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DIVORCE AS IT MIGHT BE

E. S. P. HAYNES


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DIVORCE AS IT MIGHT BE

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DIVORCE AS IT MIGHT BE

BY

E. S. P. HAYNES

Author of "Religious Persecution," "Modern Toleration and Modern Morality," "Divorce Problems of To-Day," &c.

"Our modern notions on the subject of divorce have been largely formed under the influence of the early Christian Fathers and of mediæval theologians." (*Extract from Appendix A to the Reports of the Divorce Commission.*)

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DEDICATION

To H. G. WELLS.

Dear Wells,

Your kind permission to dedicate my little book to you encourages me to mention how inspiring I have found your own works—even in the rather limited groove of divorce law reform.

The inherent clumsiness of the legal machine is of course mainly due to its manufacturers—I mean the governing classes, and ultimately the electorate, of this country. Given nothing better to drive, the lawyers do what they can to grease the wheels of the machine and adapt it for decent human use. Lawyers, therefore, feel even more gratitude than the general public to a great writer like yourself who devotes his psychological knowledge and literary genius to improving the conditions under which lawyers work by humanizing, or (I should rather say) civilizing, those forces which can alone purge our marriage and divorce laws of what is loosely called legal barbarity, but should indeed be more strictly defined as barbarous legality.

Dedication

For legality can only be barbarous because people get the laws they deserve, and a majority of our countrymen, with a few honourable exceptions like yourself, are, however unconsciously, obsessed with entirely barbarous notions of marriage, and therefore of divorce.

The conversion of the minority in which we find ourselves to-day into the majority of to-morrow will be more swiftly achieved by the influence of your writings than by the obscure spadework of specialists like myself, and that is only one of many reasons for my having asked you to accept this dedication.

E. S. P. HAYNES.

PREFACE.

The courtesy of the editors of the FORTNIGHTLY REVIEW, the ENGLISH REVIEW, and the INTERNATIONAL JOURNAL OF ETHICS enables me to collect the following essays, all written since the Report of the Divorce Commission. I deeply regret that this little volume will never meet the eye of my friend, Mr. Richard T. Gates, who has recently died in the service of his country. Few men have ever served England so well. I am indebted to Mr. Kitchin's admirable work on the History of Divorce and to the signatories of the Minority Report for my perhaps tardy conversion to the principle of divorce by mutual consent subject to proper financial safeguards and time limits, but I quite realize that other reformers may feel it as dangerous as I did for many years.

The publication of this book in time of war may surprise some of my readers, but this war is bound to blow away a number of mental cobwebs, and to make Englishmen more familiar than before with continental laws and customs. It has already abolished (let us hope for ever) a great deal of the nonsense associated with party politics. It is also perhaps not unreasonable to suppose that the

horrors of war will breed a healthy intolerance of the human stupidity that allowed the war to happen, and thus generally raise the level of political intelligence. The part played by Anglican dignitaries (with one or two honourable exceptions) in regard to the allowances granted to the dependents of those who were risking death and mutilation for their country, must inevitably diminish their claim to dictate to the community as a whole what it is to think about marriage and divorce. They claim to interpret for our benefit the words of Jesus Christ on divorce, but are we to believe that Jesus Christ would have denied to our soldiers' dependents the maintenance due to those "who have loved much"? The Church will soon be told to leave our morality alone, and when that day comes the divorce question will be debated on its merits and settled according to principles of commonsense and common humanity.

March, 1915.

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DIVORCE AS IT MIGHT BE.

Before considering the question of divorce as it might be, it may be as well to consider what it *is* in this country among the privileged circles where it is financially possible. The first essential and absorbing question is that of adultery. Has Mr. A. or Mrs. B. committed adultery, and if so, with whom? The difficulty of proving past adultery at once necessitates exploring the possibility of future adultery, and this usually involves not only employing paid spies such as detectives or domestic servants for the hunt, but also breaking open private desks and drawers, steaming letters, extorting "confessions," and generally resorting to measures that even policemen avoid, when possible, in detecting real crime. Let us assume the husband to be the injured party. He intercepts a letter, or in some other manner discovers that his wife has yielded to what in many cases seems almost a natural instinct after years of neglect, meanness, and such ill treatment as is just short of legal cruelty. What does our society expect such a

man to do? According to all the rules of the Christian religion he ought to forgive his wife up to seventy times seven. But if he did so, to the knowledge of society, he would become an object of universal ridicule. The world expects him to treat his wife from the very start worse than an ordinary criminal, to drive her outside the pale of respectable society, to prevent her from ever again seeing her children, and to expose her for days on end in the pillory which we know under the name of the Divorce Court.

That is not an unfair version of the ordinary "defended" case where the husband wins. If he loses the result is almost as painful, for the two spouses are hopelessly alienated, and the legal tie is usually afterwards dissolved by one of them agreeing to commit the adultery required by law. What happens in the undefended case? The parties have for years felt an "unconquerable aversion" for each other. They may have no children to mitigate this aversion, or the aversion may be so strong as to poison the lives of the children as well as of the parents. They want to make a fresh start. They are, to use the Princess Bariatinsky's expression about litigants in the Divorce Court, "shipwrecked people." How are they to get free? They are advised either that the wife has to commit adultery or that

the husband must perform the masquerade of desertion and the act of adultery. This is usually more convenient because the wife must commit adultery with a man of certain identity, and we have not yet established an Official Co-respondent in our Law Courts or a private agency for obtaining co-respondents as the Germans have done in Berlin. The man, on the other hand, after publicly declining to return to his wife after being asked, can then easily go to a selected hotel, of the solid respectable type that in these days caters for the business, with a genteel prostitute. These proceedings, interrupted by a stream of impertinent inquiries from the official spies employed at the public expense by the King's Proctor, at length set the unhappy couple free—but derided by those who understand the realities of modern divorce, and heartily censured by those who do not. And we are asked to believe that this farcical tomfoolery is a necessary buttress of what is commonly called "public morality," when even virtuous men who never had our modern advantages, never travelled in a railway train, or used a telephone, or heard about Evolution, such as Sir Thomas More and John Milton, advocated in the best English prose the equity and reasonableness of divorce by consent subject to necessary safeguards.

The first thing to impress on the public mind is the comparative unimportance of adultery. The whole divorce question is always discussed as if all divorce hinged upon the question of adultery or (to use the phrase of our refined journalists) "misconduct." So long as it is discussed from this point of view we shall only see the question through a false perspective, and incidentally perpetuate the whole atmosphere of treachery, espionage, and blackmail which at present poisons our divorce law and practice.

Adultery is at once a symptom of trouble between spouses and a test of matrimonial cohesion. It may mean anything or nothing: it may mean nothing more than the caprices of sexual appetite (which are by no means incompatible with a perfectly sincere devotion to a spouse who has become a lifelong friend and partner) or it may be the culminating expression of a fixed detestation by one spouse of the other, accompanied by every kind of cruelty and treachery. The desire for divorce is far oftener due to the incompatibility of the parties than to sexual vagaries. In all cases where divorce is expedient, but neither party is at fault there ought to be facilities for divorce by mutual consent, subject to a proper time limit and provision for the family, nor should the intervention of the lawyer be

necessary except perhaps for settling questions of property.

The intervention of the lawyer is of course necessary where one party injures, or attempts to injure, the other by any course of conduct to which the other can reasonably object, but it is ludicrous to make adultery the only form of injury for which divorce can be granted, unless adultery becomes a sort of legal fiction, as it is openly admitted to be in Holland to-day. For the State to refuse divorce for so cowardly and deliberate an offence as desertion (where, for example, a man runs away to the Antipodes and leaves his family to starve) or for certain acts of cruelty, or where one spouse is hopelessly insane and concealed such insanity before marriage, is a mockery of civilization.

Men and women who denounce such views as these have usually not thought much about the subject at all, and dread the effort of thought quite as much as any social innovation. There are, of course, others who find it as impossible to think clearly and dispassionately about sex as about religion, while on the other hand there is a type of Puritan Agnostic who is far less amenable to reason than the more imaginative Christian. How are all these people to be converted? How again can rational opinions be impressed upon the vast

majority of the population who have never been trained to any conception of society as a whole since they have never had any education except the preposterous rubbish they are taught in the national schools?

Albert Hall meetings are clearly impracticable. The work of divorce law reform can only be achieved by creating a new climate of opinion. Much has been done in this direction during the past decade through the Press and through debating societies and private meetings. A great deal was achieved by the publication of the evidence given before the Royal Commission and of the two Reports. But it will certainly take another period of fifty years to civilize public opinion in regard to marriage and divorce, and reformers must resign themselves to the dreary prospect of continually reiterating their doctrines to comparatively deaf ears.

Such work has little attraction on the surface. It is unpopular and tedious. It has no promise in it of any *millennium*. I often wonder why anyone should take the trouble to attack the forts of human folly since they are obviously more durable than the achievements of human intelligence. There is certainly no reward attached to such effort. The real incentive is, perhaps, the intolerance of human suffering. There are a certain number of men

and women who cannot endure to see human lives and human happiness wrecked by inhuman superstitions, however respectable or popular such superstitions may be. And the day will come when our marriage laws will appear to a younger generation much as the hanging of children appeared to the generation that was growing up in the first decades of the nineteenth century. To hang a little child for stealing from a shop seemed a necessary bulwark of public safety to the eminent and virtuous gentlemen who made our laws (particularly the bishops)—until one day it seemed horrible. The change of opinion is difficult to analyse, but it happened. Let us hope to see the same transformation of opinion before we are all in our graves. Let us also spare no personal effort before "the night cometh."

I see the Divorce Court of the future in two departments. The first department will deal with divorces by consent, and protect all parties from rash and heedless decisions, and adjust questions of property. The second will deal with contentious cases in which injury has been done. The judge will make every preliminary effort to reconcile the parties, and the strictest privacy will be observed, as is now observed in nullity suits where impotence is alleged. Such a procedure will probably heal

up as many matrimonial disputes as it will save the hideous injuries at present inflicted by our law and procedure on both innocent and guilty parties. It will be humane and rational, for it will have been purged of all the barbarity and superstition that have tainted the marriage laws of Europe ever since the decline of the Roman Empire.

Such is the ideal underlying the following essays, all of which have been written since the Reports of the Royal Commission have been issued. It seems sufficiently remote now, but that is no reason for not stating it in terms.

THE REPORT OF THE DIVORCE LAW COMMISSION.

Reprinted from the *Fortnightly Review*,
January, 1913.

It may be permissible to remind the readers of *The Fortnightly Review* that in December, 1906, the Editor kindly allowed me to make the following suggestions to them in regard to divorce law reform:—

1. To make wilful desertion for three years a cause for divorce.
2. To give equal rights for both sexes as regards adultery.
3. To give a discretionary relief of divorce when the home is broken up by lunacy.
4. To afford facilities for divorce in the County Courts.
5. To restrain the present publicity of divorce proceedings as to newspaper reports.

In November, 1909, I modified elsewhere the suggestion in regard to insanity to making it a cause of divorce only in cases where "the insanity of the spouse had continued uninterruptedly for five years and was certified

by the court doctors to be incurable." Though these suggestions were sympathetically received in many quarters, there was a widespread impression that they were merely Utopian.

Yet in less than six years they have all been endorsed by the Majority Report of the Divorce Commission in every particular, except that the County Court judges are not to dispense local justice in those Courts, but in the districts of the High Court Registries. Habitual drunkenness and commuted death sentence have been added as causes, together with some useful checks on permanent separation. Even the three signatories to the Minority Report, including (*horresco referens!*) an Archbishop, concur in giving equality to the sexes, local justice (on a stingier scale) to the poor, and in five new grounds for annulling marriage with which I will deal hereafter. They also concur in some most reasonable recommendations in regard to the right of re-marriage after seven years' disappearance, and obtaining "presumption of death," as well as in a raking criticism of the Summary Jurisdiction Act, 1895—one of those "non-controversial measures" which exhibit and bring into play, on a large scale, not only the gross and thoughtless negligence displayed at times by both Houses of Parliament in regard to measures of vital importance to the poor

though not to themselves, but also all the wholesale blundering of which officials like magistrates' clerks can be capable.

This result is not surprising to any person who has either any practical acquaintance with the intolerable misery on which the Commission has turned a searchlight, or who has sufficient imagination to realise what misery is likely to result from the actual state of the law. But as most people in England either have no such practical acquaintance with the facts, or if they hear of a particular case forthwith attribute the failure of the marriage to some mysterious delinquency of the parties, or persuade themselves that such suffering is morally wholesome and socially useful, the findings of the Commission are likely to prove a considerable shock. In ecclesiastical circles, where the English Church Union had until recently captured "the machine," what the secretary of that union calls "a storm of protest" is likely to occur. Even in more profane circles there is likely to be some resentment against this influential attack on accepted moral usages.

For in all circles alike there is a general persuasion, bred of long custom, that the domestic life of the poor is inherently, and must necessarily remain, disreputable, that wives must put up with tactful infidelity, that

children would go to perdition if they did not see the quarrels and vices of their parents at close quarters, and that separated husbands and wives, or the healthy spouses of the insane, must learn to console themselves with furtive irregularities if they are not inclined "to take up their cross."

The prejudices of the British public against divorce law reform are not entirely religious or ascetic. There are, of course, many persons who, not content with subordinating their own lives to a transcendental martyrdom, desire to impose the same on their unfortunate fellow creatures; and even more who, being completely happy in their own surroundings, demand sacrifices which they would loudly deplore in their own case. To them it seems a righteous duty to subject unhappily married persons either to a cat-and-dog life under the same roof, or to a worse than monastic system of permanent separation. Our system is worse because monastic morality, for what it is worth, is perhaps easier, if not more conspicuous, in a monastery than it is in the world.

But the less Pharisaical prejudices are to be found among the efficient, prosperous, and unimaginative. To them divorce savours of "throwing up the sponge." We all know that the most successful marriage depends on the

mutual good-will and endeavour of the parties and on a certain readiness for compromises—possibly, indeed, sacrifices. Society naturally frowns upon mere slackness and caprice, to say nothing of rapid changes after the fashion of Henry VIII. Again, the whole question is further complicated by the disharmonies of sex with the ordered life of friendly partnership. The deepest possible affection may exist between husband and wife without satisfying all the æsthetic and sentimental functions of the sexual instinct. Hence may arise complications quite unconnected with any desire for divorce. Either spouse may be tempted to adventures without the least desire to abandon the home. M. Rémy de Gourmont, in his admirable monograph, *Physique de l'amour*, boldly states a solution to which our British timidity in regard to the discussion of sex denies open expression, but the main idea of it no doubt underlies British reflection on the subject. He writes as follows:—

"La polygamie actuelle, temporaire ou permanente, est moins rare encore chez les peuples de civilisation européenne, mais presque toujours secrète et jamais légale; elle a pour corollaire une polyandrie exercée dans les mêmes conditions. Cette sorte de polygamie, fort différente de celle des Mormons et des Turcs, n'est pas non plus la promiscuité. Elle ne dissout pas le couple, elle en diminue la tyrannie, le rend plus désirable. Rien ne favorise le mariage, et par suite, la stabilité sociale, comme l'indulgence en fait de polygamie temporaire. . . . On dirait que l'homme, et principalement

l'homme civilisé, est voué au couple, mais qu'il ne le supporte qu'à condition d'en sortir et d'y rentrer à son gré. Cette solution semble concilier ses goûts contradictoires: plus élégante que celle que donne . . . le divorce toujours à recommencer, elle est conforme non seulement aux tendances humaines mais aussi aux tendances animales. Elle est doublement favorable à l'espèce en assurant à la fois l'élevage convenable des enfants et la satisfaction entière d'un besoin qui dans l'état de civilisation ne se sépare ni du plaisir esthétique ni du plaisir sentimental."

These trenchant sentences embody much of the superficial common sense in the arguments against allowing a wife to divorce a husband for adultery only, though we seldom hear the equally strong argument against allowing a husband to divorce a wife for a single act of adultery. Nor is the general line of thought alien from that of the Catholic Church, which has always, in practice, adopted a lenient attitude to matrimonial offences if duly confessed and repented of as and when committed. Even the signatories to the Minority Report refer complacently to the standard of "conjugal fidelity" in South Carolina, where the law provides for concubinage.

There is an odd kind of alliance between the ascetic and the man of the world both in Church and State regarding this matter, though their reasoning does not quite cover the whole ground. Complications often result from this apparently simple state of affairs, since, to say nothing of children accidentally

or otherwise born out of wedlock and subsequently regretted, amorous experiments sometimes end very unexpectedly. Men, and especially women, are apt to be blinded by passion for varying intervals of time, and to neglect their matrimonial business. If this occurs under present conditions, a society, openly converted to a system of what may be called matrimonial holidays, might be almost uprooted by chronic disturbances.

These observations do no more than illustrate certain phases of common prejudice, but such prejudice is, in fact, entirely irrelevant to the question of divorce law reform. The circumstances which demand the solution of divorce are *toto coelo* different. They involve not a partial, but a total, misfit; they imply no mere disharmony, but absolute incompatibility. Yet the whole foundation of the ecclesiastical position is the fixed idea that divorce is only required to satisfy carnal desires. Churchmen insist that there is "no demand for divorce," and then predict a "terrible increase" in it, as if such increase were not merely the public revelation of secretly festering misery, such as we find in Miss Llewelyn Davies's evidence before the Commission. Divorce means nothing to the priest but the emergence of "Original Sin." This belief is naïvely and forcibly expressed

in the opening passages of the Marriage Service.

I will now deal with the recommendations of the Majority and Minority Reports in detail. To start with, many will regret that the suggestions in regard to publication do little to protect innocent parties to divorce suits. Public morals are to be vindicated in the matter of reporting, and no case is to be reported until it is finished. This may do a good deal to prevent blackmailing suits, and innocent parties may often prefer publication in order to exculpate themselves. But there are necessarily many innocent parties who would no more prefer publication than a trader who has defeated an abortive bankruptcy petition, or a solicitor who has defeated an abortive attempt to strike him off the rolls. Not so very long ago a case failed which involved the conduct of an unmarried girl who was throughout the proceedings referred to as "Miss A." If both sexes are to be on an equal footing as regards causes for divorce, why should a man be worse treated than a woman in this particular matter? The hardship is unquestionably grave in the case of clergymen, solicitors, doctors, or prominent politicians.

It may also be regretted that the Commissioners felt unable to tackle such questions as the statutory age of marriage (at present

fourteen for males and twelve for females), the legitimation of children by subsequent marriage, or the general questions of family law, such as a man's power to cut his wife and family entirely out of his will. They begin their report on the question of local justice for the poor, and recommend that the High Court should exercise jurisdiction in districts corresponding with the existing registries of the High Court through Commissioners of Assize, who will generally be County Court judges specially chosen for this work in rotation. Only cases within a certain limit will be heard in this way, and this limit will be a joint income of not more than £300 a year, with assets of not more than £250. It is stated that matrimonial cases cannot be satisfactorily conducted "without the assistance of the Bar," but we are not told why. It is difficult to see why solicitors should not be as well qualified to deal with divorce cases as with the ordinary County Court cases, except possibly where complicated questions of domicil arise.

Mr. Tindal-Atkinson adds a note to the report in order to record his opinion that the divorce jurisdiction can be exercised and justice administered by the County Court with complete satisfaction to all parties. He thinks that many of the witnesses who gave evidence

against this jurisdiction being given to the County Court have in their minds the "condition of these Courts twenty-five to forty years ago." He does not, however, meet the objection of the Commissioners that some of the judges may be Roman Catholics, and may, therefore, not wish to do this work. It is difficult to see why any man should be allowed to postpone his professional duties to his religious convictions. If he does, it is not unreasonable that he should be expected to resign. The Minority Report agrees with the suggestion of local jurisdiction, but wishes to cut it down as much as possible. The signatories perhaps hope that such facilities will become as obsolete as they did after the Act of 1857.

As regards the Courts of Summary Jurisdiction, all the Commissioners agree that the power of these Courts to make orders having the effect of a permanent decree of judicial separation should be abolished, and they make a number of very sensible recommendations in regard to what powers should be preserved. They think that orders should only be made for the "reasonable immediate protection of the wife" or husband, or the maintenance of the wife and the children with her. No separation order is to last more than two years, at the expiration of which time an

application may be made to the High Court to have the order converted into a decree of judicial separation, or of divorce if there are grounds for divorce. This application can, of course, be made by the injured party, but, later on in the report, the Commissioners recommend that the Court should have discretion when a decree of separation is asked for on grounds which would justify divorce, to make a decree of divorce on the application of the respondent.

A similar recommendation is made where the petitioner omits to apply for a decree to be made absolute. It is scarcely necessary to say that the Minority Report disapproves of any step being taken to convert separation into divorce after this fashion. On this important point Mrs. Tennant adds a note: "I cannot feel that the guilty person should have any power to impose on the innocent a remedy against which he or she may have conscientious scruples"; while Mr. Spender writes: "I am in favour of giving such respondent the right on application to the Court of having a decree of separation converted into a decree of divorce after the lapse of two years," and I infer that he does not mean to limit this to cases where there are grounds for divorce. Mr. Spender's opinion seems far more sensible than the Report itself on this

point, since the express intention of the Commissioners is to abolish separation orders and decrees whenever possible, and to substitute the remedies of divorce or maintenance.

All this part of the report is most excellently drawn, and includes a number of admirable suggestions. There is only one point on which the Commissioners have not touched, and that is the hardship due to a wife being able to issue a new summons against her husband in respect of arrears of maintenance during the period when he has been in prison, immediately he comes out. I am told that a magistrate has no discretion in such cases except as to the length of the sentence, and I know of a case where a man found himself back in prison simply because he had been unable to earn money while in prison.

Concerning the question of further grounds of divorce, the Commissioners desire to give the wife the same right as the husband to divorce for adultery. Their decision is carefully reasoned. They elaborately weigh the arguments on each side, and appear little moved either by Puritanical prejudices or Suffragist clamour. They emphasise the physical dangers of venereal disease to a wife, as to which the medical evidence is overwhelming, and they refer to Lord Salvesen's evidence as showing that the wife can usually

be trusted not to exercise the power of divorce except where the husband's conduct in other respects makes married life intolerable. This recommendation is unanimous, and it includes a suggestion to make wilful refusal of intercourse a ground for annulling a marriage which has not been consummated, and an act of desertion where the marriage has been consummated. It will, therefore, be impossible for a woman to refuse intercourse to a series of husbands, and to divorce them all in turn for the sake of alimony, as some persons were inclined to fear when they first heard of the report. This would, indeed, be a serious abuse, because under the present law a wife receives the same alimony whether she marries again or not, and it is a pity that alimony cannot be reduced where the wife marries again, though not so as to cut down the maintenance of any children in her custody.

Dealing with the question of desertion, the Commissioners suggest that desertion for three years should be a ground for divorce. Mr. Spender in his note wishes to reduce the period to two years. They also think that divorce is the proper remedy for cruelty, and give a careful definition of the term.

On the question of incurable insanity they draw a very strong distinction between insanity and other diseases, and it is difficult to

quarrel with their conclusions, except where they recommend that relief should only be given when the insane person is, if a woman, not over fifty years, and if a man, not over sixty years. Yet a lunatic of sixty may quite often have married a woman twenty or thirty years younger than himself, and there is no reason why she should not have the same relief as anyone else. No suggestion is made in cases of "intermittent insanity," where the husband may emerge from an asylum and force his wife to have children who are more than likely to be insane; but this hardship is mitigated by the provisions for nullity on this head to which I shall hereafter refer. The Commissioners, however, point out that under the existing Lunacy Acts: (1) an insane spouse can get out of an asylum before convalescence is established, in defiance of medical opinion; (2) patients, subject to intermittent insanity and allowed out of confinement at intervals between the attacks, may resume marital relations; (3) married patients allowed out on probation are allowed to resume marital relations while still on probation; and (4) there are no provisions by which an insane person can be restrained from cohabitation against the wish of the other party.

As regards habitual drunkenness, the Commissioners recommend that no separation order

should be granted for more than two years by a Court of Summary Jurisdiction. If this order is not effective an application should be made to the High Court for a further order of probation, and if at the expiration of three years from the first order of separation there is no reasonable prospect that the drunkenness of the respondent will be effectively cured, then the High Court should be entitled to grant a decree of judicial separation or of divorce.

Mrs. Tennant objects to this part of the report on the ground that every incentive should be given to the sober spouse to help the other spouse, but she does not appear to have weighed the frequency of crime in such cases as these, and this danger is copiously illustrated day by day in the police news.

The recommendation of divorce in the case of a commuted death sentence seems reasonable enough, and I should not personally be disposed to go further, but Mr. Spender goes so far as to recommend divorce in the case of all sentences of five years and upwards. The result of this would, of course, be a wholesale reduction in the length of sentences.

The Commissioners profess themselves incapable of distinguishing between "unconquerable aversion" and "mutual consent" as regards divorce. They do not recognise unconquerable

aversion as necessarily putting an end, *de facto*, to married life, nor do they appear to recognise the possibility of divorce for such a cause as desertion resulting in any kind of divorce by consent. In procedure the Commissioners make a gallant attempt to clear up the muddles due to adopting domicil as the test of jurisdiction, although they admit that the factor of intention as regards domicil is bound to cause doubt. They wish to give a deserted wife a separate domicil so that she may have the right of applying to the English Courts. They recommend, generally, that British subjects should be permitted to have their cases tried in the place of their residence within the British dominions, and that the decree, when registered in the place of domicil, should be operative as if made there, provided it is made on grounds permitted by the law of the domicil. This certainly cuts a number of knots, especially in regard to the conflict of laws between, for example, England and India. For in England the test of jurisdiction is domicil, while in India and at least one British Colony the test is residence. I venture to think, however, that fifty years hence my own suggestion may be preferred. I have long suggested that there should be an uniform nationality for the British Empire, coupled with the test of residence in regard to

local laws, and that the test of residence should be universally substituted for that of domicil. This would cover not only the Imperial difficulties, but also the international difficulties, if only foreign countries can be induced to recognise the very sensible doctrine of English law that a marriage is good if it is celebrated in accordance with the country where it takes place, irrespective of the nationality of the parties. Thus, an Imperial subject living in the West Indies, where there is no divorce, would be entitled to obtain a divorce according to the law of England, Scotland, or any Colony, by (say) five years' residence, while there would be no conflict between the tests of domicil and nationality in foreign countries. This test of residence would also avoid the difficulties of giving a separate domicil to a wife living apart from her husband. Few persons, however, will quarrel with the recommendation that where the Courts of any foreign country declare a marriage null the English Court shall be at liberty to pronounce it null also, even though it may have been celebrated in accordance with the law of celebration.

All the Commissioners recommend certain causes of nullity arising from fraudulent concealment in cases of (1) mental unsoundness, (2) epilepsy and recurrent insanity, (3) where

one of the parties is suffering from a venereal disease in a communicable form, and (4) where the woman is pregnant at the time of her marriage by another man, provided the suit be brought within a year of the marriage. They suggest no rules as to the legitimation of any children by such marriages, but the legislature would presumably not impose any disabilities on such children.

Certain provisions are made for cases where one spouse has been absent for seven years; in such a case the other spouse is to have the right of applying to the Court for a decree of presumption of death, so as to be able to contract a second valid marriage. This can also be done in circumstances where it is reasonable to suppose that the other spouse is dead, even though the period of seven years has not elapsed. This procedure would follow the same lines as the present procedure before the Probate Court.

Regarding the question of recrimination, it is suggested that the Court should have a much wider discretion in regard to granting a divorce where both parties have been guilty of adultery. The existing discretion of the Court is very much fettered by some timid decisions given soon after the Act of 1857, but we are told that the Court should have a wide discretion to grant divorce where it is obviously

in the best interests of the parties, their children, and the State. There are, no doubt, many persons who think, as I do, that two parties should never be tied up by the bond of mutual adultery, but they may perhaps be reassured when they learn that for three hundred years the Scotch Courts have had the power of refusing divorce in all such cases, and have never thought fit to exercise that power; although, of course, the question of adultery affects the financial position of the parties after the divorce.

The Commissioners wish to stop the suit for restitution of conjugal rights being made a stepping-stone for divorce, but in its place they substitute the much better suggestion that a deserted woman may be entitled to apply to the High Court for immediate maintenance before the period of desertion has expired. This provision is much needed by wives in the more prosperous classes.

A decree absolute can at present be disputed for an indefinite period on the ground of jurisdiction, but the Commissioners recommend that it should be unimpeachable after the expiration of five years. It seems a pity that this recommendation cannot also apply to the law of Scotland, where a decree can be impeached for forty years afterwards.

In lieu of damages in divorce the Commissioners substitute a power for the Court to order the co-respondent to pay any actual pecuniary losses sustained by the petitioner, and to make any other financial payments for the benefit of the parties or their children. It is interesting to find the same recommendation as regards a woman found guilty with a respondent husband, pushed even to the extent of defeating a "restraint on anticipation" if necessary. There are certain minor recommendations as to divorce suits being heard before a judge alone, instead of before a judge and jury, and as to adopting the ordinary High Court procedure of writ instead of petition. Every charge of adultery in a petition is to be specific.

The recommendation to give the High Court power, on the application of either party, to set aside any deed or agreement for separation on such terms as it may think fit, or to vary its terms, should meet with widespread approval. If such a deed is set aside, or the parties are living apart without any deed, then on any *bonâ fide* application by either party to the other to resume cohabitation, the other party shall be deemed guilty of desertion if he or she refuses cohabitation without reasonable cause. The adoption of these proposals would go far

to reduce the scandals arising from the complacency of the English law during the last hundred years towards a system of voluntary and permanent separation which, before 1800, was rightly considered contrary to public policy, and was never approved by the Canon lawyers.

The Minority Report is a welcome contrast to the views officially entertained by the Church before the Commission reported, and it certainly leaves any Unionist Government at liberty to introduce legislation on these lines without affronting the Church. It is signed by the Archbishop of York, Sir William Anson, and Sir Lewis Dibdin. The report reads as if these gentlemen, although convinced against their will, were not of the same opinion still, but felt considerably alarmed by the far-reaching reforms to which they agree in the Majority Report, and which include everything but the extension of divorce for causes other than adultery, and the provisions for converting separation into divorce. They will, no doubt, be supported by most religious denominations in their desire to make adultery a condition precedent to divorce. This is partly due to the atmosphere of "taboo" which influences all religious bodies in regard to sexual intercourse, and partly due to their view of divorce as a proceeding which must

either be squalid in itself, or, if not, should be made so. On humane and rational grounds it is preposterous to maintain that a solitary act of adultery causes more misery to the parties than cruelty or desertion, or that divorce should be regarded as quasi-criminal; but it is no doubt difficult to expect the most priest-ridden country in Europe, with the possible exception of Spain, to adopt rational or humane tests in a matter of real importance to society. It is surprising to find these gentlemen solemnly quoting the evidence of a firm of lawyers in South Carolina to the effect that "conjugal fidelity is greater, and desertion less, in South Carolina than in any other State." The opinion of these lawyers is confessedly influenced by a determination to stand up for local institutions at any cost, and the reader of certain documents referred to later will find exactly the same local pride in the States of South Dakota and Nevada, where the divorce laws are extremely lax. The report, however, entirely suppresses the interesting circumstance that the State of South Carolina has long been compelled to enact a law that no man may leave more than one-fourth of his property to his mistress and illegitimate children. Without quarrelling with the common sense of this law, which might with advantage be enacted in England,

it is noteworthy that a witness who strongly defended the present law of South Carolina, was compelled to admit that the precaution in regard to concubinage was not taken without very good reason. In these circumstances "conjugal fidelity," in a sense not incompatible with concubinage, may well be "greater than in other States," nor is it uncommon to find that where men have these privileges, the women are dragooned into the chastity of an Oriental harem.

The observations on divorce in the United States are equally surprising. After recording the efforts of a Divorce Congress to agree upon an uniform divorce law which is almost identical with the recommendations of the Majority Report, except as to lunacy, we are told that the freedom of divorce in America "scandalises all decent people," and that "America is appalled at the consequences." "America" appears to consist of Mr. Roosevelt and Dr. Dike. The correspondence with lawyers in various States, printed in the appendices, does not confirm the statements in the Minority Report, nor do they deal with the circumstances referred to in the Majority Report as explaining the frequency of divorce in the States. This frequency is, no doubt, largely due to the emigration of Europeans to various States in order to get easy divorce,

and to the very lax administration condemned by the American lawyers whose opinions are invited.[1] Easy divorce is said to be the cause of immorality in ancient Rome, whereas it is abundantly clear from the excellent historical account given by Mr. de Montmorency in an appendix that easy divorce was merely the expression of a laxity which had grown up from quite different causes. The Archbishop and his colleagues complain that no witness has been able to tell them of a country where "public morality, &c., has been promoted by greater facilities for dissolution of marriage." It is, of course, difficult to prove such a proposition, especially now, since they refrained from asking any witness to do so; but it is possibly more than an historical accident that sexual morality in Catholic countries, where there is no divorce, is far more lax than in Protestant countries where there is divorce. The same inference may be drawn by any student of mediæval history, or by any person who studies the sexual morality of England

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[1] Twenty-eight opinions are given by lawyers from various States on the question whether the divorce laws should be altered, and whether such laws diminish respect for marriage. Of these, nineteen answers uphold the *status quo*, six answers suggest alteration, two are inconclusive, and one states that opinions are divided. Seven answers condemn lax administration.

before 1857 and after 1857, not to mention South Carolina. After being informed that further facilities for divorce would cause a "terrible increase in divorces," we are told that there is "no demand for divorce among the poor." It would be just as reasonable to say that there would be no demand for surgical operations among the poor supposing that hospitals did not exist. It is equally untrue to assert that an extension of causes for divorce would injure the community. The evidence of Mr. Parr, Secretary to the Society for Prevention of Cruelty to Children, and Miss Davies alone refutes the Minority Report. No fair-minded person is justified in accepting it without reading all the evidence. This head-counting Minority has no right to ignore the claims of *one hard case* for which a proper remedy exists.

Throughout this report we are expected to presume that marriage is a condition in which the spouses are always guiltily desiring other intimacies at the expense of all those sentiments which, even apart from mutual affection, are derived from common interest and parental feeling. We may possibly understand this professionally cynical view of human nature in an ecclesiastic, but why should we find it expressed by two amiable lawyers, even though one of them is a

bachelor? The truth is that ecclesiastical presumptions die hard, though that they can die is obvious when we read that the State must "legislate for the general good of the whole nation," instead of "translating the canons of the Christian Church into Acts of Parliament."

The only substantial point in the Minority Report is the suggestion that divorce for such a cause as desertion, however well deserved by a really innocent party, is sure to end in divorce by consent. This at once raises the vital question whether divorce by consent is such a bugbear as it is represented to be in both reports.

This question I hope to deal with in a subsequent number.

THE QUESTION OF DIVORCE BY CONSENT.

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In my last article on the Report of the Commission I mentioned that the Minority Report made only one substantial point, namely, the possibility of divorce for such a cause as desertion being obtained by collusion. The very word "collusion" has a disreputable sound about it, but this is only due to ecclesiastical presumptions dying hard. This particular presumption is at the moment very much alive, and the history of it should be shortly dealt with.[1]

The ecclesiastical policy in regard to marriage was always to retain as tight a hold of the institution as possible; ecclesiastical control secures ecclesiastical revenue. Thus, in the Middle Ages, when the Church controlled wills, and most lawyers were in holy orders,

[1] It may be respectfully submitted that collusion is at present a precious monopoly of the Bar, for no arrangement between two or more learned counsel has ever to my knowledge been challenged by the King's Proctor.

an intestacy was considered quite as disreputable as a collusive divorce now, for the intestate had presumed to die without calling in the aid of the Church to regulate the disposition of his property.

Marriage could only be annulled with the aid of subsidies to the Church, and even marriage, after all, was principally the means of avoiding the sin of incontinence. Sin, it may be remembered, also involved ecclesiastical control and ecclesiastical revenue. It was, therefore, important not to allow more than one escape from the sin of incontinence during a lifetime, though, of course, second marriages after the death of one spouse came to be recognised in the later days of the Christian Church.

From this point of view nothing could be more undesirable than that two spouses who wanted to be free of each other, should be allowed to obtain this freedom. Separation was only granted for the guilt of one spouse, and if the other spouse subsequently committed an offence he or she lost the benefit of the separation, and was forced back into cohabitation under pain of excommunication.

Putting aside ecclesiastical considerations, as Milton did, it seems difficult to see why two spouses should be irrevocably fettered if

both want to get free, provided the interests of the family are properly secured. If A and B are both bad characters there is no reason to make them worse by reason of enforced cohabitation. If one is good and the other bad, the same argument applies. If both are good they will then stick together as long as it is reasonably possible. The idea of compulsion in this connection is no more than a traditional taboo, which originated in ascetic doctrines, continued for economic reasons, and is now absurdly inconsistent with the present doctrine of English law, that if two spouses wish to live apart under a deed a separation they are at liberty to do so.

The whole doctrine of collusion as a bar to divorce is, therefore, merely a survival from the time when the Church, consisting of celibate priests, enjoyed the power of treating adults as children. Its only rational aspect nowadays is the fear that divorce by consent may be highly dangerous to society, whatever legal safeguards are imposed on the abuse of such a proceeding. Nevertheless, the doctrine is so far accepted by the Minority Report that the mere danger of collusion is put forward as a good reason for debarring really innocent parties (such as deserted spouses) from relief. Adultery cannot be proved when the other spouse has entirely disappeared, and desertion

is generally a much more cruel offence than adultery, yet adultery (we are told) *we must have.* A certain increase in collusive adultery apparently does not matter so much as the bare possibility of collusive desertion! Lord Halifax and other clerical-minded persons have for years complained of the large amount of really collusive, but in fact successful, adultery that is caused by the existing law of divorce, yet the signatories of a clerical manifesto like the Minority Report do not shrink from the prospect of extending adultery broadcast among rich and poor.

The Majority Report ignores divorce by consent, presumably as not being in the region of practical politics, and also ignores the danger of its recommendations resulting in divorce by consent. The signatories probably felt that even a collusive desertion for three years was a sufficiently severe ordeal in itself for two unhappy spouses as well as a sufficiently severe test of their mutual aversion. With this view I agree, and I also despair of any legal recognition of divorce by consent in this country for perhaps another century. But in order to expose the absurdity of allowing the danger of collusion to obstruct the reforms proposed in the Majority Report, I think it as well to put forward the strong arguments that can be urged for divorce by consent.

In one of his novels, M. Anatole France writes about a *millennium*, in which he sketches a society where any man or woman who happened to take a passing fancy to each other, would be able to indulge it freely without having to fear awkward or permanent consequences. But if such a couple rashly decided to have a child, and subsequently decided to part again quite shortly after the child was born, the child would not (in general) be fairly treated, even if it was financially well provided for, because it would not enjoy the care of both parents, and might possibly be deserted by both. Obviously this would not conduce to social welfare.

This little problem is at the root of all problems in marriage and divorce. The State at present declines to recognise the union of any two persons unless they bind themselves to observe a contract which they may not improbably find themselves unable to carry out. Taking the objects of marriage as defined in the Prayer Book (namely, "the procreation of children, the avoidance of fornication, and the mutual society, help, and comfort that the one ought to have of the other"), it is clearly impossible to carry them out when one party is insane, or has been guilty of persistent cruelty or desertion, or when both parties have permanently conceived a mutual aversion

from each other. Without suggesting, for the moment, precisely what the State ought to do, I begin by asking where the State ought to draw the line. It appears to me that the State is entitled to refuse legal recognition to any union except where the parties intend, in all *good faith*, to form as permanent an union with each other as human nature allows. The test of this "good faith" would be financial with the man, who would in any event undertake the financial liabilities of a husband and father, while the woman would bind herself to all the personal obligations that marriage entails as regards housekeeping and rearing children. Fortunately most unions of this kind *are* permanent and do lead to the formation of homes and families. As regards unions unrecognised by the State, it is unjust, as I think, to inflict the stigma of illegitimacy as it now exists, on any children, however born, or to limit, as rigidly as the State now limits, the economic claims of such children on the parents. (I may observe, in passing, that up to now the State has done no more then give the mother, *not the child*, a claim for 5s. a week till the child is sixteen years old.) But it is not unfair to those who will not commit themselves to a permanent union, that the State should not confer the privileges and claims of married persons *as against each other*

upon persons who contemplate nothing more than a strictly temporary cohabitation. The State would be far better justified in recognising concubinage, as the Roman law did, than in bothering itself with week-end unions.

It is worth formulating this principle to start with, because it seems to be completely ignored by writers like Mr. Bernard Shaw, who argue that marriage should confer no more rights on, for example, the wife of a husband who wants to abandon her without good reason, than it confers on the woman whose lover breaks, without good reason, a promise of marriage. According to Mr. Shaw, the utmost that a wife in this position might claim would be damages against the husband, who should then be entirely free to marry another woman. Putting the boot on the other leg, a wife would be entitled at any moment to leave her husband stranded with a number of children whom she did not choose to bring up. Personally, I cannot see why the State should be troubled to recognise such flimsy arrangements, since everyone is at liberty to make them without any public or legal ceremony or contract. It is true, of course, that partners in a firm enjoy legal rights under the Partnership Act, 1890, and yet are at liberty to dissolve their partnership at any time after due notice, but a business partnership does

not imply such a humanly serious undertaking as bringing up a family, and the State is at least entitled to presume an intention to bring up a family in two persons who profess a desire to be married. The State might, of course, prescribe a period of twenty or thirty years for marriage not to be dissolved without good cause, and give liberty to dissolve the marriage by notice after that period, but this would scarcely be of much practical use, since, if people succeed in living together for so long as twenty or thirty years, they are not likely to alter a habit of such long standing at the end of that time.

I hope that I have now cleared the ground for discussing the main subject of this essay, namely, whether, and under what conditions (if any), the mutual consent of the parties is a good cause for the dissolution of any marriage. At the outset of the question we are faced by the difficulty of mutuality. When a business partnership is dissolved, it is an even chance that the so-called mutuality is only the result of one partner refusing to continue in partnership with the other, so that mutual consent may ultimately imply the desire of perhaps but one partner to be quit of the bond. Applying this reasoning to marriage, we are bound to admit the same principle. The question then arises whether the spouse who

wants to continue the marriage, derives any benefit from a permanent union with the other unwilling spouse. In countries where divorce by consent exists, the usual view of the Legislature appears to be that a time limit sufficiently safeguards the institution of marriage, and that if two spouses repeatedly and publicly declare for a period of, say, one or two years, their desire to be free of each other, neither is likely to be harmed provided that due financial provision is made for the family. Mr. S. B. Kitchin, in his brilliant "History of Divorce," strongly advocates this view, and in support of it reminds his readers that divorce by mutual consent existed not only in ancient Rome, and the old customs of the Germanic peoples, but exists also to-day in such countries as Norway and Sweden. The only alternative policy is for the law to compel one or two of the parties to commit such a matrimonial offence as will give grounds for a divorce or for a judicial separation maturing into a divorce.

This brings us back again to the old principle. Is divorce by mutual consent, subject to proper safeguards of financial provision and of delay, compatible with a *bonâ fide* intention of marriage in the ordinary sense of the word? The sentimental argument (stripped of religious restraints)

would, of course, be all in favour of mutual consent. What possible reason can there be (Mr. Maurice Hewlett argues) for tying up two people who genuinely dislike each other? The answer is, of course, that the two spouses have duties to their children (if there be any), and that they ought, if possible, to keep up a joint household till the children are grown up. It is, therefore, desirable to keep them together until matters became so unbearable that one or other of them commits a matrimonial offence. As against this view we must recollect that such children derive but little benefit from a household embittered by conjugal disputes which frequently result in setting the children and everyone else by the ears. Again, the matrimonial offence is often committed by the party who is the less astute but (morally speaking) the less guilty. That means injustice to the individual. Finally, it seems altogether undesirable to familiarise the public with an artificial number of matrimonial offences. Such offences will always be sufficiently frequent without being artificially stimulated.

It would, therefore, seem that divorce by mutual consent tends to minimise domestic disputes, to relieve individuals whose mutual aversion gives rise to matrimonial offences, and to raise the standard of domestic morality.

Having now discussed the more abstract side of the question, I propose to deal with the historical and concrete aspects of it, and to show that divorce by mutual consent has existed in the past without dissolving the foundations of society.

As regards the history of this question, it is hardly necessary to go further back than Rome, but the difficulty of discussing the question of Roman divorce is largely due to the fact that in mediæval and modern times we have only the Christian historian's view of Roman society. Mr. Joseph McCabe has done some very useful research in this matter in his "Religion of Woman" and other works. He has, to my mind, conclusively shown (1) that Roman laxity was no worse than mediæval or modern laxity, and (2) that the freedom and dignity of the Roman matron were almost entirely due to the institution of the laxer form of marriage, which displaced the old *confarreatio* and abolished the despotic powers of the husband over her person. It could be quite as reasonably argued that Roman laxity was due to the advancement and emancipation of women as to the increased facilities for divorce, and Mommsen is equally horrified by both these developments.[1] I admit that in

[1] This view is confirmed in the excellent historical summary of this question by Mr. de Montmorency in the Appendices to the Report of the Divorce Commission.

the Roman Empire we see much laxity accompanied by a system of divorce by consent, but I contend that this is not a case of cause and effect, but of what logicians call "concomitant variations." It is at any rate certain that we find just as much laxity in the Middle Ages under a system of so-called indissoluble marriage, and the only difference is that in the Middle Ages those who could afford to pay the necessary fees to the Church got their marriages annulled by ecclesiastics instead of making their own arrangements. Those who could not afford the fees merely ignored the ceremony of marriage. Sexual offences were, of course, reprobated and punished, though not severely, in the Ecclesiastical Courts, but confession and absolution with a slight penance were usually all that was required from the transgressor.

Thus in the proceedings of the Court of the Commissary of London in 1490 we find that the priest of the Parish committed spiritual "incest" with his goddaughter, a certain Rosa Williamson. His example was followed by another priest called John, and a man called Thomas Goose. Then a man called Henry Stocton became compromised with this dangerous lady, who was also involved in a new intrigue with one John Godwyn, though we are told he had a good-looking wife. One John Warwick then appears on the scene, and he

almost killed his wife on account of his affection for Rosa Williamson. These episodes all crop up as trivial matters like the cases at a London Police Court, and there is nothing to show that Rosa Williamson's devastating career ever ended.[1]

Coming to more modern times, there are of course notorious periods of laxity, such as those of the Restoration and the Regency in England, or of the Court of Louis XV. in France. During these periods the institution of marriage was far better defined and much less uncertain than in the Middle Ages, yet the laxity was none the less extreme, and quite untempered by indissolubility of marriage. It is not until the French Revolution that we find the secular ideas of Selden, Grotius, Pufendorf, Leyser, and Frederick the Great growing up; finally it was Napoleon who put into practice the humane principles of Pothier and Montesquieu, and by his famous code made divorce by consent part of the law of France. Napoleon strongly believed in the institution of the family, but he maintained that young girls married out of convents and necessarily made mistakes, which, in the best interests of society, should be corrected without noise or scandal.

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[1] Many similar cases can be found in Hale's *Criminal Precedents*.

In our own time the principle of divorce by mutual consent is recognised in Russia, Austria (for non-catholics), Belgium, Roumania, Norway, Portugal, Japan, and Mexico. It was recognised in Germany up to 1900. The same principle has been more indirectly admitted in the device of mutual separation, or a judicial separation obtained by one party for good reasons legally maturing into a divorce, in France, Germany, Denmark, Holland, and Switzerland.

In the British Empire and the United States neither of these principles is overtly recognised, and some sort of offence has to be committed, except in the rare cases where insanity is a cause of divorce. Just as hypocrisy is homage to virtue, so the fiction of a matrimonial offence is homage to the ideal of indissoluble marriage. The State apparently shrinks from the possible imputation of encouraging caprice and fickleness in a relationship which involves the procreation and care of children, though, in fact, the State is merely perpetuating an ecclesiastical taboo.

The whole question is likely to divide public opinion for a considerable time. I have already stated my own conclusion that divorce by mutual consent tends to minimise domestic disputes, to relieve individuals whose mutual

aversion gives rise to matrimonial offences, and to raise the standard of domestic morality. There seems to me to be no historical evidence to show that divorce by mutual consent ever *caused*, or now *causes*, in those countries where it flourishes any decline in sexual morality. The principle of divorce by mutual consent involves a certain respect for human dignity and liberty which is far from fashionable in these days, but which I hope may come into fashion again. The imposition of a substantial time limit should protect the State from having to register a succession of frivolous and unworthy divorces. The lack of such a time limit was the principal defect in the Roman law. The enhanced freedom should improve the behaviour of the spouses to each other; and the abolition of any necessity for committing statutory adultery, cruelty, or desertion, should improve not only the domestic relations, but also the whole level of public morals.

The most cogent argument, however, is perhaps the question of the children. The strongest supporter of easier divorce cannot possibly deny the desirability, whenever possible, of all children enjoying the joint care and affection of both parents. Too often death destroys this ideal, and nothing could be more hostile to it than the present law in regard to custody. A woman may often

be trapped by her husband into a solitary act of adultery in circumstances where the husband's contributory guilt cannot be brought home to him. After being divorced she may *never see her own children again;* her husband can deny her all access to them. This is a disgraceful instance of legal barbarity, and if it could be abolished as a condition of having no divorce at all I should almost prefer the latter alternative.

In any case it is clear that so long as divorce is made a kind of dog-fight between the two parties, disputes concerning the children are bound to arise. Two spouses detest each other; one is bound to "sin" in order to set both free. Neither wishes to sin, and the problem for each is how best to incriminate the other. At the end of the process they are scarcely likely to be on terms that permit friendly and reasonable discussion in regard to the care of their children, although there are, of course, honourable and high-minded persons who rise superior not only to the law, but also to the squalid atmosphere that results from such a law. Two spouses who could agree to part amicably, could also make proper and reasonable arrangements for the children spending a certain time with each parent in the course of the year without being embittered by perpetual recriminations in

regard to guilt and innocence. The children would be able to speak to one parent of the other, as often happens in cases of voluntary separation, without any atmosphere of reticence or mystery. One might even hope that during the probationary period of separation antecedent to divorce absence might make the hearts of both spouses grow fonder. Anyhow, nothing could be more disastrous and tragic than the present system.

The evidence given before the Commission contains useful material scarcely referred to in either Report. Lord Gorell, in his own observations, seems to fear that it might produce effects analogous to what went on in the Roman Empire, but adds that "it might perhaps work under proper conditions to ensure deliberation and to prevent forced consents." Sir John Macdonell, after an exhaustive study of comparative legislation, advocates divorce by mutual consent subject to proper safeguards. Miss Davies and Fru Anker, of Norway, both hold that two people often behave much better if they have to retain each other's affections without relying on the coercion of a legal fetter. The same opinion was once expressed to Mr. Havelock Ellis by two East-End clergymen.

According to Fru Anker, the Norwegian law works very well. It gives divorce (*a*) after

separation for one year when both parties want it, (*b*) after separation for two years when only one party wants it, and without separation if both parties have been *de facto* separated for three years. Other opinions from different points of view strengthen the argument. Mr. Plowden, arguing from what he calls common sense, considers divorce by consent safe after a period of probationary effort to keep up the marriage tie. His view is supported by his colleague Mr. Rose. Mrs. Fawcett and Mrs. Swanwick agree with this opinion. Dr. Parker maintains that the better members of the working classes live together quite happily and respectably without any legal tie. Dr. Scurfield has collected a most remarkable number of what can only be called variations in quasi-matrimonial grouping. The contempt into which marriage has been brought among the poor by reason of no proper facilities for divorce, is undoubtedly the cause of this state of things, and the poor cannot be blamed. In fact, as there is no property to be affected by a legacy duty of 10 per cent., it would make no difference to them were it not that, to the undying shame of England, outdoor relief and charitable aid are frequently refused to persons living a perfectly decent and monogamous life in all essentials by reason of their being the victims of the law and technically living

in sin. A particular case was cited before the Divorce Commissioners by Mr. C. W. P. Barker of such a couple being refused outdoor relief, and of the man dying through starvation, according to the verdict of the jury at the inquest. The Charity Organisation Society is alleged to be an offender in this respect, and numerous cases of hardship are referred to. A more disgraceful type of Pharisaical cruelty can scarcely be conceived.[1] Mr. Barker's evidence as to the action of Guardians in such instances, which is being followed up by a new tyranny under the Insurance Act, convicts any Ministry which does not immediately remedy this state of things, of the grossest inhumanity.

On the question of collusion, Mr. Barnard, K.C., asserts that there is a great deal of it, and that there always will be unless or until the law openly sanctions divorce by consent. Mr. Blott, a solicitor, agrees that divorce for desertion might lead to collusion, but considers that this risk must be faced for the general benefit of the community. Mr. Newton Crane,

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[1] One is reminded of the condemnation of the lawyers in the gospel for imposing burdens which they will not lift a finger to remove. This point has been further driven home by the question of allowances to soldiers' unmarried dependents.

an American lawyer, considers that collusion is not likely to occur when the period of desertion is as long as three years, since collusive couples will prefer to commit offences that give immediate relief.

I have closely condensed this remarkable expression of opinion by eminent experts, because I hope that the evidence will be widely read. The three volumes cost less than 15s., but they are full of highly important information to the social reformer. The exemplary lives of the poor without the legal sanction which a scandalous law puts beyond their reach, at least show that the stability of the marriage tie depends on consent more than on legal coercion. This contemporary fact reinforces the historical arguments already adduced, for if irregular unions have such stability, *a fortiori* divorce by consent need not dissolve society.

On the general question of expediency, however, I go no further than Mr. Blott. Personally, I desire nothing better than to see the recommendations of the Majority Report given the force of law. Indeed, the recommendations of the Minority Report would be better than nothing. Liberals have nothing to lose if they offend the Church by giving the poor the same right of divorce as the rich, and indeed the Church may possibly not venture to protest

any longer against a measure so obviously beneficial and necessary, not only to individuals, but also to society at large. Even if the Liberals did have to fight the Church, it would be on greater issues and worthier principles than emerge in regard to the disestablishment of the Welsh Church. This matter, however, ought not in any circumstances to be a party question. If in either House of Parliament there is one scrap of sincerity behind the professions of solicitude for the poor which are poured out every hour for the edification of artisan electors, divorce law reform should be taken in hand forthwith. The institutions of marriage and the family are not as safe as they were from attacks in more than one quarter, and any real statesman should protect the joints in the armour without delay. The present law has been definitely condemned by the verdict of the Royal Commission. Unless it is reformed it will fall into still deeper contempt, and open disregard of it will command the reasoned support of public opinion.

Both Houses of Parliament were ready enough to pass, in a hurry, an ill-considered measure for flogging men alleged by the police to be living on the earnings of prostitution. Now, in all the worst and genuine cases of this type the man marries the woman in order to keep her completely under his control. What

relief does our law give this woman? *Ex hypothesi*, both the husband and wife have no money except what the wife makes by adultery, and after the husband has been sent to gaol the wife has no means of obtaining money for a divorce except by further adultery, which is a bar to any divorce proceedings by her, and even with money she is helpless unless she can prove adultery on the husband's part. What does *she* gain by the flogging which imparts so genial a glow of satisfaction to our moralists, who will inflict pain in the one case as eagerly as they decline to relieve it in the other?

Since my last article appeared I have received a remarkable letter from Mr. D. A. Wilson, who was at one time a Judge in Burma. He writes to me as follows:—

"In reply to the Archbishop's allegation that no witness could tell of any country where public morality is promoted by facilities for divorce, that merely shows how defective is the evidence. In Japan marriage is more common, divorces more numerous, and venereal disease less prevalent than anywhere else; and a similar phenomenon has been reported from China. The freedom of divorce is one of the reasons why the yellow races are tending to supplant the whites—they breed better. But I wish to furnish you with a peculiarly convincing bit of evidence, to be used at your discretion. From

1898 till 1902 I was the 'Judge of Moulmein,' and was greatly surprised to notice among the Indian immigrants who had been resorting to that port for half a century that most of the Hindus were either whoremongers or lived with concubines unmarried, whereas most of the Mahommedans were respectably married.

"There were the same mixtures of races in both creeds, and even in castes there was much likeness. The only explanation of the strange phenomena which the elders ever suggested, was that marriage was either indissoluble or nearly so among the Hindus, but freedom of divorce prevailed among the Mahommedans. They said our European habit of resorting to courts for divorce was positively indecent.

"The Indians coming to Moulmein were by the mere force of circumstances set free somewhat from the opinion of neighbours which keeps up the morals of Hindus at home. So far as I have been able to ascertain, it is doubtful whether among the Indians in most of India there is any superiority of Mahommedans to Hindus in the matter of morality. But in Moulmein there was no room for doubt. I vividly recollect a respectable Hindu woman of high caste and fair standing, who said in the witness-box, in the principal court in Moulmein, before many persons, that she was not the married wife of the man she lived with, although

he was the father of all her children, and she had a good family. 'If I had married him,' she said, 'I would have been his servant, and could not have got rid of him. I lived with him, but he was, and remained, my servant, and gets his wages every month from me for working in the byre and going round with milk.' All her children were illegitimate, but that seemed to her a less evil than an indissoluble marriage. Considerable property was in question. All the parties were Hindus. I recollect that at last what that woman said was taken to be the truth, and was hardly disputed."

The results of indissoluble marriage seem to be the same in the East as in the West, and our system of judicial separation is in principle quite as inhuman as the custom of widow-burning. One can only echo the Roman

"Tantum religio potuit suadere malorum."

THE LATE LORD GORELL AND DIVORCE LAW REFORM.

Reprinted from the *English Review*, July, 1913.

It may well seem a little bold to try and estimate the late Lord Gorell's achievements as a reformer of the divorce law, but I have two small advantages. In the first place, I had the honour of some personal acquaintance with him, as my father was (to use his own words in a letter to me in 1911) "perhaps the oldest friend I had." In the second place, I began working at divorce law reform, without knowing his own views on the subject, about two years before his famous decision in *Dodd v. Dodd*, and had various conversations with him on the subject during the years that followed.

Of his personal character my friend, Mr. Filson Young, observantly wrote the day after his death:—"Lord Gorell, by a curious paradox, although a brilliant and masterly lawyer, was one of the simplest of men. . . . The thing that most impressed me about him was that

in spite of years spent in the Divorce Court . . . he should still retain an entirely unspoiled faith in human nature, and believe, as he said, that everyone less simple, less good, less conventional than himself was an exception." He was an exceedingly warm-hearted man with a real passion for more than legal justice, but he rigorously avoided sentimental expressions. His speech in the House of Lords on Divorce Law Reform was passionate in conviction but dispassionate in phrase. He was so sincere and unworldly and ready to see the best of men and women that I, for one, find it difficult to forgive the Archbishop of Canterbury's suggestion in the House of Lords debate that Lord Gorell, by reason of his long experience of divorce cases, had lost something of that pristine innocence which is so notoriously characteristic of the ecclesiastical mind! He had seen and studied many types of human beings, he had travelled very widely, he knew many foreign languages, but in days when we are largely governed (or misgoverned) by Celts it is refreshing to remember how English he was in character, and how thoroughly he loved and understood English traditions. With all his freedom from insularity I have been told that he felt happier in his country home, where he took a great interest in farming, than anywhere else.

Yet I fear that his greatness of mind and character have never been adequately appreciated except by his friends and colleagues. The newspapers put all public men into pigeonholes. The pressman knew that he was a great lawyer and a great judge, but no more. He was too busy ever to write a book. The general public do not read judgments any more than blue books. Only those who have read his judgments and the Observations with which he concluded the Royal Commission on Divorce can adequately realize the massive learning and versatile receptivity of his mind.

Lord Gorell, after an extensive Admiralty practice, was made a judge in the Probate, Admiralty, and Divorce Court in 1892 at the age of 44. He brought a singularly fresh mind to the divorce work instead of an accumulation of crusted prejudices and pseudo-ecclesiastical presumptions. He realized that he was deciding the destinies of men and women, and not merely shifting a number of pawns about on a legal chessboard. I have no personal knowledge of what his opinions were on the question of reform till 1906, except that he would not tolerate any perfunctory performance of those particular duties.

At this point it may be well to take a survey of public opinion on the divorce question.

The compromise of 1857 had satisfied few reformers. Lord Lyndhurst and Lord Palmerston wished to make desertion, and such men as Henry Drummond cruelty, a ground for divorce. There was a strong body of opinion in favour of giving the County Courts divorce jurisdiction, and certain local facilities were actually given which became obsolete in 1861. Lord Palmerston had carried through a measure which was probably in advance of contemporary opinion, and the subsequent passivity of reformers must have been largely due to the feeling that things had been and might be worse. The growth of the Neo-Catholic movement did much to check further progress, and in the seventies much reforming energy was concentrated on improving the economic position of married women. In the *Fortnightly Review* of 1885 the late Sir George Lewis tried to rouse public opinion. In 1888 there was an agitation in the *Daily Telegraph*. In 1892 a bill was introduced into the House of Commons to make desertion a ground of divorce, and to put the sexes on an equal footing, which was supported by Mr. Labouchere, Mr. Asquith, and others. There was a constant undercurrent of protest from enlightened thinkers such as Mr. Lecky and Mr. Bryce, but it did not receive very warm support. The question

was shirked partly by reason of its inherent difficulties, but even more by reason of its unattractiveness for politicians in a clerical country.

So far as legislative activity went, the question slumbered till the introduction of Earl Russell's first bill in the House of Lords in 1902, which was ill received, partly because it introduced the principle of divorce by consent, and partly because of its author's own matrimonial misfortunes. It is difficult to see why a man who has suffered under a law should not suggest how it should be amended, but in a prudish country like England such conduct seems to savour of immodesty. Lord Russell's next bill in 1905, which was merely to make desertion a cause of divorce, was better received, but the movement was still far from popular. In 1904 I became Secretary of a Society of which Lord Russell was President, and which was subsequently amalgamated into the Divorce Law Reform Union. I remember a general meeting at Cliffords Inn in July, 1905, when only five members appeared, and thought that the Society should be dissolved, but Lord Russell and I both maintained that some case of gross hardship might at any time rouse public opinion.

We had not long to wait. In April, 1906, Lord Gorell, sitting as President of the Divorce

Court, gave his famous judgment in the case of *Dodd v. Dodd,* and scathingly exposed, though in studiously moderate language, the shocking hardships due to the combined operation of the separation orders produced by the lax legislation of 1895, and the inequality of the sexes in the matter of adultery. The judgment bore obvious traces of long research into the history of divorce and reflection on the modern practice. On the morning of its publication I called Lord Gorell's attention to the fact that a society already existed for the reform of the law, and he asked for full particulars, which I sent him. The decision brought fresh and unexpected support from Mr. Ramsay-Fairfax and Mr. Gates, who joined forces in the cause.

Lord Gorell obviously occupied a stronger position by not identifying himself at that time with any public agitation, but he was always interested to hear what was going on. I remember that in 1906 he thought it would be difficult to extend the activities of the King's Proctor to the County Courts, and he feared that no measure would succeed which dispensed with that official's activities. He considered the extension of the existing facilities for divorce to the poor a matter of primary importance, especially as it would expose the defects of the existing law on a

large scale. Though always minimizing the importance of his own work, he could not help admitting one day that he "had set the ball rolling." Indeed it soon became a snowball. The Press were induced to take up the subject, and when once the taboo of silence was broken, they found it good copy, for Lord Gorell's decision had had the effect of the little child's remark about the Emperor and his clothes in Hans Andersen's fairy story. Mr. Gates, as Secretary to the Union, gave much instruction to itinerant reporters, and certain unwitting bigamists became objects of sympathy instead of being treated as unholy criminals in the newspapers.

On the 14th July, 1909, Lord Gorell addressed the House of Lords from the cross-benches on the subject of divorce for the poor. He read some of the piteous letters he had received from many persons who had been trying for years to save sufficient money to obtain a divorce, characteristically remarking:—"My lords, it is not pleasant to receive such letters." The House listened with respect, but without much apparent sympathy, to a forcible exposure of the wrongs of the poor in connection with a branch of the law with which a certain proportion of them were presumably well acquainted, but they listened far more attentively to the mellifluous but vague criticisms

of the Archbishop of Canterbury, whose politic denunciations of divorce were somewhat weakened by his relationship to Archbishop Tait, a prominent supporter of the Act of 1857.

The result of this debate was the appointment of a Royal Commission to consider the whole question of divorce, and not merely the question of the best procedure in relation thereto as in 1857. Of Lord Gorell's work on the Commission I naturally know nothing, and indeed I did not see him again, except when I gave evidence in 1910. But it may be supposed that the findings of the Majority Report and the unanimity of the Commissioners on various important points must have given him great satisfaction, though the labour involved must equally have imposed a very severe strain on his powers. We may also conjecture that he might have taken an active part in rousing public opinion on the question had public opinion remained apathetic, but such speculation is sadly unprofitable now.

What remains on record for all time is printed at the end of the Evidence before the Commission, namely, the "Notes prepared by Lord Gorell as to the principles on which divorce legislation should proceed." Blue Books are so little read that I venture to indicate the more salient features of this very remarkable and learned contribution to the subject.

At the outset he calls attention to the fact that "we live in a world that would hardly be recognized by our grandparents," owing to the progress of physical science, and "although discovery may be in its infancy, and mysteries of the universe are still undiscovered, and may perhaps remain insoluble, much has been done to free the human mind from superstitious beliefs and terrors, and from that dark ignorance which for so long overshadowed human life." Such ignorance in earlier times "affected man's whole outlook on life."

The whole conception of the relation of the sexes has changed. A wife is not now entirely the property of her husband. Lord Gorell might have cited a vast number of cases in the 18th century (with which he was no doubt familiar) showing the astonishing barbarities to which a wife was then supposed to submit. He continues:—"Even in the present day, the idea which used to be universal is not yet extinct, that a woman ought to continue cohabitation . . . out of deference to her marriage vows, although her husband's vicious example and teaching may be ruinous to her children already born, and intercourse with her may result in the production of diseased and degenerate offspring."

He then proceeds to an exhaustive discussion of the theological side of the matter. He

refers to the decline of the belief in the verbal inspiration of the Scriptures, and to a letter of the late Bishop Creighton dated the 18th March, 1895, to the effect that "the Gospel consists of principles, not of maxims." He concludes his examination of theological writers thus:—"I think that no one can fail to be struck by the fact that, starting from the same sources, they have reached totally different conclusions; some, that according to Christ's teaching marriage is to be regarded as indissoluble; others that it is dissoluble on one ground; others that it is dissoluble on two grounds; others again have gone further, and admit other grounds." Theologians "have been not unnaturally influenced by the condition of society in their own day, by the existence of abuses which have passed away, and by their opinions on matters as to which their conceptions were affected by their own state of knowledge and the beliefs which then prevailed." This, he thinks, may account for the divergence of lay opinion from "the more rigid views of certain sections of the clergy. The attitude of the lay witnesses . . . seems also to show what anyone with the experience of, say, the last 40 or 50 years, must have noticed, namely, the gradual but increasing decline of ecclesiastical ideas among the laity."

In his final summary he points out that "causes other than death do in fact intervene to make continuous marriage life practically impossible. . . . It is useless to maintain a tie in theory which is broken in fact, when an attempt to maintain it leads to disastrous results to the parties, their children, and the State." The people about to marry contemplate the ordinary vicissitudes of life, but they do not naturally contemplate "that either would absolutely break the vow of fidelity, would treat the other with such violence as to render joint life unsafe, would break up the home and leave for another part of the world, or would be placed shortly afterwards in a lunatic asylum or confined as a hopeless drunkard or criminal."

Almost his last words are:—"I desire to observe . . . . that difficulties in the relation of Church and State which may occur if certain changes in the law take place, might not be difficulties if Christian teaching and sound human principles came to be regarded in the future as being in accord."

How long the fabric of supernatural religion can endure on a foundation of common sense and "sound human principles" is to some persons doubtful, but the social importance of the issues raised by Lord Gorell is beyond question. Some of the gravest social questions

have been settled in a hurry and without the assistance of men like himself; our own generation may be congratulated on having obtained the reasoned opinion of a man equally eminent in character and intellect. On the roll of the great men who have tried to reform our marriage laws, he may take his place with Sir Thomas More and Sir Samuel Romilly as one who achieved the perhaps rare happiness of an ideal marriage without losing sympathy with those less fortunate than himself.

He would have been the last to admit that the cause for which he worked need suffer by reason of his death. Yet his death cannot but bring a feeling of discouragement as well as of irretrievable loss. History teaches us that only men of his rare mould can save society from violent and crude transitions. If we cannot reform our marriage laws in time we may live to see some odd substitutes for marriage as we know it now. His death is indeed premature, yet

> The bough that falls with all its trophies hung,
> Falls not too soon, but lays its flower-crowned head
> Most royal in the dust, with no leaf shed
> Unhallowed or unchiselled or unsung.

And as Renan once luminously wrote:—

> La raison triomphe de la mort, et travailler pour elle, c'est travailler pour l'éternité.

DIVORCE AND MORALITY.

Reprinted from the *International Journal of Ethics*, October, 1914.

It is sufficiently difficult even in ordinary matters to distinguish the border-line of law and morals, but it is doubly so in regard to the question of marriage and divorce. Generally speaking, wise legislation does little more than sweep away obstacles to right doing, and protect men as far as possible from liability to wrong doing. The legislator will erect a railing or a high tower to protect sight-seers from vertigo, but will not erect a cage to prevent their committing suicide. The State exists to promote the "good life" in the Aristotelian sense, but cannot at all directly interfere with the private life and motives of the citizen. For example, the State takes cognizance of marriage; the question of unions outside marriage concerns not the State, but (if anyone) the moralist.

There is, however, a certain confusion in the public mind as to the respective functions of the lawyer or legislator and the moralist

in regard to marriage and divorce. The authority of the Church is rapidly disappearing; the Church claimed the ethical sanction which the modern moralist claims, though on different grounds. The time has therefore come to reconsider the attitude of the State, and how far it is entitled to take over the powers of the Church as opposed to the claims of the moralist.

I therefore propose to deal with the following points:—(1) The point of view of the State, (2) The point of view of the moralist, and (3) The interaction of law and morality in this particular connexion.

1. Taking first the point of the State, I conceive that the universally approved object of all divorce facilities is to promote where necessary the welfare of

(*a*) the family (including parents and children),

(*b*) where there are no children, of the spouses themselves, and

(*c*) the State itself.

(*a*) The first object of the State is to secure for all children, wherever possible, the joint care of both parents. Too often death destroys this ideal, but it is equally destroyed where one of the parents is guilty of desertion or gross cruelty in any form, or becomes insane or hopelessly incapacitated by any

other form of disease. The question of moral guilt is irrelevant as regards the welfare of the children, except in cases where moral guilt inflicts a more serious injury upon them than death or disease would. Thus, to take an analogous instance, it is immaterial for the beneficiaries under a will or settlement, whether a trustee has been sent to prison or taken to drink or drugs. In either case they want to remove him. The fact of incapacity for parenthood once fully established, the State is simply concerned with the relationship of the spouses *inter se*, and this brings me to the next head of the subject.

(*b*) The second object of the State is to secure certain rights to the spouses *inter se*, for example, to enforce such economic rights as marriage creates for the husband or wife as the case may be. Clearly the wife is in most cases entitled to financial support if abandoned by the husband, and the husband is entitled to disown such obligations if abandoned by the wife. The degree to which the marriage contract has been observed or violated by either or both parties is therefore obviously bound up with the economic aspects of marriage. But the modern State has almost entirely given up the idea of interfering with the private relations of the parties, as these were and are interfered with in

Catholic countries by the Catholic Church, or between 1857 and 1884 by the State in England, for example, by enforcing cohabitation on pain of excommunication or imprisonment. Divorce is naturally and in fact much rarer in cases where there are children of the marriage; and when there are not, modern States will more and more recognize, as many of them already do recognize, the justice and expediency of divorce by mutual consent, subject to necessary time limits and financial safeguards. Such divorces are effected either by mutual consent *eo nomine*, by separations maturing into divorce, or by the legal fiction of collusive divorce for collusive adultery or any other matrimonial offence. When once the question of the children has been satisfactorily decided, the relationship of the spouses becomes a purely private relationship.

(*c*) The welfare of the State reposes entirely on the rearing of good citizens. The State is therefore not concerned with extra-matrimonial unions except where children result. To achieve for such children equality of opportunity and decent advantages, by enforcing their rights as against the parents, ought to be the first care of the modern State, and no doubt will be so when the ecclesiastical tradition of hostility to children who have

had the audacity to get born without a preliminary fee to the Church, grows weaker. In a few States there may exist prohibitions of remarriage for a guilty spouse; but this is no real exception to the rule I have laid down, because the State cannot restrain such persons from cohabitation outside marriage.

I have roughly sketched what I believe will be the attitude of the modern State to these matters, without dealing with existing divergencies in detail, because I am not writing an essay on what the divorce laws of the world are or even what they ought to be. I am merely attempting to indicate where the sphere of law ought to end and the sphere of morality ought to begin. Let us therefore now consider the sphere of morality and the point of view of the moralist.

2. We may first note that the moralist in the older civilizations of the world, *i.e.* in France, Italy, Spain, and Russia, as also in countries like China and Japan, concerns himself mainly with the question of family obligations and human happiness and not with the question of sexual laxity *per se*. In English-speaking countries the question of sexual laxity fills the foreground of the discussion; the opponents of divorce are at pains to assert that it increases, its supporters that it diminishes, sexual laxity, as

if this decided the whole question. But in countries like China and Japan sexual laxity is not necessarily associated with any disregard of parental obligations, and this is also the case in countries like Russia and the Latin countries, though it is of course an offence against the traditional morality of the Catholic Church, and probably for that reason adultery is a criminal offence in Italy and Spain. Nevertheless in these countries, where women are so frequently married out of the convent to a husband on grounds of pure convenience, (a fact which converted Napoleon to divorce by consent) it is not surprising to find the ancient social convention of a quasi-recognised lover, and at least an implicit if not explicit acceptance of the fact that a woman may be an excellent mother even though she and her husband are not technically faithful to each other. The desire of the English or American moralist to discuss the question of divorce from only one point of view is due partly, no doubt, to a certain prurience of mind common to rigorous Puritans and pious anchorites (though this is only one of many complex factors), but mainly to the mental timidity and confusion that prevails on the whole question of sex.

The English speaking races are often accused of hypocrisy because they profoundly

believe in "suggestion" as the best means of promoting good conduct, and particularly what they call "purity." They think it dangerous to discuss or reason about such questions because they fear that open discussion would endanger the peace and order of their society. They are too intellectually indolent to tackle a complicated and difficult problem on its merits; they prefer a compromise whereby having been taught as children that extra-matrimonial relations exist only in quasi-criminal circles, they conspire when older and in other respects wiser, to maintain the same preposterous fiction, and as its logical consequence the social buttress of prostitution. In a spirit of protective mimicry the transgressors against this code pay the homage of hypocrisy to what passes for virtue, and even if discovered acknowledge to themselves as well as to others the justice of their social condemnation just because they have blindly accepted this social convention all their lives. They have broken the one rule of the game, which is—not to be found out. In such a climate of opinion it is not surprising to discover that sexual laxity is the obsessing side of the problem, and that the odious aspects of chaining two incompatible persons together are completely ignored, though vividly denounced by John Milton

in one of the greatest achievements of English prose.

Even were sexual laxity to be the sole test of divorce legislation the moralist is wrong, because divorce laws never directly *cause* laxity. Such laxity is purely the social result of social causes; it is quite as characteristic of European society when it was built upon a theory of indissoluble marriage as it is of the ancient world or the modern State. In fact, our medieval ancestors lived far more loosely than we do; they were morally purified and socially rehabilitated by confession and absolution as often as they wanted it, and where such offenders were brought before the ecclesiastical courts they were let off quite easily, as I recently showed in the *Fortnightly Review* (May, 1913). The divorce laws of ancient Rome, which were the embodiment of substantial justice and sound commonsense, never became a cause of scandal until the new wine of Greek ideas burst the old bottles of Roman tradition, and even so such scandals as existed could have been prevented by substantial time limits. *Quid leges sine moribus?* was the very pertinent question put by Horace, and *Quid mores sine legibus?* is the still more pertinent question which the opponents of divorce law reform in England are incapable of answering.

The word "moralist" can of course be used both in a good and bad sense. In its ordinary sense it means the man who defends the moral code of his own time because he is unable to think of anything better than that to which he has been accustomed. Contemporary moralists may be roughly divided into Catholic, Calvinistic, and Secularist. The Catholic moralist bases his ethical opinions on Catholic tradition; the Calvinist on the traditions of Geneva, which have so profoundly influenced the English-speaking world; and the Secularist attempts to solve these problems on rational or humanistic lines, though in practice he often relapses into the clerical tradition that no privacy should be too sacred for police interference. All types, however, generally combine to oppose any legal change that seems inconsistent with the prevailing code of morals. It is interesting in this connection to read the answers of the lawyers selected in each American State to the inquiries sent out by the Divorce Law Commission in England. Whether the answer comes from South Carolina, where the "standard of conjugal fidelity is so high" as to necessitate a law that no man may leave more than one-fourth of his property to his mistress and illegitimate children; or from South Dakota or Nevada, where the procedure

is farcical and the law very happy-go-lucky; the almost invariable reply is that there is "no demand for a change in the law," and that the moral condition of the State in question could not be better. The lawyers are in this instance merely expressing the views of their clients, and taking upon themselves the function of the moralist. The moralist ought to collaborate with the State, but too often remains satisfied with the existing code of morals.

3. This conservative instinct of the moralist is responsible for a certain interaction of law and morality because lawyers and legislators are occasionally in advance of their time. In the United States the tendency to experimental law-making frequently stimulates the ethical discussion of problems first presented as legal problems or even as new statutes, and there can be no doubt that if Lord Palmerston had invoked a referendum on his great divorce statute in 1857 it would have been strangled in its cradle. The acceptance of divorce as a fact for the richer sections of the middle class undoubtedly affected the moral code of England, and in no way more than in the new ideas that began to grow in regard to the rights and duties of married women. Yet the broad fact remains that if the Statute had been opposed to the main

stream of ethical ideas it would have remained a dead letter, just as one notices how seldom the well-to-do classes availed themselves of the Scottish law from 1600 to 1800. It is therefore by no means clear that the moralist, or even the moral philosopher, is a better custodian of social morality than the lawyer or legislator, especially where that morality is complicated with religious taboos and prohibitions; and it follows that the general public should not be too easily frightened by the opposition of so called moralists; particularly when, as in the case of divorce, the lawyer proposes to do nothing more than enlarge the liberty of the subject, with the full knowledge that this legal liberty will be severely limited by purely social sanctions.

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