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Rheinstein: Marriage Stability, Divorce, and the Law

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RECENT BOOKS

BOOK REVIEWS

MARRIAGE STABILITY, DIVORCE, AND THE LAW. By *Max Rheinstein*. Chicago: University of Chicago Press. 1972. Pp. xi, 482. \$17.50.

Review I

The final conclusion of this almost definitive study of marriage and divorce by a world-renowned scholar of comparative law comes to this: "Laws tending to make divorce difficult should not be considered" as one of the effective tools "[f]or the strengthening of marriage stability" (p. 443). Dr. Rheinstein, Professor Emeritus of the Law School faculty at the University of Chicago, concludes that it is not the legal institutions of a culture that make marriage stable but rather "family counseling and family life education" (p. 443).

Through a fascinating review of marriage and divorce in the cultural context of Japan, Sweden, Italy, France, the Soviet Union, and America, Professor Rheinstein illustrates and demonstrates the validity of his conclusion. The findings of this very important study will undoubtedly have a very strong impact both in the thirty American jurisdictions where divorce is possible after a certain period of separation without investigation of fault as well as in the remaining twenty jurisdictions in the United States that follow the traditional pattern of allowing divorce on the usual grounds of adultery, desertion, or cruelty. Professor Rheinstein would be the first to admit, however, that since he is, as he notes, "neither a statistician nor a sociologist," his findings on the inefficacy of laws in stabilizing the institution of marriage should not be taken as the very last word.

Professor Rheinstein's extensive chapter on marriage and divorce in Japan suggests that even though divorce is available in that nation by unilateral or mutual consent, the rate of divorce per one thousand population has consistently been about one third the rate of the United States. Similarly, in Sweden there are generally few, if any, legal inhibitions to separation. Yet, the rate of marriage termination remains lower than the divorce rate in America. Italy is, of course, a special case since divorce was not possible there until December 1, 1970, and, even after that date, the divorce rate is still practically zero. Professor Rheinstein's study indicates that about one million inhabitants of Italy live in so-called irregular unions, while some two and a half million persons exist in a "separated" status. Assuming that these statistics are relatively accurate, it follows that despite the absence of divorce in Italy, the rate of separation is 0.70 per one thousand population—a rate of marriage breakdown equal to that in France or in Great Britain!

Professor Rheinstein's chapter on marriage and divorce in the Soviet Union recounts the dramatic changes in public law that have characterized the Soviet Union since 1917. In 1965, the last year under the restrictive divorce law, the divorce rate for the Soviet Union was 1.7 per one thousand population. In 1966, however, the divorce rate jumped to 3.1 per one thousand population—that is, about 25 per cent above the 2.5 per one thousand population figure in the United States (p. 243). The Russian divorce rate has descended somewhat in more recent years, but Professor Rheinstein's book does not contain any evaluation of Russian divorce practices since 1966.

After a comprehensive review of the evolution of divorce law in the United States, Professor Rheinstein poses the question that confronts him and every jurist:

If we regard family stability as a social good, a situation of high incidence of marriage breakdown constitutes a social evil. Its reduction deserves to be an aim of social policy. But what about divorce? It does not occur by itself but only as a sequel of marriage breakdown. Insofar as divorce opens the door to legitimate remarriage and thus to the creation of new homes free of any taint of illegitimacy, it is a social good rather than an evil. But if the easy availability of divorce is conducive toward a high incidence of marriage breakdown, good social policy requires that the incidence of divorce ought also to be reduced. Is it? [P. 276.]

Professor Rheinstein's response to that inquiry demonstrates the frailty of any law that attempts to restrict or inhibit a permanent separation of spouses when a generation or a culture overwhelmingly approves of the permanent dissolution of a union that has turned out to be unsatisfactory. A comprehensive table of the rate of divorces per one thousand population (Table 21, p. 312) reveals that the United States, with a rate of 2.6 in 1950 and a rate of 2.4 in 1966, generally had the highest rate of divorce of any of the nations surveyed.¹ The high divorce rate in the United States persists despite the fact that traditional American family law has always considered the contract of marriage to be "tripartite"—that is, the state is a third party to the marriage contract in the sense that the contract cannot be dissolved by agreement between spouses unless the state consents.

Professor Rheinstein does not, however, in any way minimize the adverse social impact of widespread divorce. His last chapter, entitled "What To Do About Marriage Breakdown," seeks to respond to the various proposals for law reform that have been offered "to eliminate the measure of pain unnecessarily added by traditional

1. Countries considered include Austria, Canada, Denmark, France, East and West Germany, Japan, Norway, Sweden, Switzerland, and the United Kingdom.

law to the suffering which is inevitable in every case of marriage breakup" (p. 406). Professor Rheinstein sets forth these conclusions:

1. Although the median age at which people marry has dropped to about twenty years since the end of World War II, there is little if any evidence that the marriages of adolescents can be "perceptibly reduced by legal means" (p. 418). Furthermore, the "statutory establishment of short waiting periods to compel the parties to consider the fateful step at least for a few days" has been ineffective (p. 419).

2. The author concludes that divorce rates among persons with lower education or lower income seem to be higher than the divorce rates among the more affluent and better-educated elements of society. At the same time, Professor Rheinstein is skeptical about the effect upon family stability of the "family allowances," employed in thirty-eight countries, which are "motivated by a desire to reverse a declining trend in the birthrate or simply to encourage fertility" (p. 425). He does, however, recommend that research should be "undertaken to find out whether the alleviation of economic conditions apt to produce tension between spouses promises to be an effective device in reducing the incidence of marriage breakdown" (p. 426).

3. Professor Rheinstein concedes that a "major cause of marriage breakdown seems to be the uncertainty about the role assigned to women in present-day American society" (p. 427). His treatment of this evolving and indeed exploding topic is, however, very disappointing. In fact, he does not appear, in the few paragraphs devoted to this subject matter, to state very clearly the dilemmas and the demands quite properly being put forward by wives who understandably feel themselves shackled by a law of marriage fashioned and formulated by men in an earlier age when women were not even given an education, let alone equality in society or in their own marriage relationship.

4. Professor Rheinstein's treatment of the proposal that trial marriage be permitted in order to cut down on the number of divorces is also unsatisfactory. He does concede that frank recognition of trial marriage might "prevent the procreation of children in those 120,000 cases a year in which a marriage is terminated within the first three years of its existence" (p. 432). Although the proposal for trial marriage is never fully explored in Professor Rheinstein's study, he notes that in 1969 a group of progressive family law reformers in Sweden concluded:

The new legislation should as far as possible be neutral in its relationship to various forms of cohabitation and different moral ideas. Marriage has, and ought to have, a central place in family law, but one should attempt to see that the family legislation does not contain any provisions which create unnecessary difficulties for, or bur-

den upon, those who beget children or start a family without marrying. [P. 156.]

For attorneys in America who have sought to "civilize" the procedures surrounding divorce in America, Professor Rheinstein's book may well be overwhelmingly discouraging. For the attorneys, professors, and judges, who have contributed over the past ten years to the growth of the Section of Family Law of the American Bar Association and its publication, the *Family Law Quarterly*, the challenge of Rheinstein's study is not to do less to modernize family law in America, but rather to take a more fundamental or even radical approach to what must be done. Radical steps are not, however, incompatible with continued efforts to establish conciliation divisions of family courts, procedures by which the children of divorce would be granted all of their rights, and other reforms designed to make divorce as painless as possible once the decision has been reached that a divorce is the least unsatisfactory resolution of marital discord.

Professor Rheinstein's volume is indispensable for any lawyer or law-related professional working in family law in America. Only by comprehending the conclusions in this important work can all of us free ourselves from the common illusion that the law has a solution for the complex and agonizing problems of partners in a marriage that has turned out to be unstable and unsatisfactory.

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and former Chairman of the
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Review II

Within the past few years more than a dozen states have enacted major revisions of their divorce statutes.¹ Some, like California, have eliminated the traditional grounds of adultery and mental cruelty and have replaced them with a single standard, "irremediable breakdown of the marriage." Other states, like Texas, have retained the standard causes, but have added a no-fault provision in one form or another. Still others, like New York, have revitalized the old separation ground by reducing the required period to one year.

1. Freed, *Grounds for Divorce in the American Jurisdictions*, 6 *FAMILY L.Q.* 179 (1972). The *Family Law Quarterly* plans to publish a yearly summary of the statutory grounds for divorce in all the states, but the laws are being revised so quickly that any list will be unavoidably out of date soon after it is in print.

As more states revise their laws, there has been increasing pressure upon the remaining states to change. In 1970, the National Conference of Commissioners on Uniform State Laws approved model legislation in which "irretrievable breakdown" is the sole ground.² The American Bar Association has thus far refused to endorse the proposal,³ but whether or not the model legislation wins the undivided support of the organized bar, divorce reform is coming and it is coming quickly.

In the midst of this change, there is a particular need for a book that traces the cultural and political history of divorce and points the way to intelligent revision of our laws. Professor Max Rheinstein's *Marriage Stability, Divorce, and the Law* serves the first function well, but unfortunately falls short on the second. His book culminates more than twenty-five years of work, which began in 1946 when he was appointed to the Interprofessional Commission on Marriage and Divorce. The Commission, sponsored by the American Bar Association, was charged with drafting "a model law that would stem the rising tide of divorce and restore the stability of the American home and family" (p. 261). Although the Commission never proposed a statute, it stimulated extensive research, much of it by Professor Rheinstein, into the effect of divorce laws on family stability.

Professor Rheinstein's perspective on this subject has changed markedly since 1946. When the Commission began its work, "[n]aively we took it for granted that the evil was divorce" (p. 262), but he is now convinced of "the ineffectiveness of a strict divorce law as a deterrent to family breakup and as a guarantee of family stability" (p. 254). He has concluded that "American divorce law is not perfect, that it may justly be called messy, but that it is by no means deplorable" (p. 5). His changed attitude reflects two basic observations, both of which are the recurring themes of his book.

First, Professor Rheinstein states clearly what many people feel intuitively: it is marriage breakdown, not the legal formality of a divorce, that threatens families. When a divorce is finally granted, the spouses are long since separated, both physically and emotionally. Trying to save marriages by restricting divorce is as futile as searching for a cure for rigor mortis. It is too late. All that we can do is provide a decent burial. Professor Rheinstein supports this conclusion in a lengthy examination of divorce laws, present and past,

2. UNIFORM MARRIAGE AND DIVORCE ACT § 302(a)(2). For the complete statute and comments, see 5 FAMILY L.Q. 205 (1971). For an in-depth consideration of no-fault divorce, see M. WHEELER, NO-FAULT DIVORCE, scheduled for publication later this year.

3. N.Y. Times, Feb. 8, 1972, at 37, col. 2. The opponents of the statute, who criticized its drafting and particularly its provisions for spousal support, were suspected of self-interest. Many family law practitioners fear that "no-fault" somehow means "no lawyer."

in a variety of countries—Japan, Sweden, Italy, the Soviet Union, and others—as well as in a number of states in this country. He makes a persuasive case that marriage breakdown exists whether or not the legal formality of divorce is easily available. Moreover, he finds that where we have persisted in treating divorce as the evil, “[w]e have not only not succeeded in curbing marriage breakdown but have aggravated its impact and magnified its consequences” (p. 4).

Professor Rheinstein’s primary concern throughout the book is with the larger social forces that have shaped divorce law; thus he emphasizes institutions, such as the church, the legal profession, and the various branches of government, rather than individuals as they are personally touched by divorce.⁴ In the United States, he believes, “it is probable that the rate of marriage breakdown has indeed increased, although we do not know how much” (p. 268),⁵ but he attributes the increase to changing social factors⁶—emerging rights of women,⁷ industrialization, geographic mobility, and so forth—rather than to overly lenient divorce laws. The only hope that he sees for curbing marriage breakdown is in altering public attitudes about marriage through massive family education for the young and counseling for those about to marry. Although he concedes that some sort of “trial marriage” might be more effective, he believes there is no chance for legislative action, so he mentions it only in passing.⁸

Professor Rheinstein’s second theme emerges from his observation that American divorce law constitutes a compromise: “A con-

4. For development of the personal aspects of marriage breakdown, see *DIVORCE AND AFTER* (P. Bohannon ed. 1970), particularly ch. 2, “The Six Stations of Divorce,” and ch. 10, “Some Thoughts on Divorce Reform.”

5. It is easy enough to see that many marriages break up without ending in divorce, but there is no index by which the extent of marriage breakdown can be measured. Even when the definition of breakdown is arbitrarily limited to separations and desertions (as it is by Professor Rheinstein), it is impossible to come up with reliable figures because court records are poor and there has been little tabulation.

6. In this regard Professor Rheinstein has occasionally made overly broad statements that unnecessarily detract from an otherwise scholarly book. For instance, he states: “So the victims of progressive education take to flight into the escapist realms of drugs, sex, flower power, pacifism, extraparliamentary opposition, romanticism—realms in which lasting satisfaction is not to be found. The hard ways of discipline, self-restraint, acceptance of fate immutable by man, these solely effective ways to find satisfaction here on earth are disdained. If marital breakdown has indeed come to be more frequent than in the past, here seems to lie the principal cause” (p. 428). At another point, in arguing for expanded counseling services, he says: “The most useful service a conciliator can render is that of making clients realize that their marital difficulties have their roots in deepseated personality defects . . .” (p. 441).

7. See Kay, Book Review, 60 *CALIF. L. REV.* 1683 (1972).

8. No state has come close to changing its marriage law in this way, but a bill was introduced in the Maryland legislature in 1971 that would have permitted a three-year “renewable” marriage. *N.Y. Times*, Feb. 28, 1971, at 95, col. 3. As is often true, public mores may be ahead of the codified law, as more and more couples now live together without the formality of a legal marriage ceremony.

servative law of the books has been turned by the courts into a different law in action in which the ideas of liberalism are given an outlet of an often extreme character" (p. 29). In his zeal to point out that consent divorce is a "flourishing institution" in the United States, he minimizes the price we must pay for it.

The conservatives are made happy by the strictness of the law of the books. Those who are liberal to the extent of seeking freedom of remarriage for themselves, are satisfied by the ease with which their desire is accommodated in practice. Those who are not directly concerned as divorce seekers or protectors of the faith have little need for considering the problem at all. The only ones who feel troubled are those occasional academics who view with alarm the hypocrisy of the system, the light-hearted way in which perjuries are committed and condoned, and who fear for the integrity of the law and the respect in which the law and its priests should be held by the public. At one time I was a member of this band. With advancing age I have come not only to accept but to admire the compromise. [P. 254.]⁹

It is hard to believe that "conservatives" who seriously support strict laws can be mollified by statutes that are often flouted by the courts. Likewise, the cost we pay for the compromise can hardly please many "liberals." Professor Rheinstein himself admits that in order to obtain divorce, "[p]erjury may have to be committed, expensive travel may have to be undertaken, [and] procedural safeguards against collusion may have to be disregarded . . ." (p. 251). Migratory divorce is too expensive, both in money and time, for most people. Those judges in Alabama, Missouri, New York, and other states, who have disciplined or disbarred lawyers for perjury or fraud, apparently do not take a "light-hearted" view of divorce proceedings.¹⁰ He also notes that some "attorneys of the legal aid societies . . . have shied away from divorce cases in which clients or witnesses would have to perjure themselves" (p. 256). If this is correct, it reinforces the real dualism of our divorce law, namely, one rule for the rich and another for the poor.¹¹

9. As Professor Rheinstein himself points out, he did not always see it this way. In 1953 he commented that the "discrepancy between the law of the books and the law in action, which we find in so many states, has, through its tolerance or promotion of collusive practices and perjury, developed into a serious threat to the morals of the bar and the respect for law among the public." Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 *LAW & CONTEMP. PROB.* 3, 19 (1953).

10. Fourteen Alabama lawyers surrendered their licenses to practice after a bar association investigation of "quickie" divorces. *N.Y. Times*, Jan. 5, 1965, at 19, col. 6. A Missouri lawyer's license was removed for "coaching witnesses" and "collusion" in divorce cases. *N.Y. Times*, June 23, 1961, at 59, col. 4. A New York lawyer was disciplined for fraud in obtaining a Mexican divorce for a client. *N.Y. Times*, Jan. 6, 1971, at 38, col. 1.

11. For discussion of some of the ways in which divorce can be economically discriminatory, see Gold, *The Poor and Divorce: Boddie v. Connecticut*, 3 *FAMILY L.Q.*

Although he does analyze in detail a number of alternatives, Professor Rheinstein downplays the need for statutory reform because he feels that we have an acceptable consent system now.

As far as marriage dissolution is concerned, for the majority of the states and especially for their metropolitan courts, adoption of the uniform law [the "no-fault" statute proposed by the National Conference of Commissioners on Uniform State Laws] would mean hardly more than concordance of the law of the books with the law in action. As in the case of California, the major impact would be felt in the matters of child custody and of dollars-and-cents, and in the negotiations about these issues. [P. 387.]

Recent experience in California, Colorado, Michigan, and other states has shown, however, that the passage of no-fault statutes affects more than simply custody and support. Even though California's old law had been interpreted liberally,¹² the divorce rate jumped forty-six per cent in 1970,¹³ the first year under the new Family Law Act.¹⁴ There was a four per cent drop in 1971, but the number of divorces headed back up in the first six months of 1972. Opponents of no-fault divorce point to such increases as proof that reform undermines family stability, while the new law's advocates claim it only shows that many unhappily married people have been unshackled from the hypocrisy and unfairness of the former system. No matter how they are interpreted, these statistics conclusively rebut Professor Rheinstein's contention that no-fault statutes merely revise the law of the books to coincide with the law as it is already practiced: if the change were only a formality, divorce rates before and after it would have remained substantially the same.

281 (1969); Lichtenstein, *New York's New Law and the Divorce Lawyer: Now the Poor Can Get Divorced, Too*, N.Y. Times, April 26, 1970, § 6 (Magazine), at 30.

12. Professor Rheinstein points out that California judges "handled the old statute so that a divorce was hardly ever denied and thus the California divorce rate has been one of the highest in the nation. Nothing but the requirement of a minimum residence of one year in the state, and the delay produced by the interposition of an interlocutory decree, prevented California from being a competitor with Nevada" (p. 373). For a description of California practice under the old statute, see Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1212-20 (1968).

13. California Dept. of Public Health, Release No. 10, Vital Statistics—Marriage and Divorces, Aug. 1972. There were 107,807 dissolutions in 1970, as compared to 73,325 divorces in the previous year. See note 14 *infra*. The precise rate of increase depends on whether it is measured absolutely or per capita, but by either standard divorce has increased markedly under the new law. The number of petitions for divorce also rose, but only by 14.9 per cent. See Goddard, *A Report on California's New Divorce Law: Progress and Problems*, 7 FAMILY L.Q. —, — (1973). That the number of divorces rose much faster than the number of petitions in part reflects a reduction in the various waiting periods, but it also may indicate that once people institute a no-fault divorce action they are more likely to see it through.

14. CAL. CIV. CODE §§ 4500-40 (West 1970). Under the new California law, divorce is called "dissolution." Although this term is now in wide use there, it is unfamiliar in most of the country, so the term divorce is used in this Review.

Several underlying reasons may be offered to explain why the new no-fault statute caused such a dramatic increase in the number of divorces in California. Some people, who knew their marriages had failed but did not want to go through an adversary proceeding no matter how enlightened it might be, apparently found a no-fault hearing more attractive. Other couples, who previously would have gone to Nevada, have discovered that it is easier to stay home; while the California divorce rate has been going up, the Nevada rate has plummeted.¹⁵ If this signals the death of migratory divorce, at least for Californians, it is good news for everybody except Reno lawyers. It is a costly and pointless ritual to require people to go out of state to formalize the death of their marriage. Finally, "matters of child custody and of dollars-and-cents" cannot be separated from the grounds for granting divorce. Under the fault system, the party more eager for divorce must often pay either in alimony (if it is the husband who wants a divorce he pays more, if it is the wife she receives less or none at all) or in child custody rights for his or her spouse's agreement not to contest. The reluctant spouse can drive a hard bargain by threatening to fight the divorce in court; a contest can prevent the divorce altogether or at least result in a punitive decree against the "guilty" spouse. In short, Professor Rheinstein errs in concluding that the fact that ninety per cent or more of the divorces in this country are ultimately uncontested provides evidence of a de facto consent system.¹⁶ If he is right, it is only in a narrow sense; we do not have divorce for the asking. Agreement to divorce does not come easily, and the possible burden of having to prove fault puts the parties in unequal negotiating positions.

Because he does not recognize that no-fault legislation goes far beyond any "liberal" "compromise" that has evolved in the courts, Professor Rheinstein has likely failed to reassure those people who sincerely fear that such a radical change will undermine the institution of marriage. The evidence he offers to show that divorce laws have not bred divorce in the past might well have been equally convincing with respect to the future impact of no-fault laws. But, by overlooking the significant impact of no-fault divorce, he has left himself open to the contention that the cases are distinguishable.

Opponents of divorce reform will have to be persuaded that whatever risks reform bears are outweighed by its benefits. Those who are concerned that no-fault statutes will cause hasty divorce may be assuaged by provisions that require a reasonable waiting period or some sort of mandatory conciliation process, even if it is limited to informing both parties of the availability of marriage counseling

15. N.Y. Times, Jan. 3, 1971, at 59, col. 6.

16. "While not every uncontested divorce is collusive, it is always a consent divorce except in those infrequent cases of *ex parte* divorce in which the defendant did not know of the proceedings and was thus unable to defend" (p. 247).

should they want it. People must learn that as little as we like divorce, it is often the better of two unhappy alternatives. Likewise, we all must realize that divorce does not end the relationship between a husband and wife, it simply recasts it in a different form; this is especially true when there are children and substantial property involved. That as many as one of every three divorce decrees is followed by still more litigation involving either custody or support indicates that we do too little to help people adjust to their new roles and responsibilities after they have been divorced.¹⁷

In some ways the very strength of Professor Rheinstein's book may have contributed to its weaknesses. By focusing on the broader historical and cultural background of divorce, he seems to have overlooked many of the unhappy aspects of everyday practice. American divorce law is indeed a compromise, but it is the worst of both worlds, not the best as he would have us believe. That Professor Rheinstein is overly sanguine about the current state of the law should not obscure the fact that his book is an important contribution to the literature of divorce, particularly in its comparison of practices in different societies.

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17. Westman & Cline, *Divorce Is a Family Affair*, 5 FAMILY L.Q. 1, 3 (1971).