INSTITUTIONS OF DIVORCE, FAMILY, AND THE LAW

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SOCIAL SCIENTISTS ARE accustomed to thinking of the family as a primary social institution. They are less accustomed to thinking of it as one of the primary "back-up institutions" of American society. A back-up institution carries out the work of some other institution of society when that other institution fails in its task. The back-up institution might have been called an "institution for redundancy," defining redundancy with Hall[1] as "information [or action] from one [institutional] system which is backed up by other systems in case of failure." Thus, if the original institution fails in its purpose, some other institution takes over its tasks or goals, and fulfills its functions in either the original or a modified form.

However, there is another—and darker—side to the picture. Americans are loath to admit that the family itself may require a back-up institution—something for people to fall back on when the family fails. The mere fact that the American family is the only surrogate strong enough to pick up the torch dropped by other institutions means that we are anxious that the family always be adequate. If the family cannot

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1. E. HALL, THE HIDDEN DIMENSION (1966).

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back up the schools, churches, police, and the commercial and business communities when they fail—then, we say, we are lost.

Myopia does not change facts—it only makes it difficult to deal with them. Some families do fail. Therefore, the family needs back-up institutions that might do the job better. The major part of our thesis explores the effects on the legal institutions of this failure of American culture to recognize and deal with divorce as a phenomenon closely integrated into the structure and successful functioning of society.

THE LEGAL INSTITUTIONS

In a recent paper, one of the authors[2] suggested that an important characteristic of law is that it reinstitutionalizes, at its own level and for its own purpose, some (but not all) of the customary and approved modes of behavior from some of the other institutions of society. Every institution has its own regulations, valid within that institution. Some of these regulations may, as "substantive law," be reformulated in the context of a legal institution. A legal institution, moreover, has the right and the power to penetrate the original institution, excise a situation in which the regulations (in their original form) have been contravened, to settle the situation in terms of the reinstitutionalized regulations, and then to reinstate the people and the new situation back into the social flow.

Thus, a "legal" institution has all of the more general characteristics of social institutions: personnel, such as judges, lawyers, jurors, claimants, defendants, witnesses and the like; the recognized goal of settling disputes; the material culture such as the bench, the gavel, the records, the room; a set of values about the dignity of the law and the importance of its place in a society that is run with maximal security and minimal conflict; a series of activities on the part of police, judges, bailiffs and the like which amounts almost to ritual when it works well; and finally a set of regulations on its own activities.

But the legal institution is marked by two further characteristics which make it specifically legal. The first of these is that there must be a "law"—the statements about the activities of other, non-legal institutions which it has a right, indeed an obligation, to "apply" or see to

2. P. Bohannan, *The Differing Realms of the Law*, 67 AMER. ANTHROPOLOGIST, 33 (1965).

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fruition. And, second, it must have the right and the power to "invade" the other institutions of society in such a way that it can remove the cases that contravene the law or bring the law into question. With the possible exception of some religious institutions, these activities are unique to legal institutions. In other terms, legal institutions must be supported by political power and they must have a set of regulations—in accordance with those of non-legal institutions—which are restated so that they become what Kantorowicz[3] called "justiciable." All this can be called the juridical aspect of legal institutions.

In developed systems of law such as our own, the legal institutions have an additional aspect: they are important service institutions to many of the varied institutions of society. The law is a complicated structure, demanding many specialists. Many of the non-legal institutions of society (including the family) require the services of such specialists from time to time. In order to carry out these services, the legal institutions are *invited* into the general social institutions to do specialist tasks. The specialist task is the goal of the service institution; getting the larger job done—of which the "legal" job is a part—is the task of the general social institution.

Thus, legal institutions have both juridical functions and service functions. However, they do not as a rule have back-up functions. Only in some places in which the institutionalization of society is inadequate to the purposes of its citizens is the service function of the legal institutions sometimes confused with back-up functions. Conflict within an institution is not the same thing as its failure—and we must examine the way in which legal institutions can rationally be associated with back-up institutions. The juridical function is to resolve the conflict and either to get the orginal institution back on the right track or else to transfer its tasks to other institutions. What is the responsibility of the legal institutions when there are no other back-up institutions to which the tasks can be transferred?

Put another way, there are three safeguards on adequate operation of institutions. First, there is the provision of services by one institution for the highly technical requirements of another; second, there is the juridical function of providing means for getting at and settling the crippling conflicts within the original institutions; third, there is the assurance of back-up institutions to deal with the failures of the original institution.

3. H. KANTOROWICZ, THE DEFINITION OF LAW (1958).

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"Lawmen" are specialists in two types of activity (of our present concern): the juridical, which involves reinstitutionalizing some aspects of society and culture and dealing with disputes at the level of courts in terms of those reinstitutionalized norms. They are also "service specialists" who serve non-legal institutions when the latter lack specialist capacities to deal with all their problems. However, lawyers do *not* provide adequate back-up institutions, at least in the field of family law.

"Law" in our society means at least two things: the carrying out of technical tasks according to legal regulations (which is an example of a service institution) and the settlement of disputes that occur so that the institutions of society can function "normally." The criterion for judging the effectiveness of any legal system might well be how adequately it does its service job without eruption of conflict and without having to perform its juridical functions, but, on the other hand, how effectively it performs those juridical functions when they are necessary.

Families may often call on law firms as service institutions to do special jobs that they cannot themselves accomplish. But—except for rare cases of inheritance dispute—about the only time families require the legal institutions as juridical institutions is in the case of divorce. And in the setting of divorce, law is seen as a sort of back-up institution—because there is no other.

DIVORCE AS AN INSTITUTION

Divorce is not the mere undoing of a marriage. Except for marriages, usually of short duration, which are not complicated by the kinship relationships that follow on the birth of children, divorce is an institution in its own right. It has a personnel—the ex-spouses, their children, their lawyers, the friends of the ex-couple, and sometimes the new spouses of the ex-couple and their children by former marriages. Indeed, a divorce may be as permanent as a marriage—in fact, if both partners maintain their relationship to their children there must be at least a minimal ex-husband ex-wife relationship. There is also a definite culture of divorce—a whole sub-culture which has been examined in some detail by Hunt.[4] It can be called an "invisible sub-culture" because divorced persons almost all learn it, play it out when they are in groups, but drop it in the presence of what they call "the undivorced."

4. M. HUNT, THE WORLD OF THE FORMERLY MARRIED (1966).

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The greatest shortcoming in the literature on divorce (including the legal literature) is its neglect of the institutional aspects of divorce following upon the decree. Divorce is something like marriage, and the two words carry equivalent ambiguities. "Marriage" means the wedding, but it also means the relationship between husband and wife. "Divorce" is the process of getting the decree, but it is also the relationship between ex-husband and ex-wife. The vast literature in the law journals tends either to be about the technical details of the dissolution, which are treated well and sensibly, or it is a sort of dirge about our responsibilities, hopes of "saving" marriages, which merely serves to avoid the subject. The *envoi:* somebody other than lawyers should handle the matter. One should hasten to add that the latter characteristics of the legal literature are shared with the psychiatric literature (where the dominant concern is with the counter-transference) and with the literature of the social workers (where the dominant concern is with referral of cases to some other agency).

There are, of course, exceptions in all these fields. In the legal literature, Karl Llewellyn[5] has discussed the topic—although a behavioral scientist can find little to recommend his discussion. (This is unlike some of his other discussions which are basic to the behavioral scientist's view of law.) The *University of Kansas City Law Review* published a symposium on the subject in Volume 22,[6] and the various proceedings of the Section on Family Law of the American Bar Association are helpful. But the fact remains, of the many articles on the subject, few approach the problem analytically and even fewer have questioned the nature of American divorce institutions. Most assume that divorce is merely a "break-down" instead of a new development which must be explained in its own terms.

The two main clusters of purpose or function in the institution of divorce can be summed up as follows:

1. Divorce is a general institution of society established by juridical action of the legal institutions by terminating a marriage. It thereupon enables the former spouses to remarry, but does not release them from the institution of divorce—the "ex-family."

5. K. Llewellyn, *Behind the Law of Divorce,* 32 COLUM. L. REV. 1281 (1932–1933).

6. Note, *Interprofessional Approach to Family Problems,* 22 U. KAN. CITY L. REV. 1 (1953).

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2. Divorce is also (and this has not been sufficiently recognized) one of the major back-up institutions of the family. If the family fails, one possibility is divorce. That means the divorce institution should carry out some of the tasks which the family has failed to carry out.

As a back-up institution, divorce has a long and dishonorable history in America; Americans have done their best to deny that *any* institution can "back-up" the family. The tasks of the divorce institution (including, as it does, lawyers, judges, and often doctors and psychiatrists, as well as ex-spouses and their children) is to deal with the kinship relationships that were sundered or altered and to carry out some of the functions of the family, particularly socialization. The relationships in question are those of ex-husband to ex-wife and those of "single parents" to their children. Each is freighted with the various problems inherent in the "one-parent household."

The legal institution of divorce must also disentangle and reentangle property which was held jointly or in common by husband and wife during the marriage. These property matters are assumed by all legitimately to fall within the service realm of the legal institutions.

Put another way, lawyers and judges play a double role (perhaps triple role) in divorce actions. They, as part of the legal service institutions, are important at the property settlements. They play a role in the juridical aspects of divorce—that is, certain aspects of marriage and family are removed from these institutions and settled in the courts in terms of legally reinstitutionalized norms, and then the new situation fed into the institution of divorce. But this leaves still another element—the solution of the marital difficulties which must be found before the institution of divorce can work—the kinship relationships and their content, from support orders to advising therapy.

The difficulty in divorce as a back-up institution arises because there is no clear norm or sanction in the divorce institution short of those supplied by the court. Therefore, the court is, as it is now organized, a necessary part of the institution of divorce. These difficulties create conflicts of interest for lawyers—they want to do the service and juridical tasks, but to do so they have to carry out roles in the back-up institutions which they think are not properly in the realm of the lawyer.

In order to discover what lawyers think about the present law and practice of divorce, particularly in those areas of the institution of divorce that are not clearly either a part of the juridical institution or the service institution, we have examined a portion of the legal literature. We went

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through the *Guide to Legal Periodicals* from July 1959 to January 1966 under the topics Divorce, Separation, Marriage, Domestic Relations, Annulment, Settlements, and Desertion. Then we examined the articles and gave special attention to those dealing (either overtly or covertly) with attitudes toward marriage and divorce and the law that surrounds them. We were not particularly interested, in this context, in the recognized service mechanics of the institutions of the law: property settlement, child custody and/or support or procedural matters. We were interested in the remaining highly selected body of information, which deals with attitudes and opinions of lawyers, judges and others who publish in law journals, about the "non-legal" aspects of divorce and related topics—the back-up aspects. Since there is no general back-up institution of the family other than divorce, lawyers are *faut de mieux*, being asked to "do something," for the simple reason that there are service and juridical aspects of the family law in which they are the recognized experts, and nobody is an expert in the back-up aspects. Therefore, the lurking assumption runs, the lawyers should be experts in the entire field of divorce.

THE "NON-LEGAL" PROBLEM AREA IN DIVORCE

It is, thus, in the large "gray area" of the divorce institutions that we have concentrated our concern—and where the lawyers have also concentrated their concern. To repeat, we are not talking about the technicalities of divorce—about grounds or defenses—or about the legal-service technicalities supplied to the institution of divorce—alimony or support or property settlement. All of these are, and can be properly left, in the realm of lawyers. What we *are* dealing with is the "non-legal" aspects of divorce, those aspects which make divorce practice "messy" and rate family and divorce lawyers low on the status scale—compared, for example, with corporation lawyers. It is for this reason that many lawyers "never touch a divorce case" and others say "I take one once in a while as a favor to one of my clients." Kinney[7] discusses "the stigma of handling divorce cases."

Lawyers are asking, in the law journals, in symposia and at their professional meetings, what obligations and what rights they have to

7. S. Kinney, *Lawyers and Marriage Counseling—a Therapeutic Approach,* DICTA (1951) 28–30.

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examine the "real reasons" for marital break-up. Do we have to be marriage counselors? they ask. And they do not agree about the answers.

The point is made more poignant when we note that lawyers realize that (as one of them put it in conversation) "reconciliation becomes almost impossible after a contested action for a separation gets underway." Reconciliation, he adds, becomes almost impossible once the problem has been put into legal language and the "grounds" stated. Johnstone[8] notes that in his area "counseling is rarely started after the beginning of divorce proceedings." In short, in order to carry out the juridical functions, the lawyer is forced to make the job of "orthogamic engineering," as some of them call it, more difficult, if not downright impossible.

Every lawyer knows (and some of them have written) that grounds for divorce are not the same thing as reasons for divorce. Alexander[9] has noted that grounds are "merely pegs to hang a divorce decree on." Bradway[10] goes so far as to say that by making fault a basic ground for divorce (whatever the particular fault) the legislature encourages each spouse to assemble evidence of all marital dereliction. Most would agree with McIntyre[11] that complaints to the court are at best no more than symptomatic of what is bothering the marriage, and that resolving the alimony and support issues rarely discloses the "real reasons" for the disruption of the marriage.

Indeed, Glieberman[12] has pointed out that lawyers cannot possibly hear the whole truth behind the break-up of any marriage, because there are several versions—the husband's version, the wife's, and "what really happened." It would seem that discerning a legal fact is approximately the same procedure as discerning and fixing an historical fact.[13]

Of even greater gravity is the point that "what really happened" —if it is knowable at all—is professionally irrelevant to lawyers as legal practitioners, in the service sense. Some writers have even suggested that it is sometimes mere morbid curiosity that leads a lawyer to investi-

8. Q. Johnstone, *Divorce: The Place of the Legal System in Dealing with Marital Discord Cases*, 31 ORE. L. REV. 297 (1952).

9. P. Alexander, *Our Legal Horror—Divorce*, 19 J.B.A. OF KANS. 322 (1951).

10. J. Bradway, *Why Divorce?* DUKE L.J. 217 (1959).

11. D. McIntyre, Sr., *Conciliation of Disrupted Marriages by or Through the Judiciary*, 4 J. FAM. L. 117 (1964).

12. H. Glieberman, *How to Negotiate a Divorce Case Settlement*, 45 CHI. B. REC. 139 (1963).

13. E. H. CARR, WHAT IS HISTORY? (1961).

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gate the "real causes" of the break-up. The law indicates what the marital issues must be before they can be taken into court; therefore, to get into court, family difficulty must be put into the language of these issues. We have, on a number of occasions, heard this situation defended on the grounds that nobody who wants a divorce is denied it under present conditions, so why rock the boat? Yet, even to get the matter into the language and issues that the court can deal with—let alone make any attempt at reconciliation—most writers say they need some details of the marital break-up. It is the very translation from "what happened" into the language acceptable to the legal machinery that makes lawyers uncomfortable and increases the anguish and anger of most clients during the process of divorce. Our divorced informants fall into two groups: those who think they had a good lawyer because he got the divorce through and "got me what I wanted" and those who think they had a bad lawyer because he was cold and mechanical about the process. In almost all cases, divorced persons think that their ex-spouse was "got at" by the lawyer to make the case "worse" than it was. Most divorcees think that they paid their lawyers too much—and, of course, most of the lawyers with whom we have discussed the matter say that it is impossible to make a decent living on a divorce practice, unless it is limited to the affluent.

Not merely the lawyers but all Americans lack standards about what divorce ought to be. It is simply not possible for most Americans to think about divorce in positive terms. We believe, however, that a change is coming about. Divorcees use the term "successful divorce" and we learned it from them. Yet, on many occasions, we have been challenged when we use the term—by lawyers, by clergymen, by many divorcees themselves, particularly women. Only psychiatrists and a few people who have had a "successful divorce" will allow the term to pass. It appears to us that there is still a passionate conviction on the part of many Americans that there should be no such thing.

There undoubtedly is a degree of successful divorce in the United States. But it is obviously difficult to quantify and to specify examples, for the very reason that they were successful. Any field anthropologist knows that it is always difficult to find "normal" people during the first few months of field work—they are much too occupied in living to be more than polite to the field worker. We are convinced that there exists a fairly good-sized proportion of the divorced population (obviously

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we have no precise numbers) that do not dwell on their divorces, and for whom the emotional tone of their lives is not set by the status "divorcee."

Thus, the popular culture supports people who refuse to say what they think a "successful" divorce should achieve. Divorce is, by folk definition, an unpleasant topic associated with "failure" and "guilt." The divorced psychiatrist with whom, in the "field," we first discussed the notion of successful divorce said that it is one in which two people see that they are not good for each other, that they have no constructive future together, and set out sensibly and without malevolence to separate and to take care, in the best possible way, of all their recognized responsibilities toward one another and toward the children. A few divorcees agree. Most of our non-psychiatric informants find this "cold-blooded" and "cruel" and "cynical." One of the few statements of that sort, which we have discovered in our perusal of the legal literature, is by Redmount[14] who is a marriage counselor as well as a lawyer: "Divorce is necessary only when the marriage situation itself (even with counseling and reasonable psychiatric treatment) generates destruction and harmful feelings and actions to the disadvantage of the family members."

We have been driven to the conclusion that many Americans want the drama of divorce to be unpleasant for the "culprits," redolent of "failure," and that they make the divorcees, in so far as possible, into scapegoats for the conscience of the community. This attitude backed up as it is by the emotional needs of the divorcees at some stages of the process of divorce, is sometimes baldly, sometimes subtly, expressed in writings in the law journals. They run the gamut of opinion and preconception and, interestingly enough, there is in every view a discernible American sub-culture. "It should be remembered that divorce is essentially a failure of human relationships and a repudiation by one or both of the spouses of the mutual promises made."[15] Paul Alexander[16] more cautiously concedes that "the idea that divorce is easily obtained takes away much of the idea of permanence of marriage," and that people need a "will to succeed at marriage." Other

14. R. Redmount, *Perception and Strategy in Divorce Counseling*, 34 CONN. B.J. 249 (1960).

15. T. McNamara, *Should Divorce Be Made Respectable?*, 41 CHI. B. REC. 84 (1959).

16. Alexander, *supra* note 9, at 323, 330.

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writers, including Baum[17] and Johnstone[18] have noted that tough divorce law does not make marriage any better. Brown[19] goes so far as to claim that the law has encouraged divorce and has increasingly contributed to the disruption of the home.

Many lawyers exhibit a concern with the fact that marriage is easy and divorce is difficult. Fenberg[20] suggests that the two should be on a par of ease and difficulty. Palmer[21] has pointed out that divorce is never light-hearted, but is always an act of desperation. We have found the same thing—we have never found a divorce that occurred for a light or flippant reason, whatever the "grounds" used or whatever the witnesses may have told the judge.

At the other extreme we read[22] that making separation respectable will lead to the respectability of marriage; that divorce can and should be made automatic after a certain period of separation. Walker even argues that discretion about divorce should be left to the husband and wife, not the state, because the home and the violation of rules and thus the welfare of the state are at stake.

Many lawyers, on the other hand, sidestep this issue. Smith says that: "It is not the divorce itself which is alarming; it is rather the too often spurious bases on which divorces are obtained and the unnecessary disruption and destruction of the families resulting from the divorce." [23] In short, it would seem that it is not the break-up of the marriage itself which is damaging, but the fact that the present institution of divorce leaves many necessary tasks unaccomplished. Divorce as a back-up institution to the family is inadequate. Many familial functions are not performed at all. Indeed, in the absence of back-up institutions other than divorce, the law itself may be discredited.

The conflict is exposed neatly by Lattimer[24] when he notes that there are two equally respected social doctrines with which the law and

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17. V. Baum, *Law and Social Work: Marriage Counseling*, 3 J. FAM. L. 279 (1963).

18. Johnstone, *supra* note 8, at 307.

19. B. Brown, *Natural Law, the Marriage Bond and Divorce*, 15 JURIST 24 (1955).

20. M. Fenberg, *Can Divorce Be Made Respectable?*, 14 WOMEN L.J. 63 (1956).

21. W. Palmer, *Fact Against Fiction: A Judge's Findings on a Serious Problem*, 38 A.B.A.J. 653 (1952).

22. T. Walker, *Our Present Divorce Muddle: A Suggested Solution*, 35 A.B.A.J. 457 (1949).

23. C. Smith, *Lawyer's Guide to Marriage Counseling*, 50 A.B.A.J. 719 (1964).

24. W. Lattimer, *The Family and the Law*, 27 DICTA 409 (1950).

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practice of divorce must compromise: The public policy that dictates that divorce should be hard to get, because otherwise even more families would break up; and, on the other hand, the public policy that would make divorces easy in order to prevent the adultery and mayhem attendant upon keeping people married under intolerable conditions.

In short, the attitudes of lawyers and judges toward marriage and divorce merely reflect the various attitudes in the community. The attitudes in the community are not rational. Moreover, nobody—not just the divorcees themselves, but nobody—is capable of looking at the problem of divorce dispassionately, for there are no generally agreed referents to what the word "marriage" means. If "marriage" is a sacrament, then divorce is worse than futile; if "the family" is the thing to be protected at all costs, then divorce is wicked; if "happiness" is to be considered, then divorce should be made respectable; if "honesty" is to be fostered in the citizenry, then the collusion that present divorce actions necessitate is dishonest.

Yet, as Redmount has put it, present legal policy *must* support the institution of marriage.[25] In our society, that institution alone provides the necessary structure for the organization of personal relationships—in spite of the fact that marriage cannot itself sustain organization or substitute it for disorganization. He does not go on to say, however, just what aspects of the institution are to be supported; and certainly does not venture as to whether divorce is bad for the institution of marriage because it breaks up families, or good for it because it weeds out some of the bad families—leaving the over-all family situation of the nation in better shape than before.

We cannot help repeating that where there are no institutions to take the place of the home in teaching and caring for the young, divorce must, necessarily, be *considered* a misfortune. Yet, in other societies, where back-up institutions do exist (whether in the form of the extended family or some other) the same attitudes are not necessary, and individual marriages can be broken for the greater good of "The Family" in society. These two points of view ultimately have a religious, philosophical, and psychic foundation—like the proponents of materialism and of idealism in philosophy, it is doubtful that very many holding one view will ever accede to the views of the other.

25. R. Redmount, *Analysis of Marriage Trends and Divorce Politics*, 10 CRIME & DELIN. 352 (1964).

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MARRIAGE COUNSEL AND DIVORCE COUNSEL

Writers in law journals have made a distinction between marriage counseling and divorce counseling. The word "counsel" is a complex one because it means the act of talking things over, the adviser himself, the advice that is given, and the wisdom or prudence of the counselor. For lawyers, the word has a very special meaning, because counseling is precisely what lawyers are supposed to do. Kargman has said specifically that divorce counseling is not fundamentally different from any other kind of legal counseling—it is a service concerned with helping a husband and wife to adjust their conflicting claims.[26] It is, however, different from marriage counseling.

In the view of the writers we examined, divorce counseling has to do with law and the legal position of divorcing persons. Marital counseling is in the sphere of domestic relationships, and therefore in at least some degree outside the scope and training of lawyers—that is, it deals with regularities in the institution of marriage that have never been legally reinstitutionalized.

All lawyers agree that they must be good divorce counselors if they are to accept divorce cases—that is, they must represent their client's (apparent) interests and that they must proceed with adequate means to achieve their goals. Redmount has stated the range of divorce counseling succinctly. The counsel must tell his client of the implications of divorce—about the division of property, and the psychic and financial preparations that the client must make in readying himself for the consequences of the split. The client needs to be helped to assess the importance of his financial expectations and demands from the point of view of his own welfare, but also from the standpoint of children and of the ex-spouse. The demand for wealth must not be allowed to serve as a club rather than to express a real need. Furthermore, counsel should point out that demanding custody of a child may be unwise—the act may arise from hostility, and the child may eventually be a burden. He goes on to say that separation may be preferable to divorce because it is a means of biding time to provide a cooling off period, and during this period a certain amount of insight counseling, either by the lawyer or by some other professional, can occur. Redmount states

26. M. Kargman, *Lawyer's Role in Divorce Reconciliation*, 6 PRAC. LAWYER 21 (1960).

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(but in this we do not concur) that separation is the psychological equivalent of divorce. Finally, then, the attorney who is acting as divorce counselor can outline the strategy of negotiation. Redmount claims that most attorneys are prepared to be adequate divorce counselors (although judges and divorcees in our example are certainly not unanimous or wholehearted in concurrence).[27]

There is, as we noted, little dispute about divorce counseling. There is, however, a very wide range of dispute about where divorce counseling stops and marriage counseling starts, and about whether lawyers should, can, or ought to do marriage counseling. The matter is problematical for several reasons. Among them: legal ethics and counseling may sometimes be in contradiction; a lawyer cannot talk to both parties and hence is not in a position to effect a reconciliation, which must after all be the work of both parties; counseling is expensive; lawyers do not get paid sufficiently for divorce cases to make it reasonable for them to take the time; lawyers do not have the special training required for marriage counseling; and, finally, in most cases counseling does not work.

The ethical objections can be quickly disposed of. The A.B.A. has come out against the practice of a lawyer's recommending a lawyer for the spouse of his client.[28] That does not mean, obviously, that the lawyers of the two spouses should not communicate. Judges to whom we have talked are convinced that more effective communication between the lawyers would probably result in quicker and better hearings. However, divorcees to whom we have talked have also told us that the two lawyers got together "behind their backs" and worked things out to the disadvantage of one or both.

However, it is agreed by all that lawyers should, in some cases, call in special counselors for people in the process of divorce. Alexander notes that the lawyer's "schooling and his practice have fitted him to counsel on matters of money, property, and business, to prevent or recoup the loss of things material, but not of things human, such as husbands and wives."[29] A greater or lesser degree of cooperation and collaboration between lawyers and such specialists is advised. Redmount is of the opinion that the responsibility for analysis of the difficulty is

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27. Redmount, *supra* note 14, at 262–66.

28. M. and F. Harper, *Lawyers and Marriage Counseling*, 1 J. FAM. L. 73 (1961).

29. P. Alexander, *Public Service by Lawyers in the Field of Divorce*, 10 OHIO S.L.J. 17 (1952).

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beyond the competence of any unaided court, and that judicial procedure should, with statutory prescription, invoke the services of clinics, and encourage the development of such clinics as a service arm of the court.[30] Baum[31] and Kohut[32] both make the point that the legal profession should be trained to appreciate the role of the marriage counselor, and Kohut goes on to say that the legal profession cannot cope with domestic relations with traditional methods—it must work closely with social science. The case worker and the lawyer should be working closely together.

There is, however, one group of the writing lawyers who have come out against marital counseling. Kargman[33] presents two views—one, that marital counseling is a social worker's problem, not a lawyer's problem, because it is time consuming and lawyers are not trained for it. The other, that if the lawyer needs more training he should get it in order to fulfill his part of the lawyer-client relationship. Since, she says, a quarter of all marriages that took place in 1959 are remarriages, and since about three-quarters of all divorced people remarry, the lawyer is in a good position to assist his clients in reevaluating their marriages and in educating themselves for their second marriages.

There are a few writers who take an optimistic view:

> An attorney should be the best qualified person to advise people involved in domestic relations because he is well acquainted with the laws and rulings governing marital relationships and has a broad and practical knowledge of the human frailties and misunderstandings that lead to family troubles.[34]

Kinney adds that many attorneys have some knowledge of psychological and psychiatric problems.

The degree of success of attorneys as marriage counselors is also something about which there are pronounced opinions, which seem, however, to be informed by vastly different cultural backgrounds. Alexander has expressed our own feeling when he says that it will never be known how many lawyers work at reconciliation and to what extent

30. Redmount, *supra* note 14, at 249.

31. Baum, *supra* note 17, at 288–89.

32. N. Kohut, *Rehabilitation of Broken Marriages by Attorneys*, 10 PRAC. LAWYER 75 (1964).

33. Kargman, *supra* note 26, at 21.

34. Kinney, *supra* note 7, at 31.

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they are successful. Kohut[35] thinks that "whether he recognizes it or not, one of the functions of the attorney who chooses to accept divorce cases is that of marriage counsellor." Davis[36] admits that "experience has shown that many so-called reconciliations [by lawyers and judges] only serve to sustain a bad marriage." Others, like Smith[37] note that a lawyer, in his zeal, may even have an adverse effect, widening the gap between the spouses.

A number of the articles we encountered have emphasized the need for revamping the teaching of family law in the law schools to better deal with the situation. Kohut[38] says that lawyers specializing in family law need special training; Bradway[39] says flatly that "family law should be a required course in law school." Levy[40] writes that behavioral science materials and a sense of humor are better than case-book methods in teaching family law because appellate courts handle only peculiar cases—many real problems are thus ignored. He goes on to say that information must be had from psychologists, psychiatrists, social workers and marriage counselors. "Law is nothing more than a form of social control intimately related to those social functions which are the subject matter . . . of the social sciences generally." [41] However, Levy points out that there is a serious absence of focused material with which such a form of teaching could be readily brought about.

Johnstone[42] is of the opinion that, since personality analysis with respect to marriage is the general approach of all marriage counselors (in spite of differences of skill and method) law students should be given some training in observing personality characteristics and motivation. He adds that he feels justified in this opinion, because marriage counseling avoids probing the deep unconscious. Redmount[43] notes that there is often a difference between what a client wants and what he

35. Kohut, *supra* note 32, at 76.

36. B. Davis, *Illinois' Cooling-Off Law: Is It a Constructive Step Toward Solving the Divorce Problem?* 28 PENN.B.A.Q. 292 (1957).

37. Smith, *supra* note 23, at 720.

38. Kohut, *supra* note 32, at 85.

39. J. Bradway, *Family Law Should Be a Required Course in Law Schools,* 31 BAR EXAM. 59 (1962).

40. R. Levy, *Perilous Necessity: Non-legal Materials in a Family Law,* 3 J. FAM. L. 138 (1963).

41. *Id.* at 148.

42. Johnstone, *supra* note 8, at 309.

43. Redmount, *supra* note 14.

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says. The lawyer may symbolize someone who can deal with domestic trouble, who can sympathize with the client and back him up or, on the other hand, the client may expect the lawyer to see through his subterfuge. The next client may think it none of the lawyer's concern to disturb his self-deceptions. In the face of such variety, counseling must be a matter of perceiving the nature of the problem, and of strategy in reaching a solution—both demand special training. The lawyer must, Redmount finishes, decide whether he will counsel for insight, whether he will suggest psychiatric treatment (although premature suggestion may imply lack of the counsel's support), or merely counsel on the strategy of the divorce.

Finally, a few writers claim that reconciliation procedure is desirable, even if marriages are not saved. McIntyre[44] tells us that tensions in alimony and custody problems can be eased and other pressures lessened. The Harpers[45] are also of the opinion that the value of counseling cannot be measured entirely by the number of reconciliations. "Our divorce laws," they say, "are so thoroughly bad that unless they are subverted by collusion or perjury, they invite recrimination and hostility which can only intensify the travail of the ordeal." In such cases, the lawyer as counselor may be able to save some of the worst consequences—and thus (we feel, though the Harpers do not say), in some small measure recoup the distaste and disrespect for the law that naturally result.

We have gone into some detail in reporting the conclusions and opinions of these writers because we think it is a matter of considerable importance that lawyers are so vitally concerned with a problem falling outside both their spheres, which nevertheless has been thrown to them for amelioration and solution.

THE ADVERSARY PROCEDURE

None of the writers whose articles we have examined had a good word to say for the adversary procedure in divorce. We have, however, heard it defended. The usual attitude is that if the adversary procedure can go and the legal institution not lose face, it probably should go. Yet, it is our opinion that much of the constructive thought which has been put into new procedures would have been better spent if it in-

44. McIntyre, *supra* note 11.

45. Harper, *supra* note 28, at 82.

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cluded an estimate of possible means of better utilizing the present adversary procedures.

The difficulties in the adversary system are described by critics as a set of limitations. The judge cannot, within the restricted range of relevance and under the traditional rules of evidence, receive facts in sufficient quality and quantity.[46] The whole truth is not available because of the nature of the process, and "wrong" issues are raised when the law indicates the issues instead of accepting what people bring before it.[47] Most often cited is, of course, the "need" for perjury in today's divorce courts.

In the field of procedure, unlike the other fields in matrimonial law, there are some quite precise suggestions for change. The most common reform procedure is advocacy of some sort of "family court." The real issues, these writers say, deal with the "family." The point of a divorce hearing is to decide whether such and such a family should be kept together or not, and if so what plans are necessary for the security of this family.[48]

We do not intend to go into the many views of how a family court should be operated—for that would be a lengthy paper in itself. We do note, however, that there are a good many suggestions for new machinery and reform of present procedure. Bradway suggests that a new legal entity be created—the "family" which can be treated as a legal person and can be represented by a "family lawyer." [49] Bradway has earlier given some suggestions about the new machinery which might handle these problems more efficiently—a situation in which anyone, whether they be spouses, children, the state, or the family entity itself can get a case into the courts, and that there be simple pleadings so that the court could take the family under advisement in a way somewhat similar to the way in which a patient puts himself into a doctor's hands. Then, he continues, formal proceedings should be instituted to notify all parties as quickly as possible in orthodox fashion; each party would be permitted to file the issues which he wished the court to determine. The major issues, in such a scheme, would be solved therapeutically; collateral issues could be tried before a jury, and the family entity could present information as a party at interest.

46. Bradway, *Divorce Litigation and the Welfare of the Family*, 9 VAND. L. REV. 665 (1956).

47. *Id.* at 671.

48. *Id.* at 673.

49. Bradway, Suggestion: The Family Lawyer, 45 A.B.A.J. 381 (1959).

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Bradway's scheme, taking all his writings together, is the most comprehensive we have found in the law journals, but many other writers have broached the subject. Lattimer[50] has suggested a domestic relations court especially trained to handle divorce and related matters. McIntyre, in a symposium on family courts,[51] suggests that elderly persons with a proper training could make valuable contributions as marriage counselors. Undoubtedly, many would dissent from that opinion, but the point is that much thought is now being given to these considerations, some of it on the basis of sound information and analysis.[52] The family court (with its staff of social workers, accent on rehabilitation, and its correlation of divorce with juvenile matters), calling on judges only when necessary, maintaining close relationships with the schools, and instructing the people who use it in the proper respect for the courts[53]—these motifs reoccur constantly.

Lawyers are dealing actively with the legal problems of divorce and activities centering about legal reform. They are not dealing so actively or so well with the more basic problem of what changes the family is undergoing, and what the new demands on marriage and on families are, and most particularly they are not dealing well with the back-up institutions for families in difficulty. It might be said, however, that these are not problems for lawyers and that it is the social scientists and the makers and watchers of institutional morals who are behind hand. Lawyers cannot, as lawyers, handle these problems—as experts in matrimonial law and as people who see a lot of matrimonial strife, they can only join and support other members of the community in the search for new ways of understanding the matter.

CONCLUSIONS

The main conclusions of this essay are that we in America lack adequate cultural equipment to deal with today's problems of divorce, and that lawyers are sitting on the hot seat.

50. Lattimer, *supra* note 24, at 412.

51. McIntyre, *supra* note 11.

52. M. VIRTUE, FAMILY CASES IN COURT (1956) and O. GORMAN, LAWYERS AND MATRIMONIAL CASES: A STUDY OF PROFESSIONAL PRACTICE (1963).

53. E. Melson, *Family Breakdown and the Family Court*, 17 FED. PROBATION 3 (1953).

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In order to analyze the situation, it was necessary to examine our conceptualization of three different institutions: legal institutions, family institutions, and divorce institutions, and three type-functions of institutions: juridical, service, and back-up.

1. Legal institutions perform two functions that we have separated: the first is a set of special services which deal with the law. The second function of the legal institutions is juridical: to resolve conflict within general social institutions so that they can function on their own. The two are not the same thing, in spite of the fact that in performing both of these functions, the law is supportive of primary social institutions.

2. The family, as an institution, is the general back-up institution in American society, but is not itself supported by adequate back-up institutions. When a family fails in its task, the legal institutions cannot interfere except in very limited and special ways. No other institution can interfere with any effect—the extended family and the neighborhood are not privy to family difficulty and could not step in to help matters if they were.

3. Our traditional view of divorce is inadequate. We have, customarily, looked at it as if it merely ended a marriage, leaving greater or lesser chaos in its wake. We have not faced the fact that divorce begins with a decree just as marriage begins with a wedding. The institution of divorce is made up of an ex-wife, an ex-husband, probably some children of the two, maybe their new spouses, a court, a tax collector, and at least two firms of lawyers. Its purposes are residual from the family it replaces—family support and socialization. Divorce, besides being a general social institution, is a back-up institution to the family.

Given these preliminary analyses, it seems to us that this is what is happening: the legal institutions are called upon in some situations to resolve family conflict by severing a marriage and replacing it with a divorce. The legal institutions have no power to handle the situation in any other way, but feel that the other aspects of their calling—service to the original institution—should be served. They must, as the law stands, do the job of establishing a divorce on the basis of "grounds" that may have little to do with the original conflict in the marriage. Therefore, instead of dealing with the conflict in the family, they establish a back-up institution (divorce) which they believe, in many cases,

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at least, to be inadequate, although perhaps better than the unreconstructed family itself. Lawyers, then, see the non-legal aspects of the divorce as something that somebody should be doing something about. They are themselves neither trained nor adequately recompensed for filling the gap.

What they are struggling for is a way in which the law can be innovative in providing back-up institutions for the family at the same time that it rationalizes the institution of divorce. This is not a contradiction in terms, although much popular opinion would have us believe so.

Lawyers are handling marital break-up by the same caprice of historical accident that required psychoanalysts first to be doctors of medicine—the fact that there are some legal (medical) dimensions to the problem. The difference, obviously, is that psychoanalysts are extensively retrained. Lawyers are very much aware of their own lack of retraining.

All this is complicated by the fact that divorce is not a simple institution, and that it has been abhorrent for many generations. Marriage, on the other hand, is the core institution of American society, and the married couple is the basic social unit, despite the existence of sub-groups within the culture for which this is not so. In a society in which neolocal households are charged with providing companionship, sexual outlet, and the next generation and its socialization, the pressures become great. And there are no institutions backing up the marriage when it encounters hard times. Marriage counselors and a scattering of others penetrate the field—but they are few in number and not always as effective as we or they could wish.

When families fail, nobody does what families are supposed to do, so we attempt to make the divorce institution (including the court) fill the gap. Yet the court is not a back-up institution. It does not matter whether divorce is easy or difficult—except in so far as remarriage may provide a new institution: one that can do the job at which the old family and the inadequate divorce institution have failed.

In the absence of back-up institutions other than divorce, we have what Americans call "broken homes." So long as we maintain the practice of neolocality and prefer a husband-wife based social system, we must either put up with the "broken homes" or create new back-up institutions.

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This conclusion is factual rather than merely moral. If we recognize only those unions based on marriage, and believe that all the "best" households are based on the married couple, that the one-family household is the place where spouses get the most important parts of their rewards and where children get the most important parts of their training (schools take over only the easy parts of child training) then we must expect the situation that we in fact have. We can start simply—nursery schools with built-in baby sitters; special training for divorced persons (or, for any one needing it); allowances for *all* mothers, with means of recouping from those who do not "need" it. Our immediate task has not been to examine such new concepts—but to point out how rare they are in the literature, if not in social reality. This survey has led, however, to the conviction that along with the pleas for family courts and more decent divorce proceedings, we had better add a word for back-up institutions and for the real social innovation that their creation will demand.

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