

Marriage as Commitment

Robert Whelan (ed.), Just a Piece of Paper? Divorce Reform and the Undermining of Marriage, Institute of Economic Affairs Health and Welfare Unit, London, 1995

Reviewed by Brian T. Trainor

IN the introductory chapter of this lively and thoughtful collection, the editor, Robert Whelan, raises its central issue: the fact that family law in modern jurisdictions no longer makes any attempt to buttress the stability of marriage. He asserts that we have reached a point where the issue that confronts us, in the words of Professor Brenda Hoggett QC, is 'whether the legal institution of marriage continues to serve any useful purpose' (p. 7).

Advocates of easy, no-fault divorce are generally inclined to rejoice in, rather than to lament, what Mary Glendon has called 'the dejuridification of marriage' (p. 60). They insist that the law has no legitimate role to play in marriage or in other intimate relationships. If marriage is in essence a deeply personal affair between two private individuals, then surely the insistence of modern states that they wish to 'stand aside' from marriages is a step forward. Certainly, most people would agree that the continuing, intimate life of a marriage should normally be beyond the reach of the law. But, in Chapter Two, Melanie Phillips argues that easy divorce laws deal a death blow to marriage, since the legal regulations governing the process of entering or leaving a marriage are of vital importance to marriage itself and are not just incidental, legal appendages. The key culprit here is 'no-fault' divorce, for as Phillips remarks, 'duties such as staying together, being faithful to each other or treating each other reasonably exist only by virtue of the fault that accrues to desertion, adultery or unreasonable behaviour. Remove these defaults, and marriage becomes a vapid concept' (p. 14).

Phillips is concerned about the consequences that flow from the introduction of what she calls a 'no pain, no blame, no shame justice system' (p. 15). She insists that 'denying a wronged party the opportunity to say their spouse behaved badly is inimical to justice. It tries to sanitise proceedings by getting the parties to collude in an evasion of truth and is likely to cause much more frustration and bitterness by imposing such unreality' (p. 15). The failure of modern legislators to face up to unpleasant truths inevitably produces pain and misery in the lives of spouses and children. Phillips speaks of the intolerable grief and disadvantage to which the children of divorce are so often condemned and then adds that 'this grim picture is itself so intolerable that it has to be sanitised by "informed" opinion' (p. 17).

It is precisely this 'grim picture' that is painted by Patricia Morgan in its full 'unsanitised' form in the following chapter. She highlights the overwhelming body of research evidence showing that divorce both damages the parenting skills of adults and has serious negative outcomes for children. For example, she states that children from broken or incomplete families comprise a majority of the victims of

all major forms of child abuse, that the breaking apart and 're-constituting' of families are the foremost reasons for the homelessness of adolescents and their reception into institutional care, and that the suicide rates of both adults and children are highly correlated with the divorce rate. Often such adverse consequences of divorce are defended on the grounds that the 'greater evil' of a conflictual marriage is thereby avoided. But Morgan shows that 'divorce often seems to have little or nothing to do with marital incompatibility, let alone open conflict' (p. 22). She also cites several studies showing that few children are relieved by their parents' decision to separate and that 'far less recall conflict in the marriage, or attach any significance to it, than is suggested by received wisdom' (p. 27).

In Chapter Four, Norman Barry argues that marriage is 'a special sort of contract' which is 'expected to be permanent and not to be repudiated at will' (pp. 41-2); yet, unlike other contracts, it is a contract which the law fails to enforce. Those who are at fault in breaching this marriage contract are not penalised in any way. 'No-fault' divorce laws, then, are *prima facie* unjust, not only not penalising but in a sense rewarding and 'legitimising' those at fault. In Chapter Five, Bryce Christensen makes the important point that no-fault divorce, 'especially when it permits unilateral divorce, implicitly allies the state with spouses who want out of their marriages' (p. 63). Surprisingly, one searches in vain for any kind of argument that attempts to justify no-fault divorce. One might be tempted to argue that the right to divorce stems from, and is justifiable in terms of, a philosophy of freedom or individual rights. But Barry insists that the no-fault factor makes it 'impossible to describe the freedoms that legal changes have introduced as emanations out of traditional liberal or conservative doctrine since the new liberties are almost completely detached from any notion of personal responsibility' (p. 47).

The last two contributors to this mainly British collection of essays are both American, and both focus on the important but little-discussed fact that the enactment of no-fault divorce proceeded 'with little publicity and no mass support' (p. 58). In Chapter Five, Christensen argues that 'a sober analysis of "no fault" divorce may properly begin with a recognition that when legislators made this revolutionary break with legal tradition, they were not responding to widespread public pressure, but rather acceding to the well-orchestrated lobbying of a few activists' (p. 58). Likewise, in the final chapter, James Q. Wilson shows that the war over the family and divorce currently being waged is a war between the few and the many; but since the 'few' are very powerful and influential elite groups and the 'many' are a largely passive and puzzled public, the contest is by no means an even one. The public's view is that the family is the right and proper place where the most basic values are instilled in children, that it is a misfortune when children have to be reared by single parents, and that it is better for children if one parent stays at home and does not work, even if that means having less money. The elite's view is that

the life course is full of exciting options. These include living in a commune, having a group marriage, being a single parent, or living together. Marriage is one life-style choice, but before choosing it, people weigh its

costs and benefits against other options. Divorce is a part of the normal family cycle and is neither deviant nor tragic. Rather, it can serve as a foundation for individual renewal and new beginnings. Marriage itself should not be regarded as a special privileged institution; on the contrary, it must catch up with the diverse, pluralistic society in which we live. (p. 78)

Wilson holds that the war over the family and divorce is really about the role of women in modern society. Those who vociferously attack the two-parent family see it as subordinating wives to their husbands/masters and as limiting their opportunities for personal and professional development by confining them to, or even imprisoning them in, the 'private' domestic sphere. 'The traditional family, in this view, is an arena in which men are free to hit, rape and exploit women' (p. 79). Those who just as vociferously defend the family hold that traditional family values are the strongest stanchion of resistance against homosexual marriages, bureaucratized child care and compulsory sex education in schools. Quite sensibly, Wilson points out that the average mother or father would sympathise with aspects of both viewpoints; but he holds that on the central issue at stake, most parents will have no hesitation in taking their stand on the conservative side.

They will want our leaders [and] the media . . . to take their side in the war over what the family is. It is not one of several alternative life-styles; it is not an arena in which rights are negotiated; it is not an old-fashioned and reactionary barrier to a promiscuous sex life; it is not a set of cost-benefit calculations. *It is a commitment.* . . . It is a commitment required for child-rearing and thus for any realistic prospect of human happiness . . . It is a commitment for which there is no feasible substitute, and hence no child ought lightly to be brought into a world where that commitment from both parents is absent. It is a commitment that often is joyfully enlivened by mutual love and deepening friendship, but it is a commitment even when these things are absent. (p. 89)

I have quoted what Christensen and Wilson regard as the 'public's view' at some length because it is the almost embarrassingly self-evident view that is entertained by all the authors in this collection. This is not to suggest, however, that the latter are merely stating or defending the obvious. The *real* problem that this book grapples with is the valiant, dogged and persistent struggle carried on by our cultural elites *against* the obvious.

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