# THE DYING DOCTRINE OF RECRIMINATION IN THE UNITED STATES OF AMERICA*

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## I

Divorce, it is said, is a remedy for the innocent against the guilty.[1] When both parties are equally at fault, a divorce can not be granted. Or as the maxim is generally stated: "If both parties have a right to divorce, neither party has."[2] This is the classical statement of the doctrine of recrimination.

The doctrine of recrimination is found in the ecclesiastical courts which maintained the general concept of *separatio a mensa et thoro*. Here a party would be absolved of his (her) duty in a marriage, but would not be freed from the tie of the marriage. This meant that there could be no remarriage during the lifetime of the other spouse.[3] To gain a judicial separation, a flagrant breach of the marriage vows had to occur.[4] Abandonment, cruelty, or adultery therefore would be grounds, had the person claiming the judicial separation not sinned. A judicial separation then became punishment for the guilty spouse and reward for the innocent.

According to Lord Stowell in *Forster* v. *Forster*,[5] the doctrine was based on *compensatio criminum*. It was applied by Roman magistrates when the husband pleaded the wife's adultery as a defense to her application for repayment of her dowry, since its

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[1] *McCracken* v. *McCracken* (1928), 11 S. W. 2d 397 (Tex. Civ. App.).

[2] *Hoffman* v. *Hoffman* (1869), 43 Mo. 547.

[3] This was important to the woman who was unable to obtain support if she too had sinned.

[4] An English court has stated that since marriage is a contract with mutually dependent covenants, if both parties have breached the covenants, the court will not aid either party. *Beeby* v. *Beeby* (1799), 1 Hagg. Ecc. 789 at p. 790, 162 Eng. Rep. 755, at p. 756.

[5] (1790), 1 Hagg. Con. 144.

application allowed the wife to defeat this defense by showing the husband's own adultery.

Contrary to Lord Stowell, however, this action in Roman law had nothing to do with barring divorce. During the Augustan period a desirable marriage for the daughter largely depended upon her having a suitable dowry. The dowry, when given to the husband, seems to have become confused with the rest of the husband's estate.[6] However, as divorces became more frequent and husbands did not always give support or separation money to their wives, a tendency to penalize the husbands grew. This penalty was to return all, or a part of the dowry given to the husband by the wife's family. The return of all or part of the dowry by the judge was based on the concept of fault. A statute to this effect was drawn in 9 A.D. It entitled the woman to recover the whole of her dowry within one year. To the action, *actio rei uxoriae*, were certain exceptions:

> If the wife were guilty of adultery, her husband in divorcing her was allowed to retain a sixth part of her dowry; if she had committed a less serious fault, the husband could retain one-eighth.[7]

Later, by the sixth century, during Justinian's time, the wife was given the right to retain the *donatio ante nuptias* (the gift made by the husband to the wife at the time of marriage) even though she had erred.[8] None of these actions eliminated divorce where both spouses were at fault. They dealt only with the economic consequences of divorce.

When the principle of recrimination was taken into the ecclesiastical law of England, it did not, even in its incipient stages, meet with the complete approbation of the judges. In deciding *Forster* v. *Forster*, for example, Lord Stowell, himself considered recrimination to be a good moral and social doctrine. But twenty-nine years later he regretted that he had to follow the rule. However, he felt that he had neither the right nor the duty to reverse what was essentially his misreading of the Roman law. And in *Proctor* v. *Proctor* he said:

> It [the canon law] provides against the mischiefs to which a husband might be exposed by such a wife living apart, by its known doctrine, that all separations merely voluntary are totally illegal, not to be either tolerated or presumed. It acknowledges no intermediate state between a cohabitation and a formal separation. It, therefore, presumes, when

[6] Sohm, The Institutes of Roman Law (1892) p. 376.
[7] Beamer, Recrimination in Divorce Proceedings (1941), 10 Kan. L.R. 216, at p. 218.
[8] Corbett, The Roman Law of Marriage (1930) p. 210.

it withholds its divorce or separation, that the parties return to cohabitation; all matters return to their former course, but with increased vigour; the husband and wife live again on their former footing, and there is no anticipation of separate debts, or of the probability of spurious offspring. . . . Taking this, as I think I am compelled to do, as the rule of law binding upon the judgments of this Court, I cannot bind myself to the fact, that the modern course of life and manners does not furnish those corrections of the mischiefs that may follow, which the canon law had anticipated in connexion with its rule. There is no return to cohabitation, nor are any means to be resorted to for the purpose of compelling it. In the state of separation, whether authorized or merely conventional, which usually takes place, there is certainly the increased danger of a spurious offspring, and as the regulations of property exist amongst us, the danger of separate debts, to the great eventual injury of the husband and his legitimate family. But even if such mischiefs may be presumed to follow the modern application of the rule, this Court still remains under the legal obligation of adhering to it till a competent authority provides another. Whether the inconveniences of the rule, as it now operates (considered as they ought to be in opposition to those which might follow the reversal of it), are such as nevertheless ought to produce a reversal, is a question which this Court has neither a right nor a duty to inquire.[9]

## II.

In the United States, the doctrine of comparative rectitude has arisen in order to alleviate the stringency of recrimination. Under this doctrine, divorce is granted to the party least at fault; or stated more simply, the party whose hands are soiled the least is entitled to a divorce.[10] So in Illinois, it has been held that drunkenness and cruelty can not be recriminated against adultery.[11] Also in Illinois,[12] extreme and repeated cruelty on the part of the husband is not a sufficient recriminatory defense to a charge of adultery.[13]

In those states where the doctrine of comparative rectitude is not followed, however, the courts utilize the language of *Beeby* v. *Beeby*,[14] where Lord Stowell stated,

[9] (1819), 2 Hagg. Con. 292, at pp. 298-302.

[10] This doctrine has been applied in *McClain* v. *McClain* (1953), 222 Ark. 729, 263 S. W. 2d 911; *Hokamp* v. *Hokamp* (1949), 32 Wash. 2d 593, 203 P. 2d 357; *McFadden* v. *McFadden* (1948), 213 S. W. 2d 71 (Tex. Civ. App.); *Dearth* v. *Dearth* (1940), 141 Pa. Super. 344, 15 A. 2d 37.

[11] *Bast* v. *Bast* (1876), 82 Ill. 584.

[12] *Hellenbrand* v. *Hellenbrand* (1910), 211 Ill. App. 624.

[13] However, Illinois has gone the other way in recent years. In *Grady* v. *Grady* (1931), 266 Ill. App. 277, the plaintiff sued for divorce on the ground of adultery and proved his charge. The defendant recriminated by alleging and proving desertion and cruelty on the part of the plaintiff. The Illinois court refused to aid the plaintiff.

[14] *Ante*, footnote 4, cited in *Conant* v. *Conant* (1858), 10 Cal. 249, 70 Am. Dec. 717.

> . . . if he, who has first violated his marriage vow, should be barred of his remedy; the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt.

Perhaps both parties will take solace in the fact that they are guilty of adultery, and other crimes against themselves and the state and therefore build a new and beautiful life together; but more likely the parties will end up bitterly hating each other, partaking in extra-marital peccadilloes, and making a sham out of the societal meaning of marriage and family.

Operative in this "classic" doctrine of the law is a principle with a corollary. Worked together the principle and the corollary are seemingly contradictory to certain premises which are accepted by courts.

> Principle: Parties that have done no wrong may obtain a divorce.
>
> Corollary: If both parties have done wrong, neither is entitled to a divorce.

Suppose that we accept the glowing language in *Edleson* v. *Edleson*,[15]

> The public policy of this state as well as that of all others, so far as we know, is to foster, protect, and encourage marriage as it is the foundation of the family relation without which, an observation of the history of the human family shows there can be no civilization.

With this type of language and other examples of equal elevation, we are shown that the courts hold the view that marriage and the family are beautiful ideals which must be protected with vigilance. Married life is not thought of as a penalty. Under recrimination, however, married life becomes a penalty for wrongdoing.

In *Hoff* v. *Hoff*,[16] where both parties had been guilty of cruelty to each other, a Michigan Appellate court refused a decree stating:

> A proper administration of justice does not require that courts shall occupy their time and the time of others in giving equitable relief to parties who have not equities. And it is as true of divorce cases as of any others that a party must come into a court of equity with clean hands. Divorce laws are made to give relief to the innocent, not to the guilty.

*Radzinski* v. *Radzinski*,[17] another Michigan case, shows the beauty of this kind of reasoning to an even greater extreme. This was an action in which the wife alleged acts of repeated cruelty. The husband denied such allegation on his part and charged that she was extremely cruel to him. The trial court concluded that

[15] (1918), 179 Ky. 30, 200 S. W. 625.
[16] (1882), 48 Mich. 281, 12 N.W. 160.
[17] (1926), 234 Mich. 144, 207 N.W. 821.

both of the parties were at fault, and dismissed both the bill and the cross bill. The plaintiff appealed, but the lower court's decision was affirmed. In the appeal, counsel for the plaintiff complained that the trial court refused to allow testimony from the children, ages twenty and sixteen. The Supreme Court of Michigan said there was no refusal to let the children testify although the trial judge addressed himself forcefully to the point. The court upheld the right of counsel to call children, but said:

> This court can but suggest to counsel, as did the trial court, *that the best interests of the family demand that the children of the parties should not be called in divorce cases.* (Emphasis added.)

Perhaps the court's reasoning is that since the mother and father are being forced to stay married, one should not jeopardize a family unit any further by having the children testify for or against one or the other parties. But even if this is what the court thinks the children would be doing, it should be fairly evident to the casual reader that the family in this case is no longer a family; that the so called "best interests" are not served by keeping together the principal members of a unit that does not want to stay together. The "family" is not an abstraction; it is a series of relations.

Courts as they are wont to do when doctrines or concepts no longer fit the facts, try to emasculate the doctrine without destroying it. The approach may be considered as favorable by some on the ground of continuity with the past, although at times this is nothing more than bluffing the bench and bar since the court is not putting forward what is actually being done. *The price of continuity might be too high.*

In *Roberts* v. *Roberts*,[18] the Kansas court granted a divorce to the plaintiff-husband under a statute which vested the court with discretion to grant a divorce or make a settlement of property or both, when the parties appear to be equally wrong. The husband had been guilty of adultery, later condoned, and other subsequent irregularities. The wife was guilty of extreme cruelty and desertion. The court stated:

> Even if the parties had been found to be in equal wrong, the court might have decreed a divorce, for discretion to refuse implies discretion to grant.

In Iowa, a jurisdiction which appears to be committed to the doctrine of recrimination,[19] there has been a utilization of other

[18] (1918), 103 Kan. 65, 173 Pac. 537.

[19] *Wilson* v. *Wilson* (1878), 40 Iowa 230; *Pierce* v. *Pierce* (1871), 23 Iowa 238.

standards. In *Marsh* v. *Marsh*,[20] the wife sued the husband for divorce on grounds of desertion, cruelty, and inhumane treatment. The husband's cross-petition charging cruelty and desertion was not sustained by the evidence, but the court

> granted a decree to the wife stating that the evidence tends to corroborate that of the plaintiff, whose conduct has not been entirely blameless. On the contrary, we are forced to believe that she is a vulgar woman, and in some respects a fit match for her husband. But no good could possibly result if we should deny a divorce, and it might be that harm would result if these parties should, in the future, be compelled to sustain towards each other the relation of husband and wife.

In most recent years, the ingenuity of some courts has been such that recrimination is considered by judges as a doctrine to be applied in a discretionary manner. In those states which have adopted statutory schemes for divorce which are based on conditions other than fault of the parties, there is no longer any place for the doctrine of recrimination. For example in New Mexico, Alaska and the Virgin Islands, separation, incompatibility and insanity are statutory grounds for divorce.[21]

In Florida the doctrine of recrimination is upheld by statute.[22] However, the Florida courts have avoided the statute. In *Stewart* v. *Stewart*[23] the court said:

> The maxim may be invoked because of the very nature of the wrong either for the benefit of the Court and society or for the benefit of the defendant when to do otherwise would be to allow plaintiff to take an unfair advantage of the defendant.
> *The application of the doctrine of recrimination like the doctrine of clean hands is a matter of sound judicial discretion dependent on public policy, public welfare and the exigencies of the case at bar.* (Emphasis added.)

In the District of Columbia, the Virgin Islands and New Mexico, the courts have concluded that the legislative intent of the statutes of such a nature was to make recrimination only discretionary.[24]

Probably the most important decision in the United States in recent years, re-examining and revising the doctrine of recrimina-

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[20] (1909), 141 Iowa 192.

[21] Clearly insanity is not based on the fault of the other spouse. No court that has one ground for divorce, insanity, would claim that the action could be defeated by showing that the plaintiff was cruel or adulterous.

[22] Fla. Stat. 65.04, (1949).

[23] (1946), 158 Fla. 326, 29 So. 2d 247.

[24] For a review of Oregon cases on recrimination, see Recrimination as a Defense in Oregon (1955), 35 Or. L. Rev. 32, where it is stated at p. 37, ". . . Oregon cases [seem] to indicate that in a proper case the court will relax, or in its discretion not apply, the doctrine of recrimination."

tion is *DeBurgh* v. *DeBurgh*.[25] The revision was accomplished through the reinterpretation of section 122 of the California Civil Code which provides that:

> Recrimination is a showing by the defendant of any cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce.

Within the definition of "in bar", the Supreme Court of California found that discretion on the part of the trial judge could be used in recrimination. The policy behind this notion is similar to that found in *Blunt* v. *Blunt*,[26] where the decision to grant a divorce was thought to be within the hands of the trial judge, who was to consider the interests of society and apply the rule that it is contrary to public policy "to insist on the maintenance of a union which has utterly broken down".[27]

In the case of *DeBurgh* v. *DeBurgh*, the plaintiff wife and the defendant husband were married in California in 1946. They separated in February, 1949, at which time the plaintiff brought an action for divorce on the ground of extreme cruelty. The defendant filed a cross complaint for divorce, also on the ground of extreme cruelty. Each party denied the other's allegation of cruelty. The trial court concluded that "each of the parties to this action has been guilty of acts of cruelty towards the other . . . and that each party has been guilty of recrimination and neither is entitled to a divorce from the other."

The evidence in regard to cruelty was in conflict. The plaintiff's evidence tended to show that the defendant was frequently intoxicated to excess, that he beat her, that he constantly boasted of his former love affairs and generally qualified as a mean and cruel person in his actions toward his wife and his wife's daughter by a former marriage. The defendant's evidence suggested that the plaintiff had unjustly accused him of dishonesty and homosexuality and had communicated these and other false statements to defendant's business associates, resulting in irreparable harm to the defendant.

The court re-examined Section 111 of the Civil Code[28] and

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[25] (1952), 39 Cal. 2d 858, 250 P. 2d 598. [26] [1942] 2 All. E. R. 613.

[27] [1943] A. C. 517, at p. 525, 169 L. T. R. 33. The new attitude of favoring divorce when both parties are at fault came to a natural conclusion in England in *Redman* v. *Redman*, [1948] 1 All E. R. 333. The trial court in that case denied the decree because both parties had indulged in extra-marital relations. The Court of Appeals reversed on the grounds given in *Blunt* v. *Blunt*.

[28] Enacted in 1872, the section provides that: Divorces must be denied upon showing:

1. Connivance; or, 2. Collusion; or, 3. Condonation; or, 4. Recrimination; or, 5. Limitation and lapse of time.

concluded that the California statute defining recrimination as to a showing by the defendant of any cause of divorce against the plaintiff, "in bar" of the plaintiff's cause for divorce is not an automatic and absolute bar to relief since the phrase "in bar" means at the discretion of the trial court. Justice Traynor reasoned that there was no other reason for having the phrase "in bar" since if the legislature meant an absolute bar, it would have left the phrase out. The justification for this position suggests that under the wording of the California Code the equitable doctrine of "clean hands" does not apply when a denial of the plaintiff's cause would be "harmful to the public interest."

> Public policy does not discourage divorce where the relations between the husband and wife are such that the legitimate objects of matrimony have been utterly destroyed.

In addition to the defendant's showing a cause of divorce against the plaintiff, he must also show either,

> (1) that in spite of the mutual misconduct shown there is some benefit to be derived from continuing the marriage either to the parties themselves through a reconciliation or to their children; or,
> (2) that he is himself the lessor offender.[29]

The *DeBurgh* case, although possibly putting the doctrine of recrimination to rest,[30] may raise problems just as serious. "Only the embalmed corpse of the doctrine is preserved, impotent in the shroud of standards established for determining where a cause of divorce shown against a plaintiff is to be considered a bar to his suit for divorce," says the dissent at page 880. Under the *DeBurgh* case the trial judge may "if it is possible" grant a divorce to both parties.

## III.

The *DeBurgh* case, which incorporates to some degree the idea of discretion on the part of the trial judge, has followed the lead taken in *Blunt* v. *Blunt* and unwittingly followed some of the views promulgated in the Canadian case of *Gracie* v. *Gracie*.[31] Here, Mrs. Gracie brought divorce proceedings against her husband in the New Brunswick Court of Divorce and Matrimonial Causes on the ground of adultery. Mr. Gracie counter-petitioned against his wife for a divorce on the ground of adultery. The court granted the husband's counter-petition. Mrs. Gracie appealed this counter-

[29] For a full discussion of the *DeBurgh* case, see Bayse, Retreat from Recrimination — *DeBurgh* v. *DeBurgh* (1953), 41 Cal. L.R. 320, at p. 327.

[30] Sayre, Divorce For the Unworthy(1953), 8 Law and Cont. Problems 26.

[31] [1943] 4 D. L. R. 145, 59 T. L. R. 315.

petition. This appeal was allowed by a split division in the Appeal Division of the Supreme Court of New Brunswick.[32] In this court the dissolution of the marriage was entered in favor of Mrs. Gracie.

The Appeal Division accepted Mrs. Gracie's contention that the English ecclesiastical law became part of the law of New Brunswick thereby barring the granting of a divorce to a party who was, himself, guilty of adultery. This view, of course, would have effectively overruled the ability of a trial judge to grant a divorce in his discretion to those who were, themselves, guilty of marital violations. The husband in the *Gracie* case appealed to the Supreme Court of Canada where the trial court's judgment was affirmed.

According to Justice Davis, the most important question in this case was whether the New Brunswick court could grant a divorce without following the ecclesiastical rule. It was his view that not only was the ecclesiastical rule *not* incorporated as part of the Nova Scotia law, but never did divorce *a vinculo* fall under the jurisdiction of ecclesiastical law. Ecclesiastical courts were limited to suits for judicial separation *a mensa et thoro*. But for our purposes, more interesting to note is the fact that Justice Davis held that it was within the discretion of the trial judge to decide whether or not a divorce may be granted to one of the parties. By negative inference he may therefore refuse to grant the divorce to either party or to both parties on the possible grounds that they have not acted in a "moral" enough way to receive a divorce decree. This decision suggests that Justice Davis' view was, at least in an implied way, still intimately connected with the notion of fault.

Justice Rand in his opinion shows through an analysis of the law of New Brunswick of 1791, that divorce *a vinculo* may be granted. Besides this, he also notes that at the time of formulation of divorce laws in New Brunswick, no references were made to the rules considered as established practices regarding divorce in the ecclesiastical courts of England. Justice Rand also points up the fact that under the Divorce Act of 1925, the plea of recrimination is a discretionary bar only. More important, however, is the fact that implied in the tone of Justice Rand's opinion is the view that divorce is *not* something to be viewed as a battle of competing concepts regarding dubious notions of fault, but rather as something which is more clearly a series of unfortunate difficulties between human beings.

[32] [1942] 4 D. L. R. 451.

> From its [recrimination] background of an a priori logic, this procedure inevitably took on a mechanical characteristic. It tended to disregard the actual elements of conduct involved and to make use of categories of behavior as if the controversy were a contest between concepts rather than a problem between human beings. The cases contain many references to the nature of the recriminatory plea. It is a 'set off'; it is 'eodem delicto'; it is 'par delictum'; it is analogous to a breach of contract; it is a spiritual offence, and the suitor should come into Court with clean hands. But in its application there was no weighing of the moral force or strength of the act upon which it was based, nor any examination of that act as it was part of an interplay in the common life of two persons.

From this formulation it becomes clear that the one who is best able to judge the difficulties between the contending parties is the trial judge. Notions of fault, under this view, become less controlling and the frame of reference shifts to a much more realistic and pragmatic approach.

## IV.

The notion of fault in a divorce case is unimportant when the question of alimony, custody, or property settlements are before the court. These questions are, and should be, if reasoned in a craftsman-like manner, considered as distinct and separate issues on their own merits, rather than on the fault of the party.

This means that the prime concern of the judge in awarding custody of a child is "the welfare of the child" and not the fault of the parents. Unfortunately, of course, fault becomes important to some judges, and he *rewards* an "innocent" spouse with custody, or he *punishes* a "guilty" spouse with a low alimony. Certainly our analysis in this field is sophisticated enough to realize that both parties are responsible for the marital break-up which culminated in divorce even though only one may file suit, and "reward" and "punishment" become meaningless.

The Washington courts grant a divorce to both parties when both spouses seek a divorce. In *Flagg* v. *Flagg*,[33] each party sought a divorce from the other, the custody of a minor child and the adjudication of their property rights. Each appealed from an interlocutory decree. The court, after perusing a 427 page record, concluded that the fault did not wholly fall upon Mr. Flagg and that the wife was partly responsible for the grievous situation,

> This situation, according to the evidence as a whole, is one where both the parties are responsible for a condition which has resulted in

[33] (1937), 192 Wash. 697, 74 P. 2d 129.

> an estrangement and made it impossible for them any longer to live together as husband and wife. We are of the opinion that both parties have been guilty of cruelty within the meaning of the statute, and that both, therefore are entitled to a divorce.

The court reasoned that the custody of the child should remain with the mother, the father having the privilege of visitation. The governing principle, the court implies, is not who gets the divorce, but rather what is the best interests of the child. On the matter of property and monetary settlement, the court said:[34]

> There is the matter of division of property and the settlement of property rights. We have given this phase of the case careful consideration in the light of what has already been determined. Without going into details, we believe that it is for the best interests of both parties that the settlement of all property rights and claims between them should not only be complete and adequate, but final as well, so that each may henceforth be independent of the other.

Many states have statutes which do not make an award of alimony in a divorce case dependent upon fault.[35] Hence, many

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[34] At p. 686.

[35] *Illinois Statute*, Ch. 40, s. 19. Permanent alimony — Custody and support of children — Modification of decree — Enforcement.

"When a divorce shall be decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them, *as from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just*. The court may order the husband or wife, as the case may be, to pay to the other party such sum of money or convey to the party such real or personal property, payable or to be conveyed either in gross or by instalments as settlement in lieu of alimony, as the court deems equitable. Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support, it may at any time after the entry of a decree for divorce, upon obtaining jurisdiction of the person of the defendant by service of summons or proper notice, make such order for alimony and maintenance of the spouse and the care and support of the children as, from the evidence and nature of the case, shall be fit, reasonable and just, but no such order subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony or a money or property settlement in lieu of alimony or where the court by its decree has denied alimony. In any order entered pursuant to this section, the court may order the defendant to give reasonable security for such alimony and maintenance or such money or property settlement, or may enforce the payment of such alimony and maintenance or such money or property settlement in any other manner consistent with the rules and practices of the court, where a party wilfully refuses to comply with the court's order to pay alimony and maintenance or to perform such money or property settlement, or has shown himself unworthy of trust. No alimony or separate maintenance shall accrue during the period in which a party is imprisoned for failure to comply with the court's order. A party shall be entitled to alimony and maintenance after remarriage; but, regardless of remarriage by such party or death of either party, such party shall be entitled to receive the unpaid instalments of any settlement in lieu of alimony ordered to be paid or conveyed in the decree. The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and

courts which grant a divorce to the husband may still order the husband to pay alimony to the guilty wife. A court which grants a divorce is empowered to award permanent alimony to a wife against whom the divorce is granted.

There are some statutory provisions in states which make clear the view that alimony may be awarded to a guilty wife.[36] Even where statutes have provided that the guilty party is to forfeit all rights acquired by the marriage it has been held that such a statute has no effect on the power of the divorce court to award permanent alimony. This doctrine is found in *Crawford* v. *Crawford*[37] which held that the statutory provision providing "the marital rights shall cease with the decree" means no more than the divorce is "absolute," and in no way affects the statutory power of the court to award alimony to a guilty wife.

In almost all the cases which deal with alimony for the guilty party, the question is one of discretion for the trial judge.[38] The courts will consider the kind of intensity of the wife's misconduct and the quality of the husband's misconduct. In *Mueller* v. *Mueller*,[39] the court held that alimony was still available to the adulteress wife who had been beaten and had been treated with severe cruelty by her husband. In *Brunner* v. *Brunner*,[40] since the husband had an income while the wife was without means of support, the court allowed the wife sixty dollars a week alimony even though there was evidence of cruelty by the wife against the husband.

Custody of the children is not necessarily given to the one who wins the divorce. The paramount consideration on the matter of custody is, what is best for the child. Custody, then, is based on who the judge (or judges) think can best rear the child. This is generally determined by interest, economic position, character

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the care, custody and support of the children, as shall appear reasonable and proper." (Emphasis added.)

In *Adler* v. *Adler* (1940), 373 Ill. 361, alimony was considered to be an allowance that was carved out of the husband's assets for the support of the wife. The court construed the statute as giving the court the power to weigh all the facts and circumstances in deciding whether the party at fault should be granted alimony.

[36] *Keleher* v. *Keleher*, 192 F. 2d 601, *cert. den.* (1951), 343 U.S. 943.

[37] (1930), 158 Miss. 382, 130 So. 688.

[38] For recent cases on this point note: *Moore* v. *Moore* (1951), 207 Ga. 335, 61 S. E. 2d 500; *Padgett* v. *Padgett* (1951), 231 S. W. 2d 207 (Ct. App., Mo., 1950); *Poliakoff* v. *Poliakoff* (1953), 221 So. C. 391, 70 S. E. 2d 625; *Spreckels* v. *Spreckels* (1953), 111 Cal. 2d 529, 244 P. 2d 917; *Lewis* v. *Lewis* (1954), 222 Ark. 743, 262 S. W. 2d 456; *Zook* v. *Zook* (1956), 233 F. 2d 369.

[39] (1955), 44 Cal. 2d 527.

[40] (1947), 159 Fla. 762, 32 So. 2d 736.

and temperament of the parent. It is stated in *Corpus Juris*[41] that,

> Preference should be given to the party not at fault, and the custody of the child is usually awarded to the party who prevails in the suit for divorce, whether the divorce is awarded on the ground of adultery or moral laxity, cruelty, desertion, or nonsupport. Under a statute so providing the prevailing party is entitled to the custody of the children unless good reasons otherwise appear.
> *Since the best interests of the child are paramount . . . the guilt or innocence of the parties is not controlling, and custody may be awarded to the one against whom divorce was decreed, although guilty of adultery, cruelty or desertion.* (Emphasis added.)

There is even stronger language in *American Jurisprudence*.[42] It is, of course, important to note what is stated in these collections of American law, since here we are able to see what the average American lawyer will consider to be "good law" and operative in the courts.

> Where the court is called upon after the divorce of the parents to determine who shall have the custody and care of the children of the marriage, it should, as in other cases involving the custody of minor children, take into consideration all the circumstances of each particular case and dispose of the children in such manner as may appear best calculated to secure for them proper care and attention as well as a virtuous education. *In other words the welfare of the child is the chief consideration.* The dominant thought is that children are not chattels, but intelligent and moral beings, and that as such their welfare and their happiness are of first consideration. (Emphasis added.)

Accepting as the fundamental principle in this sphere the fact that the court is interested at this stage only in what is in the best interests of the child, the court will reject as too rigid the view that the spouse who wins the divorce is the one not "at fault" and therefore worthy of custody. It should be stressed, that the general law on the subject of custody *is not* connected with who has received the divorce decree. It is in agreement with what we think should be the *ought*. That is, the assignation of fault on the spouse does not guarantee reward[43]—or in this case custody of the child.

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[41] 27 C. J. S. 309 (e). [42] (1938), 17 Am. Jur. s. 683.

[43] With reference to property settlements, the Washington courts have stated the general proposition: "The state is interested in the division of property only to the extent that justice demands fair play and that an equitable result be reached. The two issues are separate and distinct, and should be treated as such." *Schirmer* v. *Schirmer* (1915), 87 Wash. 1, 145 Pac. 981.

Generally, then, fault does not enter into property settlements. In matters of homestead rights, for example, the Illinois statute gives the court the power to dispose of the homestead according to the equities of the case. Ill. Ann. Stat. (1935), c. 52, s. 5. In Louisiana the community property must be equally divided between the former spouses irrespective of the grounds of divorce or the culpability of the defendant spouse. La.

## V

The idea of fault, the primary basis upon which recrimination is founded, has little, if any practical value in the final products of divorce—custody, alimony and property settlement. The issues in these questions are separate from those of whether it is in the best interests of the parties and the state that the divorce be granted. It is clearly questionable whether the doctrines which hold "fault" as being with one spouse effectuate or implement the principle—that which is in the best interests of the individuals involved and Society. This becomes more clear as we realize that "fault" in a marriage is relational and the result of the attitudes, characteristics, and actions of both parties toward each other and others. For this reason we call into question the doctrine of fault in the law of divorce. As for the unholy outgrowth from the doctrine of fault, recrimination, we should throw off its binding shackles as being logically absurd, sociologically abhorrent, historically doubtful. The first step is through an acknowledgment of discretion on the part of the trial judge in his ability to grant a divorce decree to even that party who has erred in his marriage, or perhaps to both parties where the concept of blame has become a meaningless term between the marital partners. Onward with *Blunt* v. *Blunt*, *DeBurgh* v. *DeBurgh* and *Gracie* v. *Gracie*!

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Civ. Code (1945), Arts. 155, 159, 2406. The Hawaii, Michigan and Washington Acts provide for division in such manner as the court shall deem just and equitable. Hawaii Laws (1945), c. 273, s. 1 (14); Michigan Laws (1947), No. 317, s. 12; Rem. Wash. Rev. Stat. (1949 Supp.), c. 12 A, s. 997-11. A similar discretionary power is granted to the court in California and New Mexico: Cal. Civ. Code (1939), s. 146; N. M. Stat. Ann. (1941), s. 25-714.