Wait *Instead of seeking to establish guilt and punish it with costly legal entanglements, modern divorce courts could prevent many unnecessary separations. A compulsory waiting period, private hearings, and a thorough investigation by case workers would replace methods now too quick or too cumbersome for a right settlement, fair to all concerned.* REGINALD HEBER SMITH, *one of the founders of the Legal Aid Movement, is the author of* Justice and the Poor. *He writes from thirty-five years of active practice.*

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DISHONEST DIVORCE

by REGINALD HEBER SMITH

1

DIVORCE is a complex problem. Its real causes are many and as diverse as human beings are different. Bad divorce laws are only one cause. This article does not deny the validity of the many other causes because it does not deal with them. It is strictly limited to what the courts ought to be able to accomplish by effective legal action.

Divorce must be controlled by law. The law is the most powerful instrument for social control that civilization has been able to evolve. The law and the administration of justice have dignity and majesty as well as force. They can be used with tremendous effect. In the struggle against divorce, this power must be used constructively instead of being frittered away or perverted as it is today. Under the present premise of the law by which they are bound, our judges are now virtually helpless in the field of divorce. Our judiciary consists overwhelmingly of honorable men who wish to do their best and who, as a class, are unquestionably the finest public servants our democracy possesses.

It should be clear, therefore, that I attack our present divorce laws in strong terms, not because I wish to pull down our legal institutions, but because I wish to strengthen them.

Marriages have kept pace with growing population, but divorces have increased ten times as fast. Since 1867 the increase in divorces has been over 6000 per cent, while the population has increased 300 per cent. The figures speak for themselves: in 1867 there were 9937 divorces; in 1945 there were 494,000; and in 1946, 613,000. The sober facts are that last year the marriages of more than 1,200,000 men and women were terminated by law, and that there are now more than 5,000,000 divorced persons in the United States. The trend has been steady and uninterrupted, and our divorce laws have become more and more complex.

Lawyers have the first responsibility and can rightly be asked to make the first appraisal. The Bar Associations are beginning to realize that they must speak out in the public interest. To quote from one of the many articles currently appearing in legal periodicals: "Differing and conflicting divorce laws in our various states have given rise to an incredible legal and human confusion. Even the attorney is often at a loss to determine if a marriage is legal, or a child legitimate."

The Supreme Court of the United States had before it on October 14 two appeals in divorce cases. Mr. Justice Jackson interrupted arguments by counsel and stated: "We are in a terrible state of confusion. People — simple people — don't know whether they are divorced or not divorced."

The total confusion suggests that the error is in the premise with which the law is forced to work. The present premise inextricably mixes up our law with concepts of sin and punishment. Our statutes and our judicial decisions still embody the ancient concepts, which originated when divorce was solely within the jurisdiction of ecclesiastical courts, that one party must be *guilty* of some wrongful act and the other party must be wholly innocent.

The premise of punishment is unworkable and three divorce situations that continually arise will show where the premise of punishment leads us.

(1) A husband and wife found that they were not well mated; they had no children; being unhappy, they fell in love with other mates. They have lived with their new mates, have children, love the children, and would like to have permanent, respectable homes. Any social worker would propose to clean up that situation quickly by having a divorce decree end the old, barren, empty marriage. Then the new unions could be legalized and the children legitimatized.

Any lawyer, however, must advise this couple that a divorce is impossible *if the judge is told the truth.* Here we see hypocrisy entering the picture and, unfortunately, it will continue to haunt us. The law denies the divorce because *both* parties are guilty. But is not this pre-eminently the kind of cancerous condition that calls for social surgery?

What happens, of course, is that one party files

a petition for divorce. The other does not contest. The judge may have his suspicions, but unless the petitioner (almost invariably the woman) is unusually indiscreet there is nothing he can do, after she has proved a legal "cause," except say, "Divorce granted." Plainly, under this system, the judge is never going to hear the truth.

The lawyers are in an equivocal and uncomfortable position. That is one reason they hate divorce cases. Under the rules of the game, the lawyers have to go through a sort of mumbo-jumbo double talk. From beginning to end, under our present divorce procedure, nobody tells the husband and wife the whole truth in simple, clear, and unequivocal terms. In divorce cases truth is always dangerous, and may be fatal.

In the present case, remember that the illegal liaisons have produced children, the marriage none. Remember also that our divorce laws pretend great solicitude for children. But in this case the law will, if it can get at the facts, deliberately and coldly stigmatize those children as bastards.

(2) Massachusetts has a statute that, after a divorce, the "guilty party" cannot remarry for two years. That is straight punishment; that is what is intended, and make no mistake about it.

Suppose that after an absolutely legal divorce in Massachusetts, so that the man *is* divorced, he remarries in any other state within the proscribed two years. In Massachusetts that marriage is void. Suppose the man and woman continue to love each other and live together for more than two years, does their marriage then ripen into legality? No, it is void. Suppose, after the two-year period, children are born, are they legitimate? No, the marriage is void and they are illegitimate.

The following case arose to harass the Supreme Judicial Court of Massachusetts. A man, properly divorced in Massachusetts, within the two-year penalty term married a girl who lived in Rhode Island and the marriage was performed there. The divorce was valid in Massachusetts. The remarriage was valid in Rhode Island. The couple returned to live in Massachusetts. The court was constrained to rule that the girl was married to the man but the man was not married to the girl.

Such an impossible and crazy result can be arrived at only if you start from the puritan premise that, though the heavens fall, a man *must* be punished for his guilt as a sinner.

(3) An honorable man and his equally honorable wife come to realize and have to admit that their marriage is not working out well, that the relationship is unhealthy for them and is producing an atmosphere of tension in their home. They respect each other and love their children. After serious reflection they agree that their own health and the happiness of the children will be promoted by divorce. They agree to petition for a divorce and they agree on custody and financial support.

From beginning to end, everything is clean and straightforward. They appear in court and tell the truth. They are accustomed to talking truth. And having sworn on the Bible in open court, surely they must tell the judge how they feel and why they have agreed. They start to do so.

At that point the judge *must* dismiss the case. A divorce is legally impossible. The man and woman are guilty of a crime they may never have heard of. It is the crime of "collusion."

2

The way to get a divorce is to figure out some legal "cause" and then have an uncontested case. Not a judgment entered after agreement, but just an "uncontested" case.

Practically all divorces today are uncontested — so far as appears on the court records. William Lewis Parsons in the *Massachusetts Law Quarterly* for May, 1947, estimates that 85 per cent of American divorces were granted in uncontested proceedings. The judges in Chicago have stated that 90 per cent of the divorce cases coming before them are uncontested. These uncontested cases are, in fact, agreed-to cases. Everybody knows it. Everybody must pretend not to know it. In the whole administration of justice there is nothing that even remotely can compare in terms of rottenness with divorce proceedings.

The theory that the state is an interested party in every divorce case, because the children are its future citizens and the home is the basis of society, is sound. But under our present conditions, the genuine interest of the state has no chance to assert itself. It is not heard. It is stifled in the pervasive atmosphere of hypocrisy.

Every divorce court necessarily becomes a divorce "mill" grinding out divorces as rapidly as possible. The dockets are crowded. The woman petitioner testifies to one act of cruelty and she is corroborated by one witness. One act is as good a legal "cause" for divorce as a thousand acts of cruelty. One witness is as good as a million witnesses since there is no contest, no cross-examination, no rebuttal. There is not the slightest reason for the judge to hear purely cumulative evidence. His job is not to get at the truth. He is limited to determining if there is a legal "cause."

Divorce hearings are short and cases go through rapidly. The extraordinarily fine report of the Chattanooga Bar Association, published in full in the Chattanooga *Times*, and reported in the *Journal of the American Judicature Society* for April, 1947, disclosed a court session in 1945 where twelve divorces were granted in seventeen minutes.

In all this rush and shuffle the interest of the state is lost. While it is collusion for the parties to agree to the "cause" for the divorce, it is not collusive for them to agree about alimony and support

of children. When the lawyers for both parties tell the judge that there is an agreement on those points, there is not much that he can do but accept it. The judge has no time to make an investigation himself. And the state provides him with no staff for the purpose.

3

When the law gets hopelessly bogged down, as is true of our present divorce law, reform is best accomplished by a fresh start from a new premise. That has been the history of the evolution and growth of our legal system.

The law should throw all its weight and influence against divorce by honestly attempting prevention through reconciliation. In this effort, the courts would use all the social resources of the community so that it could deal with questions which are social, economic, medical, and spiritual in nature rather than legal, and which are the true causes of broken marriages.

The law can create, enforce, and dissolve contracts. It can deal with marriage as a contract. It is totally beyond the power of the law to create a sacrament. Therefore, it cannot successfully deal with marriage as a sacrament. This is an honest confession of self-limitation. It in no sense denies that the sacrament is the supreme ideal of marriage. The law would leave every religion free to establish its own standards for its own members and communicants, and free to enforce those standards by its own sanctions in the religious sphere.

Furthermore, as the law would seek the aid of *all* the social resources of the community, it would invoke the aid of the churches in its own effort at prevention inasmuch as the church is one of the greatest resources in every community.

If the law, having made its best effort to prevent a divorce, failed at reconciliation, it would then grant the divorce, *but* it would devote the necessary time to seeing to it that the children were properly provided for as to custody and support.

Under this new premise, divorce procedure would be totally different. It would be far simpler. The abstruse legal technicalities which have got completely out of hand would all be swept into the dustbin. Two examples will illustrate this:—

(1) "Domicile," which even the Supreme Court of the United States cannot clearly define, would be abandoned and residence put in its place. Domicile is a state of mind; residence is a fact. A social investigation about a home can be made *only* in the community where the married couple have actually lived a reasonable length of time.

This change, together with the new premise, would stop migratory divorces. A New York woman does not go to Reno because of its six weeks' residence provision. Only because her own state denies her any relief does she seek the quickest bargain available.

(2) "Collusion" would no longer be used to terrorize honest people into lying. Our law, under its new premise, would encourage people to tell the truth, and thus our judges would have at least some chance to get at the truth.

The procedure, in substance, would be this:—

Persons seeking a divorce would petition the court where they reside. Their petition would recite, not legal "causes," but the vital facts about themselves and their children. The judge would then talk to the man and woman, together or singly, or both. He would talk with each as long and as many times as he considered beneficial. The case would then stand over for six months. During this period the judge would have his social investigations made.

At the end of the six-month period, the judge would grant the divorce. Except in very rare instances, there would be no fight in open court about "causes."

The judge would then take firm control of the welfare of the children and determine their custody and provision for their support. This control he would keep throughout the children's minority.

The contract theory will not only let fresh air into an atmosphere that is now suffocating: it will substitute honesty for hypocrisy, and it will end up with decrees that are enforceable.

There is no trouble about enforcing contracts in any state in the Union. Only divorce decrees are an exception. The judges of one state view with great suspicion the divorce decrees of any other state. They resist enforcing them because they are not at all sure of their justice. Under the procedure suggested, a divorce judgment could be given full faith and credit in every state just like any judgment in any other contract action today.

Once migratory divorces are made unnecessary, the effort to enforce a divorce judgment in another state will generally be directed against a man who is, in effect, a fugitive from justice.

It is this evil of migratory divorces and the resulting chaos that the earnest advocates of a federal uniform divorce law seek to abolish. This would require an amendment to the Constitution of the United States because the federal courts now have no jurisdiction to grant divorces. Such a proposal affords a tediously slow remedy at best, and there is grave doubt whether the peoples of the different states ever would agree as to uniform and standard "causes" of divorce. Their laudable objective can

be obtained through the adoption of the new premise suggested in this article, with the further advantage that divorce proceedings will be left in the state courts where they rightly belong.

The history of Anglo-American law proves that legal reform is most easily and most effectively secured through new premises. The classical illustration is that when the common law got so bogged down by antiquated writs, pleadings, and procedures that gross injustice resulted, the principles of equity began to emerge, and afforded relief where relief had formerly been denied.

In 1919, in *Justice and the Poor*, I criticized as unfair and undemocratic the laws concerning landlord and tenant, and those determining the rights of injured workmen. The law in both fields has made tremendous progress *and it did so by adopting new premises.*

The only contribution that the law can hope to make to the solution of the divorce problem is to prevent as many divorces as possible. Divorce cannot be prohibited by law: We live in a democracy and the majority of the people will refuse to enact, to enforce, or to obey any such prohibition. Divorce cannot be curtailed by laws based on the premise of punishment.

But divorce might be prevented in many cases by sound laws that commanded the respect of the community, intelligently administered by judges properly staffed and equipped for their work.

There is good reason to believe that this idea of prevention would meet with success. The Danish law of divorce is based on prevention through reconciliation, and this is in harmony with the entire spirit of the Danish administration of justice, which is based on conciliation instead of litigation.

This plan has also been tried to an extent in Detroit. The judges, being distressed by the flood of divorce petitions, appointed a Friend of Court to make investigations, talk to the parties, and see what he could do. During the twenty-year period ending in 1943, divorce petitions filed totaled 166,872. Of these, 58,439, or approximately 35 per cent, were dismissed for various reasons *but mainly because reconciliations had been accomplished by the Friend of Court.*

Among lawyers and sociologists there is a growing awareness that the factors entering into divorce, and therefore the factors to be combated, are social, economic, medical, and spiritual in nature, as well as legal. Experts and authorities in these fields are available in most communities. The judges should have access to all these resources, have the benefit of their findings and recommendations, and thus seek to determine the best solution for the family as a whole.

Nearly all of us, as members of families, know of instances where truthtelling, good counsel, and honest advice have prevented unwise and hasty divorces. Every practicing lawyer has himself from time to time been able to convince couples that divorce was foolish and no solution for them. It seems reasonable to believe that what private parties, without power or prestige, can achieve simply through weapons of truth and honesty could be accomplished far more effectively by judges, who do have power and authority, *if they were permitted to use the same weapons of truth and honesty.*

We are apt to forget that most normal persons contemplate divorce with repugnance, arrive at their decision reluctantly, and undertake divorce proceedings with fear, with a good deal of hesitation, and much uncertainty. They are beset by doubts. Once these persons get involved in our present divorce procedure, all hope of prevention is lost. They find themselves in an atmosphere of hypocrisy and lies. Their one desire is to get out by having it over with as soon as possible. *At no point* is wise, compassionate, and dispassionate advice given them. No steadying hand is extended.

Divorce is no panacea and every experienced person knows it. This needs to be said and said hard. Love that once was genuine is a shared experience that no decree can slough off. This needs to be told persuasively. Children produced by such a union are a solemn obligation. This needs to be stated emphatically. The man or woman who attempts to escape that responsibility is attempting the impossible. The fact of fatherhood or motherhood is the same fact after a divorce as before a divorce. This must be made brutally plain and without mincing words.

If the state wishes honestly and affirmatively to assert its rightful interest, then let it unshackle its judges and equip them with all that is needful. The judges need staffs of social investigators, they need suitable chambers, and they need time. A judge should be able to devote to a divorce case just as much time and effort as he, in his discretion, believes might bear fruit.

Within the field of effective legal action there will be plenty of cases where divorce is right because it is the only humane solution. When the judge is satisfied that such is the type of case before him, he should be able to act with the merciful efficiency of the surgeon, and without torturing, humiliating, or besmirching the unhappy and unfortunate persons who stand before him.

After these admissions have frankly been made, the core of our problem still remains. Unless we are prepared to give up entirely and lose the battle by default, we must attack with every possible resource we can command.

Certainly the law should be one of those resources. And the law ought to be one of our strongest allies since it steadily demonstrates a vital capacity to regulate life in many of its aspects and activities more successfully than any other instrumentality devised by civilized society.