

1994

No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce

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No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce

J. HERBIE DiFONZO*

In recent years, widespread disillusionment over no-fault divorce has focused debate on the equity of conflicting distributive schemes. The divorce revolution of the 1960's has generally been condemned as a failed liberal reform. In this article, Professor DiFonzo re-examines the origins of the no-fault movement, concluding that the abandonment of fault grounds was conceived as a conservative measure intended to facilitate the reversal of the escalating divorce rate and to replace traditional marital dissolution with therapeutic divorce. Compulsory conciliation was the key tool in the anticipated era of modern divorce, in which newly-empowered family courts merged with the social-science and psychiatric establishment to dramatically expand the state's role in supervising family life.

The reform collapsed at mid-point, achieving only the jettisoning of divorce grounds. Professor DiFonzo argues that while the envisioned super-courts were never funded, an unintended consequence of the reform battle has survived to haunt divorce law for the next generation. The elimination of grounds transformed mutual consent divorce, the operating milieu for most of the twentieth century, into divorce on demand. The transition in divorce law from a mild reinforcement of mutuality to an enshrinement of the right of unilateral marriage demolition has resulted in a significant loss for women.

"Love, the quest; marriage, the conquest; divorce, the inquest."¹

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1. Helen Rowland, *Reflections of a Bachelor Girl* (1903), in *PETER'S QUOTATIONS: IDEAS FOR OUR TIME* 324 (Laurence J. Peter ed., 1977).

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I. INTRODUCTION: THERAPEUTIC DIVORCE AFTER WORLD WAR II

A. "Directive Therapy" in Divorce

As the shift intensified in the structure of American family life from the "institutional" to the "companionship" mode in the years after World War II, divorce reformers focused on efforts to recast the divorce court as a psychoanalytic institution, modelled after the juvenile court. In an effort to win acceptance for their radical move to stem the rising divorce rate, these reformers, led by Ohio Judge Paul W. Alexander, proposed substituting therapeutic for fault divorce. But the true agenda of social control revealed itself in its coercive conciliation procedures. Therapeutic divorce represented compelled nondivorce, holding families together through "directive" psychiatry.

The last hurrah of therapeutic divorce came in the 1960s in England and California. Realizing that fault was no longer a barrier to divorce by mutual consent, conservative reformers in both jurisdictions staged a dramatic gambit. In this last and sometimes comic scenario, reformers gambled that eliminating all fault grounds would be a sufficient enticement for divorce-minded couples to submit to a reconciliation-minded social welfare establishment. This clash of minds was supposed to yield a lower divorce rate. The reformers nearly succeeded.

But the resulting fiasco not only facilitated a divorce boom, it enshrined in divorce law a predilection for absolute gender egalitarianism. Given the continuing extent of discrimination against women, as manifested primarily in the labor force and in the cultural assumptions about the primacy of women's maternal and custodial role, a divorce law mandating strict equality as to support and property distribution serves to perpetuate the disadvantaged field in which

women find themselves after divorce. The reification of no-fault ideology has yielded divorce on demand, with little heed to the inequities of property division and child and spousal support. The rival law systems have been made one, but order has not brought sanity.

B. California and England

In codifying its laws in 1872, California provided for six divorce grounds: adultery, extreme cruelty, wilful desertion, habitual intemperance, wilful neglect, and conviction of a felony.² The only statutory deviation from fault came in 1941, when the legislature authorized divorces in cases of incurable insanity. In the 1960s, on the eve of the most dramatic reform in American divorce law, the Golden State calmly reflected the major trends in national divorce patterns. Its divorce rate, though higher than the national average, was on a par with its western neighbors. California had not experimented with incompatibility or living apart statutes, but its supreme court had practically gutted recriminatory defenses.³ In typical ten minute court hearings, ninety-five percent of divorce complainants blithely related prefabricated stories of their spouses' "extreme cruelty" destroying their marriage.

According to Herma Hill Kay, a leading figure in the 1960s no-fault movement, "[I]t was impossible to make divorce easier in California than it already was."⁴ Indeed, when Governor Edmund G. Brown appointed a commission in 1966 to begin a "concerted assault on the high incidence of divorce in our society and its often tragic consequences,"⁵ some worried Californians rushed to the courts to get divorced before the anticipated legal tightening took effect.⁶

In England, the official Church wielded its declining moral authority as best it could in favor of one last push against divorce. Under the auspices of the Archbishop of Canterbury, the Church's plan called for a full-service family court, with a coterie of social science

2. CAL. CIV. CODE § 92 (West 1954).

3. See *DeBurgh v. DeBurgh*, 39 Cal. 2d 858, 250 P.2d 598 (1952).

4. HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 46-47 (1988) (footnote omitted).

5. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 1 (1966) [hereinafter GOVERNOR'S COMMISSION] (quoting Governor Edmund G. Brown, *Charge to the Commission*, May 11, 1966).

6. MICHAEL WHEELER, *NO-FAULT DIVORCE* 27-28 (1974).

experts ready to conduct a comprehensive "inquest" on every allegedly-deceased marriage.⁷ Heavily influenced by the report of the Archbishop's group, the California reformers proposed a similar mix of coercive therapy and legal obstacles to divorce.

Those petitioners who anticipated that the reformers would try to raise the legal threshold correctly read the tea leaves of therapeutic divorce. But those litigative sooners lacked confidence in their cohorts. Throughout the century, informal divorcing under cover of the fault system had outflanked the conservative reforms in both England and the United States. In this final sally, the contradictions inherent in compulsory conciliation combined with a rejection of the hefty price tag for family courts to yield a familiar divorce paradigm in new clothes. The Anglo-American no-fault revolution was dressed in the raiment of the therapeutic salvation of marriage. But the result was naked divorce.

II. OBJECTIONS TO UTOPIA

In 1953, at a symposium on the interprofessional approach to family problems, maverick law professor Quintin Johnstone warned the participants that, despite the popular appeal of family courts, their spread faced strong opposition. Johnstone outlined the objections: the high cost of the super-staffed tribunals, lawyers' distrust of social workers and resentment of the potential loss of fees in a nonadversary procedure, the moral and ethical opposition of some members of the bar and some religious groups to compulsory counseling, and the sense that courthouse reconciliations attempted after the parties had decided to divorce came too late.⁸ Johnstone turned out to be prescient.

The opposition to compulsory conciliation first came from psychiatrists who objected to directed counseling. Believing the norms of their profession were compromised in the quest for preserving marriages, some psychiatrists protested. As Dr. Thomas French explained, it was not a psychiatrist's business "either to try to save a marriage or to try to destroy it."⁹ Far from dovetailing with the reformers' premise that divorce-seekers were impulsive and childish, the canon of individual empowerment began with the opposite presumption — that psychotherapy assisted adults to walk their own

7. REPORT OF THE MORTIMER COMMISSION OF THE CHURCH OF ENGLAND, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY 70 (1966) [hereinafter PUTTING ASUNDER].

8. Quintin Johnstone, *Family Courts*, 22 U. KAN. CITY L. REV. 18 (1953).

9. Thomas M. French, M.D., *Contributions to a Therapeutic Solution to the Divorce Problem: Psychiatry*, in CONFERENCE ON DIVORCE 62, 62 (The University of Chicago Law School, Conference Series No. 9, Feb. 29, 1952) [hereinafter CONFERENCE ON DIVORCE].

road to personal independence.

Over and again, the advocates of reform acknowledged the tension between therapeutic divorce and other therapeutic norms, only to fall back on a melange of ideological hope and anecdotal experience, clumsily cobbled together with reference to the effectiveness of the juvenile court in dealing with recalcitrant children. Emily Mudd, the director of the Marriage Council of Philadelphia, responded to Dr. French's concerns by arguing that a skilled psychiatrist could assist couples in generating the motivation to reconcile.¹⁰

Insisting that treatment could begin with reluctant patients, Mudd noted that because "the most prevalent reason for divorce is the lack of maturity of one or both partners . . . how can we expect the most childish and immature voluntarily to seek help?"¹¹ Sarah Schaar, the head of the legal department of Chicago's Jewish Family and Community Center, stressed her "very definite feeling" that compulsory counseling worked.¹² Paul Alexander asserted that just as police herded juveniles into court, so courts should steer couples into counseling.¹³ He expected "respectable case work" to emerge from this procedure.¹⁴ New York City Judge Anna M. Kross responded to Dr. French's remarks by stating that she had "yet to find the person who, in the final analysis, is not willing to accept help."¹⁵

Dr. French was outgunned in this exchange, and his views remained in the minority for years. In 1961, the A.B.A.'s Family Law Section Subcommittee on the Conciliation Court reported the continuing controversy about the propriety of strong-armed conciliation. While noting that many social workers find the tactics repugnant or ineffective, the committee insisted that "all are convinced that what we term 'gentle judicial coercion' plays an important role in effecting reconciliations."¹⁶

Ultimately, the contrary views prevailed, resulting in a sharper

10. Emily H. Mudd, *Contributions to a Therapeutic Solution to the Divorce Problem: Social Work and Marriage Counseling*, in CONFERENCE ON DIVORCE, *supra* note 9, at 65, 67.

11. *Id.* at 68. Mudd compared couples seeking divorce to ten-year-olds biting, scratching, and beating each other. *Id.* at 69.

12. Francis J. Nosek & Sarah Scharr, *Discussion*, in CONFERENCE ON DIVORCE, *supra* note 9, at 69, 72.

13. *Id.* at 73.

14. *Id.*

15. Anna M. Kross, *Therapeutic Solution of Family Conflicts*, in CONFERENCE ON DIVORCE, *supra* note 9, at 78, 80.

16. Roger A. Pfaff, *The Conciliation Court of Los Angeles County*, 1961 SEC. FAM. L. 35, 37.

distinction between the role of judges and that of behavioral scientists. While perhaps not entirely sharing Thomas Szasz' view of compulsory counseling as "moral Fascism,"¹⁷ the mental health and legal professions began to demarcate their boundaries more clearly. Counseling took place away from the courthouse. Judges did not pretend to practice social work. This cleavage reflected a return to the recognition of the antipodal natures of judging and counseling, and it sounded the death knell for family courts.

III. "BOB-HAIRED, FLAT-HEELED SOCIAL WORKERS"

Judge Paul W. Alexander, the leading proponent of family courts, enjoyed telling the story of the older judge who thoroughly disliked the notion of merging social science and law: "[He] told me that I was wasting the taxpayers' money in hiring those bob-haired, flat-heeled social workers; that their reports were illegal and that I would get myself in trouble if I used them."¹⁸ That older judge was not the only member of the legal profession who feared that family problems would become the "domain of impractical, theoretical and inexperienced social workers."¹⁹

Lawyers' attacks on the family court ranged from petty dislike of social workers and peevishness over the loss of fees should divorce clients reconcile, to serious concerns that compulsory counseling unconstitutionally burdened an individual's right to privacy.²⁰ Juvenile courts had already become "social workers' courts,"²¹ and some lawyers worried about the shift to "social information with its seemingly alarming potentialities for destruction of traditional concepts of adversary litigation."²²

The divorce bar frequently complained about loss of legal fees should family court judges and their social work contingents successfully reconcile otherwise divorce-bound clients. Paul Alexander weighed in on the side of the social scientists, mockingly suggesting that attorneys' reluctance to support conciliation was attributable to

17. THOMAS SZASZ, *LAW, LIBERTY, AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES* 248 (1963).

18. Paul W. Alexander, *What is a Family Court, Anyway?*, 26 CONN. B. J. 243, 254-55 (1952).

19. J. E. Bindeman, *Comment on the Family Court Bill*, 21 J. B. ASS'N D.C. 121, 122 (1954).

20. The latter argument was made by David E. Seidelson, *Systematic Marriage Investigation and Counseling in Divorce Cases: Some Reflections on its Constitutional Propriety and General Desirability*, 36 GEO. WASH. L. REV. 60, 79-89 (1967). See the discussion in ROBERT J. LEVY, *UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS* 118-30 (monograph prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws, 1968).

21. Johnstone, *supra* note 8, at 21.

22. Allan Fisher, *A Family Court for the District of Columbia*, 20 J. B. ASS'N D.C. 577 (1953).

venality: "For [matrimonial lawyers] divorce is their rent, their stenographer's salary, their baby's shoes, sometimes their solid gold Cadillac."²³

Professional rivalry surely fueled the bar's antipathy to the amalgamation of law and social work.²⁴ But distrust of any system of organizing knowledge and action which sought to displace the traditional role of client advocacy provided a strong motivation for many barristers. Although their recalcitrance was sometimes phrased as an insistence "that the law remain pure,"²⁵ often a clannish repugnance emerged, as in the churlish opinion of many judges and lawyers that psychiatrists, social workers, and marriage counselors were a "dubious or even evil influence on our society."²⁶

"Social workers' courts" were also expensive, although no consensus was reached on the affordability of family courts until the late 1960s.²⁷ One side of the argument pointed to the enormous costs of supporting a professional staff.²⁸ The other acknowledged those expenses, but asserted that great savings to the court system and society would flow from decreased rates of divorce and juvenile delinquency.²⁹

On balance, however, the most telling criticisms addressed the

23. See WHEELER, *supra* note 6, at 115. Both Judge Thomas J. Cunningham and reporter John Bartlow Martin observed that some divorce attorneys disliked the Los Angeles Conciliation Court because it dampened their fee-generating ability. Thomas J. Cunningham, *Education, Conciliation as Solutions to Divorce*, in *DIVORCE AND FAMILY RELATIONS: A COMPILATION OF THE ORIGINAL DICTA PUBLISHED BY THE VIRGINIA LAW WEEKLY 1949-1950*, at 46-49 (1950) [hereinafter *DIVORCE AND FAMILY RELATIONS*]; John B. Martin, *Divorce: Effort to Save a Troubled Marriage*, *SATURDAY EVENING POST*, Nov. 8, 1958, at 36, 139-42 (Nov. 8, 1958).

24. See, e.g., Gertrude Samuels, *The Family Court — How It Could Work*, *N.Y. TIMES*, Apr. 29, 1956 (Magazine), at 17, 56-60; Sol M. Isaac, *The Status of Lawyer-Social Worker Cooperation*, 3 *J. FAM. L.* 53-62 (1963); Roger A. Pfaff, *The Role of the Social Worker in the Judicial Process*, 50 *A.B.A. J.* 565-68 (1964).

25. John B. Martin, *Divorce: A Little Nest of Hate*, *SATURDAY EVENING POST*, Nov. 22, 1958, at 36, 121-26; see also JOHN H. MARIANO, *A PSYCHOANALYTIC LAWYER LOOKS AT MARRIAGE AND DIVORCE* 254-56 (1952) (expressing concern that social workers had been trained to view clients in general categories, while lawyers focused on the individual).

26. *THE FAMILY AND THE LAW* 159, 160 (Joseph Goldstein & Jay Katz eds., 1965) (quoting treatise by Quintin Johnstone).

27. Howard A. Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 *PAC. L.J.* 156, 171 (1970).

28. See, e.g., William M. Kephart, *The Family Court: Some Socio-Legal Implications*, 1955 *WASH. U. L.Q.* 61, 71; Quintin Johnstone, *Divorce: The Place of the Legal System in Dealing with Marital-Discord Cases*, 31 *OR. L. REV.* 297, 322-23 (1952).

29. See, e.g., Alexander, *supra* note 18, at 265-66; Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 *VAND. L. REV.* 633, 637 (1956); Henry H. Foster, Jr., *Procrustes and the Couch*, 2 *J. FAM. L.* 85, 93 (1962).

central concerns of power in society and the different approaches of law and social science to the resolution of issues of authority. In an oft-cited 1956 article, Professor Max Rheinstein asked rhetorically if American society was "ready to concede to the state that same grave power [as in criminal law] of transforming the personality structure of a citizen simply because he has failed to make a success out of a marriage with some other individual?"³⁰ The therapeutic divorce advocates were ready, but American society was beginning to retreat from that perimeter.

IV. THE "FAIRYLAND OF BENEVOLENCE"

The rejection of the family court ideal was of a piece with the reconsideration of the juvenile courts in the 1960s. Following up on the early criticism of Paul Tappan and others, Charles W. Tenney, Jr. described the yawning gap between the magnanimous ideals of the juvenile court and its shoddy performance to date. Writing in the 1969 *Annals of the American Academy of Political and Social Science*, Tenney called the juvenile court myth a "fairylane of benevolence."³¹ The deprivation of a juvenile's rights proved to be the dark side of ostensible compassion, as the United States Supreme Court discovered in two 1960s cases, *Kent v. United States*³² and *In re Gault*.³³

The problems with the juvenile court were legion, beginning with deficient staffing and funding.³⁴ A 1963 survey found that 25% of juvenile judges had no legal education; worse, 20% had no college education.³⁵ One-third of the judges reported that they had no probation officers or social workers attached to their court.³⁶ Appointment as a juvenile court judge, a shining honor at the outset, had slid in prestige by mid-century to the embarrassment of serving on what was nicknamed the "diaper squad."³⁷ The effort to banish lawyers from the court had largely succeeded; but the exclusion resulted

30. Rheinstein, *supra* note 29, at 639.

31. Charles W. Tenney, Jr., *The Utopian World of Juvenile Courts*, 383 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 107 (May 1969); see also PAUL TAPPAN, JUVENILE DELINQUENCY *passim* (1949).

32. 383 U.S. 541 (1966).

33. 387 U.S. 1 (1967).

34. On the "haphazard" arrangement of juvenile court resources, see ANDREW J. POLSKY, THE RISE OF THE THERAPEUTIC STATE 94-97 (1991).

35. These findings were reported in Tenney, *supra* note 31, at 116.

36. *Id.*

37. *Id.* at 110. See also Will C. Turnbladh, *Midcentury White House Conference of Children and Youth*, 2 JUV. CT. JUDGES J. 11, 11-12, 26 (1951) (juvenile courts lack the status of other courts and consequently have difficulty attracting high-caliber judges). In 1967, the President's Commission of Law Enforcement bemoaned the disappearance from juvenile courts of the "mature and sophisticated judge, wise and well-versed in law and the science of human behavior." TASK FORCE REPORT ON JUVENILE DELINQUENCY

in the invisibility of juvenile issues in legal academia. Not until 1967 was the first case book published on the subject of juvenile courts.³⁸ The confidentiality of juvenile court proceedings exacerbated the lack of public and professional attention devoted to these issues. In many ways, these once-revolutionary courts had become the backwater of the law.

But the deeper dilemma was structural: combining the powers of a criminal court with the resources of a social agency resulted in an undigestible stew. Judge Alexander insisted that the Bill of Rights did "not readily fit into the picture of the juvenile courts," and complained that the court itself was not receiving a "fair trial."³⁹ But in the words of contemporary critic David Matza, the juvenile court "masquerade[d] as a civil court despite its tell-tale dealings in penal sanction."⁴⁰ In the 1960s, the mask was lifted.

The renewed emphasis on "rights" found in the *Kent* and *Gault* cases reflected a sense that the project of socialized justice had been tried and found wanting. The Supreme Court attributed the "highest motives and most enlightened impulses" to the originators of the juvenile court.⁴¹ But it remarked that the "constitutional and theoretical basis for this peculiar system is — to say the least — debatable."⁴² And in practice, the Justices mildly concluded, "the results have not been entirely satisfactory."⁴³ Law Professor Henry H. Foster, Jr. crisply summed up the import of *Gault's* insistence on procedural due process for juveniles in remarking that the Supreme Court "refuses to believe that kangaroo-court procedures are therapeutic."⁴⁴

AND YOUTH CRIME 7 (1967). Herma Hill Kay noted that juvenile and domestic relations assignments went to junior judges in many urban jurisdictions, and even a six-month rotation was more than many judges desired. Herma H. Kay, *A Family Court: The California Proposal*, 56 CAL. L. REV. 1205, 1208-09 (1968). One family court judge wittily pointed out why most divorce judges dislike their work: "There isn't much satisfaction in being the referee in a series of fixed fights where a one round knockout has been arranged for in advance. Robert W. Hansen, *Three Dimensions of Divorce*, 50 MARQ. L. REV. 1, 3 (1966).

38. See ORMAN W. KETCHAM & MONRAD G. PAULSEN, CASES AND MATERIALS RELATING TO JUVENILE COURTS (1967).

39. Paul W. Alexander, *Constitutional Rights in Juvenile Court*, 46 A.B.A. J. 1206, 1207 (1960).

40. Alexander, *supra* note 39, at 1207; DAVID MATZA, DELINQUENCY AND DRIFT 71 (1964).

41. *In re Gault*, 387 U.S. 1, 18 (1967).

42. *Id.*

43. *Id.*

44. *Id.*; Henry H. Foster, Jr., *The Future of Family Law*, 383 ANNALS AM. ACADEMY OF POL. & SOC. SCI. 129, 143 (May 1969).

The founders' substitution of a social evaluation of the child for a legal trial of the offense resulted in a functional presumption of guilt and the application of punitive sanctions under the guise of treatment.⁴⁵ Judge Alexander blasted the adversarially-oriented juvenile court lawyer who "possesses no social conscience or is constitutionally contentious or vainly legalistic or mentally myopic, [and who] seems impelled to earn his fee by putting on a show for his client."⁴⁶ But Law Professor Thomas A. Coyne called for the return of adversarial lawyers to the juvenile court to reestablish the balance between the court and the juvenile.⁴⁷ Finally, in 1970, the Supreme Court insisted that the adult criminal law standard requiring proof beyond a reasonable doubt applied during the adjudicatory stage of juvenile proceedings. The juvenile court was, in short, ordered to act more like a court and less like an omnipotent and irresponsible social agency.⁴⁸

Contempt for juvenile court processes was not limited to the bench and bar. Social personnel dealing with juvenile delinquency were also critical of the unproductive yoking of therapeutic discourse and a legal setting. Andrew Polsky aptly summarized their perspective:

A legalistic outlook warped the court's understanding of its clients: while science might disdain rigid categories and simple labels, a judicial institution found them indispensable. Further, given that according to the therapeutic ideal a client had to participate voluntarily in the treatment relationship, it did not seem possible to treat youngsters under the court's direction. Juvenile offenders certainly grasped the cold fact that they were subject to legal discipline. And this led them to dismiss clinicians associated with the court as an annoyance or to manipulate them to secure lenient treatment.⁴⁹

The reconstitution of juvenile justice paralleled the disintegration

45. Foster, Jr., *supra* note 44, at 143.

46. Alexander, *supra* note 39, at 1209. Social Work Professor Tom A. Croxton also called for the juvenile court bar to trade its adversariness for a role as a "participant decision maker," part of the "dispositional team," including behavioral scientists and the court, all sharing the aim of rehabilitating the child. Tom A. Croxton, *The Kent Case and Its Consequence*, 7 J. FAM. L. 1 (1967).

47. Thomas A. Coyne, *Who Will Speak for the Child?*, 383 ANNALS AM. ACA. POL. & SOC. SCI. 34, 34-47 (May 1969).

48. *In re Winship*, 397 U.S. 358 (1970). The following year, the Court drew the line in the recriminalization of the juvenile court at the imposition of a jury trial requirement. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court declined to extend to juveniles the constitutional right to a trial by jury, thus preserving for the juvenile court at least one of the attributes of its independent procedure.

49. POLSKY, *supra* note 34, at 191 (citations omitted). For a contemporary perspective, see Karl Birnbaum, *A Court Psychiatrist's View of Juvenile Delinquents*, 261 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 57-58 (Jan. 1949). Robert Kramer observed in 1959 that, in their preoccupation with rehabilitation, some juvenile courts "overlook the fact that sometimes people don't want to be reformed, and that sometimes people don't want to be told what to do, even if the advice is wise." DUKE UNIVERSITY INSTITUTE OF FAMILY LAW, PROCEEDINGS OF THE INSTITUTE OF FAMILY LAW 9-10 (John S. Bradway ed., 1959) (quoting Robert Kramer) [hereinafter PROCEEDINGS].

of support for the family court idea. Even though William M. Kephart asserted in 1955 that he could not recall a single article attacking the family court in law journals, social science publications, or daily newspapers, the plethora of kudos had not produced comprehension.⁵⁰ At the end of the decade, Judge Alexander was still heard protesting that "very few people understand what a family court is or how it operates."⁵¹

But perhaps most people understood too well. As the failure of the court-supervised Utah marriage counseling experiment illustrated, the blend of judicial compulsion and therapeutic independence satisfied no one, least of all the baffled and frustrated clients.⁵² Not only had family courts been invented to "solve" the predicament of troubled families, but the "solution" was preordained to be enforced reconciliation in the majority of cases.⁵³

That American divorce practices remained unyielding in the face of this double bind should, in retrospect, have come as no surprise. Courts, as Charles Tenney reminded his readers, "do not solve problems; they resolve issues."⁵⁴ The peremptory tools of a court's legal equipment render it ill-suited to broad social or psychological questions.

Recognition of this limitation was, of course, at the heart of the therapeutic divorce advocates' call for an infusion of social science experts into the heart of the court's decision-making. But the expectation that social casework would catalyze judicial operation did not count on the converse impact. As courts became socialized, counseling assumed a judicial demeanor. When criticized, the system pulled apart again. These contradictions might be termed a socio-legal Heisenberg comedy: even when the position of a family court could be identified, its momentum carried it elsewhere.

Moreover, many family courts were socialized in name only; understaffed, underfunded, and overwhelmed, they processed domestic cases on an assembly line indistinguishable from the procedure in standard-issue civil courts with divorce jurisdiction. Sociologist Ray

50. Kephart, *supra* note 28, at 61.

51. PROCEEDINGS, *supra* note 49, at 174. Indeed, one hint that the family court idea had not been fully digested by American professionals was the glib nature of its universal acceptance. Quintin Johnstone reported that family courts were acceptable to both divorce liberals and conservatives, even those opposed to divorce on religious grounds. Johnstone, *supra* note 28, at 317.

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

53. *Id.*

54. Tenney, *supra* note 31, at 117 (emphasis omitted).

Baber described the weary scene at such courts in the 1950s:

Judges without special training, too few probation officers or officers with little or no qualification for their work, and a lack of technically trained specialists such as psychiatrists frequently make of the court a poor imitation of what it could be. It is depressing to sit and watch cases pass in array before the judge — cases in which the trouble has been developing for ten years, yet which are disposed of in ten minutes by a judge whose remarks to the persons before him show no understanding of their problems. A tired officer will lay a few record sheets before the judge before he hears the principals and whisper a few words to him in recommendation. Often these are based upon an extremely brief contact with the principals⁵⁵

Baber's observations seem almost impossible to reconcile with Alexander's rhetoric and practice. But perhaps that was the problem. Max Rheinstein opined that he would willingly support an open-ended family court regime if "all the courts . . . would be staffed with Paul Alexanders."⁵⁶ Alexander himself may have appeared everywhere, but he only sat in Toledo.

From the outset, the therapeutic divorce venture had also been plagued by underfunding.⁵⁷ The 1948 White House Conference had focused national attention on the report of Alexander and Reginald Heber Smith, calling for their new approach to divorce reform. The report was adopted by the 1948 and 1949 Conventions of the American Bar Association, both of which expressed the desire that President Truman appoint a National Commission.⁵⁸

But despite his "wholehearted concurrence in the objectives of the Conference,"⁵⁹ Truman did not act, and the A.B.A. was forced to establish its own commission in 1950.⁶⁰ Hopes that government or private foundations would fund research were dashed, with the single exception of Maxine Virtue's 1956 field study of metropolitan divorce courts.⁶¹

Max Rheinstein, as a member of the A.B.A.'s Interprofessional Commission, succeeded in persuading the University of Chicago's Comparative Law Research Center to conduct several seminars, which resulted in the publication of some essays on the subject. All

55. RAY E. BABER, *MARRIAGE AND THE FAMILY* 668 (2d ed. 1953).

56. *PROCEEDINGS*, *supra* note 49, at 199. For nearly three decades, Paul Alexander served as Judge of the Juvenile and Domestic Relations Court in Toledo, Ohio.

57. MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* viii-ix (1972).

58. RHEINSTEIN, *supra* note 57; *see also* Charlton Ogburn, *The Role of Legal Services in Family Stability*, 272 *ANNALS AM. ACAD. POL. & SOC. SCI.* 127 (1950); Mabel A. Elliott, *Divorce Legislation and Family Instability*, 272 *ANNALS AM. ACAD. POL. & SOC. SCI.* 134 (1950).

59. UNITED STATES INTER-AGENCY COMMITTEE ON BACKGROUND MATERIALS, *NAT'L CONFERENCE ON FAMILY LIFE, THE AMERICAN FAMILY: A FACTUAL BACKGROUND* at ii (1949).

60. RHEINSTEIN, *supra* note 57; Ogburn, *supra* note 58; Elliott, *supra* note 58.

61. MAXINE B. VIRTUE, *FAMILY CASES IN COURT* (1956).

in all, it was an anticlimactic yield from such a melodramatic beginning.⁶² But even greater anticlimax lay ahead.

The proponents of therapeutic divorce had always championed integrated family courts to deal with all domestic issues, from delinquency to divorce. But the constitutionalization of juvenile court procedure effected by the Supreme Court in the 1960s highlighted the fact that the adjudication of juvenile delinquency — even by a ‘socialized’ court — was a function of criminal law.⁶³

The more that therapeutic divorce proponents coupled the essence of the family court to the rehabilitative philosophy of the juvenile court, the more that divorce-minded couples were reminded of the obloquy expressed by the reformers’ rhetoric that divorce was largely impulsive and that irresponsible divorce was a crime against society. Divorce and crime proved to be oil and water. Alexander’s view that the family court “should have in reserve ample authority for dealing with people who seem to understand only the language of authority,”⁶⁴ certainly appeared to paint divorce with the same brush used for criminal cases.

The steeply rising divorce rate among the middle-class in the 1960s swept into the issue millions who believed that the criminal law and the juvenile court were largely state measures for the control of the lower class.⁶⁵ While one family court judge wondered if “placing juvenile matters in the same court with husband-and-wife cases will have a debilitating effect upon the long-developed specialized approaches of the juvenile court,” many couples considering divorce worried about the spillover in the other direction.⁶⁶

The linkage of divorce and crime was also a product of institutional cross-fertilization. In 1959, the National Probation and Parole Association proposed a model family tribunal in its Standard Family Court Act.⁶⁷ The plan was developed in cooperation with the United

62. RHEINSTEIN, *supra* note 57.

63. See *Kent v. United States*, 383 U.S. 541 (1966); *In Re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970).

64. Paul W. Alexander, *Family Life Conference Suggests New Judicial Procedures and Attitudes Toward Marriage and Divorce*, 32 J. AM. JUDICATURE SOC’Y 43 (1948).

65. LYNNE C. HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES*, 285-86 (1980).

66. Jacob T. Zukerman, *The Family Court — Evolving Concepts*, 383 ANNALS AM. ACAD. POL. & SOC. SCI. 127 (May 1969). See also the discussion of this phenomenon by Halem, *supra* note 65, at 285-86.

67. 5 NAT’L PROBATION AND PAROLE ASS’N J. 97, 99-160 (1959). See also Zukerman, *supra* note 66, at 126.

States Children's Bureau and the National Council of Juvenile Court Judges.⁶⁸ Court services available under the model included both probation officers and marriage counselors.⁶⁹ The frequent cry of therapeutic reformers that divorce bred juvenile delinquency was answered by the development of comprehensive family courts, equipped with an equal measure of arrows and olive branches. The message could hardly have been clearer: if you fail to heed the marriage counselor, you will have to deal with the probation officer. As Paul Alexander's axiom expressed it, "[W]ho doth not answer to the rudder shall answer to the rock."⁷⁰

V. DIVORCE IN THE ENGLISH STYLE

In 1963, on the introduction in Parliament of a bill permitting divorce upon seven years' marital separation, the Archbishop of Canterbury protested so stridently that the effort to introduce no-fault divorce was withdrawn.⁷¹ Yet before the end of the decade, Great Britain, led by its Church, had revolutionized divorce law and substantially influenced the course of reform in the United States.⁷²

The English Divorce Reform Act of 1969 was intended to eliminate the hypocrisy of the fault system, with its expansion of the cruelty ground beyond all reason, while more effectively preserving marriages.⁷³ It soon became clear, however, that Parliament had approved only a half-hearted therapeutic divorce measure which had absolutely failed. The entropy of divorce-minded wives and husbands could not be contained.

As recently as 1962, an important book on English divorce practice asserted that "the law of the Church is the rock on which much of our modern law has been built."⁷⁴ The Church of England's legislative views were largely articulated by Parliament acting in full accord with Church principles. Legal regulation of marriage reflected the strength of this unity of expression. Lord Penzance's judicial dictum that marriage "as understood in Christendom may . . . be defined as the voluntary union for life of one man and one woman to the exclusion of all others"⁷⁵ encapsulated the position of both Church and State toward the central institution of social life.

68. NAT'L PROBATION AND PAROLE ASS'N J., *supra* note 67, at 99-160.

69. *Id.*

70. VIRTUE, *supra* note 61, dedication (quoting the words mounted above a model of a ship located in Judge Alexander's chambers at the Toledo Family Court).

71. See Olive M. Stone, *The Matrimonial Causes and Reconciliation Bill 1963*, 3 J. FAM. L. 87 (1963).

72. See generally MARY ANN GLENDON, *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* (1977).

73. WILLIAM LATEY, *THE TIDE OF DIVORCE* 152-57 (1970).

74. JOHN M. BIGGS, *THE CONCEPT OF MATRIMONIAL CRUELTY* 2 (1962).

75. *Hyde v. Hyde and Woodmansee* 1 L.R. - P. & D. 130, 130 (1866).

In the 1950s, the massive and unsuccessful effort by the Morton Commission to examine and revise the entire structure of English marriage and divorce law reflected deep social fissures. Robert S. W. Pollard, Chair of the Marriage Law Reform Society, noted the common opinion among "responsible adults" in the 1950s that if a divorce is necessary, "it should be by agreement and without rancour."⁷⁶ Under the current state of the law, Pollard added, this conviction led to the commission of collusion and perjury.⁷⁷

At the outset of the decade, Eirene White introduced a private member bill in Parliament proposing a "marital breakdown" standard for divorce, one that could be met when the couple had been separated for seven years.⁷⁸ In view of the controversy raised by her proposal, White withdrew the bill in exchange for the government's agreement to establish a Royal Commission to study the issue.⁷⁹

The Royal Commission on Marriage and Divorce, chaired by Lord Morton of Henryton, considered a prodigious amount of evidence, heard from 67 organizations and 48 individuals, conducted 102 meetings, labored for 4 years, and produced a report in 1956 containing more than 400 pages.⁸⁰ In the end, deeply fractured, it settled nothing.

The Morton Commission stalemate revealed the Church of England's power as "the most influential opponent of change in the matrimonial law."⁸¹ The Archbishop of Canterbury strongly argued against any reform, and his views largely prevailed, as no legislative change could be premised on such a divided Report.⁸² The Church's memorandum submitted to the Commission insisted that only the fault regime validated true moral principle. Awarding a divorce to a guilty party would reek of injustice. The Church earnestly maintained that Eirene White's bill would supply the motivation for unscrupulous interlopers to form illicit liaisons with married persons, incited by the knowledge that the faithless spouse would be free to

76. Robert S. W. Pollard, *The Need for an Inquiry into Divorce*, 117 CONTEMP. REV. 39 (1951).

77. *Id.*

78. PUTTING ASUNDER, *supra* note 7, at 9-12; DOROTHY M. STETSON, A WOMAN'S ISSUE: THE POLITICS OF FAMILY LAW REFORM IN ENGLAND 159-61 (1982).

79. Stone, *supra* note 71, at 93.

80. REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE, 1956, CMD 9678.

81. Oliver B. McGregor, *Equality, Sexual Values and Permissive Legislation*, 1 J. SOC. POL'Y 51 (1972).

82. See RHEINSTEIN, *supra* note 57, at 323.

marry the paramour in seven years.⁸³

VI. "DIVORCE, THE INQUEST"

In 1963 Leo Abse attempted to revive in Parliament Eirene White's 1951 proposal for divorce upon seven years of separation. In the House of Lords, the Archbishop of Canterbury opposed a separation ground as a subterfuge for promoting divorce by consent.⁸⁴ Abse's bill failed. However, in the course of debate, the Archbishop also expressed his dissatisfaction with the existing law and the lax procedures in divorce courts:

If it were possible to find a principle at law of breakdown of marriage which was free from any trace of the idea of consent, which conserved the point that offenses and not only wishes are the basis of the breakdown, and which was protected by a far more thorough insistence on reconciliation procedure first, then I would wish to consider it.⁸⁵

In the spirit of therapeutic divorce, the Archbishop intended any new marital breakdown standard as a tool for tightening, not liberalizing, divorce law and procedure.⁸⁶ Conservatives had always maintained that a single act (or even repeated incidents) of adultery or cruelty did not necessarily destroy the marriage.⁸⁷ The marital fault system granted divorces upon proof of transgression, even when breakdown was not established. This regime had once been prized not for its subjective virtue, but for its stark objectivity in staking out some line of demarcation between acceptable and unacceptable marriages.⁸⁸ Now that line had crumbled.

The Archbishop was hinting in the House of Lords debate that the law should go further: it should require that divorce-minded spouses not only prove their partners' guilt, but further establish that the marital relation had irrevocably terminated because of that culpable

83. The memorandum is detailed in PUTTING ASUNDER, *supra* note 7, at 91-92.

84. The Archbishop was not alone among church leaders. On April 3, 1963, a joint statement opposing the seven years' separation proposal was issued by the heads of the Church of England, the Roman Catholic Church, the Church of Wales, and the Free Church Federal Council. Secular opposition to the proposal came three days later in a speech attacking Abse's bill by Sir Jocelyn Simon, President of the Probate, Divorce and Admiralty Division of the High Court. See Stone, *supra* note 71, at 94 (1963).

85. 250 PARL. DEB., H.L. (5th ser.) 1547 (1963).

86. *Id.*

87. As Reginald Haw, Vicar of Humberstone, put it in his matrimonial treatise, "[I]t is nothing short of astounding that there was so little realization . . . that worse things can happen to a marriage than adultery." REGINALD HAW, THE STATE OF MATRIMONY 105 (1952).

88. See PUTTING ASUNDER, *supra* note 7, at 29-30; RHEINSTEIN, *supra* note 57, at 3; GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 14-15 (1991); RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 566 (1988); Timothy B. Walker, *Disarming the Litigious Man: A Glance at Fault and California's New Divorce Legislation*, 1 PAC. L.J. 182-222 (1970).

action.⁸⁹ The Church would put its moral weight behind a new form of divorce, fault-plus.

In 1964, the Archbishop appointed a committee to explore the Church's position on marriage breakdown as a divorce standard.⁹⁰ After two years of study, the group published *Putting Asunder: A Divorce Law for Contemporary Society*.⁹¹ Consistent with the Archbishop's earlier comments in the House of Lords, the group declared that a breakdown standard was neither the equivalent of divorce by consent, nor "incompatible with a covenant of lifelong intention."⁹²

Echoing the reproaches of Paul Alexander and the family court movement, the Archbishop's group launched a devastating attack on the hypocrisy and fraud of the marital fault system, scoring it "not only on moral and legal grounds, but on social and psychological [grounds] as well."⁹³ It called for fault to be dethroned as the divorce criterion and replaced by marriage breakdown.⁹⁴ Rejecting a menu approach to divorce legislation, the Church group emphasized that fault and marriage breakdown were philosophically incompatible systems.⁹⁵

But *Putting Asunder* went much further than previous approaches. It articulated a system of legal proof of breakdown by analogy to a coroner's inquest.⁹⁶ As a coroner scrutinizes a corpse for clues to its demise, so courts should conduct an inquest on each assertedly dead marriage to determine whether resuscitation — a task normally beyond the capacity of a medical examiner — was possible.⁹⁷

The primary consequence of this bold critique of, and alternative to, the present divorce system would be a startling increase in judicial intervention in daily life. The courts would conduct an inquest to

89. 250 PARL. DEB., H.L. (5th Ser.) 1547 (1963).

90. PUTTING ASUNDER, *supra* note 7, at i.

91. PUTTING ASUNDER, *supra* note 7.

92. *Id.* at 17-18.

93. *Id.* at 28.

94. *Id.* at 28-29. In its appendix on psychological considerations, for instance, the Report noted:

[I]f we concentrate our attention wholly on the actions that are designated "matrimonial offences," we inevitably fail to do justice to the complex of motives in the two interacting persons which finally drives the one to act and the other to treat the action as ground for a divorce petition.

Id. at 144.

95. *Id.* at 31-32, 59.

96. *Id.* at 76-77.

97. *Id.*

evaluate the moribund status of *every* marriage submitted for divorce. Thus, the pro forma procedure adopted in undefended petitions would have to be scrapped. Because approximately ninety-three percent of all divorce petitions were unopposed,⁹⁸ the escalating demands on the justice system would be astronomical. In fact, *Putting Asunder* suggested that, given the requirements of an inquest, "an uncontested case could on occasion call for greater care and judicial skill than one that was contested."⁹⁹

The extent of official intrusion into private life was also reflected in the drafters' call for "considerably expanded" pleadings in divorce cases.¹⁰⁰ These would detail "the history of the marriage in question, the reasons alleged for its failure, any attempts made to achieve reconciliation, and all arrangements proposed for the care of any children, for the disposal of property, and for maintenance in general."¹⁰¹

Establishing "fault" under the existing divorce law would not guarantee a decree, because a petitioner would still bear the burden of showing marital breakdown.¹⁰² Nor would petitioners be assured that theirs would be the only voice a judge heard.¹⁰³ The Archbishop's group recommended that the divorce court have "discretionary power to require the attendance of both parties."¹⁰⁴

The penalty for failing to satisfy the enhanced breakdown standard was denial of the divorce decree. The court should refuse the decree where it felt the proposed maintenance was not adequate to the dependent spouse or children, or "where the conduct of the petitioner in regard to the marriage was found to be such that in the court's judgement making a decree would be against the public interest."¹⁰⁵ In addition to raising the ante by inventing this fault-plus standard, *Putting Asunder* gave divorce judges carte blanche power

98. THE LAW COMMISSION, REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE, 1966, CMND 3123, at 30 [hereinafter FIELD OF CHOICE].

99. PUTTING ASUNDER, *supra* note 7, at 77. To prevent the "automatic" processing of uncontested divorces, the drafters opposed transferring jurisdiction of such cases to county courts. *Id.*

100. *Id.* at 68.

101. *Id.*

102. *Id.* at 76-77.

103. *Id.* at 68, 70.

104. *Id.* at 68. Unafraid to prolong the inquest, the Church of England proposed that a judge have the power "to adjourn the case in order to secure the attendance of a party not present." *Id.* The drafters were far from sanguine that all relevant facts would come to light if the fact-finding process were left to the parties and their counsel alone. Indeed, they felt that the lax process of the courts yielded a street standard of divorce by consent. Given the traditional reluctance of common law judges to engage in inquisitorial procedure, they recommended that, especially in uncontested cases, "provision should be made for the intervention, when needed, of counsel representing the public interest or the interests of children of the family." *Id.* at 70.

105. *Id.* at 30, 75.

to keep the yoke clamped in the "public interest."¹⁰⁶

The comprehensive therapeutic nature of the Church's program was evident in its call for a massive infusion of forensic social workers "as part of immediate procedural reform."¹⁰⁷ These new court officers would assist judges in verifying attempts at reconciliation, testing the reliability of assertions made to the court, and providing further investigative services as requested.¹⁰⁸ *Putting Asunder* served, in short, as the Church of England's last clarion call for conservative reform and as a radical effort to reverse the flow of English divorces.

VII. THE LEGISLATIVE FATE OF "PUTTING ASUNDER"

Despite the prominent reception of *Putting Asunder*, it soon became apparent that the Church could acquiesce in, but no longer command or withstand, divorce reform. Within three months of the publication of the report of the Archbishop's group, the Law Commission produced its own report, *Reform of the Grounds of Divorce: The Field of Choice*.¹⁰⁹

The Law Commission rejected the Church's blueprint for an intrusive family court on the grounds of cost and impracticality.¹¹⁰ Moreover, a "detailed inquest into the whole married life would prove more distasteful and embarrassing" than present fault-based but cursory proceedings.¹¹¹ Nor was the Law Commission impressed by compulsory conciliation. Reconciliation efforts made mandatory would degenerate into wasting "[t]he time of marriage guidance counsellors . . . on 'cock and bull' stories to the detriment of sincere applicants."¹¹²

In detailing its own breakdown scheme, however, the Law Commission chose to reconstitute the old grounds of fault, deeming them alternate methods of showing marital breakdown.¹¹³ Additionally,

106. *Id.* at 70.

107. *Id.*

108. *Id.* The Archbishop's group made no reference to the significant shortage of English social workers in the 1960s, nor any suggestion as to how this personnel deficiency would be remedied.

109. FIELD OF CHOICE, *supra* note 98. The Law Commission had been established to review all English law "with a view towards its systematic development and reform, including . . . the elimination of anomalies . . . and, generally, the simplification and modernization of the law." Law Commissions Act 1965, § 3.

110. FIELD OF CHOICE, *supra* note 98, at 30-31.

111. *Id.* at 31.

112. *Id.*

113. *Id.* at 48-49.

the dissolution of the conjugal relationship could also be premised on two new living apart provisions. Furthermore, divorce could be obtained upon irretrievable marital breakdown which could be proven in one of five ways: adultery, cruelty, desertion for two years, separation for two years if the respondent did not object, or separation for five years.¹¹⁴ With only minor changes, these proposals became law in the Divorce Reform Act of 1969.¹¹⁵

The English reforms maintained the shell of therapeutic divorce, and, as we will see, greatly influenced the California no-fault law. In fact, had the Law Commission's proposals achieved their literal effect, the Divorce Reform Act would have truly achieved a radical conservative revolution. But the Commissioners did away with fault grounds only to revive them as "elements" of the new breakdown standards.¹¹⁶ Proof of a fault "element" would no longer guarantee a successful divorce, for the court was specifically authorized to make an independent evaluation of the alleged marital breakdown.¹¹⁷

Church and state each believed that the 1969 legislation had ushered in a new era of honesty in domestic relations. A stabilization of divorce rates was anticipated, and the bulk of the divorces that did occur would fall into the two breakdown-separation categories.¹¹⁸ Both these expectations were crushed. The Act was quickly judged a failure.¹¹⁹ Most strikingly, divorce reform, a la marital breakdown, resulted in an even more explosive burst of cruelty petitions, from 17.7% of all cases in 1971 to 41.4% in 1986.¹²⁰ The continued proliferation of behavior-based petitions represented a desire for quick terminations that outweighed the negligible stigma attached to fault divorces. Between 1971 and 1986, the percentage of fault-based petitions ranged between 61.4% and 77.8%, despite the existence of two living apart alternatives.¹²¹ Establishing spousal cruelty had remained as easy as ever.

The 1988 Law Commission concluded that the Church of England had been right two decades earlier in insisting on the incompatibility

114. *Id.* at 49. For the full text of the proposals and explanatory text, see *The Grounds of Divorce*, 117 NEW L.J. 827-28 (1967).

115. Divorce Reform Act, 1969, ch. 55 (Eng.). The principal change effected by Parliament was that a petitioner who desired to obtain a divorce on the two-year separation ground was required to obtain the consent of the respondent, not merely the absence of objection. For further analysis of the legislation, see George G. Brown, *Divorce Reform Act 1969*, 120 NEW L.J. 74 (1970); GLENDON, *supra* note 72, at 194-96; LATEY, *supra* note 73, at 152-60.

116. FIELD OF CHOICE, *supra* note 98, at 49.

117. *Id.*

118. GREAT BRITAIN LAW COMMISSION, *FACING THE FUTURE: A DISCUSSION PAPER ON THE GROUND FOR DIVORCE* 30 (1988) [hereinafter *FACING THE FUTURE*].

119. J.M. Eekelaar, *The Place of Divorce in Family Law's New Role*, 38 MOD. L. REV. 241, 248-50 (1975).

120. *FACING THE FUTURE*, *supra* note 118, at Appendix B.

121. *Id.*

of a blend of fault and non-fault grounds within a single divorce system.¹²² But the Law Commission that wrote *Field of Choice*, had also been correct in believing that marital breakdown was not justiciable. Acknowledging that the 1969 compromise had been described in professional journals as "uneasy" and even "bungling," the 1988 Law Commission proposed, finally, to completely divorce fault from matrimonial law.¹²³

What happened to the Divorce Reform Act of 1969? As the Law Commission belatedly acknowledged in 1988, the internal logic of a matrimonial breakdown system leads ineluctably to divorce on demand.¹²⁴ This eventuality is precisely what the Archbishop's group worked to avoid. But once the Church opened the door to divorce reform, the liberalization movement, which had hitherto operated within the courts' trivialization of the cruelty ground, emerged as the dominant force in family law.¹²⁵

We next turn to the greatest American effort to install the philosophy and mechanism of therapeutic divorce. California closely followed the news from England, both in heartily proposing and in ultimately rejecting a comprehensive family court.

VIII. THE FINAL BOOMERANG OF CONSERVATIVE REFORM

In 1963, the same year in which Leo Abse's no-fault bill triggered the divorce reform process in Parliament, California Assembly member Pearce Young initiated a study to identify issues and amass information "with a view towards developing a legislative program to strengthen family relations."¹²⁶ Young's initiative resulted in the establishment of legislative committees to consider measures dealing with family life, including reform of the divorce laws. At three public hearings held in 1964, a variety of legal, scientific, theological, and lay witnesses criticized California's divorce system, linking it to

122. *Id.* at 17.

123. *Id.* at 17 & n.80, 30. In its comprehensive report for the 1990s, FAMILY LAW: THE GROUND FOR DIVORCE (1990), the Law Commission recommended that irretrievable breakdown remains the fulcrum of the divorce question. Breakdown should "be proved by the passage of a twelve month period of time which would both provide solid and objective evidence of the breakdown and enable the parties to resolve its practical consequences before the divorce itself was granted." GREAT BRITAIN LAW COMMISSION, TWENTY-FIFTH ANNUAL REPORT: 1990, at 9.

124. FACING THE FUTURE, *supra* note 118, at 30.

125. *Id.*

126. Krom, *supra* note 27, at 158 (quoting News Release from Office of Assembly Member Pearce Young, 5th Assembly Distr., Mar. 15, 1963).

the increasing social and moral deterioration of society.¹²⁷

Judge Roger Pfaff, who presided over the Los Angeles Conciliation Court, vigorously argued at one of the hearings for an extension of mandatory conciliation services throughout the state, claiming that nearly ninety percent of California divorces are "neither necessary nor justified . . . provided these people could actually have some counseling and were interested in saving their marriage."¹²⁸ The committee members were quite favorably impressed by Pfaff's testimony.¹²⁹

In his message to the committee, Governor Edmund G. Brown emphasized that divorce "erodes the very foundation of our society."¹³⁰ He also made the connection between divorce and crime quite literally, telling the legislators that three-quarters of the juvenile delinquents and more than half of the inmates in penal institutions "come from broken homes."¹³¹ Free divorce was the villain for Brown, a Roman Catholic, and he called on the committee to "probe and expose the core of this growing social problem."¹³²

No legislative proposals emerged from this first round of activity. But in the spring of 1966, Brown appointed the Governor's Commission on the Family, composed of two state senators, one assembly representative, five judges, six attorneys, two law professors, one social worker, four physicians, and one member of the clergy.¹³³ The Commission was assigned four tasks:

1. study the framework of laws relating to the family and suggest revision;
2. determine the feasibility of family life education courses for the public schools;
3. consider developing uniform national standards of marriage and divorce jurisdiction; and
4. examine the establishment of state-wide Family Courts, and recommend procedures for their most effective functioning.¹³⁴

The Governor's Commission largely ignored the second and third assignments and, instead, concentrated its proposals on one integrated scheme, heavily influenced by the Archbishop of Canterbury's group: no-fault dissolution of marriage, to be processed by a therapeutic Family Court.¹³⁵ Not only did the Commission quote at

127. CAL. ASSEMBLY INTERIM COMM. ON JUDICIARY RELATING TO DOMESTIC RELATIONS, FINAL REPORT, 2 APPENDIX TO JOURNAL OF THE ASSEMBLY Vol. 23 No. 6, at 25-44 (Reg. Sess. 1965) [hereinafter FINAL REPORT].

128. Krom, *supra* note 27, at 160.

129. *Id.* at 160-61.

130. FINAL REPORT, *supra* note 127, at 176.

131. *Id.*

132. *Id.* at 177.

133. GOVERNOR'S COMMISSION, *supra* note 5, at 1.

134. *Id.*

135. *Id.* at 2.

length from *Putting Asunder: A Divorce Law for Contemporary Society*, but its proposal linking the removal of fault to a transfer of domestic cases to an administrative and therapeutic — rather than purely adjudicative — body replicated the heart of the Church of England report.¹³⁶

The Commission tied the removal of fault grounds in California to the operation of this powerful socio-legal agency, whose mission was to provide therapeutic aid to salvage a foundering marriage. A formal termination of the matrimonial union was sanctioned upon proof of marriage breakdown, but only “after penetrating scrutiny and after the parties have been given by the judicial process every resource in aid of conciliation.”¹³⁷ This final thrust of the therapeutic divorce movement is exemplified by Philip L. Hammer’s discussion of the pitfalls and pluses of mandatory counseling in the evolution of the California experiment.¹³⁸ Hammer acknowledged at the outset that “requir[ing] a psychiatric type examination and counseling of persons seeking dissolution of their marriage is a potentially significant interference by the state with the privacy and personal liberties of the individual.”¹³⁹ But, Hammer insisted, many situations warranted state interference: when one spouse opposed the dissolution, when minor children needed the state’s protection, when the parties were having difficulty working out a “rational” distribution of property, when custody and support were unresolved, and, in general, when psychiatric intercession was needed for the “reduction of anti-social hostility and tension.”¹⁴⁰ The claims favoring state intervention in these instances “fairly clearly outweigh the interest of the individual in being free from inquiry by the state into the events of his private life.”¹⁴¹

The rhetoric of therapy was in full flower in this proposed reform. The new legal lexicon banished even the word “divorce.” Candidates for a “dissolution of marriage” would file, not a “complaint,” but a “petition of inquiry,” reminiscent of Paul Alexander’s conviction that a divorce complaint should be considered “an application . . . for the remedial services of the state.”¹⁴² The case would no longer

136. Philip L. Hammer, *Divorce Reform in California: The Governor’s Commission on the Family and Beyond*, 9 SANTA CLARA LAW. 32 (1968).

137. GOVERNOR’S COMMISSION, *supra* note 5, at 2.

138. Hammer, *supra* note 136, at 41.

139. *Id.*

140. *Id.* at 41-42.

141. *Id.*

142. GOVERNOR’S COMMISSION, *supra* note 5, at 80-81; Paul Alexander, *Divorce*

be captioned *[Wife] v. [Husband]*, but the less-contentious *In re the Marriage of [Wife and Husband]*.¹⁴³ Stress on marital counselling, to be provided by a trained professional staff, would replace the former focus on adjudication and burdens of proof.¹⁴⁴ The Sturm und Drang of the adversary system would become obsolete, the Commission believed, because grounds for divorce would 'no longer be relevant'.¹⁴⁵

Upon the filing of the petition of inquiry, the court clerk was to schedule a conciliation conference.¹⁴⁶ This initial interview was mandatory, and attendance could be compelled by court order.¹⁴⁷ Subsequently, the court's counselor was to inform the judge whether the parties have decided to (a) become reconciled, (b) continue counseling, or (c) resume "their application for an inquiry into the marriage, with a view to its possible dissolution."¹⁴⁸

The condescending psycho-babble in which that third option was expressed perfectly illustrated the tendency of therapeutic divorce to mask the reality of divorce, and is of a piece with Judge Pfaff's absurd assertion that nearly ninety percent of California divorces could be averted "if only they knew."¹⁴⁹

After the initial interview, a minimum waiting period of 120 days was required before the formal dissolution hearing.¹⁵⁰ During this time, the counselor was expected to work with the parties and prepare a written report setting forth "the counselor's recommendations together with supporting facts as to the continuance of the marriage."¹⁵¹ At the hearing, the court could make the decision that the marriage had irreparably broken down. If so, an immediate order dissolving the union would follow.¹⁵²

However, if the court was unable or unwilling to make such a finding, the parties would face a ninety day continuance, during which time they were encouraged to utilize the professional counseling facilities of the court. After this last delay, the court would order the marriage dissolved upon the request of either party.¹⁵³

Each stage of the litigation manifested the continual pressure to convert a divorce action into a conciliation procedure. A determined

Without 'Guilt' or 'Sin', N.Y. TIMES, July 1, 1951 (Magazine), at 14.

143. GOVERNOR'S COMMISSION, *supra* note 5, at 81.

144. *Id.* at 82-85.

145. *Id.* at 80-85.

146. *Id.* at 82.

147. *Id.* at 82-83.

148. *Id.* at 83.

149. Krom, *supra* note 27, at 160.

150. GOVERNOR'S COMMISSION, *supra* note 5, at 83-84.

151. *Id.* at 90.

152. *Id.* at 91.

153. *Id.* at 92-93.

couple could, of course, dodge the persuasive machinations and endure the delays — eight months, or longer, particularly in a busy urban court — until they were granted a “dissolution.” But the very process of stalling divorce-minded partners was an integral component of therapeutic divorce, premised as it was on the belief — which contrary evidence could not dislodge — that divorce was at heart an impulsive act.

Partisans of therapeutic divorce made a penchant of distinguishing between marital breakdown and divorce. But they never understood that a marriage usually dissolves, in fact, long before one of the spouses decides to request a decree. Commenting on the applicability of the English reforms to the United States, Monrad Paulsen remarked:

[It was] astonishing how a vision of the atypical case has dominated the discussion of divorce by consent. Debaters conjure up the vision of two insincere pleasure seekers ready for new adventures rather than the common case of a tragic, weary couple who have concluded at last that the pain should cease.¹⁵⁴

In a 1966 address to the Family Law Section of the American Bar Association, a Milwaukee family court judge humorously exemplified the reformers’ illusion that delay is therapeutic:

They tell the story of a divorce-minded husband consulting an attorney in Milwaukee about starting an action for dissolution of the marriage. “Well, we’d start with serving and filing a summons only,” the lawyer explained, “then sixty days must elapse before we can file a complaint, and another sixty days before the action can be tried. There would be a referral to the Family Conciliation Department to discuss reconciliation. Because there are minor children involved, there would have to be a preliminary hearing on temporary custody and child support and the court might order a custody investigation which might take an extra ninety days. If custody is in dispute, the judge would probably appoint a guardian *ad litem* to represent the minor and dependent children and he might need some time to prepare for the trial . . .” “Forget it,” said the husband, “I can’t stay mad that long.”¹⁵⁵

The Governor’s Commission derived the standard for dissolution of marriage from two sources. The first was the opinion of Justice

154. Monrad G. Paulsen, *Divorce — Canterbury Style*, 1 VAL. U. L. REV. 93, 96 (1966).

155. Hansen, *supra* note 37, at 1. In his speech, the judge related another anecdote which epitomized the disdain family court advocates felt for traditional divorce grounds: “Do I have grounds for divorce?” the lady asked the lawyer. “Are you married?” the lawyer asked the lady. “Yes,” answered the lady. “Then you have grounds for divorce,” answered the lawyer. *Id.* at 3. On the importance of making divorce a “time-consuming process,” see Aidan R. Gough, *A Suggested Family Court System for California*, 4 SANTA CLARA LAW. 212, 212-17 (1964).

Roger Traynor in *DeBurgh v. DeBurgh*,¹⁵⁶ in which the California Supreme Court had diluted the recrimination statute to allow a trial judge to grant a divorce if, despite fault grounds on both sides, the legitimate objects of matrimony had been destroyed.¹⁵⁷ The second source was the work of the Archbishop's group, then recently published.¹⁵⁸

Prior efforts at therapeutic divorce had succeeded only in adding an ostensibly no-fault option to the statutory list of grounds. The framers of California's reform were anxious to eliminate grounds altogether, in order to have total control of the dissolution process.¹⁵⁹ With this aim, the timing of the publication of *Putting Asunder* could not have been more fortuitous. The Archbishop's group set forth a detailed rationale for a clean slate, as well as an argument for ending the perfunctory registration of undefended suits.¹⁶⁰

As the English proposal reasoned, the retention of fault grounds leads to needless divorces and "invests with spurious objectivity acts [whose] real significance varies widely."¹⁶¹ Marital breakdown, on the other hand, was theoretically not subject to collusive prior arrangement, and presented the issue of continuing the marriage in terms far more amenable to therapeutic intervention than did adultery or extreme cruelty, particularly when those fault grounds were so often understood to be faked.¹⁶² Moreover, divorces would no longer be "undefended," as the emphasis was no longer on contesting charges but on conciliation, and the court could command both spouses to participate.¹⁶³

The Governor's Commission was more successful than the Archbishop's group in substituting marital breakdown for a fault standard in the final legislation. But the California reformers retained the concept of individual blameworthiness when relevant to the determination of child custody, and when specific incidents of misconduct were "determined by the court to be necessary to establish the existence of irreconcilable differences."¹⁶⁴ As explained by the Commission's co-chairs, the new court would be required to examine the "whole picture of the marriage," including spousal misconduct,

156. 39 Cal. 2d 858, 250 P.2d 598 (1952).

157. *Id.* at 872, 250 P.2d at 606.

158. PUTTING ASUNDER, *supra* note 7.

159. GOVERNOR'S COMMISSION, *supra* note 5, at 2.

160. PUTTING ASUNDER, *supra* note 7, at 77-78, *passim*.

161. Richard C. Dinkelspiel & Aidan R. Gough, *A Family Court Act for Contemporary California: A Summary of the Report of the California Governor's Commission on the Family*, 42 CAL. ST. B.J. 363, 372 (1967) (alteration in original) (quoting PUTTING ASUNDER, *supra* note 7, at 29).

162. PUTTING ASUNDER, *supra* note 7, at 29-30.

163. *Id.* at 69-70.

164. Act of Jan. 1, 1970, ch. 1608, § 4509, 1969 Cal. Stat. 3325.

which could be "completely explored."¹⁶⁵

This large-mouthed exception to the ostensibly fault-free tenor of the proposal did not escape serious criticism. On one level, this apparent aberration may simply have served to allow petitioners to place their marital breakdown in context, what lawyers call *res gestae*. But what would be the effect on the desired "conciliatory and uncharged atmosphere" of barring fault at the front door but allowing it to be "completely explored" when it entered at the rear?¹⁶⁶ Howard A. Krom argued that this revival of culpability undermined the purposes of the law in permitting

the prejudicial introduction of fault-oriented testimony whenever a spouse can convince the court that it would be necessary to establish the existence of irreconcilable differences. This obviously creates an incongruity between the no-fault criteria for dissolution and the type of evidence needed to show that one is entitled to a decree.¹⁶⁷

Lynne Carol Halem noted that, contrary to the reformers' promise, this provision retained fault as an "integral component of the reform law."¹⁶⁸

Although its language did not make it into the final legislation, one of the bills proposing divorce reform included a provision that in making its findings as to irreconcilable differences the court should "be guided by, but not limited to, the statutory grounds and corresponding judicial decisions in effect prior to the effective date of this act."¹⁶⁹ Given this linguistic melange, the view that "fault concepts may be unavoidable"¹⁷⁰ in the new divorce procedure was quite reasonable, even if it turned out to be mistaken. Divorce may have been written out of the domestic relations vocabulary in California, but dissolutions were about to explode.

165. Richard C. Dinkelspiel & Aidan R. Gough, *The Case For a Family Court — A Summary of the Report of the California Governor's Commission on the Family*, FAM. L.Q., Sept. 1967, at 70, 78.

166. ASSEMBLY COMMITTEE ON JUDICIARY, REPORT OF 1969 DIVORCE REFORM LEGISLATION, J. CAL. ASSEMBLY 8058 (Reg. Sess. 1969).

167. Krom, *supra* note 27, at 179 (footnote omitted).

168. HALEM, *supra* note 65, at 244. See also Herma H. Kay, *A Family Court: The California Proposal*, in DIVORCE AND AFTER 276 (Paul Bohannon ed., 1970) (criticizing the proposal).

169. Walker, *supra* note 88, at 208 (quoting Assembly Bill 530, § 4506 (proposed by Assembly member James Hayes)).

170. *Id.*

IX. THE MEANINGLESS STANDARD OF DISSOLUTION

The conservative aura of the reforms created the impression that the Family Law Act of 1969¹⁷¹ would truly escalate the hurdles facing dissolution-minded couples. Both law review commentary and appellate court interpretation reinforced the notion that California No-Fault had closed the gates on divorce on demand.

In the statute's first year, Charles W. Johnson suggested that a dissatisfied spouse seeking a dissolution must establish irreconcilable differences by presenting "substantial reasons" for not continuing the marriage.¹⁷² Appellate affirmation was not long in coming. In 1972, the California Supreme Court noted that while the legislature had devised a no-fault, non-adversarial procedure, it "did not intend that findings of irreconcilable differences be made perfunctorily."¹⁷³

The Court pointed out that the legislature had rejected a proposal whereby the parties would be entitled to a divorce upon the processing of certain steps and the passage of a certain period of time.¹⁷⁴ On the contrary, the Family Law Act placed the trial court in the role of "an overseeing participant to do its utmost to effect a healing of the marital wounds."¹⁷⁵ To perform this critical task, judges needed to independently review evidence about the condition of the marriage. The Supreme Court specifically rejected the notion that the parties could consent to dissolve their marriage and have that consent constitute the required establishment of irreconcilable differences.¹⁷⁶

Even though the California reforms aimed to dethrone fault and eliminate the acrimony of the adversarial system, the California Supreme Court continued its long-standing concern with collusion. It worried about the parties' agreeing "that one of them would present false evidence that their differences were irreconcilable and their marriage had broken down irremediably."¹⁷⁷ The Court never questioned how a trial judge was supposed to distinguish between genuine and ersatz matrimonial failure, when both parties were determined to divorce. It merely ruled that it was the function of the trial judge, not the parties, to decide whether the evidence sufficed to allow for a divorce.¹⁷⁸

171. See Family Law Act of 1969, ch. 1608, 1969 Cal. Stat. 3323-24.

172. Charles W. Johnson, *The Family Law Act: A Guide to the Practitioner*, 1 PAC. L.J. 147, 151 (1970).

173. *McKim v. McKim*, 6 Cal. 3d 673, 679, 493 P.2d 868, 871, 100 Cal. Rptr. 140, 143 (1972).

174. *Id.* at 679, 493 P.2d at 871, 100 Cal. Rptr. at 143.

175. *Id.* (quoting ASSEMBLY COMMITTEE ON JUDICIARY, REPORT OF 1969 DIVORCE REFORM LEGISLATION 8058 (Reg. Sess. 1969)).

176. *Id.* at 680, 493 P.2d at 872, 100 Cal. Rptr. at 144.

177. *Id.*

178. *Id.*

In asserting a distinction between the will of the trial court and that of the parties seeking judicial sanction on their dissolution, the Supreme Court was ignoring large chunks of the history of twentieth-century divorce. With the trial courts acclimated to a generation or more of granting divorces upon the pious perjury of unchallenged extreme cruelty or hotel adultery, it should have been apparent that a general guideline that trial judges should make independent findings would be insufficient to change the practice of divorce in California. But more legal flotsam was to follow before the appellate courts surrendered.

Soon after *McKim* was decided, a California Court of Appeal handed down *In Re Marriage of Walton*,¹⁷⁹ addressing several challenges to the new law. The court determined from the legislative history that the irreconcilable differences to be proven by the plaintiff "must be substantial as opposed to trivial or minor."¹⁸⁰ The defendant would always have the opportunity to prove the contrary proposition, and Section 4509 of the California Civil Code gave the trial judge discretion to receive evidence of specific acts of misconduct.¹⁸¹ The court rejected a standard "based upon the subjective attitude of the parties,"¹⁸² and insisted that the Family Law Act did not constitute a "license for dissolution of marriage by consent of the parties."¹⁸³ The court concluded by emphasizing that the plaintiff had the burden of establishing the existence of "substantial marital problems which have so impaired the marriage relationship that the legitimate objects of matrimony have been destroyed and as to which there is no reasonable possibility of elimination, correction or resolution."¹⁸⁴

But the vision of no-fault conceived by the reformers, that scrupulous trial courts — not impulsive couples — would determine the right to a divorce, never materialized. Trial courts under California no-fault simply refused to deny divorces under any circumstances.

X. THE COST OF THERAPY AND THE COST OF PRIVACY

Even if trial judges had been inclined, they could have performed no inquests or investigations into the death of the marriages

179. 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972).

180. *Id.* at 118, 104 Cal. Rptr. at 480.

181. *Id.* at 115, 104 Cal. Rptr. at 478.

182. *Id.* at 116, 104 Cal. Rptr. at 479.

183. *Id.*

184. *Id.*

presented to them. The California legislature had vetoed the reformers' creation of a system of state-wide family courts.¹⁸⁵ The reasons were two-fold. Concerns about the imperial judiciary injecting itself into bedroom breakdowns buttressed fear of the stiff price tag for therapeutic divorce.¹⁸⁶ Although some reformers, such as Herma Hill Kay, claimed that the proposed family court system would subscribe to the "careful protection of individual privacy in the counseling process,"¹⁸⁷ a majority feared the rise of a controlling bureaucracy whose clientele would not be lower-class juvenile delinquents and their families, but the legislators' "colleagues, friends, and even themselves."¹⁸⁸ Concerns about timeliness and efficiency also led legislators to doubt that mandatory counseling was viable when initiated at the courthouse door.¹⁸⁹ Finally, judges were not keen on the changes in courtroom practice which therapeutic divorce threatened.¹⁹⁰

The cost estimates for supplying the requisite psychiatrists and social workers were daunting. The Governor's Commission admitted that "creating a professionally-staffed Family Court will not be an inexpensive undertaking."¹⁹¹ But it hoped that the benefits obtained, in terms of family case streamlining and prevention of "broken homes," would be worth the fiscal sacrifice.¹⁹² This cost-benefit analysis of family saving was not new. Max Rheinstein had made virtually the identical point a decade earlier: "If the [family] court achieves what it is said it will, the cost of running it will easily be

185. Aidan R. Gough, *Divorce Without Squalor*, NATION, Jan. 12, 1970, at 17, 20.

186. As the former executive director of the Governor's Commission on the Family observed, the demise of the therapeutic family court was due to "cost, concern that a family court structure would disrupt existing systems of court calendaring[,] and perhaps a fear that 'social work' would dilute 'hard legal process.'" *Id.*

187. Kay, *supra* note 37, at 1244.

188. HALEM, *supra* note 65, at 285. Riane Tennehaus Eisler detailed the story of California Assembly leader James Hayes, who shepherded key sections of the Family Reform Act through the legislature while engaged in a rancorous divorce proceeding against his wife. RIANE T. EISLER, *DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN* 24-31 (1977).

Michael Wheeler provided similar illustrations from other states. One lawyer pushing no-fault admitted an inability to get the attention of legislative leaders until "several . . . were in the midst of divorces and apparently they didn't like what they were experiencing, so our bill went through like gang-busters." An official of a state bar association told Wheeler that the key to no-fault reform there was "the fact that the chairman of the senate judiciary committee and the speaker of the house, who had both opposed us in the past, were in the middle of messy marital situations when we reintroduced our bill, and they switched right around." WHEELER, *supra* note 6, at 153.

189. ASSEMBLY COMMITTEE ON JUDICIARY, REPORT OF 1969 DIVORCE REFORM LEGISLATION 8056 (Reg. Sess. 1969).

190. See JACOB, *supra* note 4, at 58.

191. Dinkelspiel & Gough, *supra* note 165, at 74.

192. *Id.*

overbalanced by the saving of the cost of juvenile delinquency, alcoholism, and general dependency of abandoned wives and children."¹⁹³ But this argument faced its biggest test in California, and it was not persuasive, in view of the growing sentiment in both the legal and psychiatric professions that the sheriff and the therapist did not blend.

Exactly how "not . . . inexpensive" family courts in California would be was revealed in October 1967, when the Analyst for the Joint Legislative Budget Committee calculated an additional yearly expenditure of \$4,427,500.¹⁹⁴ Worse news was to come, for this analyst's estimate was the *lowest* received by the legislature.¹⁹⁵ The presiding judge of the Los Angeles Family Court Department testified that the cost for a state-wide program could run as high as \$10,000,000 annually.¹⁹⁶ The higher valuation was generally believed to be more accurate, and the legislature considered it an unacceptable additional burden on already distressed public coffers.¹⁹⁷

California's Family Law Act of 1969 resulted in the rapid expediting of divorces, as a "perfunctory judicial acknowledgement of marital breakdown replaced the parade of witnesses and staged courtroom battles."¹⁹⁸ As with prior divorce reforms, the legislative and appellate law systems pursued their goals of articulating policy norms and directing the evolution of formal legal rules, respectively. The statutory language and the appellate opinions were filled with the rhetoric of obstruction, a grandiloquent effort to render no-fault more cumbersome than fault. As before, neither system had much effect on divorce patterns.

Trial courts continued to pay little heed to case law or statute. They found their roles as divorce registrars to be even more streamlined by the removal of the necessity to play audience to the farces of fault which had been so much a part of their previous obligation. Party behavior continued to strip down the dominant law system, arriving finally at naked divorce.

193. Rheinstein, *supra* note 29, at 637.

194. Krom, *supra* note 27, at 171.

195. *Id.*

196. *Id.*

197. *Id.*

198. HALEM, *supra* note 65, at 251.

XI. EPILOGUE: THE NAKED ARE SEARCHING FOR CLOTHES

Writing in 1977, seven years after the effective date of the California no-fault reform, Riane Tennehaus Eisler reported that not one trial court had denied a dissolution petition for want of irreconcilable differences.¹⁹⁹ None of the forty-four California domestic relations judges interviewed by Lenore Weitzman in the mid-1970s had ever denied a petition for dissolution.²⁰⁰ In 1975, the legislature repealed the provision allowing the introduction into evidence of specific bad acts to show the existence of irreconcilable differences.²⁰¹ *Plus ça change*: both culpability and the very framework for divorce grounds had disappeared. *Plus c'est la même chose*: the formula had changed, but division-minded wives and husbands did what they wanted. The legal culture did not appear to substantively differentiate California divorcing in 1970 from the process a generation earlier.

This analytical insouciance was misleading, however. A true cultural and jurisprudential revolution had, in fact, pushed the informal law of divorce from "mutual consent," its operating gear for half a century, to the watershed of "divorce on demand." As Herma Hill Kay has pointed out, "Divorce by unilateral fiat is closer to desertion than to mutual separation."²⁰²

The California State Senate and Assembly were not, of course, entirely responsible for the shifting cultural paradigms represented by their reform law. The hell-for-leather individualism, which had shattered the institutional family and whose baby boomer children flaunted themselves during the "me" decade in the 1970s,²⁰³ reflects today a much deeper concern with rights than with relationships. Culture simultaneously creates law while being shaped by law and, fundamentally, is law.

California-style no-fault has had some dramatic outputs. No-fault enshrined in statute what American culture had been edging toward in other aspects of life: a predilection for absolute gender egalitarianism. This result, achieved with virtually no participation by organized women's groups, was initially perceived by many women as a splendid enhancement of their status both in marriage and after.²⁰⁴

199. EISLER, *supra* note 188, at 10.

200. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 19 (1985).

201. 1975 Cal. Stat. 59.

202. Herma H. Kay, *Beyond No-fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6, 8 (Stephen D. Sugarman & Herma H. Kay eds., 1990).

203. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 287 (1989).

204. JACOB, *supra* note 4, at 3, 23.

Second thoughts, however, came quickly. Martha L. Fineman has argued that the no-fault "revolution" was exactly that: a 360 degree turn which brought us "back to where we substantively began."²⁰⁵ The earlier focus on formal equality has been replaced by a feminist debate over the competing subjectivities within no-fault. For many women, no-fault divorce signified achievable freedom and societal validation for goals of self-actualization. But "[w]hat apparently escaped notice," commented Deborah L. Rhode, "were the inequalities in men's and women's status following divorce."²⁰⁶

The rejection of protectionist ideals of law has focused attention on the many ways in which reality remains gendered. Feminists have focused attention on how women's "disproportionate assumption of 'private' domestic responsibilities has constrained their 'public' opportunities."²⁰⁷ Mothers predominantly retain child custody after divorce,²⁰⁸ and employed women continue to receive grossly unequal compensation for their labor.²⁰⁹ Many agree with Mary Ann Mason's argument that, for women, the "concept of equality is a trap."²¹⁰

In jurisprudential terms, feminism today is split between advocates of legal equality and champions of reifying women's differences.²¹¹ Although the current debate is more nuanced, it resembles the hefty disputations earlier this century between supporters of protectionist legislation for women in industry and staunch defenders of equal rights for the sexes. The dilemma floods over academic boundaries: by the late 1980s, half of all single-parent families had dipped below the poverty line, and seventy percent of those families were

205. Martha L. Fineman, *Neither Silent, Nor Revolutionary*, 23 LAW & SOC'Y REV. 945, 945 (1989) (reviewing HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988)). Fineman expanded on this point in *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM passim* (1991).

206. DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 149 (1989) (footnote omitted); see also KEVIN GRAY, *THE REALLOCATION OF PROPERTY ON DIVORCE* 286-87 (1977).

207. Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 202, at 193.

208. RILEY, *supra* note 88, at 168.

209. MARY A. MASON, *THE EQUALITY TRAP: WHY WORKING WOMEN SHOULDN'T BE TREATED LIKE MEN* 20 (1988).

210. *Id.* at 25.

211. See Lisa C. Bower, *Unsettling 'Woman': Competing Subjectivities in No-fault Divorce and Divorce Mediation*, in *FEMINIST JURISPRUDENCE: THE DIFFERENCE DEBATE* 209-230 (Leslie F. Goldstein ed., 1992).

headed by divorced or separated women.²¹²

While five percent of all children lived only with their mother in 1960, twenty-seven percent did so in 1990.²¹³ More than seventy percent of incarcerated juveniles come from fatherless homes.²¹⁴ Judith Wallerstein's study of the effect of divorce on children found that five years after the split, over one-third of the children suffered from moderate or severe depression.²¹⁵ Despite common assumptions about children's vaunted resilience, Wallerstein continued to find serious adverse consequences in children ten and fifteen years after the parents' divorce.²¹⁶ That divorce may inflict life-long emotional harm is the premise of Diane Fassel's *Growing Up Divorced: A Road to Healing for Adult Children of Divorce*.²¹⁷

Barbara Dafoe Whitehead has called for a "cultural conversation about the family" to explore "cultural solutions" to the problems stemming from the excesses of divorce.²¹⁸ The conversation has started, but the early dialogue sets a cacophonous tone: juxtapose a *Newsweek* cover story on "Deadbeat Dads: Wanted for Failure to Pay Child Support"²¹⁹ with Mary Frances Berry's *The Politics of Parenthood: Child Care, Women's Rights, and the Myth of the Good Mother*.²²⁰

Nor are women any closer to resolving the work/family dilemma: compare *Answers to the Mommy Track: How Wives and Mothers in Business Reach the Top and Balance Their Lives*,²²¹ with *Staying Home: From Full-Time Professional to Full-Time Parent*.²²² *Answers to the Mommy Track* introduces readers to "women who are extremely dedicated to career goals but simultaneously demonstrate the great lengths to which they will go to be responsible to family

212. RHODE, *supra* note 206, at 149.

213. Barbara D. Whitehead, *Dan Quayle Was Right*, ATLANTIC, Apr. 1993 at 47, 50.

214. *Id.* at 77.

215. *Id.* at 65.

216. *Id.* at 64-65; see also JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989).

217. DIANE FASSEL, *GROWING UP DIVORCED: A ROAD TO HEALING FOR ADULT CHILDREN OF DIVORCE* (1991). Several relevant social science studies are discussed in Whitehead, *supra* note 213, and in Nancy R. Gibbs, *Bringing Up Father*, TIME, June 28, 1993, at 53.

218. Barbara D. Whitehead, *The New Family Values*, UTNE READER, May/June 1993, at 61, 66 (excerpted from FAM. AFF. (Summer 1992)).

219. Steven Waldman, *Deadbeat Dads*, NEWSWEEK, May 4, 1992, at 46.

220. MARY F. BERRY, *THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER* (1993).

221. TRUDI FERGUSON & JOAN S. DUNPHY, *ANSWERS TO THE MOMMY TRACK: HOW WIVES AND MOTHERS IN BUSINESS REACH THE TOP AND BALANCE THEIR LIVES* (1991).

222. DARCIE SANDERS & MARTHA M. BULLEN, *STAYING HOME: FROM FULL-TIME PROFESSIONAL TO FULL-TIME PARENT* (1992).

commitments."²²³ *Staying Home*, dedicated by its authors "to our mothers, who stayed home for us," rejects any track for women but motherhood, which it claims has become the "most controversial career" for a woman.²²⁴ *Staying Home* is, in turn, rebutted by Katherine Wyse Goldman's *My Mother Worked and I Turned Out Okay*,²²⁵ although the defensive tone of Goldman's title may indicate a shifting in the wind.

New challenges, at times, prompt *old* responses, and some have thought the unthinkable, calling for the return of fault.²²⁶ Law professor Stephen D. Sugarman has observed that the "rhetorical force" of a broadside against the no-fault system "can be enhanced if set in the context of an innocent and a guilty spouse."²²⁷ He has outlined several roles appropriate for reinvigorated fault, such as in cases involving "reprehensible conduct," or the allowance of a tort suit for the wronged spouse on top of the recovery obtained by application of the no-fault law.²²⁸

A recent court challenge to California no-fault claimed that divorce on demand violated the Constitution, focusing its argument on the sham nature of the court's role:

It is unrealistic in the present judicial climate . . . to expect due process in dissolution proceedings, since the outcome is determined in advance by the desire of one party to end a marriage . . . Considering the fact that approximately two million divorces have been granted by California trial courts since 1970, the empirical evidence supports the assumption that a fair hearing in a contested divorce proceeding, giving sufficient consideration to the contesting parties to enable them to prevail, is not a legal reality in California.²²⁹

223. FERGUSON & DUNPHY, *supra* note 221, at ix.

224. SANDERS & BULLEN, *supra* note 222, at v, ix.

225. KATHERINE W. GOLDMAN, *MY MOTHER WORKED AND I TURNED OUT OKAY* (1993). For men, the conversation has barely started. See John B. Barry, *Daddy-track: How About Balancing Fatherhood and Career?*, UTNE READER, May/June 1993, at 70 (excerpted from *MOTHERING* (Spring 1989)); Gibbs, *supra* note 217.

226. Whitehead, *supra* note 218, at 71; Kay, *supra* note 202, at 19; Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 202, at 136.

227. Sugarman, *supra* note 226, at 136.

228. *Id.* at 136-37. Sugarman did not advocate a return to fault, but described potential ways to reintroduce culpability in divorce law.

229. Harold O. J. Brown, *Easy Divorce Challenged as Breaking of Contract*, DAILY PROGRESS (Charlottesville, Va.), May 3, 1992, at A7 (quoting *In re Sutherland*, an unpublished opinion of the California Court of Appeals, Second Appellate District). Brown, the editor of *The Religion and Society Report*, noted that three states had introduced legislation to allow couples to marry under a "marriage contract," which would provide them, in Brown's words, "protection against unilateral abrogation" as permitted by no-fault statutes. *Id.*

What *is* a legal reality in California, as throughout America, is that naked divorce has gone too far. The — to some — astonishing suggestion that the concept of culpability might stage a comeback in the divorce ring illustrates the fascinating contingency of history. Twentieth-century legal culture has reached an impasse on divorce. A new legal and cultural matrix must now emerge.