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COMMENT

DIVORCE—CANTERBURY STYLE

MONRAD G. PAULSEN†

In March 1966 Sir Leslie Scarman, chairman of the newly formed Law Commission in England, speaking for himself at the University of Bristol, listed the objectives of divorce law as he saw them: the preservation of family life, the availability of divorce if family life breaks down and the making of proper provisions for dependent children and spouses. These aims, he affirmed, "are more or less achieved in the framework of existing law."[1]

His ultimate judgment was tolerant of present arrangements. "The law, though it creaks, works." Holding these views, Sir Leslie suggested evolutionary change rather than radical innovation. He called for decentralization in the administration of family law by establishing regional family courts which might employ lay justices as members of the court; he asked for the elimination of domicile as a basis of divorce jurisdiction and the substitution of habitual residence of either spouse. Although advocating retention of the matrimonial offense as a ground for divorce, Sir Leslie urged the additional ground of "irretrievable breakdown, evidenced by separation over a period of years, whatever the cause of the separation."[2] Furthermore, he argued that the courts should not grant a divorce unless the judge is satisfied that appropriate financial and custody arrangements have been made. Finally, he recommended reform legislation to make more effective the methods for enforcing support orders.

In contrast, *Putting Asunder,*[3] the report of a group appointed by the Archbishop of Canterbury and chaired by Dr. Robert Mortimer, Bishop of Exeter, has concluded the present law of divorce is unjust, "superficial," "remote from marital reality," and "quite simply, inept." The group, in the light of its assessment, makes a far-reaching recommendation: "the doctrine of the breakdown of marriage should be comprehensively substituted for the doctrine of the matrimonial offense as the basis of all divorce."[4] Under the marriage-breakdown doctrine the courts

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1. SCARMAN, FAMILY LAW AND LAW REFORM 2 (1966).
2. *Id.* at 20.
3. *Putting Asunder,* S.P.C.K. London (1966).
4. *Id.* at 18.

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would be called upon to determine a single, fundamental question: "Does the evidence before the court reveal such failure in the matrimonial relationship, or such circumstances adverse to that relationship, that no reasonable probability remains of the spouses again living together as husband and wife for mutual comfort and support?"[5] The arresting character of the proposal is underscored by the fact that no jurisdiction in the Anglo-American world has sanctioned the principle of marriage breakdown as an exclusive ground for divorce.

The Mortimer report is significant. The group worked for two years discussing a variety of proposals respecting the improvement of divorce law. Viewed as a statement by eminent persons whose work was sponsored by a church with a conservative heritage, it is a breath of fresh air and a great step forward. A charitable concern for unhappy individuals rather than a narrow insistence on received ecclesiastical law dominates the report. The report is aware of twentieth century problems. For example, it points out that ways must be found to permit an abandoned family to share not only in a husband's immediate cash income, but also in the fringe benefits he has accumulated. The report, however, cannot properly be judged against a church background. It is not a statement about the Christian view of marriage and divorce. Rather, the document aims at giving the state advice about those changes in the secular law of divorce which would be expedient, wise and just. The advice given will generate controversy.

The case for the present set of legal arrangements on both sides of the Atlantic is that most people who want divorces get them and get them without great expense or undue delay. Although the theory of the Anglo-American law rejects the notion that spouses who wish to terminate their marriage may do so by mutual consent, the law in practice permits consensual dissolution through the means of properly arranged, undefended cases. These "arranged" divorces (over ninety percent of those granted) are obtained, it is true, by employing fictions, collusion and sometimes perjury. To rid the law of such baggage is obviously desirable. How to do it, however, without introducing new, more serious, troubles is less than obvious.

If a new start is made on the law of divorce, should not legislators bring the law and the reality together by permitting a marriage to be ended simply because the partners seriously desire it to be ended? Few proposals strike more fire than this suggestion. The Mortimer group "emphatically" rejected this notion on two grounds. The idea would virtually repudiate the community's interest in the stability of marriage

5. *Id.* at 38.

because a judge (the community representative) would take no effectual part in the proceedings. Further, if a marriage can be ended by mutual consent, the intention of the covenant to marry would no longer be "life long." Neither point persuades.

Most persons who marry today are well aware that divorce is available if the marriage does not work. Yet, surely few intend anything other than a life-long relationship, at least at the moment of the ceremony. The purpose of the bride and groom is formed by factors more deeply rooted in the person than the provisions of the divorce law.

It is not easy to state the secular case for the community's insistence that a childless couple remain married to each other against their wishes. Does divorce by consent teach the citizens that marriage is unimportant and therefore it may be taken lightly? There is little evidence to suggest that the ease of legal divorce increases the number of marriages which break down (as opposed to increasing the number of divorce decrees). Certainly it has been easy enough to obtain a divorce in almost all American states. The American rate of divorce, moreover, has remained stable for over twenty years—if one allows for a short-lived increase immediately after World War II. The educative effect of legal provisions on moral behavior is little enough in other fields. We should not expect the teaching of the law to be especially effective in the area of divorce. The reasons for divorce and marital breakdown, as the Mortimer group itself recognizes, lie deep in the culture and the personalities it has produced, not in the provisions of a statute.

Sir Jocelyn Simon, President of the Divorce Division of the High Court in England, recently has suggested that divorce by consent should be allowed if there are no dependent children, but that divorce should not be permitted at all if the couple has children in need of care and upbringing. Even this apparently attractive limitation on the principle of divorce by consent is unsound. Married couples with children are not immune to those factors which make the parents' lives unbearable and joyless. Such a situation cannot be a happy one for children. The community, of course, has as interest in promoting stable families in which children can flourish. The question, again, is how to do it? The law can safeguard a child's economic interest to the extent that family resources permit. It can see to it that the provisions for care and custody are carefully reviewed but the law cannot preserve the home. The state can refuse to break the bonds of matrimony but it cannot bind the spouses to love each other or to live together. Even where there are children, parties seriously wishing to terminate their marriage should be permitted to do so, though,

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to repeat, especial care should be taken to give children as much security as possible.

"Mutual consent" grounds exist in Australia, New Zealand and in some American states in the form of statutes authorizing divorces after a period of separation such as two, three or five years. In 1966, the State of New York changed its divorce law by adding several grounds to adultery, the only ground for divorce under the prior statute. One of the new grounds permits divorce when the parties have lived apart for two years pursuant to a written, formal agreement of separation. These "mutual consent" provisions are unlikely to be favorites with a playboy ready with a new companion. In point of fact they have been rarely used in the United States, save in Maryland, a state in which other grounds are not easily available. The point to be faced is whether the statutory periods of enforced separation are not too long. As noted above, divorce by consent is achieved by manipulation of the other grounds for divorce. If the manipulations are subversive of the legal process and its reputation, we ought to face the reality of divorce in cases where the parties have agreed to divorce and grant the decree without undue delay.

It is, in point of fact, astonishing how a vision of the atypical case has dominated the discussion of divorce by consent. Debaters conjure up the vision of two insincere pleasure seekers ready for new adventures rather than the common case of a tragic, weary couple who have concluded at last that the pain should cease.

The Mortimer group was, of course, concerned most deeply with the troubled pair described above. It is precisely in relation to such cases that the doctrine of marital breakdown is thought most civilized and beneficial. Neither party would have to blacken the other with distorted, false allegations of adultery, desertion or cruelty. Neither would "divorce" the other and neither would stand innocent. The decree would merely pronounce "dead" that which had died. The aim is admirable but there are costs which are likely to be found excessive.

The divorce scheme described in *Putting Asunder* would require a judge to make an investigation "in some respects analogous to a coroner's inquest" with the object of inquiring into the facts and the causes of marital failure. A decree would be forthcoming if the judge finds that the marriage has broken down irrertrievably, so that no reasonable probability remained of reconciliation between the parties as would enable them to cohabit as husband and wife.

The main issue which the proposal presents is hidden in the report. The draftsmen ask whether the issue of breakdown is triable. Clearly,

in one sense the answer is "yes." Judges often employ legal standards rather than rules and decide issues of degree. A judge could apply the standard suggested and come to a conclusion. Indeed, quite often he would be right, at least when he granted the decree. The main point is not, however, whether a judge *can* arrive at a decision in a somewhat reasonable way, but whether it is wise and expedient that he should do so.

The plan of the Mortimer group contemplates that a judge might properly refuse a divorce to an embattled couple, both of whom earnestly desire release from the burden of marriage, because the judge has not been convinced of "breakdown." A single act of adultery, a course of cruelty, even a substantial period of desertion would no longer suffice, in themselves, as reasons for granting a decree of divorce. Such matters would be sufficient only if the marriage had "broken down." The report does list these "grounds" as evidence of breakdown and the members of the group, we may guess, would confidently predict that most judges would grant a decree to the offended spouse on the ground of breakdown. However, the proposal does allow for the exercise of judgment and discretion in respect to matters that men, even judges, are apt to judge only in the light of their deepest personal conviction. One would expect the greatest variations among the judges if they take their task seriously. We may wonder, with Sir Leslie Scarman, whether "a full inquisitorial attack upon every married life brought before the Court in divorce proceedings would, in the end, bring into disrepute the very thing it wishes to preserve, namely divorce by judicial process."[6]

The report's "new basis" for divorce contains another troublesome feature. The judge is to be informed about "breakdown" from the pleadings, from an answering statement which a respondent would be encouraged (but not required) to file, and possibly from a report made by a "forensic social worker," an added court official whose function would be to assist the judge in his investigations. The petition is to be considerably expanded by adding information about the history of the marriage, the circumstances of the failure, the arrangements for maintenance and the custody of children and, perhaps most important, the attempts at reconciliation. It is a fair guess that, in making an assessment that a marriage is irretrievable, most judges will give great weight to attempts at reconciliation. Should he find these attempts "inadequate" he would have the power to adjourn the hearing while such attempts go forward. While no reconciliation procedures are required under the group's plan, a serious conciliation effort could easily become a practical necessity for parties who come before certain judges.

6. SCARMAN, *supra* note 1, at 9.

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In New York, the 1966 divorce law has set up an elaborate conciliation process. At least one conciliation conference with a counsellor is required in all cases. The point simply is that there is a general interest these days in such procedures before granting a divorce. Their use raises the important question why persons who have failed in their marriage and wish to end it should be subjected to the painful prodding and the invasion of privacy which thorough conselling clearly requires. It is only fair to repeat that the report explicitly rejects the notion of compulsory conciliation (on the ground of the futility of the effort). However, the judges would be given a discretion which a certain number are bound to exercise in the direction of vigorously "encouraging" counselling.

There is a practical point. Undefended divorces under the present system are, on the whole, inexpensive and do not consume valuable time. Any true investigation by a judge is bound to take time even if he is given the assistance of a "forensic social worker." Speaking of the possibility of a full investigation in each divorce case, Sir Leslie Scarman reminded his audience: "Put simply, there are just not enough lawyers in our community to give effect to such counsels of perfection."

Any law of divorce must reflect the opinions of the people it seeks to serve. It seems probable that most people still subscribe to the idea that a spouse guilty of a serious offense may properly be divorced. The main trouble with the doctrine of matrimonial offense has been that it has been substantially the only doctrine. Little lay criticism is heard when a wife is quickly given a divorce from a husband who has badly beaten her and the children. In the light of general popular approval in such cases, and the sense of justice which supports the attitude, these grounds should be retained in the law.

The Mortimer group vigorously rejected the idea that "breakdown" should be added to the list of grounds for divorce, principally for the reason that, in the group's view, the principle of matrimonial offenses and the principle of breakdown are mutually inconsistent. This incompatibility, the report asserts, would be "glaringly obvious," creating an unfortunate anomaly. This point is persuasive only if the state chooses one principle as the exclusive one and then adds grounds which are justified on the other principle. But why should an exclusive choice be made? One principle can serve the case of the spouse who has suffered serious offense. The other can serve those spouses with whom no glaring misconduct can be associated, as well as those who seek divorce against the will of a relatively innocent partner. The legal system frequently chooses different principles to dispose of distinguishable situations.

In so far as the Mortimer group hoped to avoid "arranged" divorces we may predict that the aim will not succeed if the proposals were to be enacted. Decrees can be "arranged" under the "new basis" as well as under the existing law. The facts showing breakdown can be carefully selected. Consenting spouses can eagerly seek out conciliation services in order to establish unsuccessful attempts at reunion. The new arrangements will, of course, extend delay and add expense.

There is obviously something appealing about a proposal which seeks to take a divorce proceeding out of the category of "war games." The difficulty is that "marital breakdown" is likely to occur on a marital battlefield. The divorce proceeding is not the *causus belli* and hence making it less accusational is not likely to help the parties. Something may help. For example, the petition need not contain all the horrible, specific details required to establish grounds for divorce. Courts could be authorized to award a divorce to *both* parties, thus avoiding a public stigma. In short, some of the *publicity* surrounding the conflict can be muted quite easily by modifying existing law.

The analogy to the coroner's inquest is not a happy one. The parties to a marriage are very much alive, having personal interests which they may wish to assert, points which they may wish to advance, and facts which they may wish to dispute. Where this is true courts will employ the adversary system because it is the system which Americans know and trust.

The Mortimer group did not entirely rid the courts of ideas of guilt or offense. Proponents of the marital-breakdown doctrine acknowledge that a divorce under the doctrine, can be granted upon the request of a person who has been "guilty," or "offensive," even though the relatively innocent spouse may not desire a divorce. With a heavy heart, the Mortimer group considered the plight of the middle-aged wife whose marriage had "broken down" because of her husband's taste for a teenager. The group accepted the logic of its position—a divorce should be granted even so.

Every effort should be made to safeguard the abandoned spouse's economic interests. Ideally she should suffer no financial loss. Yet, the breakdown principle may require that her marital status be destroyed even against her will. Professor Norman Anderson of London University, a member of the Mortimer group, wrote in the *Church of England* newspaper:

> It seemed to us . . . that society can not have it both ways; the principle must be *either* the matrimonial offense *or* breakdown. . . . Unhappily, the law is unable to bring the couple

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> together again, or to heal the heartbreak which one of them may have suffered. It would, of course, be essential to ensure, so far as this is possible, that financial hardship should not be added to the poignancy of desertion and this must be extended to such matters as pension rights.[7]

Nevertheless, there are some cases too outrageous to contemplate. As to these the Mortimer group recommended "that the court should have a duty to refuse a decree, even though breakdown has been proved, if to grant it would be contrary to the public interest in justice and in protecting the institution of marriage."[8] Fault would also be retained as an important element in deciding about the level of maintenance payments. An assessment of personal conduct in marriage would remain a significant task even for judges employing the Mortimer group's version of the breakdown principle.

On September 6, 1966, Dr. T. T. Reed, the Bishop of Adelaide, in a pastoral address to the synod reminded Anglicans in Australia that the Church itself must face a problem frankly.[9] The Church must decide whether to maintain the doctrine of marriage permanency or look upon marriage as a union which could break down, disintegrate or die. The Bishop reportedly said there was no doubt what the choice must be for those who accept Christ's teaching. But there must be doubt when the Church commissions a study of the laws of marriage, divorce, and remarriage. The Mortimer report is, of course, only the recommendation of a group of individuals to the Archbishop. Yet it would be a curious church-sponsored document, indeed, if it does not foreshadow a willingness to consider doctrinal changes. Otherwise, *Putting Asunder* would appear to advise man to do that which man cannot do.

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7. Anderson, *Church of England* newspaper, July 29, 1966, p. 7, col. 3.
8. *Putting Asunder, supra* note 3, at 53.
9. London Times, Sept. 7, 1966, p. 9, col. 7.

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