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Coercive Conciliation: Judge Paul W. Alexander and the Movement for Therapeutic Divorce

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COERCIVE CONCILIATION: JUDGE PAUL W ALEXANDER AND THE MOVEMENT FOR THERAPEUTIC DIVORCE

*J. Herbie DiFonzo**

*Now, damn it, shut up. I'm telling you—you love each other*¹

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1. Harriet F. Pilpel, *The Job the Lawyers Shirk*, 220 HARPER'S 67, 68 (1960) (reporting a divorce lawyer's attempt at fostering marital reconciliation).

I. INTRODUCTION: AMERICAN DIVORCE AT THE EDGE OF FAULT

AT mid-point in the twentieth century, the American divorce system was universally acknowledged a failure. The conception that divorce was a process through which "innocent" spouses proved marital "fault" in an adversary proceeding against their erring partners, whereupon the state "punished" the "guilty" spouses by issuing a divorce decree, existed only in the insular mind of appellate opinions.

Prior to the California divorce revolution of 1969,² many American jurisdictions had passed incompatibility statutes³ and living apart laws⁴ in an effort to slow the mounting divorce rate by substituting neutral factors for the traditional requirement of proving fault. Incompatibility statutes were designed to afford a couple relief from continued wedlock in the face of serious and unrelenting disharmony.⁵ Living apart laws provided theoretical recognition that dead marriages deserved a formal burial. According to this latter rationale, after separation periods of five, seven or as long as ten years, marriages were presumed in many states to have expired by the passage of time and the obstinacy of the couple.⁶

But both the incompatibility devices and the living apart provisions failed to attract many divorce customers. Americans largely ignored these early no-fault experiments, preferring to continue divorcing under the familiar—and quite corrupted—fault system.⁷ Unhappy wives and husbands found the lengthy separation periods required under the living apart statutes much too inconvenient compared to the rapidity of the traditional fault divorce.⁸ On their face, the incompatibility laws appeared to satisfy the popular call for an amicable end to

2. 1969 California Laws ch. 1608.

3. 1935 Alaska Laws ch. 54; Del. Laws ch. 296 (1968); 1969 Kansas Laws ch. 286; 1967 Nev. Laws ch. 278; 1933 N.M. Laws ch. 54; 1953 Okl. Laws ch. 22; V.I. CODE ANN. tit. III, ch. 44 § 7 (1921).

4. 1915 Ala. Acts at 370; 1931 Arizona Laws ch. 12; 1937 Ark. Acts no. 167; 1957 Del. Laws ch. 27· 49 Stat. 539 (D.C. 1935); 1967 Haw. Laws ch. 76; 1945 Idaho Laws ch. 125; 1850 Ky. Acts ch. 498; 1916 La. Acts no. 269; 1937 Md. Laws ch. 396; 1931 Nev. Laws ch. 111; 1966 N.Y. Laws ch. 254; 1907 N.C. Laws ch. 89; 1933 P.R. Laws no. 46; 1893 R.I. Public Laws ch. 1187; 1969 S.C. Acts no. 170; TEX. R. CIV. (1925) art. 4629; 1941 Vt. Laws no. 43; 1960 Va. Acts ch. 108; 1917 Wash. Laws ch. 106; 1969 W. Va. Acts ch. 49; 1866 Wis. Laws ch. 37· 1939 Wyo. Laws ch. 106.

5. See *Burch v. Burch*, 195 F.2d 799, 807 (3rd Cir. 1952).

6. In 1929, the Supreme Court of Rhode Island articulated the rationale for living apart statutes: "Any injury to the state from the dissolution of the family cannot now be cured by insisting on the continuance of a semblance of marriage when the substance has long since disappeared." *Dever v. Dever*, 146 A. 478, 479 (R.I. 1929).

7. In 1948, only three percent of all American divorces were obtained under the living apart statutes, although such laws were in effect in 14 states and the District of Columbia. PAUL H. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 123 tbl. 59, 125-26 (1959).

8. Referring to Washington's statute requiring an eight-year separation, one author exclaimed "eight years is a long time in a world where life is short." William Seagle, *The Right to Consolation*, 2 AM. MERCURY 39, 41 (1924).

deeply dissatisfying marriages. But many appellate courts had difficulty disentangling incompatibility from the web of fault jurisprudence.⁹ This reluctance to affirm the plain meaning of the statutory language confirmed Professor Walter Wadlington's observation that, in most jurisdictions, "the ingrained concept of fault [was] difficult for the judiciary to overcome."¹⁰

The fault system constituted a sieve for the rising divorce flow. Neither living apart statutes nor incompatibility laws had succeeded in slowing the divorce rate. The regime of fault had not only failed to preserve the nuclear family, it had become the engine of transformation into the post-World War II age of divorce. Once conservative reformers identified fault itself as the rate-determining step for the rise in divorce, they proposed radical surgery in an effort to reverse what they perceived as an ominous decline in the stability of the American family. In looking for a new way to disassemble the fault system in order to render divorces much more difficult to obtain, they found a useful—if surprising—model at hand: the juvenile court.

A product of the Progressive drive to merge governmental activism with therapeutic ends, the juvenile court occupied what Andrew J. Polsky has described as the "shadowy ground between legal tribunal and social agency."¹¹ As the immediate but much more potent successor to the House of Refuge and Reformatory movements, the juvenile court transformed legal institutions to further its goal of adjusting the personalities and behaviors of the predominantly lower-class children who swamped its caseloads. The ultimate goal of the new court and its vigorous social service adjunct, the juvenile probation department, was to produce a quiescent and obedient hybrid child with lower-class skills but middle-class values.¹²

Child reformation, as so defined, was rarely achieved. But the juvenile court survived—and continues to persist—as a paradigm of professional cross-fertilization. Paul W. Alexander, the prime advocate of administering therapeutic divorce through family courts, spent many years as a juvenile court judge in Ohio. He aimed to expand the power of this coercive social experiment to families whom he and his fellow reformers viewed as socially irresponsible. Alexander worded the issue so as to make the connection clear: "Since the problems in a

9. See, e.g., *Chappell v. Chappell*, 298 P.2d 768 (Okla. 1956); *Clark v. Clark*, 225 P.2d 147 (N.M. 1950).

10. Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 52 (1966).

11. ANDREW J. POLSKY, *THE RISE OF THE THERAPEUTIC STATE* 66 (1991).

12. For literature on the origins of the juvenile court, see generally ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (2d ed. 1977); Polsky, *supra* note 11; DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980); ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* (1978); STEVEN L. SCHLOSSMAN, *LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920* (1977); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Alexander W. Pisciotta, *Treatment on Trial: The Rhetoric and Reality of the New York House of Refuge, 1857-1935*, 29 AM. J. LEGAL HIST. 151 (1985); J. Herbie DiFonzo, *The Vicious Reform: Juvenile Incarceration in America, 1825-1925* (1977) (unpublished M. Arts thesis, University of Virginia).

divorce case are so much more social than legal, why isn't it logical to take the embattled spouses out of the antiquated old divorce mill with its creaking legalistic machinery and put them into a socialized court, as we have done with the juveniles?"¹³

America after World War II was the land of the experts, and "socialized" courts for marital woes fit hand-in-glove with the powerful emphasis on scientific guidance of everyday problems.¹⁴ Legal and social science experts viewed most divorce-seekers as "sick" couples whose freedoms should be curtailed because of the adverse social consequences of their contemplated action. They believed in a strong link between divorce and future juvenile delinquency for the children of the severed union, who almost by definition were doomed to be neglected as a result of their parents' breach of the familial bond. As Lynne Carol Halem has noted, this "etiological relationship between divorce and childhood crime provided a rationale for modeling the family tribunal after the juvenile courts."¹⁵

Postwar America witnessed the acceleration of the transition of the family from the "institutional" to the "companionship" form. While the quest for family togetherness embodied the ideal of happiness, the individualistic demands of a romance culture often undermined family unity. The particular tensions on women as wives and mothers became lightning rods for significant cultural dissatisfactions, as exemplified by the vituperative attacks on men's alimony obligations.

Issues of crime, social deviance and divorce thus merged in front of the backdrop of the uneven diffusion of social science concepts into the legal profession. Seen through a haze of often-unacknowledged class bias, a single solution emerged: Paul Alexander's therapeutic divorce, administered by family courts composed of equal parts sheriff and social worker, counselor and judge.

II. THE CASE OF THE ALL-TOO-CONSENTING ADULTS

The fault system may have been discredited, but no lobby for discontented spouses arose—nor could one have been easily imagined—to campaign for more realistic divorce. Such a campaign would, in any event, have been superfluous. As two generations of readily-divorced Americans had shown, legal absolution for a broken marriage could easily be purchased with a modest amount of pious perjury. When the required penance of social ostracism disappeared between the two World Wars, the divorce court lost its menacing aspect and took on the bland coloration of a registry.

Divorce changed as marriage changed. As Sociologist Paul H. Landis reminded readers of *The Forum* magazine shortly after the end of World War II,

13. Paul W. Alexander, *Is There a Divorce Evil?* OHIO MAG., Apr. 1945, reprinted in XCI CONG. RECORD, A 1222.

14. See ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 26-27 (1988); JOSEPH VEROFF ET AL., *MENTAL HEALTH IN AMERICA: PATTERNS OF HELP-SEEKING FROM 1957 TO 1976*, at 7-8, 10 (1981).

15. LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 221 (1980).

the "companionship family," which "prizes romance and its ethereal happiness," was replacing the "institutional family rooted in the traditions of child-bearing, joint economic activity and filial duty."¹⁶ The definition of the ideal family limned by sociologists conveyed this change crisply, simply by omitting any reference to social responsibility. A successful family was one in which "husband and wife utilize[d] their resources to work out a satisfactory mutual relationship."¹⁷

So pervasive was this new understanding of marriage that when a Catholic prolocutor opined that marriage should *not* be "primarily concerned with the happiness of the parties," he admitted that the notion of hell-or-high-water marriage would be seen as "ridiculous" by some.¹⁸ No overriding communitarian "purpose" distracted couples from the focus on satisfaction. Even the emphasis on couples was, however, somewhat over-inclusive: once happiness usurped duty as the mainstay of marriage, the guideposts for satisfaction became increasingly self-centered.

With Americans viewing delight in marriage as the end, rather than the means, many thousands of spouses eschewed the work of relationship for the pursuit of what Philip Wylie termed the "one and only" myth.¹⁹ Movies, pulp magazines, television soap operas, advertisements and virtually the entire repertoire of popular music projected a "romantic complex creat[ing] expectations of a standard of psychic living which cannot be realized in most marriages."²⁰ Writer John McPartland found post-World War II Americans simultaneously raunchy and prudish, "the most sensual and profligate of peoples, worshippers of breast and thigh," while at the same time "a monogamous and chaste people to whom virginity is so sacred that it cannot be mentioned on our radios."²¹ McPartland concluded that "we raise our young in this never-never land where sex is bright and gay but doesn't exist."²²

16. Paul H. Landis, *Divorce in Our Time*, 105 FORUM 865 (1946).

17. MABEL A. ELLIOTT & FRANCIS E. MERRILL, *SOCIAL DISORGANIZATION* 597-98 (rev. ed. 1941). See STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* 107 (1988); W.F. OGBURN & M.F. NIMKOFF, *TECHNOLOGY AND THE CHANGING FAMILY* 32-57, 123-43 (1955); Robert S. Redmount, *An Analysis of Marriage Trends and Divorce Policies*, 10 VAND. L. REV. 516 (1957). See also Warren P. Hill, *Some Aspects of Family Law*, 13 OHIO ST. L.J. 1, 2 (1952) (concluding that "with the family thus stripped of all social utility beyond the mere material provision for offspring, it is small wonder that when love is dead the union tends to fly apart").

18. James P. Kelly, *History and Principles of Catholic Family Law*, in VIRGINIA LAW WEEKLY, *DIVORCE AND FAMILY RELATIONS: A COMPILATION OF THE ORIGINAL DICTA PUBLISHED BY THE VIRGINIA LAW WEEKLY, 1949-1950*, at 14-20 (Stanley C. Morris, Jr. ed., 1950) [hereinafter *DIVORCE AND FAMILY RELATIONS*].

19. Philip Wylie, *What's Wrong with American Marriages*, 49 READER'S DIG. 37, 39 (1946). See Ernest W. Burgess, *The End of Romantic Marriage*, 121 COLLIER'S 12 (1948).

20. ROBERT F. WINCH, *THE MODERN FAMILY* 389 (1952).

21. John McPartland, *Footnote on Sex*, 192 HARPER'S 212-13 (Mar. 1946).

22. *Id.*

The state of marriage itself, oddly enough, was roundly ignored by most media, which concentrated on the passion and pathos of romance and courtship. Once Cinderella married the Prince, neither was heard from again. Romantic comedies on the screen ended with "a kiss, blackout, marriage."²³ In the popular culture, the wedded state lay in the merry miasma beyond the altar, an aesthetic limbo as much *terra incognita* as Hamlet's "undiscover'd country from whose bourn / No traveler returns."²⁴ David L. Cohn suggested to the *Atlantic's* readers that marriage was "presented to the young by their elders, the movies, and slick magazine fiction, as a perpetual Christmas Eve with Tiny Tim passing double Martinis and saying 'God bless you, every one!'"²⁵ In the pointed words of two contemporary sociologists, "the quiet pleasures of conjugal happiness" constituted a "denial of the romantic faith, which tells us that we should continue to burn with the same pure, gemlike flame for the rest of our lives."²⁶

The burgeoning divorce rate in the 1940s indicated, however, not a disparagement of marriage, but its opposite: "modern couples demand more from marriage than their ancestors did."²⁷ After the Depression, Americans hankered after the married state in record numbers. During the decade, the divorced percentage of the population grew from two to three percent. But the married cohort shot up from sixty to sixty-six percent of the population.²⁸

World War II magnified the popularity of the marital state even before hostilities began. Samuel Tenenbaum noted the large increase in marriages during the summer and fall of 1940, as the Selective Service Act was debated and passed. The Japanese attack on Pearl Harbor "set off a frenzied rush to the altar," while the tense psychology of wartime created a "pathological interest in sex" as part of its heightened emphasis on adventure.²⁹

War conditions took their toll on marriages, replicating in a far broader dimension the American social experience of World War I. Tenenbaum, a New York City reporter-turned-psychologist, observed that war made husbands cynical and wives independent.³⁰ The long separations made necessary by the conflict

23. MOLLY HASKELL, *FROM REVERENCE TO RAPE: THE TREATMENT OF WOMEN IN THE MOVIES* 22 (2d ed. 1987).

24. WILLIAM SHAKESPEARE, *HAMLET* act III, sc. 1.

25. David L. Cohn, *Are Americans Polygamous?* 180 *ATLANTIC* 30, 32 (Aug. 1947).

26. ANDREW G. TRUXAL & FRANCIS E. MERRILL, *THE FAMILY IN AMERICAN CULTURE* 121-30 (1947).

27. Paul H. Landis, *Marriage Has Improved*, 62 *READER'S DIG.* 13, 13 (June 1953). As W. Somerset Maugham quipped, American women expected of their husbands "a perfection English women only hope to find in their butlers." *Id.* at 14.

28. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970: PART I*, at 9, 54-55, 64 (1975) (reporting that the percentage of unmarried Americans shrunk during the 1940s from 31% to 23%).

29. Samuel Tenenbaum, *The Fate of Wartime Marriages*, 61 *AM. MERCURY* 530, 531 (Nov. 1945). See WILLARD WALLER, *WAR AND THE FAMILY* (1940); Harold M. Wayne, *G.I. Divorce Dangers*, 114 *COLLIER'S* 13 (Oct. 21, 1944).

30. Tenenbaum, *supra* note 29, at 534.

raised sexual temptation beyond the levels of many to resist.³¹ War time was rushed time. As America raced through military preparation, a similar telescoping occurred within courtship rituals. Consequently, as historian D'Ann Campbell has observed, World War II divorces "typically involved young couples who had not been acquainted very long and who had only a poor opportunity to know each other before the husband was shipped out. Immaturity was a basic factor, often leading to infidelity."³²

Marital infidelity occurred on both the home front and the front lines, of course, but the feared promiscuity of the war years was that of the stateside woman, not of her soldier husband. This skewed perspective was compatible with contemporary sociology, which equated women's drive for equality with moral degeneration. As a 1940 text put it: "The greater social freedom of women has more or less inevitably led to a greater degree of sexual laxity, a freedom which strikes at the heart of family stability."³³

In the aftermath of war, one Newark, New Jersey judge heard twenty divorce cases in six weeks involving adultery alleged against soldiers' wives. Crowded dockets transformed divorce courts into express lanes. A Chattanooga, Tennessee Bar Association report described a 1945 court session in which twelve divorces were granted in seventeen minutes.³⁴ A *Newsweek* report on "Divorce: The Postwar Wave" highlighted Chicago jurist Edwin A. Robson's record-breaking stretch hearing 2000 divorce cases in the last four months of 1945.³⁵ Robson responded to the divorce craze by installing a nursery adjacent to his courtroom to mind the children of these exploding wartime unions.³⁶

These dramatic changes served notice that a culture of divorce abounded in post-war America. Charlton Ogburn, vice-chair and counsel for the Interprofessional Commission of Marriage and Divorce Laws, expressed his dismay that the American public "has remained rather apathetic in the face of the disturbing character of the divorce evil: the increasing number of divorces and the laxity of the courts in hearing and granting divorces, especially in undefended cases often based on fraud and collusion in violation of the statutes."³⁷ But Ogburn was mistaken. The public was not "rather apathetic;" it supported the right to divorce even if it was not in actual hot pursuit. Maxine B. Virtue's observation that the "present cultural mores generally disapprove of the spouse

31. *Id.*

32. D'ANN CAMPBELL, *WOMEN AT WAR WITH AMERICA. PRIVATE LIVES IN A PATRIOTIC ERA* 89 (1984).

33. MARRIAGE AND THE FAMILY 587-88 (Reuben Hill & Howard Baker eds., 1940). On marital relations during the war years, see MAY, *supra* note 14, at 65-75.

34. See Reginald Heber Smith, *Dishonest Divorce*, 180 ATLANTIC 42 (Dec. 1947).

35. *Divorce: The Postwar Wave*, NEWSWEEK, Oct. 7, 1946, at 33-34.

36. *Id.* See Irene Stokes Culman, *You Married Him—Now Stick with Him*, 120 GOOD HOUSEKEEPING 17 (May 1945); *Divorce: National Scandal*, NEWSWEEK, Mar. 10, 1947, at 27; *Liquor and Lipstick*, TIME, Oct. 15, 1945, at 14.

37. Charlton Ogburn, *The Role of Legal Services in Family Stability*, 272 ANNALS 127 (1950).

who does not co-operate when asked for a divorce"³⁸ more accurately suggested the flavor of the post-war divorce culture.

Despite the routine of divorces, the fault system for adjudicating them continued to provide an endless subject for exposes which were not so much damning as they were mere gawking at the human zoo. A 1945 *Life* magazine picture spread on divorce in Los Angeles remarked that mental cruelty "includes anything from a husband's reading too much to his disliking the way his wife cooks steak."³⁹ Some cases resembled that of Rowena Laird, who claimed her husband was rude to her friends and received a sympathetic murmur from the bench: "Better luck next time."⁴⁰ Similarly, Anna MacGillevery's complaint stemmed from her husband's insistence that she wear lipstick.⁴¹ Her plea for autonomy was rewarded with a divorce.⁴² But not all the divorce stories substituted conjugal ennui for the statutory ground. Neva Krebs testified that her spouse stayed out at night, beat her up and once tried to choke her.⁴³

One tale bore the marks of its Hollywood origin. The caption for two glossy pictures of recent divorcee Corinne Sylvia posing for Los Angeles newspaper photographers noted that she obtained her divorce by showing that after her husband persuaded her to vacation in Texas, he failed to send her the money to return to southern California. As Groucho Marx quipped, "Hollywood brides keep the bouquets and throw away the grooms."⁴⁴ In Michigan, readers of the *Saturday Evening Post* learned, the cruelty standard specified "extreme and repeated cruelty"⁴⁵ But this enhanced requirement could be met, during the average six-minute divorce hearing, by proof that the husband criticized his wife's clothing or refused to speak to her mother.⁴⁶

In Illinois, which also required a showing of "extreme and repeated cruelty," divorce court protocol demanded that the wife testify that her husband had slapped her precisely twice. The *Saturday Evening Post* sent John Bartlow Martin to observe Chicago divorce trials. Martin reported that the key questions and answers were always scripted, as follows:

Q. During the time of your marriage, how did you treat your husband?

A. Good.

38. MAXINE B. VIRTUE, FAMILY CASES IN COURT 229-30 (1956).

39. *Divorce Mill: Los Angeles Frees Many More Mismatched Couples Than Reno*, LIFE, July 23, 1945, at 55 [hereinafter *Divorce Mill*]. On California's expansive reading of mental cruelty, see Max Rheinstein, *Our Dual Law of Divorce: The Law in Action Versus the Law of the Books*, in THE LAW SCHOOL, THE UNIVERSITY OF CHICAGO, CONFERENCE ON DIVORCE 39 (1952) [hereinafter CONFERENCE ON DIVORCE].

40. *Divorce Mill*, *supra* note 39, at 55.

41. *Id.*

42. *Id.*

43. *Id.*

44. JILL BAUER, FROM "I DO" TO "I'LL SUE:" AN IRREVERENT COMPENDIUM FOR SURVIVORS OF DIVORCE 208 (1993).

45. David G. Wittels, *Perjury Unlimited*, 222 SAT. EVE. POST 28, 133 (Feb. 18, 1950).

46. *Divorce Mill*, *supra* note 39, at 55.

- Q. How did he treat you?
 A. Bad.
 Q. Calling your attention to [specified date], what, if anything, occurred?
 A. He struck me.
 Q. Calling your attention to [second date], what, if anything, occurred?
 A. [Same response.]
 Q. Did you give him any provocation or reason for striking you?
 A. No.
 Q. Did this leave any marks or bruises?
 A. Yes.
 Q. Cause you pain and suffering?
 A. Yes.⁴⁷

This scenario was typically followed by a stipulation regarding the property settlement, the wife's waiver of alimony, and a request that the husband pay the wife's counsel fees. The wife's testimony was then rapidly corroborated by two family members or friends. The entire hearing took eight minutes. Uncontested divorce litigation thoroughly deserved Paul Alexander's scorn as "a sham battle against the little man who isn't there."⁴⁸

III. "WITHOUT GUILT OR SIN"

Although family courts had been proposed prior to World War II, very few had been established. Maverick judge and social radical Ben Lindsey did his share in widely disparate venues. After the Ku Klux Klan drove him from the domestic relations bench in Colorado, Lindsey re-emerged in California, where he won election to a judgeship in 1934 and provided the leadership which resulted in the establishment of the Children's Conciliation Court of Los Angeles in 1939.⁴⁹ In Milwaukee, a "pre-divorce" court with a "Department of Conciliation" had opened its doors in 1935.⁵⁰

47. John Bartlow Martin, *Divorce: A Day in Court*, 231 SAT. EVE. POST 19 (Nov. 1, 1958).

48. Paul W. Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 1949 U. ILL. L.F. 695 (1949), reprinted in 36 A.B.A. J. 105 (1950) [hereinafter Alexander, *The Follies of Divorce*]. See VIRTUE, *supra* note 38, at 52 (confirming more extensively the mechanistic routine of Chicago divorce hearings in the 1950s).

49. JOSEPH KIRK FOLSOM, *THE FAMILY: ITS SOCIOLOGY AND SOCIAL PSYCHIATRY* 365 (1934). On the history of the intrepid Judge Lindsey, see CHARLES E. LARSEN, *THE GOOD FIGHT: THE LIFE AND TIMES OF BEN B. LINDSEY* (1972). See also Charles E. Larsen, *Ben Lindsey: Symbol of Radicalism in the 1920's*, in *FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER* 255 (Harold M. Hyman & Leonard W. Levy eds., 1967); John Bartlow Martin, *Divorce: Effort to Save a Troubled Marriage*, 231 SAT. EVE. POST 36 (Nov. 8, 1958); Frank J. Taylor, *A Court To Prevent Divorce*, 103 NEW REPUBLIC 239 (Aug. 19, 1940).

The statute creating the conciliation court declared its intention "to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies." 1939 Cal. Stat. ch. 737 § 1730.

50. EWING COCKRELL, *SUCCESSFUL JUSTICE* 715 (1939); *Milwaukee: Marriages Patched Up*,

Surprisingly, however, the most well-known family court, due entirely to the boundless energy and public charisma of its founding judge, was located in the minuscule metropolis of Toledo, Ohio. Judge Paul W. Alexander fired the movement for family courts from the 1940s to the 1960s. Hailed as the "father of family law,"⁵¹ he most lucidly—and persistently—articulated the philosophy of therapeutic divorce, and his life work greatly influenced the evolving understanding of marriage and the law for the remainder of the twentieth century.

Paul Alexander was a rebel in a robe. He believed in the rehabilitative power of the judicial system, and he bitterly criticized the divorce process because it rewarded perjury and punished forgiveness, thus reversing common sense. Unlike radicals who desired that the law reflect unalloyed individualism and free choice in marital partners, however, Alexander held that a judge's main role was to reintroduce warring couples to each other under a flag of truce. Each divorce petition represented an opportunity for the state to reunite the parties. During the parley, social science experts—the rehabilitation professionals, as Alexander viewed them—would coax the couple into a reconciliation.

After practicing law for nearly a quarter-century in his home town of Toledo, Ohio, Alexander was in 1937 elevated to the domestic relations and juvenile bench, on which he served for three decades. He converted the Toledo court into a national showplace for the implementation of his family court ideas. Despite never achieving his complete reform program, Alexander was widely recognized as the pioneer of and godfather to the therapeutic divorce movement.⁵²

Alexander kept a carved ship's model on the wall behind his desk. Over it appeared the legend: "Who doth not answer to the rudder shall answer to the rock."⁵³ Alexander's life-long ambition was to steer. His professional attainments were many: at various times he headed the National Council of Juvenile Court Judges, the National Conference of Juvenile Agencies and the Legal Section of the National Conference on Family Life. He also served as trustee of the National Probation and Parole Association, and he chaired the American Bar Association's Interprofessional Commission on Marriage and Divorce Laws. Alexander realized that couples engaged in an uncivil war would not willingly participate in a process aimed at frustrating their goal of secession. Quite aware that the fault regime offered no check on the divorce rate, he proposed a conservative revolution in liberal clothes: the elimination of all divorce grounds and their replacement with a therapeutic process, divorce "without guilt or sin."⁵⁴

NEWSWEEK, Jan. 26, 1948, at 27. See VIRTUE, *supra* note 38, at 174-214 (describing the operation of the Milwaukee family court).

51. Sol Morton Isaac, *Family Law and the Lawyer*, 2 J. FAM. L. 43, 47 (1962).

52. See, e.g., PAUL H. LANDIS, MAKING THE MOST OF MARRIAGE 504-05 (1955); Quintin Johnstone, *Divorce: The Place of the Legal System in Dealing with Marital-Discord Cases*, 31 OR. L. REV. 317 (1952); Ogburn, *supra* note 37, at 127-33. See also VIRTUE, *supra* note 38, at 174-214 (descriptions of the operation of the Toledo court); Gertrude Samuels, *Courts for the Family Go on Trial*, N.Y. TIMES MAG., Dec. 20, 1953, at 16 (same).

53. VIRTUE, *supra* note 38, at dedication page.

54. Paul W. Alexander, *Divorce Without "Guilt" Or "Sin,"* N.Y. TIMES MAG., July 1, 1951, at 14 [hereinafter Alexander, *Divorce Without*].

Divorces were to be granted upon the breakdown of the marriage. But who determined whether a marriage was sunk or shipshape? Not the parties, whose impulsiveness rendered them incapable of understanding their true condition. Alexander believed that troubled wives and husbands manifested their confusion and helplessness by the act of filing a divorce petition, which he deemed "an application for the remedial services of the state."⁵⁵ In Alexander's view, the central paradigm of the old divorce court had been misconceived. The fault system's call for an 'innocent' complainant and a 'guilty' defendant did not accurately reflect the complex psychological makeup of conjugal relationships. In family life, the question of guilt, borrowed from criminal law, was a clumsy barometer of the state of the marriage.

Although he worried about the quotidian fraud perpetrated upon the judicial system, Alexander's main concern lay with the immoral consequences of a system of divorce grounds. When traditional adversary procedures are "employed to resolve intrafamilial conflicts," he observed, they "tend to fan the flames."⁵⁶ He would replace courtroom dogfights with a "non-adversary or conference type of procedure in determining issues and prescribing remedies."⁵⁷ Marital warfare would end in a therapeutic armistice: as the oft-quoted title of one of Alexander's articles phrased it, "Let's Get the Embattled Spouses Out of the Trenches."⁵⁸

While most critics viewed the system of divorce grounds as too conservative, Alexander perceived it as too liberal. When a litigant in a traditional court proved that her or his spouse had been unfaithful, or had behaved with actionable cruelty, or had failed (in some jurisdictions) to provide adequate support, the court had no choice but to grant a divorce. Even if the judge believed that the marriage could be saved; even if the children would suffer terribly from the dissolution; even if, in fact, the marriage had not broken down, the divorce decree must issue. Alexander considered this mandatory grant of a divorce upon proof of specific grounds to be the worst corruption of American divorce law.⁵⁹

He agreed with the liberals that divorce grounds were a wretched substitute for marital breakdown. He proposed to eliminate all grounds. But Alexander would take an eraser to the statutory code in order to give the court discretion to *deny* divorce even in cases of adultery, cruelty or nonsupport. As a sociologist wrote in support of Alexander's theories, the concept of divorce justice should satisfy

55. *Id.*

56. Paul W. Alexander, *Legal Science and the Social Sciences: The Family Court*, 21 MO. L. REV. 105, 107 (1956) [hereinafter Alexander, *Legal Science*].

57. *Id.*

58. Paul W. Alexander, *Let's Get the Embattled Spouses Out of the Trenches*, 18 LAW & CONTEMP. PROBS. 98 (1953) [hereinafter Alexander, *Embattled Spouses*].

59. Paul W. Alexander, *Introduction*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at vi-vii (The fault system "compel[s] the judge to grind out divorces regardless of the real facts, the underlying causes and the effect upon the parties, their families and the state."). Alexander also focused criticism on those who "would make of the law a set of dehumanized, mechanized rules, and of the court a human slot machine: in goes the petition; wheels whirl; out pops the decree." VIRTUE, *supra* note 38, at xxxiv.

the real need of troubled families: not a ruling on the lawfulness of conduct, but "having the family members brought into a working relation to each other."⁶⁰

IV DIVORCE AS FARCE

But "a working relation" was far from the intent or yield of the divorce process. The *Saturday Evening Post* related the story of a Nevada legislator who, allegedly in jest, proposed a bill for slot-machine divorce. His device would automatically produce a divorce decree when fed 200 silver dollars. The mechanism would also light up like a pinball machine and play a joyous tune to celebrate the customer's freedom. The bill died.⁶¹ New York divorce litigants, whose adultery-only law rendered useless the facile fables of cruelty, specialized in "hotel" perjury. State trial judge Henry Clay Greenberg admitted to the readers of the *American Magazine* that the great bulk of Empire State divorces were obtained fraudulently, "and almost everybody in the courts is aware of it."⁶² Greenberg estimated that three-quarters of the cases were staged, with the average performance lasting eight to ten minutes.⁶³ Divorce judges felt bound to play their part, "caught in a system which, whatever the hypocrisy, is popular with a large segment of the bar and the public."⁶⁴ The wry flavor of New York divorcing was captured by the following exchange between *Time* magazine and a Brooklyn matrimonial lawyer.⁶⁵ The magazine had reported on the certainties of New York divorce jurisprudence:

Occasionally, the pajamas are green instead of pink, but there are always pajamas and the woman is always blonde. Discontented New York wives shrink from the hoary tale, but the state law which permits divorce only on grounds of adultery leaves them no alternative. Chief sufferers are referees in divorce proceedings, forced to hear over & over the same old story of raid, surprised husband, pajama-clad blonde.⁶⁶

But attorney Joseph Horowitz took sharp exception to *Time*'s description of the certainties of divorce practice and its mindless repetition. In his experience handling divorce trials in New York:

[N]ever has Madam X of the story been a blonde, never has she worn pajamas, never has a wife shrunk from the hoary tale. She has been "brown-haired," "red-

60. Earl Lomon Koos, *Family Problems and the Court*, 287 ANNALS 27, 28 (May 1953) (emphasis omitted).

61. Wittels, *supra* note 45, at 135-38.

62. Henry Clay Greenberg, *New York's Perjury Mills*, 144 AM. MAG. 46, 46 (1947).

63. *Id.* at 146.

64. *Id.* Greenberg did note that a finding of adultery effectively disqualified someone from public office, and he expressed his sense that prevaricating witnesses felt guilty and insecure long after the event. *Id.* at 147

65. *Full Dress*, TIME, Feb. 11, 1935, at 16.

66. *Id.*

haired," "light-haired," "dark." She has worn a "blanket," "black lace step-ins," "dancing tights," "panties," "white nightgown," or "nothing." New York wives have not shrunk—most of them have laughed out loud.⁶⁷

Trial judge Paul Bonyng admitted in a published opinion that Empire State courts spawned "thousands of divorces annually upon the stereotyped sin of the same big blonde attired in the same black silk pajamas."⁶⁸ Discrepancies about the color of the professional co-respondent's hair and underclothes accentuated the uniformity of perjury New York had, in short, reversed the presumptions of the formal system. The rare judge who refused to accept the faked hotel evidence would "not be long hearing divorce cases."⁶⁹ Perjury was the common coin of connubial freedom. In this Gresham's law of divorce, false testimony displaced the true because the effective lie was more valued by all sides. As Paul Alexander quipped, "the smoothest perjurer is soonest rewarded."⁷⁰ The Michigan divorce judge who opened morning hearings in uncontested cases by intoning, "Let the perjury begin," understood the strictly symbolic character of the courtroom rituals.⁷¹

Perhaps the highest level of farce was revealed in an experiment conducted by the *Cleveland Press*. Reporter Leonard Hammer submitted a bogus divorce petition in the name of Richard Campbell (the newspaper's make-up editor) and his wife. Hammer notarized the petition with a stamp conveniently left around the Cleveland court house and shoved it into a pile of similar documents on Judge Samuel Silbert's desk. No proceedings were held in the case, and no evidence was ever presented. Nevertheless, six weeks later Judge Silbert—who handled up to fifty divorce cases a day—entered a decree granting the Campbells a divorce. When the ruse was exposed, Judge Silbert cited the participants for contempt and fined the newspaper \$1000. The Campbells were refused a marriage license in Cleveland and had to drive to Indiana to get married again. In a system which operated on the proposition that all couples consented to divorce, the Campbells stood out because they were only pretending.⁷²

V THE THREAT OF GENDERED EMANCIPATION

Men and women evolved toward greater individualism at a distinctly different pace. Women's solo efforts continued to receive more criticism, and conservative

67 *Laughing Ladies*, TIME, Feb. 25, 1935, at 6 (letter to the editor).

68 *Reed v. Littleton*, 289 N.Y.S. 798, 800-01 (1936).

69 Rheinstein, *supra* note 39, in CONFERENCE ON DIVORCE, *supra* note 39, at 41.

70. Paul W. Alexander, *Family Life Conference Suggests New Judicial Procedures and Attitudes Toward Marriage and Divorce*, 32 J. AM. JUDICATURE SOC'Y 38, 40 (Aug. 1948) [hereinafter Alexander, *Family Life*].

71. Victor J. Baum, *Law and Social Work: Marriage Counseling, A Case in Point*, 3 J. FAM. L. 279, 283 (Fall 1963). See Morris Ploscowe, *The Failure of Divorce Reform*, 13 OHIO ST. L.J. 3 (1952).

72. See Wittles, *supra* note 45, at 135-38 (recounting the incident); Henry Noble Hall, *Easy Does It*, NEWSWEEK, Feb. 14, 1949, at 53 (same).

critics of the perceived regression of society targeted women's liberties as the loss leader of cultural degeneration.

Blaming women for societal ruptures was a common theme of hackneyed humor. In a law school address on the interprofessional approach to family problems, a college professor asked his audience to recall that "the good Lord made the Heaven and the Earth and Man in six days and rested. Then he made women and neither man nor God has rested since."⁷³ He also alluded to the movement for "Women's Suffrage [*sic*], the chief effect of which seems to be men suffering."⁷⁴ Seriously-intended essays often scored the same points. In a series of widely read articles in *Collier's* just after World War II, Ralph S. Banay sedulously argued the case that women's refusal to accept their biological destiny resulted in increased female criminality and schizophrenia.⁷⁵

Dr. Banay, the Research Director in Social Deviations at Columbia University, had formerly been the Chief Psychiatrist at New York's Sing Sing Prison. Interpreting the drive for female emancipation in psychopathological terms, he claimed that women's "Stone Age" emotions—including a natural proclivity for sadism and masochism—stemmed from a nature no more sophisticated than that of "preadolescent children." Women's developmental jejunacy constituted for Banay a recapitulation of preadamite courtship rituals. He observed that women's "almost instinctual fascination with danger and horror would seem to be a vestigial remembrance of the thrill and danger of the ancient hunts in which women were captured and subdued."⁷⁶

In "The Husband Really Pays," Banay vigorously attacked what he considered the overly-generous allowance of alimony to women. He saw the consequences of divorce as grossly uneven: women revelled in placing men in the "penal servitude" of alimony, while men endured the fall-out of deeper alienation and ostracism after divorce. Real women were repelled by the concept of female equality, Banay asserted, since "most normal women reveal in their dreams and fantasies that they wish to be swayed, overwhelmed and mastered by their men."⁷⁷ These desires for subordination further replicated the immutable tendencies of the species.⁷⁸

Within modern marriage, women's "emotional cannibalism" caused them to assert their independence by "devour[ing] their husbands."⁷⁹ Banay divided troublesome women into three types. The "engineering" wife allowed her spouse no voice in running the household. The "prima-donna" wife pursued her obsession with her own ambition and pleasure. But the "competing" wife caused the greatest havoc. Her insistence on her own career and refusal to "live her

73. W. Clark Ellzey, *Marriage or Divorce?* 22 U. KAN. CITY L. REV. 9, 10 (1953).

74. *Id.* at 11.

75. Ralph S. Banay, *How to Devour Your Husband*, 122 COLLIER'S 16 (1948); Ralph S. Banay, *The Husband Really Pays*, 119 COLLIER'S 18 (1947); Ralph S. Banay, *The Trouble With Women*, 118 COLLIER'S 21 (1946).

76. Banay, *The Trouble with Women*, *supra* note 75, at 21, 74, 79.

77. Banay, *The Husband Really Pays*, *supra* note 75, at 97-98.

78. *Id.*

79. Banay, *How to Devour Your Husband*, *supra* note 75, at 16-17

ambitions vicariously reduce[d] her husband to the role of economic and emotional midget."⁸⁰

Banay's sexual pogrom did not go unchallenged. A flurry of articles and letters to the editor attacked Banay for "purposely distort[ing] women's desires and aims"⁸¹ and called upon *Collier's* to "secure competent psychiatric therapy" for the psychiatrist himself.⁸² One letter writer guessed that Banay's misogynous razor had been sharpened on his own romantic misadventures: "Poor, dear Dr. Banay! I bet she was a pip!"⁸³

But the tenor of attacks on modern women revealed Banay as outspoken but not outdated. The editors of *Collier's* remarked that the hundreds of letters generated by Banay's initial article divided on purely gender lines in praising or panning his sentiments.⁸⁴ Banay's call for severely limiting alimony received support from correspondents who agreed in questioning why the husband should "pay alimony so his former wife can live on Easy Street."⁸⁵ Attacks on alimony often achieved an execrating tone, entirely out of kilter with alimony's economic impact. That this displaced sexual hatred was exhibited not only by men indicated that sometimes both sexes feared the shifting nature of marriage in the post-war era. Alimony served as the white-hot focus of a much larger cultural argument, one that has not yet been satisfactorily resolved.

Many men—as well as a not insignificant number of women—perceived alimony as a windfall for recipients and a crushing burden on those forced to pay. Statistics showed, however, that alimony was decreed nation-wide in only one-quarter of divorce cases, and that most awards were modest and often incorporated sums for child support.⁸⁶ In 1952, Chicago jurist Edwin Robson noted that wives in the Second City waived alimony in ninety-three percent of the cases.⁸⁷ Five years later, Los Angeles Divorce Commissioner C. Clinton Clad reported in the *Saturday Evening Post* that alimony awards averaged \$35 per month, a figure which he asserted was in line with awards across the country.⁸⁸ The popular image of huge alimony assessments, Clad wrote, owed its provenance to Park Avenue and Hollywood on the brain: "Almost daily one reads that this socialite got a multimillion-dollar property settlement and that movie star is asking for several thousand a month alimony. However, these cases are terribly

80. *Id.*

81. *Slur on Women Answered By Our President*, 26 INDEPENDENT WOMAN 51, 51 (Feb. 1947).

82. *The Week's Mail*, 119 COLLIER'S 64 (Jan. 11, 1947).

83. *The Week's Mail*, 119 COLLIER'S 61 (Jan. 18, 1947). Commenting on the popular post-war sport of debunking women's ambitions, one observer characterized Banay's writing as "tak[ing] out his shotgun and let[ting] go with both barrels." Harrison Smith, *Woman, the Scapegoat*, 30 SAT. REV. LITERATURE 18 (Jan. 18, 1947). See Kathryn Brummond, *Are Wives People?* 25 INDEPENDENT WOMAN 329 (Nov. 1946).

84. *The Week's Mail*, 119 COLLIER'S 61 (Jan. 18, 1947).

85. *The Week's Mail*, 120 COLLIER'S 4, 80 (July 19, 1947).

86. JACOBSON, *supra* note 7, at 126-28.

87. Edwin A. Robson, *The Law and Practice of Divorce: The Judge's Point of View*, in CONFERENCE ON DIVORCE, *supra* note 39, at 3-8.

88. C. Clinton Clad, *You Can't Afford A Divorce*, 229 SAT. EVE. POST 31 (Apr. 20, 1957).

rare. In the run-of-the-mill cases, particularly if there are children, the woman rarely receives an adequate award."⁸⁹

The brouhaha raised by many men over alimony was also ironic since most support payments represented negotiated settlements rather than orders imposed by a judiciary somehow overcome by damp eyelashes and a clutched handkerchief. In a world where the supply and demand of divorce fluctuated rather freely, the amount of support generally represented the "comparative eagerness of the spouses to dissolve the marriage."⁹⁰ When the husband was the partner more desirous of the split, the wife could drive the support figure higher as her price for cooperating. Conversely, when the wife was the moving party, the support tally was "often just as little as the husband's attorney feels she can be given without having the court question the validity of the agreement."⁹¹ Custody of children was similarly bargained for, both in terms of the custody issue itself, and with regard to the amount of corresponding support.⁹²

Most commentators were uninterested in the social facts. They preferred to relate individual horror stories of long-suffering men either in alimony jails or too poor to remarry, while their bloodthirsty ex-wives feted themselves on the spousal dole.⁹³ In his New York *Herald Tribune* column, Art Buchwald parodied this trend by inventing a magazine feature article headlined, "How I Invested My Alimony and Made a Million Dollars."⁹⁴ Although it also read like parody, the sub-head of one abolitionist proposal earnestly described alimony as a "medieval hangover [which] robs men, turns women into drones, promotes greed and damages innocent lives."⁹⁵

89. *Id.* See C. Clinton Clad, *The Economics of Divorce*, 37 PHI DELTA DELTA 14 (June 1959). See generally Kingsley Davis, *How Much Do We Know About Divorce*, 19 LOOK 65 (July 26, 1955) (remarking on the modest scope of alimony orders); Dan Hopson, Jr., *The Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level*, 11 KAN. L. REV. 107 (1962) (noting that the "news value of the large divorce settlement produces the American myth of the 'bleeding' husband and the successful peroxide blond who now can vacation in Miami," after conducting a field study in Kansas divorce courts); John Bartlow Martin, *Divorce: The Depths of Scandal*, 231 SAT. EVE. POST 44 (Nov. 15, 1958) (noting a 1955 study that reported that the national monthly median child support award was \$17.39 per child).

90. Harriet F. Pilpel & Theodora S. Zavín, *Separation Agreements: Their Function and Future*, 18 LAW & CONTEMP. PROBS. 33, 35 (1953).

91. *Id.*

92. *Id.*

93. See, e.g., James Lincoln Collier, *Time to Give Divorced Men a Break*, 96 READER'S DIG. 64 (Feb. 1970); Alexander Eliot, *Let's Abolish Alimony*, 237 SAT. EVE. POST 12 (Aug. 22, 1964); Norman M. Lobsenz, *Are Divorce and Alimony Unfair to Men?* 75 READER'S DIG. 193 (Oct. 1959); Morris Ploscowe, *Alimony*, 383 ANNALS 13 (May 1969). Harangues about alimony were, of course, not new. In 1934, New York City Magistrate Jonah Goldstein had complained of alimony's unfairness since the "man pays and pays and pays, although the wife in the meantime is earning funds." JONAH GOLDSTEIN, *THE FAMILY IN COURT* 83 (1934). See Anthony M. Turano, *The Alimony Racket*, 29 AM. MERCURY 237 (June 1933).

94. Art Buchwald, *How I Invested My Alimony and Made a Million Dollars*, HERALD TRIBUNE, reprinted in Art Buchwald, *The Seven Year Itch*, 90 AM. MERCURY 76 (Feb. 1960).

95. Eliot, *supra* note 93, at 12-16. Even an otherwise balanced account in a standard 1950s

Alexander Eliot advised women to "resist the degrading temptation to suck blood from a man who loved you once."⁹⁶ In response to the article, a representative of United States Divorce Reform, Inc. congratulated the *Saturday Evening Post* for its devotion to the cause of alimony reform.⁹⁷ Similarly, Sally L. Underhill praised Eliot for denouncing the "licensed extortion practiced by women too lazy to earn their own living."⁹⁸

During the long process of converting California from a traditional divorce state to the first exclusively no-fault American jurisdiction in 1969, the only allegations of sex-based inequality were made by divorced men who "charged that husbands were victimized and subjected to financial ruin by wives in divorce proceedings."⁹⁹ Not only did United States Divorce Reform, Inc. address the issue of gender equality at the California legislative hearings (the only organization to do so), it also attempted to qualify an initiative for the 1966 California ballot which would have removed jurisdiction over divorce and ancillary matters from the courts, placing issues such as alimony in the hands of an "Administrative Department of Family Relations."¹⁰⁰

Alimony reform became a cause célèbre for divorced men and for the women who married them. "Fathers United for Equal Rights" spawned the "Second Wives Coalition" as a separate sister organization.¹⁰¹ A lobbying group calling itself "The Other Woman, Ltd." sponsored a fund-raising advertisement pitched at divorced men.¹⁰² The copy read: "Send us \$1 to help get your ex-wife a job. Or a husband."¹⁰³ A cartoon appeared underneath, depicting an ex-wife munching chocolates as she watched television.¹⁰⁴

Rebuttals were muted. "D.P." claimed not to know any women living on alimony but to know many who supported children without any help from their ex-husbands.¹⁰⁵ For Chicago judge Thaddeus V. Adesko, alimony was a losing proposition all around, "not enough for her and the kids, and too much for him to pay."¹⁰⁶ Indeed, the tail of the dismal payment record wagged the dog of the awards themselves. A field study of Kansas divorces reported one judge's

sociology textbook devoted the bulk of its discussion on the subject to "alimony careerists," excessive awards and women who take savage delight in having ex-spouses imprisoned for failure to pay alimony. RAY E. BABER, *MARRIAGE AND THE FAMILY* 480-84 (1953).

96. Eliot, *supra* note 93, at 12-16.

97. *Letters to the Editor* 237 SAT. EVE. POST 8 (Sept. 19, 1964).

98. *Id.*

99. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 30 n.129 (1987).

100. *Id.* at 33.

101. MICHAEL WHEELER, *NO-FAULT DIVORCE* 136-38 (1974).

102. *Id.*

103. *Id.*

104. *Id.* at 51.

105. *Letters to the Editor*, 237 SAT. EVE. POST 8 (Sept. 8, 1964). See generally *Divorce Is a Battle With No Winners*, 96 READER'S DIG. 39 (May 1970) (summarizing responses to Collier, *supra* note 93).

106. Martin, *supra* note 47.

sense that since alimony "is almost impossible to collect[,] there is not much reason to grant it."¹⁰⁷ Even as well-informed an expert as family law specialist Henry H. Foster, Jr. crafted a skewed balance in his presentation of the issue. Foster argued that, except for the "zealous feminist[s]," Americans "must be [as] shocked by the number of unrealistic and unfair alimony awards" as by the "chronic breakdown in their collection."¹⁰⁸

As if to stress that "alimony drones" were unrepresentative of their sex, the popular journals continued to iterate the supposed feminine passion for submission. Woman's quest for dependence supposedly reached all the workaday corners of her life. Margaret Case Harriman considered it a "pretty canny observation" that "woman's best reason for getting married is to have somebody around the house to explain newspaper items to her and to tell her how to vote."¹⁰⁹ Harriman conceded that women were self-sufficient for life's major concerns, but day-to-day hassles required "something in trousers [to] put that mysterious male power to work" and get things done.¹¹⁰

Girls flaunting their lack of discipline, mothers unsexing their sons and wives emasculating their husbands: these accusations positioned woman once again as the storm center of cultural change. Large segments of America, both male and female, felt that pushing the limits of women's economic opportunities and social outlook carried too many risks. But how could the clock be turned back? One avenue of hope for the triumph of the nostalgic dream over the unrooted future pointed to divorce reform. Marital breakdown was the lightning rod in the sex-driven cultural storm. In many ways, woman's worst sin was leading the charge to the divorce court. As Harrison Smith concluded, "we are trying to find a scapegoat for the failure of marriage, the awesome tide of divorce and annulment, and there woman stands, the obvious center of all of man's emotional disturbances."¹¹¹

VI. THE SOCIAL CONTROL ORIGINS OF THE FAMILY COURT

The lessons learned by the merger of legal compulsion and social science expertise in the juvenile court were not lost on those who sought to expand the court's jurisdiction to the whole range of failing families. As early as 1917, the National Probation Association adopted a resolution recommending the organization of "family courts" on the juvenile court model. Such courts were expected to discourage "legal formality and delay" while encompassing "ample

107. Hopson, *supra* note 89, at 125.

108. Henry H. Foster, Jr., *Spadework for a Model Divorce Code*, 1 J. FAM. L. 11, 21 (1961).

109. Margaret Case Harriman, *Woman Needs Man*, 122 GOOD HOUSEKEEPING 41, 249-51 (May 1946).

110. *Id.* See Smith, *supra* note 83, at 18 (describing MARYNIA F FARNHAM & FERDINAND LUNDBERG, *MODERN WOMAN: THE LOST SEX* (1947), as the "most comprehensive and damning contribution" to the debate in the authors' view of feminism as "an aberration dangerous to society and fatal to women."). Even loquaciousness was dangerous during this thermidorian reaction. See Richard Attridge, *Do Women Have to Talk So Much?* 219 SAT. EVE. POST 124 (June 28, 1947).

111. Smith, *supra* note 83, at 18.

probation departments" as well as "psychopathic labs sufficiently equipped to conduct the necessary scientific investigations."¹¹²

During the inter-war period, the reformers' faith in social science experts increased as their trust in the traditional legal system eroded even further. The new institution they dreamed of would dispense with the "traditional furnishings of the usual court room," disregard "customary legal procedure" and, for that matter, discourage lawyers from participating at all.¹¹³ A completely revamped court needed a new name, such as the "Bureau of Family Adjustment"¹¹⁴ or, to use Ben Lindsey's utopian and anti-bureaucratic phrase, the "House of Human Welfare."¹¹⁵

Many attributes of the envisioned family tribunal were appropriated directly from the earlier court's renovations. Juvenile court judges had almost immediately redesigned the courtroom to de-emphasize legalism. Adopting an extremely loose chancery procedure, the children's court bypassed traditional legal rules. As for the antipathy toward lawyers, Minnesota juvenile court judge Grier Orr exulted that in his courtroom, "lawyers do not do very much and I do not believe I can recall an instance where the same attorney came back a second time; he found it was useless for him to appear."¹¹⁶ In Quintin Johnstone's estimation, lawyers were "generally so uninformed on juvenile court methods and juvenile care facilities that they [could] perform no important function in delinquency cases."¹¹⁷ In discussing the ideology of the juvenile court, historian David J. Rothman noted that disregard for the amenities of common law disposition was a positive value for the reformers. He remarked:

[In] almost every anecdote that judges or other proponents recounted about the workings of the court, a gentle and clever judge persuaded a stubborn or recalcitrant offender to "fess up," to tell the truth. Obviously this represented not a violation

112. GOLDSTEIN, *supra* note 93, at 31-32.

113. *Id.* at 76.

114. *Id.* at 81.

115. BEN B. LINDSEY & WAINWRIGHT EVANS, *THE COMPANIONATE MARRIAGE* at xv, 175 (2d ed. 1929). Ernest R. Groves suggested that courts move away from an "atmosphere of criminal procedure to a fact-finding and social-adjusting institution." ERNEST R. GROVES, *THE MARRIAGE CRISIS* 222 (1928). Support for a comprehensive domestic relations court was also articulated in SOPHONISBA P. BRECKINRIDGE, *SOCIAL WORK AND THE COURTS* 139 (1934); COCKRELL, *supra* note 50, at 704-24; ERNEST R. MOWRER, *FAMILY DISORGANIZATION* 273, 290 (2d ed. 1939). On the Progressives' development of the scientific or expertise justification for the expanded scope of administrative power, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 222-25 (1992).

116. BERNARD FLEXNER ET AL., *THE CHILD, THE FAMILY, AND THE COURT* 21-22 (1929). Judge Lindsey was, as usual, blunt. The House of Human Welfare "would do away with lawyers and the attendant expenses in the great majority of cases." LINDSEY & EVANS, *supra* note 115, at xv.

117. Johnstone, *supra* note 52, at 318.

of the individual's right against self-incrimination but the first step of the delinquent toward rehabilitation.¹¹⁸

The same impatience for procedural niceties characterized the advocates of therapeutic divorce, who frequently pooh-poohed concerns about the use of coercive procedures in family courts. The sancted end of preserving the central institution of American life justified the tainted means of dishonest therapy and devious social control. The reformers justified their deviation from the canons of Anglo-American litigation standards in two ways. First, they soft-pedalled the coercive aspects of therapeutic divorce, insisting on such oxymorons as "gentle judicial coercion." Second, they pointed out that the traditional legal canons had failed to save marriages, and the family court represented a new beginning in domestic relations law.¹¹⁹

Authority in the family courts would not lie in the musty tomes of precedent but in the fresh face of science. The divorce petition "needs to be interpreted as an expression of social difficulty which calls for expert help."¹²⁰ In the operation of the family court, Alexander proposed handing the scalpel to therapeutic professionals, thus jettisoning not only the party-driven adversary process but also the reliance on case precedent and judicial review.

No possible guidance could be derived from the rule elucidation and factual exploration of prior cases: therapeutic divorce would deal with each case as a new individualized reclamation project. By the same token, appellate review would be rendered superfluous. Either the parties would have received the divorce they initially requested, or they would have reconciled. The work of a family court would, in any event, not be appealed.

Although judges would still preside over the new court, their internal command would be markedly circumscribed. A modern judge, proclaimed a New York City magistrate, "must know how absurd it is for any human being to substitute his own opinions and assumptions for the professional findings of experts."¹²¹ "When knowledge in fields other than the law is necessary to reach an intelligent decision, only those who are expert in them should be permitted to have a deciding voice."¹²²

In the words of a modern student of the twentieth-century expansion of state power, this "casual attitude toward therapeutic power suggest[ed] the impact of science-as-ideology."¹²³ Confidence in the benevolent power of experts, whether in social science, medicine or psychology, characterized the American posture toward all social problems. Scientific techniques were believed to "inhabit[] a world that was beyond popular passions."¹²⁴ The new reliance on science

118. ROTHMAN, *supra* note 12, at 216.

119. See KOOS, *supra* note 60, at 27-33 (discussing the "minor" role anticipated for lawyers in family courts).

120. GROVES, *supra* note 115, at 223.

121. GOLDSTEIN, *supra* note 93, at 191.

122. *Id.* at 213.

123. POLSKY, *supra* note 11, at 55.

124. MAY, *supra* note 14, at 26.

trumped traditional mores in fields as far apart as child rearing and constitutional interpretation. Benjamin Spock's *Baby and Child Care* reflected an elevation of scientific sense over customary nostrums.¹²⁵ And the Supreme Court's declaring school segregation unconstitutional in 1954 owed more to social science studies than to a nuanced review of precedent.¹²⁶ Judge Alexander's family court was fundamentally of a piece with a culture in which experts "took over the role of psychic healer."¹²⁷

VII. THE PATHOLOGY OF DIVORCE

In place of divorce law's guilt-or-innocence dichotomy, Alexander and his allies substituted the paradigm of mental illness. Divorce-seekers were sick. They had come to the robed marriage doctor, whom society had equipped with the right tools and consulting specialists to decide upon the appropriate treatment. The injured person certainly should not self-diagnose, nor prescribe the needed remedy, because expert guidance was essential. Alexander insisted on a medical analogy: "though pain drives [the patient] to demand amputation of his shattered leg, the surgeon won't amputate if the leg can be repaired."¹²⁸

Moreover, those in conjugal crisis were generally unaware both of the opportunities for expert assistance and of their particular need for professional relief. Since divorce was symptomatic of illness—the divorced were "children, spoiled and stunted in development"¹²⁹—the ultimate aim was to improve the procedure so as to remove the pathology. As John H. Mariano emphasized, "We do not pass laws against disease; we strive to eradicate disease."¹³⁰

Despite his benevolent utterances calling for the avoidance of guilt and sin, Paul Alexander aimed to shift the debate from procedural rights in divorce cases to "selfishness, sinfulness, [and] immaturity."¹³¹ He believed that "tactful, gentle and persistent persuasion can induce even the most prideful or willful or belligerent spouse to talk frankly and freely."¹³² Once these miscreant spouses

125. BENJAMIN SPOCK, *THE COMMON SENSE BOOK OF BABY AND CHILD CARE* (1946).

126. *Brown v. Board of Education*, 347 U.S. 483, 494-95 n.11 (1954).

127. VEROFF ET AL., *supra* note 14, at 194.

128. Alexander, *The Follies of Divorce*, *supra* note 48. In the words of Edmund Bergler, "divorce is in general a neurotic procedure of neurotic people." Edmund Bergler, *Six Types of Neurotic Reaction to a Husband's Request for a Divorce*, 8 MARRIAGE & FAM. LIVING 81 (1946). See generally Stanton L. Ehrlich & Charles E. Sproger, *X-ray of Divorce—Recent Developments*, 1962 U. ILL. L.F. 601 (1962) (arguing that 'legal patients' with marital problems should not self-diagnose).

129. Emily H. Mudd, *The Social Worker's Function in Divorce Proceedings*, 18 LAW & CONTEMP. PROBS. 66, 70 (1953).

130. JOHN H. MARIANO, *A PSYCHOANALYTIC LAWYER LOOKS AT MARRIAGE AND DIVORCE* at Preface (1952). See generally Alexander, *Legal Science*, *supra* note 56.

131. Alexander, *Family Life*, *supra* note 70, at 40.

132. *Id.*

released their neurotic hold on the obsession of divorce, Alexander believed, they would be open to the desirability of reconciliation.¹³³

Troubled marital partners were impulsive, pursuing divorce out of an "immature" and "infantile" inability to cope.¹³⁴ Proponents of therapeutic divorce repeatedly stressed the vulnerability and uncertainty of those poised, as it were, at the precipice of divorce. The working hypothesis of therapeutic divorce was forcefully stated by Nester C. Kohut: "A substantial number of marriages alleged by the parties and supposed by the attorneys and divorce courts to be broken, lifeless or irreparable, are not in fact completely or irreversibly broken."¹³⁵ Kohut, a marriage counselor, sociologist and lawyer, was the director of "Save the Marriage, Inc." He argued that incompatibility and voluntary separation need not lead to divorce. Assertions of cruelty should not be taken at face value, and deserting spouses should be tracked down. All in all, Kohut felt that American society had a "tendency to oversympathize [with] a distraught spouse."¹³⁶

The belief in divorce as liberating was a manifestation of mental instability and an unresolved oedipal complex. In the words of John S. Bradway, "the domestic sufferer often is content, consciously or otherwise, to 'kill' his family"¹³⁷ Equating divorce with personal freedom indicated a neurotic deviation which, if unchecked, could lead to the destruction of a critical social institution. The aberrant mental state of the divorce-minded was repeatedly underscored. A Richmond, Virginia chancery judge advised matrimonial lawyers to remember that they were "not advising a client who is in a normal state of mind. Anger and

133. *Id.* See generally Paul W. Alexander, *What is a Family Court, Anyway?* 26 CONN. B. J. 269 (1952).

134. MARIANO, *supra* note 130, at 173 (chapter entitled "Mixing Chronological Years and Maturity Years").

135. NESTER C. KOHUT, A MANUAL ON MARITAL RECONCILIATIONS: A SOCIO-LEGAL ANALYSIS OF DIVORCE FOR THE UNBROKEN MARRIAGE 11 (1964). See Paul W. Alexander, *A Therapeutic Approach*, in CONFERENCE ON DIVORCE, *supra* note 39, at 51-52 (submitting that complainants and their counsel automatically—and often incorrectly—assure the court's social worker that the marriage is dead); Abraham Stone, *Marital Counseling As Aid To Legal Profession*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at 53-58 (reporting that many couples seeking divorce act on impulse).

136. KOHUT, *supra* note 135, at 7. See Emily Marx, *Psychosomatics and Judicial Separations*, 20 FORDHAM L. REV. 84, 87 (1951) (discussing the medical invalidity of some complaints of cruelty). Alice O'Leary Ralls, supervisor of the family court of King County, Washington, believed that at least half of divorce-filers "are really hoping that something will stop them before it is too late." Alice O'Leary Ralls, *The King County Family Court*, 28 WASH. L. REV. 22, 26 (1953).

Some evidence to support Ralls' thesis may be found in the statistics of divorce dismissals. In a Kansas field study, a group headed by Quintin Johnstone discovered that between 20 and 45% of all divorce suits in the late 1940s and early 1950s were dismissed prior to trial, primarily due to the reconciliation of the parties. However, the study also found that a large percentage of these reconciliations were failures, with a consequent divorce. Quintin Johnstone, *Divorce Dismissals: A Field Study*, 1 KANSAS L. REV. 245, 247 (1953) [hereinafter Johnstone, *Dismissals*].

137. John S. Bradway, *Why Divorce?* 1959 DUKE L.J. 217, 218.

jealousy create a sudden psychosis."¹³⁸ The client in the grip of hatred and hurt pride was "mentally ill."¹³⁹

Through the method of therapeutic divorce, society carried out its obligation to ensure that only the truly broken marriages were legally dissolved. All others—and the expectations were high that a majority of present divorces would be in this category—could be restored to health. The family court, not the divorce-seekers, would decide when the marriage was beyond repair. Clearly unsalvageable unions would be terminated quietly and quickly, without a public trial and the necessity of proving grounds. But the marriages which science and modern jurisprudence had brought back to health would redeem themselves through reconciliation: "Even though a couple has diagnosed its own case as hopeless, the judge would be able to draw upon the help of a body of counselors representing religious, social, psychiatric and legal insights which might point the way to reconciliation."¹⁴⁰ That the family court was a vessel in the command of the therapeutic state was rendered plain in that the power to dissolve unions, which several decades of litigious activity had operationally shifted to the individual couples, would now be reestablished as the prerogative of the government.

The reliance on expert intervention to alter the dynamics of failing marriages also led Alexander and his cohorts to criticize living apart statutes. Laws allowing for divorce after a set period of separation were "clinically unjustifiable" because they "presuppose that distraught couples are the best judges as to the viability of their marriage."¹⁴¹ They were also inappropriate because they circumvented the family court's therapeutic approach.¹⁴² Living apart provisions were similar to fault grounds in terms of their amenability to proof. Once a couple established the requisite separation period, the judge was obliged to grant the divorce, even if she or he believed the couple could yet be reconciled.

Unhappy with the approximately 400,000 annual separation agreements which dealt only with matters of custody, property division and support, and did nothing to lessen the "rate of marital carnage," Nester Kohut proposed alternative "Therapeutic Separation Agreements." These documents epitomized the reach of

138. Brockenbrough Lamb, *Ethical Considerations As Related To Divorce*, in *DIVORCE AND FAMILY RELATIONS*, *supra* note 18, at 42-45.

139. *Id.* Cf. generally Marie W. Kargman, *The Lawyer as Divorce Counselor*, 46 A.B.A. J. 399 (1960) (observing emotional intensity associated with divorce that did not necessarily result in a more neurotic client).

140. Executive Committee of the Federal Council of the Churches of Christ in America, *An Appeal for Change in Dealing with Divorce Problems* (1952) (recommending scientific experts to aim to "reorient and reeducate" spouses seeking divorce); HARPER, *PROBLEMS OF THE FAMILY* 772 (Fowler Harper ed., 1952). See JOHN H. MARIANO, *THE USE OF PSYCHOTHERAPY IN DIVORCE AND SEPARATION CASES* 70 (1958) (observing divorces resulting from "neglect in the treatment of emotional ills").

141. KOHUT, *supra* note 135, at 52-54. Kohut clinched his point by remarking that a "patient can hardly be his own physician!" *Id.* at 52. See Paul W. Alexander, *Introduction*, in *DIVORCE AND FAMILY RELATIONS*, *supra* note 18, at vi.

142. See generally Nester C. Kohut, *Family Courts and Separation Statutes: Correlatives or Non-Correlatives*, 4 J. FAM. L. 71 (1964).

therapeutic divorce concepts, "demonstrat[ing] how the separation agreement can be constructed so as to serve as a therapeutic instrument, using experience from the field of the behavioral sciences."¹⁴³

In contrast to the "mundane economic" focus of most separation agreements, these "therapeutic" instruments would emphasize the positive aspects of separation, i.e., the opportunity and obligation to obtain counseling and plan reconciliation. Kohut imagined that even separating parties still "desire[d] to preserve their marital bond intact."¹⁴⁴ With the "passage of time" and "professional marriage counseling," the parties' "feelings or perspective" toward the separation might change.¹⁴⁵ The spouses agreed to do "whatever [was] necessary" to try to save their marriage.¹⁴⁶ The agreement contained specific provisions for counseling, including the dates when the parties would "review in earnest the status of their marital relationship by meeting with or through their respective attorneys, marriage counselors or clergymen."¹⁴⁷ A specific clause providing for future conciliation was essential.¹⁴⁸

However, just as couples should not separate without the guiding hand of legal and behavioral experts, so too the beleaguered spouses should not attempt "dangerous unprepared reconciliations."¹⁴⁹ The beneficent apparatus of legal and behavioral science was especially needed if the parties wished to end their separation, since generally marital partners were "incapable and ineffective in resolving their differences by themselves."¹⁵⁰ Distressed wives and husbands who signed such agreements pledged to "steadfastly refrain" from a precipitous reconciliation, especially if "for the sole purpose of satisfying sexual desires."¹⁵¹ The therapeutic agreements aimed to help afflicted couples make "a success of their separation" by reconciling, but only under professional supervision.¹⁵²

Nor were incompatibility statutes acceptable to the advocates of therapeutic divorce. None of the states providing this ground had established adequate mechanisms to investigate the assertion of incompatibility. Even though some appellate courts had tethered incompatibility to notions of fault, the easy pathway to consent divorce allowed by the fault regime eviscerated this divorce alternative. Moreover, therapeutic divorce champions believed that apparent incompatibility inhered in every marriage, "and its emergence is not so much a signal to quit as

143. Nester C. Kohut, *Therapeutic Separation Agreements*, 51 A.B.A. J. 756, 756 (1965). See KOHUT, *supra* note 135, at 60; Kohut, *Rehabilitation of Broken Marriages*, 10 PRAC. LAW. 75 (1964).

144. Kohut, *Therapeutic Separation Agreements*, *supra* note 143, at 759. See generally William C. Boyden, *Divorce Settlement Agreements*, 39 ILL. BAR J. 110 (1950).

145. Kohut, *Therapeutic Separation Agreements*, *supra* note 143, at 759.

146. *Id.*

147. *Id.*

148. *Id.* at 760.

149. *Id.* at 758.

150. *Id.*

151. *Id.* at 759.

152. *Id.* at 760. Kohut envisaged that a temporary agreement on issues of custody and maintenance would be appended to the therapeutic separation agreement. *Id.* at 759.

the indication that the task of mutual adaptation is about to begin."¹⁵³ As with living apart statutes, the divorce ground of incompatibility failed because it bypassed the essential therapeutic commitment and allowed marriages to end without expert consultation.

VIII. SOCIAL SCIENCE AND LAW: BRAVE NEW WORLD OR POTEKIN VILLAGE?

The family court/therapeutic divorce movement blossomed quickly, bloomed brightly then died abruptly. This curious chronology may best be understood in the context of a broader pattern of fitful integration of law and the social sciences. The drive for Alexander's family courts garnered support so long as its call for a merger of law and psychology remained novel, exciting and unexamined. Therapeutic divorce rapidly lost momentum when its premises were finally held up for review, and American society realized that it did not wish its judges to act as marriage counselors, nor its psychologists to have judicial power.

Calls for interdisciplinary cooperation pervaded legal texts, law reviews and bar association journals beginning in the decade of World War II. "The temper of the times," an Ohio trial judge observed, "is unquestionably favorable to emphasizing the sociological aspects in domestic relations cases. Members of the bench and bar must guide the application of this trend."¹⁵⁴ Sidney P. Simpson and Ruth Field stressed the "necessity for functionalism in the law, a functionalism which must be implemented by the findings of social science."¹⁵⁵ Charles H. Leclaire assessed the goal of the enterprise as "improv[ing] the entire marriage-family-divorce-sociological-legal relationship."¹⁵⁶ Prophets of disciplinary collegiality broadcast the identical message dozens of times.¹⁵⁷

153. DAVID MACE, *MARRIAGE* 58 (1952).

154. Carl A. Weinman, *The Trial Judge Awards Custody*, 10 *LAW & CONTEMP. PROBS.* 735, 735 (1944).

155. Sidney P. Simpson & Ruth Field, *Law and the Social Sciences*, 32 *VA. L. REV.* 855, 856 (1946).

156. Charles H. Leclaire, *Reform—The Law of Divorce*, 17 *GEO. WASH. L. REV.* 380, 387-90 (1949).

157. For articles espousing cooperation between law and the social sciences published in legal periodicals from the 1940s until the 1960s, see Allan Barton & Saul Mendlovitz, *The Experience of Injustice as a Research Problem*, 13 *J. LEGAL EDUC.* 24 (1960); Paul Bohannon & Karen Huckleberry, *Institutions of Divorce, Family, and the Law*, 1 *LAW & SOC'Y REV.* 81 (1967); Stuart Henderson Britt, *The Social Psychology of Law*, 34 *ILL. L. REV.* 802 (1940); Thomas A. Cowan, *The Relation of Law to Experimental Social Science*, 96 *U. PA. L. REV.* 484 (1948); Samuel M. Fahr & Ralph H. Ojemann, *The Use of Social and Behavioral Science Knowledge in Law*, 48 *IOWA L. REV.* 59 (1962); H.M. Fain, *Role and Relationship of Psychiatry to Divorce Law and the Lawyer* 41 *CAL. ST. B.J.* 46 (1966); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 *COLUM. L. REV.* 50 (1967); Roswell H. Johnson, *Suppressed, Delayed, Damaging and Avoided Divorces*, 18 *LAW & CONTEMP. PROBS.* 72 (1953); Stanford W. Katz, *A Symposium on Mental Health Concepts in Family Law*, 1 *FAM. L.Q.* 61 (1967); Raphael Lemkin, *Orphans of Living Parents: A Comparative Legal and Sociolegal View*, 10 *LAW & CONTEMP. PROBS.* 834 (1944); Karl N. Llewellyn, *Law and the Social Sciences—especially Sociology*, 62

The clamor for interdisciplinary collaboration grew so vociferous, however, that it emphasized the distance to be covered as much as the desire for professional fusion. Paul Alexander acknowledged that the law "has traditionally shown considerable reluctance to stray off its own reservation."¹⁵⁸ For all of Karl Llewellyn's advice that "it pays to be neighborly,"¹⁵⁹ cooperative efforts were unimpressive in scope or number. Robert Kramer, a participant in the 1959 Institute of Family Law conference at Duke University, gauged the scholarly outpouring with a skeptical eye: "Scarcely a year passes where a learned journal of sociology or law, or whatever field you pick, fails to carry a brave article with a manifesto that what we need is interdisciplinary research."¹⁶⁰ Yet, Kramer concluded, very few joint projects were attempted.¹⁶¹ Four years later, a former president of the Russell Sage Foundation admitted the rarity of "planned cooperation" between behavioral scientists and lawyers, but insisted that a "good start has been made."¹⁶²

In his provocative *Why Lawyers Are Dissatisfied with the Social Sciences*, Samuel M. Fahr provided a philosophical and methodological basis for the interdisciplinary unease. Although he addressed the particular tension between law and social science in criminology, his remarks had broader application:

Fundamentally the social scientist is culturally oriented, and a man of statistics; whereas the lawyer tends to look at matters from the standpoint of an individual client. On the other hand, and herein lies the paradox, most social scientists seem to focus on the criminal and not upon his act; whereas the traditional approach of the law has been to concentrate upon the act.¹⁶³

HARV. L. REV. 1286 (1949); Julius H. Miner, *Conciliation Rather Than Reconciliation*, 43 ILL. L. REV. 464 (1948); Clarence Morris, *Law, Reason and Sociology*, 107 U. PA. L. REV. 147 (1958); David Riesman, *Law and Sociology: Recruitment, Training, and Collegueship*, 9 STAN. L. REV. 643 (1957); John C. Scanlon & Kenneth Weingarten, *The Role of Statistical Data in the Functioning of the Courts*, 12 BUFFALO L. REV. 522 (1963); Richard D. Schwartz, *The Law and Behavioral Science Program at Yale: A Sociologist's Account of Some Experiences*, 12 J. LEGAL EDUC. 91 (1959); Philip Selznick, *Legal Institutions and Social Controls*, 17 VAND. L. REV. 79 (1963); A.L. Tilton, *Psychology, Psychiatry and Divorce*, 28 MILWAUKEE B.A. GAVEL 12 (1968); Andrew S. Watson, *The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty*, 11 J. LEGAL EDUC. 73 (1958); J.E. Hall Williams, *The Relation of Social Work Philosophy to the Study and Practice of Law*, 5 KAN. L. REV. 366 (1957); William M. Wherry, *Preventive Law and the Unstable Family*, 21 N.Y. ST. B.A. BULL. 401 (Oct. 1949); Hans Zeisel, *Uses of Sociology in the Professions: the Law*, 15 U. CHI. L. SCH. REC. 6 (1967).

158. Paul W. Alexander, *Public Service by Lawyers in the Field of Divorce*, 13 OHIO ST. L.J. 13, 18 (1952).

159. Llewellyn, *supra* note 157, at 1305.

160. PROCEEDINGS OF THE INSTITUTE OF FAMILY LAW 7 (John S. Bradway ed., 1959).

161. *Id.*

162. Donald Young, *The Behavioral Sciences, Stability, and Change*, 17 VAND. L. REV. 57, 62 (1963).

163. Samuel M. Fahr, *Why Lawyers Are Dissatisfied with the Social Sciences*, 1 WASHBURN L.J. 161, 163 (1961). Sociologist Gilbert Geis responded to law professor Fahr in an article the following year. Geis had to admit, however, that the *Brown* desegregation decision had intensified

Communication between the disciplines was arduous enough; cooperative projects proved intensely difficult to organize. Paul Alexander's plea that law and the social sciences "get off our high horses, and bury our interprofessional jealousies" was greeted with only surface affirmation.¹⁶⁴

A similar pattern of exploration and retrenchment can be seen in the treatment of social sciences within legal education. The ideal of a law casebook developed by Christopher Columbus Langdell and James Barr Ames in the late nineteenth century continued to dominate until the middle of the twentieth century. Among domestic relations casebooks, this "pure" approach, devoid of all information but that contained within appellate opinions, represented the norm. These texts, usually labelled "Cases on _____" or "The Law of _____,"¹⁶⁵ contained no non-legal materials¹⁶⁶ and consisted simply of a selection of cases¹⁶⁷ thematically arranged.¹⁶⁸ These arid texts distilled the essence of the orthodox formalism of family law.

A rival approach developed at Columbia University in the late 1920s as a result of extensive law faculty studies in legal education, which in turn had been influenced by sociological jurisprudence and legal realism. Columbia law Professor Albert C. Jacobs and University of Michigan sociologist Robert C. Angell produced a report on family law teaching which called for a research-based sociological approach. In 1933, Jacobs produced the first domestic relations casebook on this new model, in which the cases were liberally interlaced with sociological materials.¹⁶⁹

concern among some lawyers about the increasing encroachment of social science upon the legal bailiwick. Gilbert Geis, *The Social Sciences and the Law*, 1 WASHBURN L.J. 569, 583-84 (1962).

164. Paul W. Alexander, *Foreword*, 22 U. KAN. CITY L. REV. 1, 1 (1953).

165. See, e.g., WILLIAM RANDALL COMPTON, *CASES ON DOMESTIC RELATIONS* (1951); FREDERICK L. KANE, *CASES ON DOMESTIC RELATIONS* (1936); JOSEPH W. MADDEN, *CASES ON DOMESTIC RELATIONS* (1928); WILLIAM E. MCCURDY, *CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS*, (4th ed. 1952); WILLIAM E. MCCURDY, *CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS* (1927); EPAPHRODITUS PECK, *THE LAW OF PERSONS AND OF DOMESTIC RELATIONS* (1920); EPAPHRODITUS PECK, *THE LAW OF PERSONS OR DOMESTIC RELATIONS* (1913).

166. See, e.g., JOSEPH W. MADDEN & WILLIAM RANDALL COMPTON, *CASES AND MATERIALS ON DOMESTIC RELATIONS* (1940) (including in the title of the casebook the word "materials" despite the absence of any nonlegal materials).

167. WILLIAM E. MCCURDY, *CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS* at vii (1927) (describing the textbook as a "collection of cases"). Nothing in his 1952 edition challenged that bland depiction.

168. The conceptual philosophy which specified that textbook authors were in the business of transmitting received wisdom to students is exemplified in Frederick L. Kane's assertion that "retaining [his] faith in the efficacy of the case system," he had "edited the cases as little as possible." KANE, *supra* note 165, at iii.

169. ALBERT C. JACOBS, *CASES AND OTHER MATERIALS IN DOMESTIC RELATIONS* (1933). See Brainerd Currie, *The Materials of Law Study, Part Three, Nonlegal Materials in the Law School: Beginnings of the Modern Integration Movement*, 8 J. LEGAL EDUC. 1 (1955) (detailing the shift from pure casebooks to those with both "cases and materials"). See also Albert Ehrenzweig, *The American Casebook: "Cases and Materials,"* 32 GEO. L.J. 224 (1944).

While subsequent editions of Jacobs' domestic relations text retained a flavoring of sociological materials, the movement for integration passed by the somewhat static originator, so that by the 1950s Jacobs' tome was referred to as "a reasonably traditional law book." That decade saw the integration of law and social science emerge as the "slogan of the day"¹⁷⁰

But integration may not have passed the epigrammatic stage. An article in the 1950 *Journal of Legal Education* noted that the interdisciplinary focus "has been attempted only in some of the 'progressive' schools."¹⁷¹ Elsewhere, the paucity of faculty expertise and student interest had stalled the effort. Indeed, the 1961 edition of Jacobs' once-revolutionary casebook shifted from a law-and-society focus to one of legal craft, with the result that sociological studies, although "[e]nlightening," had to "yield place to technical matter."¹⁷²

A "second explosion" of social science information in casebooks was presaged by Fowler V. Harper's idiosyncratic *Problems of the Family*.¹⁷³ Harper split his text roughly in half between legal materials and those drawn from anthropology, sociology and psychiatry.¹⁷⁴ The full flush of a new consciousness in domestic relations texts arrived with the 1960s, accompanied by the widespread, if belated, realization that a family law practitioner "must be something of a psychologist, psychiatrist, sociologist, and negotiator."¹⁷⁵

Jacobs' first effort pleased many, but not all. See, e.g., Robert Angell, *Book Review*, 33 COLUM. L. REV. 1086 (1933) (criticizing Jacobs as not going far enough); Donald Slesinger, *Book Review*, 1 U. CHI. L. REV. 659 (1934) (criticizing Jacobs as not adding the sociological materials well); Chester Vermier, *Book Review*, 47 HARV. L. REV. 732 (1934) (criticizing Jacobs as going too far).

170. See generally ALBERT C. JACOBS & JULIUS GOEBEL, JR., *CASES AND OTHER MATERIALS IN DOMESTIC RELATIONS* (3d ed. 1952); ALBERT C. JACOBS, *CASES AND OTHER MATERIALS IN DOMESTIC RELATIONS* (2d ed. 1939); Albert A. Ehrenzweig, *Teaching 'Integration'—A Comment on Law and Society*, 2 J. LEGAL EDUC. 359 (1950); Robert Kingsley, *Book Review*, 5 J. LEGAL EDUC. 400 (1953).

171. Ehrenzweig, *supra* note 170, at 359.

172. ALBERT C. JACOBS & JULIUS GOEBEL, JR., *CASES AND OTHER MATERIALS IN DOMESTIC RELATIONS* at ix (4th ed. 1961). In 1956, English scholar Otto Kahn-Freund ridiculed the case teaching method as totally inappropriate: "To teach Family law in terms of 'case law,' is to act like a professor of medicine who not only teaches pathology to students knowing nothing about the anatomy of physiology of the healthy body, but who teaches pathology in terms of the rarest diseases." Otto Kahn-Freund, *Observations on the Possible Cooperation of Teachers of Law and Teachers of Social Science in Family Law*, 9 J. LEGAL EDUC. 76 (1956).

173. Francis A. Allen, *History, Empirical Research, and Law Reform: A Short Comment on a Large Subject*, 9 J. LEGAL EDUC. 335 (1956). PROBLEMS OF THE FAMILY, *supra* note at 140. Harper's impressionistic shuffling of materials from radically different sources resulted in a deck seen as too stacked in favor of the social sciences. See Robert J. Levy, *The Perilous Necessity: Non-Legal Materials in a Family Law Course*, 3 J. FAM. L. 138, 151 (1963) (criticizing the editor's integrative effort for giving "such short shrift to many of the essentials of an introduction to the lawyer's technical tasks that its utility to a group of law students was questionable").

174. See PROBLEMS OF THE FAMILY, *supra* note 140.

175. MORRIS PLOSCOWE & DORIS JONAS FREED, *FAMILY LAW: CASES AND MATERIALS* at ix (1963). For other representatives of the second explosion in domestic relations, see JOSEPH GOLDSTEIN & JAY KATZ, *THE FAMILY AND THE LAW: PROBLEMS FOR DECISION IN THE FAMILY*

This background helps us understand the ambivalent relationship between law and science in the middle decades of this century. While American society steadily yielded increasing acreage to the claims of science, the legal profession sported a more complex attitude, "simultaneously skeptical and unbelievably gullible" about the authority of social science and the nature of the accommodation required of the law.¹⁷⁶ This uncertain attitude shaped the history of divorce and the family court.

IX. HONEST AND DISHONEST DIVORCE

National attention was focused on therapeutic divorce by the Report of the Legal Section of the National Conference on Family Life presented at the White House in May 1948. Paul Alexander had been joined in developing the report by Reginald Heber Smith, the grand old warrior of the Legal Aid movement. Smith had popularized their findings a few months earlier in a widely cited article in the *Atlantic*.¹⁷⁷

In "Dishonest Divorce," Smith did not mince words about the scope of the problem: "In the whole administration of justice there is nothing that even remotely can compare in terms of rottenness with divorce proceedings."¹⁷⁸ He asserted that divorce had spun crazily out of sync with society and must be controlled by a greater reliance on creative use of legal authority. "The law," Smith reminded his readers, "is the most powerful instrument for social control that civilization has been able to evolve."¹⁷⁹ The weight of the law should, however, support the agendas of non-legal experts, for the questions of broken marriages and divorces were primarily social, economic, medical and spiritual in nature. Smith pointed out that the investigations necessary to determine marital viability could not be accomplished in a legal system in which practically all divorces were uncontested.¹⁸⁰

Therapeutic divorce reformers often railed against the fault regime for allowing one spouse to present, pro forma, the pre-arranged verdict agreed to by the parties. Under the premises of the adversary system, the absence of one party simply made it easier for the other to satisfy the burden of proof. Because therapeutic divorce operated under entirely different suppositions, the attendance

LAW PROCESS (1965); CALEB FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 769-95 (1966) (featuring the imaginative "Quadrilogue on Divorce Policy," a hypothetical discussion involving a doctor, professor, judge and bishop).

176. Harry Kalven, Jr., *Some Comments on the Law and Behavioral Science Project at the University of Pennsylvania*, 11 J. LEGAL EDUC. 94, 96 (1958).

177. Smith, *supra* note 34.

178. *Id.* at 43.

179. *Id.* at 42.

180. *Id.* at 44-45. For the significance of and publicity attached to the 1948 Report, see Alexander, *Family Life*, *supra* note 70, at 38; Leclaire, *supra* note 156, at 387, 390; Dorothy Thompson, *Divorces Are Not Crimes: They Are Tragedies*, 59 READER'S DIG. 117 (Nov. 1951).

of both parties should be required in order to facilitate the mandatory investigation and counseling.¹⁸¹

Judges should be "unshackled" and allowed to order social intervention more aggressively since the law "steadily demonstrates a vital capacity to regulate life in many of its aspects and activities."¹⁸² As N. Ruth Wood argued in a 1949 article in the *Virginia Law Weekly*, the divorce reforms were not intended to make divorce easier or more difficult, but "to substitute truth for deception and to give the courts real opportunity to prevent marriage failures by conciliation and treatment, rather than to restrict them to the punishment of such failures by divorce."¹⁸³

Belief in the impulsiveness and loss of judgment of would-be divorcers justified the use of coercion, an ever-present element in therapeutic divorce. Since, in Alexander's words, couples in conflict suffered from an "utter lack of insight" into the factors underlying what they—often mistakenly—believed to be irreparable marriage breakdown, they needed the firm hand of a benevolent family court to help them "think straight."¹⁸⁴ Alexander brooked no recalcitrance in his court: a family judge "should have ample authority for dealing with people who seem to understand only the language of authority"¹⁸⁵

While most therapeutic-minded judges aimed to render de minimis the lawyer's role as an advocate in family court, Alexander took a different tack. An attorney had an "indispensable" role as an "effective ally of the court in 'selling' the best plan to his client."¹⁸⁶ Traditional advocacy, in Alexander's view, must be subordinated to the call for therapeutic adjustment. The new ideology constrained not only the court and its social science experts, but even private divorce lawyers, shifting their loyalty to a new client, the state-ordered marital unit.

To this end, several proposals were made embodying radically different views of the nature of advocacy and of the divorce hearing itself. John S. Bradway suggested a shift away from proof of fault grounds to broader social questions. At a divorce trial, the issues to be tried would include the following questions:

1. Why are these particular spouses unable to live amicably together as normal married people do?

181. See E. Dana Brooks, *Positive Approach to the Divorce Dilemma*, in *DIVORCE AND FAMILY RELATIONS*, *supra* note 18, at 98-102.

182. Smith, *supra* note 34, at 45.

183. N. Ruth Wood, *Precepts of Modern Uniform Divorce Law*, in *DIVORCE AND FAMILY RELATIONS*, *supra* note 17, at 103-07. In 1947, Wood had chaired a committee of the National Association of Women Lawyers which had made reform proposals similar to those of Smith and Alexander. But the Association had rejected their report as unlikely to be adopted by state legislatures. See Dorothy Dunbar Bromley, *Our Scandalous Divorce Laws*, 66 AM. MERCURY 272 (Mar. 1948).

184. Paul W. Alexander, *The Follies of Divorce—A Therapeutic Approach to the Problem*, 1949 U. ILL. L. FORUM 695, 699-700 [hereinafter Alexander, *Follies of Divorce*].

185. Alexander, *Family Life*, *supra* note 70, at 43.

186. Alexander, *Follies of Divorce*, *supra* note 184, at 710.

2. Will the parties be sufficiently better off in any demonstrable fashion after the divorce than they were before?
3. How will the process of granting a divorce affect the security to which other members of the group may be morally entitled?
4. Will some other solution than a divorce decree be more adequate to the particular problems?¹⁸⁷

Another proposal replaced not only the nature of the issues to be tried but also the composition of the jury. Raphael Lemkin argued that divorce cases should be tried to a panel containing experts from the behavioral sciences as well as "lay people with experience in family life."¹⁸⁸ The emphasis on the lawyer's reorientation toward social work culminated in Bradway's proposal that the legal profession develop a new specialty, the "family lawyer," whose client would be the family as a whole, not any of its members.¹⁸⁹

At a 1952 conference on divorce law at the University of Chicago, Paul Alexander defended his use of compulsory referrals for therapy in family court cases by analogy to juvenile court practice.¹⁹⁰ Children did not always willingly attend juvenile court and often had to be taken into custody by police. Despite that coercive beginning, juveniles often benefitted from social case work. The same procedure could work with divorce-minded adults. As Alexander had earlier phrased it, with his customary directness, "we suggest handling our unhappy and delinquent spouses much as we handle our delinquent children."¹⁹¹

Alexander dreamed of transforming the divorce court "from a morgue into a hospital."¹⁹² This change would require a substantial revision of philosophy and personnel. The philosophical milieu would, as noted above, copy the jurispru-

187. John S. Bradway, *Proposed New Techniques in the Law of Divorce: I. Family Dissolution—Limits of the Present Litigious Method*, 28 IOWA L. REV. 262 (1943).

188. Lemkin, *supra* note 157, at 851-54.

189. John S. Bradway, *A Suggestion: The Family Lawyer* 45 A.B.A. J. 831, 866 (1959).

190. Alexander, *A Therapeutic Approach*, in CONFERENCE ON DIVORCE, *supra* note 39.

191. Alexander, *Family Life*, *supra* note 70, at 41. The pervasiveness of the therapeutic divorce movement may be gleaned by the fact that every one of the published articles from the University of Chicago's 1952 Conference dealing with law revision called for implementation of the therapeutic divorce program. See generally Thomas J. Cunningham, *Education, Conciliation as Solutions to Divorce*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at 46; William J. Goode, *Compulsory Counseling, Prerequisite to Divorce*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at 74; Dudley F. Sicher, *Comprehensive Divorce Court Needed*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at 78; Dana Brooks, *Positive Approach to the Divorce Dilemma*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at 98.

192. Alexander, *Follies of Divorce*, *supra* note 184, at 707. Alexander's penchant for medical and specifically pathological metaphors was unceasing. He criticized writers who confused marriage failure with divorce, comparing that error to a failure to distinguish between appendicitis and an appendectomy. Alexander, *Introduction*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at v. He complained of appearing as a "faintly glorified public mortician," because all he did was "bury dead marriages—thirty thousand to date." Alexander, *A Therapeutic Approach*, in CONFERENCE ON DIVORCE, *supra* note 39, at 51. And he greatly feared that he had "buried a lot of live corpses." Alexander, *Family Life*, *supra* note 70, at 38.

dence of the juvenile court. The staff of the new family courts would expand to include psychiatrists, clinical psychologists, social and psychiatric case workers and marriage counselors.

But the most dramatic metamorphosis would have to occur within the judiciary. Case law specialists on the domestic relations bench would be replaced by judges trained in and sensitive to a whole array of the social and medical sciences, from community organization to psychiatry. Traditional standards of judging, in which the offense precedes rehabilitation, would be replaced by canons requiring rehabilitation in an effort to prevent the commission of the offense of divorce.

Advocates of therapeutic divorce saw little conflict between coercion and therapy. In Alexander's view, the promise of a divorce procedure freed from "guilt" and "sin" was worth the price of some judicial compulsion in the direction of the preservation of the bedrock institution of American society. But the ultimate coercion, of course, was the vast increase in the power of the court. Petitioners would not even be able to apply for a divorce without the court's consent. Thus, divorce by mutual party consent (the *de facto* popular system) would end. Moreover, a divorce decree would only be granted if the social investigation, plus the court's own inquiry, "*compelled* the conclusion that the marriage could no longer be useful to the spouses, the children, or the state."¹⁹³

The discretion to grant new divorces brought with it the corresponding power to deny old ones, even where the fault grounds had been satisfactorily established. Recognizing the porous texture of fault and the reality of mutual consent, English law Professor Otto Kahn-Freund insisted that "there are situations in which the court must be able to say 'no' though both spouses want a divorce."¹⁹⁴ On both sides of the Atlantic, courts were gearing up to say "no" in new and more potent ways. But some critics saw more than a nominal conflict between the canons of marriage therapy and the directive strategy of the new family court. This clash may be seen in the histories of some experiments in counseling and conciliation.

X. "GENTLE JUDICIAL COERCION"

Convinced of the purity of their goal and the benevolence of their methods, the advocates of the therapeutic state proposed to sacrifice personal autonomy on the altar of divorce reform. Sociologist Eugene Litwak, for instance, saw no role conflict in the operational methodology of the family courts: "[The] basic premise of law as therapy is that people seek divorce because of serious emotional problems. Therefore, any legal procedure seeking to control divorce should provide that the spouses see a therapist."¹⁹⁵ But were therapy and

193. Alexander, *Divorce Without*, *supra* note 54 (emphasis added). See generally Milton L. Grossman, *How Can We Make Divorce Realistic?* 23 N.Y. ST. B. BULL. 350 (Oct. 1951) (echoing this restrictive view).

194. Otto Kahn-Freund, *Divorce Law Reform?*, 19 MOD. L. REV. 584 (1956).

195. Eugene Litwak, *Divorce Law as Social Control*, 24 SOC. FORCES 217 (Mar. 1956) (noting that law as therapy "focuses on internalization of societal values"), reprinted in NORMAN W. BELL & EZRA F. VOGEL, A MODERN INTRODUCTION TO THE FAMILY 208-17 (1960).

compulsion compatible? A glimpse of the workings of the Los Angeles conciliation court affords an opportunity to examine this issue in context.

As noted above, the conciliation court was the brain child of the redoubtable Ben Lindsey.¹⁹⁶ Ever the heterodox, Lindsey believed in automatic divorce for childless couples (who should practice birth control until they were certain they want children), but was quite chary of granting the privilege after the family had expanded. He once told a divorce-seeking couple that his court was "concerned with the right of your children to you, rather than your right to your children."¹⁹⁷

The conciliation court was designed to work as a "pre-divorce" tribunal. A wife or husband who found the marriage in jeopardy could file a petition for a conciliation hearing. No divorce petition could then be filed for thirty days. In the meantime, the court clerk notified the other spouse of the hearing. If she or he ignored the notice, the court could compel attendance. From that point on, however, participation was voluntary, although the pressure of early intervention was aimed to induce the couple to cooperate with the court. In the words of a reporter studying matrimonial litigation, the Los Angeles conciliation court represented the "farthest any American court has gone in the direction of forcing couples to attempt a reconciliation before they may get a divorce."¹⁹⁸

Lindsey, who was seventy years old when the California legislature adopted his plan for the conciliation court in Los Angeles, never served on it. The court achieved its period of greatest influence under the leadership of Judge Louis H. Burke in the 1950s. Key to Burke's operation was his development of a comprehensive "reconciliation agreement" to be signed by the couple. As described by one of Burke's successors, the agreement contained twenty-five pages covering "practically every facet of married life." Appended to the basic agreement were up to eight special form agreements covering particularized items such as the presence of third parties in the home, stepchildren, an agreement for one of the spouses to attend Alcoholics Anonymous or the termination of an extramarital romantic liaison.¹⁹⁹

196. See LOUIS H. BURKE, *WITH THIS RING* (1958); Louis H. Burke, *The Role of Conciliation in Divorce Cases*, 1 J. FAM. L. 209 (1961); Louis H. Burke, *The Conciliation Court of Los Angeles County*, 40 CHI. B. REC. 255 (1959); Louis H. Burke, *An Instrument of Peace: The Conciliation Court of Los Angeles*, 42 A.B.A. J. 621, 690-91 (1956); Harry M. Fain, *The Lawyer's Role in California Reconciliation Court Plan*, in A.B.A., SEC. OF FAM. LAW, 1962 PROCEEDINGS 211 (1962); Paul Friggens, *The Walk-In Court That Rescues Rocky Marriages*, 81 READER'S DIG. 107 (Dec. 1962); Roger Alton Pfaff, *The Conciliation Court of Los Angeles County*, in A.B.A., SEC. OF FAM. LAW, 1960 PROCEEDINGS 35 (1960); Roger Alton Pfaff, *A Court that Preserves Marriages*, 37 PHI DELTA DELTA 3 (1959); Lloyd Shearer, *This Court Saves Foundering Marriages*, 57 READER'S DIG. 119 (Aug. 1950); Frank J. Taylor, *A Court To Prevent Divorce*, 103 NEW REPUBLIC 239 (Aug. 19, 1940).

197. Taylor, *supra* note 196, at 239-40.

198. John Bartlow Martin, *Divorce: Effort to Save a Troubled Marriage*, 231 SAT. EVE. POST 36 (Nov. 8, 1958).

199. Pfaff, *The Conciliation Court of Los Angeles County*, *supra* note 196.

The original appointment letter, signed by the judge, contained the following admonition to the summoned party: "We trust you will keep this appointment voluntarily, and avoid the necessity of requiring the Court to issue a subpoena."²⁰⁰ If the court succeeded in persuading the couple to attempt a rapprochement, it would draw up a reconciliation agreement containing a series of specific commitments about the couple's future behavior.

The terms of this contract (which included abundant sermonizing by the court) provide a snapshot not only into the heart of therapeutic divorce but also into a social system which the reformers were desperately trying to recapture. Couched in the rhetoric of therapeutic divorce, the Los Angeles reconciliation agreement is a fascinating social document which at one level points backward toward the idyllic image of conservative utopia, while its very terms highlight the seeds of family conflict which are about to explode any hope of restoring the institutional family. A typical reconciliation agreement opened with the couple's admission that their marriage "has become sick" and that they "should go to a professionally trained person for help."²⁰¹ After these ideological *mea culpas*, the parties formally agreed "that they will not accuse, blame or nag each other about things which have happened in the past."²⁰²

A reiteration of the gendered social order followed. The wife agreed that housework, meal preparation, child care and maintaining the "inside of the home" were her responsibilities. The husband took charge of financially supporting the family in addition to caring for the "outside of the home." Despite a gesture toward the existence of working women, noting that in those cases the husband "must share to a larger extent in the work of the home," the task of sustaining the traditional domestic order fell on the wife. Women who refused a dependent role were "robbed of their full dignity." The inequality of the burdens is apparent in the paragraph labelled, ironically, "Husband's Role in the Family"

It will always be true in marriage that the greatest giving will be required on the part of the wife. Through pregnancy and child-raising she loses the independence which the man continues to retain. When today we find a woman who is reluctant to face the loss of such independence it is generally because she does not trust the man to be loving, confident and considerate, particularly at the time when she must, of necessity, depend solely upon him. Generally speaking, a good woman is happy to go through a great amount of sacrifice for her husband and family, as long as his step is firm, his love tender and his faith in her and in himself is strong.²⁰³

200. Meyer Elkin, *Conciliation Courts: The Reintegration of Disintegrating Families*, 22 FAM. COORDINATOR 66 (Jan. 1973).

201. See BURKE, WITH THIS RING, *supra* note 196, at app. 270-80 (including his customary reconciliation agreement). See also *Typical Reconciliation Agreement*, 30 CAL. ST. B.J. 207 (1955); GOLDSTEIN & KATZ, *supra* note 175, at 146-50.

202. BURKE, WITH THIS RING, *supra* note 196, at app.

203. *Id.*

Other provisions in the agreement required a mutual effort to share interests and hobbies, respect the privacy of each other's mail and avoid gambling, excessive drinking and sarcastic language. The couple promised to make new friends among other married couples, so as to remove themselves from the unhealthy influence of their former circles of single friends. Conceding the importance of religion, the couple agreed to attend church regularly and to recite daily a family prayer. The document included rules for meal times, social occasions, personal appearance and relationships with relatives. The husband accepted his responsibility to take his mate out for social activities, within the constraints of the family budget, at least once a week. Clauses relating to child-rearing blended the sublime with the banal. After a preface pointing out that there are "no dull moments in parenthood," the parents acknowledged that their child is "the handiwork of God" and pledged to think and speak of the child as "our" child, never as "my" child or "your" child. The enormity of the task of child-rearing was brought home by the declaration that an "estimated 80 percent of what a child is, or turns out to be, is attributable directly to his parents."²⁰⁴ Numerous specific rules on discipline preceded a discussion of a sound family relationship based on obedience through love.

Wife and husband agreed to moderation in sexual intercourse, which was spelled out as "twice a week" under "normal conditions," which were not spelled out.²⁰⁵ The agreement contained a primer on the importance of "lovmaking" as a prelude to sexual intercourse" because of the different physiological proclivities of each sex, which were explained in detail.²⁰⁶ Oblivious to the findings of Alfred Kinsey, the agreement limited its discussion to sexual stereotypes, contrasting a man's sexual susceptibility to the "slightest stimulation" with a woman's slow "passion side."²⁰⁷ For a woman, the agreement asserted, "physical union is out of the question until her physical desire is sufficiently aroused and her glandular processes have prepared her body for such union."²⁰⁸ Unless a woman "has been properly prepared," sexual intercourse will not bring her "to the necessary climax and consequent release of nerve tension."²⁰⁹ The husband was warned that "repeated acts of intercourse which do not result in satisfaction for the wife become unpleasant."²¹⁰ For her part, the wife agreed "not to act like a patient undergoing a physical examination."²¹¹

Conjugal sexuality thus reified the gendered universe. A wife was dependant on her husband for the financial support of herself and the children, for her social life and also for her own sexual satisfaction. Her sexual duty prior to conception was not to get in her husband's way or behave as if she were on an awkward gynecological visit.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

Financial planning was not neglected. The wife was designated the family treasurer. Each party agreed to a set amount of spending cash each week, whose purpose was specified. The wife's "pin money" would be spent on, for example, cosmetics and the beauty parlor, while her spouse allocated his "pocket money" for, say, snacks and golf expenses. The agreement's final page contained a rare paean to married love, remarking that "wise couples will not suffer their mutual attachment to become casual and commonplace under the spell of monotony, or to languish with neglect, or to degenerate into mere selfish passion."²¹² On the contrary, enlightened wives and husbands "will realize that in this life they possess nature's most valued treasure—the loyal love of a human heart."²¹³

Unlike the customary provisions for regulating contracts, the court's contempt power directly enforced the terms of the reconciliation agreement. Indeed, the wife and husband acknowledged that violation of the agreement's specifications subjected the offender to the possibility of a fine, imprisonment or both. Moreover, the agreement could not be rescinded by the parties. It remained in force until further order of the court. Judge Burke claimed he used the contempt powers "very carefully"²¹⁴ In the first biennial period, for example, twenty contempt proceedings were instituted, resulting in jail terms for seven husbands and three wives.²¹⁵ In addition to punishment for breach of the reconciliation agreement, the court occasionally placed restraining orders on paramours or relatives who interfered with the harmony of the family unit.²¹⁶ In one instance, Burke jailed a husband and his lover for five days after they had spent a night together.²¹⁷ Since the husband's inamorata had endorsed the reconciliation agreement, agreeing to stay away from the husband, the judge felt justified in incarcerating both. "After that," remarked a divorce counselor in Judge Burke's court, "people took these agreements seriously."²¹⁸

The threat of coercion hung heavy over the proceedings. As a court counselor elaborated to a wife unsure whether to believe her unfaithful husband's promises to reform:

Your husband has agreed to promise in writing that he will never consort with the lady again under penalty of going to jail. This is how sincere he feels about it. For a man of his standing, the penalty of jail assures you that his promise is not one that has been lightly made.²¹⁹

212. *Id.*

213. *Id.*

214. *VIRTUE*, *supra* note 38, at 258.

215. *Id.*

216. *Id.*

217. *Martin*, *supra* note 198.

218. *Id.*

219. *Burke*, *An Instrument of Peace*, *supra* note 196, at 624. With a measure of understatement, Judge Burke concluded that the "utilization of a reconciliation agreement, which is readily compiled and signed at the very moment of reconciliation, lends dignity and weight to the promises made." *Id.* at 690.

Did the "gentle judicial coercion" work? The statistics are virtually undecipherable and the methodological problems likely insurmountable.²²⁰ How was reconciliation to be measured? Did failure to file a divorce suit for one year signify that the parties had reconciled? The primary problem was that, even dealing with a population in which one partner (at least) had expressed an interest in staving off the break-up of the marriage, the therapeutic divorce advocates were unable to show that their coercive gentleness succeeded. Robert J. Levy, serving as the Reporter for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws, went further, stating that the "prevailing opinion seems to be that court-connected conciliation services are a waste of time and money"²²¹

XI. THE UNEASY UNION OF MARRIAGE COUNSELING AND THE LAW

The profession of marriage counseling emerged in the 1930s, but for years was plagued by the paucity of marriage counselors as well as by the proliferation of mountebanks. As late as 1949, an article in *Women's Home Companion* remarked that marriage counseling was "a new idea for most of us" and proceeded to outline its rudimentary principles, while advising its female readership to beware the "thousands of quacks" employed in the field.²²²

That same issue of the *Women's Home Companion* carried an article conveying the British viewpoint. The piece by David R. Mace, the General Secretary of the National Marriage Council in England, reflected the striving for exclusivity typical of budding professions in its complaint over the unauthorized practice of marriage counseling: "The average woman would never think of doctoring her neighbor's tooth or offering to represent her in a lawsuit. But she will cheerfully and with great confidence embark upon the treatment of her neighbor's marital problems."²²³

The concern with fakery grew to enormous proportions during the 1950s. In addition to the *Women's Home Companion*, *Good Housekeeping* and *Cosmopol-*

220. The selectivity of the conciliation court rendered all reconciliation statistics virtually meaningless. The claim that the court effected reconciliations in 43% of its cases takes on a different coloration when weighed against the statistic that in 1957, for instance, the court only handled 1380 of the 31,871 divorce, separate maintenance and annulment suits filed in Los Angeles. See Martin, *supra* note 198. See also Louis H. Burke, *The Role of Conciliation in Divorce Cases*, *supra* note 196 (confusingly presenting evidence of his success). For criticism of the Conciliation Court's rosy statistics, see FOOTE ET AL., *supra* note 175, at 790-91.

221. ROBERT J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 123 (1968) (monograph prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws).

222. Evan Frances, *How To Get Marriage Counseling*, 76 WOMAN'S HOME COMPANION 36, 64 (Aug. 1949). On the origins of the marriage counseling profession in America, see Robert G. Foster, *A Point of View on Marriage Counseling*, 3 J. COUNSELING PSYCHOLOGY 212 (1956), reprinted in SOURCEBOOK IN MARRIAGE AND THE FAMILY 460-64 (Marvin B. Sussman ed., 2d ed. 1963).

223. *Who Needs Marriage Counseling*, 76 WOMAN'S HOME COMPANION 34 (Aug. 1949).

itan warned consumers about "flamboyant" advertising, impossible guarantees of success, exorbitant fees and the tactic of insisting that the client sign up for a specific number of sessions in advance.²²⁴ The *American Psychologist* estimated that 25,000 quack counselors earned more than \$375 million in 1953, and the report was still being trumpeted ten years later in the *Saturday Evening Post* as "A Growing National Scandal."²²⁵

The demand for marriage counseling, from any source, appeared to be expanding faster than the supply in the 1950s and 1960s. A national study reported that while forty-two percent of all Americans who sought professional mental health help in 1957 needed assistance with a marital problem, only four percent went to a marriage counselor. Clergy, physicians, psychologists and lawyers were contacted far more often, probably reflecting the paucity of professional marital counselors.²²⁶ The rapid spread of an organization modelled on the twelve-step program for recovering alcoholics manifested the surging need for marital help. Divorcees Anonymous was the creation of Samuel Starr, a Chicago domestic relations lawyer who had found that "in practically every case" divorced persons "were sorry for the step they had taken."²²⁷ Chapters of Starr's organization sprung up in many localities throughout the country, providing non-professional divorce counseling. The work of Divorcees Anonymous consisted primarily of divorce survivors relating the horror stories of their own experiences and proposing problem-solving alternatives to sinners on the brink. The guilt of those who had sinned was the key weapon in converting those about to fall into temptation.

These years also saw the spread of the notion that divorce lawyers were pseudo-counselors, whose first goal should be the reconciliation of the troubled couple. John Mariano was the leading exponent of the view that attorneys should overcome their "litigious predisposition" and practice "therapeutic listening" to deal effectively with their divorce-seeking clients. Mariano advocated "juristic

224. See *Where to Get a Marriage Counselor When You Need One*, 149 GOOD HOUSEKEEPING 113 (July 1959); Morris Fishbein, *Beware the Mind-Meddler* 75 WOMAN'S HOME COMPANION 36 (Dec. 1948); Michael Drury, *Are Marriage Counselors Any Good?* 134 COSMOPOLITAN 104 (Jan. 1953). The paucity of trained counselors was also bemoaned in the professional journals. See William J. Goode, *supra* note 191; Kenneth R. Redden, *Selected Bibliography*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at 74-77 128.

225. Bill Davidson, *Quack Marriage Counselors: A Growing National Scandal*, 236 SAT. EVE. POST 17 (Jan. 5, 1963). See Peggy Strait, *Marriage Counselors—Helpers and Hurters*, N.Y. TIMES MAG. 26 (Nov. 3, 1963) (expressing the same fear).

226. JOSEPH VEROFF ET AL., *THE INNER AMERICAN: A SELF-PORTRAIT FROM 1957 TO 1976*, at 131-35 tbls. 5.11, 5.13, 5.15 (1981).

227. Samuel M. Starr, "Divorcees Anonymous" a Remarkable Success, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at 50-52. For a time in the 1950s, Divorcees Anonymous garnered considerable media attention. See A. Prowitt, *Divorcees Anonymous*, 130 GOOD HOUSEKEEPING 35 (Feb. 1950); Joseph Millard, *Divorcees Anonymous*, 56 READER'S DIG. 15 (May 1950); *They Mend Broken Marriages*, 149 AM. MAG. 107 (June 1950); *Divorcees Anonymous*, 66 TIME 64 (Sept. 26, 1955); Vance Packard, *New Cure For Sick Marriages*, 161 AM. MAG. 30 (May 1956).

therapy," a listening technique for attorneys which served as "the infallible X-ray needed to guide the analyst out of the emotional neurosis into which the psychoneurotic spouse had fallen."²²⁸

Mariano's therapy was directive. In his view, the attorney's client was not the individual but the marriage itself. Although Mariano subscribed to the broad goal of maintaining the individual as a "wholly integrated personality,"²²⁹ he insisted that a psychoanalytic lawyer should aim at developing a "juristic evaluation which justifies maintaining the marriage."²³⁰ Although Mariano maintained that members of the bar should avoid practicing "psychiatry without a license," the line between prescribed and proscribed therapeutic activity was difficult to fathom. The matrimonial attorney overheard shouting at the couple in his office, "Now, damn it, shut up. I'm telling you—you love each other,"²³¹ undoubtedly believed in his heart he was engaging in appropriate lawyerly therapy. And according to Mariano's directive guidelines, he was.²³²

Edward Pokorny, Detroit's long-time statutory divorce proctor, once achieved a reconciliation by ordering the couple to embrace and shoving them at each other. On another occasion, the wife's mother interrupted a conference between Pokorny and the couple by taking a toy baseball bat and beating her screaming daughter on her rear end until Pokorny and the husband restrained her. "Curiously enough," Pokorny related, "that reconciled them." These circus tales do not a program make, although Pokorny's office claimed a thirty-five percent reconciliation rate.²³³

Disputes over the mission of therapy lay at the heart of the conflict over the merger of counseling and the courts. In Utah, the state-sanctioned marriage counseling experiment came under fire from Judge Aldon J. Anderson, Chair of the Judges' Advisory Committee on Marriage Counseling Services. Anderson testified before the State Legislative Council that an unbridgeable gap had opened between the courts and the marriage counselors. The Utah judges wanted the

228. MARIANO, *supra* note 130, at 13-14. See JOHN H. MARIANO, SHALL I GET A DIVORCE—AND HOW? 116-22 (1946) (concluding that divorces stem from psychoneuroses); JOHN H. MARIANO, THE USE OF PSYCHOTHERAPY IN DIVORCE AND SEPARATION CASES 5-6 (1958) (offering psychotherapy as remedy for weak marriages). See also Paul Sayre, *Lawyers as Physicians for Failing Marriages*, in DIVORCE AND FAMILY RELATIONS, *supra* note 18, at 50-52.

229. MARIANO, *supra* note 130, at 260.

230. *Id.* at 207. A general survey of the field, recognizing John Mariano as a pioneer in psychoanalytic jurisprudence, is contained in KOHUT, *supra* note 135, at 67-83. See Mariano, *Legal Therapy in Divorce*, 3 KANSAS L. REV. 36 (1954).

231. Pilpel, *supra* note 1, at 68.

232. MARIANO, *supra* note 130, at 197. See *The Lawyer as Family Counselor* 22 U. KAN. CITY L. REV. 28 (1953); Marie W. Kargman, *The Lawyer as Divorce Counselor* 46 A.B.A. J. 399 (1960); Andrew S. Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7 (1965).

233. Henry LaCossitt, *The Man Who Doctors Sick Marriages*, 224 SAT. EVE. POST 25 (May 31, 1952); M.Z. Gross, *Family Needs a Friend: Michigan's Friend of the Court Plan*, 30 BETTER HOMES & GARDENS 42 (Oct. 1952). See Edward Pokorny, *Observations by a "Friend of the Court"*, 10 LAW & CONTEMP. PROBS. 778 (1944); "Friend of the Court" Aids Detroit Judges in Divorce Cases, 29 J. AM. JUDICATURE SOC'Y 166 (1946).

therapists to practice "directional counseling" in the belief that some couples would benefit from explicit instructions. Since the marriage counselors had rebelled at that oxymoronic construction of their role, Judge Anderson recommended shutting down the whole project. He concluded that courts were no place for mental health programs.²³⁴

New Jersey's experience reveals another facet of coercive conciliation. In 1956, the state supreme court's Committee on reconciliation proposed that "Family Counseling Services" be established under the jurisdiction of the chief probation officer. Aware of the unsavory implications of that juxtaposition for couples under marital stress, the Committee at the same time recommended that the chief probation officer's title be changed.²³⁵

That same iron-fist-in-velvet-glove approach characterized New Jersey's attitude toward the voluntariness of conciliation. Initially, one of the parties should seek help voluntarily, but if the efforts of the judge and the court staff to persuade the couple to seek the assistance of the Family Counseling Services failed, that "refusal should be met with an order requiring submission to the agency." No concerns were voiced as to the consequences of expanding state power over private lives. The end of reconciliation simply overwhelmed any queasiness as to the coercive means. Paul Alexander's philosophy finds its justification in the Committee's rationale:

Compulsion in so personal a matter may provoke resentment and tend to frustrate efforts to bring the parties together. But where neither spouse has sought conciliation before seeking to dissolve the marriage by court action, should it be assumed that the situation is hopeless and allow the litigation to proceed in ordinary course? Or should an attempt be made by mandate as a condition to institution of the suit?²³⁶

Following precedents in California and England, the New Jersey legislature adopted the Committee's recommendation and established quasi-mandatory marriage counseling as a concomitant of divorce actions in two districts for a three-year period, commencing September, 1957.²³⁷ Within three years, the experiment was abandoned as a massive failure. Of 2293 cases referred to the divorce counselors, only fifty-seven had been reconciled, a failure rate of 97.3%.²³⁸

A few commentators believed that marriage counseling served a purpose in demonstrating the futility of reconciliation in particular cases, and thus assisting

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

235. GOLDSTEIN & KATZ, *supra* note 175, at 150-53 (excerpting the REPORT OF THE RECONCILIATION COMMITTEE OF THE NEW JERSEY SUPREME COURT, February 14, 1956).

236. *Id.*

237. NEW JERSEY CODE, tit. 33.5, §§ 1010.1 to 1011 (1957).

238. GOLDSTEIN & KATZ, *supra* note 175, at 155-56 (excerpting the REPORT OF THE RECONCILIATION COMMITTEE OF THE NEW JERSEY SUPREME COURT, April 14, 1960).

in the couple's adjustment to divorce.²³⁹ This conversion of marriage counseling to divorce counseling was far from the minds of the family court advocates, but it demonstrates the difficulty of limiting any profession to the preset rubric of an interdisciplinary project. Marital counseling's "unruliness" showed its sensitivity to its internal principles and its clientele.

XII. CONCLUSION: THE SHERIFF AND THE SOCIAL WORKER DO NOT MERGE

In the decade of the 1960s, therapeutic divorce reached a crossroad. Despite the prodigious efforts of the therapeutic reformers, most family courts were still hamstrung by what they perceived as antiquated laws which preserved the shell of the adversary process and at the same time prevented the complete absorption of divorce into the therapeutic project. Some commentators believed the movement had run its course without achieving any major breakthroughs. Others felt that the critical mass would be reached in England or California, and reform on therapeutic grounds would spark the long-awaited revolution in preserving marriage.

Paul Alexander's leadership of the movement for therapeutic family courts positioned the final drive for comprehensive divorce reform. Major proposals embodying the Alexandrian ideal of merging the sheriff with the social worker in the administrative echelon of the revamped family court were presented in both England and California. But the drive for therapeutic divorce stalled. Concern about the loss of individual autonomy found an ally in worry over the tremendous cost of welfare-state family courts. Comprehensive restructuring along therapeutic lines was defeated in both California and England.²⁴⁰ The final shape of the 1969 divorce reforms finally conceded the overwhelming triumph of unrepentant individualism. We now live with its consequence.

239. See, e.g., Johnstone, *supra* note 52, at 323-24; Johnstone, *supra* note 136, at 255-56; Johnson, *supra* note 157, at 72; Donald M. McIntyre, Jr., *Conciliation of Disrupted Marriages By or Through the Judiciary*, 4 J. FAM. L. 129 (1964).

240. See 1969 California Laws ch. 1608; Elizabeth II, 1969, ch. 55. For a full evaluation of the 1969 divorce reforms, see MARY ANN GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* (1977); Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 298 (1987); J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519 (1994).

