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Lester B. Orfield
Indiana University

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DIVORCE FOR TEMPERAMENTAL INCOMPATIBILITY

Lester B. Orfield*

ONE not acquainted with American or Continental legal history might conclude that temperamental incompatibility as a ground for divorce is a novel and radical innovation. In fact, such divorces have been possible from the beginning of our history. Legislatures granted divorces until the last quarter of the nineteenth century. "We are told that the legislature was appealed to in cases that were too flimsy or too whimsical for the courts."¹

About a century ago and for more than a generation later at least nine states had "omnibus clauses in their divorce statutes broad enough to include incompatibility of temper."² No such statutes with respect to absolute divorce survive today. The Connecticut clause, in effect from 1849 to 1878, was associated with a period in which the Connecticut divorce rate was much higher than the rate in other states.³

An early Illinois statute provided that "in addition to the causes herein before provided for divorces from the bonds of matrimony, courts of chancery in this State shall have full power and authority to hear and determine all causes for a divorce not provided for by any law of this State."⁴ But the statute was narrowly construed so as to include only common law, canon law and statutory grounds. Hence divorce for even permanent insanity was refused.⁵ Obviously divorce for incompatibility would not be permitted.⁶

An early Iowa statute provided for divorce, if it is fully apparent to the court that the spouses cannot "live in peace and happiness together and that their welfare requires a separation."⁷ The Iowa court stressed that it was not enough that the parties could not live peaceably

* Professor of Law, Indiana University.

¹ Pound, Foreword to "A Symposium in the Law of Divorce," 28 IOWA L. REV. 179 at 187 (1943). Lack of positive legislation on the grounds for divorce was a contributing factor to legislative divorce. Squire, "The Shift from Adversary to Administrative Divorce," 33 BOST. UNIV. L. REV. 141 at 150 (1953).

² 2 VERNIER, AMERICAN FAMILY LAWS 65 (1932). Arizona, Connecticut, Florida, Washington and Wisconsin are listed in STIMSON, AMERICAN STATUTE LAW §6213 (1886). Utah also had such a clause, adopted in 1852. Squire, "The Shift from Adversary to Administrative Divorce," 33 BOST. UNIV. L. REV. 141 at 152 (1953).

³ Llewellyn, "Behind the Law of Divorce: II," 33 COL. L. REV. 249 at 253 (1933).

⁴ Ill. Rev. Stat. (1845) c. 23, §8.

⁵ Hamaker v. Hamaker, 18 Ill. 137 (1856); Lloyd v. Lloyd, 66 Ill. 87 (1872).

⁶ See Bartlow v. Bartlow, 114 Ill. App. 604 (1904).

⁷ Iowa Code of 1851, §1482(8). For the history of this statute see Kingsley, "Cruelty as a Ground for Divorce in Iowa," 14 IOWA L. REV. 266 at 267 (1929); note, 28 IOWA L. REV. 341 at 347-348 (1943).

and happily together; their welfare must require a separation.⁸ The term "welfare" meant more than pecuniary welfare. It meant also the moral, social and mental well-being of the parties, and the well-being of the children. The permanent peace and happiness must be involved. Normally the plaintiff must not be at fault. But in some cases both parties might be at fault. "There may be such positive incompatibility of temper, as to render it entirely impossible for them to live together in peace and happiness."⁹ The parties must have endeavored to overcome the incompatibility. The statute making incompatibility a ground of absolute divorce was repealed in 1855 except as to pending cases,¹⁰ and it was entirely repealed in 1858.¹¹

In 1855 the Minnesota divorce law was amended to provide for divorce: "When it shall be made fully to appear that from any other reason or causes existing, the parties cannot live in peace and happiness together, and that their welfare requires a separation."¹² This statute was repealed in 1866. A Minnesota judge has stated that it was enacted "to meet a particular case."¹³ Limited divorce may still be granted in Minnesota for incompatibility.¹⁴

A Washington statute effective until 1921 provided that "a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together."¹⁵ Presumably many divorces were granted for incompatibility. Nevertheless several appellate decisions held that the mere fact that the parties felt that they could no longer live together or refused to live together was not sufficient ground for divorce.¹⁶ Thus while the statute seemed broad enough to include incompatibility, the appellate court did not accept it as a ground.¹⁷ The 1921 statute expressly enumerated the grounds for divorce, but the

⁸ *Inskeep v. Inskeep*, 5 Iowa 204 at 212 (1857).

⁹ *Id.* at 215.

¹⁰ Iowa Laws (1854) c. 76, p. 112.

¹¹ Iowa Laws (1858) c. 64, p. 97.

¹² Minn. Laws (1855) c. 17, §4(7). As to the history of this statute see Kingsley, "Cruelty as a Ground for Divorce in Minnesota," 16 MINN. L. REV. 256-257 (1932).

¹³ *True v. True*, 6 Minn. 458 at 464 (1861).

¹⁴ *Widstrand v. Widstrand*, 87 Minn. 136 at 138, 91 N.W. 432 (1902).

¹⁵ Wash. Rem. Code (1915) §982. The Washington omnibus clause goes back to 1860. Llewellyn, "Behind the Law of Divorce: II," 33 COL. L. REV. 249 at 258 (1933).

¹⁶ *McDougall v. McDougall*, 5 Wash. 802, 32 P. 749 (1893) (complaint alleged cruelty); *Wheeler v. Wheeler*, 38 Wash. 491, 80 P. 762 (1905) (complaint alleged cruelty); *Bickford v. Bickford*, 57 Wash. 639, 107 P. 837 (1910) (complaint alleged indignities). But in *Freeburn v. Freeburn*, 107 Wash. 646, 182 P. 620 (1919), the defendant obtained a divorce for incompatibility. His complaint charged incompatibility, cruelty and indignities. The Supreme Court affirmed and stressed the fact of incompatibility.

¹⁷ 28 COL. L. REV. 505 at 506, n. 3 (1928).

former provision with respect to the court's being satisfied that the parties could no longer live together was omitted; and it was further provided that divorce should be granted on the application of the "injured" party.¹⁸ In 1928 Department One of the Supreme Court of Washington held that a plaintiff was not an "injured" party simply because the defendant was temperamentally incompatible through a mental derangement, hence a decree of the lower court granting a divorce was reversed.¹⁹ In the same year Department Two of the Supreme Court affirmed a divorce and placed emphasis upon the incompatibility arising out of differences in taste and age.²⁰ Subsequent decisions made it clear that the statutory grounds are exclusive.²¹

In one state divorce has been granted for incompatibility without statutory authority.²² In an Arkansas case the parties had been married for about thirty years and had three children. The eldest child could not get along with his father and fought with him constantly. After several unsuccessful attempts to live with his wife peacefully, the husband left the marital home permanently. The wife brought an action for maintenance and support on the ground of desertion. The husband filed a cross-bill for absolute divorce. His allegations of cruelty and indignities were not proved. The trial court dismissed the wife's petition and granted the husband a separation from bed and board. On appeal by the husband the Supreme Court of Arkansas held that he was entitled to an absolute divorce.²³ Recent Arkansas decisions appear to indicate that incompatibility is not a ground and that the statutory grounds are exclusive.²⁴

The prior discussion has involved incompatibility as a ground for absolute divorce. One might surmise that it might be a more frequent

¹⁸ Wash. Rev. Code (1952) §26.08.020.

¹⁹ *Shaw v. Shaw*, 148 Wash. 622, 269 P. 804 (1928) (complaint alleged cruelty and personal indignities).

²⁰ *Haller v. Haller*, 149 Wash. 277, 270 P. 822 (1928) (complaint alleged cruelty). These two cases are commented on in a note, 4 WASH. L. REV. 83 (1929), which rejects the view that incompatibility is a ground for divorce in Washington. The latter case is cited in a case involving incompatibility. *Poteet v. Poteet*, 45 N.M. 214 at 221, 114 P. (2d) 91 (1941).

²¹ *Fix v. Fix*, 33 Wash. (2d) 229, 204 P. (2d) 1066 (1949).

²² For the present Arkansas statute as to grounds for divorce see 2 Ark. Stat. Ann. (1947) §34-1202.

²³ *Clyburn v. Clyburn*, 175 Ark. 330, 299 S.W. 38 (1927), noted 28 COL. L. REV. 505 (1928), and 2 VERNIER, AMERICAN FAMILY LAWS 66 (1932). While the court found both parties to blame, the wife was found to blame in a greater degree. The disharmony arose largely because of unwarranted suspicion by the wife of her husband's fidelity. The husband was required to pay alimony. The case is cited in a leading New Mexico decision on incompatibility. *Poteet v. Poteet*, 45 N.M. 214 at 221, 114 P. (2d) 91 (1941).

²⁴ *Disheroun v. Disheroun*, 211 Ark. 519 at 524, 201 S.W. (2d) 17 (1947) (complaint alleged cruel and intolerable treatment).

ground for limited divorce. Yet this seems not to be the case.²⁵ Kentucky²⁶ and Rhode Island²⁷ have long had omnibus clauses making it a ground for limited divorce. The Minnesota statute has been construed as permitting limited divorce.²⁸ In jurisdictions in which cruelty is a ground for judicial separation the courts have made it clear that incompatibility alone does not constitute cruelty.²⁹

What have been the developments in the twentieth century? A distinguished federal judge has pointed out that the "Virgin Islands was the first American jurisdiction to adopt incompatibility as a ground for divorce."³⁰ The Code of Laws of the Municipality of St. Croix, enacted by the Colonial Council of the Municipality in 1920, so provided.³¹ The Code of Laws of the Municipality of St. Thomas and St. John, enacted by the Colonial Council of the Municipality in 1921, also so provided.³² These provisions were carried over into the law enacted by the Legislative Assembly in 1944.³³ The first and only American state, New Mexico, made such provision in 1933.³⁴ Alaska followed in 1935.³⁵

²⁵ 2 VERNIER, *AMERICAN FAMILY LAWS* 245, 373, 378 (1932).

²⁶ Ky. Rev. Stat. (1948) §403.050. "Divorce from bed and board may be rendered for any cause that allows divorce, or for any other cause that the court in its discretion considers sufficient."

²⁷ R.I. Gen. Laws of 1938, c. 416, §8. "Divorce from bed, board and future cohabitation, until the parties be reconciled, may be granted for any of the causes for which by law a divorce from the bond of marriage may be decreed, and for such other causes as may seem to require the same: *Provided*, the petitioner shall be a domiciled inhabitant of this state and shall have resided in this state such length of time as to the court in its discretion shall seem to warrant the exercise of the powers in this section conferred."

²⁸ *Widstrand v. Widstrand*, 87 Minn. 136, 91 N.W. 432 (1902); Kingsley, "Cruelty as a Ground for Divorce in Minnesota," 16 MINN. L. REV. 256 at 266 (1932).

²⁹ *Berg v. Berg*, 289 N.Y. 513, 46 N.E. (2d) 910 (1943); Marx, "Psychosomatics and Judicial Separations," 20 FORDHAM L. REV. 84 at 85 (1951).

³⁰ Maris, J., in *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 805.

³¹ Code of Laws of the Municipality of St. Croix, title III, c. 44, §7, subdivision eight (1920).

³² Code of Laws of the Municipality of St. Thomas and St. John, title III, c. 44, §7, subdivision eight (1921).

³³ Divorce Law of Virgin Islands, Bill No. 14, §1 et seq. Sec. 7 provides: "A legal separation or the dissolution of the marriage contract may be declared at the instance of the injured party for any of the following causes: . . . (8) Incompatibility of temperament."

³⁴ N.M. Laws (1933) c. 54, p. 71, 2 N.M. Stat. (1941) §25-701: "The several district courts within and for the state of New Mexico are hereby vested with full power and authority to decree divorces from the bonds of matrimony for any of the following causes: . . . 8. Incompatibility." It has been surmised that the law was adopted because of the inadequacy of legal separation and qualified divorce from bed and board. *Poteet v. Poteet*, 45 N.M. 214 at 219, 114 P. (2d) 91 at 92-93 (1941).

³⁵ Session Laws of Alaska, 1935, c. 54, p. 120; 3 Alaska Comp. Laws Ann. (1949) §56-5-7: "For what causes marriage contracts may be dissolved. . . . Fifth. Cruel and inhuman treatment calculated to impair health or endanger life or personal indignities rendering life burdensome or incompatibility of temperament." There have been no cases construing the statute. Note, 5 ARK. L. REV. 419 at 421 (1951). The statute was applied in *Green v. Green*, (D.C. Alaska 1953) 113 F. Supp. 697.

From what source did the Virgin Islands receive the ground of Incompatibility? The Codes of 1920 and 1921 were modelled on the Alaska Code of Civil Procedure. But they added a ground of divorce not contained in the Alaska Code, namely, incompatibility of temperament.³⁶ Under the Danish law which was in force at the time of the adoption of the Codes in 1920 and 1921 divorce upon grounds "analogous to incompatibility of temperament had been recognized."³⁷ In Denmark after 1770 divorces granted by the King³⁸ became more numerous and were given on new grounds. In some cases they were given though the defendant was not at fault as where he suffered from insanity or leprosy. In some cases they were given for "irremediable disharmony in the common life."³⁹ In fact from 1790 many divorces were granted without there being any distinct legal grounds, notably when the parties had separated but also when there had been no separation. By a Danish law of March 23, 1827, applicable to the Danish West-Indies, a royal consent divorce might be given by the authorities when the spouses after a separation agreement had lived separately for three years and spiritual and temporal mediation had failed and both wished a dissolution of the marriage and were agreed upon the terms of the divorce.⁴⁰

How has incompatibility been defined in the jurisdictions which now make incompatibility a ground of absolute divorce? Justice Hudspeth of the Supreme Court of New Mexico offers the following definition of incompatibility. " 'Incompatibility' is defined by the Century Dictionary as: 'The quality or condition of being incompatible; incongruity; irreconcilableness.' And Webster's New International Dictionary: 'Quality or state of being incompatible; inconsistency; . . . incapable of harmonious combination; incongruous; as, incompatible colors; incapable of harmonious association or acting in accord; dis-

³⁶ *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 805-806.

³⁷ *Id.* at 805. See "Marriage and Divorce in Denmark," 110 *THE NATIONS* 563 (1920); Hankins, 5 *ENCY. SOC. SCIENCES* 177, 180 (1931).

The existing Danish law provides judicial separation for deep and permanent disharmony (dyb og varig Uoverensstemmelse). Where there has been a separation in fact because of disharmony for at least four years a divorce may be granted. *DANMARKS LOVE 1665-1949. "Lov om Aegteskabs Indgaelse og Opløsning,"* c. 6, §§52, 53 (¶2), 54, 55, p. 626 (1950).

³⁸ "The institution of executive divorce by the sovereign . . . was the starting point for the practice of divorce by administrative agencies as it presently exists in Denmark, Iceland, and Norway." Rheinstein, "Trends in Marriage and Divorce Law of Western Countries," 18 *LAW AND CONTEM. PROB.* 3 at 11 (1953).

³⁹ VIGGO BENTZON, *FAMILIERETTEN* 155 (Copenhagen, 1924). At the request of Judge Maris the author of this article supplied the Danish authorities and translations thereof cited in *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 805, 808.

⁴⁰ VIGGO BENTZON, *DEN DANSKE FAMILIERET* 245-246 (Copenhagen, 1910).

agreeing; as incompatible persons. . . .’ Pope’s Legal Definitions gives the following: ‘Incompatibility. The elements and qualities which may create incompatibility between persons elude exact definition, so varied are the circumstances and so dependent is such a state of feeling upon education, habits of thought and peculiarities of character. It must be assumed that the parties understood the wide signification of the word and used it understandingly (in a contract for employment that could be annulled for “dishonesty, incapacity, incompatibility or breach of the agreement”) . . . The word is not a word of art, or of technical or local meaning, or having two distinct meanings, circumstances which have been held to justify parol evidence of the meaning of a word used in a written contract. (Greenl. Ev. § 295.) The largeness of the meaning of the term . . . is no reason for limiting its interpretation, nor does it furnish any reason for permitting parol evidence in explanation.’⁴¹

Justice Bickley of the Supreme Court of New Mexico concludes that there is incompatibility “when the court is satisfied *that the parties can no longer live together.*”⁴² It “may result from causes amounting to statutory grounds for divorce as well as from causes not mentioned as being grounds for divorce.” The same judge stated later, speaking for the entire court: “We decline appellant’s invitation to give an exact definition of incompatibility.”⁴³ He thought that irreconcilableness is an important factor. Permanent separation is “strong evidence” of incompatibility, but the court does not say “that in all cases a permanent separation must necessarily precede action for divorce on the ground of incompatibility.”

The latest definition is by Judge Albert B. Maris of the Court of Appeals for the Third Circuit. After referring favorably to the definitions in the New Mexico decisions, he stated: “We conclude that while incompatibility of temperament in the Virgin Islands Divorce Law does not refer to those petty quarrels and minor bickerings which are but the evidence of that frailty which all humanity is heir to, it unquestionably does refer to conflicts in personalities and dispositions so deep as to be irreconcilable and to render it impossible for the parties

⁴¹ *Chavez v. Chavez*, 39 N.M. 480 at 486, 50 P. (2d) 264 (1935). A leading authority has proposed confining it “to the situation where the parties find themselves unable to live together happily after a bona fide effort extending over a reasonable time.” 2 VERNIER, AMERICAN FAMILY LAWS 65 (1932). For a discussion from the viewpoint of social psychology see Kelly, “Marital Compatibility as Related to Personality Traits of Husbands and Wives as Rated by Self and Spouse,” 13 J. Soc. PSYCH. 193 (1941).

⁴² *Chavez v. Chavez*, 39 N.M. 480 at 493, 50 P. (2d) 264 (1935). The italics are those of the court.

⁴³ *Poteet v. Poteet*, 45 N.M. 214 at 222, 114 P. (2d) 91 (1941).

to continue a normal marital relationship with each other. To use the ancient Danish phrase, the disharmony of the spouses in their common life must be so deep and intense as to be irremediable. It is the legal recognition of the proposition long established in the earlier Danish law of the Islands that if the parties are so mismated that their marriage has in fact ended as the result of their hopeless disagreement and discord the courts should be empowered to terminate it as a matter of law."⁴⁴

As in other divorce cases the domicile of at least one of the spouses must be within a state or territory in order to give the courts of that state or territory power to grant a divorce.⁴⁵ The Virgin Islands Divorce Law requires that the plaintiff must be an "inhabitant" of the Virgin Islands at the time of the commencement of the action and for six weeks prior thereto, which "residence" shall be sufficient to give the court jurisdiction.⁴⁶ The word "inhabitant" has been construed as meaning "domiciliary" and the word "residence" as meaning "domicile."⁴⁷ In New Mexico the plaintiff "must have been an actual resident in good faith, of the state for one year next preceding the filing of his or her complaint."⁴⁸ But a wife suing may take advantage of such period of residence by her husband. In Alaska the plaintiff "must be an inhabitant of the Territory at the commencement of the action and for two years prior thereto, which residence shall be sufficient to give the court jurisdiction without regard to the place where the marriage was solemnized or the cause of action arose."⁴⁹ Residence means domicile.⁵⁰ It must be obvious that the Virgin Islands will attract more parties seeking a divorce in jurisdictions other than the matrimonial situs.⁵¹

⁴⁴ *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 806-807.

⁴⁵ *Id.* at 804. As to the conflict of laws aspects, see Calloway, "Legal Status of the Virgin Islands Divorces," 3 *Duke B.J.* 102 (1953). A 1953 amendment to the Virgin Islands law providing that continued presence in the jurisdiction for six weeks prior to filing "shall be prima facie evidence of domicile," was found invalid in *Alton v. Alton*, (3d Cir. 1953) 207 F. (2d) 667, criticized in 22 *Geo. Wash. L. Rev.* 356 (1954) and 67 *Harv. L. Rev.* 516 (1954), cert. granted 347 U.S. 911, 74 S.Ct. 478 (1954).

⁴⁶ Sec. 9.

⁴⁷ *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 804-805. In this case the plaintiff came to the Virgin Islands about July 1, 1950 in order to work and commenced his divorce action on August 31, 1950.

⁴⁸ 2 N.M. Stat. Ann. (1941) §25-704.

⁴⁹ 3 Alaska Comp. Stat. Ann. (1949) §56-5-10.

⁵⁰ *Wilson v. Wilson*, 10 Alaska 616 (1945). An officer of the United States Army suing for divorce on the ground of incompatibility was refused divorce on the ground that a permanent domicile on a military reservation was not possible.

⁵¹ The annual rate of divorces in the past five years is 250. The average for the period 1950-1955 is likely to be 500. This seems not excessive in comparison with nearly 9,000 in Nevada and 18,000 in Florida in 1950. *The New York Times*, May 10, 1953, p. 55.

If the defendant spouse could plead the defense of recrimination, obviously the utility of incompatibility as a ground for divorce would be greatly impaired. Under the Virgin Island statute divorce for incompatibility may be obtained "at the instance of the injured party. . . ."⁵² Does this mean not only one who is injured by the defendant's incompatibility but also one who is innocent of any conduct which would afford the defendant a ground for divorce? The Court of Appeals for the Third Circuit has held not. It properly pointed out that "in the case of at least two of the grounds for divorce recognized by the statute, impotency existing at the time of the marriage and insanity occurring after marriage, there can be no question of either innocence or guilt."⁵³ In these cases the injured party has lost a normal marital relationship because of the physical or mental disability of the other. In the case at hand he has been injured by incompatibility of temperament. And he is injured even though he himself participates in the incompatibility. Incompatibility "necessarily involves both parties," in the view of Judge Maris.⁵⁴ Rare would be the spouse so saintly as to overlook the feeling of incompatibility of the other spouse, or so insensitive as not to be aware of it and indifferent to it.⁵⁵ The statutes of New Mexico and Alaska do not in express terms require that the divorce be obtained at the instance of the injured party. The New Mexico Supreme Court seems to have rejected a contention by the appellant that "divorces should only be granted on the application of the party 'injured.'"⁵⁶

The principle of recrimination should not be and has on several occasions been held not applicable when incompatibility is the ground for divorce.⁵⁷ Almost a century ago when incompatibility was a ground in Iowa, recrimination was held not an absolute bar.⁵⁸ At a time when incompatibility was a ground in Washington, recrimination was re-

⁵² Sec. 7. Such a statute is said indirectly to make recrimination a defense. Note, 26 COL. L. REV. 83 at 84 (1926). For a recent comprehensive discussion of recrimination, see 41 CALIF. L. REV. 320 (1953).

⁵³ *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 807.

⁵⁴ *Id.* at 808. The ground of incompatibility "is a recognition of the fact that in many cases both spouses are to blame." *Chavez v. Chavez*, 39 N.M. 480 at 487, 50 P. (2d) 264 (1935).

⁵⁵ The wish of one spouse to continue the marriage despite the incompatibility will not preclude a divorce. *Chavez v. Chavez*, 39 N.M. 480 at 487, 50 P. (2d) 264 (1935).

⁵⁶ *Poteet v. Poteet*, 45 N.M. 214 at 217, 114 P. (2d) 91 (1941). See also *Inskeep v. Inskeep*, 4 Iowa 204 at 214-216 (1857).

⁵⁷ Where separation for a specified number of years is a ground for divorce, there have been decisions ignoring the fault of the applicant. Note 26 COL. L. REV. 83 at 87 (1926); HARPER, PROBLEMS OF THE FAMILY 700 at 702 (1952). The same is true as to "indignities." Note, 1 WYO. L.J. 187 at 190 (1947).

⁵⁸ *Inskeep v. Inskeep*, 5 Iowa 204 at 214-216 (1857).

jected.⁵⁹ The Texas court seems in effect to have applied the theory of recrimination to a spouse alleging cruelty tantamount to incompatibility.⁶⁰

Of more immediate concern is the construction of the statutes now in force expressly making incompatibility a ground for divorce. There are no decisions concerning the Alaskan statute.⁶¹ But both the New Mexico and Virgin Islands statutes have been construed. In the first New Mexico decision the majority opinion stated that adultery "is generally available as a recriminatory charge in all cases."⁶² Two judges rejected the doctrine of recrimination.⁶³ In the next case the court assumed that the trial court found rightly against the defendant on the issue of recrimination and stated that it "need not now decide whether recrimination is a defense in a divorce action where the sole ground alleged is incompatibility."⁶⁴ Finally in 1946 the court decided that recrimination was not a bar even though the husband allegedly committed adultery after the separation occurred.⁶⁵ In 1950 the court modified its position.⁶⁶ It held that incompatibility itself might not be pleaded as a defense to a divorce action based on incompatibility. But as to other cases of traditional recrimination, the trial court in its discretion might deny divorce. In the particular case the plaintiff's acts of adultery both before and after separation might be treated by the trial court as barring a divorce sought for incompatibility. Two judges dissented on the ground that the doctrine of recrimination had been previously completely rejected. On the other hand two of the judges wished expressly to overrule the prior case completely rejecting recrimination. Thus the concept of fault continues to exist in New Mexico though in an attenuated fashion.

⁵⁹ *Schirmer v. Schirmer*, 84 Wash. 1, 145 P. 981 (1915) (plaintiff alleged cruelty and adultery; defendant alleged cruelty, divorce granted to both parties).

But shortly after the doctrine was restored. *McMillan v. McMillan*, 113 Wash. 250, 193 P. 673 (1920). See note, 26 Col. L. Rev. 83 at 87 (1926).

⁶⁰ *Mansur v. Mansur*, (Tex. Civ. App. 1931) 37 S.W. (2d) 846. Incompatibility is not a ground for divorce in Texas.

⁶¹ The only ground of recrimination mentioned in the Alaskan Code is adultery. 3 Alaska Comp. Laws Ann. (1949) §56-5-11.

⁶² *Chavez v. Chavez*, 39 N.M. 480 at 482, 50 P. (2d) 264 (1935). Hence a divorce sought on the ground of desertion was denied. Thus on its facts the decision is not a holding as to incompatibility.

⁶³ *Hudspeth, J.*, 39 N.M. 480 at 484, 50 P. (2d) 264 (1935); and *Bickley, J.*, 39 N.M. 480 at 488, 50 P. (2d) 264 (1935).

⁶⁴ *Poteet v. Poteet*, 45 N.M. 214 at 222, 114 P. (2d) 91 (1941).

⁶⁵ *Pavletich v. Pavletich*, 50 N.M. 224, 174 P. (2d) 826 (1946). *Sadler, C.J.*, dissented. The case is noted 36 Ky. L.J. 342 (1948); 31 MINN. L. REV. 744 (1947); 18 Miss. L.J. 471 (1947); 33 VA. L. REV. 355 (1947).

⁶⁶ *Clark v. Clark*, 54 N.M. 364, 225 P. (2d) 147 (1950). Two new judges participated and *Sadler, J.*, who dissented in 1946, wrote the opinion.

The most recent decision involving recrimination as a possible bar to divorce for incompatibility is an interpretation of the Virgin Islands statute.⁶⁷ The United States Court of Appeals for the Third Circuit agreed with the New Mexico decision⁶⁸ that the incompatibility of temperament of the plaintiff would not operate as a defense by way of recrimination. The court looked to the Danish background of the Virgin Islands law and found that the only ground of recrimination was adultery,⁶⁹ and the legislature intended this to be the exclusive ground.⁷⁰ The cruelty of the plaintiff is therefore not a bar to divorce on the ground of incompatibility.⁷¹

A doctrine of comparative rectitude⁷² would be less harsh than one of recrimination. Such a doctrine was seemingly applied by the District Court of the Virgin Islands. But on appeal this approach was rejected, the court stating: "Obviously, it could not apply to a case of incompatibility of temperament and in any event the Legislative Assembly of the Virgin Islands did not prescribe it in the Divorce Law of 1944."⁷³

While recrimination is not an absolute bar to a divorce for incompatibility and while the doctrine of comparative rectitude does not apply either, nevertheless evidence of misconduct of the plaintiff can be considered along with other evidence in determining whether the best interests of the parties would be served by granting a divorce.⁷⁴ The Virgin Islands law provides that the court *may* dissolve a marriage contract for the causes enumerated.⁷⁵ The New Mexico law vests the courts with "full power and authority to decree divorces" for the causes enumerated, but does not in terms require them to grant divorces.⁷⁶ The Alaska statute states that marriage contracts *may* be dissolved for

⁶⁷ Burch v. Burch, (3d Cir. 1952) 195 F. (2d) 799 at 808-811.

⁶⁸ Clark v. Clark, 54 N.M. 364 at 367, 225 P. (2d) 147 (1950).

⁶⁹ VIGGO BENTZON, DEN DANSKE FAMILIERET 217-218 (Copenhagen, 1910). Recrimination is not a bar in Scotland, and is greatly restricted in England. Note, 26 COL. L. REV. 83 at 88 (1926). The same is true as to the German statute of 1938. Silving, "Divorce without Fault," 29 IOWA L. REV. 527 at 551-556 (1944). The same is true in Poland. Szirmai, "Divorce by Mutual Consent and after Protracted Separation: Continental Practice," 2 INT. AND COMP. L.Q., part 1, 72 at 77 (1953).

⁷⁰ Sec. 10. This section was taken from the Alaskan Code. Adultery is the only ground of recrimination mentioned in the Alaskan Code. 3 Alaska Comp. Laws Ann. (1949) §56-5-11.

⁷¹ Burch v. Burch, (3d Cir. 1952) 195 F. (2d) 799 at 810.

⁷² 63 A.L.R. 1132 (1929); 14 MINN. L. REV. 94 (1929); 3 SO. CAL. L. REV. 127 (1929); 159 A.L.R. 731 (1945); HARPER, PROBLEMS OF THE FAMILY 704 (1952).

⁷³ Burch v. Burch, (3d Cir. 1952) 195 F. (2d) 799 at 810.

⁷⁴ Clark v. Clark, 54 N.M. 364, 225 P. (2d) 147 (1950); Burch v. Burch, (3d Cir. 1952) 195 F. (2d) 799 at 810.

⁷⁵ Sec. 7.

⁷⁶ 2 N.M. Stat. Ann. (1941) §25-701.

the causes enumerated.⁷⁷ The Swedish law appears to give some weight to fault.⁷⁸ The same seems to be true of the present Danish statute and the Norwegian statute.⁷⁹ It is not clear whether the Swiss law arrives at this result.⁸⁰

Since recrimination is not an absolute bar to divorce for incompatibility, a divorce may be granted to both parties. In a case where the plaintiff obtained a divorce for incompatibility, the defendant was also granted a divorce for cruelty.⁸¹

When a spouse obtains a divorce for incompatibility, he is not necessarily relieved of the obligation to pay alimony.⁸² Under the Virgin Island law alimony may be recovered from only the "party in fault."⁸³ This has been construed as meaning not only a party whose overt acts constitute grounds for divorce, but also a party whose incompatible temperament has deprived the other party of the opportunity of enjoying a normal marital relationship.⁸⁴ In this sense the plaintiff is a party at fault, as is also the defendant.⁸⁵ The Alaskan statute, which furnished the model for the Virgin Islands statute, has a similar provision concerning the "party in fault."⁸⁶ Presumably it is to be construed in the same manner as the Virgin Islands statute.⁸⁷ The New Mexico statute does not expressly require that only the party at fault

⁷⁷ 3 Alaska Comp. Stat. Ann. (1949) §56-5-7.

⁷⁸ Silving, "Divorce without Fault," 29 IOWA L. REV. 527 at 556 (1944).

⁷⁹ Szirmai, "Divorce by Mutual Consent and after Protracted Separation: Continental Practice," 2 INT. AND COMP. L.Q., part 1, 72 at 76 (1953).

⁸⁰ Silving, "Divorce without Fault," 29 IOWA L. REV. 527 at 551-556 (1944).

⁸¹ *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 810-811. Compare *Schirmer v. Schirmer*, 84 Wash. 1, 145 P. 981 (1915), in which plaintiff alleged cruelty and adultery and defendant alleged cruelty; 4 HASTINGS L.J. 197 at 201 (1953); 41 CALIF. L. REV. 320 at 329 (1953).

⁸² For the general rule see Vernier and Hurlbut, "The Historical Background of Alimony Law and Its Present Statutory Structure," 6 LAW AND CONTEMP. PROB. 197 at 202, 212 (1939); note, 28 KY. L.J. 233 (1939). See also note, 12 AUSTR. L.J. 11 (1938). Alimony has been allowed in cases of separation for a period of years. Note, 97 UNIV. PA. L. REV. 705 at 709 (1949).

Where there is temperamental incompatibility the spouse obtaining alimony may have to be satisfied with less than if she had been without fault. *Burch v. Burch*, (3d Cir. 1953) 205 F. (2d) 115.

⁸³ Sec. 12.

⁸⁴ *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 811.

⁸⁵ For cases allowing alimony when both parties are at fault, note, 28 KY. L.J. 233 at 236 (1940). Favoring the elimination of fault, see Kelso, "The Changing Social Setting of Alimony Law," 6 LAW AND CONTEMP. PROB. 186 at 195 (1939). In Germany there may be alimony though both parties are at fault, provided that the predominant fault rests with one party. Mankiewicz, "The German Law of Alimony before and under National Socialism," 6 LAW AND CONTEMP. PROB. 301 at 310-312 (1939).

⁸⁶ 3 Alaska Comp. Laws Ann. (1949) §56-5-13.

⁸⁷ *Olsen v. Olsen*, 5 Alaska 459 (1916); *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 811.

pay alimony.⁸⁸ The Supreme Court of New Mexico has upheld a decree ordering the plaintiff to pay alimony to his wife.⁸⁹ When incompatibility was a ground for divorce in Washington, a husband obtaining a divorce was required to turn over property to his wife.⁹⁰ An Arkansas decision required a husband obtaining a divorce to pay alimony.⁹¹

In the jurisdictions making incompatibility a ground for divorce the husband may have alimony if the wife is the "party in fault" in Alaska.⁹² There should be the same result in the Virgin Islands as the statute is similar.⁹³ In New Mexico alimony is available only to the wife.⁹⁴ In Germany a husband unable to support himself may have alimony.⁹⁵ In Rhode Island and possibly in Kentucky, where limited divorce is available for incompatibility, the husband may recover alimony.⁹⁶

What about custody of children when divorce is granted for incompatibility? The general rule is that custody is not determined on the basis of marital fault.⁹⁷ It is within the discretion of the court, and the welfare of the child should be the paramount consideration. Under the Virgin Islands law preference is given to the party not in fault "unless otherwise manifestly improper."⁹⁸ However it has been held that both parties are at fault when incompatibility is involved.⁹⁹ In New Mexico the court may make such orders and decrees for the custody of any minor child of the defendant "as shall deem necessary or advisable."¹⁰⁰

⁸⁸ 2 N.M. Stat. Ann. (1941) §25-706.

⁸⁹ *Poteet v. Poteet*, 45 N.M. 214, 114 P. (2d) 91 (1941). Community property is equally divided. *Sands v. Sands*, 48 N.M. 458, 152 P. (2d) 399 (1944). On the latter problem see Daggett, "Division of Property upon Dissolution of Marriage," 6 LAW AND CONTEMP. PROB. 225 (1939).

⁹⁰ *Freeburn v. Freeburn*, 107 Wash. 646, 182 P. 620 (1919).

⁹¹ *Clyburn v. Clyburn*, 175 Ark. 330, 299 S.W. 38 (1927).

⁹² 3 Alaska Comp. Laws Ann. §56-5-13, construed in *Olsen v. Olsen*, 5 Alaska 459 (1916).

⁹³ Sec. 12, construed in *Burch v. Burch*, (3d Cir. 1952) 195 P. (2d) 799 at 811-812.

⁹⁴ N.M. Stat. Ann. (1951 Cum. Supp.) §25-706.

⁹⁵ Schoch, "Divorce Law and Practice under National Socialism in Germany," 28 IOWA L. REV. 225 at 251 (1943).

⁹⁶ 2 VERNIER, AMERICAN FAMILY LAWS §133 (1932).

⁹⁷ Note, 35 CALIF. L. REV. 99 at 108 (1947); Weinman, "The Trial Judge Awards Custody," 10 LAW AND CONTEMP. PROB. 721 (1944).

⁹⁸ Sec. 12. The Alaskan statute is similar. 3 Alaska Comp. Laws Ann. (1949) §56-5-13.

⁹⁹ *Burch v. Burch*, (3d Cir. 1952) 195 F. (2d) 799 at 811-812.

¹⁰⁰ N.M. Stat. Ann. (1941) §25-714.

The Continental Practice

The earliest of all modern divorce codes making incompatibility a ground for divorce was the Prussian decree of King Frederick II (the Great), issued in 1752.¹⁰¹ Divorce might be granted not only for cause but also upon the basis of mutual agreement and for unilateral "insuperable aversion." The Prussian General Code of 1794 took over these provisions and they continued in effect until 1900.¹⁰² Maria Theresa (1740-1780) and Joseph II (1780-1790) of Austria were impressed by the Prussian model, but confined it to non-Catholic Christians, permitting divorce for unilateral aversion provided that a judicial separation had first been obtained; and to Jews who might obtain divorce by mutual agreement.¹⁰³ The Austrian law remained in effect until Germany absorbed Austria in 1938. In Denmark after 1770 divorces were given for "irremediable disharmony in the common life."¹⁰⁴ Beginning in 1790 many divorces were given without there being any distinct ground and even when the parties had not separated. The French law of 1792 permitted divorce upon mutual consent. One writer has concluded that it also allowed it on the claim of one party that incompatibility existed.¹⁰⁵ Another writer has denied that the latter was permissible.¹⁰⁶

In 1910 a report of the joint Norwegian-Danish-Swedish Commission recommended that divorce be granted at the parties' mutual request when there was "deep and constant discord."¹⁰⁷ To make certain that such discord existed it was suggested that the final decree be preceded by separation for a year during which time reconciliation should be attempted by a clergyman or some other person appointed by the court. This recommendation was adopted by Sweden in 1910, Denmark in 1915 and Norway in 1918. The Swedish law was amended in 1920. The Danish law was amended in 1922.

The Swedish statute of June 11, 1920, now in force, permits

¹⁰¹ Rheinstejn, "Trends in Marriage and Divorce Law of Western Countries," 18 *LAW AND CONTEM. PROB.* 3 at 5, 12 (1953).

¹⁰² *Id.* at 14-15.

¹⁰³ *Id.* at 12-13.

¹⁰⁴ The Danish is as follows: "ubodelig Uvilje til Samliv (odium implacabile)." See I *VIGGO BENTZON, FAMILIERETTEN* 155 (Copenhagen, 1924).

¹⁰⁵ Jacob, "Problems of Divorce in France Incident to the Statutes of 1941," 28 *IOWA L. REV.* 298 (1943).

¹⁰⁶ Rheinstejn, "Trends in Marriage and Divorce Law in Western Countries," 18 *LAW AND CONTEM. PROB.* 3 at 13 (1953).

¹⁰⁷ Note, 35 *CALIF. L. REV.* 99 at 109 (1947); Hankins, "Divorce," 5 *ENCY. SOC. SCIENCES* 177, 180 (1931). As to the Danish Law see "Marriage and Divorce in Denmark," 110 *THE NATIONS* 563 (1920). See also ORFIELD, *THE GROWTH OF SCANDINAVIAN LAW* 50, 291-292 (1953).

divorce for "deep and lasting discord."¹⁰⁸ One spouse may secure a separation on that ground, and, after a year of separation, either spouse may obtain an absolute divorce. If there is no decree of separation, either may receive a divorce after living apart for three years. The other Scandinavian states allow divorce by mutual consent, though they do not always speak in express terms about temperamental incompatibility as does the Swedish law.¹⁰⁹

¹⁰⁸ SVERIGES RIKES LAG. "Giftermålsbalk," c. 11, p. 24 (1951) provides: "2. If due to a difference in temperament and ideas or to other reasons, a deep and lasting discord has arisen between the spouses, and if one of them desires separation, he shall be entitled to it unless, with regard to his own conduct or other special circumstances it can be reasonably required that he continue the relationship.

"3. If the spouses, after having secured separation, have lived apart for a year and their marital relationship is not resumed, a decree of divorce can be issued upon the petition of either spouse.

"4. If husband and wife, without decree of separation, on account of discord, have lived apart for three years, either may receive a divorce. If only one of them desires it and, on account of his conduct or other special circumstances, it is found that the marriage law should not be dissolved upon his petition, a decree shall not be granted."

This is the translation of Professor Sellin, as quoted in Silving, "Divorce without Fault," 29 IOWA L. REV. 527 at 556 (1944). For a different translation see Rheinstein, "Trends in Marriage and Divorce Law of Western Countries," 18 LAW AND CONTEMP. PROB. 3 at 5, n. 7 (1953). For a discussion of the Swedish experience see Björkman, "Sweden's Solution of Divorce," 76 THE FORUM 543 (1926); Segerstedt and Weintraub, "Marriage and Divorce in Sweden," 272 ANNALS OF THE AMER. ACAD. OF POL. AND SOC. SCI. 185 at 189-194 (November 1950).

¹⁰⁹ Rheinstein summarized the law as follows in "Trends in Marriage and Divorce Laws of Western Countries," 18 LAW AND CONTEMP. PROB. 3 at 5, n. 7 (1953):

In Denmark there is divorce by administrative decree after separation for a year and six months. DANMARKS LOVE 1665-1949, "Lov om Aegteskabs Indgaaelse og Opløsning," c. 6, §§52, 53 (¶2), 54, p. 626 (1950). In Finland there is divorce after two years of separation in fact. Marriage Law of June 13, 1929, part III, c. 1, §76. The Icelandic law is similar. Law of June 28, 1921, §51 et seq. The Norwegian law is similar, and divorce is by administrative decree. Law of May 15, 1918, Concerning Marriage and Divorce, c. 5, §§41, 43.

With respect to divorce by mutual consent, which is closely connected with divorce for incompatibility the law has been summarized as follows by Szirmai, "Divorce by Mutual Consent and After Protracted Separation: Continental Practice," 2 INT. AND COMP. L.Q., part 1, 72 at 73 (1953). Under the Danish law of June 30, 1922, on mutual request a separation order is made. After one year and a half of judicial separation, divorce is granted on mutual request of the spouses. If the judicial separation lasts for two and one-half years, divorce can be granted on the request of one of the spouses. Divorce cannot be granted before the question of the mutual liability of the spouses to maintain one another and of the care of the children has been settled by agreement. Divorce is granted by royal decree, but in fact the spouses are entitled to divorce. In Norway, under the law of May 15, 1918, as amended on June 19, 1931, on mutual request a separation order is made. After one year of judicial separation, divorce is granted on mutual request of the parties. If the judicial separation lasts for two years divorce can be granted on the request of one of the spouses. As in Denmark, divorce is granted by royal decree. In Sweden, under the law of June 11, 1920, the rule as to judicial separation is similar to the Norwegian. But the Swedish statute refers to a "deep and permanent rift which renders living together intolerable." Proof of the rift is not made a condition of judicial separation, which is granted on joint request of the spouses.

With respect to divorce on the ground of protracted separation, which is also closely connected with divorce for incompatibility, the law has been summarized by Szirmai, *id.* at

Under the Swiss law of 1907 divorce may be obtained for incompatibility.¹¹⁰ The Swiss law is based on breakdown and not on consent or separation.¹¹¹ The law of Czechoslovakia of May 22, 1919 permitted divorce by reason of "invincible aversion, if alleged by both spouses."¹¹² The Czech code of 1949 continues this ground.¹¹³

The new Civil Code which became effective in Germany in 1900 abolished divorce upon mutual agreement and upon the ground of unilateral insuperable aversion. However divorce was still permissible for "blameworthy conduct rendering married life unbearable to the other partner."¹¹⁴ Hence in actual practice the old law was not changed very much.¹¹⁵ The German law of 1938 allowed divorce after three years separation for "a deep incurable destruction of the marital relation."¹¹⁶

The Yugoslav statute of April 3, 1946 follows the Swiss pattern,¹¹⁷ as does the Polish law of 1950.¹¹⁸ Uruguay is one of the few Latin American countries to allow divorce for incompatibility.¹¹⁹ In effect incompatibility is a ground in Russia since divorce is in the discretion

75-76. Since no judicial separation order is obtained, a longer period of living apart is required. Under Danish law it is four years. Under Norwegian and Swedish law it is three years. Under Danish and Swedish law it is a right of the parties. Under Norwegian law it appears to be within the discretion of the King. Under Danish law the right cannot be enforced if it was mainly the plaintiff's behavior which led to the separation and in addition the defendant objects. Under Swedish law the right cannot be enforced if only one of the spouses wishes the divorce, and having regard to the behavior of the plaintiff or to other circumstances, there are good reasons for not granting divorce.

¹¹⁰ Article 142 of the Swiss Civil Code provides: "If so deep a destruction of the marital relationship has occurred that continuance thereof cannot fairly be expected from the spouses either spouse may sue for a divorce.

"If the deep destruction can overwhelmingly be ascribed to one, the other only of the couple can sue for divorce."

¹¹¹ Silving, "Divorce without Fault," 29 IOWA L. REV. 527 at 545-548 (1944); Szirmai, "Divorce by Mutual Consent and After Protracted Separation: Continental Practice," 2 INT. AND COMP. L.Q., part 1, 72 at 77 (1953).

¹¹² Silving, "Divorce without Fault," 29 IOWA L. REV. 527 at 546, n. 79 (1944). The Swiss Code was influential.

¹¹³ Szirmai, "Divorce by Mutual Consent and After Protracted Separation: Continental Practice," 2 INT. AND COMP. L.Q., part 1, 72-78 (1953).

¹¹⁴ Sec. 1568.

¹¹⁵ Rheinstejn, "Trends in Marriage and Divorce Law of Western Countries," 18 LAW AND CONTEMP. PROB. 3 at 14-15 (1953).

¹¹⁶ Silving, "Divorce without Fault," 29 IOWA L. REV. 527 at 551 (1944). See also Schoch, "Divorce Law and Practice under National Socialism in Germany," 28 IOWA L. REV. 225 at 245-251 (1943).

¹¹⁷ Szirmai, "Divorce by Mutual Consent and after Protracted Separation: Continental Practice," 2 INT. AND COMP. L.Q., part 1, 72-75 (1953).

¹¹⁸ Id. at 77.

¹¹⁹ Elliott, "Divorce Legislation and Family Stability," 272 ANNALS 134 at 138 (November 1950).

of the court. The two reasons most frequently cited are adultery and "a patent inability to live together."¹²⁰

Other Alternatives

When considering the desirability of adding incompatibility to the list of grounds for divorce, it seems well to ask whether or not it is included in existing grounds. To what extent, if any, is incompatibility different from mental cruelty?¹²¹ Cruelty is a ground for divorce in 42 states.¹²² It is not a ground in Alabama, the District of Columbia, Maryland, New York, North Carolina, South Carolina, and Virginia. Eight states mention the mental element in their general designations of cruelty or include it in a formal definition.¹²³ These statutes sometimes describe a state of mind virtually identical with incompatibility.¹²⁴ Four other states speak of cruelty through personal violence "or any other means."¹²⁵ Similar provisions in other states grant relief from treatment of such nature "as to render their living together insupportable";¹²⁶ "as to injure health or endanger reason";¹²⁷ or "as to indicate a settled aversion . . . or to destroy permanently . . . peace or happiness."¹²⁸ The statutes of seventeen states are silent as to the mental factor.¹²⁹ Of this group only Illinois has consistently adhered to the view that mental distress is not enough.¹³⁰ The only state stat-

¹²⁰ *Id.* at 137.

¹²¹ It is regarded as the best alternative in note, 9 *DUKE B.A.J.* 49 at 52 (1941).

A layman might think them the same. An article on divorce in the Virgin Islands for incompatibility asserts that it "corresponds to 'mental cruelty' in the states." *NEW YORK TIMES*, May 10, 1953, p. 55.

¹²² Note, 5 *ARK. L. REV.* 419 at 420 (1951).

¹²³ California, Colorado, Georgia, Idaho, Montana, North Dakota, South Dakota and Utah. Note, 5 *ARK. L. REV.* 419 at 420 (1951).

¹²⁴ *Mont. Rev. Code Ann.* (1947) §21-106. "Extreme cruelty is . . . the infliction of grievous mental suffering upon the other by one party to the marriage, by a course of conduct towards or treatment of one party to the marriage by the other . . . which justly and reasonably is of such a nature and character so as to destroy the peace of mind and happiness of the injured party, or entirely to defeat the proper and legitimate objects of marriage, or to render the continuance of the married relation between the parties perpetually unreasonable or intolerable to the injured party."

¹²⁵ Arizona, Michigan, Nebraska and Wisconsin. See note, 5 *ARK. L. REV.* 419 at 421 (1951).

¹²⁶ *La. Civ. Code Ann.* (Dart, 1945) §138(3); *Tex. Rev. Civ. Stat. Ann.* (Vernon, 1951) art. 4629(1).

¹²⁷ 2 *N.H. Rev. Laws* (1942) c. 339, §6(V).

¹²⁸ *Ky. Rev. Stat. Ann.* (1943) §403.020(4)(d).

¹²⁹ Connecticut, Delaware, Illinois, Iowa, Indiana, Kansas, Maine, Massachusetts, Minnesota, Nevada, New Mexico, Mississippi, Ohio, Oklahoma, Rhode Island, and Vermont. Note, 5 *ARK. L. REV.* 419 at 421 (1951). But the courts give general approval to this ground in only seven of these states: Indiana, Iowa, Kansas, Minnesota, Mississippi, Nevada, and Oklahoma. *Id.* at 423-424. In New Mexico the court was readier to find mental cruelty a ground because the statute also makes incompatibility a ground. *Holloman v. Holloman*, 49 *N.M.* 288, 162 *P.* (2d) 782 (1945).

¹³⁰ *Blair v. Blair*, 341 *Ill. App.* 93, 93 *N.E.* (2d) 95 (1951).

utes unequivocally precluding mental cruelty as a cause for divorce are those of Alabama and South Carolina.¹³¹ Thus, on the whole, mental cruelty is a recognized ground as interpreted by the courts in about two-thirds of the states.¹³² Yet surely there is a considerable gap in American law when in one third of the states neither mental cruelty nor incompatibility is a ground for divorce.

Close scrutiny of the decisions reveal that mental cruelty may have considerable less scope than incompatibility. A leading writer has concluded that perhaps the weight of authority requires an intentional injury for mental cruelty.¹³³ The fact of sharp political or religious differences might well result in incompatibility and yet not constitute mental cruelty.¹³⁴ Overt acts of misconduct are necessary for mental cruelty.¹³⁵ Concealed aversion may be present in incompatibility; unconcealed aversion is mental cruelty.¹³⁶ Decisions on mental cruelty often insist on injury to the health of the plaintiff.¹³⁷ Recrimination may be a bar when mental cruelty is the ground for divorce.¹³⁸

One may also ask whether divorce for "indignities" is not a valid

¹³¹ Ala. Code (1940) tit. 34, §22; S.C. Const., art. XVII, §3.

¹³² These jurisdictions are Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virgin Islands, Washington, West Virginia, Wisconsin, and Wyoming. The law is in doubt in Kentucky and New Hampshire.

No kind of cruelty is a ground in Alabama, District of Columbia, Maryland, New York, North Carolina, South Carolina and Virginia. In the following states the courts look with disfavor on the ground: Connecticut, Illinois, Maine, Massachusetts, New Jersey, Ohio, Rhode Island, and Vermont. See note, 5 *ARK. L. REV.* 419 (1951).

¹³³ MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* 275 (1931). See also Kingsley, "Cruelty as a Ground for Divorce in Minnesota," 16 *MINN. L. REV.* 256 at 267-269 (1932); Weinstein, "Mental Cruelty as Grounds for Divorce," 17 *MARQ. L. REV.* 101 at 105 (1933). But cf. note, 5 *ARK. L. REV.* 419 at 424 (1951).

The English view does not seem to require a deliberate intention to be cruel. Rosen, "Cruelty in Matrimonial Causes," 12 *MOD. L. REV.* 324 at 342 (1949).

The Georgia statute, Ga. Laws (1946) pp. 90, 91, Ga. Code Ann. §30-102(10), defines cruelty as "the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies apprehension of danger to life, limb, or health." But this statute is liberally construed in *Hinkle v. Hinkle*, (Ga. 1953) 74 S.E. (2d) 657 at 659, noted 39 *A.B.A.J.* 502 (1953).

As to cruelty by an insane defendant see *HARPER, PROBLEMS OF THE FAMILY* 707-708 (1952). In *Swan v. Swan*, [1953] 3 *West. L.R.* 591, noted, 69 *L.Q. Rev.* 439 (1953), a divorce for cruelty was denied when the husband was suffering from such disease of the mind that he did not know the nature and quality of his acts or that he was doing wrong. *Swan v. Swan* is also noted in 17 *MOD. L. REV.* 76 (1954).

¹³⁴ Note, 2 *DUKE B.J.* 134 (1952).

¹³⁵ Note, 9 *DUKE B.A.J.* 49 at 53 (1941).

¹³⁶ *Sabot v. Sabot*, 97 *Wash.* 395, 166 P. 624 at 625 (1917).

¹³⁷ MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* 274 (1931). But see note, 5 *ARK. L. REV.* 419 at 426 (1951).

¹³⁸ 2 *VERNIER, AMERICAN FAMILY LAWS* §78 (1932); recent case, 17 *MINN. L. REV.* 663 (1933); *HARPER, PROBLEMS OF THE FAMILY* 703 (1952). But cf. *De Burgh v. DeBurgh*, (Cal. 1952) 250 P. (2d) 598, noted 4 *HASTINGS L.J.* 197 (1953).

substitute. Only ten jurisdictions make this a ground.¹³⁹ The statutes have been construed as requiring a course of conduct evidencing intentional and deliberate neglect, estrangement and settled hatred.¹⁴⁰ The concept of indignities, because of its usual requirement of intentionality, does not overlap with incompatibility to the same extent as mental cruelty since in many states the latter concept does not require intentional conduct. In some states recrimination may be a bar.¹⁴¹

Another possible alternative is divorce on the ground of protracted separation. Sixteen American jurisdictions make this a ground.¹⁴² There is similar provision in the laws of Norway,¹⁴³ Sweden, Denmark, Hungary, Germany, Austria and Poland.¹⁴⁴ English law does not so provide and the English bar is opposed.¹⁴⁵ Since the period ranges from two to five years except in Rhode Island and Texas where it is ten years, the delay may make this ground an inadequate one. There may also be difficulties with respect to recrimination¹⁴⁶ and alimony¹⁴⁷ and as to the meaning of "separation."¹⁴⁸

Another alternative is divorce by mutual consent.¹⁴⁹ Roman law permitted such divorce.¹⁵⁰ The French Civil Code of 1804, repealed

¹³⁹ This is a ground for absolute divorce in Arkansas, Alaska, Hawaii, Missouri, Oregon, Pennsylvania, Tennessee, Washington and Wyoming. It is a ground for limited divorce in North Carolina. Notes, 1 Wyo. L.J. 187 (1947); 5 ARK. L. REV. 419 at 421 (1951). Alaska allows divorce for both indignities and incompatibility. New Mexico and the Virgin Islands allow it for only the latter.

¹⁴⁰ Notes, 1 Wyo. L.J. 187 at 190 (1947); 5 ARK. L. REV. 419 at 425 (1951). In *Sabot v. Sabot*, 97 Wash. 395 at 395, 166 P. 624 (1917), the court stated: "Indifference is an 'indignity' and unconcealed aversion is a 'cruelty' within the meaning and intent of the statute. They are more refined but no less substantial than words or blows or neglect."

¹⁴¹ 1 Wyo. L.J. 187 at 190 (1947).

¹⁴² Arizona, Arkansas, District of Columbia, Idaho, Kentucky, Maryland, Nevada, North Carolina, Rhode Island, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. In four states, Minnesota, North Dakota, Virginia, and West Virginia, divorce is possible if a judicial separation is not followed by reconciliation. Notes, 35 CALIF. L. REV. 99 at 101-104 (1947); 97 UNIV. PA. L. REV. 705 (1949).

¹⁴³ As to the Scandinavian states see note 109 supra.

¹⁴⁴ Szirmai, "Divorce by Mutual Consent and After Protracted Separation: Continental Practice," 2 INT. AND COMP. L.Q., part 1, 72 at 75-77 (1953).

¹⁴⁵ Wels, "Causes and Cures of Divorce—an Inquiry," NEW YORK TIMES, Magazine Section, March 8, 1953, pp. 13, 35-36.

¹⁴⁶ Notes, 26 COL. L. REV. 83 at 87 (1926); 35 CALIF. L. REV. 99 at 101 (1947); 97 UNIV. PA. L. REV. 705 at 706 (1949).

¹⁴⁷ Notes, 35 CALIF. L. REV. 99 at 107-108 (1947); 97 UNIV. PA. L. REV. 705 at 709 (1949).

¹⁴⁸ 97 UNIV. PA. L. REV. 705 at 710 (1949).

¹⁴⁹ Notes, 20 COL. L. REV. 472 at 474 (1920); 36 COL. L. REV. 1121 at 1132 (1936). See "Legalize Divorce by Mutual Consent? Pro and Con," 34 READERS DIGEST 91-96 (January 1939).

¹⁵⁰ Yankwich, "Aspects of Roman Civil Law," 26 SO. CAL. L. REV. 292 at 304 (1953); Rheinstejn, "Trends in Marriage and Divorce Laws of Western Countries," 18 LAW AND CONTEMP. PROB. 3 at 6-7 (1953).

in 1816, so provided.¹⁵¹ The laws of several Continental states so provide: Belgium, Rumania, Holland, Norway,¹⁵² Sweden, Denmark, Hungary and Yugoslavia.¹⁵³ In effect it is a ground in Russia.¹⁵⁴ Mexican law makes mutual consent an express ground, but a year must have elapsed after the celebration of the marriage.¹⁵⁵

One way to make incompatibility a ground for divorce is to make divorce a matter of judicial discretion and abolish specific grounds of divorce.¹⁵⁶ In 1938 Germany seemed to be moving in this direction, but it was felt that the time was not yet ripe.¹⁵⁷ At that date Russia provided for divorces based on the single general divorce ground of destruction of the marital relation.¹⁵⁸ The present Russian law permits divorce "if the court . . . deems it necessary to dissolve the marriage." This permits the court to select the grounds including mutual consent.¹⁵⁹ A Hungarian statute of 1952 is to similar effect.¹⁶⁰

Conclusion

A British Royal Commission has recently taken testimony as to problems of marriage, divorce and family life. The Marriage Law Reform Society proposed that "there should be some general ground for divorce which should subsume all, or almost all, other grounds and give

¹⁵¹ Rheinstejn, "Trends in Marriage and Divorce Laws of Western Countries," 18 *LAW AND CONTEM. PROB.* 3 at 5-6, 13 (1953).

¹⁵² As to the Scandinavian states see note 109 supra. In Sweden the statute makes express reference to incompatibility.

¹⁵³ As to the Continental states see Szirmai, "Divorce by Mutual Consent and After Protracted Separation: Continental Practice," 2 *INT. AND COMP. L.Q.*, part 1, 72-75 (1953).

¹⁵⁴ *Id.* at 78.

¹⁵⁵ Summers, "The Divorce Laws of Mexico," 2 *LAW AND CONTEM. PROB.* 310 at 317-318 (1935).

¹⁵⁶ "The second legislative project should be a declaration that divorce is no longer a matter of individual right, but purely of judicial discretion to be granted in the light of all the circumstances of the case. The statute should do away with all specific causes of divorce and announce that each case must stand on its own merits, the question for judicial determination being: is the family any longer a useful, living, sociological entirety, or capable of rehabilitation?" Bradway, "The Myth of the Innocent Spouse," 11 *TULANE L. REV.* 377 at 393 (1937). See also HARPER, *PROBLEMS OF THE FAMILY* 774-775 (1952).

¹⁵⁷ Silving, "Divorce without Fault," 29 *IOWA L. REV.* 527 at 533-534 (1944).

¹⁵⁸ *Id.* at 533-534, 539-540, 548-556. See also Rheinstejn, "Trends in Marriage and Divorce Laws of Western Countries," 18 *LAW AND CONTEM. PROB.* 3 at 16-17 (1953).

¹⁵⁹ Szirmai, "Divorce by Mutual Consent and After Protracted Separation: Continental Practice," 2 *INT. AND COMP. L.Q.*, part 1, 72-78 (1953). See also Berman, "Soviet Family Law in the Light of Russian History and Marxist Theory," 56 *YALE L.J.* 26 (1946); Gsovski, "Marriage and Divorce in Soviet Law," 35 *Geo. L.J.* 209 (1947); Sverdlov, "Modern Soviet Divorce Practice," 11 *Mod. L. Rev.* 163 (1948); Wolff, "Some Aspects of Marriage and Divorce Laws in Soviet Russia," 12 *Mod. L. Rev.* 290 (1949); note, "Le Mariage et le divorce d'après la législation actuelle de l'U.S.S.R." 2 *REVUE INTERNATIONALE DE DROIT COMPARE* 347 (1950).

¹⁶⁰ Szirmai, "Divorce by Mutual Consent and After Protracted Separation: Continental Practice," 2 *INT. AND COMP. L.Q.*, part 1, 72 at 74 (1953).

a court a general jurisdiction to dissolve a marriage where, in fact it has come to an end. . . . The proposal we are discussing would be to permit in any case where deadly hatred or unconquerable aversion or incompatibility of temperament exists between the parties. . . . Incompatibility appears to us to be the sensible ground. . . . The introduction of this ground would enable all other existing grounds for divorce to be abolished except insanity. . . . The specific grounds for divorce are rarely in themselves the cause of the break-up. A man who leaves his wife or treats her cruelly generally does so as the result of tension and disharmony, arising from the spouses' personalities."¹⁶¹ The organized bar strongly opposed: "To introduce a basis whereby marriage may be dissolved by agreement or at the will of one spouse would, we believe, strike a disastrous blow at family life. It would basically alter the attitude of mind toward marriage, not merely of those who are married but of those who are contemplating marriage."¹⁶²

Possibly the American jurisdictions are no readier than England to add incompatibility to the list of grounds for divorce. Sociologists may favor, but religion, sentiment, logic and historical accident are likely to play important roles as they have in the past.¹⁶³ Incompatibility is not included in the grounds for divorce listed in a draft prepared by the Interprofessional Commission on Marriage and Divorce Law, established by the American Bar Association.¹⁶⁴

Nevertheless the American legislatures have moved in the direction of making incompatibility a ground. It is already the law of the Virgin Islands, New Mexico and Alaska. In two thirds of the jurisdictions mental cruelty is a ground. In seventeen jurisdictions protracted separation is a ground. In ten indignities is a ground. Many states have recently made insanity a ground, thus ignoring the element of fault.¹⁶⁵ As a practical matter incompatibility is often the true ground, as divorces are contested in only ten to fifteen percent of the cases. "The courts have thus come to tolerate collusive practices through which con-

¹⁶¹ Wels, "Causes and Cures of Divorce—An Inquiry," *NEW YORK TIMES*, Magazine Section, March 8, 1953, p. 13.

¹⁶² *Id.* at 35.

¹⁶³ 2 *VERNIER*, *AMERICAN FAMILY LAWS* 65-66 (1932); Fly, C.J., stated in *Mansur v. Mansur*, (Tex. Civ. App. 1931) 37 S.W. (2d) 846 at 847: "We hear men and women and complacent judges, urging severing of the marriage ties and destruction of homes because couples are not as happy as they might be, but there is no law, human or divine outside of communistic Russia, that sanctions divorces on such grounds."

The Protestant conception of Christianity would not seem clearly to stand in the way of divorce for incompatibility. *FOSDICK, THE MAN FROM NAZARETH* 112-115, 186 (Pocket Book ed. 1953). Compare *CADOUX, THE LIFE OF JESUS* 77, 143-144 (Pelican Books 1948).

¹⁶⁴ *Comment*, 22 *TENN. L. REV.* 913 at 914 (1953).

¹⁶⁵ In 27 states the statutes expressly make insanity a ground. *HARPER, PROBLEMS OF THE FAMILY* 390-392 (1952).

sent divorces can be easily obtained in spite of their reprobation by the official law."¹⁶⁶ Honesty and candor would seem to require that the statutes be rewritten to accord with what actually happens. This, and not easy divorce, is the real argument for making incompatibility a ground for divorce. A higher divorce rate need not result.¹⁶⁷ The divorce rate in the United States is three times as high as in Sweden where incompatibility is a ground.¹⁶⁸

Since incompatibility is proposed to make divorces honest rather than easy, some or all of the following safeguards should be included.¹⁶⁹ The incompatibility must be shown to be permanent and not simply the temporary incompatibility which may develop in virtually any marriage. The incompatibility must be deep-seated. That is to say, the spouses must feel that the incompatibility is irremediable, and possibly the judge must conclude that the causes alleged for incompatibility could reasonably produce incompatibility.¹⁷⁰ Possibly the applicant for divorce should be required to make an affirmative showing that he or she has tried to make the marriage succeed, and the divorce granted only to the party who had tried the harder.¹⁷¹ A certain element of delay may be necessary to prevent hasty and unjustified divorces.¹⁷² For example, divorce for incompatibility should not be pos-

¹⁶⁶ Rheinstein, "Trends in Marriage and Divorce Law of Western Countries," 18 *LAW AND CONTEM. PROB.* 3 at 19 (1953). See also Llewellyn, "Behind the Law of Divorce: II," 33 *COL. L. REV.* 249 at 284-285 (1933); note, 36 *COL. L. REV.* 1121 (1936).

The same seems to be true in England. "Where both parties to a marriage want a divorce they can always get one, though very occasionally they have to make more than one attempt." Harvey, "On the State of the Divorce Market," 16 *MOD. L. REV.* 129 at 134 (1953).

¹⁶⁷ "The only perceptible result of changes in legal grounds is the redistribution of divorces on the basis of available grounds, without any effect upon their number. This is attested by the fact that there is not the slightest connection between the number of grounds in the several states and their respective divorce rates." Lichtenberger, "Divorce Legislation," 160 *ANNALS* 116 (1932), reprinted in *SELECTED ESSAYS ON FAMILY LAW* 862, 865 (1950). Compare Elliott, "Divorce Legislation and Family Instability," 272 *ANNALS* 134 at 139-140 (November 1950).

¹⁶⁸ Segerstedt and Weintraub, "Marriage and Divorce in Sweden," 272 *ANNALS* 185 (November 1950). But the Swedish rate is increasing and incompatibility is the ground alleged in almost 90 percent of all cases.

¹⁶⁹ Sir James MacDonnell in advocating divorce by mutual consent suggested the following prerequisites: consent long persevered in, minimum age, no hope of reconciliation, safeguard of the interests of children, and a period of separation. 1 *MINUTES OF EVIDENCE BEFORE THE ROYAL COMMISSION ON MATRIMONIAL CAUSES* §408 (1912). See also *DeBurgh v. DeBurgh*, (Cal. 1952) 250 P. (2d) 598 at 606.

¹⁷⁰ Purely hedonistic reasons should be excluded. To that extent moral principles are relevant. Neuner, "Modern Divorce Law—The Compromise Solution," 28 *IOWA L. REV.* 272 at 283-285 (1943). The English cases on cruelty indicate that the individual reaction must be taken into account. Rosen, "Cruelty in Matrimonial Causes," 12 *MOD. L. REV.* 324 at 339-341 (1949).

¹⁷¹ Sayre, "Divorce for the Unworthy: Specific Grounds for Divorce," 18 *LAW AND CONTEM. PROB.* 26 at 28-31 (1953).

¹⁷² Llewellyn, "The Law Behind Divorce: II," 33 *COL. L. REV.* 249 at 280-281 (1933).

sible immediately following the marriage. Perhaps the law might require that the parties must have been married for at least one year before they can apply for divorce solely on the ground of incompatibility.¹⁷³ Possibly, as in the Scandinavian states, before absolute divorce is granted there should be a judicial separation or a protracted separation in fact of the parties. Mediation through a public official might be made a prerequisite as in Sweden.¹⁷⁴ While recrimination should not be a bar, nevertheless a remnant of discretion should be retained by the court as to certain cases where the applicant is overwhelmingly at fault and the other spouse is relatively innocent, or where children are involved. Since in the usual case of incompatibility both parties are at fault to some degree, alimony might still be decreed to the spouse defending the action. Finally, divorce procedure should become less adversary and more administrative in character.¹⁷⁵

¹⁷³ This seems to be the minimum period as to divorce by mutual consent in the Continental states. Szirmai, "Divorce by Mutual Consent and after Protracted Separation: Continental Practice," 2 *INT. AND COMP. L.Q.*, part 1, 72-75 (1953). The English law imposes a time barrier. "Under the Matrimonial Causes Act of 1937 a marriage cannot normally be dissolved until it has lasted for three years." Harvey, "On the State of the Divorce Market," 16 *MOD. L. REV.* 129 at 129 (1953).

¹⁷⁴ Segerstedt and Weintraub, "Marriage and Divorce in Sweden," 272 *ANNALS* 185, 189-190 (November 1950). See also HARPER, *PROBLEMS OF THE FAMILY* 773-775 (1952).

¹⁷⁵ Alexander, "Let's Get the Embattled Spouses out of the Trenches," 18 *LAW AND CONTEMP. PROB.* 98 (1953); Squire, "The Shift from Adversary to Administrative Divorce," 33 *BOSR. UNIV. L. REV.* 141 (1953). Divorce in Denmark, Iceland and Norway is by administrative decree. Rheinstein, "Trends of Marriage and Divorce Law of Western Countries," 18 *LAW AND CONTEMP. PROB.* 3 at 5, n. 7, 11 (1953).