

October 1968

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Herma Hill Kay
hkay@law.berkeley.edu

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Recommended Citation

Herma Hill Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205 (1968).

Link to publisher version (DOI)

<https://doi.org/10.15779/Z38CV09>

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California Law Review

VOL. 56

OCTOBER 1968

No. 5

A FAMILY COURT: THE CALIFORNIA PROPOSAL*

Herma Hill Kay†

The idea of a family court has been discussed for many years. Such a court, it is said, should have integrated jurisdiction over all legal problems that involve the members of a family; be presided over by a specialist judge assisted by a professional staff trained in the social and behavioral sciences; and employ its special resources and those of the community to intervene therapeutically in the lives of the people who come before it.¹ In the United States the idea was apparently stimulated by the optimism resulting from the success of the juvenile court movement in establishing specialized courts to deal with neglected and delinquent children. The nearly religious fervor of juvenile court proponents and their virtually unlimited expectation of the amount of good a judge and his staff of experts might accomplish by treating children therapeutically rather than punitively² carried over to the

* From the forthcoming book, *DIVORCE AND AFTER*, edited by Paul Bohannon, © 1968, by Paul Bohannon. The author was a member of Governor Edmund G. ("Pat") Brown's Commission on the Family and chairman of its Subcommittee on the Family Court. This article, however, represents only the author's views, not those of the Commission. For a synopsis of the Commission's views, see generally, Dinkelspiel & Gough, *A Family Court Act for Contemporary California: A Summary of the Report of the Governor's Commission on the Family*, 42 CAL. ST. B.J. 363 (1967) [hereafter cited as SUMMARY]; Dinkelspiel & Gough, *The Case for a Family Court—A Summary of the Report of the California Governor's Commission on the Family*, 1 FAMILY L.Q. 70 (1967).

† B.A., 1956, Southern Methodist University; J.D., 1959, University of Chicago; Professor of Law, University of California, Berkeley.

1. *The Report of the Cal. Governor's Comm'n on the Family* (1966) [hereafter cited as REPORT] contains an annotated bibliography of the legal articles dealing with the family court. *Id.* at 124-44. See also Kay & Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 724-26 (1966).

2. See, e.g., Schramm, *The Juvenile Court: Its Philosophy and Organization*, in THE

family court proposal as well. Thus, Judge Alexander of Toledo, a leading American proponent of the family court, said in one of his earliest articles on the subject:

We suggest handling our unhappy and delinquent spouses much as we handle our delinquent children. Often their behavior is not unlike that of a delinquent child, and for much the same reasons. We would take them out of the quasi-criminal divorce court and deal with them and their problems in a modern family court. When the marriage gets sick there is a cause. This cause manifests itself in the behavior, or misbehavior, of one or both spouses. Instead of determining whether a spouse has misbehaved and then "punishing" him by rewarding the aggrieved spouse with a divorce decree we would follow the general pattern of the juvenile court and endeavor to diagnose and treat, to discover the fundamental cause, then bring to bear all available resources to remove or rectify it.³

The first flush of pride in the juvenile court has given way in the United States to serious reappraisals.⁴ Indeed, it now appears to be conceded generally that the juvenile court, as it was first conceived, has failed to achieve its goals.⁵ The legal community's reaction to the Supreme Court's opinion in *In re Gault*,⁶ which compelled an observance

PROBLEM OF DELINQUENCY 270-76 (S. Glueck ed. 1959); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

3. Alexander, *Family Life Conference Suggests New Judicial Procedures and Attitudes Toward Marriage and Divorce*, 32 J. AM. JUD. SOC'Y 38, 41 (1948). See also Alexander *The Family Court—An Obstacle Race?* 19 U. PITT. L. REV. 602 (1958); Alexander, *Legal Science and the Social Sciences: The Family Court*, 21 MO. L. REV. 105 (1956); Alexander, *Let's Get The Embattled Spouses out of the Trenches*, 18 LAW & CONTEMP. PROB. 98 (1953).

4. E.g., F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 43-61 (1964); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7; Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, in *JUSTICE FOR THE CHILD* 22-43 (M. Rosenheim ed. 1962); Younghusband, *The Dilemma of the Juvenile Court*, 33 SOCIAL SER. REV. 10 (1959).

5. See authorities cited in note 4 *supra*. See also THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967) [hereinafter cited as TASK FORCE REPORT]; Lemert, *The Juvenile Court—Quest and Realities*, TASK FORCE REPORT app. D.

6. 387 U.S. 1 (1967). *Gault* involved the commitment of a 15 year old boy to an Arizona training school in part because his participation in a lewd telephone call to a married woman indicated to the juvenile court judge that the boy was habitually involved in immoral matters. *Id.* at 8 n. 5. The commitment was intended for the duration of the boy's minority, although the maximum penalty under Arizona law for an adult who made lewd telephone calls was a fine of from \$5 to \$50 or imprisonment for not more than two months. No notice of their son's arrest or detention was given to his parents, and they did not learn of the initial court hearing until the evening before it was held. Neither the boy nor his parents were represented by counsel during the proceedings, nor were they advised of their right to counsel. No record was kept of the hearings. The juvenile court judge

in delinquency proceedings of the child's constitutional rights to representation by counsel, notice, confrontation and cross-examination of witnesses, and his privilege against self-incrimination, has been largely favorable.⁷ Since the original family court idea was largely copied from the juvenile court model, it becomes necessary for modern advocates of the family court to reexamine their proposal in order to discover whether the common aspects of the two schemes are among those that have contributed to the present dissatisfaction with the juvenile court and, if so, whether these defects can be remedied or avoided. This introduction will briefly review some of the similarities and differences between the two courts, and suggest questions for consideration in the remainder of this Article.

A preliminary question, raised by some opponents of the family court, must first be mentioned: Is a court the proper institution for settling family problems? The question arises in part because a basic assumption common to both courts is that their daily work is not limited to the decision of legal questions. Issues of child custody and parental fitness, for example, often present complex questions of the analysis and prediction of human behavior that cannot be resolved by the simple application of a legal formula.⁸ Moreover, the neglect and delinquency of children and the disintegration of a family appear to involve a degree of emotional stress not normally encountered in litigation involving real property, corporations, contracts, or even personal injury actions between strangers. Finally, it is assumed that the unique resources of a court, namely the presence of a lawyer-judge, the right to use compulsory process to secure the attendance of parties and witnesses and to enforce judgments, and the tradition of deciding individual cases according to rules of law are inadequate to deal with such nonlegal problems.

One may ask why a court should attempt to act in these areas, if it is so ill-suited to the task. The answer is perhaps clearer for the juvenile than for the family court. The juvenile court has as part of its duty the protection of society from the seriously destructive acts of minors;

committed the boy to the training school. His decision was upheld by the Supreme Court of Arizona, but the United States Supreme Court reversed.

7. See generally Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700 (1967); Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233; Rubin, *The Juvenile Court System in Evolution*, 2 VALPARAISO U. L. REV. 1 (1967); Comment, *In re Gault: Children Are People*, 55 CALIF. L. REV. 1204 (1967). But see, Parker, *The Century of the Child*, 45 CAN. B. REV. 741 (1967). The Court's opinion itself contains a detailed review of recent literature criticizing the juvenile court, 387 U.S. at 14-31.

8. See Kay & Philips, *supra* note 1.

insofar as incarceration is used for this purpose, the Constitution requires the use of court-administered legal standards such as due process for the protection of the defendant. Similarly, the use of a court to decide divorce cases may be justified in part by the need to decide such primarily legal issues as the identification and division of marital property and the assessment of support as well as the need to enforce judgments concerning these matters. A court is also necessary to protect the parties and their children by orders for temporary custody and support during the divorce proceedings. Again, the supervision and enforcement of custody orders during the minority of children would appear to be a proper judicial function. Finally, courts are subject to well-established techniques of review under standards set by constitutional provisions, legislatures, or higher courts, and such review guards the court's clientele against basic unfairness. In view of these considerations, it appears more appropriate to provide courts with nonlegal techniques and personnel than to supply legal authority to nonjudicial agencies even if they are better equipped to deal with the primarily emotional problems of family dissolution.

Having decided to use a court of law to deal with nonlegal matters, however, one must next consider how the courts can best be equipped to enable them to work productively in a new dimension. To respond to this need, juvenile and family court proponents have traditionally relied upon three techniques: A specialist-judge to direct the court; a professional staff that will gather information as well as diagnose, prescribe treatment for, and sometimes actually treat, the emotional difficulties of the court's clientele; and the substitution of a non-adversary "therapeutic" environment for the law's traditional adversary procedures. Juvenile court experience with each of these three ideas has led to serious criticism and, if care is not taken, each may predictably lead to trouble for the family court. Thus, as the President's Task Force on Juvenile Delinquency has pointed out, the "mature and sophisticated judge, wise and well-versed in law and the science of human behavior"⁹ has been conspicuous by his absence in juvenile courts throughout the land. It is no secret that juvenile and domestic assignments go to junior judges in many urban courts and that even a six-month stint in the job is

9. TASK FORCE REPORT, *supra* note 5, at 7. A study cited by the Report indicated that of the 1,564 juvenile court judges who responded to a questionnaire (70% of the total), half had not received undergraduate degrees, a fifth had received no college education at all, and a fifth were not members of the bar. *Id.* at 7. The very scarcity of juvenile court judges is also a serious problem. For a thoughtful study of the use of referees to supplement judges in the California juvenile courts, see Gough, *Referees in California's Juvenile Courts: A Study in Sub-Judicial Adjudication*, 19 HASTINGS L.J. 3 (1967).

more than many judges would like.¹⁰ Yet, no existing family court plan has failed to include a proposal for a judge who can be trained to cope with the sensitive and demanding problems of disintegrating families and who will stay with the assignment long enough to develop expertise.

Providing a court with a professional staff raises difficult problems of recruitment. Critics of the family court have argued that there are probably not enough trained social workers, let alone psychologists and psychiatrists, to meet the demand created by widespread establishment of family courts. Nor is a public agency likely to be able to offer the necessary pay scale, job recruiting, and opportunities for research and professional advancement offered by competing private agencies. Further, critics argue that even if enough highly trained, sensitive, and dedicated staff members could be found to man the family courts, the knowledge of human psychology has not yet matured sufficiently to give reasonable assurance that diagnosis and treatment will lead to prediction and cure in a majority of cases. Finally, the objection has been made that the authoritarian atmosphere which inevitably accompanies courts is not a proper setting for what will be, essentially, a family service agency. Many of these objections have been given bitter point by the juvenile court experience.¹¹ Nevertheless, the idea of a professional staff is central to most family court plans.

The creation of a therapeutic atmosphere in the juvenile court was thought to require an informal procedure marked by the removal of lawyers, a relaxation of the technical rules of evidence, and a firm decision that the constitutional rights of adults charged with criminal acts did not apply to the assertedly noncriminal proceedings of the juvenile court. Nearly all of these decisions were set aside by *Gault*, which demonstrated the essential wrong-headedness of attempting to help children by depriving them of safeguards guaranteed to adults. As Mr. Justice Fortas' opinion notes, the substitution of unbridled discretion and the concept of *parens patriae* for the specific protections of the Constitution in delinquency matters too often produced arbitrariness rather than "careful, compassionate, individualized treatment."¹² Further, it has been suggested that the juvenile court's very effort to treat the offender rather than the offense was not understood by the offenders themselves who may have felt more threatened by the court's attempt to intervene in their lives for rehabilitative purposes than they would have if its aim had simply been to punish them for misconduct.¹³ What, then,

10. See Philips, *Mental Hygiene, Divorce and the Law*, 3 J. FAMILY L. 66-67 (1963).

11. See TASK FORCE REPORT, *supra* note 5, at 7-9.

12. 387 U.S. 1, 17-18.

13. Younghusband, *supra* note 4, at 15-17. See generally D. MATZA, DELINQUENCY AND

can be expected of the family court's effort to ignore marital misconduct in order to rehabilitate the faltering married lives of persons who come before it? Rheinstein has suggested that even if the court's professional staff can be expected to discover, in every case, the "true" cause of marital discord, the State should not be given the power to attempt the transformation through psychiatry of the personality structure of an individual "simply because he has failed to make a success out of a marriage with some other individual."¹⁴

Enough has been said about the juvenile court experience to indicate some of the hard questions that require a response from advocates of the family court. It is the purpose of this article to consider a particular family court proposal, that of the California Governor's Commission on the Family, in light of these problems. Before turning to the details of the California plan, however, it might be well to point out two striking differences between that plan and the juvenile court that affect the evaluation of whether any family court can be expected to escape the dilemmas of its predecessor.

The juvenile court contained within its very structure a conflict between coercion and confidentiality so basic that the system was ultimately unable to survive its disruptive effects. As we have seen, the therapeutic ideal in its juvenile court formulations meant the virtual elimination of lawyers from the court's proceedings. The probation officer was thus cast in the inconsistent roles of prosecutor and helper: His duty was both to establish the court's jurisdiction over the minor by proving his neglect or delinquency and to gain the minor's confidence afterward in order to make the court's treatment plan effective. The use in larger courts of a special "court officer," who did not himself attempt to work with the children, to present cases merely disguised the conflict. Calling upon the juvenile court judge to protect the minor by acting as his "parent" served only to confuse the situation further. The reintroduction of lawyers to the juvenile court first by statutory reform in some states and now in all states by virtue of the *Gault* decision has brought this conflict into the open and has stimulated much concern about their proper role in the juvenile proceedings.¹⁵ Similar concern can be expected

DRIFT (1964).

14. Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 639 (1956). See also *id.* at 635-40.

15. E.g., Coxe, *Lawyers in Juvenile Court*, 13 CRIME & DELINQUENCY 488 (1967); Furlong, *The Juvenile Court and the Lawyer*, 3 J. FAMILY L. 1 (1963); Levin, *The Role of the Lawyer in Juvenile Proceedings*, 39 PA. B. ASS'N Q. 427 (1968); Riesderer, *The Role of Counsel in the Juvenile Court*, 2 J. FAMILY L. 16 (1962); Skoler & Tenney, *Attorney Representation in Juvenile Court*, 4 J. FAMILY L. 77 (1964). See generally Institute of Continuing Legal Education, CHILDREN IN THE COURTS—THE QUESTION OF REPRESENTATION (G. Newman ed. 1967).

to develop about the proper role of the probation officer, now that he is required to recognize the child's legal rights as well as his human needs. Some protection of the caseworker's initial neutrality can no doubt be gained from the use of the district attorney rather than the probation officer to establish jurisdiction.¹⁶ It remains to be seen, however, whether the probation staff can successfully free itself from its prior association with law enforcement in order to deal effectively with juveniles on a confidential basis. The unappealing alternative appears to be the establishment of a special calendar for delinquent children that will develop into a junior criminal court.

Fortunately for the proposed California family court, its professional staff is not to be handicapped by a similar conflict of interests. As we shall see, the California plan does not place the caseworker in the unhappy position of gathering information from a party to be used against him. It does not, for example, provide for compulsory counseling. It is careful to protect the voluntary conciliation counseling which is available with the safeguard of absolute confidentiality between counselor and client. Reports made to the court will be submitted to the attorneys for both parties for approval before they are given to the judge. By these and other devices to be discussed in detail later in this article, the professional staff and the persons before the court are protected against the conflicting loyalties and compulsory atmosphere that so greatly hindered the effective work of the juvenile court. Moreover, attempts to curtail the use of traditional adversary techniques in the family court should not entail a mass exodus of attorneys from divorce practice. Rather, the proposed system hopefully will free the lawyer from his present role as an amateur family therapist and allow him to devote himself to the legal aspects of family dissolution such as the division of property, the establishment and enforcement of support, and the protection of children.

The second major difference lies in the degree to which the California proposal rests upon reform of the substantive law of divorce. The juvenile court proponents established an institution and a procedure for dealing with child neglect, dependency, and delinquency,¹⁷ but they did not question the use of violation of the criminal law as one basis for the court's jurisdiction.¹⁸ The court was to treat the offender, not the

16. CAL. WELF. & INST'NS CODE §§ 681 (West 1967), added by ch. 507, § 3, [1967] Cal. Stats. 1852; ch. 1355, § 9, [1967] Cal. Stats. 3192.

17. See Rosenheim, *Perennial Problems in the Juvenile Court*, in JUSTICE FOR THE CHILD 7-21 (M. Rosenheim ed. 1962).

18. The same criticism has been made of the President's Crime Commission Task Force Report on Juvenile Delinquency. See Packer, Book Review, NEW YORK REVIEW OF BOOKS, Oct.

offense; indeed, the offense was unimportant except as an identifier of the child who needed the court's services. The point is that, while the juvenile court movement produced no critical review of the criminal law as it applied to children, the California proposal begins with the conviction that establishment of a family court without an accompanying thoroughgoing revision of the substantive law of divorce would be a useless gesture.¹⁹ Since the two concepts are thus intentionally made interdependent, this Article will begin by examining existing divorce law and procedure before discussing the California plan.

1

THE PRESENT DIVORCE LAW: MATRIMONIAL OFFENSE AND THE
ADVERSARY SYSTEM

The development of the current American law of divorce has been traced elsewhere,²⁰ and will be mentioned here only to set the family court proposal in historical context. The Anglo-American history began with the exclusive jurisdiction of ecclesiastical courts in England over matrimonial actions. These courts granted two kinds of "divorce": divorce *a mensa et thoro*, which merely authorized the separation of the parties, and divorce *a vinculo*, which declared that the marriage had never legally existed. Divorce, in the modern sense of a judicial decree dissolving a valid marriage and allowing one or both partners to remarry during the life of the other, did not exist in England until 1857, although Parliament sometimes permitted individuals to remarry following an ecclesiastical separation.²¹ Although a few legislative divorces were granted in the United States, by and large the American legislatures enacted general statutes granting the courts jurisdiction to dissolve marriages only on specified grounds. In many states, these grounds consisted of the old ecclesiastical grounds for separation, uncritically carried over and made to serve as grounds for absolute divorce.²² The State's interest in marital stability, thus delegated to the courts, was

12, 1967, at 17.

19. REPORT, *supra* note 1, at 26-32. Similarly, the most disappointing aspect of the Standard Family Court Act, 5 NATIONAL PROBATION & PAROLE ASS'N J. 97 (1959) is its failure to deal with the problem of divorce law.

20. *E.g.*, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 280-85 (1968); J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS, 256-61 (1931); McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 685 (1956).

21. See generally O. MCGREGOR, DIVORCE IN ENGLAND 1-34 (1957).

22. Drinan, *Reflections on Contemporary Dilemmas in American Family Law*, 2 FAMILY L.Q. 63, 64-65 (1968).

presumably to be guarded by the judge's diligence in requiring that plaintiff's evidence clearly established the ground relied on for a divorce, that defendant had no valid defense to the plaintiff's suit, and that the parties had not conspired to put on a false case in order to obtain relief. Divorce was thus cast in the traditional common law model of an adversary procedure; plaintiff's success depended on proving defendant's fault; both parties, assumed to be at odds and dealing at arm's length, were expected to bring forth all the relevant facts about their marriage and its disintegration to be assessed by the judge in reaching his decision.

In addition to the statutory grounds for divorce, which assume that a wrongful act has been committed by one party to the marriage after the marriage had been formed, sufficient to give the other legal relief by dissolving the contract, the law recognizes annulment as an alternative means available in proper cases to free the parties from the obligations of marriage. Annulment, like divorce, gives the parties the right to remarry; unlike divorce, however, it is not based on conditions arising after the marriage has been formed. Instead, the theory of annulment is that an impediment existed at the time the marriage was contracted that makes it "voidable" and gives certain named persons the right to establish its invalidity. If the marriage is not challenged by the persons having authority to object to it within a prescribed period of time, the marriage is valid for all purposes. If the marriage is annulled, however, in strict legal theory it never existed at all; the doctrine of "relation back" operates to wipe out its effect. This doctrine, if applied with ruthless logic, would mean that children born during the nonexistent marriage are illegitimate and that the "husband" never validly contracted to support his "wife" so that she can have no alimony following the annulment. Some states have enacted statutes to prevent one or both of these results; a few court cases have properly decided that the "relation back" doctrine will not be applied automatically but rather the policy of applying the doctrine will be measured against the reasons for allowing recognition of the particular incident of marriage claimed in each case.²³

California's basic divorce law was established by its first civil code in 1872. The code provided six grounds for divorce:²⁴ adultery, extreme cruelty (defined as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage"²⁵), wilful desertion, wilful neglect, habitual intemperance, and

23. *E.g.*, *Sefton v. Sefton*, 45 Cal. 2d 872, 291 P.2d 439 (1955). *See generally* Engdahl, *The Secularization of English Marriage Law*, 16 U. KAN. L. REV. 505 (1968); Goda, *The Historical Evaluation of the Concepts of Void and Voidable Marriages*, 7 J. FAMILY L. 279 (1967); MAD-DEN, *supra* note 20, at 2-46.

24. CAL. CIV. CODE § 92 (West 1954).

25. *Id.* § 94.

conviction of a felony. Other provisions of the 1872 code, establishing connivance, collusion, condonation, or lapse of time²⁶ as defenses to divorce, attempted to ensure that the spouses would not obtain divorces based on marital wrongdoing that resulted from acts consented to by both parties; acts that had not in fact occurred; or acts that had occurred but had been forgiven or that had occurred an "unreasonably" long time before the divorce petition was filed. In addition, the defense to divorce known as "recrimination" was generally understood to prevent divorce if each spouse had been guilty of marital wrongdoing sufficient to give the other a cause of action for divorce so that neither spouse was innocent of marital wrongdoing. This result was proper, according to one of the English cases, in order that "the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt."²⁷

In California,²⁸ annulments might be obtained (1) by the parents or guardians of a minor boy under 21 or girl under 18 who married without their consent (the action must have been begun prior to the minor's arriving at the age of legal consent) or by the underaged minor (the action must have been begun prior to four years after arriving at the age of legal consent); (2) by either party to a bigamous marriage performed by at least one party in good faith or by the former spouse (during the lifetime of the parties); (3) by a person (called the "injured party") who married a person of unsound mind, or by the relative or guardian of the person of unsound mind (during the life of the party of unsound mind); (4) by a person whose consent to the marriage was procured by fraud (within four years of discovering the fraud); (5) by a person whose consent to the marriage was procured by force (within four years after the marriage); or (6) by a person whose spouse was physically incapable of marital intercourse (within four years after the marriage). In the case of annulments based on fraud, the marriage could not be annulled if the defrauded party, with knowledge of all the facts constituting the fraud, freely cohabited with the other party as husband and wife. Similarly, marriages based on force could be ratified by cohabitation. The code also provided that if the party of unsound mind "comes to reason" or the underaged spouse attains the age of legal consent, they too could ratify the marriage by freely cohabiting with their spouse.

As this brief review has attempted to make clear, the statutory theory of divorce and annulment in California in 1872 was that if the

26. *Id.* §§ 111-21, 124-27.

27. *Beeby v. Beeby*, 1 Hagg. Ecc. 789, 790; 162 Eng. Rep. 755, 756 (1799). Compare CAL. CIV. CODE §§ 122-23 (West 1954).

28. CAL. CIV. CODE §§ 82-83 (West 1954). See generally 1 B. ARMSTRONG, CALIFORNIA FAMILY LAW 41-84 (1953).

contract of marriage was undertaken freely and without impediment so that it could not be annulled, the contract was binding on both parties until such time as one of them, himself innocent of marital wrongdoing, perfected against the other a cause for divorce based on the other's fault. Once the cause for divorce had been proven and the defendant had failed to establish an adequate defense to the action, the plaintiff was not only released from his own marital obligations to the defendant but also was entitled to a dissolution of the marriage as partial legal relief for his suffering.

This traditional approach to divorce is commonly referred to as the "matrimonial offense" or "fault" theory. The law's adherence to the fault theory has been severely criticized. The notion that a plaintiff who has avoided the commission of acts that technically constitute formal grounds for divorce is "innocent" of serious marital wrongdoing ignores the realities of marital behavior and provides an unsound basis for legal policymaking. It has been suggested by psychiatrists that the law's insistence on the fault concept and the use of adversary techniques in family litigation aggravates the already conflicted interpersonal situation of the spouses and may have undesirable repercussions for the development of their children.²⁹ One practicing lawyer, a member of the California Commission and a specialist in family law, has stated that use of the law's present fault-oriented approach to divorce as a tool for severing a marriage relationship is like performing brain surgery with a shovel.

In a thoughtful article criticizing the fault theory,³⁰ Wadlington has pointed out that the present divorce law assumes either that marriages break down only upon the occurrence of specific acts recognized as grounds for divorce or that dissolution should be made available only for marriages that have suffered such acts. The first assumption, he argues, is factually incorrect and the second rests upon long-discarded social attitudes. He concludes that reformers must persuade legislators not only that marriages break down for reasons other than the wrongful act of one party, but also that the interest of society can be best served by allowing the termination in law of any marriage relationship which has ceased to exist in fact simply because it has ended.

29. Philips, *Mental Hygiene, Divorce and the Law*, 3 J. FAMILY L. 63 (1963); Watson, *Psychoanalysis and Divorce* in THE MARRIAGE RELATIONSHIP 321, 332 (S. Rosenbaum & I. Alger eds. 1968) ("Contemporary psychodynamic theory would vigorously challenge the idea that 'fault' is an appropriate and useful concept for understanding marital discord.") See generally J. DESPERT, CHILDREN OF DIVORCE (1953).

30. Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 82 (1966). See also Bradway, *The Myth of the Innocent Spouse*, in SELECTED ESSAYS ON FAMILY LAW 937 (Association of American Law Schools ed. 1950).

The marriage breakdown theory has already been recognized in California. Two recent events have sharply modified the traditional fault concept by establishing alongside it the opposing, and in my view incompatible, theory of marriage breakdown. In 1941 a seventh ground for divorce was added to the code. Called "incurable insanity," it provided that a divorce might be granted to a person upon proof that his spouse had been incurably insane for a continuous period of three years immediately preceding the filing of the divorce action; had been confined for those three years in or under the jurisdiction of a mental institution; and was, in the opinion of a member of the medical staff of the institution, incurable insane.³¹ Divorces thus granted were "not based on the deliberate misconduct of the defendant, but on the impossibility of a functioning marriage."³² And in 1952, in *De Burgh v. De Burgh*, the Supreme Court of California interpreted the recrimination statute³³ to permit divorces to be granted to both parties if the trial court, after considering the prospect of a reconciliation between the parties, the effect of the marital conflict upon the parties and upon third persons (including the children), and the comparative guilt of the spouses, decided that the legitimate objects of matrimony had been destroyed.³⁴ In such a case, the defendant's cause of divorce would not be "in bar of" the plaintiff's cause of divorce and divorces could thus be granted to both parties.

The *De Burgh* case was a landmark in California law. Professor Armstrong said of the case that "no single decision has done more for the integrity of the bar, the preservation of the sound morals of the community and the wholesome functioning of the equity powers inherent in our courts."³⁵ The opinion, written by (now Chief) Justice Traynor, firmly established the principle of marriage breakdown as the basis of divorce:

In a divorce proceeding the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it

31. CAL. CIV. CODE § 108 (West 1954).

32. 1 B. ARMSTRONG, *supra* note 26, at 177.

33. CAL. CIV. CODE, §§ 122-23 (West 1954).

34. *De Burgh v. De Burgh*, 39 Cal. 2d 858, 250 P.2d 598 (1952).

35. 1 B. ARMSTRONG, *supra* note 26, at 123. See also Armstrong, *Family Law: Order Out of Chaos*, 53 CALIF. L. REV. 121, 122-24 (1965).

nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage. But when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. "[P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed." . . .

The chief vice of the rule enunciated in the *Conant* case [i.e., an earlier case dealing with the recrimination doctrine] is its failure to recognize that the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty. The disruption of family relationships, the clandestine associations with third parties, and the oppressive effect upon children and the community are intensified. It is a degradation of marriage and a frustration of its purposes when the courts use it as a device for punishment.³⁶

Following *De Burgh* in 1952, California divorce law has existed in an uneasy state of ambivalence and inconsistency. If plaintiff, for example, establishes that defendant has committed a single act of adultery and no defense is offered, he is absolutely entitled to a divorce based on defendant's matrimonial offense.³⁷ But if defendant establishes that plaintiff has also committed adultery, or has been guilty of other marital wrongs sufficient to create a cause for divorce, the court is required to decide whether the marriage has broken down in fact before granting the divorce. By its insistence on a more detailed analysis of the actual state of the family, the breakdown principle as enunciated in *De Burgh* thus protects society's interest in preserving marriage more effectively than the matrimonial offense principle.

Moreover, the matrimonial offense principle lends itself to abuse by spouses who are agreed upon getting a divorce. Figures just released by the California Bureau of Vital Statistics covering the year 1966 indicate that 95% of all complaints for divorce (95,538 total) and separate maintenance (4,224 total) filed during 1966 were based on the ground of extreme cruelty. During the same calendar year, 60,467 interlocutory decrees of divorce were granted³⁸ and the California Judicial Council estimates that 61,957 interlocutory decrees of divorce and separate maintenance were heard on the uncontested calendar.³⁹ Although the

36. 39 Cal. 2d at 863-64, 250 P.2d at 601.

37. Cf. *Kirkpatrick v. Kirkpatrick*, 152 Cal. 316, 92 P. 853 (1907) (desertion).

38. BUREAU OF VITAL STATISTICS, CAL. DEPT. OF PUBLIC HEALTH, *DIVORCE IN CALIFORNIA: INITIAL COMPLAINTS FOR DIVORCE, ANNULMENT AND SEPARATE MAINTENANCE 1966*; 116-17, 175 (1967).

39. Letter, dated August 29, 1968, from Mr. Thomas Sasaki, Associate Statistician.

Judicial Council figures relate to cases filed in earlier years as well as some cases filed in 1966, the number of divorces that are uncontested is a significant proportion of the total divorce complaints filed. The Report of the Governor's Commission on the Family reproduces "a typical example of the melancholy and perfunctory litany of uncontested divorce" on the ground of extreme cruelty:

Attorney: Q: Mrs. X, have you resided in the State of California for more than one year and in this county for more than 90 days prior to the commencement of this proceeding?

Plaintiff: A: Yes.

Q: And during your marriage with Mr. X, he has on many occasions been cold and indifferent to you?

A: Yes.

Q: And as a result of this conduct on the part of your husband, have you become seriously ill, nervous and upset?

A: Yes.

Q: And was this conduct on the part of your husband in any manner caused by anything you have done?

A: No.

(Where a Conciliation Court is maintained)

Q: And have you done everything in your power to preserve this marriage, but without success?

A: Yes.

(Optional)

Q: And during the marriage, you at all times did your best to be a good wife to Mr. X?

A: Yes. . . .

(Following the questions relating to child custody and alimony, if appropriate, the remaining questions are addressed to the corroborating witness)

Q: Mrs. Y, you have known Mrs. X, the plaintiff herein, for ____ years?

A: I have.

Q: And you have heard the testimony she has given here this morning?

A: I have.

Administrative Office of the Courts, San Francisco. During the calendar year 1966, a total of 67,914 interlocutory divorce complaints, separate maintenance complaints, and petitions for annulment were heard on uncontested calendars throughout the state. 5,957 annulments were granted during the same period in uncontested hearings. The figure in the text is arrived at by subtracting the number of annulments granted from the total number of uncontested divorce, separate maintenance, and annulment cases heard; it may therefore not account for an unknown (but presumably minute) number of uncontested annulments denied. Figures published by the California Judicial Council in its Annual Reports are totaled for the fiscal year; figures relied on in this article have their source in unpublished monthly totals.

Q: And to your personal knowledge is all of that testimony true?

A: Yes, it is.

Attorney to Judge: Anything further, Your Honor?

Judge to Attorney: No, that will be sufficient. Plaintiff granted a divorce on the ground of defendant's extreme cruelty. . . .⁴⁰

The California situation thus illustrates the wide gulf that exists between theory and practice in the divorce area.⁴¹ It seems significant that the drive for reform of the divorce law originated in California with lawyers who handle divorce cases, just as the liberalization of the abortion law was led by obstetricians and gynecologists. In both situations, the pressure to find an accommodation between felt human needs and unyielding laws has fallen most heavily upon the professions whose craftsmanship is essential to produce the desired result. Professor Gower, in describing the English divorce practice to the Royal Commission on Marriage and Divorce in 1952, spoke of

[t]he unfortunate London solicitors [who] are doing their best to make this absurd system work in as civilized a fashion as possible . . . we are one of the worst sufferers of the present system . . .⁴²

Nor can it be supposed that the judges are unaware of the reality that is but thinly concealed behind the masks of the courtroom players. California attorneys report an uncontested divorce which takes more than fifteen minutes of the court's time is rare indeed and that the average case occupies no more than ten minutes. The plaintiff and her witness have been rehearsed in their parts by the attorney; sometimes the rehearsal becomes almost too letter-perfect. Virtue reports of the Chicago form that "the number of cruel spouses in Chicago, both male and female, who strike their marriage partners in the face exactly twice, without provocation, leaving visible marks, is remarkable."⁴³ The

40. REPORT, *supra* note 1, at 119-20 n.23 (names and punctuation altered). For similar examples of the form language used in uncontested divorces in other jurisdictions, see C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 683-701 (1966). For a provocative analysis of the problems the law would encounter if it decided to probe the psychoanalytic aspects of cruelty as used as a basis for divorce, see Katz, *Family Law and Psychoanalysis—Some Observations on Interdisciplinary Collaboration*, 1 *FAMILY L. Q.* 69, 71-76 (1967).

41. See generally Rheinstein, *supra* note 14, at 634-35; Rheinstein, *The Law in Action Versus the Law of the Books*, 9 *U. CHI. LAW SCHOOL CONFERENCE SERIES* 39 (1952).

42. Royal Comm'n on Marriage and Divorce, Minutes of Evidence, May 20, 1952, quoted in C. FOOTE, R. LEVY and F. SANDER, *supra* note 38, at 701.

43. M. VIRTUE, *FAMILY CASES IN COURT* 86-91 (1956).

uncontested divorce, then, is intended to beguile neither its participants nor its specialized audience. It seems clear that the matrimonial offense theory of divorce does not accomplish its primary end of guarding society's interest in preserving marriage by preventing divorce except upon clearly established statutory grounds. Rather, the existence of a well-established legal charade with a script written by divorce lawyers and acted out by the parties to permit the judge to achieve a result permissible by the letter of the law but forbidden by its spirit suggests that the law's present response to the divorce problem has been strongly influenced by unarticulated and imperfectly understood human impulses.

II

THE CALIFORNIA PROPOSAL: MARRIAGE BREAKDOWN AND THE FAMILY COURT

A. *Marriage Breakdown*

Once the conclusion has been reached that the matrimonial offense approach to divorce should be modified, several alternatives present themselves for consideration. One possibility, which has already been enacted by a number of states⁴⁴ and is currently being discussed in England,⁴⁵ is to add a non-fault ground of divorce, usually voluntary separation for a specified number of years but sometimes incompatibility as well, to the existing grounds based on fault. A second possibility, the one proposed by the California Commission⁴⁶ and the Mortimer Commission in England,⁴⁷ is that of abolishing the matrimonial offense doctrine altogether and substituting in its place marriage breakdown as the sole basis for divorce. A third suggestion would add to existing grounds a provision for divorce by mutual consent.⁴⁸ A fourth proposal, put forth in Canada, is to combine the breakdown approach with voluntary separation as the sole ground, allowing divorce following a two-year separation if the parties show that

44. McCurdy, *supra* note 20, at 701-02; e.g., N.Y. Laws ch. 254 (1966).

45. LAW COMM'N, REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE, CMND. No. 3123, at 42-53 (1966); Kahn-Freund, *Reports of Committees: The Law Commission*, 30 MODERN L. REV. 180 (1967).

46. REPORT, *supra* note 1, at 28.

47. REPORT OF A GROUP APPOINTED BY THE ARCHBISHOP OF CANTERBURY, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY 33-40 (1966) (commonly referred to as the Mortimer Comm'n Report) [hereinafter cited as PUTTING ASUNDER].

48. MacKenna, *Divorce by Consent and Divorce for Breakdown of Marriage*, 30 MODERN L. REV. 121 (1967). One reviewer has suggested abolishing matrimonial offense and substituting divorce by consent supplemented by breakdown if one spouse unreasonably refuses to consent. Irvine, *Reports of Committees: The Mortimer Group*, 30 MODERN L. REV. 72, 75 (1967).

the marriage is not likely to be resumed through cohabitation.⁴⁹

During the summer of 1966 the report of the Mortimer Commission, a group appointed by the Archbishop of Canterbury to review the divorce law of England, became available. The report, called *Putting Asunder: A Divorce Law for Contemporary Society*, strongly urged the adoption of marriage breakdown as the sole basis for divorce. The Mortimer Commission thus phrased the conception of "many thoughtful and conscientious persons" of marriage breakdown:

They are quite clear that marriage is meant to be for life; but if a particular marriage breaks down beyond repair, so that the common life which they believe to be the substance of the marriage comes unmistakably and irreversibly to an end, they regard the surviving legal bond as "empty" and meaningless. When they call for reform of the law, they are not asking for "easy divorce," but that the law should have regard to the empirical state of affairs, and that the court should be empowered to declare defunct *de jure* what in their view is already defunct *de facto*.⁵⁰

The California Commission's approach closely follows Chief Justice Traynor's analysis in *De Burgh*. His opinion in that case emphasized that "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted."⁵¹ The two studies thus share a common understanding that the essential notion of marriage breakdown is that at least one party to the marriage is unwilling to continue the relationship so that family life is no longer possible.

The Mortimer Commission anticipated objections that the breakdown standard would undermine marriage by making divorce too easily obtainable.⁵² A similar criticism has been made in California: namely, that the number of divorces granted will greatly increase if that standard is adopted.⁵³ The arguments made on behalf of this position usually fail to grasp the significance of the basic distinction between the divorce rate and the marriage breakdown rate. Rheinstein has painstakingly pointed out that the critical figure is not the number of

49. MacDonal & Ferrier, *Breakdown of Marriage*, 10 CAN. B.J. 6 (1967). As it was finally enacted in 1968, the Canadian Act added a watered-down version of the breakdown standard to an expanded list of traditional grounds based on fault. See Bodenheimer, *The New Canadian Divorce Law*, 2 FAMILY L.Q. 213 (1968).

50. PUTTING ASUNDER, *supra* note 47, at 38.

51. 39 Cal. 2d at 863-64, 250 P.2d at 601.

52. PUTTING ASUNDER, *supra* note 47, at 41-44.

53. See Goddard, *The Proposal for Divorce Upon Petition and Without Fault*, 43 CAL. ST. B.J. 90, 97-98 (1968).

divorces that are granted but rather the number of marriages that fail:

If statistics on divorce would reflect the actual occurrence of marital breakup, marriage stability would be perfect in all those countries in which the divorce rate is zero, *i.e.*, in those countries which do not have the institution of divorce at all. Italy, Spain, or Brazil, for instance, do not have divorce. Their divorce rates are zero. Does this fact indicate, however, that no Italian, Spanish, or Brazilian husband ever abandons his wife, that no wife ever runs away from her husband, that no couples in those countries ever separate, that no married man maintains a mistress and no married woman ever has a lover?⁵⁴

After a discussion of the importance of careful statistical evaluation, Rheinstein concludes that

statistics of divorce do not allow us to draw ready conclusions as to the state of a society's family stability or the trends of its development. In spite of their frequent identification not only in popular opinion but also in learned writing, marriage breakup and divorce are two different phenomena.⁵⁵

As the *De Burgh* case suggests, public policy is not served by attempts to lower the divorce rate by denying divorces in cases where the marriage has ceased to exist. The marriage breakdown proposal is an attempt to encourage spouses to concentrate on the realities of their relationship rather than on the legal fictions of present divorce law. Hopefully, it will also encourage persons working with the spouses to concentrate on helping them achieve a better understanding of their own situation so that intelligent choices can be made for the future.

Both the Mortimer Commission and the California proposal rejected the compromise of adding marriage breakdown to the familiar list of fault-based grounds. Both were persuaded to take this position in part because of the mutual inconsistency of the two theories: If a divorce is to be granted because of breakdown, proof of fault is simply irrelevant. If, however, proof of an unjustified and unforgiven wrongful act is sufficient to terminate the marriage in law, an inquiry into whether the marriage has or has not ended in fact is unnecessary to the case. The two approaches thus cut in different directions; seeking opposite goals, each relies on different facts. The Mortimer Commission accordingly concluded that "it would not be an improvement, but the reverse, to introduce the principle of breakdown of marriage into the existing law in

54. Rheinstein, *supra* note 14, at 643-44. See also LAW COMMISSION, *supra* note 43, at 6-9.

55. Rheinstein, *supra* note 14, at 645.

the shape of an additional ground for divorce”⁵⁶

In his stimulating comment on *Putting Asunder*, Professor Monrad Paulsen has stated his disagreement with this conclusion. Urging that no exclusive choice need be made between the two approaches because the fault principle “can serve the case of a spouse who has suffered serious offense” while the breakdown principle “can serve those spouses with whom no glaring misconduct can be associated, as well as those who seek divorce against the will of a relatively innocent partner,” he concludes that “the legal system frequently chooses different principles to dispose of distinguishable situations.”⁵⁷ The point is well taken. As Paulsen would no doubt agree, however, the fact that a distinction is possible does not necessarily mean that it should be drawn. In my view, the effort to change the divorce law is not being undertaken solely to make divorce available to all who wish it on the most convenient, or even the most appropriate, grounds. The aims of those who would make the breakdown principle exclusive are twofold: (1) To allow society to express effectively its interest in the stability of marriages by attempting to discover, in every divorce case, whether or not the marriage has irreparably broken down. As we have seen, the fault approach makes no effort to look behind the wrongful act to the present health of the relationship. (2) To rescue the administration of justice in the divorce area from the perjury and legal fictions presently required by courtroom practice under the fault system. The forced cohabitation of such incompatible partners as the breakdown and fault theories in the same statute might corrupt the new law rather than purify the old one. Moreover, the attempt to maintain both approaches in the same state would probably lead to what Rheinstein has termed the “Gresham’s law” of divorce:⁵⁸ Many spouses, acting in the mistaken belief that a divorce might be harder to obtain under the new law, would prefer the well-established fault grounds to the untried dangers of the breakdown petition. Nor can it be expected that all lawyers would advise their clients differently. Lawyers who have not been adequately sensitized to the non-legal problems inherent in the practice of family law all too frequently indicate that their sole concern is to process divorce cases as rapidly as possible. With such misplaced fears and undesirable practices hindering the ready acceptance of the new approach, it seems clear that the breakdown principle must be made exclusive in order to be made effective.

56. PUTTING ASUNDER, *supra* note 47, at 16. See also REPORT, *supra* note 1, at 26-29.

57. Paulsen, *Divorce: Canterbury Style*, 1 VALPARAISO U. L. REV. 93, 98 (1966).

58. Rheinstein, *supra* note 14, at 641-42.

It has, however, been argued that even the exclusive use of the breakdown standard will not eliminate fault and guilt as controlling factors in divorce proceedings because courts will inquire into the parties' marital misconduct to establish whether the marriage has actually broken down.⁵⁹ This argument fails to appreciate the difference between the indirect relevance of marital conduct to divorce in a marriage breakdown system and its central importance in a matrimonial offense system. Perhaps the distinction can be clarified by considering the legal effect accorded by the two systems to an act of adultery committed by a husband. Under a matrimonial offense system, a wife who establishes that her husband has committed an act of adultery is absolutely entitled to a divorce if she has neither condoned nor connived in the act and if she herself has not committed a matrimonial offense sufficient to bar her cause of action against her husband. The court is required to grant the divorce upon the wife's proof without inquiry as to whether the marriage has in fact broken down. Thus the act of adultery is not merely relevant to the divorce, it is the completely sufficient reason for ending the marriage. In a marriage breakdown system, on the other hand, the act of adultery is relevant as a symptom which indicates that the marriage may be in danger of breaking down; taken alone, however, adultery is not a sufficient reason for terminating the marriage. Thus, when a judge inquires into the ramifications of an act of adultery in a marriage breakdown system, he does so initially in order to discover whether the marriage has been damaged so greatly that it cannot be continued. If, after his investigation of all the circumstances, he concludes that the marriage has in fact broken down, he may indicate that the act of adultery both resulted from the actual breakdown and in turn caused an even greater emotional separation between the spouses. If his investigation has been thorough and careful, however, he will not normally conclude that a single act of adultery is the sole cause for the divorce. Moreover, the judge is not required to find whether adultery has been committed; he is required only to find whether the marriage has broken down. Although marital conduct will remain relevant to divorces based on breakdown, it is not accurate to say that the breakdown standard does not eliminate fault as a controlling factor in divorce.

The point is well made in descriptions of the Polish and Hungarian practice under the breakdown standard. Thus, Dr. Baracs, speaking of Hungary, points out that

it has been recognized by the Hungarian courts (and effect given to that

⁵⁹ See Goddard, *supra* note 51, at 96-97.

recognition), that 'matrimonial offenses are in many cases symptomatic of the breakdown of the marriage.' The courts' efforts accordingly have been focused on discovering whether the marriage has completely broken down. In doing so they often have had to resort to methods and principles of the old law based on the principle of the matrimonial offense.⁶⁰

And Lasok, describing the combined matrimonial offense-breakdown Polish law, states that

Polish law does not recognize absolute grounds for divorce which, if present, entitle the innocent party to have his marriage dissolved. Moreover, Polish courts must be satisfied that there is not only a valid ground but also a total breakdown of the marital union. One without the other appears insufficient; thus adultery, for example, may not constitute a sufficient cause for divorce unless it has resulted in a permanent and irreparable disintegration of the marriage bonds. And, conversely, a party to an apparently unsuccessful marriage will not obtain any relief unless he is able to show a serious cause of the failure of his marriage (e.g., adultery of the respondent).⁶¹

Drafting a statute to embody the breakdown principle presents many problems, including the following: What standard is to be used to decide whether a marriage has broken down? who will decide whether the standard has been met in a particular case? what will be the result if the parties think their marriage has broken down but the court disagrees? should dissolution be permitted if the party pressing for a divorce is the one who has committed what would have been a matrimonial offense under the old law? should divorce be permitted against the will of a spouse who has not been guilty of technical fault under the old law? should divorce be allowed upon mutual consent of the spouses even if breakdown cannot be legally established? These and other problems will be discussed in the following section in the context of the California plan.

B. The Family Court Procedure

The California proposal, unlike that of the Mortimer Commission, closely integrates the establishment of the breakdown principle with a comprehensive plan for marriage and divorce counseling to be made available through the family court in cooperation with private and community facilities. The proposed formulation of the standard for

60. Baracs, *Dissolution of Marriage in Hungarian Law*, 9 AM. J. COMP. L. 471, 481 (1960).

61. Lasok, *A Legal Concept of Marriage and Divorce: A Comparative Study in Polish and Western Family Law*, 9 INT'L & COMP. L. Q. 53, 79 (1960).

dissolution, which closely follows the California Supreme Court's language in the *De Burgh* case, is as follows:

At the hearing, an order shall be made by the court dissolving the marriage if the court, after having read and considered the counselor's report and any other evidence presented by the parties, makes a finding that the legitimate objects of matrimony have been destroyed and that there is no reasonable likelihood that the marriage can be saved. The court's order dissolving the marriage shall be effective when made.⁶²

The suggested procedure begins with a neutral petition—"In re the marriage of John and Mary Smith," rather than "Smith v. Smith"⁶³—requesting the family court to inquire into the continuance of the marriage. No specific acts or grounds are to be alleged in the petition. Temporary orders safeguarding the personal and property rights of the parties and providing for custody and support during the proceedings will be available. Within five days after the petition has been filed, the clerk of the court must fix a date for an initial interview or interviews between the parties and a counselor in order that they may "begin to explore together the desirability of continuing the marriage."⁶⁴ Attendance at one interview is mandatory and is made a condition of the petitioner's continuing the proceeding; the parties may be required to attend this session together, in the discretion of the counselor. Provision is made for situations where the defendant is unavailable or beyond the court's jurisdiction.⁶⁵ If the defendant is within the court's jurisdiction, but wilfully fails to appear, his failure can be punished by contempt, but will not defeat the court's power to terminate the marriage.

It should be clearly understood that the California proposal does not provide for mandatory attempts at reconciliation.⁶⁶ Nor does it

62. REPORT, *supra* note 1, at 91. See text at notes 47-49 *supra*. Two bills were introduced in the California Legislature in 1967 for the purpose of enacting the Commission's recommendations: S.B. 826, introduced by Senator Grunsky, and A.B. 1420, introduced by Assemblyman Shoemaker, both members of the Commission. The bills were reintroduced during the 1968 session as S.B. 88 and A.B. 230. Both bills had the same section numbers on each occasion and will henceforth be cited simply by section. The standard for dissolution is found in § 4716, SUMMARY, *supra* note *, at 372-74.

63. REPORT, *supra* note 1, at 81; § 4702, *supra* note 62; SUMMARY, *supra* note 1, at 367. The substitution of a neutral petition for the complaint has been suggested by several writers as a minor but useful technique for reducing the adversary trappings of divorce. *E.g.*, Gough, *A Suggested Family Court System for California*, 4 SANTA CLARA LAW. 212, 215-16 (1964); Bradway, *Family Dissolution—Limits of the Present Litigious Method*, 28 IOWA L. REV. 256, 269-70 (1943); Alexander, *The Follies of Divorce; A Therapeutic Approach to the Problem*, 36 A.B.A.J. 105, 170 (1950).

64. REPORT, *supra* note 1, at 82; § 4703, *supra* note 62.

65. REPORT, *supra* note 1, at 82, § 4703(a), *supra* note 62.

66. This seemingly obvious point has apparently been overlooked by a critic of the family

require marriage counseling, as that term is commonly understood. Instead, the sole function of the mandatory initial interviews is to discover the current situation of the parties in order to help them see their own situation clearly and to make available to them such of the court's services as they may choose. Its purpose is diagnostic and exploratory, rather than curative. Thus, the interview may disclose that the petitioner is a woman who has been abandoned by her husband for many years. She may not know where he is, or even whether he is alive. In such a case reconciliation counseling would appear unnecessary. Again, the parties may have attempted reconciliation themselves with the help of a private therapist. If such efforts have proved unavailing, the parties may not desire further marriage counseling from the court. In the more usual case, however, the parties may not have sought any professional help and they may be confused, ambivalent, and emotionally distraught. The counselor may be able to help them to begin looking at their situation constructively. Even if the parties and the counselor agree during the initial interviews that the marriage has irreparably broken down, the understanding gained from having worked out the problem together may lessen hostility and bitterness that might otherwise be expressed in the form of legalistic and retaliatory arguments over division of property, alimony, or the custody of children.

The period during which the initial interviews may be held expires thirty days after the filing of the petition of inquiry. At that time, the counselor who has been working with the parties must inform the court whether the parties have decided to become reconciled, to undertake voluntary marriage counseling for the purpose of attempting a reconciliation, or to proceed with their petition with a view to the possible dissolution of the marriage.⁶⁷ Each of these three possible decisions has different ramifications. If a reconciliation has been effected, the petition will be dismissed. If the parties desire reconciliation counseling, sixty days are allowed for them to meet either with the court's professional staff or a community agency or private therapist. The draft statute expressly provides that all communications made by either party to any counselor during the period of reconciliation counseling, whether or not the counselor is a member of the court's staff, will be absolutely privileged.⁶⁸ This legal protection of the confidential

court proposal who argues against the use of compulsory reconciliation procedures even though the proposal does not suggest their use. See Goddard, *supra* note 51, at 98.

67. REPORT, *supra* note 1, at 83; § 4704, *supra* note 62.

make group counseling advisable. For an interesting analysis of the confidentiality to be accorded group sessions, see Note, *Group Therapy and Privileged Communication*, 43 IND. L. REV. 93 (1967).

68. REPORT, *supra* note 1, at 84; § 4704, *supra* note 62. The caseload of the family court may

relationship between therapist and client seems necessary in order to help create a favorable opportunity for the development of rapport between the spouses and their counselors.

If the parties have decided not to undertake reconciliation counseling, or if they have done so and decided not to reconcile, they may, in continuing their application for an inquiry into the marriage with a view to its dissolution, undertake further consultation with the court's professional staff for the purpose of working out the best adjustment possible of the social and psychological circumstances attendant upon the dissolution of their marriage. This aspect of the Commission's recommendations should be viewed as providing divorce counseling, rather than marriage counseling. To be sure, couples who have tried reconciliation counseling but have decided not to reconcile may already have gained important insights into new problems likely to confront them after their marriage is dissolved. Experience reported from courts specializing in reconciliation counseling indicates that couples who did not repair their marriages were nevertheless able to work together with less hostility to plan their future and that of their children after counseling.⁶⁹

One important function of divorce counseling is to help the separating partners understand that divorce is a beginning as well as an end. Bohannon and Huckleberry have reminded us that divorce begins as a specialized relationship between the former spouses and their children, relatives, and friends and often grows to include the second (or third or fourth) spouses and their children as well.⁷⁰ We are told that one out of every nine children in America is a stepchild;⁷¹ although many stepchildren have lost one parent through death rather than divorce, the problem of preparing children for the divorce and possible remarriage of their parents is a serious one that deserves attention from the family court.⁷²

Divorce counseling has a second, equally vital function: that of helping the spouses gain insight into the reasons for their marriage failure so that they may perhaps be better able to avoid repetition of the disastrous pattern in their next relationship. A great deal has been written by psychiatrists about the unconscious impulses and motivations that control the choice of a marriage partner. Kubie states that a major

69. Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353, 357-58, 363-64, 381 (1966).

70. Bohannon & Huckleberry, *Institutions of Divorce, Family, and the Law*, 1 LAW & SOC'Y REV. 81 (1967).

71. A. SIMON, *STEPCHILD IN THE FAMILY* ix (1964).

72. J. DESPERT, *CHILDREN OF DIVORCE* (1953).

source of unhappiness between married people arises from "the discrepancies between their conscious and unconscious demands on each other and on the marriage, as these are expressed first in the choosing of a mate and then in the subsequent evolution of their relationship."⁷³ Eidelberg suggests that:

A normal person may find himself attached to the wrong mate as a result of a mistake in judgment. A neurotic, who uses a neurotic approach in selecting his love object, will consistently manage to seek out someone who must produce trouble because he is able to serve as part of a defense mechanism. Without analytic understanding the patient will be successfully fooled by the hidden infantile wish, and will be forced to repeat his mistake.⁷⁴

If a marriage is one between two people in conflict with themselves, only the reduction of such conflict will result in any real hope of a permanent solution.⁷⁵ The family court, even if it were manned exclusively by trained psychotherapists, could not hope to undertake long term treatment of the kind necessary to achieve this task. The most that can be expected in such cases is that the individual might begin to see the nature of his internalized conflicts and to accept a reference to a private therapist. Such extensive treatment by its very nature can be undertaken only as a voluntary matter.

Fortunately, however, not all cases of marriage failure require medical treatment. The California proposal anticipates that professional caseworkers, under the direction of experienced supervisors and in consultation with psychiatrists, can be expected to work productively with many families.⁷⁶ Paradoxically, divorce counseling at this point should become one of the most effective forms of marriage counseling. That is, although it may be difficult to persuade two persons who are eager to marry that they should delay their plans to take a second look at their chances of success in the marriage, it should be relatively easy to demonstrate to two persons whose marriage has just failed the value of attempting to gain the self-awareness necessary to avoid another

73. Kubie, *Psychoanalysis and Marriage*, in *NEUROTIC INTERACTION IN MARRIAGE* 10, 14-15 (V. Eisenstein ed. 1956). See also Watson, *supra* note 27, at 328-29.

74. Eidelberg, *Neurotic Choice of Mate*, in *NEUROTIC INTERACTION IN MARRIAGE* 57, 63 (V. Eisenstein ed. 1956).

75. *Id.* at 63-64; Reider, *Problems in the Prediction of Marital Adjustment*, in *NEUROTIC INTERACTION IN MARRIAGE* 311, 320-25 (V. Eisenstein ed. 1956); E. BERGLER, *DIVORCE WON'T HELP* (1948).

76. Green, *Casework Diagnosis of Marital Problems*, in *NEUROTIC INTERACTION IN MARRIAGE* 235-43 (V. Eisenstein ed. 1956); Gomberg, *Present Status of Treatment Program*, in *id.* at 269-89.

mistake. Although great care must be taken to avoid coercion, affording the opportunity for voluntary reexamination of past marriages seems to be a realistic and desirable way of expressing the State's interest in the stability of future marriages. Moreover, when the matter is viewed in this way it becomes clear that eligibility for the counseling service should not be limited to divorcing couples who have children, for the childless couple left without help may soon become involved in two unhappy remarriages *with* children.

After the period allotted for divorce counseling, and no later than one hundred and twenty days after the initial interview, the counselor must submit a report to the court setting forth his recommendation as to the continuance of the marriage. He is required to consult with counsel for both parties prior to preparing his report and copies of it will be furnished to counsel or to the parties if they are not represented by counsel. This report and all other records of the family court are confidential and will not be available to the general public.⁷⁷ If a custody investigation has been ordered by the court, that report will also be prepared and submitted ten days prior to the hearing. As we have seen, the court must decide at the hearing whether the legitimate objects of matrimony have been destroyed and there is no reasonable likelihood that the marriage can be saved. The counselor's report, the petitioner's testimony and any other evidence the parties may produce will be before the court. If the parties and the counselor have agreed that the marriage has in fact broken down, the judge may make a like finding and enter his order dissolving the marriage. If, however, the court finds that the marriage has not broken down, he may continue the proceeding for ninety days "during which time the parties may, if they so desire, pursue further the possibility of continuing the marriage."⁷⁸ The purpose of this provision is to allow the parties, with knowledge that the court believes their marriage can be saved, to make a final attempt at reconciliation. The help of the court's professional staff will be available to them if desired. The intent appears clear, however, that no attempted reconciliation is required. If the parties do not choose to try again, they may simply wait for the ninety day period to elapse.

At the end of the ninety day period, the draft provides for a second hearing. If at that time the decision of one or both parties is that the marriage should be terminated, "the court shall enter its order, effective when made, dissolving the marriage."⁷⁹ Thus, if the parties have been

77. REPORT, *supra* note 1, at 86; § 4706, *supra* note 62; SUMMARY, *supra* note *, at 371.

78. REPORT, *supra* note 1, at 92; § 4717, *supra* note 62; SUMMARY, *supra* note *, at 371.

79. REPORT, *supra* note 1, at 93; § 4718, *supra* note 62; SUMMARY, *supra* note *, at 371.

unable to agree on a reconciliation and it is clear that the marriage has ceased to exist in fact, the court is directed to terminate it in law as well. This provision is an effective guard against the objection⁸⁰ that the breakdown principle allows a judge who dislikes divorce to require the perpetuation of hopeless marriages under the guise of finding reconciliations to be possible in all cases.

The Commission's solution, however, is a sharp departure from the proposal of the Mortimer Commission which concluded that in cases where an "innocent spouse" objected to being divorced and where the petitioner "had not only been patently responsible for ending the common life but had blatantly flouted the obligations of marriage and treated the other party abominably," society's interest in dissolving empty legal ties would be outbalanced by other considerations and the court should refuse the divorce, even though breakdown had been established, since to grant it would be "contrary to the public interest in justice and in protecting the institution of marriage."⁸¹ Although one may sympathize with the churchmen's dilemma, it is difficult to see how refusing a divorce even in this case protects the institution of marriage. Their solution is an obvious attempt to warn by example other potential petitioners who contemplate similar reprehensible conduct that freedom from marriage bonds cannot be purchased in this manner; yet it appears doubtful that the fruits of such warnings, if heeded, will be more stable unions. The very fact that a petitioner is prepared to go so far to achieve a legal termination of his marriage indicates that the marriage has already broken down; indeed, the Mortimer Commission conceded that breakdown could be established in such a case. Their proposal on this point, then, is simply a decision, however reluctantly reached, to use the continuation of marriage as a punishment for outrageous behavior.

Moreover, the outrageous behavior may not be limited to the conduct of a petitioner who seeks to rely on his own conduct to establish marriage breakdown. The Polish experience with a statute which provided that "divorce cannot be decreed if the petitioner alone was guilty of breakdown, unless the defendant consents to divorce"⁸² indicated that a majority of defendants who withheld their consent to their spouses' divorces based on breakdown did so from motives of

80. See Rheinstejn, *supra* note 14, at 640; Paulsen, *Divorce: Canterbury Style*, 1 VALPARAISO U.L. REV. 93, 97 (1966). This point has also been missed by Mr. Goddard, who needlessly argues that the granting of divorces should not be made dependent upon "the personal attitude and conviction of the judge." Goddard, *supra* note 51, at 99.

81. PUTTING ASUNDER, *supra* note 47, at 53.

82. Goercki, *Recrimination in Eastern Europe; An Empirical Study of Polish Divorce Law*, 14 AM. J. COMP. L. 603, 604 (1966).

hatred, revenge, and a desire to harm the plaintiff.⁸³ The law also allowed the defendant in this situation to demand payment for consenting to the divorce. Divorcees and lawyers interviewed during Professor Gorecki's study of the actual functioning of these laws indicated that higher alimony, vacating the family apartment, unequal division of matrimonial property, transfer of ownership of real or personal property, and cash payments were all included in typical arrangements made to acquire the necessary consent to divorce.⁸⁴

In 1964 the Polish law was changed to provide that

divorce cannot be decreed if the petitioner alone was guilty of breakdown, unless either the respondent consents to divorce or the refusal of his consent is, in the given circumstances, contrary to the principles of social life in the community.⁸⁵

Professor Gorecki reports that the change was made in order to invalidate refusals to consent to divorce that were based on improper motives as well as to prevent demands for compensation as the price of giving consent.⁸⁶ A similar form of legal blackmail was terminated in California when the recrimination doctrine was sharply modified by the *De Burgh* case. Why should it be reintroduced now in the form of a law that allows an "innocent" spouse to block the granting of a divorce to a "guilty" spouse? Justice Traynor's opinion in *De Burgh* has firmly established as the public policy of California that the continuance of marriage shall not be used as a device for punishment; not even, I would add, punishment for outrageous behavior.

C. Property Division and Support

The Mortimer Commission concluded that divorce should not be granted against the wishes of an "innocent" spouse, even though breakdown had been established, unless the court were satisfied that the provisions concerning that spouse's property, maintenance, and pension rights were equitable.⁸⁷ The English Law Commission, in commenting on the Mortimer report, agreed that such a safeguard might be necessary, but expressed the hope that it would be infrequently used since "it is offensive to decency and derogatory to respect for family ties to preserve the legal shell of a dead marriage for purely monetary considerations."⁸⁸ On the same point, Gorecki reports dissatisfaction with the

83. *Id.* at 617-20.

84. *Id.* at 621-22.

85. *Id.* at 604.

86. *Id.* at 627-28.

87. PUTTING ASUNDER, *supra* note 47, at 48.

88. LAW COMMISSION, *supra* note 43, at 21.

Polish law which makes no provision, other than alimony, for compensation to a party who has suffered pecuniary or emotional loss during the marriage.⁸⁹ The problem is a serious one. Analysis in this area must frankly recognize that the economic position of women in the United States is not, despite years of effort and the provisions against sex-based discrimination in employment contained in the Civil Rights Act of 1964,⁹⁰ equal to that of men.⁹¹ The California proposal is made against the background of a community property system which recognizes the vested and equal interest in the community property of both spouses.⁹² Present California law ties the division of community and quasi-community property to the grounds for divorce: If the decree is rendered on the grounds of wilful desertion, wilful neglect, habitual intemperance or conviction of felony, the community and quasi-community property must be divided equally; but if the grounds are extreme cruelty, adultery, or incurable insanity, the court must divide the property unequally.⁹³ Continuing its effort to reduce the importance of matrimonial offenses in divorce, the Commission recommended that except where the economic circumstances of the parties require an unequal division, the community and quasi-community property be divided equally in all cases.⁹⁴

Although this recommendation can be expected to work equitably where the parties have accumulated enough property during the marriage to provide for both of them after the divorce, it will not solve cases in which the accumulation is inadequate or non-existent.⁹⁵ In such situations, alimony remains the only practical means of providing

89. Gorecki, *supra* note 80, at 616.

90. 42 U.S.C. §§ 2000e-2(a)-(j) (1964). See generally Note, *Sex Discrimination in Employment under Title VII of The Civil Rights Act of 1964*, 21 VANDERBILT L. REV. 848 (1968).

91. See Kanowitz, *Sex-Based Discrimination in American Law: Law and the Single Girl*, 11 ST. LOUIS U. L. REV. 293, 326-30 (1967); CAL. ADVISORY COMM'N ON THE STATUS OF WOMEN, AMERICAN CALIFORNIA WOMEN 17-26 (1967); PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN 27-34 (1963). See generally *Symposium, Women and the Labor Force*, 7 INDUST. RELATIONS 187 (1968).

92. CAL. CIV. CODE § 161a (West 1954) provides:

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property." For a discussion of the interpretation of this section and its historical antecedents see Schreter (now Kay), "Quasi-Community Property" in *the Conflict of Laws*, 50 CALIF. L. REV. 206, 215-17 (1962).

93. CAL. CIV. CODE § 146 (West 1954). See generally I B. Armstrong, CALIFORNIA FAMILY LAW 791-96 (1953).

94. REPORT, *supra* note 1, at 111; § 5100, *supra* note 62; SUMMARY, *supra* note*, at 377.

95. In some non-community property (common law) states, the divorce court is not authorized to divide the property of the spouses upon divorce. See H. CLARK, THE LAW OF DOMESTIC RELATIONS 449-52 (1968). In my view, meaningful divorce law reform in such states will

adequate maintenance for the divorced wife who is unable to support herself. Apart from directing the court to consider the circumstances of both parties, including the duration of the marriage, in making its order for the support of one or both of them⁹⁶ and providing for contempt enforcement of all support orders, including those based on non-modifiable agreements of the parties,⁹⁷ the Commission made no attempt to alter the present basis of alimony awards. The California standard for ordering support thus remains the need of one party and the ability of the other to pay.⁹⁸ The limitation of present law⁹⁹ that support can be ordered payable only by the party against whom a decree of divorce or separate maintenance has been granted will be changed to provide that support can be granted to either party.¹⁰⁰ Matrimonial fault had been largely eliminated from alimony awards by the supreme court's holding in *Mueller v. Mueller*¹⁰¹ that alimony could be granted to an adulterous wife in a case where divorces were being awarded to both parties pursuant to the *De Burgh* rule. The Commission's recommendation will thus complete the separation of alimony from technical findings of fault.

It cannot be assumed, however, that alimony alone can provide for the economic consequences of divorce. Indeed, a recent survey concluded that the major difficulty with alimony is that it is generally insufficient to support the wife adequately.¹⁰² Moreover, even when alimony is granted there exists an enormous practical problem of enforcing its payment. Without attempting to canvass the still-growing body of literature dealing with the Uniform Reciprocal Enforcement of Support Act,¹⁰³ it can be said generally that existing enforcement procedures are not utilized adequately in many states. The Commission recommended

require the recognition of such a power in the divorce court. *See generally*, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY TO THE CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN 4-5 (1968); Daggett, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROB. 225, 230-31, 234-35 (1939).

96. REPORT, *supra* note 1, at 112; § 5101, *supra* note 62; SUMMARY, *supra* note *, at 376.

97. REPORT, *supra* note 1, at 114-117; § 5114, *supra* note 62; SUMMARY, *supra* note *, at 377-78. This section was proposed and enacted separately, becoming effective in 1967. CAL. CIV. CODE § 139, *as amended* (West 1967)

98. *See generally* 1 B. ARMSTRONG, *supra* note 26, at 349-56 (1953); 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW 2657-60 (1960).

99. CAL. CIV. CODE § 139 (West 1954).

100. REPORT, *supra* note 1, at 112; § 5101, *supra* note 62; SUMMARY, *supra* note *, at 376.

101. 44 Cal. 2d 527, 530-32, 282 P.2d 869, 870-71 (1955).

102. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 422 (1968).

103. 9C U.L.A. 12 (1957). *E.g.*, Comment, *Choice of Law: Interstate Enforcement of Duties of Support*, 1965 DUKE L.J. 356; Note, *Conflict of Laws, Maintenance, New Texas Version of the Uniform Reciprocal Enforcement of Support Act*, 44 TEX. L. REV. 814 (1966); *Legislation, Support of Dependents, Uniform Reciprocal Enforcement of Support Act, Ohio Problems, Constitutionality and Duties of the Initiating Court*, 35 U. CINCINNATI L. REV. 168 (1966).

that the family court be allowed to require that the district attorney appear on behalf of a spouse and children to enforce alimony and child support orders in any case in which an order for alimony had been made to a spouse having custody of minor children and an order of child support had also been made for the children.¹⁰⁴ This proposal was an attempt to broaden existing law which permits the divorce court to direct the district attorney to appear on behalf of minor children to enforce child support orders.¹⁰⁵ It seems that the court should also have been given authority to direct the district attorney to enforce alimony orders even when no minor children are living in the home. It appears, however, that no strong sentiment exists for public enforcement of the private support of divorced wives who do not have the care of minor children. This view appears shortsighted, particularly if the alternative is to be public support of the divorcee through welfare or general relief.

D. Annulment and Separate Maintenance

Having so consistently taken the firm position that marriage breakdown should be the only basis for divorce, the Commission recommended abolishing the present law of annulment and substituting the marriage breakdown theory there as well. Stating its conviction that no essential difference between annulment and divorce exists, the Commission pointed out that if the parties continue the marriage with knowledge of the impediment, the marriage has not broken down. If, however, an annulment is sought, the underlying reason for so doing is that the marriage has broken down and that issue should be tried directly just as in any other dissolution proceeding.¹⁰⁶ As the prior discussion of annulment law indicated, California permits third parties to commence annulment proceedings in some cases.¹⁰⁷ The Commission would continue this provision only in the case of parents who may seek annulment of the marriage of their underaged children and would allow the spouses to invoke the counseling aid of the professional staff of the family court¹⁰⁸ if they wished to continue their marriage against parental opposition. The economic consequences of an annulment or declaration of invalidity of a void marriage has been provided for by existing case law in a comprehensive set of doctrines developed to protect the "putative spouse" who believed in good faith that he or she was validly married.¹⁰⁹ In such cases, property that had been acquired during the

104. REPORT, *supra* note 1, at 108; § 5004(b), *supra* note 62.

105. CAL. CIV. CODE § 139.5 (West Supp. 1967).

106. REPORT, *supra* note 1, at 35-37.

107. See text at note 22 *supra*.

108. REPORT, *supra* note 1, at 95-97; § 4722-24, *supra* note 62.

109. See generally 1 B. ARMSTRONG, *supra* note 26, at 856-76; Note, *The Aftereffects of*

relationship could be divided by analogy to the community property laws.¹¹⁰ The Commission recommended that these case-developed rules be codified¹¹¹ and that the legislature reverse *Sanguinetti v. Sanguinetti*¹¹² which had prohibited an award of alimony to a putative spouse.

Under present law, a party who has established a cause of action for divorce may request separate maintenance rather than divorce.¹¹³ The logic of the Commission's position on marriage breakdown might seem to compel the abolition of legal separation, which permits the parties to live apart but continues the marriage bond. There are, however, some couples who desire to remain legally married in order to retain benefits such as social security and yet do not wish to live together. The Commission saw no reason to forbid this result nor yet to require that it be achievable only by voluntary separation.¹¹⁴ The draft therefore provides that following the establishment of marriage breakdown, the court may order a legal separation of the parties if they jointly request it rather than a dissolution of the marriage.¹¹⁵

E. Child Custody

Apart from its emphasis on divorce counseling directed at achieving a lessening of hostility between the parties that might otherwise express itself in legalistic battles over the children, the Commission took three other steps toward modifying the present law and procedure of child custody. One innovation, that of permitting the court to appoint an attorney to act as guardian ad litem for a child if good cause appears to do so,¹¹⁶ was taken over from the Wisconsin practice.¹¹⁷ Although Judge Hansen has reported most favorably on the Wisconsin experience with guardians ad litem,¹¹⁸ my own view is that the introduction of a third attorney to represent the children will be less useful in the California family court than it has proven to be in Wisconsin. Use of the marriage breakdown theory and divorce counseling in California will hopefully have reduced the parties' hostility and bitterness so that they can see

Annulment: Alimony, Property Division, Provision for Children, 1968 WASH. U.L.Q. 148.

110. *E.g.*, *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533 (1920).

111. REPORT, *supra* note 1, at 75; § 4604, *supra* note 62.

112. 9 Cal. 2d 95, 69 P.2d 845 (1937); REPORT, *supra* note 1, at 76-77; § 4605, *supra* note 62.

113. CAL. CIV. CODE § 137 (West 1966).

114. REPORT, *supra* note 1, at 33-34.

115. REPORT, *supra* note 1, at 93; § 4719, *supra* note 62; SUMMARY, *supra* note *, at 373-74.

116. REPORT, *supra* note 1, at 100-01; § 4901, *supra* note 62; SUMMARY, *supra* note *, at 376.

117. *See, e.g.*, *Wendland v. Wendland*, 29 Wis. 2d 145, 155-57, 138 N.W. 2d 185, 191 (1965).

118. Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAMILY L. 181 (1964); *The Role and Rights of Children in Divorce Actions*, 6 J. FAMILY L. 1 (1966).

themselves as parents who must cooperate in planning the future of their children in a sensible way. Wisconsin, however, still operates under the full rigors of the fault theory and the adversary system;¹¹⁹ in this situation the children may well need the protection of an independent advocate.

A second recommendation deals with investigations of child custody matters by members of the court's professional staff. Present law permits the larger counties to employ domestic relations investigators who will investigate and report to the judge "all pertinent information as to the care, welfare, and custody of the minor children of the parties to the divorce action."¹²⁰ The practice has developed in Los Angeles County of having the attorneys who represent both parties stipulate that the investigator's report will be received in evidence and that the investigator need not be present in court at the time of the hearing.¹²¹ Since this stipulation is made before the custody investigation commences, an attorney has no way of knowing whether the material contained in the report will be damaging to his client's position on the custody issue. And, since the stipulation means that the investigator will not be available for cross-examination as to matters contained in the report, the attorney has no way of attacking an unfavorable report short of calling as witnesses the persons interviewed by the investigator. This course is itself dangerous because present law is unclear whether a person so called becomes the witness of the party who called him, thus requiring counsel to run the risk of being bound by the witnesses' testimony without being able to cross-examine him.¹²² Since present law clearly provides that the domestic relations investigators shall be present at the hearing and may be called to testify and be subject to cross-examination,¹²³ the Los Angeles practice seems a clear evasion of the statutory policy.

An asserted justification for the Los Angeles practice is that dispensing with cross-examination saves the investigator's time so that he can deal with his heavy caseload.¹²⁴ Some may also argue that

119. Hansen, *Wisconsin's Family Code — After Five Years*, 18 OKLA. L. REV. (1965).

120. CAL. CODE CIV. PRO. § 263 (West 1966) (enacted 1951).

121. Pfaff, *Domestic Relations Investigators*, 36 LOS ANGELES BAR BULL. 192, 194 (1961).

122. See CAL. EVID. CODE § 776 (West 1966).

123. CAL. CODE CIV. PRO. § 263 (West 1966) provides in part that "[s]uch investigator or investigators who have investigated the care, welfare and custody of the minor children as provided for in this section, shall be present at the trial of the divorce action of the parties who are the parents or custodians of such minor children, and may be called to testify by the judge or either party as to any matter which they have investigated. The testimony of such investigators shall be subject to questions direct and cross which are proper, and shall be competent as evidence."

124. Pfaff, *supra* note 117, at 194.

disallowing cross-examination helps to reduce the adversary atmosphere in custody cases. It seems, however, that requiring counsel to call as witnesses the persons interviewed might cause more antagonism than a cross-examination of the investigator who may be able to clear up any misunderstandings or ambiguities in his report easily and simply. As to timesaving, one may suggest that surrendering the valuable and traditional protection of cross-examination is too high a price to pay for efficiency. Accordingly, the Commission reiterated the present position of the law that the investigator must appear in court and be available for cross-examination.¹²⁵ It further specifically recommended that the statute expressly provide that the right of cross-examination shall not be waived by any party prior to the hearing.¹²⁶

A third, more important, recommendation affecting children attempted to steer a middle course in its proposed standard for child custody adjudication between the dominant parental right theory of present California law which requires a finding of parental unfitness before custody can be awarded to a non-parent¹²⁷ and the best interests of the child theory that has been recommended by writers in the field.¹²⁸ The draft proposed the following standard:

In awarding the custody, the court is to be guided by the following standards and considerations:

- (1) Custody shall be awarded to either parent according to the best interests of the child.
- (2) Although preference in an award of custody shall be given first to either parent, and second, to the person or persons in whose home the child has been living in a stable and wholesome environment, the court may award custody to persons other than the father or mother or the de facto custodian if it finds that such award is required to serve the best interests of the child.¹²⁹

This provision received perhaps the most severe criticism of the entire draft statute at the legislative hearings held on the proposal.¹³⁰ Objections were raised that the measure reposes unlimited discretion in judges to find that the best interests of children require their placement with outsiders even if their parents are fit, and that such discretion is

125. REPORT, *supra* note 1, at 102-03; § 4903, *supra* note 62; SUMMARY, *supra* note *, at 375.

126. See authorities cited note 121 *supra*.

127. *E.g.*, Stewart v. Stewart, 41 Cal. 2d 447, 260 P.2d 44 (1953); Roche v. Roche, 25 Cal. 2d 141, 152 P.2d 999 (1944); *In re Campbell*, 130 Cal. 380, 62 P. 613 (1900). See generally 1 B. ARMSTRONG, *supra* note 26, at 993-1006.

128. *E.g.*, Foster & Freed, *Child Custody*, 39 N.Y.U.L. REV. 423, 615 (1964).

129. REPORT 99; § 4900; SUMMARY 374-76. See also SUMMARY 38-43.

130. See note 60 *supra*.

likely to be abused. Much of this criticism has apparently been stimulated by the Iowa supreme court's unfortunate opinion in *Painter v. Bannister*,¹³¹ granting custody of a seven year old boy to his middle-class, midwestern "stable" grandparents rather than his "bohemian" California father. It cannot be doubted that this opinion has had a great impact in California and that it has given rise to many doubts about the best interests standard.¹³² In an effort to meet this criticism, the present bill might be amended to make clear that before custody may be given to non-parents the preference favoring parents must be overcome by a showing that the child's needs cannot be adequately met in the parental home. The proposed section could then read as follows:

In awarding the custody, the court is to be guided by the following standards and considerations:

- (1) Custody shall be awarded to either parent according to the best interests of the child.
- (2) Preference in an award of custody shall be given first to either parent, second, to the person or persons in whose home the child has been living in a stable and wholesome environment, and third, to any other person or persons according to the best interests of the child. The court may, however, award custody to persons other than the father or mother or the de facto custodian only if it finds that such preference is overcome by a showing that the child's needs cannot be adequately met in his present environment and that such award is required to serve the best interests of the child.

The proposed amendment would avoid the requirement of present law that a negative finding of parental unfitness be made before the child can be given to outsiders, while still maintaining the original draft's affirmative emphasis on the child's needs. Whether this compromise will prove acceptable remains to be seen.

F. The Family Court Structure

The California proposal recommends that the family court exercise unified jurisdiction over all legal questions affecting the family.¹³³

131. 258 Iowa 1390, 140 N.W.2d 152, cert. denied, 385 U.S. 949 (1966). The Iowa judgment awarding custody to the maternal grandparents was modified in California by an order appointing Harold Painter, the boy's father, guardian of his son's person and awarding him custody of his son. *In re Painter*, No. 22077 (Super. Ct., Santa Cruz County, Aug. 28, 1968).

132. See Kay & Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 720-22 (1966). B. Lindsley, Report to the Assembly Judiciary Committee on A.B. 1420, The Family Court, August 1967 (unpublished manuscript).

133. REPORT, *supra* note 1, at 9-10, 64. The court's proposed jurisdiction extends to the following cases: "marriage, including consent to marry . . . ; legal separation; declaration of

Surprisingly, this suggestion has proved to be one of the most controversial aspects of the report. Some of the objections to it appear to be based in part on dissatisfaction with the juvenile court and an accompanying reluctance to include any juvenile matters within the family court. It has also been suggested that the new emphasis on constitutional rights of juveniles arising from the *Gault* case may push legal practice in delinquency matters closer to the technicalities of the criminal court.¹³⁴ If this tendency is viewed as creating a corresponding divergence between the delinquency and neglect caseloads of the juvenile court, one solution may be to transfer only the neglect and dependency cases to the family court in order to allow the delinquency cases to develop separately. The California report made no attempt to deal with this question. Instead, it proposed merely a formal unification between the two courts, suggesting a family court with two separate divisions, a juvenile division and a domestic division. No attempt was made to work out a method of combining the daily work of the two divisions. More thoughtful planning would be required to achieve real integration of the two courts. It may be that such an attempt should not be made until the family court's domestic division has been allowed time to develop its own style free from the need to reorganize the juvenile court system.

Opposition has also developed, however, even to the combined jurisdiction of the family court over its domestic calendar which includes matters now handled by the domestic, probate, conciliation, and law and motion calendars of the superior court. Critics of the plan argue that the long term assignment of judges to specialized calendars such as the family court will increase an already critical delay in processing non-domestic litigation and will impede flexible court administration by preventing temporary assignments of judicial personnel to congested calendars. Such opposition appears misplaced, since the consolidation of family matters in one calendar can be expected to reduce the overlapping of jurisdictions and the consequent duplication of effort required by

nullity; dissolution of marriage; support of children; custody of children, including habeas corpus petitions involving the issue of child custody; alimony; division of community property, quasi-community property, and homesteaded property; paternity; adoption; legitimation of children; emancipation of children; approval of contracts for minors' services; appointment of guardians of the person and conservators of the person for minors, incompetent persons, mentally retarded persons, and other adults for whom such an appointment is sought; relations between parent and child; matters that were adjudicated prior to the effective date of this part in the juvenile court and the court of conciliation; and any other matters that involve the legal relationships between members of a family unit." § 4100. The Drafters' Comment notes that "for the time being at least, actions involving interspousal or parent-child torts and crimes should not be tried as such in the Family Court, although it is of course recognized that they are indicative of disruptive family relationships." *Id.* at 65; SUMMARY, *supra* note *, at 365-66.

134. *E.g.*, Coxe, *Lawyers in Juvenile Court*, 13 CRIME & DELINQUENCY 488, 489-90 (1967).

present law. Dean Pound¹³⁵ has pointed out that the traditional response of the law to new legal problems from the time of Roman law through the development in England from the twelfth to the sixteenth centuries to twentieth century America has been to establish a new tribunal to deal with each new problem, frequently without any clear definition of jurisdiction between the new court and its predecessors. He argues persuasively that this approach leads only to a duplication of effort that is wasteful both of public funds and private energy, and concludes that what is needed is not a special tribunal for every special legal system, but rather a system of specialist judges in a unified court. This problem is apparent in many areas of judicial administration, but it is particularly aggravated in the area of family law:

A system of courts devised to deal with the typical single issue required by the system of formulating an issue in pleadings, reducing the controversy by a series of successive formal statements to a fact asserted by the one and denied by the other, is not adequate to the troubles of a family in the complex society and manifold, diversified, and complicated activities of today. Treating the family situation as a series of single separate controversies may often not do justice to the whole or to the several separate parts. The several parts are likely to be distorted in considering them apart from the whole, and the whole may be left undetermined in a series of adjudications of the parts.¹³⁶

G. Legislative Status

The family court proposal has been received with interest in California. Bills¹³⁷ to enact the Commission's recommendations were introduced in 1967 by Senator Donald Grunsky of Watsonville and Assemblyman Winfield Shoemaker of Santa Barbara, both members of the Commission. The bills were referred for interim study during the 1967 session and were reintroduced at the 1968 session. They were withdrawn from active consideration at the 1968 session partly in response to the request of the State Bar of California that its Committee on Family Law be given time to study the proposal more thoroughly. The proposal has been endorsed by such diverse groups as the California Congress of Parents and Teachers, the San Francisco Mental Health Association, the California State Psychological Association, the NAACP, the Sacramento *Catholic Herald*,¹³⁸ the *Monitor*¹³⁹ (the official

135. Pound, *The Place of the Family Court in the Judicial System*, 5 NATIONAL PROBATION & PAROLE ASS'N J. 161 (1959).

136. *Id.* at 164.

137. *Catholic Herald*, April 20th, 1967, at 4, col. 1-2.

138. *Monitor*, May 4th, 1967, at 22, col. 1.

139. *Napa County Record*, January 31st, 1968, at 2, col. 1.

Roman Catholic Archdiocesan paper of San Francisco), the Napa County *Record*,¹⁴⁰ and television station KPIX in San Francisco. The proposal has also been endorsed in principle by the San Francisco Bar Association and the Family Law Committee of the State Bar of California. The only organized opposition to the proposal has come from a private association composed largely of divorced men called United States Divorce Reform, Inc. USDR's opposition to the present divorce laws had been previously expressed by testimony at legislative hearings and by leaflets, some bearing a crude drawing of a divorcee, martini glass in hand, draping one arm around a judge and imploring him to make her former husband work harder to push uphill the vehicle in which she, the Judge, and her (male) attorney are riding. Their opposition to the Family Court Act is based not only on a preference for their own initiative proposal to remove divorce from the courtroom in order to place it in an administrative Department of Family Relations,¹⁴¹ but also on their apparent belief that any legislation prepared by a commission numbering five practicing lawyers, four judges, four legislators, and two law professors among its twenty-two members should not be accepted without great suspicion.

Current expectations are that the family court bill will again be placed before the California Legislature at its 1969 session which begins in January. Hopefully, the State Bar Committee on Family Law will have been able by that time to complete its consideration of the bill and make its recommendations.

III

A COMPARISON: THE NEW FAMILY COURT AND THE OLD JUVENILE COURT

In evaluating the California family court proposal in the light of the juvenile court experience, one sees immediately that several institutional similarities exist between the two courts. Thus, the California plan retains the concept of the specialist-judge and his professional staff. The proposal does not attempt to suggest a method for recruiting the family court judge, partly because of the poor reception accorded the effort of an earlier commission to control judicial selection for the juvenile courts. In 1947 Governor Earl Warren appointed a commission for the study of juvenile justice. One of its recommendations was that juvenile judges be selected by a panel composed of the presiding judge of the county

140. See note 60 *supra*.

141. SUMMARY, *supra* note *, at 366.

superior court and four members of the public, three of whom must represent public education, public welfare, and the legal profession.¹⁴² Several lawyers have expressed their views privately that one of the reasons for the legislature's failure to act upon the Commission's report, which included an endorsement of the family court idea, was the Judicial Council's strong opposition to this recommendation. Rather than risk similar disapproval with a like proposal, the present report allows the presiding judge alone to make the selection from superior court judges, but directs him to be guided by the "prior training, interest, and ability" of the particular judge in the general area of human relations,¹⁴³ provides for a minimum appointment of two years, and authorizes the Judicial Council to conduct state and regional training seminars for family court judges and their staffs.¹⁴⁴ The dependence upon the judge as the critical factor in the court's operation that was so central to the early juvenile courts, however, is lessened by the California proposal's attempt to give the professional staff a more influential role in determining the court's administration than the probation staff of the juvenile court commonly enjoys. Thus, although the Commission followed Mrs. Bodenheimer's account of lessons learned from the Utah marriage counseling experiment¹⁴⁵ by recommending that the family court judge have authority to choose his professional staff, the quality of the staff is protected by the high degree of professional training required of its members;¹⁴⁶ the opportunities for case consultation with outside specialists, including psychiatrists;¹⁴⁷ and the Commission's specific recommendation that conditions and terms of employment conform to the *Manual of Personnel Standards and Adjudication Procedures* of the National Association of Social Workers.¹⁴⁸

The problem of recruiting a professional staff for the court is a real one. The Mortimer Commission¹⁴⁹ did not recommend the establishment

142. Final Report Cal. Special Crime Study Comm'n on Juvenile Justice, 16 (1949) (The Elkus Report).

143. REPORT, *supra* note 1, at 61; § 4003, *supra* note 62; SUMMARY, *supra* note *, at 366.

144. REPORT, *supra* note 1, at 63; § 4004, *supra* note 62.

145. Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 UTAH L. REV. 443 (1961).

146. The counselors must have a master's degree and the chief counselor a master's degree plus five years of clinical experience in "one of the behavioral sciences, such as social work, psychology, counseling and guidance, rehabilitation, or sociology, or its equivalent." REPORT 67-68; § 4202.

147. REPORT, *supra* note 1, at 69; § 4203, *supra* note 62; SUMMARY, *supra* note *, at 366.

148. REPORT, *supra* note 1, at 71.

149. PUTTING ASUNDER, *supra* note 47, at 53-54, app. E. See also LAW COMMISSION, *supra* note 43, at 30-34.

of a counseling service within the court structure, in part because of the shortage of trained workers. Rheinstein, on the other hand, dismissed similar objections with the statement that the establishment of family courts would create a demand for qualified counselors that would induce young people to enter the field, provided the salaries were sufficiently attractive.¹⁵⁰ Unless adequate state funds are made available, salaries are not likely to be as attractive as those available in competing public or private jobs. Therefore, it might become necessary as a practical matter to postpone the effective date of the family court act until courts are able to fill their staffs with qualified personnel, and even then to begin on a small scale by serving only persons with children, later expanding the service to include persons without children.

The court's effectiveness will depend largely on the creation of a good working relationship between its professional staff and the local bar. Time must be spent in explaining the new procedures to attorneys and in enlisting their understanding and support. Introduction to the nonadversary approach of the family court ideally should begin in law school. At the same time, however, the professional staff must learn that lawyers are more likely to cooperate with social work methods if they can be reassured that their clients' legal rights are being respected by the court. The traditional caseworker's attitude that lawyers are abrasive and obstructive must somehow be tempered with the insight that lawyers are trained to evaluate suggestions, including good suggestions, in the light of all the alternatives available to their clients. Community seminars presenting the court's work from both viewpoints might prove helpful in creating the necessary atmosphere of cooperation and mutual respect.

Finally, the California proposal reaffirms the commitment of the family court to the therapeutic principle. It does so, however, within the context of a careful protection of individual privacy in the counseling process. Although the initial interview is mandatory, no attempts should be made to force either confidences or reconciliations. Marriage counseling is not required; it is available only upon request and within the confidential relationship made possible by the guarantee of absolute privilege. It must be reiterated that the state cannot require as the price for permitting a divorce proceeding that the parties enter long term therapy. Nor should the state be able to condemn the parties to endure the empty shell of a legal marriage that has ended in fact; it is for this reason that the California proposal denies to the judge the power of permanently refusing divorce.

150. Rheinstein, *supra* note 14, at 637.

The therapeutic principle itself, however, must be justified if it is to be adopted as the policy of the state. The point is not so much whether the law should be involved in dealing with problems of human relationships; that question has long been settled in the affirmative.¹⁵¹ Rather, the issue can be phrased in terms of the interplay between individual privacy and the public interest. No one denies that the state is legitimately interested in fostering the continued existence of the family, for, as Parsons has noted, the family is the functioning social unit which provides the primary basis of psychological and emotional security for the normal adult and acts as the primary agency for the socialization of children.¹⁵² The question is not how far the state may legitimately go in attempting to preserve the family unit; although I suppose that if it could be established that the absolute denial of divorce for any reason would preserve the family, advocates for that position could be found and would have to be dissuaded, in the name of individual freedom, from compulsory social planning. The real question is whether the large scale commitment to the therapeutic approach recommended by family court advocates will be justified in terms of increased family stability. This problem is touched on in one of the most witty and perceptive essays currently available dealing with divorce policy.¹⁵³

The essay is written in the form of an imaginary quadrilogue between the American delegates (a judge, professor, psychiatrist, and bishop) to the hypothetical First International Interdisciplinary Congress on Family Stability and the Rights of Children. The discussion deals trenchantly with such topics as the divorce rate as a predictor of family stability; the impact of the emancipation of women and the industrial revolution on the changing role of the family; institutionalized evasions of divorce laws, such as the Nevada divorce and the formalized cruelty complaint; the marriage breakdown theory; and the use of reconciliation counseling in the courts, with particular emphasis on the Los Angeles husband-wife agreement. Toward the end of the essay, the professor comments on the judge's proposal for marriage counseling offered through the courts:

. . . the implicit premise of the counseling approach seems to be that it is individual failure which causes our high breakdown rate. That is really the same basic error as that into which I feel the Bishop has fallen, the

151. See generally Pound, *supra* note 130.

152. Parsons, *The Normal American Family*, in *MAN AND CIVILIZATION: THE FAMILY'S SEARCH FOR SURVIVAL* 37 (S. Farber ed. 1965).

153. C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW* 769-95 (1966).

only difference being that the Bishop's root cause is immorality and the Judge's is psychopathology.

The psychiatrist states his agreement with this point and adds,

. . . Kubie has pointed out that it is destructive social forces in our society and not individual psychopathology which threaten the family. It seems obvious to me that Kubie is right when he says that psychiatry—and by that I take it he also includes all forms of counseling help—can't roll a ball uphill when everything else in society is conspiring to roll it down. The real danger I see in both the Judge's and Bishop's approaches is that by their emphasis on false issues they keep us from tackling the basic problems of family life in modern society.¹⁵⁴

As we have seen, one of the motivations of the juvenile court movement was its conviction that delinquent youth were not criminals who needed punishment but rather misguided children who had lost their way and needed help to regain the path of right conduct. The professor's comment seems to charge that family court proponents are similarly motivated by the belief that persons who divorce have failed in their marriages because they are somehow sick; if only they could be cured, stable marriages would be the result. The psychiatrist in agreeing, however, sets up a false dichotomy between individual illness and the illness of society. Kubie, on whose statement he relies,¹⁵⁵ has concluded elsewhere¹⁵⁶ that the problem of human happiness, whether in or out of marriage, will remain unsolved unless a fundamental change in our educational system can be achieved that will give primary focus to the individual's self-knowledge rather than specific subject matter areas. He adds that psychiatry has merely contributed to the ideal of self-knowledge a deeper understanding of what is implied by that ideal: a penetration into the unconscious levels of the human spirit. The suggestion offered by the family court is that the "basic problems of family life in modern society" can be approached constructively through the normal individual's deeper understanding of himself and his increased awareness of how he presents himself to others¹⁵⁷ within the

154. *Id.* at 793.

155. *Id.* quoting Kubie, *New Forces Constraining the American Family*, in *The Future of the American Family — Dream and Reality*, C-1, C-2 (1963) (mimeo, Child Study Ass'n of America). See also Litvak, *Divorce Law as Social Control* in *A MODERN INTRODUCTION TO THE FAMILY* 215 (N. Bell & E. Vogel, eds. 1960) ("The fundamental objection to the law as therapy is that it tends to locate deviation within the individual. It fails to recognize that the faults of marriage need not lie within the persons involved but might well be a product of the regular societal system of socialization.")

156. Kubie, *supra* note 71, at 31.

157. See generally E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

context of his marriage. No one suggests that a divorce court is the only or even the best place to acquire such understanding and awareness. For many, however, it may be the only place available at the critical time; and for them, it will hopefully become a convenient place to begin.

CONCLUSION

As this brief description of its principal features has attempted to make clear, the California proposal seeks to remove the matrimonial offense as the basis for divorce, property division, and alimony; to diminish parental right as the sole touchstone of child custody; and to substitute a factual inquiry into marriage breakdown as the basis for divorce, economic circumstances as the criteria for property and support issues, and the best interests of the child with a parental preference as the standard for custody decisions. The reader may properly have concluded that the California plan ultimately depends for its success on the possibility of creating a comfortable working relationship among judges, lawyers, the court's professional staff, family members, and the general community, that will permit the court to work with families in a non-adversary and constructive fashion.¹⁵⁸

The success of the juvenile court depended in part on the same possibility; too often that possibility did not materialize, perhaps because too many hopes were staked on the critical leadership of the judge. Some progress has no doubt been made since the time when it was thought that a half hour's exposure to a wise and kindly judge could change the life pattern of a misguided child. Basing one's hopes for the success of a family court on notions of "saving marriages" through an hour's contact with a marriage counselor appears similarly unrealistic. If the family court is to become truly non-judgmental and oriented to helping each family discover what is in its own best interests, rather than simply prescribing the same cure for all families, "saving marriages" cannot be the court's primary goal. There must be a frank recognition that "some marriages are not worth saving, and should be terminated for the welfare of all concerned."¹⁵⁹ Nor should this recognition be limited to couples without children, for research in California has indicated that couples who are in constant conflict should divorce for the sake of their children, instead of remaining together for the sake of the

158. For a report of an imaginative and apparently successful-attempt to create such a community of understanding and cooperation, see Fogelson, Pearson & Sanders, *Making Better Lawyers: A Report on a Unique Interdisciplinary Venture*, 2 FAMILY L.Q. 322 (1968).

159. Harper & Harper, *Lawyers and Marriage Counseling*, 1 J. FAMILY L. 73, 74 (1961).

children.¹⁶⁰ The court's objective, when it is petitioned to inquire into the continuance of a marriage, must be to discover the facts; when the facts lead to the conclusion that the marriage should be dissolved, the court must be prepared to act accordingly.¹⁶¹ Only in this way will the court's professional staff be free to work honestly with each couple, rather than feeling compelled to produce statistical "reconciliations" to justify the court's existence. And if, after a full opportunity for reconsideration, one party refuses to continue the marriage at the final hearing, the court will be able to grant a dissolution knowing that it has done what it could for the marriage, and hoping that any future marriages contracted by the divorcing parties will have a better chance for success because of its efforts.

I do not imagine that it will surprise the reader to learn that I favor the family court proposal. Its future in California, however, is far from clear. The bills embodying its provisions are detailed and complex. Time will be required for those concerned to study and evaluate the proposal. I believe that an openminded and careful evaluation will be favorable to the principles sought to be achieved by the Act. Details can be altered without detracting from those principles; no doubt changes can and will be suggested that will improve the present draft. In the end, however, I hope that the law will find its way to the adoption of principles that favor honesty over perjury, a concern for the individual over legal fictions, and a commitment to deal fairly with the realities of family interaction rather than an artificial search for fault and an unproductive assignment of blame.

160. Landis, *The Family and Social Change: A Positive View*, in *MAN AND CIVILIZATION: THE FAMILY'S SEARCH FOR SURVIVAL* 179-80 (S. Farber ed. 1965) (reporting a study of 330 university students, all children of divorced parents). See also Nye, *Child Adjustment in Broken and in Unhappy Unbroken Homes*, 19 *MARRIAGE & FAMILY LIVING* 356 (1957).

161. See Kubie, *supra* note 71, at 32-37.