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LEGAL SCIENCE AND THE SOCIAL SCIENCES: THE FAMILY COURT†

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If you were asked what in your opinion was the most significant development, the greatest forward stride that has occurred in Anglo-American jurisprudence since the signing of Magna Charta, I am sure your answers would be both learned and fascinating. But in selecting the particular epoch or event of legal history and philosophy there would be little occasion for uniformity. I suppose all of us would be entitled to select the one we deem most important, and none would have the right to gainsay. I wonder if any of you would join that not inconsiderable body of individuals who have taken their cue from none other than Roscoe Pound, who has been dubbed by the American Bar Association Journal "the pre-eminent legal scholar of the world."

Dean Pound has stated publicly that in his opinion it was the establishment of the juvenile court movement that was the most forward-looking development in Anglo-American jurisprudence since Magna Charta. By a strange coincidence, a nisi prius judge in Ohio some 40 years ago gave voice to a similar sentiment:

> "In our opinion, this is the broadest and most humane act given to a people since the signing of the Magna Charta by King John. It is in tune and in step with every inspiring thought and noble impulse concerning the care, safety and well-being of children under 18 years of age."[1]

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†The third Earl F. Nelson Memorial Lecture delivered at the University of Missouri on March 9, 1956.

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1. State v. Joiner, 20 Ohio N.P. (n.s.) 313 (1917).

It was only at the turn of this century that the first juvenile court came into being. It was in Chicago. It came as the result of a very happy wedding between a courageous bar association and a group of earnest and far-sighted social workers. The plan worked out at that time has required comparatively little modification. In every state and in many foreign lands there are now flourishing juvenile courts, modeled on the same pattern and philosophy, ministering unto wayward children and their stricken parents (and maybe sometimes to parents who aren't so stricken.)

While no juvenile court that I know of has ever come very close to achieving its full potential (mainly for lack of funds and trained personnel), the fact remains that by its wedding of legal science and some of the other social sciences, the court has been able to point the way, and grow and develop. It has always seemed to me that it gives its greatest promise of usefulness in this very blending of law and social casework, medicine, psychology, psychiatry, counseling, religion, education, etc.

There is another phenomenon, the family court, which very closely resembles the juvenile court. It came into being in Cincinnati in 1914 under the leadership of Hon. Charles W. Hoffman, who was then elected to the Court of Common Pleas, Division of Domestic Relations, and who still holds that position at the age of about 86.

The family court also strives to wed the legal and social sciences. It lifts bodily the main features of the philosophy, methodology and procedure of the juvenile court and adapts them to the family court. Since juvenile courts are so much better known and are so very much more numerous than family courts, and since family courts constitute a most hospitable theatre for the joint action of the law and many social sciences, I propose that we examine the family court on its merits. I am sure you will have no trouble following the application of the various social sciences.

First, just what is a family court? It has three main distinguishing characteristics: integration, the "therapeutic approach"[2] and a specially trained staff. A true family court is one designed and equipped to protect and safeguard life in general and family units in particular by affording to the members thereof, in addition to their purely legal remedies, various

2. See Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 36 A.B.A.J. 105 (1950).

other types of help; and by resolving all their justiciable problems and conflicts arising from their intrafamilial relationships in a single, integrated court, having one staff of specially skilled personnel, with one philosophy, one underlying purpose, working as one team, with one set of records, all in one place, under one direction, that of a specialist judge or judges. When the community is not large enough to support integration, a state-wide court, similar to the Connecticut and Utah juvenile courts, is envisioned.

There are a half dozen postulates or guiding principles which generally govern the practices and policies of family courts in so far as they are not prohibited by or in conflict with the substantive law of the state:

1. Persons involved in various kinds of family litigation or proceedings are generally in need of guidance and aid of various kinds, in addition to that rendered by the impersonal, judgmental and punitive processes of the law.

2. With rare exceptions such persons are unfamiliar with the varieties of aid available and are quite insensible of the particular types of help appropriate to their individual problems.

3. It is better for the family and all its members to make peace, resolve conflicts, and compose differences than to engage in pitched battles in the courtroom.

4. The traditional adversary procedures of the law when employed to resolve intrafamilial conflicts tend to fan the flames and intensify antagonism between and among members of the family; therefore such procedures should be displaced as far as possible by the non-adversary or conference type of procedure in both determining issues and prescribing remedies; provided that the conventional adversary procedure must always be available to any person demanding it for the finding of disputed facts.

5. Prevention is better than punishment. The family court should apply the law and exercise its powers, express and implied in such a way as to serve the best interests of the family unit, conserving the marriage if possible; and in case of irreconcilable conflict between or among members of the family, then so as to protect the more helpless members of the family as equitably as possible.

6. Care must always be taken to see that no person is permitted to take advantage of, or profit by his own wrong.

7. Persons seeking relief from marital and other family problems by recourse to law and courts should not be denied appropriate help or turned away whether before, during or after litigation; provided it is desirable for lawyers and courts to refer such persons to other agencies when it is clear that neither lawyer nor court has the means to afford such persons the type of help indicated, or that such help can be rendered better by the other agencies.

The foregoing is not an authoritative definition of the family court, but rather a general description gathered from the observations of various persons who have studied family courts in operation. It is recited so that you may know the kind of thing we have in mind when some of us of the American Bar Association talk about family courts.

In May, 1948, at the call of the President of the United States, there met in Washington, D. C. a National Conference on Family Life. The American Bar Association was invited to send a delegation to participate in this conference. The delegation was headed by Reginald Heber Smith, of Boston, and it played a leading role at the Conference.

In September, 1948 this delegation submitted its report to the House of Delegates at the annual meeting of the American Bar Association at Seattle. The report was accepted by the House and the recommendations unanimously approved. From this report we quote:

"3. *Family Courts*

"Reform of the divorce laws will do no good unless we can establish new procedures in courts which are especially designed and equipped for the purpose.

"Such courts we call family courts. They should have jurisdiction over all problems, civil and criminal, that directly affect the family or its members. Equitable as well as legal remedies should be in their hands.

"The judges need to be experts and the only way they can become expert is by devoting themselves to this type of judicial work year after year.

"They must have adequate staffs. This means probation officers, investigators, case workers, psychiatrists. The personnel

must be decently paid; in fact, the salaries must be enough to attract and keep the best type of personnel.

"Of course this will cost more money than the typical divorce court costs today in *terms of money.* What must be made plain to the American people is that the total cost of the administration of justice is no more than a drop in the bucket of national or state expenses, and further that the cost of our present divorce system in *terms of human tragedy* has become too high to be tolerated any longer.

"The American Bar Association has always been sympathetic to the evolution of family courts. The time is ripe to give the movement a great forward push.

"That is the objective of our second recommendation."[3]

Just as the fundamental purpose of the juvenile court is to protect children and restore them to society as healthy, happy, law-abiding future citizens, (notice the word "happy;" juvenile courts have learned that a happy child is seldom truly delinquent, and a delinquent child is seldom truly happy) so the outstanding objective of the family court is to protect the family and restore it to society as a healthy, law-abiding unit, the basic unit of our society.

Now, a family consists of human beings. The only way to protect the family is to protect the human beings who comprise it. Just as a child in conflict with the law needs help, so do members of the family in conflict with each other need help. But our adult civil and criminal courts are not designed to give to troubled members of the family the kinds of help they need; these courts are designed rather to ascertain disputed facts, adjudge the blame, impose punishments.

The General Secretariat of the Supreme Court of Japan put it very neatly:

"In regular court procedure, whether criminal or civil, it is the aim of the Court to establish a certain fact which happened in the past and apply laws thereto, while, in the procedure of the Family Court, whether it involves a family case or juvenile case,

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3. 73 REPORTS of A.B.A. 103 *et seq.*; *id.* at 302 *et seq.* (1948).

> the Court attaches more importance upon how to maintain the peace and happiness of the family involved or how to adapt juvenile delinquents to normal social life than upon how to simply establish a past fact.'"[4]

(Notice the word "happiness." Family courts have learned that a happy family seldom distintegrates. and families that come to court are seldom happy.)

Curiously a considerable segment of the American bar seems to have remained impervious to the true significance of what has been happening in the field of matrimonial actions. We know that in many jurisdictions—most of them quite respectable—divorce cases have long outnumbered all other civil actions combined; that each year more than 400,000 marriages fail and families are disrupted to the point of divorce; that additional hundreds of thousands of families become disorganized without seeking divorce; that broken families breed juvenile delinquency and cost countless millions in various forms of "relief;" that altogether these phenomena directly and vitally affect the lives of millions (husbands, wives, and children) and indirectly affect more millions (notably the taxpayers).

But statistics cannot paint a true picture. Take just the matrimonial cases or family service department of the family court. They learn early that they are handling not so many cases of this or that type but people, human beings, two human beings, about half the time several human beings, some of them small and helpless.

Maybe it's a mother who has come clear across town, lugging her wailing infant in her arms, "to see the judge" who will give her the divorce that (she thinks) will end all her misery and restore her lost happiness.

Maybe it's a husband who couldn't keep up with his abler wife and took to drink and now is terror-stricken at the prospect of losing her.

Maybe it's a heedless pair of youngsters who married for love (of the wrong kind) and now propose to get rid of their baby and of each other so they can each go out and have unfettered fun.

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4. "A Guide to the Japanese Family Court," General Secretariat, Supreme Court, Japan. Mar. 1953, p. 8.

Maybe it's a faded, elderly matron who loyally stuck it out with her husband until the family was raised and now wants a divorce so she can suffer in solitude, not knowing or caring how or where she will live.

Maybe it's a soft-spoken, well-groomed lady who avoids the judge's experienced eye, and responds to a few pointed questions with a burst of tears and a confession she doesn't want a divorce and is just doing it because she thinks her husband wants her to.

Maybe it's a hardened beauty who has cast covetous eyes upon Mr. Tall, Dark and Handsome, who was quite willing to be persuaded of the greater intensity of the verdure in the other pasture, and who is also seeking a divorce from his wife.

Maybe it's an absconding husband and father who artfully tried to turn the tables by claiming wife and family abandoned him years ago and their whereabouts are unknown.

Maybe it's a couple who parted in the heat of a quarrel and each is too proud to unbend or doesn't know how to go about making amends.

Maybe it's a pair who could get along with each other all right but who have been driven apart by designing in-laws.

Whatever the type of problem, there passes before the court a steady stream of people, humans, in trouble, in distress. Something is badly out of kilter. The most serious thing in their lives has gone radically wrong. What started out with such promise to be a thing of beauty and a joy forever has become an ugly thing of torture and potential agony forever. And they firmly believe, and just about all of us lawyers believe with them, that the only way to end this potential perpetual agony is by death or divorce.

The traditional and prevailing divorce court would regard these people as so many cases. It would be judgmental and punitive. It would find the facts and apply the law, let the chips fall where they may.

Thoughtful members of the legal profession in virtually every part of the country have been increasingly appalled at the unspeakable ineptitude and downright disastrousness of the old-fashioned legalistic way of handling cases that are peculiarly family troubles.

Investigations have been made, studies have been conducted, and with surprising uniformity, lawyer after lawyer, community after community

has come up with conclusions and recommendations in favor of the integrated family court.

Perhaps the most thorough of these studies was that conducted by the Klots Committee of the Association of the Bar of the City of New York. The report was prepared and filed by Walter Gellhorn, of Columbia Law School, assisted by Jacob D. Hyman, Dean of the Buffalo Law School, and Sidney H. Asch, of Columbia.

A dozen conclusions are found on page 12 of their report, which is entitled: "Children and Families in the Courts of New York City." To quote a few:

> "1. Cases which are the subject of this report differ in important respects from the purely adversary proceedings ordinarily litigated in a court of law. The issues involved are varying aspects of family deterioration which call for judicial determination of the root cause and for the application of therapeutic and preventive measures.
>
> "2. A specialized judiciary equipped by training and disposition with the proper approach and skill in handling the matters involved is required for such cases.
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> "5. A new, single, integrated court should be created by constitutional amendment which should have jurisdiction (exclusive except as indicated) over the following matters:
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> "(a) all cases over which the Children's Court now has jurisdiction;
>
> "(b) crimes and wayward behavior of minors over 16 years of age except: (four paragraphs of exceptions);
>
> "(c) simple assaults and disorderly conduct involving members of an immediate family unit;
>
> "(d) proceedings to establish paternity;
>
> "(e) all claims for support, including those for support of children born in or out of wedlock;
>
> "(f) matters involving custody of children;
>
> "(g) proceedings for divorce, dissolution, annulment and separation;

"(h) proceedings to authorize adoption.

"6. Special facilities, including social case work, counseling, probation, medical, clinical psychiatric and psychological services, co-ordinated with and supplemented by the work of appropriate qualified religious and philanthropic agencies, are essential for the proper handling of these matters. The integrated court should be properly equipped with such facilities.

"9. The court should be authorized to have such special parts as may be essential, i. e., a part for juvenile cases, a part for youth cases, a trial part for the proper handling of such matters as paternity trials, and for jury trials of issues in matrimonial proceedings."

Because we of the legal profession are notoriously addicted to neophobia, many of us raise objections to placing these special powers, duties and facilities in a court setting. We say bluntly: "These things are not legal, they have no place in a court of law." We say (softly, to ourselves): "What if the embattled spouses are persuaded to lay down their arms or even to enter into an armed truce? What about our fees?" Perhaps we rationalize, "What are all the private agencies for, anyway?"

Not long ago a class in an eastern law school had been studying the proceedings of the Senate Committee regarding the establishment of a family court in Washington, D. C.[5] Knowing that Ohio had a statute requiring the investigation of all divorce cases involving a child under 14, a member of the class was instructed to write to me and pose a number of questions. A few excerpts from my reply (abridged) might be apropos.

Like some of the witnesses at the hearing, and like some lawyers, the class was worried about the investigators or marriage counselors, and feared their reports would be incompetent for hearsay and other reasons. "As a matter of fact," I explained, "these reports consist largely of analysis and opinion, diagnosis and prognosis. The 'investigators' do not concern themselves with grounds for divorce or defenses. That is the lawyers' concern. Their interest is not in what has happened in the past, but

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5. *Hearings Before a Subcommittee of the Committee on The District of Columbia, United States Senate,* 83rd. Cong., 2d Sess., on S. 2701, A Bill to Establish the Family Court for the District of Columbia (February 24, 25 and 26, 1954).

in what, if anything, can be done about it now. By law their reports must be given to litigants upon request at least five days before the hearing. The author of the report may always be called for cross-examination. In divorce cases this happens maybe once in two or three years, for no reason other than that the lawyers find in the reports nothing to warrant cross-examination. Of course, at the very least these investigators must be expert caseworkers, and they should have special training in marriage counseling."

The student cited a hypothetical case "where a personality conflict or sexual maladjustment leads a counselor to believe that the parties *should* not continue to live together. "Rarely," I replied, "would a good counselor so express himself to the judge. For one thing, counselors know that it would be useless to express such an opinion. They know to their sorrow that the court has no choice in the matter and that if evidence of guilt is adduced, the judge is bound by law to grant the divorce. And they have learned that one of the easiest things in the world is to adduce evidence of guilt in a matrimonial case—especially in an uncontested case (as over 95% of cases are)."

The student wondered "what happens when the judge knows that the real reason W. seeks divorce is not a ground for divorce." As I wrote him: "The answer is simple. She gets it anyway. Her lawyer brings in evidence to substantiate valid grounds for divorce. No matter how impure her motive, no matter how unjust her claims, no matter if the judge has 'an abiding conviction to a moral certainty' that she has a boy friend whom she intends to marry, he is powerless to deny her a divorce so long as she brings in evidence to prove H.'s guilt.

"I am in complete agreement with Professor Huard[6] (and incidentally we are both in agreement with Roscoe Pound) in (1) opposing the rotation of judges and (2) advocating that the family court be not a separate court but a department of the court of first instance of general jurisdiction, and (3) that the jurisdiction of the juvenile court be integrated with that department.

"Not all family courts will be exactly alike nor will the investigator's functions be identical. But experience has shown they are mostly both help and hindrance—but not always in the way many of the witnesses at

6. *Id.* at p. 58.

the hearing seemed to hope or fear. As indicated above, they do *not* help the judge decide whether to grant or deny a divorce. Only competent evidence in open court can determine that.

"They may help him in matters of child custody and visitation for they can do what judge and attorney cannot do: they can go into the home and observe with a trained eye the interpersonal relationships between the child and other members of the family, and can report their observations and expert opinions with complete neutrality. In such cases they generally take the stand, but counsel often waive cross-examination.

"Specially trained 'investigators' are often invaluable in a hotly contested duel over dollars. Being primarily diagnosticians and therapists, they mollify and pacify the belligerent battlers and replace vindictiveness with some degree of sweet reasonableness. This the lawyers always welcome because it enables them to settle the money matters amicably, without a court fight that may well be bloody and lengthy and prevent them from devoting their time to other and more lucrative business.

"But 'investigators' are not there for the purpose of helping judge or lawyer, but of helping the litigants and their families. They explore diagnostically to discover whether the marriage may be viable. And if they find a spark of life they work on it, sometimes maybe for a year or two, with the attorneys' consent and co-operation. If they are successful the case never comes before the judge except for a routine dismissal. If not, their report contains simply their diagnosis and a record of their efforts and their prognosis of 'unfavorable,' meaning it is useless to try to work further with the parties. Thus they have helped the parties all they can and if the judge ultimately has to grant a divorce they have at least helped him avoid 'burying a live corpse.'

"In some ways it must be admitted the 'investigators' are a hindrance. They hinder those who would *deceive their own lawyers and the court.* In those courts where thorough-going investigations have been inaugurated there has been a noticeable decrease in the customary perjury, and there has been an attitude of increased frankness. At first a few lawyers have objected to being 'kept honest,' as one of them jestingly put it, but the opposition generally dwindles to the vanishing point.

"At the senate hearings it seemed to me that precious hours were wasted in setting up straw men to knock down. For example, a wail went

up that the adversary system was about to be totally abolished. I know of no student, teacher, scholar, writer, lawyer or judge who has ever advocated total abolition of the adversary system. Scores of them have pointed out its inadequacies, and its unsuitability for juvenile and matrimonial cases. Under every statute I have ever heard of and in every family court existing or contemplated, recourse may always be had to the adversary process for the finding of facts in dispute. It is doubtful if it will ever be displaced for that purpose. And if this should ever happen, it will be only because a better method of finding the truth will have been discovered."

Now, I seem to hear the refrain, "Well, but why repose all these extra-curricular, extra-legal functions in a *court of law?* What are our social agencies for?" There are several answers. Maybe the first might be another question: Is a court any the less a court of law because it also exercises equity jurisdiction? Or because it seeks to apply the principles of preventive law? Or because it recognizes the value of and seeks to employ other sciences and disciplines to supplement legal science? Or because its attitude is humanitarian, its approach therapeutic instead of punitive and legalistic (although, of course, never illegal)?

Secondly, any family court in its right mind is only too happy to refer all the clients it can to other agencies for casework, counseling. medical, economic, psychological, psychiatric and all manner of family services. The court staffs are invariably underpaid and overworked and they are hardly reluctant to relieve themselves whenever they can conscientiously do so.

Thirdly, there are certain unfortunate facts of life well known to family courts. People in domestic discord seem for the most part never to have heard of the family service agencies or of pastoral or marriage counseling services. Or, if they have heard of them, their ideas about them are distorted or dim or downright hostile. Even if they had a perfect understanding of the services available, a large percentage of them would by-pass even the best of agencies, even the friendliest and wisest of pastors, for a number of reasons. The principal reason is that they are hurt, threatened, frightened, angry, vindictive, confused, ashamed, their pride is wounded. In their overwrought emotional state they want only one thing. They don't want to learn how to make a go of their marriage, how to save their family from the final coup de grace, how to live with their so-and-so of a spouse. They don't even want to learn how to live with themselves. They can't or won't recognize any difference between symptom and cause. They cer-

tainly don't want to look within themselves for any causative factor. All they feel is that their spouse gives them pain which they deem intolerable, and to rid themselves of the pain all they want is to be rid of the spouse. So they have recourse to the only redress they know, the law. And the law offers them the only remedy it knows, divorce.

Fourthly, the social agencies have too often made a practice of preparing a feast, beating the dishpan and crying: "Here it is: Come and get it!" Then the very people most in need of it don't hear the appeal or ignore it. The agencies havn't taken it where the people are. Now, in the simplest military strategy when the enemy must file through a narrow pass, that is where we concentrate our fire. The advertiser doesn't post his signs in a secluded glade for the chance beauty-seeker to see, but beside the highway where the multitude must pass by. The Indian who must catch all the salmon he can does not wait patiently by the inviting pool for the fish to swim into his net; he stations himself beside the narrow gorge up which the salmon must fight his way to the spawning grounds. So the State which really wants to save all the marriages it can will not sit by in the side street and wait for the victims of marital malaise to find their way to the clinic; it will station itself by the busy highway down which these unhappy victims are lugging their moribund marriages to the morgue, and there offer its clement and therapeutic services. Surely if the State really wants to reach people to help them, there can be nothing wrong with its going where the people are who need to be helped.

Fifthly, it thus appears that in a substantial proportion of marriage failures the social agencies are ineffectual. This is through no fault of their own. They can hardly go along the street pushing doorbells and saying to each housewife: "Good morning, are you having domestic trouble today? We would like to demonstrate our latest model in family service." The only trouble is that there just isn't any way to get all the people who need this kind of service to seek it. Only after that happy day arrives will there be no need to repose such services in the court.

But, lastly, until then there is no by-passing the family court. All marriages destined for ultimate burial, and many merely sick ones are channeled through the court. As pointed out above, it sifts out the utterly defunct marriage from the merely moribund, and when it discovers a spark of viability it goes to work thereon. And even when it does not succeed to the point of reuniting the disunited, it may and does succeed in helping a

party to learn to live with himself in spite of himself. It helps those in need of help with the *kind* of help they need.

It is often argued by learned lawyers and sociologists that by the time a disintegrating marriage gets into the divorce court it is so far gone that it is too late to do anything about it except give it a legal burial. While this is very frequently true, it is not always true. Obviously, the longer the sore is allowed to fester, the harder it is to cure, but even old sores don't always require an amputation. Fortunately the experience of the family courts has shown that sometimes even the most stubborn-seeming spouses prove tractable.

Of course no family court is so naive as to believe one can really force marriage counseling or any form of therapeutic measure upon an unwilling or resistant client. But there can be no harm in at least exposing him to such measures, and it has been found that sometimes there are subtle ways of breaking down such resistance and "selling" the idea that there may be for him other and better remedies than divorce—especially a divorce spawned in the searing heat of a bitter court battle.

Altogether the logic seems to be in favor of the family court. What experience we have bears out the logic. The general idea appears so right that these courts seem bound to become prevalent in the course of time.

Although substantial interest in the family court movement has been shown from Wisconsin to Texas, from New York to California, in Canada, and in several European countries, we still have only a handful of these courts in operation. Just since World War II Japan has established about three times as many integrated family courts as there are in all the United States.

To revert to the eloquent words of Reginald Heber Smith in his report to the House of Delegates in Seattle in 1948:

> "The cost of our present divorce system in terms of human tragedy has become too high to be tolerated any longer. The American Bar Association has always been sympathetic to the evolution of family courts. The time is ripe to give the movement a great forward push."