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# DIVORCE REFORM IN CALIFORNIA: THE GOVERNOR'S COMMISSION ON THE FAMILY AND BEYOND

Philip L. Hammer\*†

On May 11, 1966, Edmund G. Brown, then Governor of California, established the Governor's Commission on the Family.<sup>1</sup> The Commission was a bipartisan group composed of members of the legal, medical and social welfare professions, the legislature and the clergy. The Governor, recognizing that "the time has come to acknowledge that our present social and legal procedures for dealing with divorce are no longer adequate,"<sup>2</sup> directed the Commission to undertake a "concerted assault on the high incidence of divorce in our society and its often tragic consequences."<sup>3</sup>

On December 15, 1966, the Commission submitted its final report and recommendation to the Governor. The recommendations are summarized as follows:

[T]he Commission recommends, in essence, the creation of a state-wide Family Court system as part of the Superior Court, with jurisdiction over all matters relating to the family. The Family Court is to be equipped with a qualified professional staff to provide counseling and evaluative services. We recommend that the existing fault grounds of divorce and the concept of technical fault as a determinant in the division of community property, support and alimony be eliminated, and that marital dissolution be permitted only upon a finding that the marriage has irreparably failed, after penetrating scrutiny and after the parties have been given by the judicial process every resource in aid of conciliation. We recommend that a neutral petition be substituted for the present adversary pleading by complaint and answer. In short, it has been our goal to establish procedures for the handling of marital breakdown which will permit the Family Court to make a full and proper inquiry into the real problems of the family—procedures which will enable the Court to focus its resources upon the actual

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<sup>1</sup> Appointed as Co-Chairmen of the Commission were Judge Pearce Young of the Los Angeles Superior Court (then an Assemblyman) and San Francisco attorney Richard C. Dinkelspiel. The Executive Director was Professor Aidan R. Gough of the University of Santa Clara School of Law.

<sup>2</sup> Letter from Governor Edmund G. Brown to the Governor's Commission on the Family, May 11, 1966.

<sup>3</sup> *Id.*

difficulties confronting the parties, and will at the same time safeguard their rights and preserve the confidentiality of the information thus acquired.<sup>4</sup>

The Commission's recommendations are embodied in the proposed *Family Court Act*.<sup>5</sup> The *Act* is described in detail elsewhere.<sup>6</sup> The present article will, therefore, be confined to a discussion of the need for reform of the present divorce system and to a criticism of particular provisions of the *Family Court Act*.

THE NEED FOR DIVORCE REFORM

A. *The "Soaring Rate of Divorce"*

Part of the initiative for what may be called "divorce reform" comes from the general belief in "the growing divorce rate"<sup>7</sup> or in "the declining stature of the married state."<sup>8</sup> Some perspective on the "soaring rate of divorce" may be gained from the following table:

FINAL DIVORCES, NUMBER, RATE PER 1000  
POPULATION, 1922-1966—CALIFORNIA<sup>9</sup>

Year	Average Number	Average Rate
1922-1925	10,122	2.3
1926-1930	14,267	2.6
1931-1935	14,510	2.4
1936-1940	20,234	3.1
1941-1945	27,361	3.2
1946-1950	38,763	3.9
1951-1955	35,995	3.0
1956-1960	40,229	2.7
1961-1965	51,935	2.9
1966	62,648	3.3

<sup>4</sup> REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 1-2 (1966) (hereinafter cited as REPORT).

<sup>5</sup> A.B. 230 and S.B. 88, Calif. Legislature, Reg. Sess. (1968) (hereinafter cited as Act). The Act was introduced in the California Legislature by Senator Donald L. Grunsky and Assemblyman Winfield Shoemaker. Action on the bill was delayed to enable a committee of the State Bar of California to consider the bill and make its recommendations. The recommendations of the committee are discussed *infra*.

<sup>6</sup> Dinkelspiel & Gough, *A Family Court Act for Contemporary California—A Summary of the Report of the Governor's Commission on the Family*, 42 J. ST. B. CALIF. 363 (1967); Dinkelspiel & Gough, *The Case for a Family Court*, 1 FAM. L.Q. 70 (1967); REPORT.

<sup>7</sup> Letter from Governor Edmund G. Brown to the Governor's Commission on the Family, May 11, 1966.

<sup>8</sup> Letter from Governor Edmund G. Brown to the California State Assembly, March 4, 1964.

<sup>9</sup> CALIF. DEP'T. PUB. HEALTH, BUREAU OF STATISTICS, DIVORCE IN CALIFORNIA 114 (1967).

The table shows that, whereas the absolute number of divorces has increased over the years, just as the California population has increased, the number of final decrees of divorce for each 1000 residents of California (the divorce rate) has remained relatively constant, with fluctuations apparently due to war and depression. The average rate for the years 1961-1965, 2.9, is equal to the average rate for the years 1922-1960. The apparent increased rate for 1966 is presumably a result of the legislature's amendment of Civil Code section 136 in 1965, allowing the entry of a final judgment of divorce one year after the service of summons and complaint, as opposed to one year after the entry of the interlocutory judgment.<sup>10</sup> The Vietnam war, social unrest, and inflation may also be factors affecting the increase.

The fact that the divorce rate is not "soaring" does not, however, mean that the incidence of divorce is not a cause for concern. In 1959, the divorce rate for the United States as a whole was 2.24, as compared to 1.2 for Sweden, 0.83 for West Germany, 0.61 for France and 0.51 for England and Wales in 1960.<sup>11</sup> It is estimated that one of every four marriages, and one of every five first marriages, in the United States ends in divorce.<sup>12</sup> The comparable estimate for California is higher, as a result of the lower marriage rate and higher divorce rate. The lower marriage rate is due to the high rate of migration to California (only 44.6% of the parties to actions instituted in California in 1966 for divorce, annulment or separate maintenance were married in California)<sup>13</sup> and to the frequency of Nevada marriages (30.3% of the California-born parties to such actions were married in Nevada).<sup>14</sup> The higher divorce rate in California is probably also due to migration and its vicissitudes.

Another disturbing statistic is that almost two-thirds of the divorces granted in reporting states, in 1964, were to couples with at least one child under eighteen years of age.<sup>15</sup> Sixty per cent of the parties to actions instituted in California in 1966 for divorce, annulment or separate maintenance had one or more children under eighteen.<sup>16</sup>

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<sup>10</sup> *Id.* at 7.

<sup>11</sup> Schmidt, *The "Leniency" of the Scandinavian Divorce Laws*, in 7 SCANDINAVIAN STUDIES IN LAW 107, 118 (F. Schmidt ed. 1963).

<sup>12</sup> R. BLOOD, MARRIAGE 230 (1962).

<sup>13</sup> CALIF. DEP'T PUB. HEALTH, BUREAU OF STATISTICS, DIVORCE IN CALIFORNIA 62 (1967).

<sup>14</sup> *Id.* at 63.

<sup>15</sup> U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, VITAL STATISTICS OF THE UNITED STATES 2-10 (1964).

<sup>16</sup> CALIF. DEP'T PUB. HEALTH, BUREAU OF STATISTICS, DIVORCE IN CALIFORNIA 46 (1967).

Although the rate of divorce may not be appreciably greater today relative to the rate throughout the last half century, there is no question that the absolute number of divorces poses a grave social problem with which the present divorce system is apparently unable to cope. The question is what legal means are available to solve that problem.

#### B. *The Amenability of the Social Problem of Divorce to Legal Solutions*

In 1965 the California Legislature established, under the Bureau of Vital Statistics, a uniform, statewide system for the collection of information concerning every action for divorce, annulment or separate maintenance and the characteristics of the parties to such actions.<sup>17</sup> The Bureau's first report,<sup>18</sup> for 1966, is of remarkably high quality and should be of great interest to social scientists and attorneys alike. Among the findings included in the report are the following:

1. In 44.9% of the cases, either the husband or the wife or both had been previously married.<sup>19</sup>
2. The earlier the marriage, the more likely a divorce, especially for females, and especially for teenage females who marry non-teenage males.<sup>20</sup>
3. In the case of first marriages, the earlier the marriage, the sooner the divorce, until age thirty, and, thereafter, the later the marriage, the sooner the divorce.<sup>21</sup>
4. Interracial and interfaith marriages last about two-thirds as long as intraracial and intrafaith marriages.<sup>22</sup>
5. The lower the occupational category of the husband the shorter the time between marriage and separation.<sup>23</sup>
6. In about 15% of the cases, by the best estimate, the wife had conceived a child prior to the marriage.<sup>24</sup> The corresponding figure for teen-age wives was about 25%.<sup>25</sup>

There is little, if anything, that the law can or should do to prevent or discourage remarriages, early marriages, interracial or

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<sup>17</sup> CAL. HEALTH & SAFETY CODE §§ 10360-71 (West Supp. 1967).

<sup>18</sup> CALIF. DEP'T PUB. HEALTH, BUREAU OF STATISTICS, *DIVORCE IN CALIFORNIA* (1967).

<sup>19</sup> *Id.* at 18.

<sup>20</sup> *Id.* at 127.

<sup>21</sup> *Id.* at 25.

<sup>22</sup> *Id.* at 29, 43.

<sup>23</sup> *Id.* at 31.

<sup>24</sup> *Id.* at 53.

<sup>25</sup> *Id.* at 61.

interfaith marriages, marriages of low-income men, or marriages of pregnant women. A law could of course be passed forbidding second marriages or raising the age of consent, for example, but if such a law were not adopted by our sister states it would be virtually unenforceable and therefore undesirable. Moreover, practically any restriction on the marriageability of members of a given class, even if enforceable, would probably prevent at least as many happy as unhappy marriages. The law can, on the other hand, do something in the way of creating more auspicious conditions for marriages, for example, by establishing programs of sex education. Also, legislation directed at improving economic and social conditions would make life in general, and married life in particular, more tolerable. But the favorable results that can be expected from such remedial legislation are limited. A more comprehensive approach to the solution of the social problem of divorce is needed. No matter how ill-starred a marriage may be, the law must aim at saving it when it begins to founder. Such is one of the aims of the *Family Court Act*.

### C. *The Legal Problem of Divorce*

In addition to a mechanism for the alleviation of the social problem of divorce, the *Act* proposes a solution to the legal problem of divorce—what England's Justice Scarman refers to as the law's achievement of a "high productivity level of divorce by artificialities which most of us deplore, and sometimes at a price of suffering inflicted upon the innocent which no humane society should tolerate."<sup>26</sup>

The prevailing legal doctrine and procedures with respect to divorce were subjected to devastating criticism in "The Report of a Group appointed by the Archbishop of Canterbury."<sup>27</sup> The Group, which was chaired by the Lord Bishop of Exeter and included the Lord of Appeal and a Justice of the High Court of Justice, set forth its objections as follows:

(a) [O]ne may say that the actions which count as matrimonial offences . . . are not as a rule the basic causes of marital failure: their relation to the failure is more complex. . . . Consequently, the concentrations of judicial attention upon the offences defined by the law invokes a false set of values, and invests with spurious objectivity acts of which the real significance varies widely according to the various qualities of marital relationship that provided their setting. . . .

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<sup>26</sup> Address by Justice Scarman, *Family Law and Law Reform*, at the University of Bristol, Mar. 18, 1966.

<sup>27</sup> THE REPORT OF A GROUP APPOINTED BY THE ARCHBISHOP OF CANTERBURY, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY (1966).

(b) The accusatorial procedure that the present law entails is no less superficial and remote from marital realities. . . . Sometimes a suitable offence can be conjured up from the history of the marriage; sometimes, if those concerned are not too scrupulous, one will be contrived; in either event a nonsense is made of the law. . . .

(c) The necessity to use the processes of this system . . . can encourage spouses to commit offences on purpose, or to twist the conduct of their partners into the semblance of offences, or to act together in collusion to get what they want. In such instances . . . the law in effect admits 'divorce by consent'. . . .

(d) [T]he logic of the matrimonial offence requires the court to pronounce one of the parties 'guilty' and the other 'innocent'. . . . [T]he spouse found 'guilty' of the offence in question is thereby held generally responsible for the breakdown of the marriage; and that may be far indeed from doing justice to the 'guilty' person. . . .

(e) [T]he existing grounds for divorce are mutually inconsistent. If . . . the moral principle underlying the doctrine of the matrimonial offence is right and necessary to be maintained, then divorce on the ground of a spouse's insanity must surely be immoral; for insanity is not an offence but an affliction.<sup>28</sup>

Another fiction of the present divorce system is that courts inquire into the facts surrounding uncontested divorces. As stated by the authors of the *Family Court Act*:

[E]xtreme cruelty . . . is the ground upon which 96% of California's divorces are sought and granted. 94% of these hearings are uncontested, and it is at once apparent that there can be no meaningful purpose achieved by continuing to operate under a system which lends itself to a form of sham inquiry.<sup>29</sup>

The authors of the *Act* also indicate that "the need for the parties to assume a formal adversary posture at the outset of the judicial process" causes "conflict and rancor between the parties" and thus "any efforts toward reconciliation are hindered at best and rendered futile at worst."<sup>30</sup> Further objections to the adversary system are raised below in the section on legal representation.<sup>31</sup>

The *Family Court Act* would replace the "fictions, artificialities and subventions"<sup>32</sup> of the matrimonial offense system with a "no-fault" doctrine and a largely non-adversary proceeding for the dissolution of marriage.

<sup>28</sup> *Id.* at 28-31.

<sup>29</sup> REPORT at 30-31 (footnotes omitted).

<sup>30</sup> *Id.* at 17-18.

<sup>31</sup> See p. 49 *infra*.

<sup>32</sup> Scarman, *supra* note 26, at 3.

## CRITICISMS OF THE FAMILY COURT ACT

A. *Professional Interviewing and Conciliation Counseling*

The proposed *Act* provides that a "proceeding concerning the dissolution of marriage shall be commenced by the filing of a petition . . . requesting the family court<sup>33</sup> to inquire into the continuance of the marriage."<sup>34</sup> Thereupon, the clerk of the family court "shall fix a date for an initial interview or interviews at which the parties and a member of the professional staff (hereafter called the counselor) will begin to explore together the desirability of continuing the marriage."<sup>35</sup> The *Act* inconsistently provides that "[t]he attendance of each party at one of the interviews at least shall be a condition of continuing the proceeding . . ."<sup>36</sup> while also providing that "[w]illful failure to appear as ordered . . . shall not defeat the jurisdiction of the court to dissolve the marriage."<sup>37</sup> What is perhaps meant is that the attendance of the party making the petition is a condition of continuing the proceeding, but that the non-attendance of the other party does not defeat the jurisdiction of the court.

After the interview or interviews and within 30 days of filing proof of service of the petition, the counselor will inform the judge "whether the parties have decided to (1) become reconciled . . . ; (2) continue counseling for a period not to exceed 60 days from the date of filing of proof of service of summons and petition with a view to their possible reconciliation . . . ; or (3) continue their application for an inquiry into the marriage, with a view to its possible dissolution . . . ."<sup>38</sup> The language of these provisions presupposes that both parties have met with the counselor and are able to agree upon the future course of the proceedings. The *Act* gives no guidance as to what course should be followed when one party has not attended an interview or when one party desires counseling with a view to reconciliation and the other party desires counseling with a view to dissolution of the marriage. Neither does the *Act* outline what steps will be taken if one of the parties desires no counseling.

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<sup>33</sup> The *Act* would create a division of the Superior Court, known as the family court, with jurisdiction extending to all "matters that involve the legal relationships between members of a family unit." Acr § 4100. The quoted language has been correctly criticized by the Committee of the State Bar to Study the Report of the Governor's Commission on the Family as overly broad in that it would unnecessarily bring into the family court matters concerning, for example, simple partnership dissolutions and partitions of land. Letter from Robert L. Brock, Chairman, to the Board of Governors of the State Bar of California, Feb. 12, 1968 (copy on file at offices of Santa Clara Lawyer) (hereinafter cited as Brock Letter).

<sup>34</sup> Acr. § 4702.

<sup>35</sup> *Id.* § 4703(a).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 4703(b).

<sup>38</sup> *Id.* § 4704.



If the parties agree to pursue the second course and fail to become reconciled within the 60 day period, they *may* renew their application, and, if they do, they *shall* then undertake the third course.<sup>39</sup> Under the third course, counseling would be "for the purpose of working out a settlement of the circumstances attendant upon the dissolution of the marriage including the problems of child custody and visitation."<sup>40</sup>

1. *Mandatory Counseling.* The committee appointed by the Board of Governors of the State Bar to study the Report of the Governor's Commission and the *Family Court Act*, read the *Act* to provide for "mandatory interviewing and counseling."<sup>41</sup> The State Bar Committee "unanimously and sharply opposed . . . this notion."<sup>42</sup> Only attendance at the initial interview, however, is "mandatory" (i.e., may be ordered on pain of contempt of court),<sup>43</sup> and the Governor's Commission distinguished between "reconciliation counseling" and the "initial evaluations."<sup>44</sup> This distinction is blurred by the Commission itself. In speaking of the "initial evaluation" the Commission states:

If [at the termination of the initial interview] the parties decide that *further counseling* may be of benefit, we recommend that they be empowered to continue it. . . . If the parties conclude that reconciliation is not feasible, they enter into *further consultation*. . . .<sup>45</sup>

The Commission's talk about "further" counseling leads to the conclusion that the drafters of the *Act* intended that some counseling should take place at the initial (mandatory) interview. The "dead end" into which the parties run if they do not desire counseling (that is, the impossibility of continuing the proceeding unless one of the three courses specified by section 4704 is chosen) and the imperative language of section 4705 ("they shall undertake counseling") implies that after the initial interview the parties might decide *which* sort of counseling to undertake, but not *whether* to undertake it. If counseling is mandatory under the *Act*, then grave questions arise with respect to the practical efficacy of such provi-

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<sup>39</sup> *Id.* § 4705.

<sup>40</sup> *Id.* § 4704.

<sup>41</sup> Brock Letter at 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Act*, § 4703(b).

<sup>44</sup> *REPORT* at 83-84.

<sup>45</sup> *Id.* at 20 (emphasis added). But what is meant by "further" counseling? See also Dinkelspiel & Gough, *A Family Court Act for Contemporary California—A Summary of the Governor's Commission on the Family*, 42 J. ST. B. CALIF. 363, 370 (1967) where the members of the Commission state: "If the parties decide that *further counseling* might be of benefit, they could continue either with the professional staff of the court or with qualified individuals or agencies in the community." (emphasis added).

sions and to the invasion of the "privacy surrounding the marriage relationship."<sup>46</sup> In any event, the *Act* should be amended to clarify the stage at which counseling is to be undertaken and whether or not it is mandatory or a condition of continuing the proceedings.

2. *Practicality of Mandatory Interviewing.* So far as the practical difficulty is concerned, experience has shown that compulsory conciliation counseling may be unworkable.<sup>47</sup> As the authors of the Pennsylvania Divorce Code say:

New Jersey recently undertook an experiment in this area. . . . [T]he Supreme Court of New Jersey . . . announced that in ten counties of New Jersey, after September 1, [1957], any couple seeking divorce or separation, must cooperate in an attempt to effect a reconciliation if any children are involved. The plan was tested for three years and found to be unsuccessful due to its compulsory features and in 1960-61, a committee was appointed to devise a substitute plan based on voluntary counseling.<sup>48</sup>

3. *Right of Privacy.* The "right of privacy" difficulty with mandatory counseling has two aspects: first, the question of whether the state has any business at all in subjecting particular marriages to "a penetrating scrutiny"<sup>49</sup> or inquiring "into the whole picture of the marriage,"<sup>50</sup> and, second, whether the *Act* provides sufficient protection for the confidential results of such scrutiny.

The first aspect is vividly spelled out by Professor Max Rheinstein, the Director of the University of Chicago Comparative Law Research Center, in his article on the "therapeutic approach" to the problem of marriage stability:

[I]t will, of course, be necessary for the family court's staff in every case to discover the true cause of the marital discord. . . . The discovery of the true cause may not be too difficult in a good many cases, but there are others where it cannot be discovered without probing into the depth of the personalities of the parties concerned, especially if a cure is sought to be achieved by means of depth psychology. The "true" cause of a couple's marital discord may be of a delicate nature, especially when it is connected with sexual

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<sup>46</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>47</sup> Gower, *Testimony before the Royal Commission on Marriage and Divorce*, 1 MINUTES OF EVIDENCE 24 (1952): "[I]n every country where [compulsory reconciliation] has been tried I understand that it has proved a complete farce. . . . I have spoken to French and German judges about this, and they have all agreed that it is completely farcical." The problems of expense and recruitment are also practical barriers. See Goddard, *The Proposal for Divorce Upon Petition and Without Fault*, 43 J. ST. B. CALIF. 90, 98 (1968).

<sup>48</sup> GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, PROPOSED MARRIAGE AND DIVORCE CODES FOR PENNSYLVANIA 87 (1961).

<sup>49</sup> REPORT at 23.

<sup>50</sup> *Id.* at 29.

maladjustment. Shall a citizen who is trying to be freed from a tie of marriage be compelled to submit to such a probing into his mind as a necessary condition for his petition to be considered? Shall such compulsion be exercised upon the other spouse? What, incidentally, shall be done if the other spouse refuses to submit to such a diagnostic trial? The questions raise the far-reaching problem of what constitutes the proper limits of governmental power as against individual freedom. Again, in the United States the tradition has been that of keeping governmental influence at a minimum.<sup>51</sup>

The "true cause" of the marital breakdown having been determined, the "therapeutic approach" then turns to an attempt to eliminate that cause, entailing, in many cases, the reformation of the party's character.

We concede to the state the right to attempt a personality transformation in the case of a convicted criminal. . . . Are we ready to concede to the state the same grave power of transforming the personality structure of a citizen simply because he has failed to make a success out of a marriage with some other individual? Do we have enough confidence in the present state of psychiatry to regard it as able to achieve such a task?<sup>52</sup> If it is, we are confronted with the even more profound problem of the image in which we wish the patient's personality to be reformed. . . . If psychiatry really can do what the advocates of the therapeutic approach expect it to do, it holds such frightful possibilities that one should hesitate to impose it as an indispensable condition upon anyone who seeks to be freed from a tie of marriage.<sup>53</sup>

To require a psychiatric type examination and counseling of persons seeking dissolution of their marriage is a potentially significant interference by the state with the privacy and personal liberties of the individual. It should be permitted only where there is an overriding state interest. The most obvious state interests that would be served by such counseling are the protection of a spouse who does not desire the dissolution of the marriage, the protection of minor children who may suffer from a broken home, the reduction of anti-social hostility and tension, and, in the eventuality that the marriage should be dissolved, the working out of a rational and consensual distribution of the property, provision for support of the parties and children, and arrangement for the custody of the children. These interests, when they obtain, fairly clearly outweigh

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<sup>51</sup> Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 638 (1956).

<sup>52</sup> Compare the Commission's faith in the "great advances in the knowledge of human behavior," REPORT at 11, with Kimpton, *The Social Sciences Today*, in THE STATE OF THE SOCIAL SCIENCES 350-51 (L. White ed. 1956): "[Paracelsus] stood on the border between magic and science, with a foot in both. . . . Perhaps the social sciences stand today somewhere near the position that Paracelsus occupied."

<sup>53</sup> Rheinstein, *supra* note 51, at 638-39.

the interest of the individual in being free from inquiry by the state into the events of his private life.

But when both parties desire the dissolution of the marriage, where there are no minor children, and where the parties can work out for themselves a distribution of the property and provision for support, then there is no state interest sufficient to justify such inquiry and counseling. The reconciliation that might be brought about in that situation is not, in other words, in the public interest, or not so much in the public interest as to justify an invasion of personal rights by the state. Although counseling might still have the publicly beneficial effect of helping the parties to separate amicably, it is just as likely to revive conflicts that they would rather put behind them. When, therefore, the parties both assert a desire to dissolve the marriage, when they have no minor children, and when they have reached agreement in writing upon property distribution and support, they should be allowed to waive the initial interview and subsequent counseling.

Even where there is a sufficient state interest in compelling counseling, a further problem of individual liberty arises under the proposed *Act*. The *Act* provides that "[t]he counselor shall file a written report with the judge . . . at the conclusion of the counseling period as provided in Section 4704," that "[t]he report . . . shall include a statement of the circumstances of the parties . . . and the counselor's recommendations together with supporting facts as to the continuance of the marriage," and that a "copy of the report shall be given to the parties. . . ." <sup>54</sup> Section 4704 of the *Act* provides also that "[a]ll communications made by either party to any counselor under subparagraph (2) of this section shall be absolutely privileged."

So far as the wording of the statute is concerned, ignoring for a moment the Comment, <sup>55</sup> section 4714 seems to require the counselor to present the judge with (all) facts that support his recommendation as to the continuance of the marriage. Section 4704, on the other hand, prevents the counselor from revealing facts upon which his recommendation would, in the ordinary case, necessarily depend.

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<sup>54</sup> ACT § 4714.

<sup>55</sup> REPORT at 85. "It is the intent of [section 4704] to broaden the scope of the protection afforded to communications made in the course of reconciliation counseling, and to ensure their immunity from disclosure even upon inquiry by the judge. For this reason, the wording 'absolute privilege' was used. . . . The Commission emphasizes, however, that this privilege should apply only to communications made during reconciliation counseling and not to information imparted during the initial evaluations or subsequent investigations."

Taking the Comment into consideration, it appears that it is intended that the counselor should not recite facts learned during the reconciliation process.<sup>56</sup> In that case, the counselor must either make his recommendation on the basis of such facts, while not revealing them, or else make his recommendation in disregard of such facts. The former alternative would effectively cut the judge out of the decision-making process, and the latter would require the counselor to perform a feat of mental gymnastics.

The solution to this dilemma would seem to be either to require the counselor to prepare his report and present it to the judge and parties upon the termination of the initial interview and investigation and before the reconciliation period or to eliminate the "absolute privilege" as to communications made during that period. The difficulty with the latter solution, in addition to that spelled out in the next paragraph, is that

[t]he possibility that the counselor might be required to divulge to the court such personally sensitive disclosures as the reconciliation process would necessarily involve, could only result in a lack of confidence on the parties' part, and a consequent unwillingness to utilize conciliation counseling services.<sup>57</sup>

A difficulty with the former solution, which attends the whole notion of the counselor's report, is that a counselor may acquire information, whether in the interview, investigation or reconciliation stage, which may be prejudicial, or simply embarrassing, to one or both of the parties. It would be one thing if such information were divulged by the parties, under oath, in open court, and subject to the test of cross-examination, to the standard of section 352 of the California Evidence Code, and to such restraint as the parties may choose to exercise in the interest of each other's personal feelings and self-respect. But it is quite another thing to admit in evidence, without the opportunity for objection, the counselor's second-hand version of whatever the parties have, for whatever reason, chosen to reveal or to cook up in the informal atmosphere of the initial interview or during reconciliation counseling. Why should the judge be presented with the counselor's hearsay report of one party's untested statement that the other party is sexually maladjusted in a particular way, or, for that matter, with a similar statement that the one party has behaved toward the other with

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<sup>56</sup> But it must be noted that such information as is imparted during the initial interview is not privileged and it became apparent (see note 45 *supra*) that the Commission intended that some reconciliation counseling would take place at the first interview. And note the reference in the Report to "investigations"—does this mean that information which the counselor gets on the side may be included in his report?

<sup>57</sup> REPORT at 22.

perfect charity (or with the counselor's purely conclusionary report to that effect)? Why should the other party be exposed to the counselor's perhaps half-baked judgment that he is a sexual misfit?

It is no answer to say that the counselor's report does not materially affect the parties' legal rights, for the judge must make important determinations concerning, for example, the custody of children, which the counselor's report could not help but affect. Nor is it an answer to say that the parties may present evidence in contradiction of the counselor's report,<sup>58</sup> for the report, however prejudicial and unreliable, will remain "in the case". (And how does one prove that one really is sexually normal?)

There is a possible safeguard against the dangers inherent in the counselor's report, and that is to allow the parties to object to any part of the report on the same grounds as they might object if the counselor were testifying in court. The practical difficulty, however, is that the judge must read the counselor's report in order to rule on what parts may be stricken. If this difficulty were overcome by obtaining a ruling from a judge not assigned to the case, there would still be the further difficulty that, in practice, each party would probably object, on grounds of hearsay, to any part of the report based on the declarations of the other or a third party which he considered detrimental to his side. Then, if the other party wished to bring the subject of such declarations to the attention of the judge, he would have to call himself or a third party to testify. Without such testimony, the recommendation (opinion) of the counselor would be without a proper basis. It should be further noted that the right to object to the introduction of information included in the counselor's report would be a hollow one so far as an unrepresented spouse is concerned.

Now we are back to where we started, with the counselor's report reduced to a skeleton and the bulk of the evidence before the court having been produced in the ordinary way. The conclusion is apparent that the counselor's report should be done away with altogether. It has, even if in a relatively innocuous way, all the evils with which our law of evidence is designed to cope. The evidence that the judge needs in order to decide the case can, after all, be presented by the parties. The elimination of the counselor's report would preserve, from the eyes of the judge and others, intimate facts of the marriage relation which the parties may reveal to the counselor or may be revealed by the counselor's investigations and which are, basically, none of the business of government. To

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<sup>58</sup> See Act § 4716.

that extent, the parties' personal rights would be preserved. It would allow the parties to engage in honest, open-ended and, therefore, potentially constructive discussions with the counselor, without the threat of subsequent exposure, embarrassment or legal disadvantage.

Of course, one hope for the *Family Court Act* is that it would save some marriages that the parties do not want to save, or think cannot be saved. One function of the counselor would be to make an expert recommendation as to which such marriages might be saved. In making that recommendation, facts other than what the parties might choose to present in court would be useful to the counselor, but if the parties can suppress facts in court, they could as easily do so in interviews with the counselor. They probably would so do, because of a reasonable apprehension that, regardless of the "absolute privilege," disclosures might adversely affect the counselor's recommendation. There is, moreover, no compelling reason why the counselor could not make a recommendation independent of any report to the judge or on the basis of the facts presented at the hearing.

There is an additional practical problem with the counselor's report. One wonders how much of the counselor's time will be spent in the preparation of reports. If the counselor does an adequate job, then he will have very little time remaining for his important duty of counseling—the married reader should ask himself how much labor would be involved in preparing a careful and comprehensive description of his own marriage. If the counselor prepares his report in a summary manner, then the report would amount to an empty formality and justice would often be denied.

A more comprehensive and attractive solution to the problem of the counselor's report, as well as to the problem of compulsory counseling, is suggested by Rheinstein. He would, instead of "compelling everyone who seeks to formalize the breakup of his marriage . . . as a preliminary to submit to treatment aimed at changing his personality,"<sup>59</sup> shift the focus to the prevention of marital crises by means of publicly supported education for family living. Further, by means of "reconciliation proceedings . . . separated from the divorce court,"<sup>60</sup> he would provide conciliation counseling "in the case of a marriage in which difficulties have appeared to arise, in

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<sup>59</sup> Rheinstein, *supra* note 51, at 666.

<sup>60</sup> *Id.* at 661. "Such a separation also will avoid the difficulty that reconciliation proceedings either degenerate into that kind of meaningless formality which they are likely to be where the divorce court's docket is overcrowded, or that the parties are bullied into a 'reconciliation' which they do not really intend and which is unlikely to last."

which no separation has yet occurred and in which both parties are willing to maintain their relationship.”<sup>61</sup>

In fairness, it must be said that what the drafters of the *Family Court Act* probably intended was something close to what Rhein-stein proposes, so far as the prevention of marital crises is concerned,<sup>62</sup> but common sense tells us that parties will not ordinarily approach the family court until their marital problems have become extremely critical. They would be inclined to seek counseling at an earlier stage if reconciliation proceedings were not so closely associated with proceedings for the dissolution of the marriage.

Another problem concerns the confidential nature of the report. Proposed section 4706 provides that “the records of the family court shall be confidential and shall be available . . . to persons who . . . have a legitimate educational or research interest in the work of the family court.” There can be very little question that a survey of the records of the family court by such persons would result in interesting findings as to the causes of marital problems. At the same time, however, parties to proceedings in the family court have a substantial interest in keeping their communications to the counselors strictly “between you and me,” regardless of how detached and discreet third-party research workers may be. The fact that the parties’ communications are, to a degree, compelled makes it especially important that they be treated with at least the same degree of confidentiality that communications to lawyers, physicians and religious advisers receive as a matter of fundamental principle. If the records are to be made available to researchers, the parties should be so informed before the initial interview, they should be allowed to decide whether their files will be open or closed to researchers, or all identifying references to the parties should be deleted before the records are opened. Criminal liability should attach to unauthorized use of the records, and they should be destroyed after one or two years.

A final objection relating to the *Act’s* counseling provisions is raised against proposed section 4720, which reads:

The court may in its discretion, and if the report of the counselor so recommends, order either party to the marriage, or the minor children of the marriage, if any, to continue working with the professional staff of the family court after the marriage has been dissolved. Any person who fails to obey such an order may be found guilty of contempt of court.

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<sup>61</sup> *Id.*

<sup>62</sup> See REPORT at 17-18.



This provision, because it does not set any standards for the determination of the conditions under which a party can be required to work with the staff (under any conditions?), or specify what is meant by "working with the professional staff" (undergoing psychoanalysis?), or indicate how often or for what length of time the court can order a party to work with the staff (eight hours a day? for the rest of his life?), or define what amounts to failure to obey such an order (missing an appointment?), or provide for a hearing on the order (can a 20-year-old child, who has not appeared in the proceeding, be ordered to work with the staff?), is unconstitutionally vague and does not meet the minimal requirements of due process of law. It is in derogation of individual liberties and is paternalistic to a degree undesirable in state institutions. The provision should be eliminated from the *Act*.

### B. *The Standard for Dissolution of Marriage*

Under the *Family Court Act*, the counselor will make his report within 120 days of the first interview.<sup>63</sup> Within five days of the filing of the report, the clerk will set the matter for hearing,<sup>64</sup> but there is no provision for the time of the hearing. At the hearing, the judge, upon the basis of the report and of any evidence presented by the parties will, if he decides that "the legitimate objects of matrimony have been destroyed and that there is no reasonable likelihood that the marriage can be saved," order the marriage dissolved.<sup>65</sup> If he does not so decide, then he will continue the matter for not more than ninety days. During the continuance the parties may undertake counseling with the staff of the family court.<sup>66</sup> If, at the end of 90 days (not at the end of the continuance?), one or both of the parties decide that the marriage should be terminated, the court will order it dissolved,<sup>67</sup> or, if both parties request it, order their legal separation.<sup>68</sup>

The *Family Court Act* thus eliminates the "fault" grounds of divorce. A majority of the Special Committee of the State Bar of California "felt that the so-called 'no-fault' divorce system is preferable to the present system based upon legally prescribed grounds."<sup>69</sup> The Committee's chairman and one other member, however, opposed the "no-fault" system and, while advocating the reten-

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<sup>63</sup> Act § 4714.

<sup>64</sup> *Id.* § 4715.

<sup>65</sup> *Id.* § 4716.

<sup>66</sup> *Id.* § 4717.

<sup>67</sup> *Id.* § 4718.

<sup>68</sup> *Id.* § 4719.

<sup>69</sup> Brock Letter at 4-5.

tion of the interlocutory decree, proposed that separation for a period of years be added as a further ground for divorce. The reason given for their opposition is as follows:

Marriage is a contract which embodies rights and obligations and parties entering that contract should not be told that it makes no difference what they do or do not do toward the other spouse in connection with that marriage. If we are to consider marriage as a significant (if not sacred) contract, then it must embody some behavioral obligations. Under the proposed legislation it would make no difference at all what efforts a party made to achieve a satisfying relationship in a marriage he or she would escape from all responsibilities with minimal financial hazard.<sup>70</sup>

Marriage is, of course, not a contract (it is a personal relation arising out of a civil contract<sup>71</sup>), for if it were, it could presumably be revoked by mutual consent, and, in any case, the law can prescribe the manner of extinction of a contract.<sup>72</sup>

Although, from a legal point of view, the argument urged by the dissenting committee members may be insubstantial, it has some weight from a moral point of view. It confuses, however, the legal and moral questions involved in the dissolution of marriage. As the Governor's Commission points out:

Our study has convinced us that . . . a 'breakdown-of-marriage' standard in no way derogates ecclesiastical doctrines of the indissolubility of marriage. When a Civil Court orders the dissolution of a marriage, it does not reach the canonical bonds of the union; it acts rather upon the complex of legal rights and duties that make up the legal status of marriage. In point of fact, our present grounds for divorce had their origin in ecclesiastical law, where they were grounds for canonical separation only. They had nothing to do with civil divorce until they were transferred into the civil law and, in an ecclesiastical sense, misapplied.<sup>73</sup>

The *Family Court Act* would thus restore the proper distinction between the civil and moral law. It would permit the extinction of the "personal relation arising out of civil contract," where the civil foundations of that contract, the legitimate objects of matrimony, have been destroyed.<sup>74</sup> It would not affect the obligations imposed

<sup>70</sup> *Id.* at 9.

<sup>71</sup> CAL. CIV. CODE § 55 (West 1954).

<sup>72</sup> Issue must be taken, too, with the dissenters' view as to "minimal financial hazard," in the light of the *Act's* provision for equal distribution of community property (section 5100) and for alimony "in such amount and for such period of time as the court may deem just and reasonable, having regard for the circumstances of the respective parties including the duration of the marriage." *Act* § 5101.

<sup>73</sup> REPORT at 29-30 (footnotes omitted).

<sup>74</sup> ACT § 4716.

by the moral law, a matter properly left to the dictates of the parties' individual consciences and other sources of spiritual guidance.

The separation of the legal and moral aspects of the dissolution of marriage is not proposed for its own sake, but for the purpose of tidying up the mess which has resulted from the attempt (currently much less than half-hearted) to bring legal authority to bear in upholding moral authority. It appears that the sanctity of the marriage relation is in no way obligated to, but is in fact mocked by, the burlesque now being performed in our divorce courts.<sup>75</sup> As the Group appointed by the Archbishop of Canterbury stated:

We are far from being convinced that the present provisions of the law witness to the sanctity of marriage, or uphold its public repute, in any observable way, or that they are irreplaceable as buttresses of morality, either in the narrower field of matrimonial and sexual relationships, or in the wider field which includes considerations of truth, the sacredness of oaths and the integrity of professional practice. As a piece of social mechanism the present system has not only cut loose from its moral and judicial foundations: it is, quite simply, inept.<sup>76</sup>

The case for the abolition of the fault grounds for divorce has been ably and more fully stated elsewhere,<sup>77</sup> and the present author is content to record his endorsement.

### C. *Legal Representation*

To a certain extent, the *Family Court Act* substitutes administrative for judicial procedures. This substitution is due, in part, to the fact that "there has been widely circulated in recent months an initiative proposal to remove family matters from the courts entirely, and to place them in the hands of an administrative body. . . ."<sup>78</sup>

A significant cause of dissatisfaction with existing procedures, and a motive for the creation of a "bureau of divorce," is that the present procedures are accessible only to persons who are able to pay an attorney's fee. This fee, especially in the case of an uncontested divorce, may be disproportionate to the minimal services rendered.

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<sup>75</sup> See REPORT at 30-31.

<sup>76</sup> THE REPORT OF A GROUP APPOINTED BY THE ARCHBISHOP OF CANTERBURY, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY 32 (1966).

<sup>77</sup> E.g., REPORT at 26-32. *Contra* Goddard, *The Proposal for Divorce Upon Petition and Without Fault*, 43 J. ST. B. CALIF. 90 (1968).

<sup>78</sup> Dinkelspiel & Gough, *A Family Court Act for Contemporary California—A Summary of the Report of the Governor's Commission on the Family*, 42 J. ST. B. CALIF. 363, 366 (1967).

The fact that persons without means are provided access to the divorce court by legal aid societies in many localities, does not mitigate the evil for persons who live in areas not serviced by such societies or for persons whose income is slightly greater than the standards of eligibility for legal aid. Also, insofar as legal aid attorneys are occupied by the formalities of the divorce procedure, they are prevented from rendering other essential services to their indigent clients. Thus, the evil of the present procedure is not eliminated but merely displaced.

The high cost of divorce may even be a cause of family break-up. In poor communities, estranged spouses enter into relationships with third parties without obtaining a dissolution of their marriage. When such relationships, not recognized by the law or by ecclesiastical authorities, become common, the institution of marriage loses its "sanctity" in the eyes of the community, resulting in further family break-up.

There is no compelling reason why attorneys could not be eliminated from the procedure for the dissolution of marriage, at the discretion of the parties, in cases in which the area of dispute between the parties is minimal. In fact, for all that the *Family Court Act* says, it should be possible under that law for the parties to proceed without legal representation, where the issues are not complex. It was perhaps for reasons of practical politics that the authors of the *Act* did not make the dispensability of lawyers explicit. A definite provision to that effect would be desirable and would make the law more attractive to the proponents of a purely administrative approach. The *Act* should also provide for a "petition of inquiry" form, provided by the family court, which could be utilized by persons with minimal education.

In fact, dispensing with lawyers in certain cases is essential to the success of the new law, insofar as such success depends on the cooperation of the parties. The "defendant" would be much more inclined to participate in the reconciliation process if he did not feel constrained to hire a lawyer in order to do so.

However, the possibility that unrepresented parties will be admitted to the family court as a matter of course poses problems for lower income parties (wealthier parties would probably continue to be represented). The first problem is that they will lack adequate legal advice and assistance at points where their vital interests are at stake. Thus, for example, a husband might, for the lack of legal advice, fail to contest an award of child custody to which he is entitled. The second problem is stated by the Committee of the State Bar: "Nothing in the Act would require the counselors to be trained

in legal or accounting or business matters and yet they would presumably be in the position of resolving intricate economic problems where tax and other consequences might be of major concern."<sup>79</sup> Thus, for example, an unrepresented wife, having no one to turn to for advice but the counselor, might be erroneously advised to include her separate property in what purported to be a community property settlement.

The two problems of a lack of legal advice and of too much legal advice from someone unqualified to give it, do not seem amenable to any ready solution. At the minimum a legal advisor should be attached to the family court. At the maximum the court should be empowered to order unrepresented parties, who can afford it, to obtain counsel and to appoint counsel for unrepresented parties who cannot.

#### D. *Child Custody*

1. *The "Parental Right" Standard.* It is well established in California that in a divorce action,

[w]here a parent applying for custody is in a position to take the child and is not shown to be unfit, the court may not award custody to strangers merely because it feels that they may be more fit or that they may be more able to provide financial, educational, social, or other benefits.<sup>80</sup>

*In re Campbell*<sup>81</sup> is the leading case in California on the subject of the right of parents, as against strangers, to the custody of minor children. The court in *Campbell* held that:

Under the general law . . . the father has a *natural right* to the care and custody of his child . . . and this right is recognized by the provisions of our codes, [Cal. Civ. Code § 197, and what is now Cal. Prob. Code § 1407]. . . . [T]he right . . . is of essentially the same nature as the right of property. . . . The right must therefore be regarded as coming within the reason . . . of the constitutional provisions for the protection of property.

. . . .

[U]nder the general law, the *prima facie* presumption is that the parent is competent; and hence the court is not authorized to appoint another as guardian, unless it finds to the contrary.<sup>82</sup>

The natural right theory of the *Campbell* court was followed in *Roche v. Roche*.<sup>83</sup> There the court quoted the Supreme Court's

<sup>79</sup> Brock Letter at 4.

<sup>80</sup> *Stewart v. Stewart*, 41 Cal. 2d 447, 451, 260 P.2d 44, 47 (1953).

<sup>81</sup> 130 Cal. 380, 62 P. 613 (1900).

<sup>82</sup> *Id.* at 382-83, 62 P. at 614-15 (emphasis added).

<sup>83</sup> 25 Cal. 2d 141, 152 P.2d 999 (1944).

opinion in *Prince v. Massachusetts*,<sup>84</sup> where it was said that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents,"<sup>85</sup> and the following language of *In re White*:<sup>86</sup>

The right of a parent to the care and custody of a child cannot be taken away merely because the court may believe that some third person can give the child better care and greater protection. One of the natural rights, incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody.<sup>87</sup>

The *Campbell* court's interpretation of section 197 of the Civil Code and of what is now section 1407 of the Probate Code formed the basis of the decisions in *Newby v. Newby*<sup>88</sup> and *Stewart v. Stewart*.<sup>89</sup> Thus, California has, through a long established line of cases involving statutory interpretation, adopted the "parental right" standard for child custody.

A third rationale for the "parental right" standard, in addition to the natural right and statutory grounds, is suggested by Chief Justice Traynor, then Justice, in his concurring opinion in *Guardianship of Smith*.<sup>90</sup> His justification for that standard is that "the rule requiring that custody be awarded to a [fit] parent in preference to a stranger does not operate to subordinate the interests of the child to those of the parent,"<sup>91</sup> because "it would seem inherent in the very concept of a fit parent that such a parent would at least be as responsive as the trial court, and very probably more so, to the best interests of the child."<sup>92</sup> In other words, to award custody to a parent found to be fit is, in all likelihood, in the child's best interest, for father (or mother), if fit, knows best—or at least better than the court. A parent's claim of custody in obvious disregard of the child's best interest would be evidence of his unfitness.<sup>93</sup>

It should be pointed out that there is no explicit statutory authority for the award of custody to a third party in a divorce proceeding. Section 1407 of the Probate Code, however, impliedly authorizes the appointment of a third party as a general guardian. Section 138(1) of the Civil Code, which provides that, in a divorce

<sup>84</sup> 321 U.S. 158 (1944).

<sup>85</sup> *Id.* at 166 (dictum).

<sup>86</sup> 54 Cal. App. 2d 637, 129 P.2d 706 (1942).

<sup>87</sup> *Id.* at 640, 129 P.2d at 708.

<sup>88</sup> 55 Cal. App. 114, 202 P. 891 (1921).

<sup>89</sup> 41 Cal. 2d 447, 260 P.2d 44 (1953).

<sup>90</sup> 42 Cal. 2d 91, 265 P.2d 88 (1954).

<sup>91</sup> *Id.* at 95, 265 P.2d at 891 (concurring opinion).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 97-98, 265 P.2d at 892.

action, the court is to be guided in awarding custody "by what appears to be for the best interests of the child," may contemplate an award to a third party, but that provision, when read together with section 138(2), may be understood to apply only "as between parents adversely claiming custody."

If Civil Code section 138 must be so read, then the only statutory basis for a "best interest," as opposed to a "parental right," standard is section 1406 of the Probate Code, which provides that, in the appointment of a guardian for a minor child, the court is to be guided by the best interests of the child. However, that section must be read with section 1407, which establishes a parental preference in the appointment of guardians. That preference, can, according to the cases, be overcome only by a showing of unfitness on the part of a parent, upon which showing the "best interest" standard would come into play.

The rule that a parent may be denied custody if proved unfit is non-statutory. The notion of unfitness, however, has not been thoroughly developed in the decisions. As stated in *O'Brien v. O'Brien*:<sup>94</sup>

The California courts have avoided the formulation of a clear-cut definition of "unfitness" applicable to all guardianship or custody cases, and it has been stated that the variable and complex nature of human relationships and conduct renders it impossible and undesirable to do so. (*Guardianship of Smith* (1957) 147 Cal. App. 2d 686, 694 [306 P.2d 86].) However, in *Guardianship of Willis* (1954) 123 Cal. App. 2d 446, 450 [266 P.2d 944], the court quoted with apparent approval the following definition of "unfitness" from the Massachusetts case of *Richards v. Forrest* (1932) 278 Mass. 547 [180 N.E. 508, 510]: "In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of moral delinquency. Violence of temper, indifference or vacillation of feeling toward the child, or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects."<sup>95</sup>

As *O'Brien* itself illustrates, the quoted definition is not quite tight enough.<sup>96</sup>

2. *The Family Court Act's "Best Interest" Standard and Its Potential Consequences.* A provision of the *Family Court Act* is de-

<sup>94</sup> 259 A.C.A. 437, 66 Cal. Rptr. 424 (1968).

<sup>95</sup> *Id.* at 442, 66 Cal. Rptr. at 427.

<sup>96</sup> See *Guardianship of Smith*, 147 Cal. App. 2d 686, 693-99, 306 P.2d 86, 92-95 (1957).

signed to meet criticisms of the "parental right" doctrine<sup>97</sup> by substituting a "strict best interest" rule. The *Act* provides as follows:

In any action where there is at issue the custody of a minor child, the court may . . . at any time thereafter during the minority of the child, make such order for the custody of such child as may seem necessary or proper. In awarding the custody, the court is to be guided by the following standards and considerations:

(1) Custody shall be awarded to either parent according to the best interests of the child.

(2) Although preference in an award of custody shall be given first to either parent, and second, to the person or persons in whose home the child has been living in a stable and wholesome environment, the court may award custody to persons other than the father or mother or the de facto custodian if it finds that such award is required to serve the best interests of the child.<sup>98</sup>

It is not clear what is intended by the "preference" of subsection (2). It may be read to require that custody be awarded to a parent (or de facto custodian) unless the parent (or custodian) is shown to be unfit. But the "preference" may also be construed to require an award to a parent (or custodian) only when the best interests of the child will be served thereby, or when no other person or persons can better serve the interests of the child. When the Comment by the Governor's Commission on the Family is considered, it becomes clear that the latter interpretation is the one intended by the drafters of the *Family Court Act*. The Comment states that:

[Proposed section 4900] changes existing decisional law to permit the award of custody in proper cases to third persons without a specific formal finding of complete parental unfitness.

It is the sense of the Commission that the paramount consideration must be the welfare of the child, but that the parents' primacy of right to custody must be preserved.<sup>99</sup>

The Governor's Commission, in its Report, elaborates upon its intentions in proposing section 4900:

[I]n the occasional case where the child's interests would be served best by giving custody to a non-parent—a stepparent or relative, for example—the court cannot presently achieve this without an affirma-

<sup>97</sup> *E.g.*, *Roche v. Roche*, 25 Cal. 2d 141, 144, 152 P.2d 999, 1000 (1944) (dissenting opinion); *Guardianship of Casad*, 106 Cal. App. 2d 134, 234 P.2d 647 (1951); *Shea v. Shea*, 100 Cal. App. 2d 60, 223 P.2d 32 (1950) (dicta); 1 CALIFORNIA CONTINUING EDUCATION OF THE BAR, *THE CALIFORNIA FAMILY LAWYER* § 15:22, at 562 (1961); *Kay, Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 719-20 (1966).

<sup>98</sup> ACT § 4900.

<sup>99</sup> REPORT at 100.



tive finding that the parents are wholly unfit. This doctrine is designed to secure the rights of the parents, which is surely a fit goal. Unfortunately, it sometimes loses sight, we believe, of the right of the child to an award of custody which will promote the stability of his life and best permit him to grow up as a happy and productive member of society.<sup>100</sup>

Note that proposed section 4900 does not require a showing that it is not in the interest of a child that custody be awarded to one of his parents; all that is required is a showing that it is in his best interest that custody be awarded to a third party. Thus, a court might find that a child would get along very well with a parent, but if it further found that the child would be even better off with a third party, then it would be permitted to award custody to the latter.

The notorious Iowa Supreme Court decision in *Painter v. Bannister*<sup>101</sup> and the results on the trial level in two recent California cases<sup>102</sup> illustrate the potential danger of the strict best interest standard. In *Painter*, a father, upon the death of his wife and after having failed to make satisfactory arrangements for the care of a son, gave temporary custody of the boy to the latter's maternal grandparents. The father remarried about a year and a half later, and he and his new wife, who was "anxious to have [the boy] in her home,"<sup>103</sup> sought to regain the custody of his son, which the grandparents refused to relinquish. The father made a successful habeas corpus petition in an Iowa court, but the execution of judgment was stayed pending appeal. Some two and a half years after the child was brought to his grandparents' home, when he was then seven years of age, the matter was finally determined by the Iowa Supreme Court.

The court said that "[w]e are not confronted with a situation where one of the contesting parties is not a fit or proper person. . . . There is no suggestion in the record that [the father] is morally unfit."<sup>104</sup> The court found, however, that the father had grown up in a foster home, that he did not do well in school, that he had served in the navy and did not like it, that he had not held a steady job and aspired to be a free-lance writer, photographer and painter, that he had poor financial judgment, that he lived in the rear of an old, unpainted, although tastefully decorated house, surrounded by

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<sup>100</sup> *Id.* at 39.

<sup>101</sup> 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966).

<sup>102</sup> *O'Brien v. O'Brien*, 259 A.C.A. 437, 66 Cal. Rptr. 424 (1968); *In re Raya*, 255 A.C.A. 297, 63 Cal. Rptr. 252 (1967).

<sup>103</sup> *Painter v. Bannister*, 258 Iowa 1390, 1395, 140 N.W.2d. 152, 155, *cert. denied*, 385 U.S. 949 (1966).

<sup>104</sup> *Id.* at 1393, 140 N.W.2d at 154.

weeds and wild oats, and had contemplated moving to Berkeley or Sausalito, California, that he was an agnostic or atheist and was influenced by Zen Buddhism, that he was a political liberal and a supporter of the American Civil Liberties Union, and that he had behaved unconventionally at the funeral of his son's mother.<sup>105</sup> "[T]he kind of life [the boy] would be exposed to in the [father's] household," according to the court, "would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating."<sup>106</sup> It appeared to the court that, upon the boy's arrival at his grandparents' home, he was maladjusted, unable to distinguish fact from fiction, aggressive and undisciplined, and confused about his "father-figure."<sup>107</sup> These traits the court attributed not to the boy's five years or to the death of his mother, but to the influence of his father.

On the other side, the court found that the grandparents were college graduates, that the grandfather was an editor for the Iowa State University Agricultural Extension Service, once a member of the school board, and a regular Sunday school teacher, that they had a large and comfortable house and that they were well-respected in their community.<sup>108</sup> "[Their] home provides [the boy] with a stable, dependable, conventional, middle-class, middlewest background. . . . It provides a solid foundation and secure atmosphere."<sup>109</sup>

The high Iowa court placed "a great deal of reliance" on the testimony of an "eminent child psychologist," even though the trial court had refused to "accept it at full face value because of exaggerated statements and the witness' attitude on the stand."<sup>110</sup> The psychologist testified, on the basis of tests and "depth interviews,"<sup>111</sup> that the child had come to recognize his grandparents as his parental figures,<sup>112</sup> that to remove him from their home would have the detrimental effect of destroying his "view of his own reality,"<sup>113</sup> that "the chances are very high [he] will go wrong if he is returned to his father,"<sup>114</sup> and that the grandparents' advanced age was unimportant, whereas it would be psychologically undesirable for the boy to live with persons of his own age range.<sup>115</sup>

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<sup>105</sup> *Id.* at 1392, 1394-95, 140 N.W.2d at 154-55.

<sup>106</sup> *Id.* at 1396, 140 N.W.2d at 156.

<sup>107</sup> *Id.* at 1398-99, 140 N.W.2d at 156-57.

<sup>108</sup> *Id.* at 1392, 140 N.W.2d at 154.

<sup>109</sup> *Id.* at 1393, 140 N.W.2d at 154.

<sup>110</sup> *Id.* at 1397, 140 N.W.2d at 156.

<sup>111</sup> *Id.* at 1398, 140 N.W.2d at 157.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1399, 140 N.W.2d at 157.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1399-1400, 140 N.W.2d at 158.

In reversing the order awarding custody to the father, the court said: "We do not believe it is for [the boy's] best interest to take him out of this stable atmosphere in the face of warnings of dire consequences from an eminent child psychologist and send him to an uncertain future in his father's home."<sup>116</sup>

*O'Brien v. O'Brien*<sup>117</sup> is an upside down version of *Painter*. Here the lower court, in a divorce action, found both parents of a four year old girl unfit and awarded custody to her maternal grandparents, "whose home was a fit and proper environment for the raising and training of the child and conducive to her best interests."<sup>118</sup> The appellate court reversed the trial court's decision stating that the evidence indicated that the father, a dentist,

is by nature a reserved individual with a limited ability or inclination for socializing with others or engaging in outward displays of affection; that he devoted most of his energies to his business pursuits . . . and did not spend a great deal of time with [the girl]; that on certain isolated occasions, he had been less than a model parent, in that he had left [the girl] alone briefly, had not immediately tended to her dental needs and had twice engaged in heated arguments with [the mother] in the child's presence. The record is devoid of any evidence suggesting that plaintiff was in the least immoral or intemperate or that he was ever intentionally cruel to his child. The only evidence bearing upon [the girl's] feelings toward her father was to the effect that she adored him.<sup>119</sup>

In *In re Raya*,<sup>120</sup> the lower court adjudged two children to be dependent children within the meaning of section 600(a) of the Welfare and Institutions Code and removed them from the custody of their mother. According to the appellate court, which reversed the trial court:

Section 600, subdivision (a) . . . permits an adjudication of wardship when proper and effective parental care or control is lacking. The phrase "proper and effective" offers at best a dim light to discern the point at which a juvenile court is authorized to invade and supplant a parent-child relationship. In one sense the phrase expresses *an objective identical with the judicially expressed goal of the child's welfare*.<sup>121</sup>

The facts were as follows:

[T]he couple, separated, were each presently cohabiting with partners of the opposite sex under a consensual extramarital, but long

<sup>116</sup> *Id.* at 1400, 140 N.W.2d at 158.

<sup>117</sup> 259 A.C.A. 437, 66 Cal. Rptr. 424 (1968).

<sup>118</sup> *Id.* at 439, 66 Cal. Rptr. at 425.

<sup>119</sup> *Id.* at 442-43, 66 Cal. Rptr. at 427.

<sup>120</sup> 255 A.C.A. 297, 63 Cal. Rptr. 252 (1967).

<sup>121</sup> *Id.* at 302, 63 Cal. Rptr. at 255 (emphasis added).

lasting, arrangement; . . . [the mother] and her consort . . . have had four children out of wedlock while [the father] and his mistress . . . have had three children.<sup>122</sup>

[T]he children were happy, healthy and well adjusted in the home provided by their mother and [her consort]; the mother and [her consort] were satisfying the children's need for familial love, security and physical well-being. The fact that the mother had established a home and was living with a man to whom she was not married supplied the sole evidence which might support the finding. This piece of evidence was inextricably coupled with a group of accompanying circumstances: (1) the relationship was stable, not casual or promiscuous; (2) poverty alone had prevented [the mother's and father's] divorce and the mother's marriage to [her consort]. . . .<sup>123</sup>

It is fair to say that, under the "strict best interest" formulation of proposed section 4900, results, such as those reached by the Iowa Supreme Court in *Painter* or by the lower California courts in *O'Brien* and *Raya*, would not be disturbed on appeal. In each of the three cases, a judge, in the exercise of his sound discretion, might have found that the interests or welfare of the children would be best served by a third party. But it is plain, if one is permitted to make a value judgment, that in none of the cases should the parents have been denied custody of their children, for the reason, apparent at least to the California appellate courts, that the parents were not unfit.

It is suggested by one author, that the error which these cases illustrate could be avoided if the family court were "assisted by a staff of specialists, trained in social work, psychology, psychiatry and sociology,"<sup>124</sup> who would solve the difficult problem of determining what the best interests of the child require. The testimony of the "eminent child psychologist" and the court's reliance on it in *Painter* justify some skepticism in this regard.

Three further points, raised by the three cases above, should be made here. One is that parents, during the period of separation, illness, emotional distress, or financial difficulties which often precedes a dissolution of marriage, will consider placing their children in the care of relatives or trusted friends. It would be unfortunate if parents were deterred from taking this action for the benefit of their children by a fear that, in the event they should find themselves in the family court, a judge will rule that the best interests of the children require that they not be removed from the custody

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<sup>122</sup> *Id.* at 299, 63 Cal. Rptr. at 253.

<sup>123</sup> *Id.* at 303, 63 Cal. Rptr. at 256.

<sup>124</sup> Kay, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 725 (1966).

of the de facto custodian who, in many cases, will be better able to provide a stable and secure environment.

A second point is that a standard as vague as the "best interests of the child" will promote appeals and will thereby cause a prolongation of the child's uncertainty as to his relationship to his parents or custodians—an uncertainty that in itself is against his best interests. The more the litigation is prolonged, as in *Painter*, the greater the shock to the child if and when he is eventually separated from his parents or custodians. Also, it will be difficult for parents to vindicate their rights on appeal, for the longer a child remains with a third party custodian, the greater will be the reluctance of a court to move the child.

Third, only in the rarest of cases will low-income parents be represented by such "able and vigorous counsel,"<sup>125</sup> and have the assistance of such expert witnesses as are essential to the protection of their and their children's interests when set against the findings and recommendations of social workers, probation officers, and the professional staff of the family court, who will not always have a scrupulous regard for the personal rights of their "clients" or a high level of tolerance for subcultural attitudes and practices. One would not want to go so far as to say that the "best interest" standard is aimed at the poor and at minority groups, but there can be no doubt that it is they who would feel its sting.

In fairness to the Governor's Commission, it should be said that its emphasis on the welfare of children is wholly praiseworthy. Children should be protected from neglect, cruelty and exposure to immorality. But it must be said that the "best interest" standard, insofar as it is intended to protect children from harm, literally, or almost so, "throws out the baby with the bath." There should be a narrower means of protecting children from harm than a law which authorizes the dissolution of the parent-child relationship even when the parent is not harming the child.

As the Commission says, the "child's true interests" should not be subordinated to "the parents' proprietary rights."<sup>126</sup> But the suggestion that a parent's interest in his child is congruent with, or even similar to, his interest in a chattel, is an instance of cynicism. Chief Justice Traynor's observations with respect to the compatibility of the best interests of a child and the rights of a parent are here very much in point.<sup>127</sup>

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<sup>125</sup> See *In re Raya*, 255 A.C.A. 297, 305, 63 Cal. Rptr. 252, 257 (1967).

<sup>126</sup> REPORT at 38.

<sup>127</sup> See note 90, *supra*, and accompanying text.

It should be said, too, that the Commission appears to be motivated by the laudable desire to spare parents the humiliation and pain of being branded as unfit, and, as a consequence, of being forever separated from their children.<sup>128</sup> The Commission's view, however, accentuates the negative and overlooks the fact that the requirement that parents be proved unfit before they may be denied custody is set up to protect, not to oppress, them. It is an exaggeration to say that a parent, once found unfit, cannot regain custody of a child, for under existing law, as well as under the Commission's own formulation, "the court may . . . at any time . . . during the minority of any of the children of the marriage, make such order for the custody as may seem necessary or proper. . . ."<sup>129</sup> It is submitted that to make a showing of unfitness is neither as damning nor as difficult a matter as the Commission implies.<sup>130</sup>

3. *Constitutional Objections to the "Best Interest" Standard.* In *In re Campbell*,<sup>131</sup> the court said that the right of a parent to custody "must be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property."<sup>132</sup> This notion, which was not repeated in the later cases, has no currency, and was of dubious validity in the first place.<sup>133</sup>

The "parental right," however, if not protected by the fourteenth amendment restrictions on the taking of property, may come under that amendment's guarantee against the deprivation of liberty without due process of law. That liberty includes the right of the individual "to marry, establish a home and bring up children,"<sup>134</sup> and the right of parents "to direct the upbringing and education of children."<sup>135</sup> The right to bear children is "one of the basic civil rights of man."<sup>136</sup> There is a "private realm of family life which the state cannot enter."<sup>137</sup> According to a concurring opinion in *Griswold v. Connecticut*:<sup>138</sup>

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<sup>128</sup> See comment by the Co-Chairman and Executive Director of the Commission in Dinkelspiel & Gough, *The Case for a Family Court*, 1 FAM. L.Q. 70, 80 (1967): "[N]o useful purpose can be served by forcing a formalized finding of unfitness which permanently cuts off parent from child."; REPORT at 39-40, 100.

<sup>129</sup> CAL. CIV. CODE § 138 (West 1954); Act § 4900.

<sup>130</sup> See *Guardianship of Shannon*, 218 Cal. 490, 493, 23 P.2d 1020 (1933); *O'Brien v. O'Brien*, 259 A.C.A. 437, 442, 66 Cal. Rptr. 424, 427 (1968); *Guardianship of Smith*, 147 Cal. App. 2d 686, 693-99, 306 P.2d 86, 92-95 (1957).

<sup>131</sup> 130 Cal. 380, 62 P. 613 (1900).

<sup>132</sup> *Id.* at 382, 62 P. at 614.

<sup>133</sup> See *Wadleigh v. Newhall*, 136 F. 941, 947 (N.D. Cal. 1905).

<sup>134</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>135</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

<sup>136</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>137</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>138</sup> 381 U.S. 479 (1965).

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights . . . to marry and raise a family are of a similar order and magnitude as the fundamental rights specifically protected.

. . . The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather . . . there are fundamental personal rights such as this one, which are protected from abridgment by the Government. . . .<sup>139</sup>

As to the question of whether the right of a fit parent to the custody of his child is “so rooted in the traditions and consciences of our people as to be ranked as fundamental,”<sup>140</sup> and “implicit in the concept of ordered liberty,”<sup>141</sup> two considerations are relevant, if not determinative: the rule of the common law and the practices of the several states. There can be no doubt that the “parental right” standard was recognized in the common law,<sup>142</sup> and the practices of the states are summarized as follows:

In controversies between a father or mother . . . and third persons, as to the custody of children, while the welfare of the child is said to be the prime consideration, the parent undoubtedly has a strong prima facie right. No showing by a third person that he could furnish the child a better home or education than the parent could furnish, would cause a court to remove the child from the custody of its parents, if the home which they provided was decent and respectable [citing cases]. The courts say that the natural affection of parents, and the advantages of being brought up by one’s own parents, outweigh any possible advantage of wealth or culture, and thereby attempt to keep the decisions consistent with the statement that the child’s welfare is the main consideration.<sup>143</sup>

With respect to apparent deviations from the “parental right” standard in some states, it is said that:

Although one commentator purports to see ‘a new current of concern based upon a feeling that a child himself has a right to some minimum level of care and opportunity . . . in contrast to an earlier total concern with the right of the parent in his child,’ the cases supporting such an emphasis usually involve contests between parents or a non-

<sup>139</sup> *Id.* at 495-96 (concurring opinion).

<sup>140</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>141</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>142</sup> *In re Campbell*, 130 Cal. 380, 382, 62 P. 613, 614 (1900), citing 2 KENT’S COMMENTARIES \*203; 1 BLACKSTONE, COMMENTARIES 447 (Cooley ed. 1899).

<sup>143</sup> J. MADDEN, PERSONS AND DOMESTIC RELATIONS 372 (1931); see cases cited in Petitioner’s Brief for Certiorari at 4, *Painter v. Bannister*, 385 U.S. 949 (1966), and in Brief for Board of Christian Social Concerns as Amicus Curiae at 4. (On file in the University of Santa Clara Law Library.)

parent who prevails because he has stood *in loco parentis* . . . for an appreciable period of time.<sup>144</sup>

Another author points out that "most courts applying the best interest test to third party situations utilize a variety of procedural devices which increase the probability of the natural parents winning the suit."<sup>145</sup>

If there is a fourteenth amendment right on the part of a fit parent to the custody of his child (except perhaps in the limiting case where the child's "psychological best interest" requires that custody remain in a long-term de facto custodian), that right "may not be abridged by the state simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose."<sup>146</sup>

There is no question that the protection of the welfare of children is a "proper state purpose." There is some question, however, as to whether the proposal that the court award the custody of children on the basis of their "best interests" has more than *some* rational relation to that purpose, because, as pointed out by Chief Justice Traynor, a fit parent would probably be more responsive to the best interests of the child than the trial court.<sup>147</sup> It is arguable that the proposed method of custody determination is not related to the welfare of children with the requisite degree of rationality, for the reason that the best interests of children are better known to their fit parents than to judges, however buttressed the opinions of the latter may be by those of psychological and sociological experts. As Chief Justice Traynor asks, "[i]s the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served?"<sup>148</sup>

The question of whether or not the Constitution of the United States protects such natural or substantive rights as the right of fit parents, against third parties, to the custody of their children, is subject to a wide difference of judicial opinion. These opinions range from the view that "the concept of liberty protects those personal

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<sup>144</sup> Foster & Freed, *Child Custody*, N.Y.U. L. REV. 423, 427 (1964) (footnote omitted).

<sup>145</sup> Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 154 (1963).

<sup>146</sup> *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (concurring opinion). "No court can, for any but the gravest reasons, transfer a child from its natural parent to any other persons. . . ." *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 469, 113 N.E.2d 801, 803 (1953).

<sup>147</sup> *Guardianship of Smith*, 42 Cal. 2d 91, 95, 265 P.2d 888, 891 (1954) (concurring opinion).

<sup>148</sup> *Id.*



rights that are fundamental"<sup>149</sup> to the belief that no "broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the '[collective] conscience of our people' is vested in this Court by . . . the Fourteenth Amendment, or any other provision of the Constitution . . ."<sup>150</sup> The dominant view seems to be that:

The doctrine that prevailed [in earlier cases]—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.<sup>151</sup>

However, even though the courts "do not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch *economic problems . . . or social conditions*,"<sup>152</sup> they may make such a determination with respect to laws which "operate directly on an intimate family relation."<sup>153</sup> And "there can be no doubt that at a minimum [the words of the due process clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*"<sup>154</sup> nor that such requirements apply where "the result of the judicial proceeding [is] permanently to deprive a legitimate parent of all that parenthood implies."<sup>155</sup> Viewed in this light, the words of Chief Justice Traynor<sup>156</sup> take on a new significance. The Chief Justice is perhaps saying that, in a contest between a fit parent and a third party as to the custody of a child, there is no such thing as a "hearing appropriate to the nature of the case," for "it would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child."<sup>157</sup>

An argument can be made that since a fit parent is the best judge of the best interests of his child, a court cannot, by way of transferring the child's custody to a third party, substitute its judgment as to the child's best interest for that of the parent. For the

<sup>149</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (concurring opinion of Mr. Justice Goldberg).

<sup>150</sup> *Id.* at 520 (concurring opinion of Mr. Justice Black).

<sup>151</sup> *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

<sup>152</sup> *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (emphasis added).

<sup>153</sup> *Id.* (dictum).

<sup>154</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added).

<sup>155</sup> *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

<sup>156</sup> *Guardianship of Smith*, 42 Cal. 2d 91, 95, 265 P.2d 888, 891 (1954) (concurring opinion).

<sup>157</sup> *Id.*

court to do so would amount to a denial of the opportunity to be heard in much the same way as would a court's arbitrary substitution of its finding of fact for that of a jury. It is in this sense that the Chief Justice, in recasting "the concept of parental fitness in terms of the best interests of the child . . . placed the rule upon its best possible modern footing"<sup>158</sup>—upon the ground of procedural due process. The process that is due is an adjudication of the parent's fitness. Only when that determination is unfavorable to the parent can he be denied the custody of his child. When it is favorable, due process requires that only he can decide in whose custody the child's best interests would be served.

The author suggests that section 4900 (2) of the *Family Court Act* be re-written as follows:

Custody shall be awarded to either parent, as against a non-parent, according to the child's best interests, unless the court makes an affirmative finding, based on clear and convincing proof, that the parents are unfit or otherwise incapable of exercising custody, or that to remove the child from the de facto custody of a non-parent would constitute a grave and immediate threat to the child's psychological well-being; upon such a finding, custody may be awarded to a non-parent according to the best interests of the child.

4. *Custodial Investigations and Reports.* Section 4903 of the *Act* provides that "whenever good cause appears, the court may require an investigation and report concerning the care, welfare and custody of the minor children of the parties" and that "the professional staff shall make investigations and reports thereof." Although section 4903 makes provision for cross-examination of the persons who prepare the custody report or who provide information included in it, it is still open to the criticisms raised above against the counselor's report. Potentially prejudicial and unreliable information, relating to intimate details of personal relations and behavior, can get before the court in spite of the objections of the parties or their ability to show its unreliability.

The impact of misinformed and scandalous matter would of course be felt hardest by persons who, because of their poverty, are unrepresented or underrepresented.<sup>159</sup> Indeed, because of a deference to the middle and upper classes on the part of some courts, investigations would tend to be conducted into the status of the children of lower-class families. The report allowed by section 4903 (but not the *testimony* of professionals with respect to the child's

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<sup>158</sup> tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 *STAN. L. REV.* 900, 926 (1964).

<sup>159</sup> *Cf. In re Raya*, 255 A.C.A. 297, 63 *Cal. Rptr.* 252 (1967).

welfare) should be eliminated—at least where the parties are unrepresented.

5. *Repeal of sections 199 and 214 of the Civil Code.* The Act would repeal Civil Code sections 199 and 214, relating to actions to determine custody of children where there has been no divorce. Those sections should be retained. It should be possible for a party, who has religious scruples about divorce or who has hope for reconciliation after a period of months or years and who cannot obtain the agreement of the other party as to a legal separation, to obtain an "order or decree in regard to the support, care, custody, education, and control of the children of the marriage."<sup>160</sup> If a person cannot obtain legal custody of children other than by filing a "petition of inquiry," the consequences will be attempts at "self-help" and an increase in the dissolution of marriages that might eventually be saved.

### E. Annulment

1. *"The Coalescence of All Dissolution Proceedings."* Under present law, a marriage may be adjudged a nullity (annulled)

[U]nder certain circumstances . . . where a party to the marriage was under the age of consent; where a former husband or wife of either party was living and the marriage with such person was then in force; where either party was of unsound mind; where the consent of either party was obtained by fraud; where the consent of either party was obtained by force; and where either party was, at the time of marriage, physically incapable of entering into the marriage state and such incapacity continues and appears to be incurable.<sup>161</sup>

"[C]onvinced that the essential question presented in the annulment of a voidable marriage does not differ from that presented in any dissolution of marriage cases," the Governor's Commission, in proposing the *Family Court Act*, recommended "the elimination of the specific fault annulment grounds; the removal of the annulment of voidable marriages as a separate form of action; and the coalescence of all dissolution proceedings (save for declarations of nullity in case of void marriages) into a single form of action governed by a single standard."<sup>162</sup>

2. *The Standing of Parents and Bigamous Spouses.* Where a ground for annulment exists, the outcome, so far as the dissolution of marriage is concerned, would be the same under the proposed

<sup>160</sup> CAL. CIV. CODE § 199 (West 1954).

<sup>161</sup> 16 Cal. Jur. 2d *Divorce, Separation, and Annulment* § 320 (1967), citing CAL. CIV. CODE § 82 (West Supp. 1968).

<sup>162</sup> REPORT at 35-36.

law as under the present law. In either case the marriage will be terminated if either party at the final stage of the proceedings so decides. Where no ground for annulment exists, the outcome under the proposed law might not be the same as under the present law, because under the *Act* the marriage can be terminated upon the decision of one of the parties, despite the lack of a ground. The outcome so far as the *non-dissolution* of the marriage is concerned may not be the same where the following grounds for annulment exist: that a party to the marriage is under the age of consent or already married.

Under present law a cause of action for annulment will lie under certain circumstances where a party to a marriage was without the capacity of consenting thereto.<sup>163</sup> Such action may be brought "by a parent, guardian, or other person having charge of such non-aged male or female, at any time before such married minor has arrived at the age of legal consent."<sup>164</sup> The same is true under the proposed *Family Court Act*.<sup>165</sup>

Section 4723 of the proposed *Act* provides that, where the petition of inquiry is filed as provided in proposed section 4722, the counseling services of the family court shall be available to the parties, their parents or guardians, or to the person filing the petition. If the parties do not desire counseling, the court, upon proof of the non-capacity to consent, shall dissolve the marriage.<sup>166</sup> If the parties do desire counseling and decide to "become reconciled" or, in any event, do not decide to "continue their application for an inquiry into the marriage, with a view to its possible dissolution,"<sup>167</sup> and if it is not the case that "the decision of one or both parties is that the marriage should be terminated,"<sup>168</sup> then, presumably, the marriage will not be dissolved. The *Act*, in other words, permits a minor, who does not have the capacity to consent to marriage but who somehow contracts a marriage not void ab initio, to remain married despite the will of his parents to the contrary.

It is difficult to evaluate this outcome of the proposed law. On the one hand, it would allow marriages to stand even though one or both of the parties to the marriage may be under the age of consent, where the relationship of the parties is strong enough to emerge unscathed from the counseling gauntlet—which is perhaps not undesirable. On the other hand, it would provide little protection

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<sup>163</sup> CAL. CIV. CODE § 82(1) (West Supp. 1967).

<sup>164</sup> CAL. CIV. CODE § 83(1) (West 1954).

<sup>165</sup> ACT § 4722.

<sup>166</sup> *Id.* § 4723.

<sup>167</sup> *Id.* § 4704.

<sup>168</sup> *Id.* § 4718.

for strong-willed children or for children whose wills have been overborne and who have contracted marriages against their best interests. The law, too, would inadequately protect the interests of parents in the care and custody of their children. It would encourage false swearing in the obtaining of marriage licenses.

Another thing to be said in favor of the effect of the new law is that it would give protection to under-age persons who have married and are expecting or have borne a child. It would appear, however, that a better way of achieving that result would be to expand section 79 of the Civil Code (proposed section 4413), which provides that "[w]hen unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman," so that it applies to minors and so that the anticipated or actual birth of a child constitutes "living together as man and wife." To do so would have the further advantages of discouraging false swearing and of securing such intimate matters from the eyes of government.

Under present law an action for annulment will lie where, at the time of marriage, "the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force."<sup>169</sup> In case the marriage in question is "knowingly bigamous," as defined by implication in present section 61(2) of the Civil Code and in proposed section 4602(2), its absolute invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material.<sup>170</sup> Whether the marriage is knowingly or unknowingly bigamous, an action of annulment may be brought, under present law, by the "former" husband or wife.<sup>171</sup> However, the proposed *Family Court Act* does not give such standing to former spouses, where the marriage is unknowingly bigamous.<sup>172</sup> Even if the *Act* gave former spouses rights comparable to those of parents under proposed section 4722, the result would be similar to that described above. Thus, the putative spouse and the bigamous spouse could remain married despite the will of the former spouse to the contrary.

In the present case, however, the effect of the proposed law is probably not undesirable. Where a husband or wife is reasonably believed to be dead by his or her spouse, or has disappeared for five years and is not known to be living, the spouse should be free to remarry and raise a family without the threat that the former

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<sup>169</sup> CAL. CIV. CODE § 82(2) (West Supp. 1967).

<sup>170</sup> 16 Cal. Jur. 2d *Divorce, Separation, and Annulment* § 319 (1967).

<sup>171</sup> CAL. CIV. CODE § 83(2) (West 1954).

<sup>172</sup> Act § 4600.

husband or wife will return and bring an action to annul the spouse's remarriage. Even in the rare case in which the disappearing spouse (e.g., a serviceman presumed dead or an amnesiac) is not the author of his or her own misfortune, it would seem to be more humane to allow the remarrying spouse to determine for himself where his responsibilities lie, rather than for the law to force him to abandon his new family and to resume a perhaps defunct relationship. The outcome in either case would probably be the same, for under the present or proposed law, the spouse would seek the dissolution of one marriage or the other, and remarry if necessary, as his feelings dictated.

3. *Declaration of Nullity.* Section 4600 of the proposed *Family Court Act* carries over section 80 of the Civil Code and provides for a declaration of nullity in the case of a marriage void from the beginning. The void marriage is distinguished from a marriage that is merely voidable under present law and which would be dissolvable in more or less the standard way under the new law.

Proposed sections 4601 and 4602 define two classes of void marriages. There is perhaps a third class, consisting of marriages which are "invalid because of failure to meet the essential requirements of licensing or solemnization."<sup>173</sup> Although this third class is not defined by the present or the proposed law, it may be inferred from sections 55, 68, 69, 69a, 70 and 71 of the Civil Code and from sections 4300, 4400-02, 4405 and 4406 of the proposed *Family Court Act*. The language of proposed sections 4604 and 4605 ("[w]henever a determination is made under this chapter [having to do with void marriages] that a marriage is void or otherwise invalid")<sup>174</sup> also implies a third category.

Proposed section 4601, which carries over section 59 of the Civil Code, provides that marriages between parties of a certain consanguinity are void from the beginning. Proposed section 4602, which is based on section 61 of the Civil Code, provides as follows:

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

(1) The former marriage has been declared a nullity. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted prior to judgment decreeing the dissolution of marriage.

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<sup>173</sup> REPORT at 76.

<sup>174</sup> ACT § 4604 (emphasis added).

(2) Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

Responsibility for the above quoted gobbledygook cannot be laid on the Governor's Commission, for the Commission recommended that section 61 of the Civil Code be carried over *intact*<sup>175</sup>— although to do so would presuppose an action for annulment and an incapacity to re-marry for one year following the date of service or appearance of the defendant in an immediately preceding divorce action.

The plain meaning of the first paragraph and the first sentence of subsection (1) of proposed section 4602 is that no person may validly re-marry during the life of a former spouse unless the former marriage was absolutely void and has been judicially declared as such. "Declared a nullity" means "declared void from the beginning," as proposed section 4600 itself makes clear. What is intended, of course, is "annulled or dissolved" ("annulled" being necessary to cover cases prior to the coalescence of all dissolution proceedings).

The second sentence of subsection (1) is unnecessary, ambiguous, and contrary to present law. It is unnecessary in that its intent is carried by the preceding language of proposed section 4602. It is ambiguous in that it is not clear which "parties" are referred to. It is contrary to present law in that it would render absolutely invalid a marriage contracted prior to a decree of annulment,<sup>176</sup> or prior to the entry of a judgment of divorce when the same might have been entered if applied for<sup>177</sup> (since the proposed law would repeal section 133 of the Civil Code which provides for the entry of a final decree of divorce *nunc pro tunc* as of the date when such decree should have been given), or under the conditions described in subsection (2) where there has been no judgment decreeing the annulment or dissolution of the marriage.<sup>178</sup>

The second sentence of subsection (2) is inconsistent with the coalescence of all dissolution proceedings. To adjudge a marriage a nullity is to annul it, and the proposed law abolishes the action of annulment. Further, with the abolition of the action of annulment,

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<sup>175</sup> REPORT at 74.

<sup>176</sup> See *In re Eichhoff*, 101 Cal. 600, 605, 36 P. 11, 13 (1894); *Biles v. Biles*, 107 Cal. App. 2d 200, 202, 236 P.2d 621, 622 (1951).

<sup>177</sup> See *Nicolai v. Nicolai*, 96 Cal. App. 2d 951, 955, 216 P.2d 913, 916 (1950).

<sup>178</sup> See CAL. CIV. CODE § 61(2) (West Supp. 1967).

every marriage not void from the beginning will be forever valid. Marriages not void from the beginning, may not be invalidated, although they may be dissolved. The sentence is also a redundancy in that the foregoing language has already declared that such unknowingly bigamous marriages are not invalid. As a matter of fact, it is not even a sentence.

The meaning of the proposed section 4602, including the intent that subsection (2) should be an exception of subsection (1), would be clearer if the first sentence of subsection (2) were merged with the first sentence of subsection (1); if the second "unless" [subsection (2)] were replaced by "or"; and if the last (purported) sentence of subsection (2) were eliminated.

Proposed section 4608 ("[a] judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them") is superfluous in view of the abolition of the judgment of nullity (annulment).

4. *The Rights of Putative Spouses.* The Governor's Commission, in proposing sections 4604 and 4605 of the *Family Court Act*, recommended that innocent parties to a void marriage should be entitled to a moiety of what would have been community or quasi-community property and alimony had the marriage been valid. It is not altogether certain that the recommendations of the Commission were not intended to apply also to marriages which are presently voidable. The uncertainty is introduced by the use, in proposed sections 4604 and 4605, of the phrase: "whenever a determination is made under this chapter that a marriage is void or otherwise invalid." "This chapter" has to do only with void marriages, but it is voidable marriages that are *determined* to be void. In place of the word "determination," the word "declaration" should be used.

There is no need for a provision similar to proposed sections 4604 and 4605 with respect to parties to presently voidable marriages. A voidable marriage is valid so long as it is not annulled. When it is annulled, it becomes invalid from the beginning. For that reason parties to presently voidable marriages do not, upon annulment, possess community property or a right to alimony. But if the *Family Court Act* is adopted, abolishing the action for annulment, no presently voidable marriage could be annulled (although, of course, such a marriage could be dissolved, and a void marriage could still be declared a nullity). All presently voidable marriages would thus be forever valid. Upon their dissolution they would be treated the same as non-voidable marriages—that is, as formerly existing, valid marriages. Parties to what are now voidable marriages would, therefore, be entitled to alimony, and the property



acquired by their joint efforts will be community or quasi-community property.

The Governor's Commission's provisions for the case of a void marriage present a problem which the following example may help to clarify. Suppose that a husband deserts his lawfully wedded wife and five children, and knowing her to be alive, marries another woman. This second marriage is absolutely void. The first marriage remains in force. Under section 164 of the Civil Code (section 5310 of the proposed *Family Court Act*), all the California real property and all the personal property of the husband acquired while the marriage is in force is community property. The first wife, under section 161(a) of the Civil Code (proposed section 5305) has an interest in said property which is present, existing and equal to the interest of the husband. Suppose further that the second wife discovers the husband's bigamy and petitions for a declaration of nullity.

Under proposed sections 4604 and 5100, the second wife would be entitled to half of the property acquired during her union with the husband by their joint efforts, and, under proposed sections 4605 and 5101, she might be entitled to support payments from the husband. Thus, the proposed law intends to take from the husband and give to the second wife the community property of the first wife and to satisfy out of other such property such order of support as cannot be satisfied out of the husband's separate property.

As the law stands, it would seem to authorize an unconstitutional taking of the property of the first wife. This point of view, however, does not appear to have been urged upon the California courts, and it is well-settled by the cases that:

[W]hile, strictly speaking, there can be no community property in the absence of a valid marriage, courts will, in dividing gains made by the joint efforts of a man and woman living together under a voidable marriage which is subsequently annulled [or a void marriage], apply by analogy the rule which would obtain when a valid marriage is dissolved.<sup>179</sup>

And it is said that in the case of a contest between a legally recognized spouse and a putative spouse:

[T]he claim of a putative spouse must be limited to property acquired during the continuance of that relationship. It seems obvious that one-half of the property in question belongs to the putative spouse. The other half belongs to the legal community (husband and legally recognized spouse) and should be distributed as any other community property under the same circumstances.<sup>180</sup>

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<sup>179</sup> *Schneider v. Schneider*, 183 Cal. 335, 341, 191 P. 533, 535 (1920).

<sup>180</sup> *Estate of Ricci*, 201 Cal. App. 2d 146, 149, 19 Cal. Rptr. 739, 740-41 (1962).

Proposed section 4604 thus codifies existing case law, and proposed section 4605 is not inconsistent with the rationale of that law. Taking it for granted that the provisions of those sections are wholly desirable, the law relating to community property should be amended accordingly.

To thus amend that law would solve a further community property problem which might otherwise arise under the *Family Court Act*. If a putative husband or wife of a bigamous spouse obtains a declaration of nullity or a dissolution of the marriage, he or she will be entitled to half of the property of the union. The bigamous spouse's original mate will be left with an undivided one-half interest in the other half of such property. On the other hand, if the original mate first obtains a dissolution of his or her marriage to the bigamous spouse, then, the putative husband or wife not being a party to the dissolution proceedings, the original mate will be given one-half of the property acquired while that marriage was in force, including one-half of the property acquired during the subsequent union. The putative husband or wife, if he or she then obtains a declaration of nullity or a dissolution of marriage, will be left with one-half of the other half (a quarter) of the property of the subsequent union. It would seem that the way to avoid these anomalous results would be to amend the law relating to community property to the effect that only one-half of the property acquired by a putative and a bigamous spouse is the property of the community consisting of the legally recognized and bigamous spouse.

There is a final problem which may be dealt with here, although it may more properly belong to a discussion of proposed sections 5100 and 5101, relating to the division of community property and alimony. Under the *Family Court Act*, the knowingly bigamous husband of the above example might obtain a dissolution of his marriage to his first wife and would thereupon be entitled to an equal division of the property acquired while they were living together. And if it was the wife who deserted the husband and who bigamously remarried, then, upon the dissolution of her marriage to her first spouse, she would be entitled to an equal division not only of the property acquired while they were living together, but also the property accumulated by the husband when they were no longer living together<sup>181</sup> and (if she was justified by his misconduct in deserting him)<sup>182</sup> earned by him.<sup>183</sup> These possibilities should be foreclosed by explicit statutes.

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<sup>181</sup> *Sidebotham v. Robinson*, 216 F.2d 816 (1954).

<sup>182</sup> See CAL. CIV. CODE § 175 (West Supp. 1967); ACT § 5329.

<sup>183</sup> *O'Bryan v. Commissioner*, 148 F.2d 456 (9th Cir. 1945); *Commissioner v. Cavanaugh*, 125 F.2d 366 (9th Cir. 1942).

### F. *Alimony and the Division of Marital Property*

The special committee of the California State Bar, on the basis of its study of the *Family Court Act*, reported that:

Section 5100 requires an equal division of community and quasi community property unless the court finds that 'the economic circumstances' of the parties requires an unequal division. The Committee feels that this is too limiting. . . . The Committee is of the opinion that the court, in its division of the community property of the parties, should evaluate and weigh all circumstances of the situation including the conduct of the parties during the marriage. . . . [T]he court should have great power to adjust the equities of the parties. . . .

The law as it exists requires the court to award community property in favor of the innocent spouse in cases of cruelty and adultery. There is an even greater justification for an unequal division of community property in cases of desertion, habitual intemperance, non-support and conviction of a felony. . . .

Section 5101 provides for alimony but appears in its wording to permit alimony regardless of the conduct of the parties during the marriage. The Committee is of the opinion that the conduct of the parties should be considered, not on the matter of amount of alimony, but in connection with whether alimony should or should not be given.<sup>184</sup>

There is much to be said on either side of the question of whether property should be awarded and alimony granted on the basis of fault. The State Bar Committee, however, ignores the determinative consideration that the elimination of the fault grounds of divorce and the retention of the fault concept of property rights are, analytically and practically, mutually exclusive. As the authors of the *Family Court Act* say:

If our standard for the dissolution of marriage is to be an irreparable breakdown of the marriage relationship rather than particular misconduct, it follows that fault should not be determinative of the disposition of property, lest we let in by the back door what we have sought to remove by the front.<sup>185</sup>

. . . .

As in the case of divorce and division of property, we believe that the elimination of the fault determinant in the awarding of alimony will substantially lessen the bitter strife between the parties.<sup>186</sup>

### CONCLUSION

The Governor's Commission on the Family, in proposing the *Family Court Act*, has rendered a valuable service to the people of California.

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<sup>184</sup> Brock Letter at 7-8.

<sup>185</sup> REPORT at 45.

<sup>186</sup> *Id.* at 48.

This article disapproves the *Act's* too complete substitution of inquisitorial for adversary proceedings, its switch from a natural rights to a naive-utilitarian approach to child custody and certain other of its provisions. It approves, however, the institution of the family court and of reconciliation services (independent of the court). It defends the abolition of the fault grounds for divorce and for property distribution and alimony.

The enactment of the Commission's proposal, with appropriate modifications, will place California in the vanguard of the Western world's inevitable reform of its archaic and pernicious substantive and procedural law of divorce.