Book Review: "Here Come Da Family Court Judges"*

by
Dana E. Prescott**

Do Your Divorce Right: Straight Talk from Family Court Judges (2011), by Hon. Andrew Horton and Hon. John David Kennedy. Standish, Maine: Tower Publishing. (pp. 402).

In their forthcoming book, *Do Your Divorce Right: Straight Talk from Family Court Judges*, Justice Andrew Horton and Judge David Kennedy[1] have written a unique and plain- language book concerning the written and unwritten rules of the family court process. As court administrators and clerical staff well-know, the percentage of *pro se* litigants in family court systems throughout the country is substantial and unlikely to abate anytime soon.[2] This book, however, provides illumination for

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* For those readers of a certain era, this phrase will be familiar from *Rowan & Martin's Laugh In* (1968-1973). Comedian Flip Wilson used it in his sketches and later Sammy Davis, Jr., in black robe and wig, would introduce himself from the stage to a courtroom proceeding involving some hapless defendant. Clips may be found on the Internet.

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1 ANDREW HORTON & JOHN DAVID KENNEDY, DO YOUR DIVORCE RIGHT: STRAIGHT TALK FROM FAMILY COURT JUDGES (2011). In Maine, the tradition is that District Court judges are "judges," Superior Court judges are "justices," and Maine Supreme Judicial Court "justices" are otherwise known collectively as the "Law Court." I have known Justice Horton and Judge Kennedy for many years. I write this review of my own volition because their book advances the literature available to consumers and other professionals. I am confident that anything that I write will neither cause me benefit nor increase my suffering when I appear before either one in the future.

2 *See* Amy C. Henderson, Comment, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 UMKC L. Rev. 571 (2003); Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer? An Empirical Study of Divorce Cases*, 12 J.L. FAM. STUD. 57 (2010) (presenting empirical data concerning *pro se* divorce outcomes); Richard H. Painter, *Pro Se Litigation in*

more than just consumers. Guardians ad litem, social workers, therapists, forensic evaluators, and other experts who practice in family court will benefit as well from its insights and commentary. To accomplish their goal of reaching a broad range of court-users, the authors carefully avoid limiting the text to Maine law and practice. This is a wise decision (and not just for purposes of circulation and sales).

Justice Horton and Judge Kennedy begin by noting that they have presided over more than ten thousand trials or other events in family law litigation. The depth and range of their experiences hearing evidence and rendering judgments about others may be the key reason that their book avoids the oversimplifications and fallacies that perforate too many "how to do your own divorce" books. Although well-meaning, many such books ignore the core problem of family law practice in a democracy. The choice(s) to court, marry (or not), have children (or not), sacrifice earning capacity for the benefit of another, or purchase assets and incur debt, whether rational or irrational to the proponent *at the time of choice*, may have little connection to the outcome of *future* litigation when the trial court must accept the *present* consequences of those choices.

In a theme that emerges throughout their text, the authors respect the deeply-held feelings and emotions of litigants that the past may generate but explain to the reader that legal structures and definitions limit judicial authority and discretion. For too many consumers, varieties of personal choice over the course of years, without the advice and consent of the judiciary, do not excuse the unwillingness of judges to wring "emotional and moral vindication from a settlement or the legal process"[3] to the satisfaction of consumers. Nevertheless, knowledge about the legal system and its operations from the perspective of those who must act as judges is critical to understanding the consequences of litigation over wealth or progeny.

To accomplish these ambitious objectives, the authors provide "Sidebar Stories" which, like Aesop's fables, are intended to

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Times of Financial Hardship – A Legal Crisis and Its Solutions, 45 FAM. L.Q. 45 (2011); Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel*, 42 FAM. CT. REV. 655 (2004).

[3] HORTON & KENNEDY, *supra* note 1, at 123.

teach a deeper lesson in each of its fifteen chapters: Chapter 1 (Assessing Your Situation), Chapter 2 (Separating or Not), Chapter 3 (Finances, Property and Support), Chapter 4 (If You Have Children Together), Chapter 5 (Working With Lawyers), Chapter 6 (Starting a Court Case), Chapter 7 (Avoiding Court Battles), Chapter 8 (How Family Courts Work), Chapter 9 (The Dark Side), Chapter 10 (While Your Case is Pending in Court), Chapter 11 (How to Present Your Case at Trial), Chapter 12 (After a Court Hearing), Chapter 13 (Round Two), Chapter 14 (Round Three or Four, or. . .), and Chapter 15 (Starting Over, Achieving Peace). For readers only familiar with the cable TV version of family court, this combination of vignettes and constant reference to reflection, spirituality, respect, and dignity afford readers a chance both to smile and, perhaps, have an awakening in which it just does not seem like a good idea to do what was first contemplated. The authors also avoid the density of legal writing[4] as there are a few citations to any statutory or case law. Although the length of the book may be a challenge for some readers, the availability of a glossary at the beginning, a usable index, and an appendix with helpful forms for worksheets budgeting and other checklists make it an excellent resource.

Despite the title, the book itself is not just limited to divorce but includes married and non-married families in various stages of separation. The demographics of divorce and cohabitation in the United States have created complex family systems because of the frequent vertical and horizontal reformation of those sys-

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[4] For readers who may wish to find this criticism stated more adroitly, see Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936-37) ("There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground."). While self-reflection requires me to agree with Professor Rodell, he would find no small meanness in my placing his quote in a footnote:

> Then there is this business of footnotes, the flaunted Phi Beta Kappa keys of legal writing, and the pet peeve of everyone who has ever read a law review piece for any other reason than that he was too lazy to look up his own cases. So far as I can make out, there are two distinct types of footnote. There is the explanatory or if-you-didn't-understand-what-I-said-in-the-text-this-may-help-you type. And there is the probative or if-you're-from-Missouri-just-take-a-look-at-all-this type.

Id. at 40.

tems.[5] Clients sometimes struggle with the unfairness of the distinction between married or not. The law in most states, however, still differentiates between those persons who marry and those who do (or can) not regarding property distribution or spousal support, for example. Of importance to some readers, the book does not discuss the vulnerabilities of an aging population in the United States with diminished capacity and who may face divorce.[6] Moreover, this book, like much of the legal literature, does not examine racial, religious, LGBT, or multicultural distinctions in detail.[7] Unlike social science research and publications, no ethical precepts in legal writing require authors (including me) to explicitly reveal the limitations of our work if applied beyond homogenous populations.

Despite those common limitations, the authors' insightful perspective is that the divorce process "operates on at least four levels – legal, emotional, financial, and spiritual. This book attempts to address all of these levels in an interrelated manner."[8] This is a critical aspiration and one that the book achieves. Of particular interest, the authors choose to begin the first chapter by essentially asking the age-old Dear Abby question: Are you better off with or without him/her? What may be disconcerting to lawyers with the patina of aged cynicism is that the authors suggest a spiritual reflection for the consumer before undertaking a legal assessment.[9] I know this seems unusual in a secular setting from the bench, but self-reflection is a critically important com-

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5 *See* Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces,* 21 J. ECON. PERSP. 27, 27 (2007) ("The family is not a static institution.").

6 Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?* 16 J. AM. ACAD. MATRIM. LAW. 481, 481 (2000) ("We are becoming a much older society at an accelerated rate. As a consequence, an awareness of aging issues, even in the field of family law, has become essential to the practice of law.").

7 *See* Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 85 (2009).

8 HORTON & KENNEDY, *supra* note 1, at vii.

9 This Journal's Editor, Tom Wolfrum, approached a similar topic in his book review. *See* Thomas Wolfrum, *Book Review: The Happy Lawyer, Making a Good Life in the Law: Is Happiness Enough?*, 23 J. AM. ACAD. MATRIM. LAW. 441, 451 (2010) ("The examined, well-lived life consists not only of happiness, but also of tribulations to keep us strong, sorrow to keep us human, failures to keep us humble, and successes to keep us growing.").

ponent to litigation and iterations of tactics and strategies. Substantial research suggests that traits like forgiveness, spirituality, hope, and empathy may mitigate the propensity to inflict conflict on a formerly intimate partner.[10]

The authors then take a rather unique risk after the introduction. Rather than embedding the issue of domestic violence and safety assessments in a chapter (or sub-chapter) of the book, or trying to explore this complex social welfare problem without creating an early rise in the blood pressure of a reader with a specific bias, the authors meet the challenge directly: "since the presence or absence of domestic violence in a relationship is an issue of *extreme* importance, we need to take a detour and refer you to an explanation of what we mean when we use that term in this book."[11] Unlike a few decades ago, divorces regularly begin with concurrent efforts to obtain a restraining or domestic abuse order. In this arena, the overlapping politics of social science research and legal rules and standards generates substantial angst.[12] Nevertheless, a safety assessment represents a wise starting point because whether lawyers and judges like it or not, separation is often a flashpoint for couples and children.

As for the overall economics of divorce, family court judges are "not naïve, and often see parties try to manipulate the financial picture. One example of this is "what we refer to as

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10 For examples of this interesting and evolving literature, see Juliet Rohde-Brown & Kjell Erik Rudestam, *The Role of Forgiveness in Divorce Adjustment and the Impact of Affect,* 52 J. DIV. & REMARRIAGE 109 (2011); Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce,* 43 WAKE FOREST L. REV. 441 (2008).

11 HORTON & KENNEDY, *supra* note 1, at 2 (underline in original).

12 The volume of material generated by this discussion is vast so a few examples will have to do. *See* Richard J. Gelles, *The Politics of Research: The Use, Abuse, and Misuse of Social Science Data – The Cases of Intimate Partner Violence*, 45 FAM. CT. REV. 42, 42 (2007) ("As intimate partner violence (IPV) evolved from a private matter hidden behind closed doors into a significant policy, practice, and research issue, I came to understand that policy and practice seemed to be more influenced by ideologies and political values than actual research and evidence."); Mary E. Gilfus et al., *Gender and Intimate Partner Violence: Evaluating the Evidence,* 46 J. SOC. WORK. EDUC. 245, 248 (2010) ("Clearly not all or even most men batter their female partners, and a broad macroanalysis of gender-based oppression cannot help differentiate why some men batter their partners while most do not and why some women also batter their intimate partners.").

'SAIDS', that is, 'Suddenly Acquired Income Deficiency Syndrome.'"[13] Subsequent discussions of bankruptcy and the consequences of financial stress are one of the more important reasons that personal relationships during and after divorce "flounder."[14] Consumers of family court services may rarely understand that judges cannot re-write past choices to have joint credit card debt, home equity loans, or multiple ATVs, snowmobiles, or surfboards.[15] There are many circumstances of sadness such as the illness of a parent or child or an accident or tragedy that yields debt and divorce. In other cases, however, consumers want separation without the consequences that flow from limited or negligible resources now divided between two households.[16] In this country, need is a matter of perception. For some consumers, $100.00 a week may save the apartment and afford stability for children. For other consumers, $8,000 a month is simply not enough to maintain a "proper" standard of living.

In a Sidebar, the authors tell the tale entitled: "Be careful what you wish for," a typical case in which the parties played a common value game with jointly owned personal property. One party puts a low value on items he or she wants and a high value on the items the other party wants. In this particular case, the husband put a very low value on his worn out automotive tools but a high value on his wife's rare Hummel collection and, of course, the wife did the opposite. When announcing his ruling, Justice Horton said that he "believed in awarding parties what they value. Since the husband valued the figurines more than the tools and vice versa for the wife, he got the figurines, valued at about what he said they were worth, she got the tools, valued at about what they said they were worth."[17] Justice Horton's ruling also said that the parties were free to swap the items that had

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13 HORTON & KENNEDY, *supra* note 1, at 8.

14 *Id.* at 10.

15 *Id.* at 197 (described in a sidebar captioned "The Creditor Couldn't Care Less about the Divorce Judgment.").

16 *See* Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance,* 4 HARV. L. & POL'Y REV. 3 (2010); Sudderth v. Sudderth, 984 A.2d 1262 (D.C. Ct. App. 2009) (a husband, who was homeless after the separation, was entitled to award of property in lieu of spousal support when the husband was uneducated and the wife was the high income earning spouse who had four elective cosmetic surgeries).

17 HORTON & KENNEDY, *supra* note 1, at 44.

been awarded. One of the lawyers subsequently told him they had done just that, with the moral of the story: "Be realistic and be careful what you wish for."

Chapter 3 on how judges decide property and spousal support describes and reinforces the many aspects of judicial discretion; some of which remain rather unsettled.[18] Consumers are not really interested in dartboard or lottery approaches to outcomes. Of course, static outcomes through formulas are often "beauty in the eye of the beholder." Moreover, judicial discretion in the division of property or the award of spousal support is discomfiting to those members of the public who want their needs met without consequence or risk. A key reason that cases settle is because, as we lawyers frequently explain to clients, risk is minimized by the certainty of outcome. Clients, however, have a different sense of fairness and unfairness that is blended with a certainty that their voice will be heard clearly in the chaos of a courtroom. The authors do try to dispel this notion. But what was once a notion – a sort of maybe this is how it may be – is now a deeply embedded sense of entitlement to an outcome commensurate with the expectations, rights, and needs of the proponent. What often shocks consumers of both sexes is that their marriage was (and is) really an economic bargain in which no one knew that he or she should have established the financial arrangements long before the "threat point."[19]

In Chapter 4, Horton and Kennedy begin the discussion of children by trying to "help you predict how a judge might decide the contested issues presented at a court hearing. If your case is going to mediation, reading this chapter will help you assess how reasonable and practical your goals are."[20] The authors spend considerable time describing alternative dispute resolution meth-

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18 *See* Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61 (2008); Brett R. Turner, *Unlikely Partners: The Marital Home and the Concept of Separate Property*, 20 J. AM. ACAD. MATRIM. LAW. 69 (2006); Joanne Ross Wilder, *Spending the Children's Money: A Critical Look at Custodial Accounts*, 20 J. AM. ACAD. MATRIM. LAW. 127 (2006).

19 *See* Paula England, *Separative and Soluble Selves: Dichotomous Thinking in Economics, in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 45-46 (Martha Albertson Fineman & Terence Dougherty eds. 2005). Economists have written extensively on these issues.

20 HORTON & KENNEDY, *supra* note 1, at 55.

ods such as mediation and the necessity of preparation and good faith in that setting.[21] For all the reasons we know as professionals, collaboration is better than conflict in the absence of duress or coercion. After all, family residences and courtrooms are littered with the emotional and psychic remnants of children and parents who engaged in chronic conflict.

The authors openly tag the complaint that courts favor mothers over fathers and emphasize the point of gender neutrality in the context of the actual facts.[22] This statement does little to rid the public of myths and misconceptions. Nevertheless, readers are reminded that many "judges believe that the best indicator of which parent will serve a child's best interests is which parent has over time been more involved in meeting the child's needs the more actively engaged in raising the child."[23] Once again, the freedom to make choices in the past may unhappily constrain choices in the future. Horton and Kennedy certainly provide an honest appraisal of this practical reality. Even still, if you "treated the child or the other parent badly, if you come across as a crackpot, a whiner, a mean-spirited bully or abuser, or a mediocre (or worse) parent, the judge will be far less likely to award you custody over the other parent."[24] In one of the vignettes about the practical aspects of judicial decision making, the authors write:

> Judges have ways of finding out just how involved a parent has been in a child's life. During a trial over custody in which both parents claimed they have been very involved with the child, I asked each parent to write down the names of the child's teachers and doctor. One parent was able to provide all of the names without difficulty. The

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21 This literature is extensive as well. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System,* 108 PENN. ST. L. REV. 165 (2003); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 3 J. EMPIRICAL LEGAL STUD. 843 (2004).

22 For a past response to this debate, see Linda J. Lacey, *Book Review: As American as Parenthood and Apple Pie: Neutered Mothers, Breadwinning Fathers, and Welfare Rhetoric*, 82 CORNELL L. REV. 79 (1996); *see also* Leighton E. Stamps, *Age Differences Among Judges Regarding Maternal Preference in Child Custody Decisions,* 38 CT. REV. 18, 19 (Winter 2002) ("There has been a great deal of speculation in the legal literature, however, that judges still have a preference for maternal custody.").

23 HORTON & KENNEDY, *supra* note 1, at 56.

24 *Id.* at 57.

> other, after much hemming and hawing, admitted to not being able to remember the names, but claimed to have a bad memory for names.[25]

While this is an important lesson, there is a legitimate concern that oversimplification may mislead some readers into a false sense of confidence about the dominance of the past. A parent may know biographical details but possess an insensitivity to the child or the other parent that is rather visible. Explaining the various factors which must be balanced in a best interests decision are important to grounding the role of judges in the interpretation of facts and the application of that law. For linear thinkers, or those unfairly caught in fear and anxiety at a moment in their lives, the subtleties or nuances of "best interest" may create its own frustrations. Explaining what "you" *know* to be true is not the same as *proving* a fact to be true, which may cause a bitter response toward the legal system (and lawyers and judges as living targets). The most that can be said truthfully to the public is that flawed humans are being asked to make judgments about flawed human beings under compression and in the artificial and limited confines of a courtroom.

Of special importance, however, the authors try to explain to consumers the benefits and risks of interventions ordered by courts across the country in child custody cases. Guardians *ad litem* (GALs), parenting coordinators, mediation, co-parenting therapy, and parenting education courses are all attempts to enhance emotional regulation or diminish cognitive distortions by parents-in-conflict. Family law lawyers still struggle with how to avoid confusion between interventions like therapy and forensic evaluations, for example,[26] or the limits of expert witnesses devining whether overnight visitation for a three year old will create attachment problems, and on and on.[27] In a book of this sort, the complexity of this intersection between "science" and "law" could not be approached without generating even more fear or misunderstanding. The lack of consistent empirical evidence concerning the efficacy of each intervention in the *environ-*

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25 *Id.* at 58.

26 *See* Mary Johanna McCurley, et al., *Protecting Children from Incompetent Forensic Evaluations and Expert Testimony,* 19 J. AM. ACAD. MATRIM. LAW. 277 (2005).

27 *See* Mary Main et al., *Attachment Theory and Research: Overview with Suggested Applications to Child Custody,* 49 FAM. CT. REV. 426 (2011).

ment of child custody litigation, much less how and why any intervention has a positive or negative impact for a specific family, is a constant problem for both professional disciplines.[28] Although the authors spend a fair amount of time discussing these various efforts, the traps and trips are difficult because there is no set formula in which an intervention input yields a fixed output.

Whatever the language variations from state-to-state, the consequences of "being investigated" implicate ethical and legal dilemmas that are an important topic of discussion for consumers.[29] There is a plethora of social science and legal literature that attempts to integrate judicial decision making, the crafting of parenting plans, and the role of GALs and other experts with some form of scientific understanding about the impact of those parenting plans on the developmental interests of children.[30] An analysis of the efficacy of this effort to integrate research, practice, and law is beyond the scope of this book review. What is important to remember is that the focus of Horton and Kennedy's book is on the environment (internal and external) in which judges make those decisions:

- First, judges often make their decisions based on limited time and information.
- Second, judges have to make their decisions within legal frameworks.
- Third, judges want to believe they have done the right thing in making their decisions.[31]

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[28] *See* William M. Grove & R. Christopher Barden, *Protecting the Integrity of the Legal System: The Advisability of Testimony for Mental Health Experts Under* Daubert/Kumho *Analysis*, 5 PSYCHOL. PUB. POL'Y & L. 224 (1999). The problem of reliability and relevance is not limited to child custody. *See* Jonathan M. Dunitz & Nancy J. Fannon, Daubert *and the Financial Damages Expert,* 26 MAINE BAR J. 62 (2011).

[29] For a well-written and current discussion, see Marcia M. Boumil et al., *Legal and Ethical Issues Confronting Guardian ad litem Practice*, 13 J.L. FAM. STUD. 43 (2011).

[30] *See* Diana Moreland et al., *Florida's New Shared Parenting Statute: What Professionals Need to Know* (Bench Book Supplement, 2009), *available at* http://www.afccnet.org/pdfs/FLAFCC%20Parenting%20Plan%20Bench%20Book%20Supplement.pdf

[31] HORTON & KENNEDY, *supra* note 1, at 56; *see* Douglas L. Weed, *The Nature and Necessity of Scientific Judgment*, 15 J.L. & POL'Y 135, 135 (2007) ("Judgment sits at the center of the intersection where science, law, and policy

Indeed, in my practice I find it useful to provide clients with a copy of the statutes that are actually passed by the legislature.[32] After all, the Internet provides considerable mis-information concerning laws that may not be generalizable, nor does that information explain that the parameters for decision making are defined by elected officials from the other branches of government. The judiciary has an obligation to act within the constraints of those laws as a matter of its constitutional function. Consistent with this position, Horton and Kennedy maintain a textual theme concerning the *role and responsibilities of the trial judge*. An understanding of the structures and functions of the court system is crucial because, as family courts evolved into "street level" social service agencies in the United States, those forms of justice that parties will accept required results consistent with their expectations and perceived needs.[33] Everyone gets a

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meet."). This debate and its tension are not left solely to the legal profession. *See* Jack P. Shonkoff, *Science, Policy, and Practice: Three Cultures in Search of a Shared Mission,* 71 CHILD DEV. 181, 181 (2000) ("In the world of social policy, science is just one point of view, and frequently it is not the most influential.").

32 For an interesting discussion of the relationship between common law and statutes in child custody, see John J. Sampson, *Choking on Statutes Revisited: A History of Legislative Preemption of Common Law Regarding Child Custody,* 45 FAM. L.Q. 95 (2011).

33 *See infra* note 38; Victor J. Baum, *A Trial Judge's Random Reflection on Divorce: The Social Problem and What Lawyers Can Do About It*, 11 WAYNE L. REV. 451, 451 (1965) ("This article lays no claim to painstaking scholarship or analysis. Unfortunately, there is little time for either in the life of docket-ridden, elected judges. Nor is there any pretense that the article reflects the wisdom of lone experience. It represents the reactions of a relatively new judge after hearing in his eight years, an appalling number of divorce cases. I find myself asking, 'Must it be this way?'"); Shirley M. Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 901 (1970-71) ("We ask courts to shield us from public wrong and private temptation, to penalize us for our transgressions and to restrain those who would transgress against us, to adjust our private differences, to resuscitate our moribund businesses, to protect us prenatally, to marry us, to divorce us, and, if not to bury us, at least to see to it that our funeral expenses are paid."); Kermit Lipez, *We Should All Be Judges: Rosh Hashanah Sermon at Etz Chaim*, 25 MAINE BAR J. 225, 225 (2010) ("Although the legal process produces losers, judges know that those losers do not become unworthy of respect of sympathy"); Charles E. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1281 (1952) ("[Judge Cardozo] viewed the law in all its branches, not solely as an authoritative technique for the resolution of strife, but chiefly as a social process for recognizing and marshalling the values that we

trophy. Everyone gets the same grades irrespective of effort. Failure is not a bridge to future success. My rights trump your needs.

In various chapters, Horton and Kennedy effectively describe the consequences of trial and the motivations that may drive a refusal to seek more efficacious outcomes. As they write, "go to trial if you must, but in fairness to yourself, the other party and any children involved, do it only after an honest and thorough assessment of all of the risks and benefits, including the intangibles we have summarized here."[34] If I could assign readings to fill this knowledge gap about the effects on liberty of a judicial system exercising such profound choices over families, I would suggest three classic books: Judge Frank Coffin's *The Ways of a Judge: Reflections From the Federal Appellate Branch* (1980), Professor Walter Murphy's *The Elements of Judicial Strategy* (1964), and Judge Jerome Frank's *Law and the Modern Mind* (1938). I would add two books by Louis Nizer, *All My Life in Court* (1944) and *The Jury Returns* (1966). Nizer is not only a gifted writer but his texts provide great insight into both the use and abuse of judicial power, as well as the specific role of the trial lawyer acting within that system.

Explaining to the public, however, that the autonomy and responsibility to exercise freedom of choice concerning their families is abdicated when entering the court system has become a struggle itself. Perhaps, in my Utopia, civic education can emerge as more than an historical artifact. Indeed, Judge Frank described the public's desire for "justice" and the potential for disillusionment in that peculiar order decades ago:

> Not only lawyers, but all men in their approach to law are somewhat childes emotionally and therefore prone to Platonizing – not, of course, in the crude manner of children, but in a polished and sophisticated fashion. Verbalism and word-magic; fatuous insistence on illusory certainly, continuity and uniformity, wishful intellection, which ignores, or tries to obliterate from cognizance, unpleasant circum-

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prize. Yet he never forgot that in this process the ethical test of the judge is not whether his judgments run parallel to the judgments of a moralist, but whether the judge administers his office true to its traditional limitations as well as to its aspirations.").

[34] HORTON & KENNEDY, *supra* note 1, at 210.

> stances – these are the marks of childish thought and often affect legal thinking.[35]

This "romantic idea" now flows through the "capillaries of the legal system."[36] These capillaries have founded structural interventions like unified family courts which often reflect "the joint efforts of state legislators, administrators, and court officials to cope with burgeoning case loads and demands for services brought on by significant changes in family structure and in the legal doctrines applicable to divorce and parenting disputes."[37] This is certainly true. But it is also reflective of a much larger problem that courses through this book.

By convention and tradition, a democratically-elected government was supposed to exist at the edges of the tapestry to prevent unraveling by the extremes of human behavior or that propensity for conflict that governs so much of human relationships. Today, the threads have woven their way from the edges to the center and back. True to nature, the tapestry is now held only by an unseen gravity[38] which must inevitably begin to fray and then shred. Perhaps the best example of this tenuous state of equilibrium is the voice of the client in the lawyer's office: "Let the judge decide." When I was a young lawyer, I found it somewhat of a relief because I could simply allow that to occur and the fault belonged to the judge or jury, not me. For many lawyers, a trial is much easier on the soul and the psyche than the inevitable buyer's remorse and blame that follows settlement. I do fear that too many modern judges have little respect for the role of lawyers and the stress associated with client representation; much less that trials are an important outlet that prevents more recourse to violence and further rends the tapestry. His-

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35 JEROME FRANK, LAW AND THE MODERN MIND 81-82 (1930).

36 Richard Boldt & Jana Ginger, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 82 (2006), *quoting* MARY ANN GLENDON, A NATION UNDER LAWYERS 168-69 (1994).

37 *Id.* at 84.

38 In another article, I borrowed the term "hydraulic pressures" to describe the same effect. *See* Dana E. Prescott, *Unified Family Courts and the Modern Judiciary as a "Street-Level Bureaucracy": To What End for the "Mythical" Role of Judges in a Democracy,* 27 QUINNIPIAC L. REV. 55, 109 (2009) (*quoting* Norman L. Finkel, *Moral Monsters and Patriot Acts: Rights and Duties in the Worst of Times,* 12 PSYCHOL. PUB. POL'Y & L. 242, 243 (2006)).

tory yields many examples of violence as a means to resolve conflict if a society does not accept the validity of an incorruptible and neutral judiciary.[39]

As I became more reflective (and perhaps by experience made wiser or weariness won), I also became more familiar with my colleagues who became judges. Early in my career, judges were like the principals and teachers of years ago. I grew up in an era when one still used Mr. and Mrs., or doctor or judge, or Aunt and Uncle. The teacher's room at school was a secret and sacrosanct place. By itself, this contained a lesson when I began to substitute teach during college in the community where I grew up. When I first entered through that passage, the teacher's room was completely dense with smoke, there was card playing for some stakes over in a corner, and various other forms of entertainment and gossip which I found rather uncomfortable as a not-far-removed twenty year old. Similarly, a judge's chambers or the church pew had its own significance. An inherent property of these hierarchical relationships was one of fear and respect for authority. Whatever the reality of what went on behind closed doors, a certain unknown did temper behavior and attitudes.

Thus, the statement "LET THE JUDGE DECIDE" creates a teaching moment – as some say. I still ask clients or new lawyers or social workers how does one become a judge? The look of puzzlement, even among those with post-graduate education, is common. Most of the judges I know are wonderful people whom you would enjoy having over to your house for a cookout. But what makes consumers think that there is some particular insight that comes with judicial robes? Some state judges are appointed for life, some elected, and some, as in Maine, appointed for seven year terms. In Maine, there is no unified court system so it is not one judge–one family as it is in other states (which also falls into a "be careful what you wish for" category). Instead, a judge parachutes into the courthouse on the morning of trial, reads whatever is in the file, which often is very little, meets

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[39] For anyone teaching lawyers, a very painful reminder of what may occur when the judiciary and the legal profession forget these lessons may be found in Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Trans. Deborah Lucas Schneider) (1991). If I was a law professor, this book would be required reading.

the parties for the first time, hears the evidence, and "decides" the case based upon a filtering of factoids by lawyers and witnesses.[40]

I have asked clients, therefore, to reflect on the fact that they live in a democracy and chose their partner, chose with whom they have children, live their lives relatively unencumbered by government interference when raising those children or spending resources, but then arrive in a lawyer's office or at the courthouse and say to a complete stranger: "Please tell me when I can pick up and see my children." This stranger then subsequently enters a court order that says the "exchange will occur on Tuesdays at 5:00 p.m. and if someone does not arrive within 15 minutes, the other parent is free to go home." For some clients, however, there really is a deep-seated desire to have a higher authority make a decision that does "justice" in some ephemeral way.[41] What consumers do not understand until it is too late is that the infrastructure and traditions of the court system still involve an "adversarial system that inhibits the court's access to information. The process alienates parties, delays outcomes, and focuses attention on matters extraneous to the child's best interest."[42] Of course, any quest for solutions through the judicial system will be motivated by a powerful drive to ration (and rationalize) adult conflict in all its incredible variety.

We, as professionals, have to be particularly careful to remember that many folks who find their way into family court intend to move on with their lives without ever addressing the

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40 *See* Gerhard Wagner, *Heuristics in Procedural Law, in* HEURISTICS AND THE LAW 289 (Gerd Gigerenzer & Christoph Engel eds. 2006) ("If the court tries to base its decision on the 'true facts' of a case, it would have to interrogate the parties thoroughly about the state of their relationship as well as consult their children, neighbors, relatives, colleagues, and the like to ascertain whether the account given by the parties is valid. Such an investigation would not only entail high costs, it would also be anything other but agreeable.").

41 *See* Quintin Johnstone, *Book Review: Family Cases in Court*, 24 U. CHI. L. REV. 798, 798 (1957) ("The role of the courts in divorce cases raises troublesome questions concerning which there is much difference of opinion. To what extent should the courts seek to aid divorce litigants in solving family problems beyond mirror judication of status and property rights within the narrow limits of adversary proceedings?").

42 Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86 (1997).

court system again. Nevertheless, there are barriers even to the best of original intent. All of us have anecdotes of this sort. Indeed, one of the most unique aspects of being a family law lawyer is there is really no need to make up stories because the stories we tell each other are sufficiently painful and amusing (often at the same time). These experiences yield an interesting approach by the authors in Chapter 5 with the sub-heading: "Finding, Choosing, Hiring, Getting Along with, and Parting Ways with Your Lawyer."[43] The chapter does an excellent job of encouraging efficiency, with questions like "why is my lawyer friendly with the other side's lawyer?"[44] As the authors note "take it from us – judges hate to see lawyers bickering" so "if your lawyer doesn't treat the other party's lawyer as an enemy, that's a good thing, not a bad thing."[45] While reading Horton and Kennedy's book to write this review, I went searching on my shelves for a passage I found years ago. This quote reminds us that nothing is really new:

> A sad proportion of the letters one opens comes from the niggling, cantankerous. Litigious, lesser breed of solicitors who gain a catch penny or catch-six-and-eight penny reputation for smartness but do our profession no good. Alas, from time immemorial, we have been plagued with these 'babbling and tumultuous lawyers,' who specialize in 'the chicane or wrangling or captious part of the law.' With such men it is impossible to pursue the gentle arts of compromise. Their breast-pockets are stuffed with writs. Their dictated letters are dictatorial, each sentence barbed with a threat. Argument with them soon degenerates into the kind of staccato, bellicose correspondence reported to have passed between two Irish chieftains:
>
> 'Pay me the tribute,' wrote the one, 'or else.'
>
> 'I owe you no tribute,' replied the other, 'and if. . .'[46]

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43 HORTON & KENNEDY, *supra* note 1, at 87.

44 *Id.* at 105.

45 *Id.*

46 REGINALD L. HINE, CONFESSIONS OF AN UN-COMMON ATTORNEY 82 (1946). Professors Levit and Linder make a similar point: "The adversarial system and the ethical obligation of zealous representation have spawned some mutant offspring." NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW 59 (2011). I, however, do not buy into the "good-old days." Like most new lawyers, I attended many depositions and motion hearings over discovery in complex litigation. There was much behavior that would be sanctioned today.

An important point that is often not made well, or is done in the form of bashing lawyers,[47] ignores the role of lawyers as safety valves for sanity. What Horton and Kennedy highlight, however, is distinct from other books of this sort. The choice of a lawyer is also a reflection of the client's values. This does not mean all clients can *control* what they see or hear from lawyers by questioning the advice, any more than the public – including lawyers who should know better – place blind faith in a doctor or airline pilot or bridge engineer. But lawyers are only agents, albeit powerful ones, but still just agents. If a party wants to be kind, generous, respectful, transparent, and collaborative, the choice of a lawyer may well reflect that goal.

The remaining chapters review the nuts and bolts of the judicial process, including the need to respect court clerks, marshals, and other staff. Every new lawyer must learn that you can annoy judges with some degree of frequency, but if you annoy the clerks or court security your life is going to be much more unpleasant. Clients, because of the infrequency with which they attend court, or the self-absorption that accompanies episodes of "Jersey Shore" and "Judge Judy," often have to be reminded that courthouse walls have ears.[48] Behavior and words find their way back to chambers. The problem is that cable TV shows, in which highly paid judges and lawyers pontificate and shout at each other, encourages court proceedings that look like a somewhat tamer version of these shows. Much of the public believes that courthouses are now stages for gross behavior, with an insensitivity to their environment that has serious consequences beyond ratings.

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47 *See* Thomas L. Shaffer, *The Irony of Lawyer's Justice in America,* 70 FORDHAM L. REV. 1857, 1861 (2002) ("More specifically, lawyers have sought power and wealth more by making America work the way they and their clients want it to work than by seeking the common good in a joint social order.").

48 I learned a valuable lesson years ago when I responded to a female client in her early 40's who asked me what to wear to court the next day. I told her that she should dress as if she was going someplace nice for the evening. When I turned around in court the next morning she was wearing an outfit that would have made Madonna blush, along with every piece of jewelry she could conceivably have found or owned. I am now more circumspect in my advice concerning dress codes. Just the other day, another person criminally charged for something minor showed up in court with a t-shirt that had a marijuana leaf on the front. Alas.

In this context, another sidebar looks inside the mind of a judge in the environment where thought and behavior are measured. It is your job to persuade the judge "to adopt your position rather than the other party's position in contested issues."[49] For guidance, the authors encourage the use of outlines for trial, and even provide a sample "roadmap."[50] They are often amazed by how many people never figure out what the judge is interested in or not interested in. (Even highly trained lawyers may fail to read cues but the really dense lawyer is the one who cannot tell when the judge is annoyed or not paying attention.) Many of these do's and don'ts seem just common sense but you could easily cut out the sidebars from all these chapters and cobble them together as a gift for clients or other professionals.

In later chapters on post-judgment litigation, the authors provide an interesting set of categories: tweaks, blow-ups, and life changes.[51] Horton and Kennedy offer examples and the means for collaborative solutions. Because the roller coaster from tweaks to blow-ups may be avoided by early prevention, and a modicum of good faith, efforts to help blunt poor outcomes are prudent. Of particular interest, the authors note that the most common reason for blow-ups are "explosive situations that come about because the family court decision glossed over or buried a basic problem instead of dealing with it and the public surfaces later on."[52] Unfortunately, we live in an age of speed.

When one party is riding full torque and the other party is having trouble even getting into gear, "lurking problems" may result in years of litigation in which the post-judgment litigation is really the emotional residue of the divorce. For judges, the problem is balancing client wishes with a child's needs over time. The father who disappeared comes back into the life of a child who wants to know why and looks to live with that parent and not the one who cleaned up the up-chuck for many years, for example. The mother who re-married and moves in her new husband and his three children does not understand why the kids cannot get along and now want to live with her ex-husband. These are often quite painful events for entire family systems. In

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49 HORTON & KENNEDY, *supra* note 1, at 155.
50 *Id.* at 219-20.
51 *Id.* at 275.
52 *Id.* at 281.

many respects, this situation tests the resilience and the character of families, and, of no small measure, the better instincts and values of the judicial system.

Particularly interesting is the closing in Chapter 15 which posits this lesson: "Starting over and Achieving Peace." The authors encourage a deeper need to understand the patterns of successful relationships and those patterns that are also self-destructive.[53] For that purpose, the authors review the major religious traditions that recognize the benefit of being generous to others and the need to achieve peace, with acts of kindness: "Our hope is that this book can help, or has helped, both you and your present or former spouse or partner to 'look to the better angels' of your natures and to complete what is often a difficult and painful process with your poise, honor, and dignity intact."[54]

One could offer up the economic destruction of families, the intergenerational transmission of the capacity for conflict, and all the chaos that ensues as an unfairly pessimistic response. When you add to this mixture an aging population in the United States with its own vulnerabilities and the potential for divorces much later in life, years after the marital bargain was struck unimpinged by the passage of time, you have a critical mass of conflict that the courts cannot possibly digest. At the same time, the public has a right to expect that judges are trained sufficiently to have insight into the nature and complexities of family systems. In some states, there are standards for those appointments but in other states it is still a political process and to the elected winners go the spoils of judicial appointments to the family courts. Although the public expects much more than can possibly be delivered, judicial systems, and the other branches of government, would be wise to recognize the consequences of failing to deliver the appearance and substance of justice that modern Americans have come to expect.

A point of crucial value is that the elements of a successful democracy really will struggle to co-exist with the chaotic dysfunction of family systems. This statement is not an argument for a return to "conventional" structures that still maintain a hold on the narrow mind of those unfamiliar with centuries of child abuse

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53 *Id.* at 305.

54 *Id.* at 306.

and domestic violence.[55] The capacity for empathy, hope, spirituality, forgiveness are the qualities that make for civilized discourse. This is not some sense of overexaggerated frustration with individuals and institutions. Justice Horton and Judge Kennedy certainly recognize the need for clarity of thought and emotion by consumers, lawyers, and judges. This is, however, a long-winded way of writing that democracy appears resilient to many commentators only because the passage of time from its creation to its dominance today, suggests little perspective on the past. In contrast, dinosaurs were really resilient. The Roman and Turkish empires were pretty resilient. Constitutional democracy is in a much more fragile state of equilibrium, teetering between chaos and dissolution into forms of government that seemingly fulfill a public's primary need for security and entitlement.

The legal system has a duty – and its own self-interest since its components are citizens as well – to keep educating and explaining and evolving. There is a reciprocity to human conflict that cannot be quaffed by mere appeals to honor, dignity, and self-respect when behavior or thoughts are indecent, petty, or mean. For many of these reasons, Horton and Kennedy offer many valuable perspectives for readers that are rarely found in this form of literature. As a means to wrap these ideas together, the authors began and finished their book with a quote from Lincoln's First Inaugural Address:

> We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break the bonds of affection . . . The mystic chords of memory will yet again swell the chorus of the Union when organ touched, as surely they will be, by the better angels of our nature.[56]

In this address, Lincoln understood that a *union* of any sort, familial or governmental, is a bond only as strong as its parts if that bond is to yield to those better angels. As Justice Horton and

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55 JOHN KEEGAN, A HISTORY OF WARFARE 84 (1993) ("What science cannot predict is when any individual will display violence. What, finally, science does not explain is why groups of individuals combine to fight others.").

56 HORTON & KENNEDY, *supra* note 1, at 306. President Lincoln was also a practical politician and, in the same speech, reminded the seceded states that he did not intend to interfere with the institution of slavery. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT 189 (2003). I only mention this addendum because history always has a darker side that educates and informs and, if forgotten, may negate avoidable peril.

Judge Kennedy conclude: "If our book accomplishes anything, it will be to enable you and your partner to make good decisions about staying together or not; and, if not, to achieve a graceful disengagement."[57] Their book is an honest, worthy, and unique attempt to help people achieve those aspirations.

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57 *Id.*