

1972

Colonial Lawyer, Vol. 4, No. 1 (Fall 1972)

Editors of Colonial Lawyer

Repository Citation

Editors of Colonial Lawyer, "Colonial Lawyer, Vol. 4, No. 1 (Fall 1972)" (1972). *Colonial Lawyer*. 11.
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THE COLONIAL LAWYER

Volume 4, Number 1

FALL, 1972

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The Colonial Lawyer is published semi-annually at The Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia 23185.

The opinions expressed are those of the writer and do not necessarily reflect the official position of the school.

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For Your Thought

Have the legal concepts of "fault" lost the usefulness that they might have once had? Within the realm of auto accidents and divorces the legal premise of "fault" has led to a black or white approach, but as our knowledge of sociology and psychology has increased, most situations seem to be more of a nebulous and complex nature far from being black and white.

In his article on no fault insurance, Charles Poston shows that liability determinations no longer, if they ever did, fulfill the function of punishment. In fact, every driver's premiums underwrite those large jury decisions. Negligence cases have developed a world of their own, apart from reality, where the skill of a lawyer, not the needs of the injured are determinative of the final outcome.

The same basic premise of "fault" is questioned in Les Bailey's article on no-fault divorce. The "grounds" for divorce are often in reality the visible symptoms of a disrupted relationship. Instead of condemning and seeking to punish the "guilty" perhaps the better role of the State would be to aid in reconciliation. If this is not possible then the legal bonds should be dissolved with as little disruption as possible.

Perhaps it is too easy for a law student to criticize that in which he does not have a vested interest, but if those who practice law are indeed part of profession then it is they who should seek-out change when it is obvious that a system is not serving the people. If the Legal Profession would be willing to seek legal change, then perhaps we could regain the respect of those people who's interest we seek to protect. But then again how many new cars will respect pay for... *

Faculty Profiles

The *Colonial Lawyer* began a new department with this issue. The Faculty Profile is intended to present to the members of the Marshall-Wythe School of Law community the fact that many new and interesting professors come to the school to teach as the school expands in size and ability. This issue will introduce two of the six professors which arrived this year. They are Jerome Leavell and Henry Hutchinson. The remaining four new professors will be included in the following two issues of the *Colonial Lawyer* this school year. The other four professors include Anthony Fitch, Michael Madison, Scott Whitney and Walter Williams. An expansion program includes more than just quantity; it is also measured by the quality of the members which are included in the quantity. It is hopeful that this Profile will show this quality, in relation to the development of the Marshall-Wythe School of Law.

*

JEROME F. LEAVELL

As the Marshall Wythe School of Law expands, many new students and professors come together to "discover" the law. Doctor Leavell is one of six new professors which became a part of the law school this year.

Doctor Leavell received his J.D. Degree from the University of Mississippi in 1951 and his L.L.M. from Yale in 1965. In 1969 Doctor Leavell received



a Ford Foundation Fellowship to Oxford University, Balliol College. After studying in Oxford, Doctor Leavell returned to the United States and earned his J.D.S. Degree from Yale in 1972. Doctor Leavell, also has had several years of practical experience in the practice of law, including membership on the U.S. Supreme Court Bar and the Bars of several states, namely, New York, Arkansas, Mississippi, and Georgia.

Doctor Leavell is married and has 2 children. He is a member of Phi Alpha Delta Law Fraternity, The Oxford University Law Society, the American Society for Legal History and the American Society of International Law.

As can be seen from the above facts, Doctor Leavell has qualifications to suggest that he is a legal scholar, but all the degrees that one can earn doesn't show that the person holding the degrees is a good teacher. But this is not the situation in Doctor's Leavell's case. Doctor Leavell believes that the primary role of a teacher is to stimulate, to provoke, and to inspire. In discussing the Socratic Method as used in our law school, Doctor Leavell quotes Eugene Ionesco, who said, "a work is not a series of answers, it is a series of questions. It is not the answer that enlightens but the question." When Doctor Leavell states "the unexamined thought is not worth thinking," one realizes that Doctor Leavell is a teacher who wants his students to "discover" the law rather than to be told the law.

*

T. Henry Hutchinson

Marshall-Wythe is the site of a legal experiment this year—one that reaches to Boulder, Colorado. Teaching at the Law School this semester is T. Henry Hutchinson, senior member of the firm of Hutchinson, Black, Hill, Buchanan and Cook. The experiment: Professor Hutchinson is on a one year extended leave from his firm—with pay.

Professor Hutchinson is teaching Commercial Law and Business Organization this fall semester. He says he enjoys both the contact with the students and talking and working with the faculty. Yet Hutchinson did not originally plan to teach this year — he had planned to be taught.

The mechanics of the extended leave program are particularly well suited to Hutchinson's firm, due to its size: 8 members are involved in the program. While this calls for each of the remaining seven members to absorb one-seventh of the work load of the absent member, such an additional load



is not burdensome. And while the financial load is equally increased, it is, as Hutchinson observes, "just the cost of doing business. It's no different than carpeting on the floor or paintings or other niceties you can put on the wall." Furthermore, Hutchinson notes, once the program is started, the load will become less noticeable since there will always be one man out of the firm.

If an extended leave program can be undertaken, it should, Hutchinson says, be seriously considered. There are substantial benefits both to the firm and the individuals. The sabbatical is not — or should not — be a "glorified vacation." The firm benefits from the experiences, the different perspectives brought back to the office.

Finally, the personal benefits are the best reason for the installation of such a plan. Professor Hutchinson said that after twenty years of practice it was "good to go back to school and study law," adding that it was really the first time he had been able to do so since taking the bar exam. The sabbatical year is a complete severance from practice — "you virtually quit for a year" — and such a change takes a bit of adjustment. "For the first couple of months," Hutchinson said, "you still think of things that should have been done or someone you have to call, before you realize the situation."

Not to be minimized is the theory that such leave "prepares the person for retirement; it teaches you how to retire." This might be particularly important for members of the legal profession. But even more important, as Professor Hutchinson concludes, the sabbatical will give him the "chance to enjoy the practice of law for the next twenty years."

Which Way Is The Courthouse?

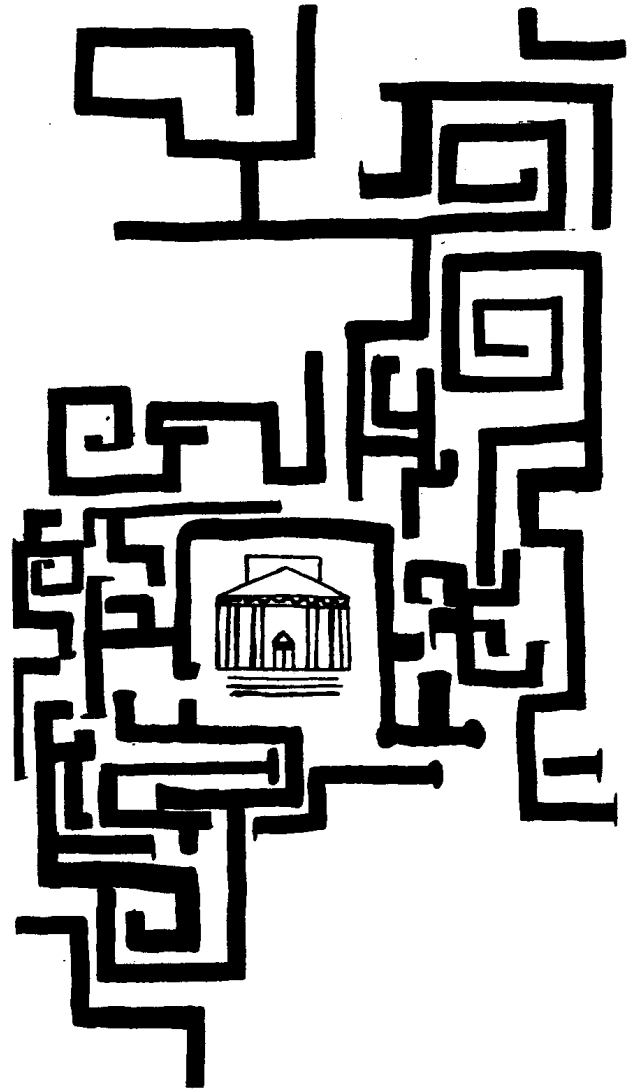
Some thoughts on the desirability of clinical legal education.

by

Charles E. Friend, Asst. Professor of Law, T. C. Williams School of Law, University of Richmond, Virginia.

Prior to the mid-1950s, any legal educator who dared to suggest that the law school curriculum could be modified to include courses and programs of practical application ran a very serious risk of being burned at the stake. The prevailing view was that law school should be an extended voyage into the theoretical, with emphasis on mental gymnastics and bad Latin. It was felt that law school should be devoted entirely to the absorption of theory and the development of the ability to "think like a lawyer." Those who were ever troubled with the question of the actual, demonstrable value of this approach were usually successful in repressing the doubts, usually on the basis that the student could "find out where the courthouse is" after graduation. Three years were thought, after all, to be scarcely enough time to train the student to be a legal scholar, much less to be a lawyer. Consequently, law students of the last century and a half have been emerging from their three long, dull, expensive years in the halls of ivy to find that they are still virtually useless as practicing attorneys. Every law school graduate who enters the actual practice of law discovers that, however impressive his grasp of Roman Law may be, he is still completely in the dark when required to defend a traffic charge or select a jury.

In the last few years, this ivory-tower approach to legal education has come under increasing attack, although probably for the wrong reasons. The awakening social conscience of the American nation has manifested itself in the law school community in an increased interest on the part of law students in participating in legal aid projects and third-year practice programs, and those who actively press for such programs usually do so upon the assumption that this should be done because it is socially and ideologically the desirable thing. The motivation is To Serve Our Fellow Man, Noblesse Oblige (note the compulsive use of Latin), the White Man's Burden, etc.



The cold, uncharitable fact is, however, that unless and until a law school—*any* law school—offers some reasonable proportion of practical, nuts-and-bolts experience to the student, that law school is not performing what is, after all, its primary purpose—to train future lawyers. That is the *real* reason why the law school curriculum needs re-examination, and it has nothing to do with new concepts of social justice. It is, and always has been, a question of the law school's true mission.

The stereotyped reply to the foregoing assertion is that it requires three years to present the student with the necessary theoretical foundation; he can always learn to be an (ugh) **practicing** attorney later. Of course, law graduates do learn--eventually--but the sad fact is that the graduate who enters a large firm frequently finds himself relegated to the library for months, because he is not equipped to be of any other service to his employer; and the brave soul who hangs out his own shingle finds that he is completely unprepared to function in his client's interest in even the simplest courtroom situation. The result is that, after three years of law school, the graduate finds himself faced with another painful period of unofficial apprenticeship which lasts for a bare minimum of one or two years, and usually longer, until he has indeed discovered how to function as a practicing attorney.

In light of this state of affairs, it is difficult to understand the viewpoint of those who regard practice-oriented law school courses and programs as some necessary evil, permitted in the curriculum only to keep the animals quiet.

Happily, this attitude is fast disappearing, and an increasing number of schools are adding practical courses to the programs, with resultant benefits to the students, to the profession, and to society as a whole.

Unfortunately, while it is very easy to jump on the clinical bandwagon and praise the principle of practical legal education, it is very difficult to determine how the law school curriculum should be restructured to make room for the optimum number of practice-oriented courses. To neglect the traditional courses which are the foundation stones of a solid legal education in favor of forty or fifty hours of legal aid, trial practice, law-office management, and habeas corpus for fun and profit would be as bad as (if not worse than) the purely theoretical approach. A well-reasoned balance needs to be struck, and the pressure being brought to bear by those who conceive their role as law students to be solely the immediate establishment of a student-run storefront law office in every block should not induce us to act in haste or to introduce too much of a good thing.

Clearly (as we lawyers say), the first year of law school needs to be devoted to a solid grounding in the keystones of the law--torts, contracts, criminal law, property, etc. Without a sound knowledge of these fundamental areas, any subsequent attempt at legal education would be an exercise in futility. In the first year, the student has neither the time nor the background necessary to make any clinical experience meaningful, and none should be attempted.

In the second year, although there remains a substantial body of basic law to be taught (wills, trusts, evidence, business organizations, tax, etc.), the student has acquired enough of the fundamentals to make practical applications somewhat more meaningful, but the desirability of permitting or encouraging any significant amount of practical work at that level is still questionable. However, the typical second-year student, although still lacking background in some of the major areas, is becoming restive and wants some latitude for electives to relieve the weary hours. A taste of the clinical can certainly serve to make the second year more palatable, if nothing else.

It is in the third year, of course, that maximum attention can be paid to practical subjects. Assuming for the moment that a third year of law school is needed at all, the year can be made immensely more valuable to the prospective attorney by a carefully planned introduction to the practice of law through elective or even (heresy! blasphemy!) required courses in practice-oriented subjects.

There are several possible approaches, but it would appear that at a minimum each curriculum should include a classroom course in trial tactics and procedures, supplemented by a mock-trial program in which **all** students may participate. A course in the arts and sciences of in-office practice, as differentiated from trial technique, would seem desirable, and an internship program involving clerkship for credit in a local law office would be of great benefit. The participation of students in the true "legal aid" program--i.e., students assisting practicing attorneys in advising the poor--provides the student with invaluable experience in the difficult art of counseling, and should be pursued wherever such programs are available.

The third-year practice programs, in which third-year students actually represent clients in local courts on minor matters, are popular with students but present some very serious difficulties, including possible constitutional objections. Although it is very difficult to convince students that the antipathy in some jurisdictions to such programs is not merely arbitrary, reactionary discrimination against them, the fact is that the advisability as well as the feasibility of third-year practice is at least questionable. There can be little question that the program, if available, would be of immense value to the student. Whether the public would benefit equally is doubtful, but under carefully controlled conditions socially desirable results might be obtained.

Whatever the approach taken, and whatever the specific modifications or additions to the traditional curriculum, it appears certain that both

(Continued on page 14)

to the land he has created, unless the General Assembly may be persuaded to give him one. If he has no title, *a fortiori* he should not have to pay real estate taxes. Yet, it would also appear that he would through use acquire vested rights in the land, even though technically he owns only the fill material and the State retains title to the land below mean low water. Practically speaking, however, a VMRC permit is tantamount to a grant in this situation, since it is extremely unlikely that it would ever be revoked and the riparian property owner ordered to restore the state-owned bottom to its original condition. Because vested rights would certainly be acquired after a bulkhead was constructed, there is a strong argument that such a revocation would amount to a taking, and the State would have to compensate the landowner for his loss.

Looking at the situation from the public's stand-point, the state is often inadequately compensated by individuals using state-owned bottom. It is true that the applicant must pay a permit fee of \$25.00 if the cost of the project is less than \$10,000.00 and \$100.00 if it is more than \$10,000.00.¹⁴ Also, the VMRC exacts a royalty of 10c to 30c per cubic yard for removal of subaqueous land,¹⁵ and, therefore, the person who plans to dredge below mean low water to obtain land fill will pay the state a small fee for the dredge material. On the other hand, if the fill material is obtained from some other source, the state gets nothing for what may be perpetual use of its property. Moreover, there are probably many persons who opt for bypassing the time-consuming VMRC administrative process and dredge without a permit. If the VMRC does not establish a viable system of ascertaining when this occurs, private parties will benefit at public expense with impunity.

The legal and environmental problems created by allowing perpetual use of state-owned bottom lands were in the past relatively insignificant, since it was assumed that the demand for land would never be greater than the supply available for development. Today, however, real estate developers are aware that there is an increasing demand for waterfront property; that nearly all natural riparian land has already been exploited or set aside for future development; and that it is thus very profitable to "create" waterfront property by filling wetlands or below mean low water. It is suggested that to protect the environment and to bring certainty to an ambiguous area of the law, the General Assembly should enact legislation which further limits the use of state-owned bottom lands. This could be accomplished by requiring riparian landowners to pay the state rent based on

the value of the bottom used, computed by considering environmental damage, economic loss to the public, and other relevant factors. In addition, the VMRC should be directed to adopt a system whereby individuals who dredge or fill without a permit could be apprehended *before* they complete their illegal and environmentally destructive activities. Such measures would not halt utilization of bottom lands, but would encourage responsible development and result in compensation to the state for use of a valuable public resource. *

FOOTNOTES

1. Ewell v. Lambert, 177 Va. 223, 229, 12 S.E.2d 333,336 (1941.)
2. Taylor v. Commonwealth, 102 Va. 759, 76647 S.E. 875, 879 (1904).
3. United States v. Applachian Elec. Power Co., 312 U.S. 712 (1940).
4. Va. Code Ann. §62.1-1 (Cum. Supp. 1972).
5. Newport News Shipbuilding & Drydock Co. v. Jones, 105 Va. 503, 54 S.E. 314 (1906); Meredith v. Triple Island Gunning Club, Inc. 113 Va. 80, 73 S.E. 721 (1912).
6. Va. Code Ann. §62.1-2 (Cum. Supp. 1972).
7. 102 Va. at 766, 47 S.E. at 879.
8. 159 Va. 924, 166 S.E. 557 (1932).
9. Virginia Acts of Assembly 1970, ch. 621 at 1288.
10. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
11. Va. Const., art. XI, §1.
12. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
13. Shanks v. Lancaster, 46 Va. (5 Gratt.) 110 (1848).
14. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
15. *Id.*

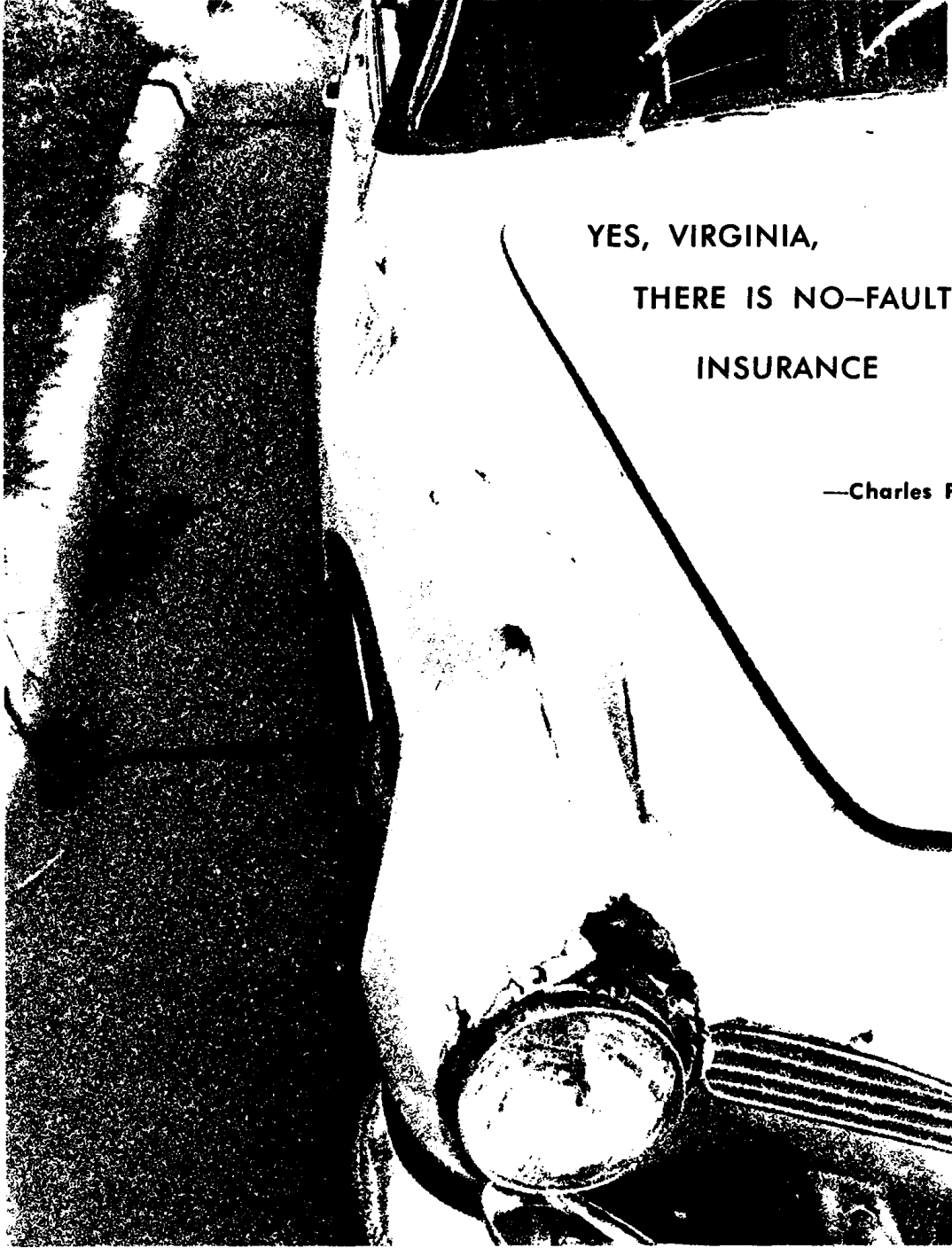
(COURTHOUSE)

(from page 5)

professional and social pressures dictate some re-evaluation of the existing approach to legal education. Many law schools have successfully instituted programs of the types mentioned, and no doubt many more will do so, and in great profusion.

My personal view is that legal education needs to be more responsive to the temper of the times and the needs of the profession as it exists today, but I feel that today's law student must be careful not to fall into the trap of believing that a successful navigation of the first semester of law qualifies him to eschew further interest in the basic and traditional functions of the law school. A solid theoretical foundation is essential to success as an attorney, and it always will be. Academic flexibility is needed; academic revolution is not.

Student understanding of that fact is essential if we are to fulfill our mutual obligations to our chosen profession. *



YES, VIRGINIA,
THERE IS NO-FAULT
INSURANCE

—Charles Poston

Today's growing popular demand for improvement in the automobile insurance industry has found responsive expression in many forms. Some schemes favor keeping the present tort liability system with modifications designed to meet the

most serious complaints consumers have voiced; other plans—and certainly those most publicized—have proposed abolishing the tort liability system altogether and replacing it with a "no-fault" insurance system.

The essence of no-fault liability insurance is the absence of the requirement of finding tort liability (or fault) in the insured before an obligation to pay arises.¹ Most plans provide that the insured's own company will pay costs for medical treatment up to a set amount or threshold level.²

Virginia, like her sister states, has felt the rising discontent with the present insurance system. Quick cancellation of policies by some companies--frequently publicized by Lieutenant Governor Henry Howell--prompted the General Assembly to place restrictions on the companies' right to cancel automobile liability insurance policies.³ By the 1972 session of the General Assembly the automobile insurance reform movement had clearly grown to be a force of some strength. Several bills purporting to be no-fault measures were introduced, but some of these were no-fault proposals in name only. Others represented serious attempts to effect useful change in Virginia's automobile insurance system.

Most states have at least considered no-fault proposals, and approximately ten have adopted some form of no-fault automobile liability insurance.⁴ Most of these supposed no-fault laws have simply modified the traditional system based in tort liability.

Massachusetts and Florida have perhaps the truest of the no-fault laws, both of which are based on the Keeton-O'Connell recommendations,⁵ which are found in their work *Basic Protection for the Automobile Accident Victim*.⁶ This work was the first comprehensive study of the automobile tort liability system undertaken with a view toward reforming it. The study, of course, sparked a great deal of debate among the academic community, legal societies, consumer groups, and insurance organizations. Supporters rapidly gathered under the no-fault label, believing it to be the panacea for all automobile insurance ills; and opposition to the proposal formed just as quickly. Some of the opposition was based upon serious, thoughtful reasoning; some represented an emotional response to what was seen as a challenge to financial interests. Certainly, neither side had a monopoly on reason and logical thinking, but it seems that every serious study of the automobile insurance problem resulted in recommendations for reform, whether or not under the tort liability system.⁷

THE MASSACHUSETTS PLAN

About two years ago Massachusetts enacted the first no-fault statute in the country.⁸ The Massachusetts Plan, in brief, provides that every car

owner must purchase at least \$2000 in medical and wage continuation benefits protection for his passengers and injured pedestrians. Unless a bone is fractured, permanent impairment results, or medical bills exceed \$500, claims for general damages, in addition to the insurance benefits provided by the law, are not permitted. In other words, immunity from tort liability is granted up to a \$500 threshold level. The tort liability system is retained for general damages in excess of \$500 as well as for disfigurement, fractures, and in some cases, part payment for lost wages. Subrogation of claims is permitted when tort liability is found. If the injured driver is intoxicated, doped, or if he intentionally injures himself, no-fault coverage does not apply.⁹

When the Massachusetts Plan went into effect in January, 1971, a fifteen percent reduction in premiums was ordered for personal injury insurance. Before the year had ended, however, the state insurance commissioner, seeing that the savings actually realized under no-fault insurance exceeded the initial estimates, ordered a further 27.6% reduction for 1972. Prior to 1971, Massachusetts had one of the highest premium rates in the nation; but during the first nine months under no-fault, there was a 60.6% reduction in average claims. Although the figures for 1970 were computed differently from those for 1971, there was clearly a substantial saving to the policy holders in premium rates under the no-fault law. In 1972 the no-fault coverage was extended to property damage as well as personal injury.¹⁰

The Plan's immediate success in Massachusetts resulted in widespread publicity of the savings to the policy holders, and this promise of substantially lower rates won new converts to no-fault proposals. Four more states have since adopted compromise plans, others have ordered insurance companies to offer no-fault coverage on an optional basis, and a large majority of the remaining states including Virginia are studying various proposals for automobile insurance reform.

ACTION IN VIRGINIA

In December, 1968, the Virginia State Bar appointed a committee to undertake an impartial study of various "Basic Protection Plans" which were then being proposed by various groups and to offer recommendations as to the best method of reform, if such was needed. The report, submitted for the year ending June 30, 1971, urged retention of the basic tort liability system with certain modifications. It suggested giving courts not of record exclusive jurisdiction over claims up to and

including \$3000, abolition of the right of removal to a court of record, and retention of the present right of appeal. The committee sought to reduce court time and, in some cases, court costs by allowing written medical reports as well as bills and estimates for repairs given under oath to be admitted into evidence as exceptions to the hearsay rule. The committee felt that the contingency fee system allowed persons with valid claims who could not otherwise afford to pay attorneys' fees to seek relief in court. The State Bar committee therefore urged that the contingency fee system be retained with supervisory authority lodged in the trial court.

The committee's major recommendations concerned the substantive law of negligence in Virginia. It recommended abrogation of tort immunities covering governmental units, charitable organizations, and the relationships of husband to wife and child to parent. It endorsed repeal of the statutory requirement that a guest may recover only upon a showing of gross negligence by the driver, and recommended adoption of a system of comparative negligence which would, by its nature, abolish the doctrines of last clear chance and contributory negligence, which now prevent recovery in many automobile negligence cases. Except for the comparative negligence recommendation, the changes suggested by the committee were relatively minor, with no support being shown for a change in the basic tort liability system.¹² Many of the recommendations offered by the committee could be attacked on grounds of self interest. For example, abrogation of the immunities might increase the number of recoveries and perhaps open some deeper pockets to plaintiffs, thus giving their attorneys larger fees. As a whole, however, the committee's recommendations represent what seems to be a conscientious attempt to evaluate the present system in light of the alternatives available today. The basic proposals of the State Bar Committee were introduced into the 1972 session of the General Assembly as House Bill Number 594.¹³

Perhaps the most vocal opposition to the no-fault concept comes not from the State Bar as a whole but rather from the Virginia Trial Lawyers Association, an organization composed in large measure of negligence attorneys. During the 1972 session of the legislature, the Virginia Trial Lawyers Association and the Virginia Association of Defense Counsel urged the legislature to require automobile insurance policies to include benefits for medical expenses and loss of wages. No-fault advocates, however, attacked the suggestion as one failing to deal with the basic problems confronting automobile owners. They charged that the additional coverage would result in substantial increases in premium rates.¹⁴

Early in the 1972 session the Virginia Advisory Legislative Council (VALC), a study group composed, in part, of attorneys and legislators, urged the adoption of no-fault automobile insurance in Virginia. The VALC cited widespread dissatisfaction with the present system, overpayment of some claims and delayed payment of others, and over-protection of the negligent party in comparison to the victim as reasons for endorsing no-fault. Among the advantages it expected from no-fault were more protection for the same cost, prompt payment regardless of fault by one's own insurer, and reduced litigation while maintaining tort liability for the more serious cases. The VALC was closely divided in adopting this position, and several members expressed their opposition to it. One Council member charged that the plan "allows payment of large sums of money to the drunk, willful, wanton, and negligent driver."¹⁵ Others evaluated the proposal as a cautious but well-considered position.¹⁶

Along with the genuine no-fault bills which fell into the legislative hoppers during the 1972 session, there were many bills proposing amendments to the existing automobile liability insurance laws. Perhaps the public demand coupled with what seemed to be a real threat of a federal law on the subject made the issue an even stronger one. Of the bills considered, the major proposal to survive the session was a bill entitled "The Virginia Automobile Accident Victim Reparations Act", hereinafter referred to as the Williams Bill.¹⁷ Continued to the 1973 session, this bill followed the VALC proposal in many respects and was sent to the Committee on Corporations, Insurance, and Banking.

The Williams Bill provides prompt payment of medical expenses upon valid proof that a loss has been sustained. Duplication of payment for the same injury is prohibited, and the right to sue in tort is restricted to cases in which medical treatment expenses exceed \$1000 or when the victim suffers death, dismemberment, disfigurement, or permanent disability. The bill is not as drastic a reform as other no-fault proposals, however it provides both prompt payment of medical expenses and wage continuation benefits to accident victims. Indeed one of the major criticisms of the tort liability system is that those involved in serious accidents having large claims are often delayed by extended judicial proceedings while minor claims are settled quickly because of the financial impracticality of litigating them. Of course, persons in the former situation are frequently those who can least afford a delayed settlement.¹⁸

Several detailed insurance reform bills were introduced in the 1972 Assembly. At least two were entitled the "Virginia Automobile Accident Victim Reparations Act."¹⁹ The common theme throughout these bills was to insure prompt payment of benefits to automobile accident victims. Many conclusions may be drawn from a comparison of these bills, but it seems indisputable that there is a growing concern in Virginia not only for dependable car insurance but also for prompt settlement of claims when accidents do occur. The number of bills introduced to effect some change in the insurance law reflects not only a legislative concern but also a realization that the voter has a vested interest in the issue. Early in the session, Governor Holton told the General Assembly that no-fault insurance is "an idea whose time has come." Among the advantages he sees in it are rapid payments for accident victims and a more equitable distribution of payments among those injured.²⁰

Perhaps the greatest single reason for Virginia's public interest in insurance reform is concern for the premium rate structure. Insurance rates have not remained constant; neither have they decreased.²¹ Every car owner has regular personal contact with premium payments. He pays them when they fall due and receives nothing tangible in return until he is unfortunate enough to have an accident, in which case he may well face prolonged negotiation and litigation before settlement. When an alternative offering substantial reduction in his premiums is proposed, the car owner cannot be expected to advocate retention of the tort liability system.

QUESTIONS AND CHALLENGES

In the midst of the clamor from various sectors of the public in favor of no-fault, there are numerous objections to be contended with. These objections fall into three categories: constitutional, traditional, and conceptual.

Constitutional challenges began in 1971 with the case of *Pinnick v. Cleary* in which the Massachusetts law survived a charge that it violated the right to trial by jury, separation of powers doctrine, and due process of law under the federal and state constitutions.²² Under the no-fault statute the plaintiff recovered for medical expenses but not for loss of earning capacity or pain and suffering. On appeal he claimed that the law deprived him of his constitutional right to full recovery in tort under the due process clause. The court held that the statute was valid in that it was rationally related to the legitimate legislative purpose of regulating the insurance industry so as to provide more efficient administration of justice in automobile negligence

"The greatest single reason for...public interest in insurance reform is...the premium rate structure."

cases. Furthermore, the court stated that no one "has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."

In 1972, however, a contrary decision was handed down by the Illinois Supreme Court when it struck down the state's no-fault law as being violative of due process under the state and federal constitutions. The facts of the case were similar to those in *Pinnick* but the statute was not identical to the Massachusetts law. Here the court said that the law limiting amounts recoverable by accident victims for pain and suffering was invalid under the Illinois constitution.²³

These cases illustrate not only the conflicting views of no-fault's constitutional validity but also the fact that no uniform law on the subject should be expected unless a federal law is passed. State constitutions, traditions, and preferences will dictate variations in insurance plans, and this is probably a desirable situation. Certainly state legislatures should be allowed to adopt the plans most suitable for their states. But again there is criticism of this view, noting that a conflict of laws problem of some magnitude would frustrate settlement of claims of out-of-state drivers. It is difficult to see, however, how no-fault systems would lead to any more of a conflicts problem than now existing under the many variations of the tort liability systems in effect throughout the nation.²⁴

Another basis of opposition to no-fault is that it does violence to the ancient common law tenet that a wrongdoer must pay for his own misconduct. Does the wrongdoer now pay for his negligent driving or does his insurance company? All drivers pay insurance premiums of some sort. Accident settlement costs are certainly passed on to those insured through premium rates. In short, it is something of a fiction to insist that the negligent driver really pays for the damage he causes. To be sure, his premium rate may increase after an accident, but that burden is not really comparable to

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INSURANCE

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the situation of his having to satisfy any judgments against him out of his own pocket. The criminal law, on the other hand, does punish the wreckless and negligent driver in many cases. No-fault proposals do not attempt to disturb the criminal sanctions against such drivers. This moral justification for the present tort system as applied to automobile negligence cases, then, tends to lose its force when one delves beneath the surface. Perhaps it is not inaccurate to say that automobile negligence law has to some extent prostituted the basis of the tort liability system by encouraging the development of liability insurance to protect the *negligent* driver from the consequences of his negligent acts.²⁵

Finally, there are the assertions that no-fault will not result in lower rates at all; that instead rates will remain unchanged or may even rise.²⁶ Possibly there was merit to these positions before no-fault insurance was tested in practice, but the success in Massachusetts tends to support the view that no-fault plans, in fact, offer substantial premium reductions. There has been no convincing evidence of no-fault bringing higher rates that has not been discredited by the cost reduction of approximately forty percent in Massachusetts.²⁷

CONCLUSIONS

Change is in the wind for the automobile insurance industry in Virginia, and political leaders ignore the public concern over the issue at their peril. The real question is related to the form the changes will take in Virginia and the extent of the changes. It is a question that demands an objective study of all alternatives, not an emotional, self-serving or haphazard approach. The no-fault concept poses some serious questions that must be answered, but it appears to have captured the public's support. The comparative negligence approach recommended by the State Bar committee certainly presents what may be an acceptable alternative. Its major obstacle, however, is the tremendous amount of publicity the no-fault proposals have had and the sensational success of the Massachusetts Plan. The consumer will tend to opt for the plan that serves him best for the least cost, and other interest groups will naturally be influenced by their special concerns. The General Assembly, then, must face the problem by considering all alternatives and adopting the plan most suitable for Virginia.²⁸

There is nothing sacred in a concept or idea just because it is old, and prudent change of a constructive nature should not be feared. The no-fault proposals do not represent change for its own sake, but, rather, offer a plausible alternative for coping with a need—the need for prompt, efficient in-

surance coverage at a reasonable cost. While it is a proposal that alters a basic area of the law, our legal system is, ideally, geared to accommodate such change when necessary. From the consumer's viewpoint, no-fault insurance makes sense; and because the consumer in this instance is largely the middle-class individual, who is also the typical voter, Virginia can anticipate the General Assembly's adoption of some form of no-fault automobile liability insurance within the near future. *

FOOTNOTES

1. Brainard, "A No-Fault Catechism: Ten Basic Questions Raised and Answered," (1972) *Ins. L.J.* 317.
2. Greene, *Risk and Insurance* (2nd Ed. 1968), 453-54.
3. Va. Code Ann. §38.1-381.5 (Cum. Supp. 1972).
4. *The Wall Street Journal*, Aug. 7, 1972, at 1, col. 6.
5. *Id.*
6. 1965
7. *See Report of the Committee to Study and Evaluate Basic Insurance Protection Plans*, Twenty-third Annual Report of the Virginia State Bar (1971) for a proposal to retain the tort liability system with certain modifications (hereinafter referred to as the State Bar Committee).
8. Puerto Rico adopted a government-sponsored no-fault system in 1968. Aponte and Denenberg, "The Automobile Problem in Puerto Rico," (1968) *Ins.L.J.* 884.
9. "Status Report on No-Fault Auto Insurance," *J.Am.Ins.*, Jan-Feb. 1972, at 10; Dacey, "No-Fault—End of a Civilized Tort System?" 6 *New Eng. L. Rev.* 79 (1970).
10. "Will 'No-Fault' Bring Cheaper, Better Auto Insurance?" *Changing Times*, March, 1972, at 16-17.
11. Report of the State Bar Committee, *supra* note 7, at 36 et seq.
12. *Id.*
13. *Report of the Committee on Basic Insurance Protection*, Va. Bar News, May/June, 1972, at 23.
14. *Richmond Times Dispatch*, Jan. 18, 1972, at A6, col. 1.
15. *Id.*
16. *Virginian-Pilot* (Norfolk), Jan. 20, 1972, at A14, col. 1.
17. H.B. 337 (1972 Session).
18. Keeton and O'Connell at 11-13.
19. H.B. 315 and H.B. 337 (1972 Session).
20. Address to General Assembly, Jan. 12, 1972
21. Keeton and O'Connell at 69-71.
22. *Pinnick v. Cleary*, 271 N.E. 2d 592, Mass. Interestingly, amicus briefs supporting the plaintiff's challenge to the bill were filed by the American Trial Lawyers Association, the Massachusetts Trial Lawyers Association, and the Massachusetts Bar Association. Amicus Briefs supporting the no-fault statute were filed by the American Mutual Insurance Alliance, American Insurance Association, and the Massachusetts Association of Independent Insurance Agents and Brokers, Inc.
23. *Grace v. Howlett*, 283 N.E.2d 474, 51 Ill.2d 478 (1972).
24. Braunstein, "Conflicts of Laws Problems Arising from Different No-Fault Auto Insurance Plans in Various States," 67 *The Brief* 234 (1972).
25. Jones, "The Great Myths About Auto Insurance Today," an address before the Society of Chartered Property and Casualty Underwriters, Jan. 22, 1969, in Philadelphia. Mr. Jones was President of the American Insurance Association which supports no-fault automobile insurance.
26. *See* Senator Tower's remarks on the federal no-fault bill. 118 CONG. REC. S13084 (daily ed. Aug. 8, 1972).
27. *The Wall Street Journal*, August 4, 1972, at 6, col. 1.
28. In *Pinnick*, *supra* note 22, the court pointed out that the automobile tort liability insurance system seems to have the highest cost/benefit ratio of any major compensation system in operation in the nation. For every dollar of net benefits, this system consumes about a dollar. 271 N.E.2d at 605.

No-Fault Divorce- BEYOND GOOD & EVIL

—Les Bailey

We may take judicial notice that the family, held together by that legal, affectional, spiritual relationship called marriage, is the keystone of our social order. Yet vital to our civilized life as this crucial relationship is, it is being dissolved at an alarming rate through archaic legal machinery which encourages disrespect for the law; which is cumbersome, irrelevant, and socially costly and painful; and which makes no provision to help alienated spouses understand the causes of their disaffection and so effectively deal with them as to preserve the marriage.

A brief look at the abuses prevalent in the United States under the adversary, fault oriented divorce system will illustrate the sad truth of the previous statement characterizing archaic American divorce law and suggest the need for fundamental reform. In the divorce law of most states divorce will be granted only where one spouse is able to prove his mate guilty of some marital offense specified by statute such as adultery, desertion, extreme cruelty, etc.¹ Because such grounds are difficult to prove, parties are encouraged to perjure themselves, indulge deliberately in immoral staged acts or collude to consent to or not to contest divorce.² An alternative way to circumvent the stringent grounds of divorce required to be proved in one state was made possible by *Williams v. North Carolina*.³ The out-of-jurisdiction "quickie" divorce in some such place as Nevada legitimized by *Williams* not only circumvents the law but is wasteful of resources, both of the financial resources of the party involved and of the court resources of the State granting the divorce on the basis of what is often a perjured statement of domiciliary intent.⁴ In the adversary, fault system each spouse retains his own attorney and girds himself for a bitter battle which often involves exaggerated name-calling and fiercely pious and vindictive charges. The system promotes the struggle to establish the requisite fault grounds for divorce and to gain the upper hand in wrangles over property, custody, and support. The tension and hostility attendant to the acrimonious atmosphere of such a knockdown, drag-out battle not only renders slim the prospect for reconciliation but also heavily burdens the time of already badly congested courts. The greatest suf-

ferers from the tension and hate stimulated by the adversary-fault system are often the children who are buffeted by opposing forces beyond their comprehension.⁵

Absence of imputations of guilt and innocence would spare children the painful sense that one of their parents had been publically exposed as an evil or malicious person, while the other had been judged, by comparison, to be a paragon of virtue...Children would suffer much less as a result of their parent's divorce if they could see it as a human tragedy which everyone concerned had tried to prevent, but which despite all efforts, could not in the end be avoided.⁶

Perhaps the greatest source of abuse under the fault system is found in such defenses to an action for divorce as recrimination.⁷ This defense precludes relief for the complainant who does not approach the court with "clean hands".⁸ There are obvious flaws in such a defense. First, one indulges in social fantasy by believing that incident to most marriage failures, there is a guilt-innocence dichotomy.⁹ Secondly, by counter-charging complainant with a legally cognizable marital offense, a "vindictive spouse", on purely vengeful motivation, is enabled to block relief provided by law.¹⁰ Thirdly, one spouse can employ recrimination as a tool of extortion to win unconscionable concessions in matters of property division, custody, alimony, and support.¹¹ But surely the greatest flaw of the defense of recrimination is that where not proved in fact, its pleading so accentuates an already bitter misunderstanding as to severely dim the chances of reconciliation.

Thus there is a cornucopia of suffering and social waste incident to the abuses of an adversary divorce system unprofitably preoccupied with guilt. Why not then, one may ask, abolish all grounds for divorce and institute a system based, perhaps, upon the fulfillment of a required period of separation? Or why not grant a divorce at any time one is requested merely upon the consent of both parties? Both concepts are unworkable because afflicted with costly side effects. Separation as a divorce standard is undesirable because, if set too short, may encourage divorce, and if set too long, the parties must pay dearly in emotional suffering and financial loss caused by a delay attended by the absence of an immediate right to remarry.¹² Both concepts are utterly wrecked by the vindictive spouse who withholds the consent essential to the operation of both.¹³ Facile acceptance of consent as the



panacea among grounds for divorce is foreclosed by the necessary recognition that, as a third party to the marriage contract, the state is vitally concerned to ensure that marriage not be dissolved merely upon the whim of its partners.¹⁴ Surely that state is unwise whose facility of divorce provokes the death of a marriage whose partners hastily reacted to temporary frustration, a death which might easily have been prevented had the state provided a proceeding which required a delay long enough to expose the threatened marriage to the possible saving grace of skilled counseling.¹⁵

SUGGESTIONS & SOLUTIONS

The abuse potential, inequity, inefficiency, and suffering which is a tragic commentary on adversary, fault-oriented divorce can be eliminated only by fundamental reform. Concern with fault, guilt, etc. strikes only at the surface symptoms of a failing marriage, and even then, such concern does not respond to effectively remedy the desperate need of estranged spouses to identify, objectively understand, and attempt to deal with the real causes of their fractured marital relationship.¹⁶ A study commission in New Jersey has succinctly identified the relevant inquiry of substantive divorce law:

Demonstrable fault is frequently the result of, rather than the cause of marital breakdown. It is the public interest in private morality, in marriage as an institution, that is best served by terminating marriages that have failed. There is no vested right to immunity from divorce...blocking the offender from terminating a meaningless relationship and perhaps creating a socially desirable one.¹⁷

It would seem then that an enlightened substantive divorce law would focus on the marriage relationship itself, by providing some appropriate procedure to determine: (1) whether the marriage relationship has broken down, (2) whether the breakdown can be repaired, (3) if the latter is true, what are the causes of the breakdown and how can they be prevented or resolved. Why waste the state's time and resources in litigating guilt/innocence which is of questionable relevance to

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marriage viability when, as observed by a noted authority, "most people believe that marriage should be terminated when the husband-wife relationship is no longer able to function."¹⁸ The "marital breakdown concept...is the heart of most...recent legislation"¹⁹ and "is implicit in some of the statutory grounds for divorce appearing in the various states."²⁰ Since these statutory provisions embrace social reality by implying a no-fault basis for certain divorce grounds, why not bring the entire statute into alignment with the enlightened recognition that, where the marriage relationship is irreparably defunct, an efficient, consistent dissolution of the marriage contract not only averts needless suffering but increases the public respect for a vital segment of the law.

"Reconciliation chances should be vastly improved; public respect for divorce law would be enhanced; considerable time would be saved for badly congested courts."

THE THEORIES OF "NO-FAULT"

Granted that substantive divorce law should ground its authorization of a marriage dissolution on whether the marital relationship can be retored, the naturally resulting question is: what standard should be applied in making this determination? Perhaps only some experimentation will resolve the issue of whether the determination should be one of fact by experts in the behavioral sciences or one of law by the judge. Most states with new no-fault divorce legislation have made the determination one of law to be made by the judge upon the basis of all the evidence, both lay and expert.²¹ One eminent authority suggests that a grant of divorce be based on the "submission of satisfactory evidence that, on the basis of a thorough clinical investigation..., it was reasonably apparent that..." the marriage was shattered beyond repair. When the judge is so satisfied, "divorce would be granted without guilt being imputed to either party."²²

Clinical examination of the viability of the marital relationship with an eye to determining the likelihood of repairing the fracture should be the

crucial part of the no-fault evidentiary process. Since public interest in the stability of marriages is great, this clinical examination should be made incident to a prescribed series of conciliation sessions, participated in, if possible, by both spouses and directed by skilled professional counselors.

Divorce court conciliation departments exist in at least fifteen states²³ and are valuable not only in saving marriages but are particularly helpful in establishing a calm and objective attitude between the spouses during divorce proceedings even though reconciliation proves impossible.²⁴ Such an attitude is invaluable in the adjudication of such collateral issues as property division, alimony, support, and custody by making justice more likely and by saving much time for badly congested courts.²⁵ Such conciliation is badly needed because divorce petitions are often filed in search of some competent body which can provide help by impartially identifying the causes of the marital conflict and by suggesting practicable methods to resolve them.²⁶ One possible objection to conciliation counseling is that, if made mandatory, it may amount to a state invasion of the individual's constitutional right to Privacy.²⁸

Presently there is no clear statement in the law specifying the rights of divorce litigants to refuse to discuss or reveal their private or intimate relationships.²⁸

The effectiveness of conciliation counseling would be vitiated without such discussion and revelation. One solution to this problem, employed in proposed Virginia legislation, provides the incentive of accelerating the dissolution decree for those who agree to cooperate with the conciliation process.²⁹ Invasion of privacy problems are thus avoided by making conciliation counseling voluntary.

In summary then, what are the advantages of a system of no-fault divorce coupled with an incentive-oriented conciliation process? Reconciliation chances should be vastly improved; public respect for divorce law would be enhanced;³⁰ considerable time would be saved for badly congested courts; collateral issues could be more easily and justly resolved and children spared the painful and psychologically damaging exposure to needless hostility and tension; extortion-provoking defenses would be abolished. If reconciliation proved impossible, both partners could come away from the marriage as whole persons, cognizant of the reasons the marriage failed and thereby prepared with an awareness making more bright the prospects of future marital success.³¹ Society would be spared the existence of a residue of bitter and quilt plagued divorce(e)s.

"...providing a more "dignified and blameless way out" when a court finds...that the union is irreparably destroyed."

DISSENT AND DISSATISFACTION

To conclude this general discussion of no-fault divorce, two widely voiced objections to the concept will be considered. The first is that no-fault divorce legislation makes divorce so easy that it actually provokes or encourages divorce. There is no empirical evidence to support this charge, and the argument ignores the ease with which divorce can be presently obtained in almost any jurisdiction by such expedient means as perjury, fraud, collusion or flight to another state.³² The other objection is grounded on genuine and understandable Christian concern that by enacting no-fault divorce statutes the state is violating the principle laid down by God that divorce be based solely on adultery. One who makes this seemingly valid objection may be put at ease by being reminded of the Lord Jesus Christ's command to "render therefore unto Caesar the things which be Caesar's and unto God the things which be God's"³³ Every Christian marriage has two dimensions: its spiritual dimension, over which God is sovereign; and its legal dimension, over which Caesar, the state, is sovereign. The state does not initiate nor has it the authority to order the dissolution of the spiritual plane of a marriage. Only God can do that, and He has conditioned the grant of a divorce of separation (*a mensa et thoro*), the only type He authorizes, solely on the offense of adultery. Therefore, temporal courts have jurisdiction only to dissolve the marriage contract and its attendant legal obligations. Spiritual responsibility for transgression against the spiritual dimension of the marriage rests with its partners and not with the state, since it is they, who have the will and free choice to heal the fractured relationship and repent in the sight of God for their transgressions against the relationship. As one thoughtful commentator has observed:

Yet the marriage vows may persist in effect after the divorce on a moral-spiritual level with both parties refraining from remarrying and thus maintaining fidelity until the death of the other party.³⁴

It is the duty of all courts and attorneys, and especially Christian judges and attorneys to do everything which is ethically within their power to encourage reconciliation between spouses who come to them with marital problems or seeking divorce. Appropriate referrals should be made to professional counselors for conciliatory service which is beyond the competence of the attorney.

THE VIRGINIA PROPOSAL

Turning now to an examination of key provisions of the proposed revision to Title 20, Chapter 6 of the Virginia Code (Dissolution, Separation, and Annulment),³⁵ Section 20.1-153 of the revision admirably states it to be a policy of the law to deal with divorce by realistically focusing on the marriage relationship itself to assess its viability in determining whether a decree of dissolution should be granted.³⁶ This realistic orientation of the law is further illustrated by the policy goal of mitigating divorce-caused harm to spouses and children and by the goal of a dispute settlement process characterized by an amicable atmosphere.

In section 20.1-155(1) "Irreparable breakdown" is made the sole ground of divorce.³⁷ Wisely the section provides that such a breakdown of the marriage relationship may be found only when it is shown by substantial evidence that there are such fundamental differences that the "legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." These terms seem to be to the point and will be further clarified in the context of particular cases which construe them in the Virginia Supreme Court of Appeals.

Sections 20.1-163 and 20.1-175 prescribe a conciliation procedure which must be subscribed to by the parties if they wish a decree of dissolution immediately after the required ninety day conciliation period instead of waiting for the prescribed period of one year to elapse, should they elect not to participate in conciliation.³⁸ This provision uses the incentive technique already discussed to avoid objections of invasion of privacy. However, section 20.1-163 requires respondent to complete and file a conciliation questionnaire within thirty days of being served with copies of petition and summons. This writer feels that this provision is an unwarranted invasion of respondent's privacy despite statutory assurances that respondent's questionnaire "shall be confidential and may be used only by the court, counsel for the parties, or persons authorized by the court."

Section 20.1-176, granting an emergency decree sooner than ninety days at the discretion of the court, is worded in such vague and overbroad language as to invite abuse. This provision should be re-written authorizing this accelerated decree only upon a showing of one of several specified grounds of emergency. Section 20.1-170 wisely abolishes all defenses to an action for divorce such as recrimination, connivance, and collusion.

That the court may "refuse to grant the petition on the uncorroborated testimony of the parties or either of them" is inconsistent with the basic reform objectives of this no-fault oriented revision. Where there are no third party witnesses to the conditions which evince an irreparably broken marriage relationship, one vindictive party can block dissolution of a dead and intolerable relationship. This inconsistent provision should be struck from section 20.1-105.

With the objections just noted remedied as suggested, this code revision would seem to bring Virginia's substantive divorce law into harmony with what appears to be the most enlightened modern thinking on the subject. This thinking, as already pointed out, espouses a divorce law that uses every reasonably available means of judicially encouraging the preservation of our society's key relationship while providing a more "dignified and blameless way out" when a court finds, on substantial evidence, that the union is irreparably destroyed. *

FOOTNOTES

1. Rose, *Non-Fault Divorce in Ohio*, 31 Ohio S. L.J. 52, 55 (1970); Va. Code Ann. § 20-91 (Supp. 1970).
2. *A Divorce Reform Act*, 5 Harv. J. Legis 563, 568(1968); Mace, *Marriage Breakdown or Matrimonial Offense: A Clinical or Legal Approach to Divorce*, 14 Am U.L. Rev. 178, 187(1965); Note, *The No-Fault Concept: Is This the Final in the Evolution of Divorce*, 47 N.D. Lawyr 959, 963-64(1972); Pound, *A Symposium on the Law of Divorce-Foreword*, 28 Iowa L. Rev. 179, 180(1943). The legal form of the adversary system is followed, but the spirit of the law is circumvented as facts are fabricated to fit the law in order to achieve desired results. Such duplicity can but result in increasing disregard for law through steadily bolder techniques of circumvention on the road to ultimate defiance of the law and the breakdown of its effective control over social behavior.
3. 317 U.S. 287(1942). There the Court held that where the court of X acting per procedural due process alters the marital status of one domiciled in X by granting him a divorce from his spouse residing in Y, the original marriage domicile which he left, the said divorce is entitled to "full faith and credit" in the courts of Y.
4. *A Divorce Reform Act*, supra note 2, at 570.
5. Mace, supra note 2, at 186.
6. *Id.*
7. Rose, supra note 1, at 55-56; Bodenheimer, *Reflections on the Future of Grounds For Divorce*, 8 J.Fam. L. 179(1968).
8. I.e., complainant to qualify for relief, must not himself be guilty of action recognized as a ground for divorce.
9. Rose, supra note 1, at 56; *A Divorce Reform Act*, supra note 2, at 567.
10. *Id.*
11. Rose, supra note 1, at 57.
12. Mace, supra note 2, at 183; note; supra note 2, at 967.
13. Mace, supra note 2, at 183.
14. *Id.*
15. *Id.*
16. New Jersey, Final Report of Divorce Law Study Commission 7-10 (1970); *A Divorce Reform Act*, supra note 2, at 568.
17. *Id.* at 6-8.
18. Mace, supra note 2, at 181.
19. Rose, supra note 1, at 55; Cal. Civ. Code § 4350 (West 1970); Iowa Code § 598(1970); Mich. Comp. Laws Ann. § 552.6(); N.J. Rev. Stat. § 2A:34-2(); *A Divorce Reform Act*, supra note 2, at 565. "Grounds which imply the breakdown of marriage, rather than matrimonial offense are insanity (29 states), living apart (18 states)' disappearance (4 states)...." Mace, supra note 2, at 182 n.6. Virginia prescribes two such no-fault divorce grounds: living apart and incurable or natural impotency. Va. Code Ann. § 20-91(Supp.1970).
21. See generally statutes cited note 19.
22. Mace, supra note 2, at 185.
23. McIntyre, *Conciliation of Disrupted Marriages by or Through Judiciary*, 4 J. Fam. L. 117(1964).
24. *Id.* at 129.
25. *Id.*
26. *Id.* at 118.
27. *Id.* at 121.
28. *Id.*
29. Va. Code Ann. § 20.1-109(Proposed Revision).
30. Note, supra note 2, at 964.
31. Mace, supra note 2, at 186; *A Divorce Reform Act*, supra note 2, at 569.
32. Schoenlaub, *No-Fault Divorce: A Practical Approach to the Problems of Marital Failure*, 27 J.Mo. Bar 579, 580(1971).
33. Luke 20:25 (King James).
34. *A Divorce Reform Act*, supra note 2, at 571.
35. This revision was done by William and Mary Law students Sam Powell and Tom Wright under the supervision of Williamsburg-James City County Del. Russell Carneal.
36. § 20.1-153. *Policy*.—This chapter shall be liberally construed and applied to promote its underlying purposes to make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making the irreparable breakdown of the marriage relationship the sole basis for its dissolution, to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution, and to promote the amicable settlement of disputes between parties to triag.
37. § 20.1-155. *Definitions*.—For the purposes of this chapter the following definitions shall apply:
(1) "Irreparable breakdown" means that condition of fundamental differences determined by the court to be substantial evidence of a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.
38. § 20.1-175. *Conciliation procedure*.—Except where conciliation procedures are not required under § 20.1-173 (2), court shall require the parties to a petition for dissolution to participate in conciliation measures for a period of at least ninety days from the issuance of an order setting forth the conciliation procedure and the conciliator. Such procedure may include, but shall not be limited to, referrals to the domestic relations division of the court, if any is established, public or private marriage counselors, family service agencies, community health centers, physicians and clergy. The costs of such conciliation procedures shall be paid by the parties. However, if the court determines that such parties will be unable to pay without prejudicing their financial ability to provide themselves and any minor children with economic necessities, such costs may be paid from the court expense fund.

LAND PIRACY

PRIVATE APPROPRIATION OF PUBLIC LANDS

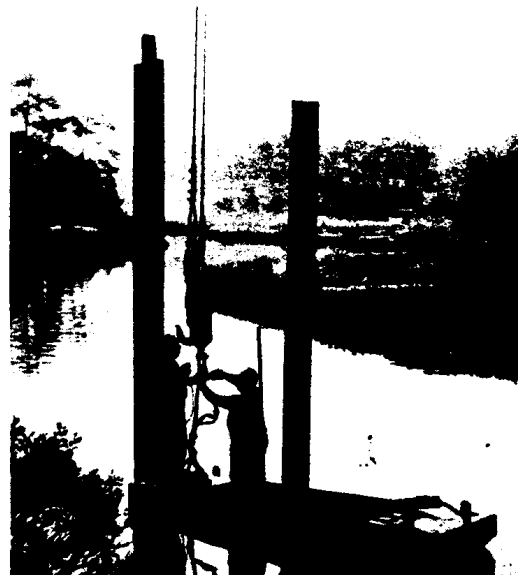
—David Johnson

Some legal questions are left unanswered for years, usually because they are unknown or insignificant to most of us, or because powerful groups with vested interest to protect prefer things to remain as they are. An example of this situation may be found in the Virginia law governing private use of state-owned subaqueous land. A close examination reveals that this body of law fails to protect public interests and creates an undue amount of frustration for the riparian property owner.

Any discussion of the weaknesses of the present use permit system must be prefaced by a brief statement of the manner in which the law determines whether particular subaqueous land belongs to the state or to a private party. Conceptually, this is no problem, for the courts have ruled that "a grant or conveyance of land bounded by a non-navigable stream carries with it the bed of the stream to its center,"¹ while "the navigable waters and the soil under them, within the territorial limits of the State, are the property of the State, to be controlled by the State, in its discretion, for the benefit of the people of the State."² The problem, of course, is in ascertaining in particular situations whether the body of water in question is "navigable." It has been said that "(t)he question of navigability is one of fact. Its determination must stand on the facts of each case. The test is whether the stream is being used, in its natural and ordinary condition, as a highway of commerce, on which trade or travel are or may be conducted in the customary modes of travel on water."³ Such broad definitions will not offer much assistance to the attorney whose client wants to know if his property line extends to the center of a particular stream. He may offer his opinion, considering the facts as presented to him in the light of cases decided on other facts. However, there is no

way he can answer the question with any certainty.

The law regarding ownership of subaqueous land has been codified,⁴ but, with one exception, the statute is merely declaratory of common law.⁵ Until 1819 the Virginia common law provided that the riparian land owner's property line terminated at high water mark. In that year the General Assembly passed a statute⁶ giving riparian owners the land above low water mark. Thus, in one fell stroke thousands of acres of land were taken from the public without a demand for any compensation from those few citizens who were benefited thereby. While this legislative action may be explained in terms of the prevailing economic and political philosophy of the nineteenth century, it cannot be approved, since a statute of this type is clearly a breach of the government's duty to control the use of subaqueous land "for the benefit of the people of the State."⁷ It may be suggested that this violation of public trust argument has broader ramifications



if viewed in conjunction with the due process clauses of the fifth and fourteenth amendments to the United States Constitution. In short, an act of taking public land without compensation may be unconstitutional. Such an argument has never been raised and probably presents a moot point, since the 1819 statute was upheld in *Miller v. Commonwealth*.⁸ Moreover, even if this decision were to be reversed at some future date, the state could not reacquire land used for over a hundred years by riparian landowners without reimbursing them for their loss.

A more important question to Virginians today is the extent to which and for what purposes private individuals should be allowed to use state-owned bottom land. This determination is now the responsibility of the Virginia Marine Resources Commission (VMRC), an administrative agency which grants use permits if certain broad statutory criteria have been met by the applicant. Before July 1, 1972 some uses of subaqueous land such as "fill by riparian owners opposite their property to the established bulkhead line"⁹ did not require a permit from the VMRC. The practical effect of this exception was that in many instances a riparian owner could acquire, at a minimal investment, land below low water mark by extrapolating the line of the nearest established bulkhead to a point off the shore of his property and building his bulkhead along this imaginary line.

In 1972 the General Assembly abrogated the "established bulkhead line" exception and by statute directed the VMRC to consider the following in its decision making process:

In granting or denying any permit for the use of State-owned bottom lands, the Commission shall be guided in its deliberations by the provisions of Section 1 of Article XI of the Constitution of Virginia, and shall consider, among other things, the effect of the proposed project upon other reasonable and permissible uses of State waters and State-owned bottom lands, its effect upon the marine and fisheries resources of the Commonwealth, its effect upon the wetlands of the Commonwealth, and its effect upon adjacent or nearby properties, its anticipated public and private benefits, and, in addition thereto, the Commission shall give due consideration to standards of water quality as established by the State Water Control Board.¹⁰

Article XI of the Constitution of Virginia states that "it shall be the policy of the Commonwealth to conserve...its public lands...(and) to protect its...lands...for the benefit, enjoyment, and general welfare of the people of the Commonwealth."¹¹ Additionally, the VMRC was given the power "to issue permits for all...reasonable uses of State-owned bottom lands, including...the placement of bulkheads...by owners of riparian lands, in the waters opposite such riparian lands...provided, that such...bulkheads...shall not extend beyond established bulkhead lines."¹² Thus, it is clear that, notwithstanding a requirement to now obtain a permit from the VMRC, it is still possible for a riparian landowner to acquire property below the mean low water mark. The question under existing law is whether this is a "reasonable use" of state-owned bottom land. To answer this the VMRC must look to the decision-making criteria which the General Assembly has directed it to consider.



From an examination of each criterion, it would appear that the erection of a bulkhead below mean low water would seldom be a "reasonable use" of state-owned bottom. Furthermore, a common theme of all the criteria is that the use of state-owned subaqueous land must have some purpose other than merely benefitting private interests. Implicit also is the idea that such use must in some manner benefit the public.

The riparian landowner who does obtain a permit to construct a bulkhead below the mean low water mark is placed in an awkward legal position. His deed will most likely show his property lines ending at the low water mark. Because a VMRC permit is not a grant, and since the doctrine of adverse possession does not operate against the state,¹³ the riparian owner has no way of obtaining a legal title

to the land he has created, unless the General Assembly may be persuaded to give him one. If he has no title, *a fortiori* he should not have to pay real estate taxes. Yet, it would also appear that he would through use acquire vested rights in the land, even though technically he owns only the fill material and the State retains title to the land below mean low water. Practically speaking, however, a VMRC permit is tantamount to a grant in this situation, since it is extremely unlikely that it would ever be revoked and the riparian property owner ordered to restore the state-owned bottom to its original condition. Because vested rights would certainly be acquired after a bulkhead was constructed, there is a strong argument that such a revocation would amount to a taking, and the State would have to compensate the landowner for his loss.

Looking at the situation from the public's stand-point, the state is often inadequately compensated by individuals using state-owned bottom. It is true that the applicant must pay a permit fee of \$25.00 if the cost of the project is less than \$10,000.00 and \$100.00 if it is more than \$10,000.00.¹⁴ Also, the VMRC exacts a royalty of 10c to 30c per cubic yard for removal of subaqueous land,¹⁵ and, therefore, the person who plans to dredge below mean low water to obtain land fill will pay the state a small fee for the dredge material. On the other hand, if the fill material is obtained from some other source, the state gets nothing for what may be perpetual use of its property. Moreover, there are probably many persons who opt for bypassing the time-consuming VMRC administrative process and dredge without a permit. If the VMRC does not establish a viable system of ascertaining when this occurs, private parties will benefit at public expense with impunity.

The legal and environmental problems created by allowing perpetual use of state-owned bottom lands were in the past relatively insignificant, since it was assumed that the demand for land would never be greater than the supply available for development. Today, however, real estate developers are aware that there is an increasing demand for waterfront property; that nearly all natural riparian land has already been exploited or set aside for future development; and that it is thus very profitable to "create" waterfront property by filling wetlands or below mean low water. It is suggested that to protect the environment and to bring certainty to an ambiguous area of the law, the General Assembly should enact legislation which further limits the use of state-owned bottom lands. This could be accomplished by requiring riparian landowners to pay the state rent based on

the value of the bottom used, computed by considering environmental damage, economic loss to the public, and other relevant factors. In addition, the VMRC should be directed to adopt a system whereby individuals who dredge or fill without a permit could be apprehended *before* they complete their illegal and environmentally destructive activities. Such measures would not halt utilization of bottom lands, but would encourage responsible development and result in compensation to the state for use of a valuable public resource. *

FOOTNOTES

1. Ewell v. Lambert, 177 Va. 223, 229, 12 S.E.2d 333,336 (1941.)
2. Taylor v. Commonwealth, 102 Va. 759, 76647 S.E. 875, 879 (1904).
3. United States v. Applachian Elec. Power Co., 312 U.S. 712 (1940).
4. Va. Code Ann. §62.1-1 (Cum. Supp. 1972).
5. Newport News Shipbuilding & Drydock Co. v. Jones, 105 Va. 503, 54 S.E. 314 (1906); Meredith v. Triple Island Gunning Club, Inc. 113 Va. 80, 73 S.E. 721 (1912).
6. Va. Code Ann. §62.1-2 (Cum. Supp. 1972).
7. 102 Va. at 766, 47 S.E. at 879.
8. 159 Va. 924, 166 S.E. 557 (1932).
9. Virginia Acts of Assembly 1970, ch. 621 at 1288.
10. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
11. Va. Const., art. XI, §1.
12. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
13. Shanks v. Lancaster, 46 Va. (5 Gratt.) 110 (1848).
14. Va. Code Ann. §62.1-3 (Cum. Supp. 1972).
15. *Id.*

(COURTHOUSE)

(from page 5)

professional and social pressures dictate some re-evaluation of the existing approach to legal education. Many law schools have successfully instituted programs of the types mentioned, and no doubt many more will do so, and in great profusion.

My personal view is that legal education needs to be more responsive to the temper of the times and the needs of the profession as it exists today, but I feel that today's law student must be careful not to fall into the trap of believing that a successful navigation of the first semester of law qualifies him to eschew further interest in the basic and traditional functions of the law school. A solid theoretical foundation is essential to success as an attorney, and it always will be. Academic flexibility is needed; academic revolution is not.

Student understanding of that fact is essential if we are to fulfill our mutual obligations to our chosen profession. *

MARRIAGE

(from page 11)

marriage viability when, as observed by a noted authority, "most people believe that marriage should be terminated when the husband-wife relationship is no longer able to function."¹⁸ The "marital breakdown concept...is the heart of most...recent legislation"¹⁹ and "is implicit in some of the statutory grounds for divorce appearing in the various states."²⁰ Since these statutory provisions embrace social reality by implying a no-fault basis for certain divorce grounds, why not bring the entire statute into alignment with the enlightened recognition that, where the marriage relationship is irreparably defunct, an efficient, consistent dissolution of the marriage contract not only averts needless suffering but increases the public respect for a vital segment of the law.

"Reconciliation chances should be vastly improved; public respect for divorce law would be enhanced; considerable time would be saved for badly congested courts."

THE THEORIES OF "NO-FAULT"

Granted that substantive divorce law should ground its authorization of a marriage dissolution on whether the marital relationship can be retored, the naturally resulting question is: what standard should be applied in making this determination? Perhaps only some experimentation will resolve the issue of whether the determination should be one of fact by experts in the behavioral sciences or one of law by the judge. Most states with new no-fault divorce legislation have made the determination one of law to be made by the judge upon the basis of all the evidence, both lay and expert.²¹ One eminent authority suggests that a grant of divorce be based on the "submission of satisfactory evidence that, on the basis of a thorough clinical investigation..., it was reasonably apparent that..." the marriage was shattered beyond repair. When the judge is so satisfied, "divorce would be granted without guilt being imputed to either party."²²

Clinical examination of the viability of the marital relationship with an eye to determining the likelihood of repairing the fracture should be the

crucial part of the no-fault evidentiary process. Since public interest in the stability of marriages is great, this clinical examination should be made incident to a prescribed series of conciliation sessions, participated in, if possible, by both spouses and directed by skilled professional counselors.

Divorce court conciliation departments exist in at least fifteen states²³ and are valuable not only in saving marriages but are particularly helpful in establishing a calm and objective attitude between the spouses during divorce proceedings even though reconciliation proves impossible.²⁴ Such an attitude is invaluable in the adjudication of such collateral issues as property division, alimony, support, and custody by making justice more likely and by saving much time for badly congested courts.²⁵ Such conciliation is badly needed because divorce petitions are often filed in search of some competent body which can provide help by impartially identifying the causes of the marital conflict and by suggesting practicable methods to resolve them.²⁶ One possible objection to conciliation counseling is that, if made mandatory, it may amount to a state invasion of the individual's constitutional right to Privacy.²⁸

Presently there is no clear statement in the law specifying the rights of divorce litigants to refuse to discuss or reveal their private or intimate relationships.²⁸

The effectiveness of conciliation counseling would be vitiated without such discussion and revelation. One solution to this problem, employed in proposed Virginia legislation, provides the incentive of accelerating the dissolution decree for those who agree to cooperate with the conciliation process.²⁹ Invasion of privacy problems are thus avoided by making conciliation counseling voluntary.

In summary then, what are the advantages of a system of no-fault divorce coupled with an incentive-oriented conciliation process? Reconciliation chances should be vastly improved; public respect for divorce law would be enhanced;³⁰ considerable time would be saved for badly congested courts; collateral issues could be more easily and justly resolved and children spared the painful and psychologically damaging exposure to needless hostility and tension; extortion-provoking defenses would be abolished. If reconciliation proved impossible, both partners could come away from the marriage as whole persons, cognizant of the reasons the marriage failed and thereby prepared with an awareness making more bright the prospects of future marital success.³¹ Society would be spared the existence of a residue of bitter and quilt plagued divorce(e)s.

"...providing a more "dignified and blameless way out" when a court finds...that the union is irreparably destroyed."

DISSENT AND DISSATISFACTION

To conclude this general discussion of no-fault divorce, two widely voiced objections to the concept will be considered. The first is that no-fault divorce legislation makes divorce so easy that it actually provokes or encourages divorce. There is no empirical evidence to support this charge, and the argument ignores the ease with which divorce can be presently obtained in almost any jurisdiction by such expedient means as perjury, fraud, collusion or flight to another state.³² The other objection is grounded on genuine and understandable Christian concern that by enacting no-fault divorce statutes the state is violating the principle laid down by God that divorce be based solely on adultery. One who makes this seemingly valid objection may be put at ease by being reminded of the Lord Jesus Christ's command to "render therefore unto Caesar the things which be Caesar's and unto God the things which be God's"³³ Every Christian marriage has two dimensions: its spiritual dimension, over which God is sovereign; and its legal dimension, over which Caesar, the state, is sovereign. The state does not initiate nor has it the authority to order the dissolution of the spiritual plane of a marriage. Only God can do that, and He has conditioned the grant of a divorce of separation (*a mensa et thoro*), the only type He authorizes, solely on the offense of adultery. Therefore, temporal courts have jurisdiction only to dissolve the marriage contract and its attendant legal obligations. Spiritual responsibility for transgression against the spiritual dimension of the marriage rests with its partners and not with the state, since it is they, who have the will and free choice to heal the fractured relationship and repent in the sight of God for their transgressions against the relationship. As one thoughtful commentator has observed:

Yet the marriage vows may persist in effect after the divorce on a moral-spiritual level with both parties refraining from remarrying and thus maintaining fidelity until the death of the other party.³⁴

It is the duty of all courts and attorneys, and especially Christian judges and attorneys to do everything which is ethically within their power to encourage reconciliation between spouses who come to them with marital problems or seeking divorce. Appropriate referrals should be made to professional counselors for conciliatory service which is beyond the competence of the attorney.

THE VIRGINIA PROPOSAL

Turning now to an examination of key provisions of the proposed revision to Title 20, Chapter 6 of the Virginia Code (Dissolution, Separation, and Annulment),³⁵ Section 20.1-153 of the revision admirably states it to be a policy of the law to deal with divorce by realistically focusing on the marriage relationship itself to assess its viability in determining whether a decree of dissolution should be granted.³⁶ This realistic orientation of the law is further illustrated by the policy goal of mitigating divorce-caused harm to spouses and children and by the goal of a dispute settlement process characterized by an amicable atmosphere.

In section 20.1-155(1) "Irreparable breakdown" is made the sole ground of divorce.³⁷ Wisely the section provides that such a breakdown of the marriage relationship may be found only when it is shown by substantial evidence that there are such fundamental differences that the "legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." These terms seem to be to the point and will be further clarified in the context of particular cases which construe them in the Virginia Supreme Court of Appeals.

Sections 20.1-163 and 20.1-175 prescribe a conciliation procedure which must be subscribed to by the parties if they wish a decree of dissolution immediately after the required ninety day conciliation period instead of waiting for the prescribed period of one year to elapse, should they elect not to participate in conciliation.³⁸ This provision uses the incentive technique already discussed to avoid objections of invasion of privacy. However, section 20.1-163 requires respondent to complete and file a conciliation questionnaire within thirty days of being served with copies of petition and summons. This writer feels that this provision is an unwarranted invasion of respondent's privacy despite statutory assurances that respondent's questionnaire "shall be confidential and may be used only by the court, counsel for the parties, or persons authorized by the court."

Section 20.1-176, granting an emergency decree sooner than ninety days at the discretion of the court, is worded in such vague and overbroad language as to invite abuse. This provision should be re-written authorizing this accelerated decree only upon a showing of one of several specified grounds of emergency. Section 20.1-170 wisely abolishes all defenses to an action for divorce such as recrimination, connivance, and collusion.

That the court may "refuse to grant the petition on the uncorroborated testimony of the parties or either of them" is inconsistent with the basic reform objectives of this no-fault oriented revision. Where there are no third party witnesses to the conditions which evince an irreparably broken marriage relationship, one vindictive party can block dissolution of a dead and intolerable relationship. This inconsistent provision should be struck from section 20.1-105.

With the objections just noted remedied as suggested, this code revision would seem to bring Virginia's substantive divorce law into harmony with what appears to be the most enlightened modern thinking on the subject. This thinking, as already pointed out, espouses a divorce law that uses every reasonably available means of judicially encouraging the preservation of our society's key relationship while providing a more "dignified and blameless way out" when a court finds, on substantial evidence, that the union is irreparably destroyed. *

FOOTNOTES

1. Rose, *Non-Fault Divorce in Ohio*, 31 Ohio S. L.J. 52, 55 (1970); Va. Code Ann. § 20-91 (Supp. 1970).
2. *A Divorce Reform Act*, 5 Harv. J. Legis 563, 568(1968); Mace, *Marriage Breakdown or Matrimonial Offense: A Clinical or Legal Approach to Divorce*, 14 Am U.L. Rev. 178, 187(1965); Note, *The No-Fault Concept: Is This the Final in the Evolution of Divorce*, 47 N.D. Lawyr 959, 963-64(1972); Pound, *A Symposium on the Law of Divorce-Foreword*, 28 Iowa L. Rev. 179, 180(1943). The legal form of the adversary system is followed, but the spirit of the law is circumvented as facts are fabricated to fit the law in order to achieve desired results. Such duplicity can but result in increasing disregard for law through steadily bolder techniques of circumvention on the road to ultimate defiance of the law and the breakdown of its effective control over social behavior.
3. 317 U.S. 287(1942). There the Court held that where the court of X acting per procedural due process alters the marital status of one domiciled in X by granting him a divorce from his spouse residing in Y, the original marriage domicile which he left, the said divorce is entitled to "full faith and credit" in the courts of Y.
4. *A Divorce Reform Act*, supra note 2, at 570.
5. Mace, supra note 2, at 186.
6. *Id.*
7. Rose, supra note 1, at 55-56; Bodenheimer, *Reflections on the Future of Grounds For Divorce*, 8 J.Fam. L. 179(1968).
8. I.e., complainant to qualify for relief, must not himself be guilty of action recognized as a ground for divorce.
9. Rose, supra note 1, at 56; *A Divorce Reform Act*, supra note 2, at 567.
10. *Id.*
11. Rose, supra note 1, at 57.
12. Mace, supra note 2, at 183; note; supra note 2, at 967.
13. Mace, supra note 2, at 183.
14. *Id.*
15. *Id.*
16. New Jersey, Final Report of Divorce Law Study Commission 7-10 (1970); *A Divorce Reform Act*, supra note 2, at 568.
17. *Id.* at 6-8.
18. Mace, supra note 2, at 181.
19. Rose, supra note 1, at 55; Cal. Civ. Code § 4350 (West 1970); Iowa Code § 598(1970); Mich. Comp. Laws Ann. § 552.6(); N.J. Rev. Stat. § 2A:34-2(); *A Divorce Reform Act*, supra note 2, at 565. "Grounds which imply the breakdown of marriage, rather than matrimonial offense are insanity (29 states), living apart (18 states)' disappearance (4 states)...." Mace, supra note 2, at 182 n.6. Virginia prescribes two such no-fault divorce grounds: living apart and incurable or natural impotency. Va. Code Ann. § 20-91(Supp.1970).
21. See generally statutes cited note 19.
22. Mace, supra note 2, at 185.
23. McIntyre, *Conciliation of Disrupted Marriages by or Through Judiciary*, 4 J. Fam. L. 117(1964).
24. *Id.* at 129.
25. *Id.*
26. *Id.* at 118.
27. *Id.* at 121.
28. *Id.*
29. Va. Code Ann. § 20.1-109(Proposed Revision).
30. Note, supra note 2, at 964.
31. Mace, supra note 2, at 186; *A Divorce Reform Act*, supra note 2, at 569.
32. Schoenlaub, *No-Fault Divorce: A Practical Approach to the Problems of Marital Failure*, 27 J.Mo. Bar 579, 580(1971).
33. Luke 20:25 (King James).
34. *A Divorce Reform Act*, supra note 2, at 571.
35. This revision was done by William and Mary Law students Sam Powell and Tom Wright under the supervision of Williamsburg-James City County Del. Russell Carneal.
36. § 20.1-153. *Policy*.—This chapter shall be liberally construed and applied to promote its underlying purposes to make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making the irreparable breakdown of the marriage relationship the sole basis for its dissolution, to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution, and to promote the amicable settlement of disputes between parties to triag.
37. § 20.1-155. *Definitions*.—For the purposes of this chapter the following definitions shall apply:
(1) "Irreparable breakdown" means that condition of fundamental differences determined by the court to be substantial evidence of a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.
38. § 20.1-175. *Conciliation procedure*.—Except where conciliation procedures are not required under § 20.1-173 (2), court shall require the parties to a petition for dissolution to participate in conciliation measures for a period of at least ninety days from the issuance of an order setting forth the conciliation procedure and the conciliator. Such procedure may include, but shall not be limited to, referrals to the domestic relations division of the court, if any is established, public or private marriage counselors, family service agencies, community health centers, physicians and clergy. The costs of such conciliation procedures shall be paid by the parties. However, if the court determines that such parties will be unable to pay without prejudicing their financial ability to provide themselves and any minor children with economic necessities, such costs may be paid from the court expense fund.

INSURANCE

(from page 9)

the situation of his having to satisfy any judgments against him out of his own pocket. The criminal law, on the other hand, does punish the wreckless and negligent driver in many cases. No-fault proposals do not attempt to disturb the criminal sanctions against such drivers. This moral justification for the present tort system as applied to automobile negligence cases, then, tends to lose its force when one delves beneath the surface. Perhaps it is not inaccurate to say that automobile negligence law has to some extent prostituted the basis of the tort liability system by encouraging the development of liability insurance to protect the *negligent* driver from the consequences of his negligent acts.²⁵

Finally, there are the assertions that no-fault will not result in lower rates at all; that instead rates will remain unchanged or may even rise.²⁶ Possibly there was merit to these positions before no-fault insurance was tested in practice, but the success in Massachusetts tends to support the view that no-fault plans, in fact, offer substantial premium reductions. There has been no convincing evidence of no-fault bringing higher rates that has not been discredited by the cost reduction of approximately forty percent in Massachusetts.²⁷

CONCLUSIONS

Change is in the wind for the automobile insurance industry in Virginia, and political leaders ignore the public concern over the issue at their peril. The real question is related to the form the changes will take in Virginia and the extent of the changes. It is a question that demands an objective study of all alternatives, not an emotional, self-serving or haphazard approach. The no-fault concept poses some serious questions that must be answered, but it appears to have captured the public's support. The comparative negligence approach recommended by the State Bar committee certainly presents what may be an acceptable alternative. Its major obstacle, however, is the tremendous amount of publicity the no-fault proposals have had and the sensational success of the Massachusetts Plan. The consumer will tend to opt for the plan that serves him best for the least cost, and other interest groups will naturally be influenced by their special concerns. The General Assembly, then, must face the problem by considering all alternatives and adopting the plan most suitable for Virginia.²⁸

There is nothing sacred in a concept or idea just because it is old, and prudent change of a constructive nature should not be feared. The no-fault proposals do not represent change for its own sake, but, rather, offer a plausible alternative for coping with a need—the need for prompt, efficient in-

surance coverage at a reasonable cost. While it is a proposal that alters a basic area of the law, our legal system is, ideally, geared to accommodate such change when necessary. From the consumer's viewpoint, no-fault insurance makes sense; and because the consumer in this instance is largely the middle-class individual, who is also the typical voter, Virginia can anticipate the General Assembly's adoption of some form of no-fault automobile liability insurance within the near future. *

FOOTNOTES

1. Brainard, "A No-Fault Catechism: Ten Basic Questions Raised and Answered," (1972) *Ins. L.J.* 317.
2. Greene, *Risk and Insurance* (2nd Ed. 1968), 453-54.
3. Va. Code Ann. §38.1-381.5 (Cum. Supp. 1972).
4. *The Wall Street Journal*, Aug. 7, 1972, at 1, col. 6.
5. *Id.*
6. 1965
7. *See Report of the Committee to Study and Evaluate Basic Insurance Protection Plans*, Twenty-third Annual Report of the Virginia State Bar (1971) for a proposal to retain the tort liability system with certain modifications (hereinafter referred to as the State Bar Committee).
8. Puerto Rico adopted a government-sponsored no-fault system in 1968. Aponte and Denenberg, "The Automobile Problem in Puerto Rico," (1968) *Ins.L.J.* 884.
9. "Status Report on No-Fault Auto Insurance," *J.Am.Ins.*, Jan-Feb. 1972, at 10; Dacey, "No-Fault—End of a Civilized Tort System?" 6 *New Eng. L. Rev.* 79 (1970).
10. "Will 'No-Fault' Bring Cheaper, Better Auto Insurance?" *Changing Times*, March, 1972, at 16-17.
11. Report of the State Bar Committee, *supra* note 7, at 36 et seq.
12. *Id.*
13. *Report of the Committee on Basic Insurance Protection*, Va. Bar News, May/June, 1972, at 23.
14. *Richmond Times Dispatch*, Jan. 18, 1972, at A6, col. 1.
15. *Id.*
16. *Virginian-Pilot* (Norfolk), Jan. 20, 1972, at A14, col. 1.
17. H.B. 337 (1972 Session).
18. Keeton and O'Connell at 11-13.
19. H.B. 315 and H.B. 337 (1972 Session).
20. Address to General Assembly, Jan. 12, 1972
21. Keeton and O'Connell at 69-71.
22. *Pinnick v. Cleary*, 271 N.E. 2d 592, Mass. Interestingly, amicus briefs supporting the plaintiff's challenge to the bill were filed by the American Trial Lawyers Association, the Massachusetts Trial Lawyers Association, and the Massachusetts Bar Association. Amicus Briefs supporting the no-fault statute were filed by the American Mutual Insurance Alliance, American Insurance Association, and the Massachusetts Association of Independent Insurance Agents and Brokers, Inc.
23. *Grace v. Howlett*, 283 N.E.2d 474, 51 Ill.2d 478 (1972).
24. Braunstein, "Conflicts of Laws Problems Arising from Different No-Fault Auto Insurance Plans in Various States," 67 *The Brief* 234 (1972).
25. Jones, "The Great Myths About Auto Insurance Today," an address before the Society of Chartered Property and Casualty Underwriters, Jan. 22, 1969, in Philadelphia. Mr. Jones was President of the American Insurance Association which supports no-fault automobile insurance.
26. *See* Senator Tower's remarks on the federal no-fault bill. 118 CONG. REC. S13084 (daily ed. Aug. 8, 1972).
27. *The Wall Street Journal*, August 4, 1972, at 6, col. 1.
28. In *Pinnick*, *supra* note 22, the court pointed out that the automobile tort liability insurance system seems to have the highest cost/benefit ratio of any major compensation system in operation in the nation. For every dollar of net benefits, this system consumes about a dollar. 271 N.E.2d at 605.

Alumnus Profile

The Winds Of Change

Dean Curtis must have been pleased with his graduating class of '48 as late May, 1967 brought exams to a close. Wayne "Flub" O'Bryan was certainly just as pleased with his receipt in that year of the American Law Student Association's Silver Key Award for leadership. As SBA President he increased student activity in the ABA and initiated the now traditional Barristers' Ball. In the process, he earned the W.A.R. Goodwin Scholarship, was listed in *Who's Who Among Students in American Colleges and Universities*, and attended the American Law Student Association Annual Meeting in Montreal, Canada.

1972 finds David Wayne O'Bryan a partner in the Richmond, Virginia firm of White, Cabell, Paris and Lowenstein and President of the William and Mary Law School Association. Mr. O'Bryan attended Benedictine High School and Richmond Professional Institute in Richmond before coming to William and Mary College in Williamsburg. In 1970, after a number of years association with White, Reynolds, Smith and Winters in Norfolk, Virginia, Mr. O'Bryan returned to Richmond for his present position. Just four and one-half years ago Mr. O'Bryan was working his way through law school as a wine steward at the King's Arms and sharing the house on Duffie Drive with a fellow student David Wittan. Those few years have seen a dramatic progression for him, not unlike the change from a law school of 290 students to 450 students. In fact, this sense of transition set the tone for a recent conversation with Mr. O'Bryan about his reactions to the changes at the law school and his enthusiasm for the growing Law School Association.

"Personally," Mr. O'Bryan reflects, "I'm glad to see the growth at Marshall Wythe. In order to grow in stature the law school had to grow in size. It was just absolutely too small before to become the outstanding professional school that it has the potential to be, though that stature may be obtainable at the present size of approximately 450 students."

The growth in the law school inevitably led to the growing community of Marshall Wythe alumni. "I was interested in alumni activities before I graduated. Our relation back to our school is the one thing we all have in common. and the fact that we all are graduates of the law school is enhanced by the recent progress at the school." Actually, Wayne O'Bryan, Steve Harris, and Jerry Franklin, the editor of their Law Review, left William and Mary with the clear intention of becoming immediately instrumental in shaping a stronger alumni community. Such determination was characteristic of "Flub" O'Bryan. The nickname, based upon a 286 pound SBA President, was totally inapplicable to the counselor at White, Cabell, Paris and Lowenstein of around 90 pounds lighter. That trait of perseverance was not lost in the group's efforts to "build a Marshall Wythe alumni and friends association." Their success is substantial.

Marshall Wythe is now honored with almost 800 alumni of increasing professional competency and geographical diversity. Mr. O'Bryan assumed the Presidency in April of this year. Several changes have resulted. "The Annual Association spring meeting is being moved to the fall. The meeting this year on Saturday, October 14 offered many more events of interest to alumni—from the morning seminars and the luncheon to the football game, followed by the cocktail party. We didn't expect everyone to come to every event but hoped instead that everyone would enjoy at least one program. This new time should prove more convenient and enjoyable to alumni. This year's program has taken a lot of work. I really appreciate the diligence of our Board of Directors members, the consistent work of Bob Dutro, and the efforts of Judge Hal Bonney in coordinating Homecoming."



Perhaps the most ambitious change initiated by Mr. O'Bryan is the renewal of a Marshall Wythe fund raising program this year. Originally contributions to the law school were applied to the Woodbridge Fund, established by the Association to eventually produce sufficient income to endow a "chair of law" at Marshall Wythe and furnish student scholarships.

There was consideration by Dr. Graves, President of the College of William and Mary that college-wide fund raising might be in the best interests of the law school as well as the various organizations and departments. But "there is a substantial feeling among the alumni and friends of the law school that I know personally, that whatever they contribute must go totally to their law school. Also, information from my attending a recent Fund Raising Conference in Washington suggests that a fund raising campaign run by the Association will yield the most benefits to the law school. It is the recommendation of the Board that while we will be able to use some college services, this will be an effort conducted by our Association."

Is 100% fund participation just a campaign drive away? "Well, alumni participation has been fairly consistent over the years that I've been associated--it's been poor!" But transition is in motion and the Association under Mr. O'Bryan's guidance has fostered the increased alumni interest. Between the new Homecoming schedule, issues of the Alumni Briefs, and the spirit of a fund campaign at a time when the law school is stretching its resources, increasing alumni interest is being reinforced.

Certainly, the changes in the law school and its alumni association have been pronounced, and at the end of our conversation there was a residual enthusiasm for what progress those next four and one-half years might bring. *

Alumni News

CLASS OF 1932

Presently serving Marshall-Wythe School of Law as a member of its Board of Directors is RUSSELL A. COLLINS. A past president of the Newport News Bar Association, Mr. Collins is also serving as local Judge of Elections, Chairman of the Electoral Board, and Bail Commissioner.

CLASS OF 1944

WILLIAM O. MORRIS, a professor of law at West Virginia University, once again lectured at Johannes Gutenberg University, Mainz, Germany for a month this past May as a Fullbright Professor. Mr. Morris also served as a visiting professor last summer at Hastings College of Law, University of California, and lectured at the Sixth International Meeting on Forensic Sciences, Edinburg, Scotland, in September. He has authored a new book, *Dental Litigation*, published this year by Michie Co., Charlottesville, Virginia.

CLASS OF 1960

Listed in the 1972 Who's Who in Government is HARMON D. MAXSON, Mr. Maxson is an attorney for the Indian Claims Commission and an honorary member of the Beaver Clan of the Seneca Indian Tribe, and Six Nations of the Iroquois League.

CLASS OF 1961

DOUGLAS BOECKMAN is a candidate for an LL.M. at New York University. He is presently Appeals Attorney for Liberty Mutual Insurance Company in New York City and resides at 311 W. 90th Street, New York, New York 10024.

LARRY WISP has the proud distinction of recently being elected as Boss of the Year by the Norfolk-Portsmouth Area Legal Secretaries' Association. Mr. Wisp has been active as both secretary and treasurer in recent years in the City of Chesapeake Bar Association.

CLASS OF 1963

T. L. GROOMS of East Moline Illinois is manager of Industrial and Labor Relations for the John Deere Company there.

One of five winners of the Federal Bar Association's 1971 Younger Federal Lawyer Award for outstanding legal service to the Federal Government was CHARLES A. WHITE, JR. Mr. White is presently Chief, International Affairs Division, Office of the Judge Advocate, U.S. Army, Europe and 7th Army, in Germany. He supervises an office staff of 18 persons, including 8 other civilian and military attorneys. His duties include negotiation interpretation, implementation of treaties and other international agreements with seven European and

Middle Eastern countries, as well as monitoring of all foreign criminal jurisdiction exercised over U.S. personnel by the Federal Republic of Germany, Belgium and France. His staff is also responsible for the conduct of all civil litigation on behalf of or against the U.S. Forces in Germany.

WILLIAM M. WHITTEN, III took his LL.M. in Government Procurement Law at George Washington University in 1971. He is currently a major with the Army's Judge Advocate General's Corps at the U.S. Aviation Systems Command Headquarters in St. Louis, Missouri.

CLASS OF 1966

ROBERT E. KANE, JR. is a partner in the firm of Sullivan and Kane in Richmond, Virginia. His business address is 1508 Willow Lawn Drive, Richmond.

One of the Assistant Attorney Generals for the Commonwealth of Virginia is WILLIAM T. LEHNER. He advises present students that knowledge of legal research is the single most important subject of law school.

KENNETH N. WHITEHURST, JR., married to the former Lillie L. Switzenbaum, is an Associate Judge with the Juvenile and Domestic Relations Court, Virginia Beach, Va. He served in the House of Delegates of the Virginia General Assembly in 1968 and 1970. In 1969, Ken was honored as an Outstanding Alumnus by the national office of Phi Alpha Delta Legal Fraternity.

CLASS OF 1967

CRAIG U. DANA, formerly with the U.S. Navy's Judge Advocate General's Office, is now associated with the firm of Morris, Downing and Sherred of Newton, New Jersey. His residence address is 30 South Shore, Sparta, New Jersey 07871.

STEWART P. DAVIS has recently opened his own office for general practice in Falls Church, Virginia. Upon resigning from his JAG Commission last December, he received a Meritorious Service Medal from the U.S. Army Judiciary, Defense Appellate Division. The Davis' became the parents of a son, Ned, in May of 1971.

Judith Getsug became the bride of BURKE W. MARGULIES in August of 1971. He is presently Trust Officer for the First Virginia Bank of Tidewater and also for the Trust Company of First Virginia in Norfolk.

CLASS OF 1969

ROBERT S. DURTRO, secretary of the William & Mary Law School Association, has been named Substitute Judge for the James City County-York County-City of Williamsburg Courts.

ROBERT P. KAHN is a staff member of the Judge Advocate General's Office, 12th Naval District Regional Medical Center, Oakland, California. His address is 1051 Bella Vista, Apartment 3, Oakland, California, 94610.

Current treasurer for the Montgomery-Floyd-City of Radford (Va.) Bar Association is ROBERT A. LOWMAN. Robert is in private practice in Radford and tells students to learn all they can about civil and criminal procedure.

J. LARRY PALMER is a partner in the new firm of Stokes, Lemmond, and Palmer of Hopewell, Va. Larry has lately been active in Big Brother and Drug Abuse programs in the Hopewell area. His advice to students is to spend every spare minute in the courthouse.

CLASS OF 1971

SUSAN BUNDY COCKE is an associate with McClintock and Mullins in Tazewell, Virginia. She is secretary-treasurer of the Tazewell Bar Association and secretary of the 22nd Judicial Circuit. The Cockes live at 106 Marion Avenue, Tazewell, Virginia 24651

STANLEY M. HIRSCH has opened his own law firm in Chesapeake, Virginia. His business address is Indian River Professional Building, 4310 East Indian River Road, Chesapeake, Virginia 23325.

Associated with the firm of James and Consolvo of Virginia Beach, Va. is DONALD E. LEE, JR. Don recently completed three months active duty with the U.S. Army in Fort Benning, Georgia.

We would like to thank everyone for their continued response to our column, and once again we invite all alumni to drop us a short note informing us of any important changes or events in your life and career. Write to:

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