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THE INSTABILITY OF THE FAMILY:
A JURIDICAL DIAGNOSIS

By Fred Ruiz, LL.B., J.D.

ANALYSIS OF THE ARGUMENT—Two major contentions are upheld by this paper: First, that it is the duty and the necessity of our political, legal and social institutions to sanction and maintain the nobility and integrity of the home as the seat of family life; Second, to exhibit the manner in which this necessary function of government should be discharged. In the order named, these two propositions are considered under several heads respectively, as follows: I. The discussion of the governmental sanction involves (1) The supreme importance of the family as the unit of social life and organized progress; (2) The fact that there exists and is increasing a marked instability of the family relations; (3) The direct, obvious and logical responsibility for this disastrous condition, resting upon the State because of its policy and practice in its political and legal systems; (4) The proofs of this responsibility are clear and convincing, and are required by the modern tendency to deny, defy and deride both the value of family stability and responsibility for its instability. II. How the State should perform its proper duty in the premises involves (1) The indissolubility of validly consummated marriage, as a fundamental tenet of Christianity; (2) The historical and judicial determination that our government is explicitly committed to Christianity, as the basis of its institutions and the spirit of its civilization; (3) The ideal indissolubility is not a mere religious abstraction, but a practical necessity, the disregard of which inevitably and universally leads to political and social degeneracy; (4) Specific suggestions as to the sanctions the government owes to the ideal of indissoluble marriage.

It is apprehended that a substantial contribution might be made toward definiteness and clarity by an anticipation of the method of attack; a more informative expression of the object of this modest endeavor, and the means contemplated to achieve that object. The purpose of the paper is to established the contention (1) that our government, our institutions, our legislatures and our

1 A Thesis submitted to the Faculty of the College of Law of the University of Norte Dame, for the Degree of Juris Doctor, June, 1928.
courts must sanction the noble, dignified integrity of the home, and (2) to indicate how our political institutions should sanction the integrity and stability of the home.

Almost within the last generation, the family has come into public consciousness as the matrix of a constantly growing social problem. It is not alone an increase in the more obvious forms of family disorganization, such as divorce, separations and desertions, and marital discord, that cause concern; these explicit forms are recognized as but the overt expressions of a new conception of the family, uneasily felt but as yet largely undefined. It is precisely this new conception of the family that shall be, after all, the chief concern of this paper.

Although divorce and the other symptoms of marital discord and family instability are only expressions of this new conception of the family, yet this conception can not be intelligently discussed without a casual allusion to these symptoms. The discussion of a subject of this nature cannot possibly be confined in any one channel; its treatment cannot be purely technical or purely academic. Religion cannot be excluded; sociology, ethics and morals must be miscible with jurisprudence. Let these preliminary observations be remembered, and thoughts of incoherence and irrelevancy be indulgently reconsidered before they are allowed to settle.

I.

"The unit of the social state is the Family, first in the order of human development and fundamental in the constitution of organized society. However progressive and perfect may become the forms of social control through the ages, whatever laws and institutions impair the natural integrity of family life are essentially in derogation of the original unit of civilized society, and should be the subject of vigilant scrutiny and suspicion," are the opportune words of Judge Wootten, with a complacent allusion to this citation and the distinguished gentleman who authenticates it, the dire necessity of the integrity of the home will be dismissed.

But not only will the importance of the integrity of the home be thus passed by, but also the fact that this integrity is at present

very seriously impaired will be left to the daily observation of our papers and magazines and the life about us, with the pertinent observation that the annual report of the Federal Commerce Department shows that in 1926, marriages increased by 1.2 per cent over the 1925 total, while divorces increased 3.1 per cent, and that divorce continues to increase faster than marriage in the United States.  

There can be no safer vehicle for this argument than a dispassionate, authenticated review of the history of marriage, and the official judicial principles to which our courts have so lucidly subscribed and committed our political institutions. We need start no earlier than the so-called "Reformation". The "Reformation" "emancipated" the individual, and an immediate expression of this emancipation was the secularization of marriages—the recognition of marriage as a contract instead of as a sacrament—and the substitution of the civil for the religious ceremony. From that event dates the responsibility of the State, logical, fundamental and heavy, to exalt the dignified integrity of the home and "to guard them from disturbances from without".

It seems to have come from high places that the State is not in any way bound to preserve the integrity of the home; that this is rather a matter for the personal judgment of the individuals concerned; and that in the generous indulgence of these individual circumstances lies the welfare and stability of society, rather than in the sacrifice of the individual to an abstract social good. This attitude is spreading throughout the land like the hot, molten lava of the roaring volcano, it has already begun to rot the foundation of society, and the stench of this organic decomposition is polluting the very air that we breath.

But the responsibility of our political institutions is so clear that "those who run may read". When the State assumed control of these matters, it accepted the corresponding responsibility in much more unmistakable terms than a casual allusion to history would possibly reveal. It recognized the relation of marriage as a civil contract instead of a sacrament, but it made it plain, through its judicial tribunals, that it was to be recognized as a contract sui generis, not as an ordinary contract. It has made

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3 Ernest R. Nolway, "Family Disorganization" (1927).
it plain that the will of the parties, once the contract is consummated, shall be entirely subordinated to the will of the State speaking through its legislatures and courts for the public good. The Supreme Court of Maine has said that “It is not a contract within the meaning of the clause of the Constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation...the creation of the law itself; a relation, the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true basis of human progress.” The Supreme Court of the United States tells us that “It is something more than a mere contract. The consent of the parties, is, of course, essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of the purity of which the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.” These views have been questioned, but they have weathered the storm every time undisturbed, and today there is no dissent from them throughout the length and breadth of our land, and it would only be an affection of research to cite the judicial corroborations listed in these two cases.

But if the responsibility is on the “State”, it may be more specifically traced to the legislature. It is that unit of our political organization which is most directly burdened with this responsibility. The division of government into three departments, and the implied inhibition upon the legislative department to exercise judicial functions, was neither intended nor understood to exclude legislative control over the marriage relation. In fact, the power of prescribing by general laws what causes shall constitute sufficient ground for a divorce, and what shall be the consequence of a divorce founded on the ascertainment of these causes, is strictly within the legislative competency and its exercise is intrusted to

5 Adams v. Palmer, 51 Me. 481, pp. 484, 485.
the legislative discretion, and whether the legislation is wise or unwise may be a question on which opinions differ, but with it the courts have no concern; their duty is to enforce the law as they find it. The legislature may, therefore, authorize the granting of divorces by the courts for any cause deemed by it to be sufficient.

The family is the original cell, which by a process of multiplication has come to constitute the corpus of society. That is too obvious for citation of authority. Any elementary text in sociology or political economy will substantiate that statement. The purpose of law is to regulate society. The basic, natural and logical concern of the State and its political institutions, then, with the welfare, the tranquility and the stability of the family would seem to be too plain for argument. But the responsibility of our political institutions in this regard has been deemed a very important part of this paper, because our political institutions have not seemingly recognized their full responsibility, and proof will be advanced for that; because many of the prominent members of our profession have not been big enough to appreciate their duty in this regard, and proof will be given for that; because prominent and notorious social lights and popular celebrities have ridiculed, and some have criticized, rather naively, all concern about the stability of the family, and that will be substantiated; and, finally, because the public is becoming contaminated also with the notion of voluntary dissociation, if such an indulgent allusion may describe such a devastating evil.

Let us dwell first on the irresponsibility of our political institutions. It has been shown that the legislature is the institution primarily responsible for the care of the home. That is the branch of our government to say when and how and where the State shall intervene. A mere enumeration of the grounds for divorce established by the legislatures throughout the union will fill any sincere exponent of durable monogamy with apprehension, ranging as they do from the situation in South Carolina, where divorce is impossible for any cause, to that of Washington, where a decree will be rendered "for any other cause deemed by

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the court sufficient". But if the legislatures do not deem it politic to insist too much on the continuity of the marriage relation, let that aspect of the question be reserved for the second branch of the subject, where we have agreed to discuss the manner in which this responsibility should be borne. But the courts, where the power so majestically reposes to interpret the will of the legislature, have forgotten their very specific confinement to this power and the settled impropriety of exceeding it, and have positively pandered to public sentiment. Obvious to the true value of their charge, they have vacillated when they should have stood firm in defense of their charge. It need not be shown again how the State has declared that the contract of marriage shall be a peculiar contract, entirely beyond the will of the parties after it has once been consummated. But the courts have not adhered to this judicial principle.

Oh, yes, they proclaim it officially, but they have discharged it in practice. How completely this is borne out by everyday life about us! The legislature may say, for example, that divorce shall be granted for extreme cruelty. What constitutes extreme cruelty must be decided by the courts. Judicial precedence literally exudes to show that there must be either actual violence committed, attended with danger to life, limb or health, or a reasonable apprehension of such violence. There may be much unhappiness from unkind treatment and from violent and abusive language, "but the court ought not to interfere, it must leave the parties to the correction of their own judgment; they must bear as well as they can the consequences of their own choice." That logic rings true. The State has said the will of the parties shall not prevail. So the courts continue to say today, but they argue that this husband has been extremely cruel to his wife because he has called her a bad name, or, say, the mental anguish in which the wife has so pitilessly thrown her husband by a thoughtless charge of infidelity or adultery, constitutes unmistakable extreme

12 Smith v. Strother, 8 P. (Cal.) 852 (Semble).
13 Robinson v. Robinson, 66 N. H. 600 (Semble).
17 Harris v. Harris, 2Ph. Ecc. 111.
cruelty. That would surely be to pander to public sentiment, and an out-right concession to individualism, though disguised under an obedience to the will of the legislature and a gesture for the public good.

Is that possible? Well, it has been done. Petty vexations, even though they wear out the animal machine, are certainly not cases for legal relief, not unless the will of the parties is to be substituted for the jurisdiction of the State, and the implication of the public good is to be discarded for the satisfaction of the individual. "People must relieve themselves against such natural vicissitudes of life as well as they can, by prudent resistance,—by calling in the succors of religion and the consolation of friends; but the aid of courts is not to be resorted to in such cases", is the consoling attitude of the Supreme Court of New Hampshire. But the Supreme Court of Georgia seems to have forgotten that judicial sanity and precedence and public policy demand the will of the parties be entirely suppressed after the consummation of a valid marriage, and it has gone to the ridiculous extent of legalizing polygamy by allowing a divorce for nagging.

So it seems, then, not to multiply illustrations further, that the courts have a tendency to regard the statutory conditions of the legislature as mere blanket terms, "The testimony of the cases showing a variance between the legal cause for divorce and the natural cause, and so legal causes thus represent nothing more than standards to which family discord must be made to conform before the State will grant a divorce".

"And so we have to reckon with collusive divorce, which, when both parties are agreed on severance of the bonds of matrimony, makes incompatibility the decisive factor, provided sufficient evidence be trumped up to satisfy one of the legal statutory grounds." That is the outspoken opinion of a recent judge of the Probate Court of Boston. Hence we blame the courts for not shouldering the full responsibility that is theirs; and we charge that "the divorce-court judges, whom we might expect to

18 178 Cal. 548; See also 8 Ore. 100; 60 Tex. 61; 76 Ind. 136; 23 Ind. 546. For acts of "cruelty" other than physical, see notes in 15 L. R. A. (N. S.) 300; 13 L. R. A. (N. S.) 224; 12 L. R. A. (N. S.) 820; 2 L. R. A. (N. S.) 669.
19 66 N. H. 600.
20 125 S. E. 856.
21 Ernest R. Mowrer, in "Family Disorganization" (1927).
find eager to detect the underlying causes of divorce, give little or no attention to its underlying causes”. Such is his experience of Judge Hoffman of the Domestic Relations Court of Cincinnati. The Judge is quoted as saying that, “In a city of one of the southern states, a judge grants a divorce in all cases, holding that the mere fact of the filing of the complaint is sufficient to warrant a decree”; and that “there are few divorce applications refused in any jurisdiction; all are granted without any investigation of the family conditions, or any inquiry as to the truth of the charges”. It does seem, then, that our political institutions have not recognized their full responsibility, and such is the apprehension of no less a distinguished commentator of the law than Schouler, who has written that “At the present rate and in the present direction, there is danger lest the sanctions of the courts to marriage and divorce be practically superseded during the next century by private discretion and individualism.”

Again, it was suggested that it might not be futile to expatiate on the obvious responsibility of our political institutions to defend the integrity of the home, because many of the prominent members of the Bar have not been big enough to appreciate their duty in this regard. This phase need not be unduly elaborated, but one need only to be reminded of the fact that the lawyers have a great deal to do with the nature and amount of the evidence introduced into court and the manner of its presentation, as officers of the court, in order to distribute to them their just due of the blame already indicated that rests so heavily on our courts for this exaggerated leniency in our marital affairs. Some time ago, a Divorce Proctor was appointed by the courts of Kansas City, whose duty it was to appear in behalf of the State in uncontested divorce cases, and he found that people were getting divorced for such trivial things as a dislike of each others hair, under the trumped-up charge of incompatibility; and he found also that he could not decide whether to blame the perjurers themselves or the lawyers,—“the dishonest attorneys who are only after the money the divorce decrees will bring them”, he is reported as having described them. He had letters in his files from the attorneys on the other side suggesting that they ‘get together, because it would

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be easy to separate the couple and divide the pile’ and other abundant evidence of his suspicions”. And he is credited with this confession: “From what I have seen and learned of the viewpoint of people of today of marriage and divorce, I am convinced that not once case in ten is legitimate.”

Furthermore, the opinion of prominent members of the Bar, nationally known men, on these matters, necessarily influences the public mind. Judge Lindsey very distinctly repudiates the judicially settled characterization of the marriage relation as the sole concern of the State and beyond the whim of the individual. The notorious Clarence Darrow, the self distinguished criminologist, has displayed the inane asininity,—and these strong words have passed unrestrained because such a raucous contradiction of judicially settled polity deserves no other name,—this gentleman has displayed the inane asininity to express the thought that to him, from whatever standpoint, “The only question relating to divorce is: Does it promote pleasure or pain?” That would be a more fitting question for swine in the contemplation of a nice, muddy puddle of water.

The responsibility of our political institutions to sanction the dignity and integrity of the home, so patently abvious, has been undertaken to be shown because there have been, there are, and there will be, notorious social lights and popular celebrities to ridicule all concern about the stability of the family. From the pages of a daily newspaper of only yesterday, to denote with that word that it is very recent, a distinguished matron seems to look at the reader very complacently and above the picture the words: “Tells her idea of motherhood”. The lady is none other than Miss Sylvia Pankhurst, age thirty seven, militant suffragist leader of pre-war days in England, and her ideas of motherhood are nothing less than very remarkable and quite startling. She does not believe in marriage, and she astonished her neighbors by announcing the birth of a son, in the columns of a labor newspaper, and, expressing herself as strongly opposed to the marriage contract, she explained that her son was the child of a happy union of affection, declining to reveal the name of her

26 Judge Ben Lindsey, “Modern Youth”.
27 Chicago Herald, Tuesday, Dec. 27, 1927.
son's father because he was averse to publicity. The choice of words of this exuberant woman is flagrant,—and fragrant—contempt of court: "I consider marriage is a personal question", she is reported to have said, "and should rest entirely upon affection. It is regrettable it should be subject to a legal contract." 28

How vividly come to mind those beautiful, judicial concepts of marriage, undisturbed to this day as the law of the land: "the purest social tie and the true basis of human progress"; 29 "the foundation of the family and of society"; 30 "the true 'officinae gentium'"; "the nurseries of the State". 31 And, let it be written, that this travesty on the most sublime of social relations be more fully exposed: the sensational announcement of this reputedly sensational woman will have the support and the sanction of the Liberal Church of Colorado, and Bishop Frank Rice of the Liberty Church announced in Denver, Saturday, the seventh of April, that a resolution of commendation and indorsement of Miss Pankhurst's action had been unanimously adopted at a special session of the ecumenical council of resident cardinals, archbishops, bishops and other officials of the church, a copy of the resolution to be sent to Miss Pankhurst. 32

The screen celebrities, ephemeral perhaps, but in the public eye just the same, and oracles to many people, have their ideas on motherhood and marriage also. Seeking a divorce from her second marriage, the incomparable Gilda Gray insisted "the grounds are nobody's business; they are purely personal". 33 She will not even concede the court the dignity of a coffee pot. And Jessie Reed, former "Follies" girl, obtained her fourth divorce with no apparent intention of remaining single or repenting her fourth estrangement, observing that "Three years of married life is about enough for anybody." 34

Finally, the obvious responsibility of our political institutions to sanction and exclusively supervise and control the marriage relation has been thus ultimately substantiated and authenticated, because the public has become contaminated with the notion of voluntary dissociation and has begun to believe that

28 *The South Bend Tribune*, Thursday Eve., April 5, 1928.
29 51 Me. 481.
30 125 U. S. 190.
32 *Chicago Herald*, Sunday, April 8, 1928.
33 *South Bend Tribune*, Monday, December 14, 1928.
34 *Chicago Et e. American*, Saturday, February 4, 1928.
perhaps it is true after all, that it is not the business of the State, and that it is not a matter of “the highest public concern.” This episode of our story may be told in four words: Feminism, Individualism, Emancipation and Burlesque. Recently, just a few months ago, a distinguished economist in one of our universities wrote a very interesting book, scholarly and generously authenticated, on family disorganization. In this book, the professor tells us a thing or two about a very interesting popular movement in our very midst today, “the Feminist movement”. The aim of this popular movement is explained as: “more freedom in sexual relations for women”!

The outstanding exponent of this movement is credited with this philosophy: “It is a lying contention that the conduct which in these respects is regarded as proper corresponds in any way to our truly vital needs. The truth is that the sexual life is the focal point of every healthy being whose instincts have not undergone partial or complete atrophy, that upon full satisfaction of sexual needs depends the true equilibrium of the mental, no less than the physical personality”. Mr. Mowrer cites her as one of the true representatives of the modern feminist movement, and quotes her and others to the effect that this attitude is one of the aims of that movement: more freedom in sexual relations for women. And “Feminism thus recognizes”, continues Mr. Mowrer, “few obligations to society as a basis for family life, but rather stresses the amatory and sexual needs of the individual.” A recent edition of one of our dailies reports the completion of plans by the woman’s party to put Congress on record on a proposed equal rights amendment to the federal constitution, and the news item concludes with this paragraph: “Despite the advent of woman suffrage and the general progress of the feminist movement, the woman’s party contends that women still have a hard fight ahead to achieve a complete equality of opportunity with men”.

Individualism is another influence, or philosophy, or call it what you please, permeating the public consciousness, shaping public opinion, and rather palpably affecting the popular notions of the marriage relation. This philosophy preaches the personal schematization of life,—making one’s own definitions and deter-

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35 Ernest R. Mowrer, "Family Disorganization, 1927.
37 South Bend News-Times, Thursday, December 29, 1927.
mining one's own behaviour norms. Carrying this ideal into family relations, the individual asserts his right to seek whatever union will give him the greatest opportunity to express his personality and to dissolve as freely marital ties when they become oppressive.38 We must give serious attention to the fact that in the United States there is a great divergence of inherited standards, laws and customs regarding the basis of marriage, the righteousness or wickedness of possible divorce, and the propriety or impropriety of remarriage after domestic changes, which confuses the matter. For want of a clear ideal of religious values and social demands involved, the rule of personal desire and individual idiosyncrasy has too great predominance. Here, where ethical doctors disagree, and moral teachers differ, youth makes its ideal an exaltation of romance in marriage and mature years demand the right of the most extreme individualism.

Finally, to show how little the public regards the marriage relation as "the highest public concern", let us take the last two together: Emancipation and Burlesque. The dependence of the woman upon the man, and the peculiar nature of all the economic functions of the old fashioned home were always a vital constituent in the stability and solidarity of the home.

Specialization in industry and the movement of population from the country to the city have taken away almost all the economic functions of the home and led to the "emancipation" of women. The multiple opportunities of urban life for women to become self-supporting have released her from economic dependence upon man. Hence, marriage is not so imperative as formerly, and after marriage, the woman can break the family relation without necessarily endangering her livelihood. As late as 1860, divorces were still rare.39 It was not until after the Civil War that the doctrine of woman's emancipation began to show results. The views of the earlier exponents of the emancipation of women were distorted, and they were made to appear as fullfledged proponents of a free-love campaign. So unpopular was their campaign that they were ridiculed and ostracized. Influential people of that time were not disposed to tolerate any views impairing the marriage relation. But the fashion of publicity making light of

38 Thomas' "The Unadjusted Girl", p. 86, cited by Mowrer, ante.

39 North American Review, April, 1860.
marriage began to spread. So-called comic papers of wide circulation and vaudeville shows abounded in jokes and alleged witticisms on marriage, while serious writers professing to have a mission wrote books and plays either openly or adroitly attacking and mocking marriage. By 1881, the divorce question had become such a scandal that the "New England Divorce Reform League" was organized by leading Protestants and Catholics. It was made a national organization in 1885, it was at the solicitation of this body that the United States government made its first investigation of marriage and divorce, and from those investigations accurate figures are obtainable for the forty years from 1867-1906, showing a steady and alarming increase in the divorce rate from the first report to the last. With such an attitude, the public cannot be said to regard the marriage relation as "the purest social tie" and "the surest basis of human progress". The levity with which marriages are often contracted is amazing and disheartening. Young persons who have never considered each others' spiritual fitness for life-long companionship, who have not given a serious thought to the obligations of parenthood, rush into matrimony as if it were a transient feté. Some times the wedding is made a prank or a show at a fair, on a train, in an airplane, or elsewhere, to gain prestige for "smartness". A couple were married recently in an airplane as it circled above Portsmouth, Ohio, the ceremony being a feature of the opening of a new air field. In a recent case, the parents decided to separate and flip a coin for the child. A couple were recently married in a fraternity-house cellar in Annapolis, Maryland, substituting "until love dies" for "until death do us apart". Fraternity men dressed in female attire acted as bridesmaids. This is not the worst of it. Such persons never seem at a loss to find a justice or a minister to "solemnize" their travesties of the nuptial vows. The following description of a notorious wedding resort which formerly existed in Michigan illustrates the shocking frivolity with which the most important of human relations is sometimes treated: "It is estimated that fully 20,000 people will visit this

41 Gustavus Myers, "Rapid Increase of Divorce" in Current Hist. Mag., N. Y.
42 Chicago Herald, November 13, 1927.
43 Chicago Herald, February 20, 1927.
44 Times-Picayune, of New Orleans, February 7, 1928.
city to-morrow to attend the third annual Maçcabees' county picnic. It is thought to-morrow will prove to be the greatest day in the history of St. Joseph as well as Gretna Green of Chicago. Fully forty-four bridal couples will arrive from Chicago to take advantage of being married free, as is offered in a part of their program. The parties with matrimonial intentons, upon calling at the Marriage Temple, will be furnished by County Clerk Needham with their license and a handsome marriage certificate, free of charge, provided they consent to be married in public from the veranda of the hotel. Any clergymen in the city, upon request, will officiate. Hundreds of excursionists from Indiana will come for the express purpose of witnessing the ceremonies".45 On October 10, 1919, a press dispatch in a Los Angeles newspaper stated that at the Convention of the American Legion in Kansas City, the Rev. John W. Inzer, Chaplain of the legion, and a local jeweler had announced that all ex-service men might marry at the convention free of charge. Inzer would perform the ceremony free, the jeweler would furnish the ring, and the other expense of the ceremonies would be borne by the convention fund.46

So, then, the responsibility of the State and our political institutions to sanction and guard and promote the integrity and the solidarity of our homes and the stability of the marriage relation, while so much a matter of course, has been discussed, proved and authenticated because it has been questioned, disputed and burlesques. Now, let us examine the second object of this paper: How ought this responsibility be borne?

II.

In the elaboration of the previous argument, it was found necessary to begin with two presumptions. The symmetry is altogether fortuitous, but two presumptions must be requisitioned for this emergency also. In the fashion of the preacher, I take my text from the tenth chapter of Mark, second to the twelfth verses: "What, therefore, God has joined together, let no man put asunder". I preach the indissolubility of validly consummated marriage, and I urge that the responsibility of the State to guard and protect the stability and integrity of the marriage relation and our families and our homes demands nothing less, and

46 Idem.
nothing more, than the unremitting, relentless and adamantine sanctions of our political institutions to exalt the ideal of indissoluble monogamy,—the grim and inexorable determination of our political institutions to refuse, always and forever, under any and all circumstances, to dissolve any validly consummated marriage with complete emancipation of the parties. Here, indeed, there is burden of proof, and the very suggestion starts an audible murmer and a perceptible stir among the vast numerically preponderant recalcitrants, but that can only make the undertaking more profitable and interesting. Both the indissolubility of validly consummated marriage as a fundamental principle of Christianity, and Christianity as the essence of our political and social integration shall be presumed with a passing reference to the authorities amply substantiating them.

If the indissolubility of validly consummated marriage is a fundamental principle of Christianity, and our government is explicitly committed to Christianity, then the lassitude of our political institutions is a violent contradiction and a betrayal of the basic precepts of our political existence. Sufficient data and authority has been gathered to satisfactorily establish these observations; but to present all this material here would entail an undue prolongation of this paper. They shall be presumed, with just passing comment and a few allusions and sufficient citation of authority to justify the presumption. Christianity is the system of doctrine and precepts taught by Christ. There are many religions beside the Roman Catholic professing to follow the precepts of Christ, and many sects professing to be Christian, because there are as many differences of opinion as to what the precepts of Christ are; but the Catholic religion, more particularly the Roman Catholic stands firm, “the only breakwater to the advancing tide of social immorality in our country” in its recognition of marriage as a sacrament, as dissoluble, once validly consummated, only by death. Reputable and distinguished authorities have denied it: but history, unbiased refutes them all: Nicholas and Lothaire, Clement VII, Henry VIII, Catherine of Aragon

47 Webster.  
48 Albert Benedict Wolfe “Marriage and Divorce”.  
and Anne Boleyn and the loss of a great nation from the Faith; Pius, Napoleon I, Josephine and Marie Louise,—the lives and deeds of all of these are an embarrassing answer to those who try to impeach the prestige of the Church.

But the proofs of the Catholic Church for the divinity of the command that no man shall put asunder are as accessible and intelligible and conclusive as they are claimed to be authentic.\(^5\) The Church has analyzed, scrutinized, compared and reasoned and concluded these authorities to substantiate its position,\(^6\) and a distinguished layman gives us a scholarly and exhaustive treatment of them in the American Catholic Quarterly Review.\(^7\) And let the delusion never be harbored that the sacramentality of marriage is ornamental but let it be known that it is a vital attribute of the relationship itself.\(^8\)

Our nation has been explicitly and unmistakably committed to Christianity. The distinguished Dudley G. Wooten, jurist, scholar and author, at present teaching at the Hynes College of Law at the University of Notre Dame has sufficiently proved it. I refer you to him.\(^9\) The Christian religion was always recognized in the administration of the Common Law, and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized.\(^9\) Holland said in *Cowen v. Milbourne* "It has long been laid down, and has only been recently questioned that Christianity is part of the law of England."

The distinguished authorities cited prove both that the indissolubility of consummated marriage is a fundamental principle of Christianity, and that our own government is explicitly committed to Christianity, but because these authorities have been pointed out rather than cited and discussed, it has been thought best to consider these arguments presumed rather than proved; but the way is paved for the arresting interrogation of James Cardinal Gibbons "How can we call ourselves a Christian people,

\(^{50}\) Matt. XIX 12; Mark X 2-12: Luke XVI 18; 1 Peter 111, 1-7: Matthew V 31, 32.
\(^{51}\) Seventh Canon of the 24th Session of the Council of Trent.
\(^{53}\) Leo XIII, Encyc. "Arcanum".
\(^{54}\) "Church and State in The United States", in "The Catholic Builders of The Nation" Vol. 1 pp. 61-83.
\(^{55}\) T. M. Cooley, cited by Webster.
\(^{56}\) L. R. Ex., 230, 234.
if we so flagrantly, shamelessly, legally violate a fundamental law of Christianity?"\(^{57}\)

But the ideal of indissolubility is not a mere religious abstraction, but a practical necessity. That is why a student of the Law has chosen it as a fitting subject for a legal thesis, and its sociological and religious and ethical aspects have been incentives as evidence of its added importance, rather than deterring irrelevancies. Marriage is a contract made in due form of law, by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife.\(^{58}\) The law recognizes no other definition of marriage. The ideal of indissolubility is rather fundamental law than a mere religious abstraction. Our courts, and not alone the Church, tell us that "It does not mean a temporary agreement to dwell together for a time for the gratification of sexual desires, but it is essential that the contract be entered into with a view to its continuance through life."\(^{59}\) Of course this is not to say that a marriage may not be dissolved. It has already been indicated how and when and where and why the State has claimed the right to do that; but our courts, sensible, practical and political institutions and not religious, have recognized such a possibility as a contingency of so remote expectation as not to enter into the ordinary calculations of the duration of the relation of married life; as one of those extreme cases, which like earthquakes and tempests in the natural world, or like public executions in the history of individual existence, do, indeed, sometimes occur, but which no one feels bound to expect or provide against."\(^{60}\) And the law, as well as religion, "presumes that when parties enter into the bonds of matrimony, they do so with a full realization of the frailties of human nature and with full recognition of their duty of mutual forbearance of the faults of each other".\(^{61}\)

Justice Manning, speaking for the Supreme Court of Alabama has said that "The institution of marriage is indeed the most interesting and important of any in society. It is through the marriage relation that the homes of a people are created—those

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57 "Divorce", in Century, 78: 145–9 May 1909.
58 2 Bouvier, 2097.
60 William Mastechs v. John Stearns, 9 Vt. 325 (Semble).
homes in which, ordinarily, all the members of all the families of the land are during the part of every day assembled together; where the elders of the household seek response and cheer, and reparation of strength from the toils and cares of life; and where, in an affectionate intercourse and conversation with them, the young become imbued with the principles and animated by the spirit and ideas, which in a great degree give shape to their characters and determine the manner of their future lives. These homes, in which the virtues are most cultivated and happiness most abounds, are the true 'officinae gentium'—the nurseries of the State. While with their interior administration the State should interfere as little as possible, it is obviously of the highest public concern that it should by general laws adapted to the state of things around them, guard them against disturbances from without".62 That may possibly remind one of the impassioned flow of the Chautauqua lecturer, but this is not sentimentally; it is one of our own august judicial tribunals laying down the law of the land.

Now we have reached the proper stage to dispel a very fundamental error. There are many cases, very many of them, where the husband is unfaithful and abuses his wife and positively endangers her life and that of her children every day of their continued propinquity, and forbearance cultivates martyrdom. Is it politic, just or ethical to refuse them the right to dissolve such hopeless incompatibility? No! Decidedly not! Such a couple should separate, and the quicker the better; such a wife should petition for a divorce, and such a wife should readily obtain the same in any enlightened government. But that does not diminish the ideal of indissolubility; it makes it more difficult to understand but it does not dim the lustre of that ideal in any way; it does not prove that indissolubility is a mere religious abstraction. There are three distinct kinds of separations known to the law, viz., the declaration of nullity, separation and divorce. The first is merely a declaration of that which has only appeared to be a marriage, never to have been a marriage; the second allows the two to live apart but leaves no one free to marry again while the other lives; the third is a complete separation with the freedom

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denied by the second. The first two will cover all cases that have raised the question of the social and political expediency of indissolubility and leave the ideal of indissolubility—the unyielding determination of the State to never grant the third kind of separation to ever permit a re-marriage of the one during the life of the other of the parties—the only worthy ambition of a Christian nation in the solution of its domestic problems, and the only conclusion of political expediency in our domestic relations. The second method of separation is sometimes alluded to as a divorce “a mensa et thoro”, and that is why it may be said that a divorce might sometimes be granted, with undiminished loyalty to the ideal of indissolubility. So, one John Cowan, a distinguished medical doctor, with neither bias for religion or politics makes a contribution to our cause when he says “A wife who, although doing all that her best nature can do to make her married existence an enjoyment, is nevertheless abused, maltreated and wronged in any of the many ways that sordid, licentious, brutal husbands may demonstrate, is perfectly justified by the laws of Nature in separating or being divorced from such a husband, the same argument applying with equal force to the man when the wife is the transgressor. Yet, though I hold divorce to be necessary under these circumstances I do not allow that it is right for either man or woman to marry again”. The author is a doctor of medicine, not a theologian or a student of jurisprudence. What are his reasons? “It savors too much of uncleanness, adultery and fornication, and it runs contra to all that is pure, clean and chaste that a separated or divorced man or woman should marry again” And this profound student of human nature unsuspectingly tells us it is impolitic also: “Besides, such men and women are apt to make precisely the same mistake in forming new unions, making the institution that should be divine in its nature and observance, a mockery and a farce”. The temptation has been resisted to indulge in a very interesting discussion of the inconstancy of human emotions, and extensive and specific citations could be “dissected”, classical, analytical, and judicial to show how susceptible human nature may be to the ravages of legislation ex-

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63 Bouvier.
65 Addison, “The Spectator”, “A Coquette’s Heart”.
66 Chassay, “Touchstone of Character”.
altering the individual too high above the social good; but the words of the distinguished Sharswood cannot be withheld: "Though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of married life is secured by its indissolubility. When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accomodation that yoke which they know they cannot shake off. They become good husbands and good wives from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties it imposes. If it were once understood that upon mutual disgust, married persons might be legally separated, many couples who now pass through the world with mutual forebearance, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness and intolerance, in a state of estrangement from their common offspring and in a state of most licentious and unrestrained immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good".

In the midst of this complacency and lassitude, let us investigate the conundrum—when is a divorce not a divorce? The law is a mighty jester. Here is one of its merriest jests. Can a man be both married and single, a woman both the wife and the mistress of the same man, children both legitimate and illegitimate at the same time? And the point of the jests is that he, she and they can be. Absurd? Not a bit. It is eminently logical. Infrequent? A mere academic possibility? Not at all. It is the condition of thousands of our fellow citizens, who, finding the laws of their own commonwealths not sufficiently favorable, have traveled to Nevada, Washington, and other "easy divorce" states. The awful results are only beginning to be felt, and not even beginning to be popularly realized. When, in a few years, some of the many who have divorced and remarried under the present easy going regime, die, and their estates are in a process of settlement, complications will be endless. Women then will learn

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they are not widows, and men that they are not husbands. The case of Mrs. Kimball, or rather Mrs. Semon is in point. She married Mr. Semon in the state of New York in 1885. Five years later she went to North Dakota, and after remaining ninety days, brought an action for divorce. The papers were handed to Mr. Semon in New York, but he did not appear in the suit, and the North Dakota court granted Mrs. Semon her divorce. In 1891, she returned to New York, and four years later went through a second ceremony of marriage with Mr. Kimball. A year later Mr. Kimball died, leaving no will. According to religion and the moral law, that woman had contaminated her immortal soul with the stigma of adultery. But there are some who would consider that a mere religious abstraction. What did the law say was the situation of this woman? There has been much discussion as to the recognition by one State of a marriage in another, but his paper shall not be encumbered with that digression. What did the courts of New York say? The rendition of the North Dakota decree made her a divorced woman in that State, and North Dakota gave her the privilege of remarriage. But in New York she was still the wife of Mr. Semon. Her relations with Mr. Kimball were adulterous. Nor had she a scintilla of claim to this property. His collateral relatives alone could inherit. So decided the New York Court of Appeals in 1908. Neither need it be urged that this reluctance of the State of New York to recognize the dissolution of North Dakota violates the full faith and credit clause of the federal constitution.

Let one more instance be submitted to vanish the delusion that the ideal of indissolubility is a remnant of some ancient religion and to show the political and social and judicial embarrassment that inevitably results from the discard of indissolubility. The State of Illinois has a law, providing “That in every case in which a divorce has been granted, neither party shall marry again within one year from the time the decree was granted, and every person marrying contrary to the provision of this section shall be punished by imprisonment in the penitentiary for not less than one year, nor more than three years, and said marriage shall be

held absolutely void." It is a firmly rooted principle in our jurisprudence that no jurisdiction will enforce the purely penal provision of another. Laws such as the statute cited, supra, have usually prohibited the marriage of the party in fault against whom the divorce was granted, and they have been construed as penal in their nature and having no extra-territorial effect. That is to say, if the Illinois statute should be regarded as penal, e. g., a person marrying in Illinois, getting a divorce there and going to Missouri, say, for remarriage immediately thereafter, the marriage in Missouri would be valid because the State of Missouri would not be bound to recognize the penal statute of Illinois, and neither comity nor the federal constitution nor anything else could stand in the way of the refusal of Missouri to recognize the Illinois statute, and consequently if the party should return next day to Illinois, he would have evaded the Illinois statute altogether. That precise dilemma has arisen again and again.

But enough of that.

This all leads to the primary object of this paper: to the insistence that the State and our political institutions must sanction the integrity and stability of the marriage relation, and that the only logical, effective, sane and judicially sound way to do that is to sanction indissoluble monogamy. And let there be no misapprehension as to what is meant by "sanction". It is a synonym for ratification, ordinarily; but in Law, the word has a technical significance. Used in this technical sense, it refers to "the detriment, loss of reward, or other coercive intervention annexed to a violation of a law as a means of enforcing the law". It is in this sense that this term is used in this paper: the intervention annexed to a violation of a law as a means of enforcing it. More particularly, and without further argument, in view of all that has already been submitted, it is submitted that it is the duty of our legislatures,—if the responsibility to say when and why and how the marriage relation should be terminated as has been shown, rests here,—to refuse absolutely such a dissolution of that relation once lawfully consummated, as will allow a remarriage of either party during the life of the other. There should be no such

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71 Sec. 1 a Chapter 40 Hurd's Stat. 1911 p. 862.
72 Huntington v. Attrill, 146 U. S. 617.
74 Webster.
a thing as a complete, divorce "a vinculo". A recent judge of the Probate Court of Boston has said that "It may be reasonably doubted whether any people in occidental lands has marriage laws so defective as ours".75

To begin our suggestions: "Majority" is the law's simple device for securing mental maturity in the graver affairs of life. Is not wedlock as serious a business as making a will or signing a deed? The ages below which a marriage may not be contracted ought to be that of legal majority for both the man and the woman. They are not,—but let that be dismissed with a reference to an exhaustive and authentic corroboration by Swindlehurst,76 and the passing observation that at Common Law, the age at which an infant, whether male or female, reaches full majority is fixed at twenty-one years,77 and that at that same Common Law, males above fourteen and females above twelve are capable of contracting a valid marriage.78 That's wrong. The law should fix the minimum age for marriage at twenty-one and penalize its infraction. Immature marriages are a prolific source of evil, including divorce. Why should the parent have the power of legitimizing them by his consent?79 And not only may the parent by his consent legalize such impolitic marriages, but, generally, not even his consent is required to legalize them, the general rule being, that unless the statute expressly declares a marriage contracted without the necessary consent of the parents to be a nullity, such statutes will be construed to be directory only, so that the marriage will be held valid although the disobedience of the statute may entail penalties on the licensing or officiating authorities.80 The law should hold such marriages void, and impose penalties for its infraction.

We need also a better license system, so as to secure full publicity and faithful compliance with the law. This will be secured by the inclusion of a provision for the announcement of intention to marry so that at least ten days advance notice shall be given before he issuance of the license. Only five states now

77 22 Cyc. 511.
80 Reischneider v. Reischneider, 244 Ill. 92.
require such an advance notice of from two to five days.\textsuperscript{87}

Again, it is suggested that it will serve the best interests of our domestic relations to abolish the common law marriage. It has been urged that a more rigid license system is necessary. The abolition of the Common Law marriage is the logical thing to follow. The Common Law marriage ignores the license altogether. It has been said that marriage is merely a civil contract, differing from any other contract only in that it is not revocable at the will of the parties; that the essence of the contract of marriage is the consent of the parties, as in the case of any other contract, and whenever that is present the contract of marriage is completed.\textsuperscript{82} No citation is deemed necessary to call to mind the universal practice of requiring the recording of mortgages, so that one may not buy property already sold, to put it that way; and the registration of deeds, that the public may know who own this or that property; but it seems not necessary at all to take such pains with the marriage relation. No marriage should be valid until properly recorded, and cohabitation therein should be punished as fornication. But, lo and behold, it has been held that it is this very cohabitation that constitutes the essential element in the validity of such an un-licensed, Common Law marriage.\textsuperscript{83} The Assistant United States Attorney for the District of Columbia has published his reaction: “A Doctrine that requires two persons to be guilty of the crime of fornication a number of times before they create the legal status of matrimony is absurd. Yet this is exactly what is required in a number of American states. Again, where will the line be drawn? Who shall say where the line will be? When do the parties cease to be fornicators and just when does the sublime institutions of matrimony begin? The usual argument advanced in favor of these unions is that they render the children legitimate. This was the brief argument of the Supreme Court in 1878. But the fact is overlooked that a great number of these unions are not and were not intended to be permanent. The parties just ‘quit’ as they call it, and go through a marriage ceremony with someone else. If the first union was not a marriage, the children are illegitimate and if there were no children, the parties at any rate, were guilty of fornication against which

\textsuperscript{81} Robert Grant, ante.
\textsuperscript{82} Hulett v. Carrie, 66 Minn. 327.
\textsuperscript{83} Lorimer v. Lorimer, 124 Mich. 631.
there are strict statutory provisions in many states. If the first union is held a valid ceremony and a good marriage in order to legitimize the children, the children of the subsequent marriage are bastards and if there were no children of the second union, the parties ought to be made liable for polygamy or adultery, but the law seems to be majestically, loftly unconcerned. The American Bar Association and practically every writer on the subject of Marriage has condemned the Common Law marriage. One says 'no doubt our Common Law marriage is thoroughly bad, involving social evils of the most dangerous character . . . a custom which legalizes and virtually invites impure and secret unions'. Another asks 'is it not an amazing fact that in a matter which so profoundly affects the dignity and stability of the family, society should be so slow to take enlightened action?' And an eminent Scotch lawyer has said 'the law makes clear and full provisions for contracts affecting the sale of houses and lands, horses and dogs, and goods and chattels of every description; and why marriage, the most important of all human contracts, should not be as anxiously defined and thus placed beyond the reach of both fraud and doubt appears to me to be one of the greatest anomalies in the law of a Christian country'.

This distinguished member of the Bar gives also a complete table in his article of the situation on this matter in the states and possessions of the United States, and another such list may be found in Decker's "Digest of the Law Relating to Common Law Marriages". Common Law marriage should be completely abolished, and nothing left to take its place but the full, unrestrained operation of the statutes on fornication and bastardy.

And again, the difficulty was discussed earlier, of the construction of a statute forbidding remarriage within one year, as penal and therefor not to be enforced by another jurisdiction. It was observed that Illinois had such a statute but that a party might obtain a divorce in Illinois and marry in Missouri next day and return to Illinois the next and evade the statute completely. No suggestion was made as to a remedy, the observation being made at the time merely to illustrate the social and political embarrassment resulting from a disregard of the ideal of indissolub-

85 Appended to Woodruff's "Domestic Relations" Third Edition.
ility. Here is a suggestion. It is easy to make, because it is merely a suggestion of the adoption of a happy solution already evolved in some jurisdictions and the suggestion is made that it be adopted in the rest. The state of Wisconsin has a similar statute and the same difficulty has arisen there, and the solution of the court is submitted verbatim: "Upon no reasonable ground can this general restriction be explained, except that the Legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriage. The inference is unmistakable that the Legislature recognized the fact that the sacredness of marriage and the stability of the marriage tie lie at the very foundation of Christian civilization and social order; that divorce while at times necessary, should not be made easy, nor should inducement be held out to procure it; that one of the frequent causes of marital disagreement and divorce actions is the desire on the part of one of the parties to marry another; that, if there be liberty to immediately remarry, an inducement is thus offered to those who have become tired of one union, not only to become faithless to their marriage vows, but to collusively procure the severance of that union under the forms of law for the purpose of experimenting with another partner, and perhaps yet another, thus accomplishing what may be called progressive polygamy; and, finally, that this means destruction of the home and debasement of public morals. In a word, the intent of the law plainly is to remove one of the most frequent inducing causes for the bringing of divorce actions. This means a declaration of public policy or it means nothing. It means that the Legislature regarded frequent and easy divorce as against good morals, and that it proposed, not to punish the guilty party, but to remove an inducement to frequent divorce. To say that the Legislature intended such a law to apply only while the parties are within the boundaries of the state and that it contemplated that by crossing the state line, its citizens could successfully nullify its terms, is to make the act essentially useless and impotent and ascribe practical imbecility to the law making power. A construction which produces such an effect should not be given if unless the terms of the Act make it necessary. The prohibitory terms are broad and sweeping. They declare, not only that it shall be unlawful for divorced persons to
marry again within the year, but that any such marriage shall be null and void. There is no limitation as to the place of the pretended marriage in express terms, nor is language used from which such a limitation can naturally be implied. It seems unquestionable that it was intended to control the conduct of the residents of the state, whether they be within or outside of its boundaries. Such being in our opinion, the evident and clearly expressed intent of the Legislature, we hold that when persons domiciled in this state and who are subject to the provisions of the law, leave the state for the purpose of evading those provisions, and go through the ceremony of marriage in another state and return to their domicile, such pretended marriage is within the provision of the law and will not be recognized by the courts of this state.86 The Supreme Court of the United States also looks at this problem in the same manner,87 as well as a number of other of our states, among them Tennessee,88 Oregon,89 and Pennsylvania90 and Illinois.91

Moreover, there is needless confusion of the contract to marry with the contract of marriage. The former is an agreement to marry92; the latter is the consummation of that agreement, not any longer regarded as a contract but rather as a status.93 The law sanctions the former, the contract to marry, by the imposition of damages upon the party breaching the contract, to be paid to the other party to the contract; but it has no such sanction for the contract of marriage, except incidentally perhaps, as alimony, a divorce "a vinculo" putting an end to all obligations of either party to the other.95 That is wrong. Of course, the State, having excluded the power of the parties to terminate the marriage relation, any termination being effected by the State can hardly charge either party with damages for breach of any contract: but, the incongruity remains just the same. It is inconsistent with the nature and purpose of these respective contracts, to sanction the enforcement and the bond of the contract to marry and to in-

87 State v. Tutty, 11 Fed. 753, 7 L. R. A. 50.
89 State v. Tutty, 11 Fed. 753, 7 L. R. A. 50.
90 183 Pa. 625, 39 L. R. A. 529.
91 256 Ill. 460, 100 N. E. 222.
92 Perkins v. Hersey, 1 R. I. 493.
95 Barrett v. Failing and Wife, 111 U. S. 523.
dulge the dissolution of the contract of marriage. The very freedom of the two parties in a contract to marry; their unrestrained and uncoerced volition; their spontaneous, ingenuous disposition are the surest safeguards of the stability of the consequent relationship to which the courts have been so repeatedly committed. The mere change of heart, then, should completely absolve a person from his contract to marry if he so chooses to be absolved, and nothing impresses one so much in his study of Domestic Relations as this astonishing practice of the courts to compel a party to such a contract who has suffered a change of heart, to suffer in addition thereto, a pecuniary loss for a transaction entirely beyond his control. The human emotions are inconstant, and love is no exception. The only dependable basis for an enduring alliance between a man and a woman is spontaneous love for each other. Not only that, but a sincere, clean, respectable alliance can not spare this element of human attraction. That being so, it would seem that no respectable motive in any intention to marry could prevail without a good taste of this human emotion. But one who knew human nature has written that "Love is a gift that nature sows with a grudging hand in the furrows of human heart" and another, that it is "inconstant and capricious," and so it would seem that if love springs in the heart of a human, it is no fault or credit of his; nor can any diminution or complete cessation be attributed to him. Erotic love is a form, an aspect, a force or something or other of human nature that comes and goes—though it is not always nomadic; but it is essentially beyond human control. Consider then, the unique indispensability of spontaneous, mutual erotic love in a happy union and consider the proverbial fury of a woman scorned and try to imagine the popularization of suits for specific performance of contracts to marry. It would be the most crass impolicy to give the slightest sanction to such a thing. Is it not almost as bad to allow damages in these cases, and to place the limit of those damages entirely within the discretion of the jury, as is the practice of the courts? But that is not all,—if the spontaneous and uncoerced mutual consent of the parties be essential and it be impolitic to sanction in any way the bond of a repented contract to marry, then how much more impolitic it

96 Balzce.
97 Chassay.
must be to sanction the enforcement of a contract to marry where the repentant party is seriously ill. It would seem to best serve the interests of society to keep these people apart. But the law will extort damages from such a person and his illness is no defense. What irony, indeed, to compare that gesture of the law with justification of the claim of the State to the right to cut the Fallopian tubes of suspects to prevent the unfit from continuing their kind. And when one would expect the courts to be concerned only with the domestic prospect of a happy home, and to subdue at least, all other motives for contracts to marry, one finds nothing but disappointment in the words of the court “If the plaintiff was willing, in view of defendant’s social position, or that which she might acquire by reason of his wealth, to marry him, and await his restoration to health, she has the right to insist upon the benefit of the unconditional contract.” In the nourishment of these spontaneous apprehensions, it was no small gratification to stumble across the corroboration of a distinguished chancellor in the English House of Commons: “When they found that actions of that kind were scandalously abused, it was time that the action should justify itself, that they might see on what foundation it rested. The action for breach of promise was not so ancient as some persons might be disposed to imagine. This country flourished for many centuries without any person thinking of bringing an action of this description . . . . there was no flavor of venerable antiquity surrounding it”. The chancellor gave it as his opinion that “the law was abused in very many cases”, in so many cases that it was better “the action should be abolished”. The Harvard Law Review has this to say about it: “Anomalous, practically an action of tort, with heavy damages claimed and often given, and used sometimes as a method of blackmail, sometimes as a means of expressing the indignation of all good jurymen against faithless swains, it forces the courts into a commercial view of what properly cannot be regarded as a matter of trade or dicker”. The Roman law did not allow an action for damages where there was a mere breach of a promise to marry.

99 Hall v. Wright, El. Bl. & El. 745 (hemorrhage of the lungs).
101 Smith v. Compton, supra.
102 134 Law Times 201 Lord Chancellor Herschell in the House of Commons.
103 7 Har. L. Rev. 372.
And this is the law in Austria, Germany, Italy, Spain, Switzerland and Chili. But emotions are as inconstant this side of matrimony as on the other, and the same reasons which sustain any suggestion of the facilitation of the dissolution of a contract to marry would seem to prevail in a contract of marriage. Yes, indeed, how true it is that the ties of marriage, by assigning a legitimate object to the passions, still do not dry up the source of agitation and the capricious restlessness which the heart conceals; but in the ceaseless magnetic field of the sexes, God, religion, morals, decency and enlightened civilization, public policy and the very exigencies of our social and political purpose, all have said with one voice: "Below this line you shall think and meditate and choose, and beyond this line you shall abide by your choice". The line is matrimony. And so, I would oppose to the trend of our law, the suggestion that no impediment be placed by the law on the voluntary retraction from the contract to marry, and that no retraction be ever permitted from the contract of marriage with complete restoration of freedom to the parties.

Finally, let it be conceded that the ideal of indissoluble monogamy may be positively impossible to attain; so is the universal regard for the sanctity of human life, but we provide the highest sanction for the preservation of human life. Furthermore, let it be understood, that it is not insisted that we attain the ideal of indissoluble monogamy. It is insisted, rather, that we pursue this ideal with all the zeal and sanction of our political institutions, our courts and our legislatures. Governors, in conventions assembled may seek to reconcile the policies of their states, which range all the way from that of South Carolina, where divorce is impossible for any cause after marriage, to that of Washington, where a decree will be rendered "for any other cause deemed by the court sufficient", and the American Bar Association and lesser bodies may attempt to draft a uniform law, but the question still bristles with difficulty, and it will continue to bristle with difficulty until the legislatures learn, if they ever do, to refuse absolute altogether. Though the several communities are likely to continue hard to convince when the issue is merely the superiority of other tribal customs to their own, it should be clear

104 Sherman "Roman Law in The Modern World" Sec. 459 (1917).
105 Chapin, of the New York Bar in "Everybody's" 33:3441-7 Sept. 1915.