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Volume 36  
Issue 4 *Dickinson Law Review - Volume 36,*  
1931-1932

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5-1-1932

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### Recommended Citation

Jacob M. Goodyear, *Sources of Divorce Theories*, 36 DICK. L. REV. 225 (1932).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol36/iss4/1>

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# Dickinson Law Review

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Volume XXXVI

MAY, 1932

Number 4

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## *Sources of Divorce Theories*

Whether one accepts the Biblical version of the creation or adopts a theory of that event as advanced by scientists and biologists, yet it is universally admitted that even as nature planted the germ of attraction between the sexes just so were sown the seeds of discord and discontent. So it has been through all time that side by side have existed happy marriages and unions entirely lacking in felicity. In some instances it was the civil government that formulated the marriage contract and authorized its existence, while in others it was the religious leader of the race from whom such authority was derived. Whether Buddha, Mohammed, Confucius or the Sun itself, or whether the doctrines of Jesus of Nazareth controlled the religious life of the individual, in a large measure determined the attitude toward marriage and home life. Even as a wide diversity of views existed toward marriage, just so there has ever been a difference in the thoughts of the individual in regard to the severance of the marriage relation. The same variance in relation to marriage—founded as it has been upon religious beliefs—is found in relation to divorce. States and nations have legislated upon the subject, have even banned it entirely; but nevertheless the individual has demanded that there be some arrangement by which unhappy bonds may be severed. In the history of divorce legislation the pendulum has swung from one extreme to the other, touching every conceivable theory until there has evolved finally an American attitude that is distinctive and characteristic of the race that gave it birth. Even today there are extremes in divorce laws such as in South Carolina where no divorces are granted and in Nevada where they are handed out with a celerity

that astonishes. These are not typical and a student of the subject will easily reach the conclusion that husband and wife have equal rights before the courts and that each cause or complaint must be proven with scrupulous exactitude. The era of modern divorce legislation in the United States began less than a century ago and a better understanding of the attitude of the legislatures and of the courts lies in knowledge of the steps that have been taken by the human race toward the goal that seems to be attained.

### Hebrew Divorces

It has been said truthfully that certain classes of Jewish law are "mountains hanging by a hair" and there is little doubt that divorce legislation among the Hebrews falls within this classification. In Israel, marriage was looked upon as the foundation of and the means for a chaste and holy life. As adultery undermines such a foundation, marriage ought to be dissolved by it; so the Mosaic law determined. However, the whole spirit of Judaism was opposed to divorcing at all and the first recognition of the right to divorce came in case adultery was proven. In that event it was lawful to give a bill of divorcement and put the guilty party out of the home because further cohabitation would be unlawful. Gradually the law expanded and developed until the bill of divorcement could be given whenever there was any uncleanness found in the wife. A curious phase of the law was that regardless of the guilt or innocence of the party divorced, the divorce could be granted at the instance of the husband alone. On him was the duty of appearing before the religious leaders and there publicly announcing that he divorced his wife. The bill of divorcement was not given by authority of the church or of the civil government, but was given by the authority of the husband alone and the duty of the rabbis before whom he announced his intention was simply to reduce that declaration to writing. Certain technical phrases had to be used and some formal statements made, and this combination when finally writ-

ten was the bill of divorcement given to the wife. The delivery of this bill to the wife created an absolute divorce and either party was free to remarry at will.<sup>1</sup> Even today there lingers a ghost of the old law in the desire of many Hebrews to secure a bill of divorcement from a rabbi even after the civil authorities have legally dissolved the union.

### **Greek and Roman Divorces**

The ancients realized the necessity for divorce legislation and even while the Jewish husbands were appearing before rabbis to have bills of divorcement transcribed, so other nations were developing an attitude toward the subject. With the Greeks there was little adverse action required and mere agreement of the parties to be divorced and the registration of that intention at a central office seems to have been all that was necessary. In Rome, however, the severity, dignity and high standards of the traditional Roman matron for a long time made divorce on any ground impossible. For more than five hundred years of the history of Rome the sanctity of the marriage relation and the worship of the Lares and Penates made marriage something to be severed only by death.<sup>2</sup> With the decline of the power and majesty of the Roman Empire and the corresponding decline in individual virtues, corruption and dissolution crept into the life of the individual and divorces were legalized. Soon Roman jurisprudence regarded husband and wife as having equal rights before the law and divorces were granted upon the petition of either party. Justinian recognized the many evils attendant upon the easy severance of marital relations and by imperial decree abolished divorces and forbade the civil authorities to grant them for any cause. Soon however, he was compelled to rescind this decree and restore unlimited divorces, giving as the reason for this reversal the misery, hatred and crime that flowed from indissoluble unions.<sup>3</sup> By his order mutual wish and consent were all

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<sup>1</sup>Albany Law Journal, Vol. 8, Page 292.

<sup>2</sup>Schouler's Domestic Relations, 1st Edition.

<sup>3</sup>Ruling Case Law, Vol. 9, Page 243.

that were necessary to secure a divorce and with this doctrine once firmly established, the Roman home was doomed and with it the Empire itself.

### French Divorces

French divorces find their foundation in the Code of Napoleon which admitted divorces for several causes, but vested the decision regarding them in the individual. Mutual consent was the prime requirement but when it was lacking the tribunal before which an application was made might decree a divorce for any reason that seemed proper to the judges. Modern divorce legislation in France has gone far from this provision of the old Code but the facility with which decrees are secured seems to have remained.

### English Common Law

According to Blackstone divorces were entirely within the cognizance of the ecclesiastical courts and not part of the common law. They were of two kinds, one total and the other partial. The former, or divorce *a vinculo matrimonii*, was granted only for one of the canonical causes of impediment existing before marriage, such as affinity, and the theory of the total decree was that the marriage was null and void *ab initio*.<sup>4</sup> The partial decree, or decree *a mensa et thoro*, was granted when the marriage was originally lawful, but for some cause such as cruelty or adultery it became improper or impossible for the parties to continue cohabitation. The canon law was closely followed by the common law which regarded the nuptial tie with such reverence and awe that the latter would not permit a divorce to be granted for any cause arising after marriage. This attitude was claimed to be founded upon divine law and religious beliefs and even though the latter expressly defined infidelity as a cause for divorce, yet the common law would not recognize that, on the ground that divorces should not be allowed to depend upon any matter or cause

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<sup>4</sup>Ruling Case Law, Vol. 9, Page 243.

wholly within the control of the parties. Canonical decrees were often granted upon the uncorroborated confessions of the parties, and, as this grew to be more and more frequent, the attitude of the common law sought to provide a check on divorces.

The English Divorce Act of 1858 codified divorce legislation to a great extent and provided for the granting of decrees by the civil courts. The theory of the ecclesiastical courts and the stern and unrelenting attitude of the common law permeates and animates this modern legislation.<sup>5</sup>

### American Common Law

Ecclesiastical law concerning divorces as that law existed in England never became a part of the common law in the United States. Ecclesiastical law was administered by courts and judges that never existed in the American colonies and the jurisdiction exercised by these courts was never specifically granted to any of the American courts. It is true that the theory and rules of procedure and practice of the ecclesiastical courts have been followed rather closely in some of the United States, so that in interpreting modern divorce statutes recourse must be had to church doctrines. It has been held also that when jurisdiction formerly exercised by ecclesiastical courts is vested by statute in a modern American court, the settled principles of the former become the fixed guides for the latter.<sup>6</sup> These precedents from the ecclesiastical courts are followed most closely whenever questions involving the effect of condonation and connivance are considered. Likewise, in this country a suit for divorce on the charge of desertion is our substitute for the English libel for restitution of conjugal rights and the rules governing each proceeding are practically the same. So it has been held that a legislature in providing that desertion should constitute a valid cause for divorce used the word

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<sup>5</sup>Schouler's *Domestic Relations*, 1st Edition.

<sup>6</sup>*Hawkins v. Hawkins*, 193 N. Y. 409, 10 Am. State Reports 460.

in the same sense as used by the earliest English courts.<sup>7</sup> The same analogy has been applied in a case in which the statute failed to define the word "cruelty" as ground for a divorce, because here again precedents were sought in ecclesiastical law. Therefore, while it is true that ecclesiastical law never became a part of American common law, yet its spirit has shaped and fashioned modern divorce legislation to a greater extent than is generally realized.

### Colonial Divorces

Some little dispute exists regarding the earliest divorce legislation in the American colonies and this arises not so much out of the facts as it does from a too casual examination of them. The historian Bancroft makes no mention of divorces in the early colonies and his failure to give them notice is the authority of those who contend the colonists did not sanction divorces for any cause whatever.<sup>8</sup> Palfrey, however, in his history mentions the fact that inferior courts had jurisdiction in divorce cases.<sup>9</sup> This brief notice of the fact of early American divorces is enough to spur an investigation of colonial records to ascertain the facts.

Massachusetts, according to the historian Hutchison, took the lead in constituting divorce courts.<sup>10</sup> In the early annals of that colony there is a definite record that in 1639 courts of appeal were constituted to hear cases of "divorce, capital and criminal causes."<sup>11</sup> The first decree granted by these courts is a matter of record and seems to prove that Massachusetts was the first American colony to provide for the severance of the marriage relation.<sup>12</sup>

In Rhode Island, which closely followed the Massachusetts rule at first, the General Assembly had jurisdiction of divorce cases, but only on the ground of

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<sup>7</sup>Southwick v. Southwick, 97 Mass. 327.

<sup>8</sup>Albany Law Journal, Vol. 20, Page 110.

<sup>9</sup>Palfrey's History of New England, Vol. 2, Page 17.

<sup>10</sup>History of Massachusetts, Vol. 1, Page 393.

<sup>11</sup>Massachusetts Colony Records, Vol. 1, Page 276.

<sup>12</sup>Massachusetts Colony Records, Vol. 1, Page 283.

adultery. Connecticut followed the Massachusetts rule exactly by a statute adopted in 1656.<sup>13</sup>

In 1692 the Massachusetts rule was changed and the power to divorce was given to the Governor and the Council and this law continued in force until the Revolution.

The Biblical Digest which was prepared in 1656 gave desertion and adultery as grounds for divorce and cited Scriptural authority for this enactment. According to the Digest, which was adopted as law by Massachusetts, Connecticut and Rhode Island, the grounds for divorce were stated by Governor Winthrop as "the officers of the body politic have a rule to walk by in all their administrations which rule is the word of God and such conclusions and deductions as are or shall be regularly drawn from thence."<sup>14</sup>

Connecticut took authority to grant divorces from the General Assembly in 1672 and vested it in the Governor and his Assistants. In 1677 in that same state the rule was laid down that no divorce should be granted except upon adultery, desertion for three years and fraud.<sup>15</sup>

No statutes of New York regarding divorces seem to remain extant but that there were such is unquestioned. The records of the courts of the patroons at Albany show at least three divorces granted between 1630 and 1664 and the records of the same court show divorces granted with greater frequency between 1664 and 1776 while the English were in charge of that colony.<sup>16</sup>

George the Third took cognizance of the matter of divorces in the colonies and in 1773 gave instructions to all Provincial Governors, including the Governor of Canada, that no divorces were to be granted for any cause. Despite the influence of Henry the Eighth the English law still held to the idea of an indissoluble marriage. These instructions were obeyed in some colonies which were loyal to the crown, but in Massachusetts, Rhode Island and Connecti-

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<sup>13</sup>Albany Law Journal, Vol. 20, Page 133.

<sup>14</sup>Life and Letters of John Winthrop, Vol. 2, Page 445.

<sup>15</sup>Albany Law Journal, Vol. 20, Page 134.

<sup>16</sup>Albany Law Journal, Vol. 20, Page 134.

cut they were absolutely ignored, and to some extent they were disobeyed in New York.<sup>17</sup> The reason for the disobedience of the royal decree regarding divorces lay in the fact that in the colonies marriage was regarded as a civil contract and not a religious sacrament. This theory was a necessity, since no pioneer could well forge a home out of the wilderness without a wife to aid him, and marriages were performed by the civil and not by the religious authorities. Following in logical order, since marriage was a civil matter, its dissolution was a civil matter also, and divorces should be granted by the courts, according to the reasoning of the colonists. The colonial laws relating to marriages and divorces did not seek to create new causes for divorce or new principles on the subject; they sought merely to meet existing conditions in a way that seemed fair and just to all parties concerned, and by a procedure that could not be controlled by any ecclesiastical authorities.<sup>18</sup>

### Divorce Theories

Roman jurisprudence regarded husband and wife as distinct persons having equal rights, but this was not the theory of the English common law.<sup>19</sup> The latter emphasized unity as the cardinal principle and to secure this the legal entity of the wife was either extinguished or suspended during coverture. The scheme of the Civil law pays scant attention to this idea of unity which was mere theory and legal fiction. The community system in force in some states is an intermediary between the common law and modern Civil systems. The religious theories of divorce have as wide a variance as the legal theories. The Church of Rome has ever held marriage to be indissoluble and refuses to recognize the validity of a civil divorce, at least so far as freeing the individual and making him eligible to remarry.

The Hebrew theory parallels the Catholic idea and

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<sup>17</sup>Albany Law Journal, Vol. 20, Page 135.

<sup>18</sup>Divorce in New England by Charles Cowley.

<sup>19</sup>Schouler's Domestic Relations, 1st Edition.

refuses to sanction civil decrees until and unless there is a bill of divorcement prepared by a rabbi along the lines laid down by the Mosaic law.

Many elements and influences have combined to shape the modern theory of divorce in the United States. One of the most prominent of these influences lies in the "Married Women's Acts" adopted by nearly every state in the union. These emancipate a married woman from the unity idea of the common law and give her almost unbridled freedom in the management of her temporal affairs. This liberty in handling her own money exercised a liberalizing influence on the right of a woman to sue and be sued and also on her right to divorce her husband for cause shown.<sup>20</sup>

Possibly the greatest influence on divorce legislation has been the spirit of Christianity. While the dictates of the Nazarene have received wide and various interpretation and while the Protestant sects and denominations cannot agree upon the subject, yet it is the Christian rule that has shaped the policy of civil governments. Jesus of Nazareth taught men to respect womanhood and laid down adultery as the one cause for divorce. In applying the Christian doctrine it is true that the causes for divorce as recognized by law have been enlarged and increased, yet it is the spirit of this great teacher that has led the law to grant divorces to women who have been outraged by their husbands. The varied causes for divorce, as now expressed in statutes, are the product of many elements indeed, not only historical and ecclesiastical, but fanatical and liberal, as well as the remnants and heritages of the stern Puritans who first constituted divorce courts in New England.

### **Federal Divorce Laws**

The varied and many causes recognized in the several states, the various requirements for jurisdiction and the diverse rules of procedure regarding service and practice have combined in recent years to direct discussion in favor

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<sup>20</sup>Schouler's *Domestic Relations*, 1st Edition.

of a federal divorce law and the granting of divorces by federal courts. While it is true that such a federal law would contribute to uniformity that is now sadly lacking, yet serious objections to such a measure arise out of the past as well as the present. Ours is a government of delegated powers and nowhere in the Constitution is there a delegation to the federal courts of the right to grant divorces, which was so early exercised by the colonial courts. To permit such a federal law to become operative one must stretch the Constitution to the breaking point or further amend a document that has been amended all too often in recent generations by provisions that more properly should be in the form of substantive law. In addition, government today is both bureaucratic and paternalistic and much of the present high taxation can be attributed to these influences. Modern divorce legislation by the federal government would only serve to increase these paternalistic tendencies beyond all natural bounds and would make the detriments to such a law far outweigh its benefits.

### **Modern Theories**

Marriage contracts are not on the same footing as ordinary contracts and it is well settled now that the parties cannot agree to compromise or modify at will. The Biblical injunction is that the obligations of the marriage state are to be preserved and well guarded. The government, in theory and to a great extent in actual practice, guards the sanctity of the marriage even as it demands obedience and loyalty from its citizens. The control over divorce belongs not to the individual, but to the public because it is the common weal and the doctrine of the greater good for the greater number that should control the power to divorce.<sup>21</sup> While there may be conflict of laws at present and modern legislation appears to proceed on varied theories, yet there are certain fixed principles that have been set as guiding stars by which divorce courts are to chart their courses. Marriage is a contract, quasi-civil in

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<sup>21</sup>Schouler's *Domestic Relations*, 1st Edition.

character, but with a religious element ever present; a type of contract that requires more than ordinary honesty on the part of the parties thereto. It requires the highest good faith both at its inception and in its continuance and the contracting parties are ever charged to exercise the greatest honesty and confidence. Less than this impairs the contract and for the good of the state, namely, to check the misery and crime springing from unhappy unions, a divorce may be granted.<sup>22</sup>

The home is the basis of the state because there citizens are made and no nation can rise higher than the product of its homes. Governments are vitally interested in conserving the sanctity of the home, but on the other hand, simple justice demands that an erring spouse be punished and a breach of the marriage contract not be condoned. To serve these two ends seems to be the special province of modern divorce courts. How they act to meet the problems before them will determine, in a large measure, the destiny of the republic.

There are urgent problems to be solved by the divorce courts of the nations. There are situations that existing statutes do not provide for and there is a state of flux in respect to divorce legislation. How society will meet the problems of this modern day with respect to domestic relations it is difficult to predict. But the bald fact remains that our divorce statutes are not perfect and that changes must be made. What those changes will be and how modern legislation will act to solve the needs of this generation remains to be seen. Legislators have before them the records of the past. The experience of generations long dead presents a fund of information to be used in providing laws for the present. Society must meet the "divorce evil", if such exists, and must provide for litigation arising out of unhappy marriages, for truly this is one of the great problems of the day. The centuries look down on us who have the record and the benefit of the experi-

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<sup>22</sup>Penna. Legal Journal, No. 3, Page 292.

ence of many generations and if we fail to balance the scales of justice, then with Shakespeare we must say,

“The fault, dear Brutus, is not with our stars,  
But with ourselves, that we are underlings.”

Carlisle, Penna.

JACOB M. GOODYEAR.