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# NO-FAULT DIVORCE LAWS: AN OVERVIEW AND CRITIQUE\*

JAMES T. MCHUGH\*\*

## Introduction

**D**URING THE past five years there has been a growing trend throughout the country in favor of a general revision of divorce legislation. Fifteen to twenty years ago the focus was on establishing a national divorce law to replace the widely divergent laws in the various states. The present trend, however, focuses on the model statute developed by the National Conference of Commissioners on Uniform State Laws, popularly referred to as "no-fault divorce law." The model statute was studied by the Family Law Section of the American Bar Association and some changes have been made. But the Family Law Section in its 1971 Mid-year Report recommended that the model statute not be approved by the ABA. At its annual meeting in February, 1972, the ABA rejected the model law.

Nonetheless, some type of no-fault legislation—or something described as such—has been proposed in a number of states and already adopted in some.

Consequently, it is the purpose of this paper to provide an overview of the present situation, to describe the no-fault proposal and to emphasize its weaknesses, and to provide some recommendations in regard to legislative proposals. It is hoped that the analysis and suggestions will serve as a basis for further consideration on the part of lawyers, social workers and those involved in marriage and family life work. This paper is not a theological treatise on the indissolubility of marriage, nor

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\*\* United States Catholic Conference.

is it intended in any way to be a justification for divorce. But the causes of divorce and the present legislative trends face us with pastoral problems of serious import, and these are quite definitely the concern of the Family Life Division of the United States Catholic Conference. Accordingly, some pastoral recommendations are also included in the concluding section.

### **The Present Situation**

Although it is commonly estimated that between one-quarter and one-third of all American marriages end in divorce, a careful study of marriage and divorce released in October, 1971, by the U.S. Census Bureau showed that the figures have to be analyzed more closely to get an accurate picture of the divorce situation. This study, conducted in 1967, for couples married during the previous 20 years, presented the following facts:

- a) Four-fifths of the whites and two-thirds of the Negroes married in the 20-year period preceding 1967 had been married only once.
- b) Youthful marriages are most risky. Thus, 28% of men marrying before age 22 were divorced, while only 13% of those marrying after age 22 were divorced. For women, the figures were 27% before age 20, as compared to 14% after age 20.
- c) The rate of divorce was higher in all categories for Negroes, for those in the lower economic strata, and for migrants.

### **Reasons for the Proposed Revisions of the Laws**

The laws governing divorce vary from state to state, and while the laws on the

books seem strict, the actual administration of the law seems lenient. Moreover, marriage counselors and social scientists point out that the statutory grounds for divorce are seldom, if ever, the real causes of marriage breakdown. Finally, fast and easy divorce has been available for many years in Mexico, and more recently in the Dominican Republic and Haiti.

At any rate, the reasons given for a revision of present divorce laws usually include:

- a) Concern for fair and equitable treatment for all persons who require divorce, regardless of socio-economic status.
- b) Determination to avoid the dishonest charges often made as grounds for divorce and the acrimony that accompanies the divorce proceedings.
- c) Desire to alleviate the harm done to children by long and often dishonest proceedings.
- d) An attempt to release the court of the task of making judgments in matters that are highly subjective and emotion-laden.
- e) Marital breakdown is seldom the fault of only one party; in most cases it is extremely difficult to delineate clearly who is most responsible.
- f) Once the couple enter into divorce proceedings, it is hardly likely that they will be turned back by the law, the courts, the church, or social disapproval. Therefore, the law should seek to grant them what they want as smoothly as possible, with proper safeguards for personal rights.

There is considerable truth to these arguments and to others like them. But divorce

legislation is only one aspect of marriage legislation, and perhaps a far broader examination of laws affecting marriage and family life is necessary before an ideal divorce law can be established. For instance, in light of the statistics on young marriages, perhaps age for marriage should be reexamined.

### The New Proposals

Obtaining a divorce has customarily depended on proving that some legal ground was present in the specific case. Grounds for divorce included desertion, physical or mental cruelty, adultery, etc. Verification of the guilt of the offending party was not only the justification for the divorce, but was very often a powerful influence in the awarding of alimony and the distribution of the possessions.

At any rate, no-fault divorce is looked upon as a radical departure from the past system. There are no grounds for divorce other than the irretrievable breakdown of the marriage. There is no necessity to determine who is guilty for the breakdown of the marriage, but simply the necessity to verify that it is irretrievably broken. There are various legal proposals now being discussed, and the ABA's Family Law Section unanimously accepted "irretrievable breakdown" as the exclusive ground for divorce if acceptable and appropriate guidelines are provided so that the concept is workable and so that the new law applies some brakes on impetuous divorce and better safeguards the public interest in the family. Herewith are the variations of approach now being considered under the concept of no-fault divorce.

#### 1. *Irretrievable Breakdown*

The couple petition the court for dissolution of marriage on the basis that the marriage is irretrievably broken. Either party or both parties may petition. A hearing is held for the court to determine that the allegation is true and to hear the response of the non-petitioning party. If the court finds the marriage broken, it declares the marriage dissolved and presides over the property settlement. No attempt is made to assess guilt or fault. The whole proceeding could be finished in little more than 90 days.

The basic difficulties of the breakdown theory are (1) establishing objective criteria that can be applied to indicate the breakdown of marriage; and (2) establishing some manageable procedure to verify that the criteria have been met in each case. Without some cooling off period for counseling or attempted reconciliation, the court may never be able to verify the reasons for the declaration. Moreover, the speed with which the dissolution can be accomplished allows little chance for a sober re-evaluation by the parties.

In some states provision is made for some reconciliation attempt or for some marriage counseling. In California, the old grounds—adultery, desertion, cruelty, etc.—can be cited as evidence of breakdown.

Once the traditional grounds or fault concepts are entered, even as corroboration of the breakdown, the parties—and judges and lawyers—begin to think in the old categories.

Although the simple irretrievable breakdown system is theoretically appealing, it has not found ready acceptance. It seldom

allows for any after-thoughts or reconciliation, and as evidenced by the ABA action in February, 1972, it probably will not gain nationwide legal endorsement until some changes are made.

## 2. *Breakdown Plus Separation*

In order to follow the no-fault concept, some jurisdictions are considering a law that combines the breakdown theory with a period of separation. The couple appear in court and assert that the marriage is irretrievably broken, and then live separate and apart for a period of one or two years. (If only one party appears, the time may be increased to anything from two to five years.) If, at the conclusion of the stipulated time, there has been no reconciliation nor any other reason to prolong the waiting period, the court grants the divorce—which takes effect immediately. No other grounds are needed or considered as reasons for the court decree.

## 3. *Difficulties of the New Proposals*

Granting that our present legal system for divorce is inadequate in many respects, these new proposals at least try to avoid the ideological pitfalls of the fault system. However, their weakness lies in the fact that they assume a social system and patterns of behavior that do not now exist. The following are some of the specific weaknesses of the new proposals:

a) The presumption is that both husband and wife can separate and begin a new life on equal grounds. In fact, a woman who has been away from her profession, previous employment, or area of skill for a five- to ten-year period does not easily find a way to support herself.

b) The emphasis in the new divorce laws is placed on the relationship between husband and wife. There is an assumption that a fair process decreases the possibility of anyone being hurt. But the child always suffers some harm, and these proposals really do not come to grips with that.

c) Although recognition of reconciliation and counseling is inherent in the new laws, very little provision is generally made by the state to assure availability of service. Indeed, there is little more than token acknowledgement of the value of a broad-based domestic court system, with adequate social services.

d) Since other sections of the law are not always brought up to date with the divorce law, there is the danger that a fair and equitable financial arrangement will not be achieved.

e) Any serious attempt to revise divorce laws should also include some attempt to get at the sources of marital instability. Age at marriage, degree of preparation, extenuating circumstances (e.g., out-of-wedlock pregnancy) are factors that society must also consider in granting the marriage license.

f) Because children suffer greater emotional and material deprivation from divorce, perhaps some form of independent representation should be arranged to protect their rights and assure them of future opportunities that they might otherwise have enjoyed.

g) In any case, enforcement of the court's mandates should be ensured to protect the rights of all concerned.

### Pastoral Suggestions

Divorce and divorce laws are a fact of life in contemporary America. It is hardly likely that any divorce law can be looked upon as good, because its very existence is a testimony to the breakdown of "the intimate partnership of married life and love [that] has been established by the Creator and qualified by his laws, and is rooted in the conjugal covenant of irrevocable personal consent" (*Gaudium et Spes*, No. 48). Regrettably, however, some marriages do in fact break down, and the Church must take this into account in attempting to fulfill her pastoral responsibilities in the area of marriage and family life. Consequently, without entering upon the question of pastoral care for the divorced and for those in second marriages, the following recommendations are proposed:

a) On the strength of the statistical evidence regarding the breakdown of marriage for those marrying young, for the poor, and for migrants, the Church should increase her pastoral commitment for these groups. A system of special counseling for the young and for those pregnant before marriage should be established in every diocese. This would delay hasty marriages, perhaps permanently for some. It is not so much a

question of refusing the sacrament as taking definite steps to insure its proper reception.

Pre-marriage programs such as pre-Cana and high school marriage programs should be increased. Some specialized programs should be set up for the poor and for migrants.

Although family stability seems stronger in the Spanish-speaking population, we should expect an erosion here because there is so much mobility and migration in this population. Definite programs to compensate for the mobility will strengthen family life.

b) Marriage counseling services should be increased at every level. In addition to professional counseling services, priests and seminarians should be given the opportunity to learn basic counseling skills and to recognize the causes of marital instability.

c) In every diocese, and certainly in every state conference, a special committee of lawyers, counselors, physicians, and family life personnel should be established to monitor state domestic relations laws. This committee should be able to detect trends that will lead to legal change and should anticipate legislative initiatives sufficiently in advance to comment knowledgeably or formulate alternatives.

### Bibliography on Divorce

This listing does not attempt to be comprehensive. Rather, it provides reference to contemporary books and articles, particularly those dealing with the no-fault legal proposals.

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