1830).

The connivance of a husband to his wife's prostitution deprives him of the right of obtaining a divorce or of recovering damages from the seducer . . . The husband may actively connive at the adultery . . . or he may passively . . . It may be satisfactorily proved by implication. Annot., 17 A.L.R.2d 342 (1951).

cancel out certain facts areas. Rather it seems to say to the plaintiff perhaps by way of estoppel: we will not allow you to use certain types of facts because as to them your hands are not clean and we are not so much interested in the family problem as in the fact that only antiseptic plaintiffs will be given a hearing in this court. It is possible that the concept originated in a period of legal history when one spouse was supposed to have a sort of property right in the person and conduct of the other. Each was expected to ride herd on the activities of the other upon pain of losing legal rights. Just how far this concept is realistic today is not too clear. It is quite possible, with the various changes in the position of women, that any effort to assert such a property right would aggravate rather than reduce marital discord. Present day marital partners may not like to be pushed around by each other. Here again one can speculate as to the advice a lawyer should give his newly married client, and if he did give it, the resulting family life might be quite interesting.

Suppose all these defenses actually produce facts for the divorce court. The question still remains: Are these the types of facts which will help the court deal adequately with the divorce or is the result an aggravation of the normal wear and tear of marital relationships which contribute to the eventual breakdown of the family. The legislatures in this connection have not been overly helpful in stating the "grounds" for divorce (that is, the areas of fact which have public significance in this type of litigation). They have conceived of matters in terms of fault or guilt of one spouse when the real difficulty is the inability of these two people to get along companionably under the bonds of matrimony. No wonder it is hard to get the essential public facts.

So long as the critics, as spectators, persist in viewing divorce as no more than a symbolic battle between an innocent spouse who seeks relief from an intolerable situation caused by the faulty partner, one may be mildly interested in whether the rules mentioned above are used as tools or as weapons. But once one regards the situation as an objective socio-legal "mess" which must be cleared up publicly by the state, potential weapons in the hands of the spouses are something to be viewed with concern, if not with alarm. Our attention is directed realistically to the complex and delicate tasks to be performed. We should be interested continuously in supplying the divorce courts with the most appropriately improved tools. As new tools are developed, they should be tested and if found useful, employed as replacements where they give promise of doing a better, a more understanding, a more complete job.

We come now to the last of these defenses—*collusion*,[21] which differs

[21] The statutes providing for collusion as a defense are collected in Jacobs and Goebel, supra note 4, at app. 42.

from the others. Collusion is not so much a blotting out of facts or a cancelling off of facts or an estoppel, as it is a dislocation. There is a controversy to be sure, but it turns out that it is really between the wrong parties. In orthodox legal theory the controversy should be between the two spouses. In practice it is not infrequently between the spouses (temporarily united for the purpose) and the court representing the state. The parties collude and hope the court will not find them out and too often their hopes are realized. The state is hampered in its efforts to obtain the relevant facts and the family problem is inadequately solved.

An example of collusion should be considered.[22] Husband and wife were married and living together in New York in 1954. In July he drove her to the airport, purchased a ticket for her on a plane to Birmingham, Alabama, and saw her off. On arrival at Birmingham, the wife went to the office of an attorney, now deceased, who had been selected by the husband. He had waiting for her a complaint in divorce, a property settlement agreement, and a deposition. She signed them and returned the same day to New York, and in due course she received a true and correct copy of a divorce decree. Six years later, husband and wife both appeared before the Alabama court. The husband, giving his reasons, asked for a modification of the divorce decree so as to eliminate the requirement of $60.00 a week alimony. The wife filed an answer asking the court to enforce the decree, to require the husband to pay the income taxes on the alimony she had received, and to cite the husband for contempt for his delinquency in making alimony payments and allowance to pay her lawyer's fee. In the course of the proceeding, it became apparent that neither the husband nor his wife had been or were residents of Alabama and that a fraud had been perpetrated on the court in 1954. The court on its own motion, entered a decree on July 15, 1960, setting aside the 1954 decree and dismissing the petitions of both spouses on the ground that the first decree was procured by fraud on the court and was therefore null and void. In a legal sense the problem was back where it had been in 1954. The dignity of the court had been vindicated, but what of the marital problem?

In this example of collusion we have an agreement between husband and wife to join forces, a fictitious set of facts presented to the court as a basis for decision, a court relying in good faith on the record thus presented to it in orthodox fashion, and a decree secured. Then after a lapse of time we have three more significant items: a disagreement between

22 Hartigan v. Hartigan, 128 So. 2d 725 (Ala. 1961), 47 Cornell L.Q. 459 (1962). Also discussed in Vol. II, No. 3, The Family Lawyer (May 1961).

husband and wife, a discovery by the court of the real facts, and an orthodox judicial reaction—a legally proper refusal of the court to deal further with the family problem.

It is at this point that we become aware of the dual function performed by the divorce court. On the one hand, it deals with a family problem. But at the same time it has its own dignity to consider. In collusion cases the emphasis on this second problem is often pronounced, and there is no reason to object. However, we are still left with the question: What are we going to do about the family problem? We can, of course, ignore it or we can blot out parts of it or cancel them out or invoke a form of estoppel. The result, from the standpoint of the court, may be a simplification. But the ultimate question is whether we can afford a system of law which does not face up to all the public problems presented to it for solution. The rule against collusion tends to obscure the family problem rather than lead to its solution.

Thus, viewing the setting from the standpoint of the state, we may lack some confidence in the no-collusion rule. Let us examine it more specifically.

WHAT IS COLLUSION?

Collusion has been defined by laymen,[23] legal lexicographers,[24] legisla-

[23]The Encyclopedia Americana defines collusion as:
An agreement between or a consent of action by, two or more persons. The term usually connotes fraud and secrecy. It is often defined as an agreement to defraud or to obtain an object forbidden by law. Collusion is less inclusive than, but substantially the same as, conspiracy. In judicial proceedings, there is collusion where two or more persons apparently in an adversary position in relation to each other, improperly conspire to defraud or to injure another person or to deceive the court. However, a proper act of cooperation or common effort by persons having similar or identical interests does not constitute collusion. In the law of divorce collusion is a conspiracy of a husband and wife, to suppress evidence, to present false or manufactured testimony, or for one of them to commit, or appear to commit, an act which would lead the court to grant a divorce. The mere fact that both parties desire to obtain a divorce is not of itself collusion.
Webster, New International Dictionary 446 (2d ed. 1961) says:
A secret agreement and cooperation for a fraudulent or deceitful purpose: deceit, fraud. LAW: An agreement, between two or more persons, to defraud a person of his rights by form of law or to obtain an object forbidden by law.

[24] An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. Collusion and fraud of every kind vitiate all acts which are infected with them and render them void . . . In divorce law, an agreement between a husband and wife that one of them will commit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury . . . Collusion is a conspiracy of the husband and wife to obtain a decree of divorce by false or manufactured testimony. Nelson, Law of Divorce 500. Bouvier, supra note 16, at 186.
An agreement between two or more persons to defraud another of his rights by the forms of law, or to secure an object forbidden by law. In divorce proceedings an agreement between husband and wife to procure a judgment dissolving the marriage contract, which judgment, if the facts were known, the court would not grant and usually involving a feigned cause of action. 2 A.L.R. 699 (1919). Ballantine, supra note 16, at 232.

tures,[25] and courts.[26] Two essential factors are (1) an agreement between the parties (2) to commit or omit a legally significant act. The immediate and obvious damaging result is that the court is mislead as to the material facts. The fraud takes place prior to the litigation. Before there can be an agreement between a husband and wife, there is probably some "persuasion." The method by which this may be accomplished is, for obvious reasons, too often one of the missing links in the chain, but a most important link. If both parties are just naturally anxious for a divorce, the persuasion becomes a simple matter. In other less favorable situations, the meeting of the minds may be brought about by a process of negotiating, of horse trading, or arm twisting. In some instances persuasion and duress are obvious synonyms. The legally significant act or omission as to which the court may be deceived is also a matter of some variety. On the one hand, it may be jurisdictional, limited to dates and places of residence where the statute prescribes a certain period of residence; to guard against this proctors are established.[27] On the other hand, concealments and misrepresentations can theoretically be divided into at least three major substantive categories:

Invention.[28] Here spouse A claims that spouse B has committed the act, when as a matter of fact B has not done so. The collusion is complete when B, properly persuaded keeps his mouth shut on the subject and the court is mislead. The case is then tried on fabricated facts and B does not play his expected bona fide adversary role.

Commission.[29] Here B actually does commit the act, but he does so

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[25] The statutes are collected in Jacobs and Goebel, supra note 4, at app. 42.

[26] Brainard v. Brainard, 82 Cal. App. 2d 478, 186 P.2d 990 (1947); Bancroft v. Bancroft, 178 Cal. 359, 173 Pac. 579 (1918); Thomson v. Thomson, 121 Cal. 11, 53 Pac. 403 (1898); Beard v. Beard, 65 Cal. 354, 4 Pac. 229 (1884); Dochelli v. Dochelli, 125 Conn. 468, 6 A.2d 324 (1939); Mills v. Mills, 119 Conn. 612, 179 Atl. 5 (1935); Mitchell v. Mitchell, 312 Ky. 810, 229 S.W.2d 967 (1950); Conyers v. Conyers, 311 Ky. 468, 224 S.W.2d 688 (1949); Holcomb v. Holcomb, 100 Mich. 421, 59 N.W. 170 (1894); Hudson v. Hudson, 176 Mo. App. 69, 162 S.W. 1062 (1914); Rapp v. Rapp, 162 Mo. App. 673, 145 S.W. 114 (1912); Stewart v. Stewart, 93 N.J. Eq. 1, 114 Atl. 851 (1921); Williams v. Williams, 261 App. Div. 470, 25 N.Y.S.2d 940 (4th Dep't 1941); Doeme v. Doeme, 96 App. Div. 284, 89 N.Y. Supp. 215 (1st Dep't 1904); Wiemer v. Wiemer, 21 N.D. 371, 130 N.W. 1015 (1911); Geis v. Gallus, 130 Ore. 619, 278 Pac. 969 (1929); Miller v. Miller, 284 Pa. 414, 131 Atl. 236 (1925); Moore v. Moore, 197 Tenn. 360, 273 S.W.2d 148 (1954); Erwin v. Erwin, 40 S.W. 53 (Tex. 1897).

[27] The statutes regarding this system are collected in Jacobs and Goebel, supra note 4, at app. 47.

[28] The reports of the cases are not too clear with respect to invention. Reading between the lines of the following citations one concludes that probably invention was present. Meyer v. Meyer, 184 Cal. 687, 195 Pac. 387 (1921) (possibly connivance); Hall v. Hall, 93 Fla. 709, 112 So. 622 (1927); Denehie v. Denehie, 306 Ky. 787, 209 S.W.2d 309 (1948); Grush v. Grush, 90 Mont. 381, 3 P.2d 402 (1931); Fuchs v. Fuchs, 64 N.Y.S.2d 487 (Sup. Ct. Kings County, 1946).

[29] It seems even more difficult to locate illustrations of this category. However, the following might be considered: Potter v. Potter, 101 Fla. 1199, 133 So. 94 (1931); Fender v. Crosby, 209 Ga. 896, 76 S.E.2d 769 (1953); State v. Richardson, 122 La. 1064, 48 So. 458 (1908); Griffiths v. Griffiths, 69 N.J. Eq. 689, 60 Atl. 1090 (1905).

because he was persuaded by A and would not have done it without the persuasion. One rule of law is violated to enable A to comply technically with the requirements of another rule of law. The misrepresentation is as to B's motivation and again B does not play his expected bona fide adversary role.

Omission.[30] Here B has evidence which, if presented to the court, would serve to halt A's action. It may be A who has committed the act, probably thereby removing himself from the class of innocent spouses. Due to persuasion B does not raise a defense. The case is tried as though A did have clean hands, and the court is none the wiser, although there is reason to argue that it ought to be. Neither A nor B plays his expected bona fide adversary role. In each of these situations, it is to the advantage of the spouses to take out of the hands of the court control over the fact producing machinery.

THE INTEREST OF THE STATE

The courts declare that the state has an interest in marriage and the family.[31] However, the extent and nature of that interest is not always set forth with too much clarity, for the legal concept of marriage emerges as not merely a two-party affair. A third party, the state, is involved.

We may argue the reasons for this assumption of public control. Extremists may suspect some long-range, socialized program to supplant the original, individualistic, rugged, frontier American family with a somewhat flabby and compliant institution more and more dependent upon and subservient to the state. At the other extreme there may be those who believe that the family was, at best, no more than a primitive institution and that we cannot expect it under its own power to thrive, nor even to exist, unless in greatly modified form, in our complex civilization. To such persons state control may seem to be a very practical means of rescuing from obsolescence, maybe eventual oblivion, a social institu-

[30] Potter v. Potter, 101 Fla. 1199, 133 So. 94 (1931); Hall v. Hall, 93 Fla. 709, 112 So. 622 (1927); Floberg v. Floberg, 358 Ill. 626, 193 N.E. 456 (1934); Radle v. Radle, 204 Iowa 82, 214 N.W. 602 (1927); Denehie v. Denehie, 306 Ky. 787, 209 S.W.2d 309 (1948); Edelson v. Edelson, 179 Ky. 300, 200 S.W. 625 (1918); State v. Richardson, 122 La. 1064, 48 So. 458 (1908); Hudson v. Hudson, 176 Mo. App. 69, 162 S.W. 1062 (1914); Winder v. Winder, 86 Neb. 495, 125 N.W. 1095 (1910); Sheehan v. Sheehan, 77 N.J. Eq. 411, 77 Atl. 1063 (1910); Griffiths v. Griffiths, 69 N.J. Eq. 689, 60 Atl. 1090 (1905); Fuchs v. Fuchs, 64 N.Y.S.2d 487 (Sup. Ct. Kings County 1946); Campbell v. Campbell, 75 N.E.2d 698 (Ohio 1947); Maimone v. Maimone, 55 Ohio L. Abs. 566, 90 N.E.2d 383 (1949); Heine v. Witt, 251 Wis. 157, 28 N.W.2d 248 (1947).

[31] The courts have various ways of expressing this interest of the state as indicated in the following cases. But in general one concludes that beyond declaring the state a party in interest the extent of that interest has been left as a matter of judicial discretion in the individual case. Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020 (1915); Reed v. Reed, 138 Colo. 74, 329 P.2d 633 (1958); Potter v. Potter, 101 Fla. 1199, 133 So. 94 (1931); Hopkins v. Hopkins, 174 Miss. 643, 165 So. 414 (1936); Lippincott v. Lippincott, 141 Neb. 186, 3 N.W.2d 207 (1942).

tion of great or perhaps of sentimental utility. However, most observers probably do not go to extremes in these matters.

There are at least three public reasons why the state finds the family useful and therefore may want to encourage it—to control it. The family performs three basic social functions which up to the present time cannot be duplicated elsewhere; it provides an orderly basis for the relation between the sexes, a fairly flexible means of holding and disposing of marital property, and an invaluable device for the training of children still so young that the principle of extra-family togetherness has not had a chance to make an impression on them.

The idea that the family should be controlled is not novel. Primitive families were self-sufficient. Otherwise they did not survive, and the members of each group probably realized this situation quite clearly. However, they were controlled externally by the ominous forces of nature. If we look for a single word to describe this type of regulation, we will probably fix on "economic."

During the Middle Ages in Western Europe there was another form of control exercised. It was external in the sense that it was directed by the church. The word to describe it is "spiritual." Today also, control by the state is external. But the word to describe it is neither primarily "economic" or "spiritual." Probably "sociological" comes as close as any to it, or perhaps "socio-legal."[32]

The interest of the state in family stability and durability is less persuasive where the two spouses are the only members of the group. Where there are children and peripheral persons, a better argument can be made that family dissolution should not take place without the state seeing to it that the rights of these extra people are protected. But there are still two more groups whose concern over the debacle caused by an impending divorce is relevant. One of these is the taxpayer because in all too many instances he must pay the bill for solving a deplorable domestic situation over which, from the first, he has had little control. The other group consists of possible subsequent spouses in future marriages of the same parties who are now confessing their inability to handle the problems of the family before the court.

Where divorce is inevitable, the state, under present conditions,[33]

[32] The socio-legal approach to problems of the family is indicated in materials such as: Rheinstein: The Stability of the Family, A Report to the Director of UNESCO on the Colloquim on the Comparative Study of the Legal Means to Promote the Stability of the Family, held in Spain, under the auspices of the International Association of Legal Science. The report is published in Les Colloques de Chicago (Septembre 1957) Oragnisés par l'Association Internationale des Sciences Juridiques, Part II, and The Legal Means to Promote the Stability of the Family, Annales de la Faculté de Droit D'Istanbul, Huitième Année—Tome IX. No. 13, p. 1 (1960).

[33] In Reed v. Reed, 138 Colo. 74, 77, 329 P.2d 633, 635 (1958) the court said:

would appear to be the only agency competent to clean up the "mess." It should do so with a maximum of sympathy and understanding, but it should do a complete, an inclusive job which should be as speedy and accurate as the circumstances permit, and it can only perform this task if it has the whole truth.

How Useful is the Collusion Concept?

Does the collusion concept help the courts to obtain the true facts? This question involves a consideration of *what* facts are the *true* facts. The legislature would have us direct our attention to such matters as jurisdiction (at least of the plaintiff), grounds (adultery, cruelty, desertion, etc.), and the type of relief requested (a limited or final decree). A fair argument can be made in support of the proposition that this process is an over-simplification. It focuses attention on only a portion of the problem. The question is not merely whether the court can get in and out of the controversy with a minimum of effort and trouble.[34] Rather it is something deeper—a family problem, a public problem. For example, why did this catastrophe come about? What was it which caused a breakdown of an institution which started business hopefully under a public license?

Historically, in the field of criminal law, we used to ask ourselves one main over-simplified question: Did the defendant do the forbidden act with which he was charged? If the answer was in the affirmative, the next problem—what shall we do *to* him—was comparatively simple. Then, we reached a point in our thinking at which the second question became: What shall we do *for* him? In order to answer this we had to know much more about him than his actions and intent at a given moment of time. We had to know what sort of person he was and whether he might be "rehabilitated." Sooner or later, he was probably going to emerge from his period of incarceration or other punishment to take his place once again in the everyday world of law-abiding citizens. Unless he was better able to play the role of good citizen when he came out than he was when he went in, there did not seem much value either to him or the community in letting him out at all. Thus it is quite possible for us to expand and deepen our thinking about any field of law.

"All this is aside from the fact that the State is a party in every divorce action. . ." Ward v. Ward, 25 Colo. 33, 52 Pac. 1105, 1107 where it was said ". . . there are, in reality, three parties to every divorce action—the plaintiff, the defendant, and the state and if there is any collusion or fraud between the parties, or if any facts are developed at the trial which make it inequitable or unjust for a divorce to be granted, the Court must see to it that the decree for divorce is not entered."

[34] It is interesting to compute the trial time it takes some divorce courts to dispose of a single noncontested case. There are no official records. But informal rumors among observers suggest that five minutes is often regarded as normal.

In the field of family law a somewhat similar situation, whether or not the law recognizes it, is presented. The state should want to know not merely *whether* the defendant in his nonconforming conduct committed adultery or desertion or was cruel. If the state were informed also as to *why* he was guilty of this conduct which is unacceptable to the maintenance of the average civilized family, the courts could do a more constructive type of work. If we grant either party a divorce, we are generally allowing him sooner or later to marry again. When he does so, if he is no better qualified to bear the responsibilities of family life than he was when he secured his divorce, there may well be a question as to whether the divorce process serves a useful public purpose. How many families does he have a right to wreck?

If the problem is viewed in this light, we may well query whether a rule banning collusion can possibly give us the basic data on the matters which are of importance to the state. If the results of the collusion rule are not helpful to the state, they certainly do not do much constructively for the spouses. They are too often an irritating challenge to evasion.

Unfortunately, statistics[35] in the field of family law are so inadequate that we cannot even guess how many current divorce cases involve this form of deceit. The usual examples come when the spouses have a further disagreement and one wants to threaten or to punish the other by further court action.

There are several reasons, therefore, why the no-collusion rule, whether or not it is dear to the heart of the divorce litigant, is not of much help in making sure that the court has the whole truth. First, legislative divorce procedures appear to be aimed at the wrong set of facts. The basic public question in any family breakdown is not whether one spouse committed an antisocial act. It is whether the family is still a going concern, and if not, then why not. Therefore, no sort of gathering of peripheral facts is going to insure that the Court gets what the state needs to enable it to dispose of the various problems which arise. Second, the rule is negative. It says to the parties: You must not get together on this controversy. If both parties want a divorce, this type of rule is a challenge, i.e., can we outwit the court? Thus, the rule is misconceived in terms of human reactions. An affirmative rule which made it advantageous, or at least less disadvantageous, for the parties to make complete disclosure would seem to have more chance of success. Third, the rule

35 Voices have been raised in support of a movement to improve this situation. Rheinstein and Plateris, "The Importance of Central Files of Divorce Records," 46 A.B.A.J. 1285 (1960) Plateris, Statistical Data on Marriage Stability, Paper #15 Les Colloques de Chicago (Septembre 1957); Annales de la Faculté de Droit D'Istanbul 258-292 (1960); Huitième Année—Tome IX, No. 13 (1960).

is an oversimplification. It conceives of divorce as concerned with a single transaction—release from an intolerable situation. In fact divorce involves not infrequently two transactions. The plaintiff wants to be released from an intolerable domestic situation because he wants to create a new and different domestic situation. No-collusion, whatever it may or may not do for the former item, has even less benefit when the problem of remarriage is considered. Finally, the rule is artificial. It requires an adversary position in form even though none exists in fact. It is playacting.

Possible Remedies

It is comparatively simple to say that inactivity will not solve the problem or provide us with a better rule. It is also easy to pontificate that we should re-aim our divorce procedure at the real, instead of at an incidental, aspect of the problem and that we should invent an affirmative rather than a negative rule. The actual doing of it, however, will require more effort and thought, based on trial and error.

We do have one example of a legal system which, apparently, was able to produce all the facts necessary for the formulation and solution of the public aspect of the divorce problem. Thus, during the Middle Ages, the Ecclesiastical Courts[36] had a variety of methods available to them in obtaining information. They were probably effective but there is no occasion to turn back the clock several hundred years and seek to restore this other-worldly atmosphere. Neither does it follow that we are presently ready to treat a family breakdown by therapeutic means.[37]

Even within the framework of the adversary process, it may still be possible to devise a type of proceeding which will not ecourage the two spouses to join forces to deceive the court. One solution is to eliminate the simple unified adversary decree. The adversary process is at its best where it is dealing with a simple past event and the prayer is for money damages. In an automobile accident—a tort—the plaintiff and defendant have met, probably only once, very likely under conditions of violence. But in a divorce the parties have met under conditions which are designed to produce a status, a fiduciary relationship.[38] They have lived together for a time, maybe for years, and therefore the break has often come

36. I Holdsworth, History of English Law 619 (7th ed. 1956); I Pollock and Maitland, History of English Law 439, 478 (2d ed. 1923).

37 There is not much published material directly on the subject of treating divorces therapeutically. The data on family courts is the most relevant. The subject is widely discussed at meetings of the Section of Family Law of the American Bar Association. See Alexander, "The Family Court—An Obstacle Race," 19 Pitt. L. Rev. 602 (1958).

38 That marriage is regarded as something more than a contract is generally accepted. For a collection of materials see Jacobs and Goebel, supra note 4, at 58-79; Maynard v. Hill, 125 U.S. 190 (1887).

about gradually. Furthermore, the relief desired is complex. Money damages in the form of alimony or support is a factor, but what the court is doing is dissolving a status.

The court is dealing with a public relationship—marriage. The husband and wife sometime in the past appeared before the marriage-license clerk and in effect represented themselves as competent to assume the responsibilties of married life. Now they appear before another public official, the judge. The plaintiff says the defendant failed, but a more realistic appraisal of the situation is that both have failed. Only, the plaintiff does not admit his shortcomings. He asks to be put back, as it were, in status quo so that, if he happens to want to, he may make another try at marriage. This really complex situation calls for something more than the traditional adversary approach.

If divorce had to do only with the property interests of the two spouses, the court might well expect to receive from existing procedures about as much information as is available in any other type of litigation over property. The other aspects of the controversy, the custody of children and the severing of the status bond, are sui generis and call for other types of remedies. Already the custody of children has been taken over, in large measure, by a nonadversary process.[39] The dissolution of the family tie is somewhat analagous to the settlement of an estate in which attention should be given to the rights of groups of people like creditors and heirs. It is also somewhat analogous to the dissolution of a corporation or business partnership where creditors and stockholders require attention, or perhaps the settlement of a bankrupt's estate. True, in these instances the problem is essentially economic and the rights of the parties generally may be expressed in terms of money damages or property awards, but at all events the basic element of dissolution is present. In a divorce there is dissolution, but the factors are not alone economic, rather they are also spiritual and sociological or socio-legal.

In this broader view of divorce litigation, the initial question is whether the family is "dead." The answer to this may come from several sources. One difficulty with the no-collusion rule is that under it we expect the correct information to come from the embattled spouses. A somewhat comparable situation would be present if, where an individual was dead, we expected testimony directly from the corpse. The spouses will give us subjective data at a time when our need is for objective information. When the medical profession faces this type of problem, it offers a wealth of objective testimony from attending physicians, the coroner, the med-

[39] The rules governing this process are collected in Standards for Specialized Courts Dealing with Children (U.S. Children's Bureau Pub. No. 347, 1954).

ical examiner, toxicologists, and others. On the other hand, the law has been conservative in its approach to this type of situation. True, it admits testimony of an accountant in the economic affairs of business enterprises, but as yet we have no family "coroner." That does not mean that we might not develop one.

If the rules prohibiting collusion are of little fact-producing value in the first part of a divorce proceeding, they are even less effective in the second or remarriage part. In this second area, the question, which affects the public interest, concerns the competence of the spouse to undertake the prospective, responsible, and public job of another marriage, and this question should arguably be answered before the license to marry is issued. Corrupt agreement between the spouses to deceive the divorce court as to the facts of the first family breakdown apparently is not substantially prevented by the no-collusion rule and its enforcement. Deception of the state by which a second marriage license is acquired by a person incompetent for the task is not touched at all by this same rule. Therefore, it seems that the time is ripe for a consideration of alternative remedies and other preventive devices.

Several basic ideas may profitably be fitted into any proposed remedy. One of them is to take out of the process as much benefit to the parties as possible in trying to outwit the court. Another is to view divorce not merely as an individual event like an automobile accident but rather as a continuing process, each phase of which deserves careful judicial attention. It would appear that the existing rules against perjury, subornation and contempt are adequate to take advantage of the divorce litigant who simply refuses to co-operate. However, our present concern is with fact pleading—how to get before the court the whole truth relating to the public interest.

There is not much consolation in the possibility of setting up a diligent and expensive corps of detectives and investigators who, upon the filing of a complaint, would meticulously check up on all facts in all divorce cases. Negative solutions based on thou-shalt-not rules would seem to require too much effort and money to gain extensive approval. They tend to stir up the competitive spirit of the husband and wife, not so much against each other but against the legal system. If we could eliminate the collusion concept entirely and put some more realistic system in its place, better results might well be expected. If we cannot count on full-bodied enthusiastic cooperation by the spouses, we might at least employ a routine which would make it considerably less advantageous to them to try to buck the system, to try to outwit the court. It is such a proposal which is presently suggested.

CHRONOLOGICALLY DIVISIBLE DIVORCE

It would be useful if we could find some other term to replace the much-battered "divorce." If we still employ it, there is need to describe what it is we are talking about. Presently, we use it in the sense of a process by which one family is dissolved and one of its members proceeds legally to create a new family. Of course, this latter result does not always take place, but there is nothing abnormal about the idea; it follows logically from the dissolution of family #1. Any legal concepts we may have in mind as remedies should include the urge to create family #2.

In the *Estin* case[40] the Supreme Court of the United States sanctioned the concept that divorce is topically divisible. Property issues present one problem, the right to remarry another. But a *chronological* division of divorce into stages with certain consequences at each step and with a consecutive thread of purpose running through all the stages is not inconceivable. To protect better the public interest in the family, a division into four consecutive steps would appear adequate to modify, if not entirely to neutralize the effect of the spouses' self-serving attitude toward withholding from the court the facts of the dissolution part of the case. The result might be more cooperation between court and litigant.

The first of these stages would be an *application* to the court by either one or both spouses for a decree dissolving the family unit. The word "*divorce*" would not appear because it would drag into the arena unnecessarily too many controversial issues. After the usual statement of names and the fact of marriage, plaintiff or plaintiffs would request relief from what he or they regard as an intolerable condition, just as the petitioner might have done during the Middle Ages. All he would be permitted to ask for at this stage would be that the family be dissolved, not the right to remarry. So property and custody problems and their adjustment would be relevant.

The second stage would find the court dealing with a problem of *dissolution* of a legal unit once created by law and now at the request of a "minority stockholder," an alleged failure. The court's initial problem would be to decide whether the family actually was "dead" or whether efforts at reconciliation between the spouses might restore it to a sufficient degree of vitality to make possible a resumption of normal opera-

40 Estin v. Estin, 334 U.S. 541, 549 (1948).
The language is:

> The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern.

tions. After this point was determined and it appeared that the family was no longer capable of performing the functions which the state expects of the persons whom it licenses for this purpose, the declaration of nonexistence would be handed down. This declaration would involve not merely the statement that the family was no longer a living unit with which its members and third persons might deal. It would also include a revocation of the license and proper recording of the fact in the office of the marriage license clerk in the state bureau of vital statistics and anywhere else that the circumstances might require. Thereafter, the obligations of the members of the family to each other in property and in personal affairs would be as indicated in the decree and not as previously existing at law. Following this procedure would be a recording of such information as might be presently available as to the cause of the breakdown—with a view to its later use. Fault need not be placed on anyone. The only immediate issue whether the once-going concern has come to a full stop—and why. If information were not too accurate on the reason for the breakdown or if the opposing spouse did not see fit to avail himself of his right to defend, no great damage would be done. After all, the main decision as to the nonexistence of the family will be made not because one spouse has been guilty of improper marital conduct but because it is apparent to the court that these two people are no longer mutually willing or able to sustain the public burdens of operating a family. The court is dissolving a status or revoking a license.

The third stage involves a placing of both spouses on *probation* in anticipation of stage four and a prescribing the terms of probation. Under the laws of many states at the present time, divorce proceeds in two stages. The "cooling off"[41] period is not infrequently prescribed in the hope that reconciliation may be encouraged. However, the spouses during that period are left to their own devices, the state keeps hands off. Whether it works out in practice is a matter for still further research.

The period of probation could last from six months to a year and would produce objective records gathered impersonally by competent observers, which would very likely reveal something about the marriageable characteristics of the former spouses. The probation system would be in the hands of some of the professions, or quasi-professions, which are as much interested in the problems of the modern American family as are the lawyers. This information properly marshaled and classified would be of interest in the fourth stage.

The fourth stage, the proceeding for permission to remarry, would be

41 The statutes are collected in Jacobs and Goebel, supra note 4, at app. 53, (interlocutory decree), at app. 58 (right to remarry).

taken only by those divorced spouses who desired to remarry. The first three steps would be prerequisite. Either one of the ex-spouses, irrespective of fault, could make application—not to the marriage license clerk—but to the court as a special proceeding. The action of granting or rejecting the request would be judicial and not merely ministerial. The question would be: Is this applicant, obviously a partner in one past marital failure, presently possessed of the characteristics and qualifications which at least in minimum form, are essential to give reasonable promise of success to a second marriage and the building of a new family. The proceeding would not be adversary. The proponent would move ex parte on the basis of his own affirmative record. The burden of proof would rest on him. What he did or did not do in the earlier marriage would be interesting background data but not necessarily conclusive of the present question. What was discovered during the probationary period would also be interesting and perhaps compelling. But in the last analysis, the applicant with his affirmative supporting testimony, would stand or fall on the impression he made presently on the judge, or perhaps on an interprofessional advisory committee of experts.

If domestic problems were all in the economic field, the law would have less trouble in making evaluations as to marriageability. Today courts desiring information on which to base prediction of future events in the business world have little difficulty qualifying expert witnesses who will testify, for example, to the probable trend in real estate or investments. That in family law economic data is not of itself sufficient to satisfy the inquiring judge, need not block efforts in this direction. There are persons in medicine, sociology, and divinity who may also qualify as expert witnesses and supply the courts with invaluable marital data.

It is probably true that law is presently a bit reserved in accepting evidence of this character because we have had less experience with interprofessional co-operation than with a partnership of business and law. It is suggested that this reserve need not long endure. All the professions live, as it were, in the same neighborhood. Familiarity with one's neighbors in interprofessional intercourse need not breed contempt—in fact quite the contrary. The field of family law is certainly one in which there is need for conducting experiments in this area of co-operation. When an accord has been reached between law and the relevant social and physical sciences, the process suggested in stages three and four should not be impracticable.

Comparable Procedures

In family law the immediate question is whether there are any familiar legal routines presently susceptible of comparison or analogy with that proposed. At least one is the application which a disbarred lawyer makes for reinstatement as a member of the profession.[42]

The process is ex parte, and the petitioner is running against his own record. His past conduct before he was disciplined is interesting but not necessarily controlling. The question is: What impression does he presently make on the court and the organized bar. In support of his request he certainly presents evidence which is not properly labeled "economic." If the word "sociological" seems too strange, we may substitute for it the word "professional."

The idea that people who marry and operate and maintain a stable family might be analogized to a profession is not too far-fetched. There was probably a time when anyone could "marry" and get along as best he might, but for a long time there have been standards established by public opinion and to some extent by law which rule that not everyone is qualified for matrimony.[43] The ones who pass the hurdles are a class apart deserving of special recognition and, because of the importance and difficulty of their task, of respect.

The elements for a profession are variously named,[44] but the following are generally accepted—organization, the pursuit of a learned art, and a spirit of public service. The marriage license supplies at least some evidence of official public organization. A brief perusal of literature devoted to preparation for marriage suggests that there is here the basis for the required essential learning.[45] Finally, the spirit of public service may be required by the state and compliance imposed on the parties even though some individualists may not be too ready to agree. This final condition is characteristic of the control by the state over lawyers.

Conclusion

The present suggestion is that the concept of no collusion be eliminated from the legal fact-gathering tools available for divorce procedures. In its place a system of chronologically divisible divorce is proposed. It is

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42 See Annot., 70 A.L.R.2d 268 (1960) (reinstatement of attorney after disbarment, suspension or resignation).

43 The statutes prescribing who may and who may not marry are collected in Jacobs & Goebel, supra note 4, Appendix: Table 2, Restraint on Marriage; Table 4, License; Table 13, Age of Parties; Table 20, Consanguinity and Affinity; Table 21, Insanity, Epilepsy and Disease; Table 22, Physical Incapacity; Table 23, Miscegenation; and so forth.

44 Pound, The Lawyer from Antiquity to Modern Times 4 (1953).

45 Becker & Hill, Family, Marriage and Parenthood (2d ed. 1955).

not necessary that the proposal be perfect. Otherwise, there would be fewer legal concepts. It is sufficient if it promises more than the present system. The important factor in the present proposal is that it shifts the point of emphasis of the litigant. Presently, a divorce plaintiff is required by the existing system to win on his own innocence and on the weakness of the adversary's position. Under the proposal, he wins or loses on the strength of his own record.