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A Critique of the Recrimination Doctrine

Marvin M. Moore

A curious doctrine this—a singular kind of subtraction—to subtract crime from crime and there remains nothing but innocence.

Sir C. Creswell, Judge Ordinary in Hope v. Hope, 1 Swa. & Tr. 94, 95, 164 Eng. Rep. 644, 645 (1858).

A CRITIQUE OF THE RECRIMINATION DOCTRINE

BY MARVIN M. MOORE*

Under the doctrine of recrimination a defendant in a divorce action establishes a good defense by showing that the complainant is guilty of misconduct constituting a ground for divorce.[1] In other words "[I]f both parties have a right to a divorce, neither of the parties has."[2] The purpose of this Article is to examine the doctrine of recrimination and consider the grounds advanced for its application today.

The recrimination doctrine currently exists in some form in the divorce law of all American jurisdictions. Thirty-two states have statutes providing for the doctrine's application.[3] These enactments may be grouped into six major classes. In the first, comprising twelve jurisdictions, the doctrine is applicable regardless of the ground upon which the plaintiff is seeking a divorce and regardless of the marital offense of which he is shown to be guilty.[4] A statute typifying those making up this group is that of Idaho. "Divorces must be denied upon showing . . . recrimination."[5] "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce."[6] In the fourteen states composing the second class the acts provide that recrimination operates only where the plaintiff petitions for a divorce on the ground of adultery.[7] In this one situa-

* Assistant Professor of Law, University of Akron College of Law; A.B., 1955, Wayne State University; LL.B., 1957; LL.M., 1960, Duke University.

1. See 17 AM. JUR. *Divorce and Separation* § 263 (1957).

2. Brazell v. Brazell, 54 Cal. App. 2d 458, 459, 129 P.2d 117, 118 (1942).

3. See II VERNIER, AMERICAN FAMILY LAWS § 78 (1932).

4. ARK. STAT. ANN. § 34-1209 (1947); CAL. CIV. CODE §§ 111, 122; GA. CODE ANN. § 30-106 (1958); HAWAII REV. LAWS § 324-26 (1955); IDAHO CODE §§ 32-611, 32-613 (1947); MICH. COMP. LAWS § 552.10 (1948); MONT. REV. CODES ANN. §§ 21-118, 21-128 (1955); N.D. CENT. CODE ANN. §§ 14-05-10, 14-05-15 (1960); NEB. REV. STAT. § 42-304 (1960); S.D. CODE § 14.0713 (1939); WIS. STAT. 247.101 (Supp. 1963); WYO. STAT. ANN. § 20-55 (1957). Since the decisions in DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598 (1952) and Lowry v. Lowry, 170 Ga. 349, 153 S.E. 11 (1930), recrimination has been a defense in California and Georgia only where the trial judge in the exercise of his discretion chooses to apply it.

5. IDAHO CODE § 32-611 (1947).

6. IDAHO CODE § 32-613 (1947).

7. ALASKA COMP. LAWS ANN. § 56-5-11 (1949); ARIZ. REV. STAT. ANN. § 25-313 (1956); DEL. CODE ANN. tit. 13, § 1528 (1953); FLA. STAT. ANN. § 65.04 (1943); ILL. ANN. STAT. ch. 40, § 11 (Smith-Hurd 1956); IND. ANN. STAT. § 3-1202 (1946); ME. REV. STAT. ANN. ch. 166, § 55 (1954); MO. REV. STAT. § 452.030 (1952); N.J. REV.

tion the respondent may successfully defend by establishing that the complainant has himself committed adultery. Representative of the statutes comprising this group is Indiana's enactment. "Divorces shall not be granted for adultery . . . when the party seeking the divorce has also been guilty of adultery under such circumstances as would have entitled the opposite party, if innocent, to a decree."[8] Classes three, four, and five are represented by only one state each, Minnesota, Kentucky, and West Virginia, respectively. Minnesota's enactment confers upon the court discretion as to whether a recriminatory offense should be deemed a bar to a divorce.[9] Kentucky's statute limits the application of the recrimination doctrine to the situation where a spouse pursuing a divorce on the ground of the other's habitual drunkenness for one year has himself committed the same transgression.[10] West Virginia's enactment declares adultery to be the only recriminatory defense allowed, but adds that proof of that will bar the complainant's action for a divorce regardless of the ground upon which he is suing.[11] Finally, the sixth class consists of those jurisdictions which have acts imposing the doctrine of comparative rectitude.[12]

The eighteen jurisdictions which lack a statute embodying the recrimination doctrine recognize it as a common-law defense under at least some circumstances.[13] In eleven of these states any misdeed by complainant amounting

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STAT. § 2A:34-7 (1952); N.Y. DOM. REL. § 171 (Supp. 1963); ORE. REG. STAT. § 107.070 (1961); PA. STAT. ANN. tit. 23, § 52 (1955); TENN. CODE ANN. § 36-811 (1955); TEX. REV. CIV. STAT. art. 4630 (1960).

In Illinois, Indiana, and Maine the courts have ignored the statutory limitation and applied the recrimination doctrine in divorce actions based on grounds other than adultery. Comment, 41 CALIF. L. REV. 320 (1953).

Although Florida's statute is framed in imperative terms, it has been decided that recrimination is a discretionary defense to a divorce in that state. Stewart v. Stewart, 158 Fla. 326, 29 So. 2d 247 (1946).

Notwithstanding the terms of the Texas statute, the courts of that state have embraced the doctrine of comparative rectitude. Dunn v. Dunn, 217 S.W.2d 124 (Texas 1949); McFadden v. McFadden, 213 S.W.2d 71 (Texas 1948).

8. IND. ANN. STAT. § 3-1202 (1946).

9. It is provided in MINN. STAT. § 518.06(9) (Supp. 1963) that: "A decree of divorce *may be adjudged* to either husband or wife notwithstanding that both have conducted themselves in such manner as to constitute grounds for divorce." (Emphasis added.) MINN. STAT. § 518.08 (1947) provides:

> In any action brought for a divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce in the following cases:
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> . . . .
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> (4) When it is proved that the plaintiff has also been guilty of adultery under such circumstances as would have entitled the defendant, if innocent, to a divorce. (Emphasis added.)

10. KY. REV. STAT. ANN. § 403.020 (1963).

11. W. VA. CODE ANN. § 4714 (1961).

12. KAN. GEN. STAT. ANN. § 60-1506 (1949); NEV. REV. STAT. § 125.120 (1957); OKLA. STAT. ANN. tit. 12, § 1275 (1961).

13. See Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 242 (1942).

to a ground for divorce may bar his divorce suit, irrespective of the ground upon which his action is based.[14] In summary, some form of the recrimination doctrine is recognized everywhere in the United States. Approximately one-half of the states apply the broadest concept of the doctrine—the court *must* deny a divorce to *any* applicant who is shown to be guilty of misconduct constituting *any* ground for divorce.

One may reasonably inquire why the recrimination principle has been so warmly received in this country. The courts have advanced six grounds for justification of the doctrine. Four of them, which may be termed "legalistic," are the following:

1. The doctrine has over 2,000 years of acceptance as evidence of its soundness.
2. A person applying for a divorce must come into court with clean hands.
3. When the parties are *in pari delicto* the court should aid neither.
4. Marriage is a contract, and the complainant, having breached the agreement himself, has no standing to demand relief.

The other two grounds, which may be termed "policy-oriented," are these:

5. The recrimination rule by rendering divorces more difficult to obtain promotes marital stability.
6. The doctrine serves to deter immorality, since an individual is less likely to commit adultery (or any other marital offense) if he knows that he may thereby render himself unable to obtain a divorce at some later time.

The recrimination principle admittedly has ancient origins, for it existed in the Roman legal system.[15] But there the form and effects of the doctrine were much different from their modern counterparts. In the Roman law the principle was embodied in the doctrine of *compensatio criminis* (a set-off of guilt), which was purely a rule of property law.[16] A Roman husband could by his own unilateral act divorce his wife, and no judicial sanction whatsoever was necessary.[17] In time, however, the law began to accord a nonadulterous wife some protection by permitting her to recover her dowery upon a divorce. Although this right was normally denied to an adulterous wife, the doctrine of *compensatio criminis* enabled her to recapture her dowery in spite of her licentiousness if she could show that her husband was also

14. See *id.* at 245.
15. See COMM. OF THE ASS'N OF AMERICAN LAW SCHOOLS, SELECTED ESSAYS ON FAMILY LAW 937 (1950).
16. Beamer, *supra* note 13, at 217.
17. *Ibid.*

guilty of adultery. The operative principle behind this rule was that equal offenses cancel each other. As Lord Stowell, the judge mainly responsible for the introduction of recrimination into Anglo-American law, has noted:

> [The recrimination doctrine] could not be applied directly, in . . . [the Roman] system of law, to the immediate subject of *divorce*, because divorce being a matter altogether within the authority of the husband himself . . . the magistrate could have no power to apply any such principle to that transaction.[18]

In the twelfth century the principle of recrimination was adopted from the Roman law by canonists, who incorporated it in an addition to Corpus Juris Canonici.[19] The canonists appear to have had two reasons for adding a recrimination rule to church law: The doctrine frequently enabled the church to prevent a wife's being cast loose in a society in which unattached women had no place,[20] and it served a religious purpose by punishing the parties for their transgressions and thereby inducing them to atone for their misdeeds.[21] Evidence that the canonists were interested in the doctrine's latter function are the words of Sir William Scott (later Lord Stowell), Judge of the Consistory Court, in *Beeby v. Beeby*:[22]

> It is not unfit . . . that he should not be allowed to complain of the pollution which he himself has introduced; that he, who has first violated his marriage vow, should be barred of his remedy: the parties may live together, and find sources of mutual forgiveness in the humilation of mutual guilt.

As formulated by the canonists, the recrimination rule permitted a spouse accused of adultery in a proceeding for a divorce *a mensa et thoro* (from bed and board) to defend by showing that the complainant had also been unfaithful.[23] In the canon law the doctrine was limited to the divorce *a mensa et thoro*, because the church did not recognize a divorce *a vinculo matrimonii* (absolute divorce from the bond of marriage).[24]

In the 1602 English case of *Rye v. Foljambe*,[25] a divorce action brought on the ground of adultery, the Star Chamber decided that the only kind of divorce possible in England was a divorce *a mensa et thoro*. Between 1602 and 1857, when Parliament established the Court of Divorces and Matrimonial

18. Forster v. Forster, 1 Hagg. Con. 144, 147, 161 Eng. Rep. 504, 506 (1790). (Emphasis added.)
19. See Scott, *The Doctrine of Recrimination in Divorce Proceedings*, 21 ROCKY MT. L. REV. 408 (1949).
20. See Beamer, *supra* note 13, at 213.
21. *Id.* at 214.
22. 1 Hagg. Ecc. 787, 790, 162 Eng. Rep. 755, 756 (1799).
23. See Comment, 13 ORE. L. REV. 335 (1934).
24. *Ibid.*
25. 3 Salk 137, 72 Eng. Rep. 838 (1795).

Causes, the ecclesiastical courts—the only judicial bodies in England having jurisdiction over matrimonial actions[26]—consistently applied the recrimination doctrine in actions for divorce *a mensa et thoro* on the ground of adultery.[27] (The Matrimonial Causes Act significantly modified the recrimination rule by giving the court discretion whether or not to decree a divorce when the complainant was shown to have committed a recriminatory offense.[28] The court retains this discretion under the present English law.[29])

The historical origin of the recrimination doctrine indicates that it was initially confined to divorces *a mensa et thoro* and that the only recriminatory offense recognized was adultery. In the United States approximately one-half of the states apply the doctrine to absolute divorce where the applicant is guilty of any conduct which constitutes grounds for divorce. It is suggested that the historical origin of recrimination does not justify the doctrine as it now operates in the United States.

The "clean hands" justification of the recrimination rule was the basis for denying a divorce in *Hoff v. Hoff*[30] and *Phillips v. Phillips*.[31] In the former case the plaintiff sued for a divorce on the ground of extreme cruelty and his wife filed a cross-bill charging plaintiff with the same offense. The Michigan Supreme Court declared that the trial court, which granted the wife a divorce after finding the charges of both parties to be true, should have dismissed both bills.[32] Justice Cooley stated:

> A proper administration of justice does not require that courts shall occupy their time and the time of people who are . . . witnesses to the misdoings of others in giving equitable relief to parties who have no equities. And it is true of divorce cases as of any others that a party must come into a court of equity with clean hands.[33]

The *Phillips* case was a divorce action brought by a wife on the ground of gross neglect of duty. The defendant petitioned for a divorce on the same

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26. Note, 19 VA. L. REV. 400 (1932).
27. COMM. OF THE ASS'N OF AMERICAN LAW SCHOOLS, *op. cit. supra* note 15, at 939.
28. See Comment, 41 CALIF. L. REV. 320 (1953).
29. Matrimonial Causes Act, 1950, 14 Geo. 6, c.25. The relevant portion reads:
> [T]he court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—
> . . . .
> (ii) of cruelty . . . or
> (iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted . . . .

30. 48 Mich. 281, 12 N.W. 160 (1882).
31. 48 Ohio App. 322, 193 N.E. 657 (1933).
32. Since the wife alone appealed, and since the court could not without an appeal by the husband alter the decree to her prejudice, the court affirmed the judgment awarding her a divorce on her cross-bill.
33. 48 Mich. at 281, 12 N.W. at 160.

ground, and the trial court, deeming both petitions to be meritorious, awarded divorces to both parties. The Ohio Court of Appeals reversed, saying:

> There must not only be an injured party and a guilty party, but the injured party must be free from fault amounting to a legal ground for divorce . . . . Of course, an action for divorce is not strictly a chancery proceeding, but the equitable maxim that no litigant will be given relief where he does not come into court with clean hands is applicable to a party seeking a divorce . . . . This principle is the very foundation of the doctrine of recrimination . . . which has come to us from the canon law.[34]

The requirement that a plaintiff enter court with clean hands is a rule developed and applied in the equity courts and is not normally invoked in proceedings at law.[35] Although a few states commit divorce jurisdiction to courts of equity, a divorce action, unlike annulment, is not a proceeding traditionally entrusted to these courts. Since a court's power to grant a divorce rests solely on statute,[36] it is suggested that a divorce cannot justifiably be denied on the basis of a maxim appropriate only to equity matters. If the "clean hands" doctrine is nevertheless to be invoked in divorce actions, it should be invoked subject to the qualifications by which it is normally limited. Foremost among these qualifications is the principle that the maxim should not be employed when it would produce an unjust or unwise result.[37] "The maxim being founded on public policy, public policy may require its relaxation."[38] It would therefore seem that the "clean hands" rule cannot properly be advanced to justify use of the recrimination doctrine in those cases where denial of a divorce appears unwise.

Employment of the *"pari delicto"* maxim to justify application of the recrimination rule is illustrated by *Mattox v. Mattox*,[39] where a wife sued for divorce on the ground of adultery. During the course of the proceedings it was revealed that she was guilty of the same misdeed, and her suit was dismissed. The court stated: "These parties are in pari delicto, and to grant relief to either of them would be offering a bounty to guilt."[40] The two objections discussed above to invoking the clean hands doctrine in divorce cases also apply to using the *pari delicto* rule in such actions. The latter maxim, like the former, being a creature of equity jurisprudence, is not appropriate in a divorce proceeding.[41] If, however, it is to be employed it should be limited

34. 48 Ohio App. at 324, 193 N.E. at 658.
35. 2 POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 398 (5th ed. 1941).
36. CLARK, DOMESTIC RELATIONS 42 (1954).
37. Note, 27 So. CALIF. L. REV. 220 (1953).
38. Evans v. Evans, 157 P.2d 495, 502 (Ore. 1945) (dissenting opinion).
39. 2 Ohio 233 (1826).
40. *Id.* at 243.
41. 2 POMEROY, *op. cit. supra* note 35, § 403.

to the situation where the court considers its use necessary to insure a just result.[42] In *Saylor v. Crooker* the court stated: "Equity does sometimes interfere to relieve one of two parties who are in pari delicto. It will do so if its forebearance would result in a still greater offense against public morals and good conscience."[43]

The argument that one who has himself breached the marital contract has forfeited his right to complain of his spouse's breaches appears in *Tillison v. Tillison*,[44] and *Richardson v. Richardson*.[45] In the former controversy a husband sought a divorce on the ground of adultery. His wife was permitted to plead and to present evidence of intolerable severity. With reference to the wife's recriminatory allegations, the court said:

> The doctrine of recrimination in divorce cases rests upon the principle that a person shall not be permitted to complain of a breach of contract which he himself has violated . . . . There is no reason why the rights of parties under the marriage contract should not rest on as secure a basis as mere property rights.[46]

The *Richardson* case was a divorce suit initiated by a wife on the ground of adultery. During the course of the trial, it was established by her own testimony that the plaintiff had abandoned her husband without justification. The court dismissed the complaint, stating—

> Marriage in this state is a civil contract and each party is bound to live up to it. . . . [P]laintiff broke her contract with defendant and without justifiable cause . . . . By every rule of construction it seems to me that the right to relief, in these cases, as in all cases of contract, must be predicated as well upon good faith of and honest performance by the complaining party as upon bad faith and nonperformance on the part of the other party. I cannot subscribe to any such doctrine as that, in the marriage relation, one party, may, without cause, desert the other and then trade on that other's not maintaining continence. By first breaking the contract of marriage . . . plaintiff forfeited her right to demand relief for defendant's subsequent breach of it.[47]

The basic flaw in the breach-of-contract theory of the recrimination doctrine lies in the fact that marriage is much less a contract than a status—and a status in which the state is vitally interested.[48] That the marital relation differs fundamentally from an ordinary commercial contract was emphasized

42. Note, 29 MICH. L. REV. 232 (1930).
43. 97 Kan. 624, 625, 156 Pac. 737, 738 (1916).
44. 63 Vt. 411, 22 Atl. 531 (1891).
45. 114 N.Y. Supp. 912 (1906).
46. 63 Vt. 411, 412, 22 Atl. 531, 532 (1891).
47. 114 N.Y. Supp. 912, 914-15 (1906).
48. CLAD, FAMILY LAW 3 (1958).

in *Maynard v. Hill*.[49] There the United States Supreme Court decided that article I, section 10 of the United States Constitution, prohibiting state legislation impairing the obligation of contracts, did not invalidate an Oregon Territory enactment dissolving Maynard's first marriage. The court stated:

> [W]hilst marriage is often termed by text writers and in decisions of courts a civil contract . . . it is more than a mere . . . contract . . . . It is an institution, in the maintenance of which in its purity the public is deeply interested . . . . When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest . . . upon the general law of the State . . . .[50]

It would appear that a divorce court should be reluctant to apply contract rules to a situation in which the best interests of the state and of the parties are not served by their application.

Do the policy-oriented reasons offered in defense of the doctrine justify its existence? The first—the thesis that the recrimination principle promotes marital stability by making the marriage bonds more difficult to break than they would otherwise be—is expressed in *Richardson v. Richardson*:

> All good people know that marriage is the mother of purity and virtue and the guardian angel of the human race; that the family is the . . . promoter of all our best achievements. For these reasons when, as now, the moral sense of a large part of the community seems to be dulled and deadened as to the importance and sacredness of the marriage tie . . . it is high time that . . . the servants of the law as well as its ministers should put up bars . . . .[51]

Admittedly, to the extent that the recrimination rule is not circumvented by collusion[52] it does render a divorce more difficult to obtain than would be the case in the rule's absence. However, it does not follow that the doctrine promotes marital stability. It is unlikely that the parties will ever resume cohabitation. The gradual liberalization of American divorce laws over the past few decades may be ascribed to a gradual realization that the denial of

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49. 125 U.S. 170 (1888).
50. Maynard v. Hill, 125 U.S. 190, 210 (1888).
51. 114 N.Y. Supp. 912 (1906).
52. In DeBurgh v. DeBurgh, 39 Cal. 2d 858, 864, 250 P.2d 598, 604 (1952), Justice Traynor observed—

> It bears noting how frequently divorces are uncontested. In many cases neither spouse is "innocent," and yet by agreement, one of them defaults to ensure a divorce. Thus, a strict recrimination rule fails in its purpose of denying relief to the guilty. Moreover, it exerts a corrupting influence on the negotiations that precede the entry of such a default. The spouse who more desperately seeks an end to a hopeless union is penalized by the ability of the other spouse to prevent a divorce through the assertion of a recriminatory defense, and the more unscrupulous partner may obtain substantial financial concessions as the price of remaining silent.

a divorce seldom revives a broken marriage.[53] If a divorce is warranted when only one party is guilty of marital transgressions, it would seem to be even more warranted when both are guilty. "[T]he *double* offense renders *slight* the chance that the *marriage will be of further social value. . . .*"[54] It is an anomaly that the more the parties antagonize one another, the less opportunity they have to end their marriage. That the termination of a marriage otherwise than by natural death is a deplorable occurrence is undeniable; but if the marriage is such a total failure that both spouses have come to hold their conjugal obligations in contempt, the relationship is no longer an asset to the parties or to the state.

The other policy-oriented defense frequently advanced in behalf of recrimination is that it serves to deter immorality.[55] It is submitted that the doctrine not only fails to deter immorality, but actually fosters it. For example is it realistic to suppose that a husband or wife who is inclined to commit adultery, or any other marital offense, is likely to desist out of fear that his actions will enable his spouse at some future time to defeat his petition for a divorce? That the doctrine ever produces such a result is doubtful. The spouse who commits adultery is normally secretive about the act and does not expect his mate to learn of the deed. Cruelty, the most commonly employed ground for divorce[56] represents a pattern of conduct, and it is not likely that an individual with propensities toward cruelty will (or even could) stifle these propensities for any substantial period of time in order to maintain his ability to procure a divorce.

The recrimination doctrine may actually contribute to immorality since the denial of a divorce to a man and woman who are unable to live together does not purge them of emotional and physical needs. Unable to satisfy their needs within the law, they are likely to satisfy them outside of it. In the words of one writer,

> Is it logical to assume that a man and a woman who still possess the physical capacities for sexual intercourse and the normal desires for association with members of the opposite sex, are going to harness those natural feelings because the court has declared them both at fault and denied a decree?[57]

Not infrequently the predictable end-result of the recrimination doctrine's application is an illicit relationship, followed by the birth of illegitimate children.[58]

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53. See Beamer, *supra* note 13, at 249.
54. Note, 29 MICH. L. REV. 232, 234 (1930). (Emphasis added.)
55. See Beamer, *supra* note 13, at 252.
56. JACOBS & GOEBEL, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS 428 (4th ed. 1961).
57. Scott, *supra* note 19, at 411-12.
58. *Ibid.*

That the objectionable aspects of recrimination have not gone unnoticed is evidenced by the fact that a number of jurisdictions have significantly modified the rule. The modifications have taken two forms: the adoption of the doctrine of comparative rectitude and the application of recrimination as merely a discretionary bar to a divorce. Under the doctrine of comparative rectitude the court will grant a divorce to the party who is less at fault.[59] The comparative rectitude theory is embodied in the statutory law of Kansas,[60] Nevada,[61] and Oklahoma.[62] The Kansas enactment, which is similar to that of Oklahoma, reads, "When the parties appear to be in equal wrong, the court *may* in its discretion refuse to grant a divorce . . . ."[63] The clear implication of this language is that a divorce may be decreed even when both parties have committed marital transgressions, and the act has been so construed.[64] The Nevada statute may go a little beyond the usual expression of the comparative rectitude theory:

> In any action for divorce when it shall appear to the court that both husband and wife have been guilty of a wrong or wrongs which may constitute grounds for a divorce, the court shall not for this reason deny a divorce, but in its discretion may grant a divorce to the party least in fault, if both parties seek a divorce, otherwise to the party seeking the divorce, even if such party be the party most at fault.[65]

The states of Arkansas, Kentucky, Louisiana, Texas, and Utah have accepted the comparative rectitude theory by judicial decision.[66] Recrimination is now considered a discretionary defense to a divorce in California, the District of Columbia, Florida, Georgia, the Virgin Islands, Washington,[67] and Minnesota.[68] In these jurisdictions, unlike those following the comparative

59. See 12 AM. JUR. *Divorce and Separation* § 265 (1936). In Louisiana, which has adopted this doctrine, the court will refuse to decree a divorce if it finds the parties to be equally culpable. Wals v. Swan, 221 La. 329, 59 So. 2d 409 (1959).

60. KAN. GEN. STAT. ANN. § 60-1506 (1949).

61. NEV. REV. STAT. § 125.120 (1957).

62. OKLA. STAT. ANN. tit. 12, § 1275 (1961).

63. KAN. GEN. STAT. § 60-1506 (1949). There is one significant difference between the Oklahoma act and that of Kansas. The former provides for the granting of divorces to *both* parties in the situation where both spouses are at fault, while the latter contemplates the giving of a divorce to the less blameworthy party if to anyone. See Lassen v. Lassen, 134 Kan. 436, 7 P.2d 120 (1932) and Roberts v. Roberts, 103 Kan. 65, 173 Pac. 537 (1918). The words "in equal wrong," as used in the Kansas statute, mean "in equal *statutory* wrong" (all of the statutory grounds for divorce being accorded equal weight), rather than "in equal moral wrong." Day v. Day, 71 Kan. 385, 80 Pac. 974 (1905).

64. Roberts v. Roberts, 103 Kan. 65, 72, 173 Pac. 537, 540 (1918). In this case the court observed: "[T]he legislature has vested in the district court discretion to refuse a divorce when it appears that the parties are in equal wrong. . . . The converse and necessary concomitant of discretion to refuse is discretion to grant."

65. NEV. REV. STAT. § 125.120 (1957).

66. See 27A C.J.S. *Divorce* § 67 (1959).

67. See 17 AM. JUR. *Divorce and Separation* § 264.

68. MINN. STAT. §§ 518.06(9), 518.08 (Supp. 1963).

rectitude theory, it makes no difference which party is more at fault. The decision to grant or deny a divorce is based upon such criteria as: the likelihood of reconciliation, the effect of the disharmony on the physical and mental health of the parties, and the extent to which the discord is harming the children.[69] These factors influenced the court's decision in the leading case of *DeBurgh v. DeBurgh*.[70] The trial court, applying the doctrine of recrimination, denied a divorce to a petitioning wife and a cross-petitioning husband after finding that both parties were guilty of extreme cruelty to one another. The Supreme Court of California reversed, stating that the wording of California's recrimination statute reveals a legislative intent that the recrimination rule be merely a discretionary bar to a divorce.[71] The court stated:

> It is apparent . . . that the Legislature intended that divorce cases involving recrimination be governed by the same principles that apply generally throughout our jurisprudence. Although the plaintiff's fault has always been regarded as an important element in the decision of any case, our courts have traditionally refused to exalt that element above the public interest . . . . It is clear that the Legislature, in relying upon judicial principles of general application, intended that in divorce litigation the fault of the plaintiff should have no more significance than elsewhere in the law.[72]

Minnesota is the only jurisdiction other than California in which recrimination is made a discretionary bar by statute.

The development of the comparative rectitude and discretionary-use theories represents an encouraging phenomenon, and it is hoped that more jurisdictions will see fit to adopt one of these approaches. If any case merits the granting of a divorce, it is the situation where both parties are guilty of marital misconduct. The marriage of such a couple is nearly always a derelict, and neither the spouses, their children, nor society is benefited by the continuance of such a relationship.

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69. 27A C.J.S. *Divorce* § 67 (1959).

70. 39 Cal. 2d 858, 250 P.2d 598 (1952).

71. CAL. CIV. CODE § 111 provides that divorces must be denied upon a showing of recrimination. "Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce." CAL. CIV. CODE § 122.

72. 39 Cal. 2d at 866-67, 250 P.2d at 602-03.