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PREVENTIVE LAW AND FAMILY LAW:  
PRE-MARITAL PHASES AND PURPOSES

I. INTRODUCTION

The formal definition of "preventive law," "a branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties,"<sup>1</sup> has existed only since 1961,<sup>2</sup> and the origin of preventive law as an identifiable development within the law is traceable to 1870.<sup>3</sup> This evolution and crystallization of a *concept*-without-a-label in less than a century would not appear to embrace a remarkably protracted length of time; however, such progress is more readily understood when it is realized that this formalization was aided by the legal professions identification of the movement, and grasp of its objectives, for an extensive period of time prior to its rapid acceleration toward concretization after 1870.<sup>4</sup> Lawyers, for many years, have been cognizant of the "consultive processes in law" which are directed at reducing the need for the formal aspects of law reflected in trial and appellate procedures<sup>5</sup> and of the growing emphasis on that part of the law which has both negative *and* affirmative goals; that is, the prevention of legal "trouble" *and* the achievement of desired legal "results,"<sup>6</sup> rather than merely the former. Estate planning, for example, is typical of preventive law practices that, for centuries, have been merged into the operative *conduct* of lawyers notwithstanding the burgeoning of emphasis on this aspect of the law in this century. Because of the relative anonymity of its development, "preventive law" has popularly emerged as an appellation rather than a *démarche*, and the prediction expressed by the movement's most eminent spokesman that the "periodic legal check-up,"<sup>7</sup> a concrete and specific tool of preventive law, would become an integral component of all law office practice prior to 1960,<sup>8</sup> has likewise proved to be somewhat less than accurate. The "legal check-up" concept is, however, an expanding notion,<sup>9</sup> and is integral to the development of this comment as well as to its methodology.

1. Merriam Webster, *New International Dictionary* 1798 (3d ed. 1961).

2. *Preventive Law Symposium*, 38 So. CAL. L. REV. 377 (1965).

3. See HURST, *THE GROWTH OF AMERICAN LAW* 261-62 (1950). See also Brown, *The Law Office — A Preventive Law Laboratory*, 104 U. PA. L. REV. 940 (1956) [hereinafter cited as Brown, *The Law Office*].

4. See, e.g., Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) [hereinafter cited as Llewellyn, *Some Realism*]. For a comprehensive bibliography, see BROWN, *PREVENTIVE LAW IN THE LAWYERING PROCESS* (1963).

5. See Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation*, 109 U. PA. L. REV. 972, 988 (1961).

6. See Habermann, *Preventive Law — A Challenge to the Bar*, WIS. B. BULL. 7 (August, 1966).

7. The phrase was coined and given currency in BROWN, *MANUAL OF PREVENTIVE LAW* 35 (1950). See also Brown, *The Law Office* 951 n.33.

8. See Brown, *The Law Office* 951 n.33. See also Brown, *The Practice of Preventive Law*, 35 J. AM. JUD. SOC'Y 45, 47 (1951).

9. See generally Tilles, *Understanding the Consultant's Role*, 39 Harv. Bus. Rev. 87 (Nov.-Dec. 1961).

The purposes of this paper are to show not only that preventive law should operate in the field of domestic relations law but also that there is an obligation on not only preventive law lawyers but also on the entire legal profession to analyze the difficulties which the preventive law movement has encountered, and to attempt to correlate this analysis with domestic relations law problems; to recommend specific preventive law objectives in the field of domestic law problems; and, to consider some of the indirect advantages of commencing and nurturing preventive law approaches to family law problems. In particular, the recommendation will be made that a statute be enacted using the "legal check-up" technique. This statute would require a "pre-marital legal check-up" comprehending a simultaneous interview between an attorney and the parties planning to enter into the marital status. The primary *function* of the lawyer would be to apprise the couple of the State's interest in *their* marriage. The essence of this function would constitute an elaboration of the State's concern for the regularity and integrity of *their* marriage and an examination of its legal elements and ramifications, emphasizing, in this latter aspect, that each will assume a new and different legal status, legal personality, and legal capacity.

## II. RELATIONSHIP OF PREVENTIVE LAW TO DOMESTIC RELATIONS LAW

Law is a social institution created for the satisfaction of social needs, and legal history is a record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; "a more embracing and more effective securing of social interests."<sup>10</sup> Because of the relationship of their profession to society and its components, lawyers, not unnaturally, have tended to view themselves as "the oldest form of behavioral scientist."<sup>11</sup> When law is perceived as a means to social ends rather than as an end in itself, it is self-evident that "before rules [of law] were facts."<sup>12</sup> Preventive law classifies facts as either "hot" or "cold," the former referring to current facts of immediate affairs, the latter signifying the historical facts of a record on appeal.<sup>13</sup> Distinguishing facts in this manner serves a functional purpose related to the dual objective of preventive law, the control of facts to which legal consequences attach and the

10. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (rev. ed. 1954).

11. See Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585, 593 (1965). The Dean of the University of Pennsylvania Law School has stated that: Lawyers are constantly concerned with behavioral problems. They are called on for advice by the disturbed and the mentally ill, and they see many problems with mental health aspects. They need understanding of human conduct, its motivations and determinants. They need this understanding, not so that they can substitute for psychiatrists, but to be *better counsellors* and judges.

Quoted in Wels, *Psychiatry and the Law in Separation and Divorce*, in NEUROTIC INTERACTION IN MARRIAGE 326-27 (Eisenstein ed. 1956). (Emphasis added.)

12. See Llewellyn, *Some Realism* 1222.

13. Brown, *The Law Office* 940-41.

control of the likelihood of dispute regarding these facts.<sup>14</sup> Expressed in this manner, litigation is broadly viewed as a part of law in which there has been a breakdown in the practice of preventive law, rather than as a mere settlement of a dispute; that is, litigation vis-à-vis preventive law aims is a remedial legal procedure. Viewed in this light, it is clear that the approach to legal problems taken by preventive lawyers is necessarily *a priori*: Does the event or happening have legal consequences? If so, can contact with the formal machinery of law — trial and/or appellate procedures — be avoided?

That marriage is a contract with mutually dependent covenants,<sup>15</sup> but that divorce is something more than a suit for damages for breach of contract,<sup>16</sup> are axioms of law, irrespective of any analytical bases for the seeming paradox arising from a juxtapositioning of them. Recently the Supreme Court said in *Griswold v. Connecticut*:<sup>17</sup>

Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an *association* for as noble a purpose as any involved in our prior decisions.<sup>18</sup>

In relating the rights of married persons to fundamental rights guaranteed by the first amendment, the Supreme Court was, in one aspect, carrying forward legal considerations of marriage that have appeared from time to time before the Court.

In *Maynard v. Hill*,<sup>19</sup> reference to marriage as a civil contract, in both judicial decisions and scholarly writings, were recognized as convenient shorthand methods of indicating that the contract to marry becomes executed by its solemnization, with or without an attendant religious ceremony, so that a "relation" is created, a relation that is an "institution" of society founded upon consent and contract of the parties.<sup>20</sup> The rights, duties, and obligations of this "social relation," however, depend not upon the agreement which signifies the relation, but upon "the general law of the State, statutory or common, which defines and prescribes those rights . . . [which] are of law, not of contract."<sup>21</sup> Subsequent decisions of the Court expanded the legal ramifications of this "social relation" by declaring that both marriage and divorce created a new legal

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14. *Id.* at 942 n.10. The homely classification of facts into "hot" and "cold" serves a definitional purpose but is also designed to show that the "control" at which preventive law aims is germane to the practice of law rather than the "control" sought, for example, by Pavloveans.

15. See, e.g., *Beeby v. Beeby*, 1 Hag. Eccl. 789, 790, 162 Eng. Rep. 755, 756 (1799).

16. See, e.g., Weinstein, *Proposed Changes in the Law of Divorce*, 27 Mo. L. Rev. 307, 323 (1962).

17. 381 U.S. 479 (1964).

18. *Id.* at 486. (Emphasis added.)

19. 125 U.S. 190 (1888).

20. *Id.* at 210-14.

21. *Id.* at 211.

“status”<sup>22</sup> which included as a part of its meaning “the regularity and integrity of the marriage relation.”<sup>23</sup> Most recently, while striking down a State antimiscegenation statute in *Loving v. Virginia*,<sup>24</sup> the Court characterized marriage as “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”<sup>25</sup>

Thus, the progression of characterizations of marriage before the Supreme Court over a period of exactly eighty years has been from civil contract, to social relation, to status, to association, to basic civil right.<sup>26</sup> The collation of judicial opinion is, however, deceptive. While it would seem that an orderly body of law on marriage has emerged, the situation outside of the legal sphere has been drastically different:

The modern trend seems to be to regard marriage as a status only in the subordinate sense, the relationship being primarily that of contract, which can be abrogated or dissolved and with considerably more ease than one could extricate one's self from the liabilities arising out of one of a business relationship.<sup>27</sup>

It is the difference between the deceptively systematic body of law on the subject of a basic civil right and the widespread beliefs that marriage is “in short, a social relationship”<sup>28</sup> or a “cultural product”<sup>29</sup> that presents a challenge to the preventive lawyer in his attempt to reconcile the abstract statements of law to the problems of those who live in the very real world and who compose the clients in a domestic relations case.

The widely accepted legal definition of “status,” “that condition of a person by which the nature of his legal personality and his legal capacities are determined,”<sup>30</sup> is separate and distinct from the definition of “status” which serve other fields; for example, the sociological. Nevertheless, despite the fact that by marriage two people pass from one kind of legal status, the non-marital,<sup>31</sup> into a distinct and different legal status, the marital, by solemnizing a contract to marry, it has been, and is, asserted that not only has there not developed a legal approach to these events which singly and collectively have a legal significance attached, but that there has not even appeared a legal approach to legal theory in the field

22. *E.g.*, *Williams v. North Carolina*, 325 U.S. 226, 230 (1944).

23. *Estin v. Estin*, 334 U.S. 541, 546 (1947).

24. 87 Sup. Ct. 1817 (1967).

25. *Id.* at 1824.

26. In *Loving*, when the Court described marriage, it appeared to be reaffirming a definition expressed in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The use of the phraseology “basic civil rights” in both cases, however, is simply coincidental. To view *Loving* as but an affirmance of a prior judicial pronouncement would be to discount the panorama of American history in the field of civil rights since 1942 and to weaken the force of the case itself.

27. McGuire, *Civil Law Concerning Marriage*, in *FUNDAMENTAL MARRIAGE COUNSELING* 416 (Cavanagh ed. 1963).

28. See GOODE, *AFTER DIVORCE* 90 (1956).

29. See Montagu, *Marriage — A Cultural Perspective*, in *NEUROTIC INTERACTION IN MARRIAGE* 4 (Eisenstein ed. 1956).

30. Cavanagh, *Introduction*, in *FUNDAMENTAL MARRIAGE COUNSELING* xvii (Cavanagh ed. 1963).

31. The non-marital status as a peculiar type of legal status is a concept already well developed in specialized fields of law; for example, the taxing law.

of family law.<sup>32</sup> This is so notwithstanding the crises in the family system that arise due to the act of divorce, an act which itself has legal significance and legal involvement.<sup>33</sup> Is such a vacuum, in legal approach and in legal theory, a proper sphere for preventive law technique, where it is fundamental that "the really first stage at which a lawyer may be called upon to predict . . . is . . . before the client has 'signed a contract' "?<sup>34</sup> If so, are there worthwhile specific objectives upon which preventive law can take sight? Or is the legal profession to attempt to preserve the status quo, and occasionally make a deferential gesture<sup>35</sup> as its contribution to the expanding work being accomplished in family law and family relations? To phrase such questions is, of course, to exercise in rhetoric, for the legal profession is well aware that its abstention from contributions in the field have been productive "of a chaotic situation in domestic relations law and . . . [of] a mephitic atmosphere prejudicial to the dignity of the legal profession and the judicial system."<sup>36</sup>

### III. PRESENT OBSTACLES TO GREATER PREVENTIVE LAW DEVELOPMENT IN THE FAMILY LAW AREA — A SUGGESTION

Some courts have recently given emphasis to the implementation of the formal elements of law in order to reconcile parties to a contemplated divorce proceeding,<sup>37</sup> receiving, thereby, justifiable commendation. These attempts, however, are not overt resort to the process of preventive law<sup>38</sup> and cannot be cited for the proposition that a legal approach to marital law problems is not lacking. Legal conciliation procedures in the area of divorce are a product of "marital illness,"<sup>39</sup> a strain in a legal relationship has reached the point that remedial legal measures must be invoked, and the Family Courts are viewed as a "therapeutic measure" of a "preventive character" whose "primary purpose would be that of salvage."<sup>40</sup> Reconciliation, in the eyes of the law, is a "voluntary resumption of marital cohabitation in the fullest sense" involving four elements measured by the legal micrometers: a living together as husband and wife, sexual relations, joint domicile, and intent of the parties.<sup>41</sup> The effect of a reconciliation is

32. See Dean & Kargman, *Is There a Legal Conceptual Framework for the Study of the American Family?*, in EMERGING CONCEPTUAL FRAMEWORKS IN FAMILY ANALYSIS 281 (Nye & Berardo ed. 1966).

33. For a study of the nature of this particular crisis on the family system, see ZIMMERMAN & CERVANTES, *MARRIAGE AND THE FAMILY* (1956).

34. Brown, *The Law Office* 942 n.10.

35. See, e.g., Bradway, *Proposed New Techniques in the Law of Divorce*, 28 IOWA L. REV. 256, 269 (1943), where the suggestion is offered that a divorce proceeding should be entitled "*In re* the dissolution of the . . . Family."

36. Furlong, *Dual Divorce Decrees and Conciliation in Contemporary Family Law*, 2 WILLAMETTE L.J. 134, 135 (1962).

37. See, e.g., Rall, *The King County Family Court*, 28 WASH. L. REV. 22 (1953).

38. Because the word "preventive" is susceptible of various meanings, one must be cautioned and cognizant of the dangers of the ultraquistic subterfuge; that is, the use of a word in both or several of its senses during the same discussion. See Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 387 (1941).

39. See, e.g., Furlong, *supra* note 36, at 138.

40. McGuire, *supra* note 27, at 417-18.

41. Clark, *Separation Agreements*, 28 ROCKY MT. L. REV. 149, 178-79 (1956).

the equivalent to a rescission.<sup>42</sup> These "preventive" reconciliation measures are designed to prevent a culmination of the legal proceedings in a divorce by having the parties to the proceeding resolve their difficulties under the auspices of a court. In this sense and in only this sense are such proceedings "preventive" and, as such, are readily distinguishable from the broader non-remedial twofold purposes of preventive law.<sup>43</sup>

In a society that values marital stability highly, the *decision to divorce* and not merely the fact of divorce is a proper factor for consideration in the post divorce adjustment study.<sup>44</sup> Hence, to recognize the invocation of legal and judicial machinery at a point when the status is on the verge of fissure is not the same as saying that any ensuing exertion within the legal and judicial procedural framework is preventive law. The reconciliation proceedings are designed to prevent *further* demands on the formal components of the legal system. A lawyer's services at this stage are more mechanical than ameliorative, because the lawyer, himself, is boxed-in with respect to any attempts by him to resolve the domestic relations problem which he is about to enter, *in medias res*.<sup>45</sup> Thus, when the point is reached that conciliatory measures are deemed appropriate or necessary, the law finds itself at the threshold of a full-blown legal dispute, the possibility of avoiding or controlling which is an announced objective of preventive law.<sup>46</sup>

The difficulties arising from the failure to isolate the legal aspects of marriage and of divorce are best mirrored in the fact that with one exception, where it was suggested that marriage annulment litigation could be prevented in large measure by a state investigation of facts before the issuance of a marriage license,<sup>47</sup> the proponents of preventive law, themselves, have done little more than recognize the area as a proper one for legal activity and techniques.<sup>48</sup>

In this sense,<sup>49</sup> the development of a legal approach to modern problems of marriage, as there has already developed an approach to divorce, would per se constitute a valid and rewarding purpose for the preventive law lawyers.<sup>50</sup>

42. *Id.* at 182.

43. See text accompanying notes 5-6 *supra*.

44. See GODDE, *op. cit. supra* note 28, at 6. See also text accompanying note 70 *infra*. In the criminal law field, the process of adjustment is being accorded more attention and the legal profession is being called upon more to make contributions. "Adjustment" in this sense is pointed more to true rehabilitation and not merely a procedural device that hopefully will reduce the number of recidivists.

45. For a more comprehensive discussion, see Baum, *A Trial Judge's Random Reflections on Divorce: The Social Problem and What Lawyers Can Do About It*, 6 J. FAMILY L. 61, 70-71 (1966).

46. See generally Brown, *The Law Office*.

47. Bradway, *The Family Watchdog*, 86 U. PA. L. REV. 823 (1938).

48. Brown, *The Law Office* 942 & n.9.

49. See notes 44-48 *supra* and accompanying text.

50. "The broadest possibilities for preventive practice lie, however, in the vast fields of property law and contract." Brown, *The Law Office* 944. Karl Llewellyn, hardly a master of the understatement, once said, "Contracts in what we may broadly call family relations do not work out in general as they do in business." Llewellyn, *Some Realism* 1240.

## IV. LEGAL FACTS FOR A PREVENTIVE LAW PURPOSE

The *sine qua non* of preventive law is, as has been pointed out,<sup>51</sup> facts of legal significance. In 1910, there was 1 divorce for every 11.4 marriages; in 1965, the divorce rate was 1 in every 3.7 marriages. During this period the median age for the marrying parties dropped from 24.6 years for the male and 21.2 for the female to 22.8 and 20.6 respectively,<sup>52</sup> and the break-up rate for young married people is estimated at one in three.<sup>53</sup> Divorce has been called the "most common kind of civil litigation" in the United States, constituting almost 40% of pending state court cases in some areas.<sup>54</sup>

The same facts, of course, mean different things to different professions.<sup>55</sup> The above facts have presented a thorny area for lawyers because the attitude has been generated that there are persons more properly qualified to deal with these facts in order to derive and apply any meaning from them; namely, the minister, the psychiatrist, the psychologist, and the sociologist.<sup>56</sup> This attitude can be ascribed, in part, to charges made from both sides of the bench that the legal profession has abandoned,<sup>57</sup> or is unfit<sup>58</sup> for, treating any of the family law problems innate in these statistics. Controversy has mistakenly focused on the contention that lawyers would be unable to take and use such facts for a legitimate legal purpose without poaching on the preserve of several other professions.

For the lawyer, the aforementioned statistics mean that 1 of every 3 marriages will terminate; that is, 2 people out of every 6 in the class will begin a legal relationship with a contract and terminate that relationship by formal legal proceedings that may involve another contract, a property settlement agreement. During this passage between two formal legal incidents, the two people will have passed through three separate legal statuses,

51. See note 14 *supra* and accompanying text.

52. Dept. of Commerce Statistical Abstract of the United States 46, 62-63 (1966). In 1965, 1,789,000 marriages were contracted. *Ibid.*

53. See Baum, *supra* note 45, at 62.

54. *Id.* at 74, 75 & n.28.

55. See generally Cavanagh, *Introduction*, in *FUNDAMENTAL MARRIAGE COUNSELING* (Cavanagh ed. 1963).

56. See, *e.g.*, Baum, *supra* note 45, at 70-74.

57. See, *e.g.*, Ketcham, *supra* note 11, at 598.

58. Baum, *supra* note 45, at 93:

The legal profession can help bring a breakthrough in controlling the divorce epidemic if a number of things happen:

"If" lawyers learn more about the behavioral sciences in order to appreciate the knowledge and skills of other disciplines dealing with family conflict.

"If" lawyers will make use of such knowledge and skills by appropriate referrals to clergymen, psychologists, social workers, medical doctors and, especially, professionally-trained marriage counselors.

"If" the profession undertakes a program of upgrading the teaching and practice of family law.

"If" lawyers exhaust the possibility of improving their clients' unhappy marriages before recommending divorce, and a canon of ethics is adopted to assure such an effort by each and every attorney.

"If," above all else, the profession can change divorce laws so that adversary proceedings are deferred until there has been expert diagnosis of family problems and an opportunity for voluntary therapy.

"If" the profession vigorously supports high quality, voluntary pre-marital education and counseling.



the non-marital, the marital, and the divorced; and, they have a 50%<sup>59</sup> chance of creating a fourth status during this interim, the parental. The children who are the product of the marriage have, as a result of the procreative process, their own legally cognizable status, which the courts will consider and protect, the "status of dignity."<sup>60</sup> In addition, the behavior patterns of most divorcees disclose that they are later reassimilated to the marital status.<sup>61</sup> And, an increasingly substantial percentage of the remaining 4 of 6 persons in the class are implementing modernized legal machinery for reconciliation in which great formality is attached to the execution of a reconciliation agreement, another contract.<sup>62</sup> The irresistible conclusion, therefore, is that nearly 1 of every 2 persons in the class will both enter the class and approach leaving or actually leave the class via legal instruments and legal instrumentalities.

However difficult this conclusion may be for other professions to accept, it has particular significance for the legal profession on the issue of whether there exists a public policy favoring the indissolubility of marriage to which the strength of legal presumptions can be attached.<sup>63</sup> It is an accepted legal truism that "the public policy of one generation may not, under changed conditions, be the public policy of another."<sup>64</sup> The public policy that appears to hold sway in divorce proceedings of today is that "a reasonable effort be exerted to determine whether or not the marriage is in fact terminated," and, if "the marriage is one in legal form only, it should be terminated."<sup>65</sup> The interest that lawyers have in the relative ease of separation or divorce in contemporary society and the public policy that is reflected by the statistics is similar, in some respects, to that of other professions: "Our concern here is not with whether such an attitude is 'good' or 'bad'; rather we should note that it is not prevalent in most cultures but is peculiar to our own."<sup>66</sup> From this position of objectivity, it cannot be denied that these facts constitute a sufficient number of "law creating events"<sup>67</sup> to which the purportedly practical approach of preventive law is aimed. Nor can it be denied that a legal approach to these legal facts is not only desirable but also necessary if the traditional gap between a society in flux, and in flux typically faster than the law,<sup>68</sup> is not to widen beyond acceptable limits.

59. See, e.g., Weinstein, *supra* note 16, at 310.

60. Williams v. North Carolina, 325 U.S. 226, 237 (1944).

61. See Goode, *op. cit. supra* note 28, at 207.

62. See, e.g., Furlong, *supra* note 36, at 141.

63. For the classic articulation of this legally impelling public policy, see Evans v. Evans, 1 Hag Con. 35, 161 Eng. Rep. 466 (1790). For a consideration of the continued vitality of this alleged public policy in various sophisticated forms, see, e.g., Whitmire, *Maintenance on Appeal*, 10 LAW & CONTEMP. PROB. 757 (1944).

64. Patton v. United States, 281 U.S. 276, 306 (1930).

65. See Weinstein, *supra* note 16, at 329.

66. Montagu, *supra* note 29, at 7. See HARING, MARRIAGE IN THE MODERN WORLD 132 (1965). It should be noted that in civil law countries, it is considered a mandate on the law to prevent internal family affairs from too often becoming the subject of civil-law mediation.

67. See Brown, *The Law Office* 941 n.7.

68. Llewellyn, *Some Realism* 1236.

V. STATUTORY PRE-MARITAL LEGAL CHECK-UP:  
THE NECESSITY

Having reviewed the facts and having discussed the broad purpose of a preventive law approach in the field of family law, we come now to the "question of *making* the facts talk."<sup>69</sup> It is a working assumption in many professions that the United States is a society that values marital stability highly; the sociologist, for example, considers the divorce rate as an unequivocal index of social change that may proceed from either personal disorganization or from a current social pathology.<sup>70</sup> In a legal context, in both state<sup>71</sup> and federal courts,<sup>72</sup> the permanency of marriage contracts is of peculiar concern because although marriage and divorce affect personal rights, they also touch basic interests of society. Thus, it is firmly embedded in our legal tradition and in our legal institutions that the State's interest in the family causes the marital status to be three-cornered, with the State as a third party;<sup>73</sup> and, in the absence of any constitutional prohibitions, legislation in support of the State's legitimate and vital interest in maintaining "effective control of the marital status"<sup>74</sup> will be upheld.<sup>75</sup> The judicially recognized substantial state interest in the permanency and integrity of the marital status which can, constitutionally, be supported by legislation, can lead to an enactment of a technique of preventive law, the "legal check-up,"<sup>76</sup> as a means to effectively assert and

69. See Llewellyn, *The Modern Approach to Counselling and Advocacy — Especially In Commercial Transactions*, 46 COLUM. L. REV. 167, 183 (1946) [hereinafter cited as Llewellyn, *The Modern Approach*]. (Emphasis added.)

70. See, e.g., GOODE, *op. cit. supra* note 28, at 6-10.

71. See, e.g., De Ryt v. De Ryt, 6 Ohio St. 2d 31, 40, 215 N.E.2d 698, 706 (1966).

72. See, e.g., Williams v. North Carolina, 325 U.S. 226, 230 (1944).

73. See BISHOP, MARRIAGE AND DIVORCE §§ 229, 231 (6th ed. 1881); HILL, MARRIAGE AND THE FAMILY 537 (1942); KEEZER, MARRIAGE AND DIVORCE §§ 1.07, 1.08 (2d ed. 1945). See generally Connolly, *Divorce Proctors*, 34 B.U.L. REV. 1, 6-9 (1954).

74. *Estin v. Estin*, 334 U.S. 541, 547 (1947).

75. See, e.g., *Loving v. Virginia*, 87 Sup. Ct. 1817 (1967); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 384 (1930). Under our federal system, the domestic relations of husband and wife are matters reserved to the State, but not exclusively because of the demands of equal protection and due process. *Ibid.* See also *Williams v. North Carolina*, 325 U.S. 226, 233 (1944).

76. This phrase serves as a favorite shorthand description for preventive lawyers. See text at p. 840 *supra*. Its usage is continued in this paper but a *caveat* is necessary. In business, where the employment of a consultant by corporate executives for both preventive and corrective reasons is relatively fully developed, the analogy of a doctor-patient relationship has been explored. The analogy has been found to be misleading in three areas: the way in which the "patient" is identified; the responsibility for diagnosis; and, the degree of participation of the client in formulating and carrying out the "therapy." See Tilles, *Understanding the Consultant's Role*, 39 Harv. Bus. Rev. 87, 90 (Nov.-Dec. 1961). The fallacies inherent in the doctor-patient analogy when extended to the field of management improvement technique become, possibly, subtly but seriously compounded in a scheme for a pre-marital purpose. As a condition to obtaining a marriage license, a medical examination is generally required because of the health interest in protecting the parties against infectious diseases. See, e.g., CLARK, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 26 (1965), for a discussion of the medical examination requirement as a condition precedent to the issuance of a marriage license. The latent danger in the use of the language "legal check-up" consists in the possibility of the prospective licensees identifying the two requirements, thereby frustrating at least one of the fundamental purposes of a statutory legal check-up, namely, the impressing upon the individuals,

protect that interest if the States' efforts hitherto have been ineffective<sup>77</sup> or outmoded.<sup>78</sup>

Prior statutory regulation has consisted of both licensing conditions precedent to the entry into marriage<sup>79</sup> and divorce legislation. Cooling-off statutes<sup>80</sup> and interlocutory decrees<sup>81</sup> are recognized, legitimate legal devices designed to slow down the divorce rate while providing an opportunity for the human element to function so that the parties can preserve, by themselves, those interests which the statutory devices were expected to foster.<sup>82</sup> A brief examination of these statutory measures and their purpose should, it is hoped, emphasize the need for statutory preventive law.

The interlocutory decree was the earlier of the two statutory devices aimed at providing an opportunity for, if not in fact actually effecting, a reconciliation. One of the purposes of the statutes, ostensibly, was to provide the opportunity to consider the conduct of the prevailing party subsequent to the divorce, a necessity derived from the problems of proof in a modern divorce defense.<sup>83</sup> In upholding this device, the courts have interpreted the legislative intent as not to make divorce difficult but to assert the public policy against the "rapid acquisition of successive spouses."<sup>84</sup> A specific object of an interlocutory decree statute — the protection of persons who *enter into* the marriage relation — coexists with the broad general purpose of protecting the public interests.<sup>85</sup>

Lack of success, from the view-point of protecting the State interests in marital integrity and permanency, led to a shift in statutory emphasis to

of the intangible but genuine state interest in the preservation and integrity of *their particular marriage* and that the statutory requirement is something more than a procedure that they must endure in common with all those seeking to enter into the marital status.

77. See, *e.g.*, *Estin v. Estin*, 334 U.S. 541, 546-47 (1948).

78. See Weinstein, *Proposed Changes in the Law of Divorce*, 27 Mo. L. Rev. 307, 327-29 (1962) for a discussion of extant legislative procedures considered in the light of contemporary demands.

79. See CLARK, *op. cit. supra* note 76, at 26, for a survey of the scope and degree of pre-marital statutory regulation.

80. See, *e.g.*, ILL. REV. STAT. ch. 40, § 7b (1956) :

Subject to the exceptions hereinafter in this Act provided, no complaint for divorce shall be filed until after the expiration of 60 days from the day summons is served or from the last day of publication of notice or, in cases in which publication of notice or service of summons is waived, from the day defendant appears in the cause in person or by counsel, provided, however, that plaintiff shall file his or her complaint not later than 90 days from the day the praecipe is filed or 70 days from the day summons is served or the last day of publication of notice or the day defendant enters his or her appearance where publication of notice or service of summons is waived.

81. See, *e.g.*, WIS. STAT. ANN. § 247.37 (1957) :

(1) When a judgment or decree of divorce from the bonds of matrimony is granted so far as it affects the status of the parties it shall not be effective until the expiration of one year from the date of the granting of such judgment or decree. . . .

(2) So far as said judgment or decree affects the status of the parties the court shall have power to vacate or modify the same for sufficient cause shown, upon its own motion, or upon the application of either party to the action, at any time within one year from the granting of such judgment or decree. . . .

82. See CLARK, *op. cit. supra* note 76, at 590.

83. See, *e.g.*, *Roddis v. Roddis*, 18 Wis. 2d 118, 120, 118 N.W.2d 109, 111 (1962).

84. *Id.* at 121, 118 N.W.2d at 112.

85. *Fraser v. Fraser*, 334 Mass. 4, 133 N.E.2d 236 (1956).

the cooling-off statute. Such legislation has been viewed as a valid exercise of the State's police power to promote the public welfare and as a reasonable rule regulating divorce<sup>86</sup> before the parties become enmeshed in the adversary proceedings attendant upon the filing of the petition.<sup>87</sup> Challenges to such statutes as a means to legitimate legislative objectives and on the grounds of vagueness and indefiniteness have been unsuccessful.<sup>88</sup> The courts, in upholding the cooling-off statutes, have considered themselves as participating in the protection of the integrity and sanctity of family life and as serving the best interests of the community by attempting to reconcile the parties seeking a divorce or separation.<sup>89</sup> Attacks on the grounds of State indifference to the human passion involved in a divorce proceeding have likewise failed.<sup>90</sup>

Nevertheless, these statutory devices have failed to be effective. Apart from the difficulties these procedures have had with the developing pragmatic and realistic grounds for divorce — marriage failure<sup>91</sup> — current statistics on the divorce rate indicate in clearer fashion the measure of their inadequacy. But unless our entire system of social values is to be revolutionized, the legitimate interests which support such legislation should not be frustrated.

A suggestion has been made to the N. Y. Legislature that there be enacted a mandatory thirty-day "cooling-off" period before the issuing of a marriage license.<sup>92</sup> Such a suggestion appears as the ultimate in a cry of desperation. It fails, however, as a rational suggestion simply because it would merely add to the formality of the State regulation of entry into the marital status without incorporating cures for defects encountered in the statutory measures of the same nature in the form of interlocutory-decree and traditional "cooling-off" statutes. As such, the legislation would be devoid of any practical meaning. Since, however, there are valid State interests to be preserved and fostered, the etiology of the recommendation is compelling in its logic. If the decision to obtain a divorce follows a considerable period of deliberation by the parties and is accountable in large measure for the frustration of existing statutory devices,<sup>93</sup> and if the parties rights of marital privacy are constitutionally secure from State interference after the formation of the marital status

86. See, e.g., *People ex rel. Doty v. Connell*, 9 Ill. 2d 390, 394, 137 N.E.2d 849, 852 (1956).

87. See, e.g., CLARK, *op. cit. supra* note 76, at 590.

88. See, e.g., *People ex rel. Doty v. Connell*, 9 Ill. 2d 390, 395-97, 137 N.E.2d 849, 853 (1956).

89. See *Pashko v. Pashko*, 63 Ohio L. Abs. 82, 85, 101 N.E.2d 804, 806 (C.P. 1951).

90. They also say that human passion is involved in this matter which is not amenable to regulation by law. That, of course, is not sound thinking because it is only through the exercise of discipline with respect to human passion that man has evolved above the level of brute force and laws in many instances merely reflect another discipline.

*Id.* at 90, 101 N.E.2d at 809.

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

92. *The Divorced Woman — American Style*, Newsweek, Feb. 13, 1967, pp. 64-70.

93. See, e.g., GOODE, *AFTER DIVORCE* 138 (1956).

until the parties themselves resort to formal legal machinery,<sup>94</sup> then the only time for the State to effectively assert its interests would be prior to the formation of the status, and the statutory adoption of a pre-marital "legal check-up" would meet the requirements of the "perceived need test"<sup>95</sup> of preventive law as a standard for proper legal action in a sphere of legal interests.

## VI. PRE-MARITAL LEGAL CHECK-UP: THE PROPRIETY

Preventive law purposes necessarily involve a blending of facts and law, and of law and facts.<sup>96</sup> Therefore, in its pragmatic approach to the prevention of legal disputes, even though there is demonstrated need for revised statutory procedure prior to the creation of the marital status, the propriety of such action must be shown before preventive law will affirmatively support the enactment of one of its own techniques. Preventive law clearly acknowledges "non-law suit" means of achieving preventive law purposes and equally recognizes that the need and propriety of such means increases as the source of potential legal dispute is identified with the family law relationship of the parties.<sup>97</sup> Preventive law would recognize that "divorce occupies a very particular place among the predictable tragedies of living."<sup>98</sup> It would then shape the observation in a legal framework, such as, divorce or reconciliation proceedings are a predictable source of legal procedures for nearly one-half of those people who enter the marital status so that the avoidance of such legal disputes is within the proper scope of preventive law purposes. But the mere formulation of an answer does not necessarily provide a workable, that is, a practical, legal approach.

The "traditional psychological basis of law that man is a responsible being able to choose his own ends and make his own adjustments" doesn't seem to hold up in a considerable proportion of family court cases. Perhaps the trauma of domestic disharmony so disturbs the emotions of the spouses that their judgment becomes unsettled and they are unable to think.<sup>99</sup>

Additionally, preventive law must contend with the assertion that "solutions to marital problems [arise] only when people voluntarily come to understand their problems."<sup>100</sup> The statutory pre-marital legal check-up, however, could assimilate and digest the experience and truth of these observations.

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94. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1964).

95. See Llewellyn, *Some Realism* 1224.

96. See Brown, *The Law Office* 947-48.

97. *Id.* at 944 n.12.

98. Goode, *op. cit. supra* note 93, at 203.

99. Alexander, *The Family Court — An Obstacle Race?*, 19 U. PITT. L. REV. 602, 608 (1958).

100. Baum, *A Trial Judge's Random Reflections on Divorce: The Social Problem and What Lawyers Can Do About It*, 6 J. FAMILY L. 61, 82 (1966).

It is a fact that Americans are marrying young. Although it is also a fact that the American divorce rate is the highest in the world, it does not follow *necessarily* that the ages of those participating in divorce has decreased correspondingly.<sup>101</sup> The fact of youth, however, has been a prime consideration leading to significant revampings of legal approaches to legal problems in other areas of family law. When the modern minor appears before the juvenile court, it has been asserted that a judge's approach based on "paternalistic notions of noblesse oblige,"<sup>102</sup> is ineffective to accomplish the legal purposes of juvenile court. Modern youth demand an individualistic and realistic appraisal of their actions which have brought them before the court, in relationship to the demands of law and of society upon them.<sup>103</sup> The latter observation would appear to be applicable, a fortiori, in the marital-divorce setting where problems are compounded by the fact that irrespective of chronological maturity, many parties to a divorce are emotionally immature.<sup>104</sup> And as the approach to legal proceedings has had to be revamped<sup>105</sup> because of the impact of modern social conditions and the inability of existing juvenile proceedings to handle the problem and the child while respecting the latter's constitutional rights, so also must the legal approach to marital problems be similarly re-focused. The pre-marital legal check-up, having as its motive the protection of vital State interests, presents the ideal opportunity for this reorientation in approach.

It is not remarkable that the courts have had reason to observe that a prime source of the legal dispute emanating from the modern marital condition is the failure of the parties to the contract to marry to understand the terms and conditions of that contract.<sup>106</sup> This absence of an individualized pre-marital articulation of the elements of "one of life's most important contracts" has been criticized by both legal<sup>107</sup> and non-legal<sup>108</sup> writers. Considering that law is a social institution and as such is one of the fundamental social structures designed to specify "the role obligations of the individual," particularly those which make immediate demands on him;<sup>109</sup> and, considering too that the basic purpose of marriage licensing laws is to insure that persons who intend to marry give formal notice of such intent and receive formal permission from the State in order to protect the special interest of the State, the community, and society as a whole in the "creation and maintenance" of

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101. Cf. text accompanying notes 52-53 *supra*.

102. See Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585, 595 (1965). See also Paulsen, *The Juvenile Court and the Whole of the Law*, 11 WAYNE L. REV. 597, 609 (1965).

103. Paulsen, *supra* note 102, at 612.

104. See, e.g., Furlong, *Dual Divorces and Conciliation in Contemporary Family Law*, 2 WILLAMETTE L.J. 134, 136 (1962).

105. *In re Gault*, 387 U.S. 1 (1967). See Comment, 12 VILL. L. REV. 803 (1967).

106. See, e.g., *Heisler v. Heisler*, 52 Ore. 691, 693, 55 P.2d 727, 729 (1936).

107. See, e.g., Furlong, *supra* note 104, at 141 n.33.

108. See, e.g., Cavanagh, *Introduction*, in *FUNDAMENTAL MARRIAGE COUNSELING* xi (Cavanagh ed. 1963).

109. See GOODE, *op. cit. supra* note 93, at 204.

the family,<sup>110</sup> the pre-marital legal check-up as a means of satisfying these demands looms as not only desirable but also legally appropriate.

Another proper purpose could be served by requiring potential entrants into the marital status to become legally aware of their legal rights and duties vis-à-vis the State's interests and expectations, in order to increase the stability of marriages — a consequent "common sense" probability.<sup>111</sup> It has been estimated that at least one-half of the people who launch the formal legal machinery via divorce suits are genuinely hoping "that something will stop them before it is too late" because the vast majority of those who initiate the divorce proceedings do so "*without thinking through* what it may entail."<sup>112</sup> It has also been strongly asserted that a considerable number of people use the divorce process "as a means of straightening out the other partner,"<sup>113</sup> feeling that they have secured for themselves a "psychological advantage" by being the petitioner.<sup>114</sup> Alleviating the judiciary of demands such as these could hardly be denied as a proper purpose of a statutory pre-marital legal check-up. The analogy to what has been said by the proponents of change in the juvenile courts<sup>115</sup> again appears relevant: "Some formality and proper attention to the important procedural values need not interfere with the desired rehabilitative aim of the Court."<sup>116</sup>

Since it is "common knowledge" that the tendency of law-makers has been to conserve and maintain the marriage relation by making various changes in the law,<sup>117</sup> and since legislation "with respect to general characteristics rather than with respect to a specific group of men" in which the legislature has relied upon its "general knowledge of human psychology" is permissible,<sup>118</sup> the propriety of legislation in accordance with the goals of pre-marital preventive law purposes appears to be unquestionable.

#### VII. LAWYERS AND THE PRE-MARITAL LEGAL CHECK-UP

That a legal approach to a particular contemporary social and legal problem can be formulated, that a statutory procedure should be enacted, and that a particular movement within the legal profession — preventive law — can be relied upon to spearhead and to shape these legal developments may be conceded without answering a fundamental question: Are lawyers capable of and *should* they execute this program as conceived?

The American legal tradition is historically lavish in its assertion that lawyers are "officers of the court" whose admission to the bar is

110. McGuire, *Civil Law Concerning Marriage*, in FUNDAMENTAL MARRIAGE COUNSELING 414 (Cavanagh ed. 1963).

111. See GOODE, *op. cit. supra* note 93, at 97.

112. Rall, *The King County Family Court*, 28 WASH. L. REV. 22, 26 (1953). (Emphasis added.) See also Baum, *supra* note 100, at 77.

113. Furlong, *supra* note 104, at 138.

114. *Id.* at 164.

115. See notes 102-03 *supra* and accompanying text.

116. Paulsen, *supra* note 102, at 609. See also Furlong, *supra* note 104, at 156-57.

117. See *Garrett v. State*, 118 Neb. 373, 379, 224 N.W. 860, 863 (1929).

118. See *United States v. Brown*, 381 U.S. 437, 454-55 (1965).

an exercise of judicial as well as ministerial power.<sup>119</sup> The corollary of this concept is that lawyers are "officers whose duties relate almost exclusively to proceedings of a judicial nature."<sup>120</sup> That the dockets of almost all courts are overburdened to a distressing extent has been a common condition of modern legal living for some time.<sup>121</sup> It is well known that only a fragment of the controversies concerning property, children, and alimony are litigated in a divorce action.<sup>122</sup> The expanding awareness, assertion, and enforcement of both civil and individual rights; the continuation of scientific discoveries having direct and indirect impacts on modern legal process; the population explosion; the continued urbanization of a nation; developments in criminal procedure and in criminal law enforcement; and the organically expanding national economy, all have been factors cited as sources of aggravating a presently barely tolerable position of the courts and the legal profession<sup>123</sup> and multiplying the need for "lawyer skills."<sup>124</sup> A result has been a demand that lawyers contribute a "fair share" of their time to worthwhile civic and community enterprises<sup>125</sup> and a call for more, and improved, legal talent in the field consonant with the nature of the calling of a legal career.<sup>126</sup>

A blend of the "officer of the court" and the "fair share" concepts demonstrates the preferred position of lawyers, presently and immediately, to implement, in the midst of this maelstrom, a State program in the area of the preservation of marital stability, integrity and sanctity. The statutory pre-marital check-up would inject an individual, personalized approach to

119. See, e.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (1867).

120. *Id.* at 379.

121. See, e.g., Miller, *The Role and Responsibility of the Legal Profession in a Changing Society*, 33 TENN. L. REV. 433, 434 (1966).

122. See, e.g., Clark, *Separation Agreements*, 28 ROCKY MT. L. REV. 149 (1956).

123. Miller, *supra* note 121, at 434. Compare, Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967). Cf. Bok, *Emerging Issues in Social Legislation: Social Security*, 80 HARV. L. REV. 717 (1967).

124. Freeman, *The Role of Lawyer as Counselor*, 7 WM. & MARY L. REV. 203, 204 (1966).

125. See, e.g., Miller, *supra* note 121, at 436. Cf. Weinstein, *Proposed Changes in the Law of Divorce*, 27 MO. L. REV. 307, 324-27 (1962). The contributions of lawyers, at least in America, to an advancement of the general interests of the public, [I]nclude furthering some of the most basic goals of modern society, such as public understanding of the law and its implications, compliance with its terms, reasonable access of private persons to government institutions and officials, peaceful settlement of controversies, reasoned and open discussion of government policy, and modification of law in accord with majority will but acceptable to the minority.

JOHNSTONE & HOPSON, *LAWYERS AND THEIR WORK* 6-7 (1967).

126. In private practice, the number of top-talent lawyers working in the individual and family maladjustment fields could be considerably increased if some of the big corporate law firms were to open separate departments that would take on a volume of typical family, juvenile, and even criminal matters of nonwhite-collar character. With their access to outstanding legal talent and their skill and care in working out legal problems, these firms could have a very positive upgrading impact on such forms of practice, and they would probably make money too. They might also give real meaning to the professional responsibility some of their members are so fond of talking about.

*Id.* at 565.



the protection of State interests, the type of approach clamored for by advocates for changes in divorce laws,<sup>127</sup> and by proponents of change in the juvenile courts.<sup>128</sup> The recommended pre-marital procedure of having the State operate through its "officers of the court" who have met State requirements for qualifying as representatives of its interests would eventually and inevitably benefit the legal profession<sup>129</sup> and the entire legal system.<sup>130</sup> The necessary participation of lawyers in the statutory scheme would be but an extension of the reliance that courts, administrative tribunals, and government agencies have always placed on them.<sup>131</sup> Such extension, on a serviceable scale, would avoid any need for a proliferation of government funds and agencies that could otherwise stand as a deterrent to the State's taking effective and rapid measures to discharge a responsibility to itself and to society.

Practically, charges must be contended with that law students, and hence lawyers, are poorly, or at most indifferently, schooled in family law problems, and that the nature of a lawyer's acquired skills makes him eminently unfit for direct grappling with fundamental family problems even as they relate to law.<sup>132</sup> Preventive law, by fostering its particular goals in the marital law fields and by its continued efforts in other areas of law, should be more than adequately able to demonstrate the irrationality of such fears and the myopia that has led to their unqualified uttering.

Preventive law takes the position that the accurate prediction that a law suit will not be commenced is more significant than the prediction of the outcome of a suit that is commenced.<sup>133</sup> Defining "law suit," for our limited purposes, as "divorce or reconciliation proceedings" the relationship to *preventive law* has already been demonstrated. In legal terms, this focus on the lawyer as counsellor, rather than advocate, is entirely compatible with preventive law purposes as related to State and judicial *interests* in marital litigation. For a lawyer, counsellor's rules are geared to shaping a transaction while it is still capable of being shaped.<sup>134</sup> The transaction, in our context, is a marriage, and its shaping is limited to making the parties aware of the State interests in their marriage and advising them of pertinent legal procedures concerning legal obligations

127. See, e.g., Weinstein, *supra* note 125, at 327.

128. See text accompanying notes 102-03 *supra*.

129. The kind of benefits accruing to lawyers by their participation in the statutory scheme of pre-marital check-ups are difficult to precisely articulate but should be analogous to those foreseen for the juvenile court judge who

will be called upon more frequently to explain his findings of fact and law in articulate, written opinions . . . [providing the] community . . . additional means of appraising its juvenile court judge beyond the warmth of his handshake and the correctness of his own family relations.

Ketcham, *supra* note 102, at 595.

130. See, e.g., Weinstein, *supra* note 125, at 125.

131. See, e.g., JOHNSTONE & HOPSON, *op. cit. supra* note 126, at 6.

132. See note 58 *supra*.

133. See Brown, *The Law Office* 944.

134. See generally Llewellyn, *The Modern Approach*.

and rights available to those who have entered into the marital status — in a refined, incisive and lawyer-like manner.

It is a fact that when marital friction has developed the counselling services of an attorney have proved successful.<sup>135</sup> The explanation is twofold: (1) people prefer to avoid any implications of neurosis or of need for psychiatric treatment; and (2) the attorney's ability to give advice and suggestions of an immediate and practical nature which result in an increase of practical knowledge, thus improving marital situations.<sup>136</sup> *Why* this fact is true is not relevant to a legal discussion; but, because this fact can be applied analogously to a procedure before marriage, designed to reduce and to alleviate demands on legal interests and legal formal procedures *when marital friction has* developed, is germane to a consideration of the preventive law purposes for achieving the premarital legal formality as a means of achieving legitimate legal interests. This, coupled with the fact that the lawyer, as counsellor, is accustomed to viewing rules of law and legislation according to the nature and degree of danger which they offer in the production of an undesirable legal result,<sup>137</sup> makes unquestionable the suitability of a statute implementing the skills and objectives of the legal profession in furtherance of legitimate State, social and communal interests.<sup>138</sup>

#### VIII. POSSIBLE OBJECTIONS TO THE PREVENTIVE LAW APPROACH TO FAMILY LAW PROBLEMS

Opposition to preventive law approaches is inevitable. Resistance to preventive law purposes in general has centered around a postulate of the movement: "Intelligent effort to cut beneath old rules, old words, to get sight of current things."<sup>139</sup> The rationale of such resistance applies with greater force in relating preventive law to family law and may account, in large measure, for the hitherto reluctance of the movement to extend itself into the area of domestic relations as opposed to commercial, property and labor relations. But if the purposes of preventive law are not merely capable of defense but also warrant affirmative support and development, and if the legitimate legal interests are capable of definition and of legal treatment, then it seems inexplicable that greater emphasis has not been devoted to an area of law which involves such a large percentage of litigation and the utilization of so much legal machinery.

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135. See Reider, *Problems in the Prediction of Marital Adjustment*, in *NEUROTIC INTERACTION IN MARRIAGE* 322-23 (1956).

136. *Ibid.* For a consideration of the importance of a favorable predisposition in a "patient" in a commercial setting, see Tilles, *Understanding the Consultant's Role*, 39 *HARV. BUS. REV.* 87, 90 (Nov.-Dec. 1961).

137. See Llewellyn, *The Modern Approach* 168.

138. Such a rationale was manifest in the recently nationally-publicized case of *Painter v. Bannister*, 140 N.W.2d 152 (Iowa), *cert. denied*, 385 U.S. 949 (1967), where the appellate court simultaneously and significantly considered problems of human behavior within the family setting when it reversed the lower court on the basis of a psychologist's trial testimony.

139. See Llewellyn, *Some Realism* 1223.

Practical arguments of varying weight can be urged on three separate grounds: (1) content of the legal check-up; (2) solicitation by lawyers; and, (3) costs. The purposes of this comment have been to analyze problems peculiar to an extension of preventive law measures into the field of family law; to define a suggested modern technique of treating particular legal problems; and, to demonstrate the desirability, propriety, and necessity of such techniques. Considering the scope of the comment, the listed practical objections to an enactment of a statutory pre-marital legal check-up are irrelevant. However, it would be desirable to consider aspects of these objections not only as a form of rebuttal or of anticipation but also to demonstrate that such criticisms, if postulated, would not reach the essence of any conclusions expressed herein.

One of the curious anomalies of the consulting field is that there is no word to describe what it is that the client does while he is being helped. "To consult" is to ask someone else for advice or information. But "consulting" reverses the action completely. It implies that all of the activity is on the part of the person doing the helping — a particularly pernicious semantic trap.<sup>140</sup>

Although the *logical* manner of discussing the use of consultants would be to raise the issue of desired results,<sup>141</sup> there is one aspect of the statutory pre-marital check-up procedure that merits prior consideration. Family law problems and their avoidance are peculiarly and constitutionally "local."<sup>142</sup> The normal manner in which lawyers function as an entity is through the local Bar Association. It is expected that the standard procedure would continue and that supervision of the statute's operation could be reasonably controlled by close liaison between the State and these local units of control. Cooperation by the public is expected and it is also expected that participants would seek to capitalize on the knowledge of the legal consultant in other spheres of law once the *raison d'être* of the check-up is accomplished; namely, the assertion of the State interests and an exposition of the legal and governmental authorities available to those who espouse the marital status. This predictable blending of the practical with the social and the legal would, in all probability, relate to local legal difficulties or to a presentation of general legal questions to which a lawyer could respond with a high degree of certainty without any advance preparation.

For example, entrants into the marital status require some place to live and their alternatives, generally, are three-fold: (1) buy a home; (2) lease; or (3) live with one of the parents. A portion of the legal

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140. Tilles, *supra* note 136, at 91.

141. *Ibid.*

142. Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. *Maynard v. Hill*, 125 U.S. 190, 205 (1887). In *Loving v. Virginia*, 87 Sup. Ct. 1817 (1967), the antimiscegenation case, it was the particular "statutory scheme" that was held to be violative of the Constitution.

check-up would be devoted to an adumbration of the legal aspects of the several alternatives. Questions on insurance could be posed, particularly in connection with any imminent realty or personalty investment. Questions of estate planning should be expected, varying in depth with the background and assets of the interviewees. If a young couple is present, the many myths about lawyers and strange legal instruments called "wills" may prompt a question concerning the advisability for either or both of them. Queries may be directed at credit and impending items to be purchased on conditional sale and the nature of joint rights on or after a down-payment, on or after the marriage. Or questions might range into the field of taxation and be as fundamental as whether a joint return should be made for the year, or what system of household accounting of expenses could be established in order to prepare for the filing of the income statement. Or the image of the new wife who overdraws the checking account and who is part of American folklore and humor may lead into a discussion of the law of negotiable instruments; for example, whether there is a legal requirement to discover and report unauthorized signatures or alterations when the bank's statement of account is received.

The list of possible areas of discussion collateral to the consideration of the statutory pre-marital requirements<sup>143</sup> is as limited and as wide as the practice of law itself. The procedure should differ in the law office no more than it already does, for that is the place where the client with knowledge of the facts meets the lawyer with knowledge of the law.<sup>144</sup> If the nature of the questions that may arise during the check-up requires the attention of a specialist, it would hardly be novel for a lawyer to recognize a situation in which an "expert" is needed.

That preventive law is merely a disguise for solicitation and advertising by members of the bar is a contention that has already been made.<sup>145</sup> It could be renewed under the statutory system as proposed. The answer, previously made by preventive lawyers, remains the same: How can it be unethical for an attorney to give advice concerning cases, statutes or regulations which affect his client's position?<sup>146</sup> In addition, if the "clients" of a pre-marital check-up have a sufficiently defined legal position whereby a lawyer's advice would provide a useful, albeit, incidental function, are not *incidental* interests of the State also being furthered? Expanding legal forces derived from a modern sense of decency and justice are not confined to developments in the 1960's.<sup>147</sup> During these years, however, the Supreme Court has given impetus to the use of traditional legal machinery for the accomplishment of traditionally non-legal purposes.<sup>148</sup> The landmark case of *Griswold v. Connecticut*, establishing the constitutionality of the marital

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143. See text at p. 840 *supra*.

144. See, *e.g.*, Brown, *The Law Office* 948.

145. *Id.* at 948-49.

146. *Ibid.*

147. See, *e.g.*, Llewellyn, *The Modern Approach* 179.

148. See, *e.g.*, *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

rights of privacy, must have put to rest any good faith but misguided charges of solicitation concerning the preventive law approaches to legal problems centering on the marital relationship and its preservation, and the preservation of the rights and duties flowing therefrom.

The costs of obtaining a medical examination under existing marriage licensing laws has not been a valid argument against the State's imposition of the requirement upon the parties.<sup>149</sup> However, the cost of legal services, a standard complaint,<sup>150</sup> could, conceivably, be a legitimate legal objection when indigents are considered. Considering, however, that legal services for indigents under governmental programs have been extended to their legal problems in family law despite contentions that legal service functions for indigents should not be extended to "domestic relations cases,"<sup>151</sup> the argument loses much, if not all, of its force as applied to the statutory pre-marital requirement, the necessary services for which are within the scope of already extant legislation.<sup>152</sup>

#### IX. CONCLUSION

Proponents of a legal approach to divorce problems have suggested a large number of benefits that would accrue to society as a whole<sup>153</sup> and to each State in particular.<sup>154</sup> A preventive law approach to the problem would be able to *effectively* accomplish the same results, or, at a minimum, make their accomplishment easier and more feasible, and, at the same time, *affirmatively* promote and preserve values and interests which merit concern and attention by the law and its machinery.

The need for affirmative, responsible, and effective action by government officials was dramatically re-stated by the Supreme Court in the

149. See generally, 55 C.J.S. *Marriage* § 25(b) (1948).

150. See, e.g., JOHNSTONE & HOPSON, *op. cit. supra* note 125, at 7.

151. Note, *supra* note 123, at 826.

152. The law for indigents is not confined to family law problems other than the pre-marital; for example, divorce, juvenile delinquency, and contact between these areas of social concern is inevitable if not necessary. The proponents of the juvenile court changes stated that "the presence of lawyers in juvenile courts will not only provide better justice, but will also have a significant impact upon the legal and social work professions." Ketcham, *Legal Renaissance in the Juvenile Court*, 60 Nw. U.L. REV. 585 (1965). Interestingly enough, the Supreme Court has agreed with this proposition. *In re Gault*, 387 U.S. 1 (1967).

153. See, e.g., Connolly, *Divorce Proctors*, 34 B.U.L. REV. 1, 8-9 (1954):

There are many other factors which promote the interest of the state in marriage and divorce including the legitimacy and care of minor children; the economic interest of the state if the children or the mother should have to be placed on welfare or in a State institution; peace and harmony in the family and community; settlement of property rights and the distribution of property on the death or divorce of the parents; operation costs of court proceedings as to alimony, contempt and custody of children; the possibility of reconciliation of the parties in the interests of stabilizing the marriage relationship in general; the protection of the absent or insane spouse or respondent; a hygienic interest in the prevention of disease; assurance of a supply of children who will be properly cared for and trained; a sort of old age insurance for the wife after her childbearing age has passed; furnishing better living conditions for the family unit; a stabilizing effect created by inter-family responsibility; regulation of distribution of wealth in a small sense due to the family wage earner; and, protection of the good name and character of innocent co-respondents.

154. See, e.g., Weinstein, *supra* note 125, at 330-31.

recent case of *Camara v. Municipal Court*<sup>155</sup> where the requirement of obtaining a search warrant was constitutionally imposed on health department and other administrative officials: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."<sup>156</sup> By analogy it is equally anomalous to expect that an expansion of the grounds for divorce and a more comprehensive formalization and regularization of the law and procedures of divorce will provide the appropriate machinery for protecting the overt State interest in the integrity and the stability of marriages, and the individuals' perhaps latent interests in the same objectives, and at the same time, insure that the rights of *all* the parties will be *respected*.

Perhaps more than those who are technically styled as "preventive lawyers" are concerned with the values incident to the marital status — or is it merely coincident or circumstance that *Griswold*, *Painter*, *Loving*, *Gault*, and *Camara* have followed closely on the heels of one another's holdings?

*James F. Falco*

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155. 87 Sup. Ct. 1727 (1967).

156. *Id.* at 1732.