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DIVORCE IN UTOPIA*

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I have long been puzzled at the hold which Plato's *Republic* has had on the imagination of Western man. What is the reason for the continued attraction of this most utopian of all legal treatises?

Almost as a matter of course Plato assumes that human beings are indefinitely educable; that justice in the individual and in the state is the route leading to the highest achievement in life; that the human family is an outmoded institution; and, most important for us, that men and women are equal in all respects except for physical strength. The *Republic* has much else in it, but this is more than sufficient. I shall limit myself to the last two assumptions: those concerning the decay of the family and the equality of the sexes.

On the decay of the human family much remains to be said. The tendency to prolong human infancy, discernible in all cultures, speaks both for and against the family as a ecologically viable form. Human young are helpless for a far longer period than the young of any other animal species. This argues for an increase in the survival value of the family. On the other hand, cultural evolution has made child-rearing so complex that supporting social institutions are forced to intrude upon the family and thus weaken it as a biological entity.

The growth of actual equality between the sexes since Plato's time appears to be much more clear-cut. The differential of physical strength in favor of the male has gradually been reduced over the centuries as the hunting cultures have waned. Today, this difference is negligible. A woman can push a button or pull a trigger every bit as efficiently as a man.

Plato was a member of a patriarchal society that had only recently achieved its emancipation from the age-old matriarchy. Yet, he was able to envision a state in which both sexes could be reared, educated, and could work together on the basis of absolute equality. Twenty-three centuries later we can attest to the practicality of the ideal much more simply than he could have done, though it would be hard for any of us to

* I am happy to dedicate this brief study to Professor Jermone Hall whose interest in Plato has been life-long. That the subject of the paper turns on the problem of equality between the sexes in the law will, I hope, be of further interest to him.

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outdo the ease and grace with which he makes it appear that sexual equality is the only ideal conceivable for a rational person.

We are well aware that Plato based sexual equality on the notion that women are not only equal to men, but with respect to rulership, can be made virtually identical with them. Note, that women are to become like men; men are not to become like women. This masculine ideal rested on the assumption that since Greek patriarchal society is to carry over into a sexually egalitarian state for rulers, the power structures that men had erected to keep women of the ruling class in submission were to be swept away.

Suppose we try to adjust Plato's basic pattern to the problem of divorce. Suppose, that is, that we see what would happen if we were to apply "men's law" to the breakup of the family. By men's law, I mean the law men customarily use in their everyday dealings with one another, *i.e.*, the law of the extended economic male community.

Judicial decision is law made by men for men. Women participate in it only peripherally and they take men's law as they find it. The female in a divorce action does not shape the law in the way a male in an ordinary law suit changes the law in his own interest. In divorce proceedings, the suit is customarily a ritual rather than a genuine resolution. Certainly, it is rarely a creative resolution of opposing points of view. Men's law, by contrast, is sophisticated and creative. I shall initially examine men's law under the general rubrics of contract and tort since they and their extended sub-systems constitute most of the ways men use law in order to resolve legal conflict among themselves.

Contract

Karl Marx once grudgingly acknowledged that it is to the credit of the bourgeoisie that it rescued millions from the idiocy of rural life. Let us add to this accomplishment a magnificent effort in the field of human relations: the attempt to rescue the family from what had become in Western culture the idiocy of clerical-religious life. The aspect of the ideal that interests us is the attempt to secularize marriage by making it a civil contract.

We can briefly consider this lapsed ideal of the founders of the industrial revolution by sketching the broad outlines of the theory of a civil contract. A contract is private legislation. Its terms are within the control of the contracting parties. The form of the agreement, while subject to many constraints, remains flexible. The agreement is modifiable at any time by mutual consent, and terminates either by agreement or by breach. As a practical matter, either party may terminate, under reasonably

ascertainable penalties. Finally, the courts stand ready to enforce the agreement or to stay away from it at the will of the parties concerned. Thus we have the ideal elements of the contract agreement.

Contract law has given rise to an immense sophisticated body of legal devices designed for governing the modern world of commerce and finance. I propose that reformers of the law of divorce study the strengths and the weaknesses of this body of law. I do not suppose that an "ideal divorce law" would stand a greater chance of acceptance than Plato reckoned for the coming into existence of the ideal just state. However, in each case we have benchmarks against which to measure practice.

Consider seriously the notion of marriage as a contract. Parties cannot include any terms that idle fancy dictates. We are dealing with what the civil law calls contracts of adhesion, where the terms are those appropriate to the relation which is created. Nor does our proposal mean that the parties to a marriage can terminate it at any time regardless of the factual situation. General Motors could not conceivably end its contracts with dealers overnight, but their agreements are subject to adjustment and substantial revision, theoretically at any time and practically at reasonable intervals.

Furthermore, consider the procedure of *arbitration*. It is sheltered from many of the shocks of an action at law for breach of contract. The procedure is not informal; informality would defeat its purpose and lead to indefinitely prolonged bickering and ill-feeling. Or, look at bankruptcy law. Originally, bankruptcy proceedings were analogous to divorce. The enterprise had to be ripe for dissolution before legal action was available. This requirement has long since past. Now, we speak of *re-organization* where there are the same parties, management and creditors, these last being the "children" of the analogous divorce action, in whose interest the re-organization takes place. A great deal of suffering ensues from a blighted financial, commercial or industrial venture, but modern re-organization procedures rescue a great many enterprises.

There is a large and thriving branch of the law known as *creditors' rights*. Its theorists are accustomed to inveigh against its inadequacies, especially in providing help to the underprivileged. Its focus upon the rights of creditors instead of debtors is to be expected in a culture whose law is heavily weighed against the poor. Compared, however, with children's rights, its reliefs to the poor are phenomenal. Moreover, these processes could aid in the advancement of the law of divorce far beyond its present deplorable state.

Contract law and its sub-systems reduce to relatively concrete gains and losses the large element of recrimination, mutual distrust, hatred and

revenge that characterize blighted enterprises. These elements of human passion are not ignored but are channelled into a large common reservoir known as "damages." By contrast, current proposals for reform in the law of divorce simply eliminate any element of fault. These schemes are abstract and unrealistic. They assume that the law of divorce can settle fundamental disagreement between the parties by ignoring it. Apparently none of these reformers have ever been married; for they seem not to realize that when a marriage is troubled it usually constellates feelings of fault, guilt, hatred, recrimination and revenge. Thus, the parties should be entitled to a *hearing* on the issue of fault as traditionally provided. Today, parties who feel they have been wronged desire an opportunity to present their side of the "case," rather than merely having access to a sympathetic ear.

Tort

Of all the subtle relational interests that tort law is expected to protect, those of familial and marital relations are least adequately served. Only recently has it been recognized that the serious injuries to such relations are not those from outside the family circle but rather those originating from within. Against these injuries the law felt and still feels helpless. Indeed, members of a family still cannot adequately sue one another in tort. In instances where capacity to sue is grudgingly recognized, the interests to be protected are so poorly delineated that tort law is often incapable of processing the claim.

Emancipation from the clerical notion that the family is a sacrosanct religious institution and that resort to the competing secular services of the law is sacrilege is a slow process. Ridiculous distortions of tort law are a common result of this anachronism. For example, witness the evil effects of interspousal immunity, which in effect is interspousal incapacity, and the difficulties experienced in tort actions between parents and children.

Abstractly, all intrafamilial incapacities should be swept away and the interests delineated on a basis equal to that of other valued relations. Thus, in that restricted but extremely important class of wrongs in which the rather drastic remedies of tort law are appropriate, they should be available to the injured member of the family against the familial wrongdoer.

Tort law, although drastic is also sophisticated. It is difficult to imagine a more flexible instrument than the law of negligence, which now regulates the distribution of a large class of personal and proprietary losses. It is true that the practitioners of that branch of law are often

under severe criticism because of its inadequacies. However, compared with the law available to those suffering intrafamilial wrongs, it is utopian.

I conclude that tort law might feasibly be put at the disposal of man and wife as an alternative to destruction of the marriage by divorce. I am aware that tort law has had a most undistinguished history of attempts to serve this use. Perhaps, since it is essentially public law designed primarily for loss distribution and thus operates retrospectively, it will be helpful only rarely. Indeed, it may not really be suitable for interspousal or even intrafamilial injury. Tort law, we may say, is too public, too injury-conscious, too oriented toward money damages, and in the end too rough for the devilishly sensitive nature of family disagreement. Contract law, we may surmise, would prove to be too free, too emancipating, and too unconcerned with injuries to those not in contractual privity with one another. We must, therefore, seek a closer analogue—one which may exist in labor law.

Labor Relations

The law of employment relations is a mixture of tort and contract principles. Substantively, it is vastly public whereas its method of procedure is largely private or largely inter-personal. A contract is, or should be, the legal matrix out of which rises the employment relation. In theory, the same is true in marriage. But, labor law also embodies aspects of tort law.

I shall not attempt to outline the striking development over the past thirty years in the area of employment relations law. Friction between labor and management was at least as acrimonious and apparently as insoluble as that between husband and wife. Employment relations have now greatly changed. I propose that our specialists in divorce law look to the employment relation as an analogue to the marital relation. Imagine the effect of an injunction against a recalcitrant husband at the behest of his harassed wife ordering him "to cease and desist from refusing collectively to bargain" with respect to their differences. Visualize a federal, state, or even a local agency enforcing a Marital Relations Act or a Fair Marital Practices Act. The result might be disastrous, for all Utopian schemes invite disaster. However, this Platonic vision would surely accord with a portion of the grand plan of the human race to place men and women together on a plane that the patriarchal revolution had thought to reserve to men alone.

Children

Modern divorce law founders on the question of what to do with the children of broken marriages. Indeed, the welfare of the children appears to be the overriding ethical concern of all who deal with divorce and the disintegration of the family. Plato's disposition of children was typically homosexual: education will solve their problems once they are emancipated from the tyranny of the biological family. This is not to level a criticism at the *Republic's* apparent hard-hearted rationalistic scheme for breaking up the hold that the biological family has on human destiny. Utopias solve all problems rationally, and for Plato, education is the universal cure for human ills.

Is there any reason to believe that placing at the disposal of the warring partners to a marriage the more highly sophisticated processes of "men's law" would benefit the injured children? None, specifically. But it is hard in principle to see how they could be more deeply hurt by it. Administrative law is at present in such an embryonic state that administering agencies seem invariably to sacrifice the interests of all except the major conflicting parties before them. This is so despite the fact that their official mandate is to preserve some third-party value system, such as that of the public interest, or in the case of divorce, that of the injured children.

The benefits to ensue to the children from the proposals outlined above follow from an untested assumption: if parents can be made to order their differences more rationally, children will necessarily gain. This assumption may be false but it surely deserves the respect accorded to all rational Utopian plans. It serves additionally as an ideal, more clearly delineated than the one which purports to place the interests of the children as paramount over all other competing claims; an ideal which, at best, has failed dismally.

Conclusion

I hope no one thinks that I believe these practical proposals for reform are of greater consequence than the ideal itself of sexual equality before the law. Practical proposals, even those of experts, tend neatly to cancel one another. For example, Plato's practical proposals embodied in his late treatise on *The Laws* are of interest only to the antiquarian, while the *Republic* is still a living force. I hope, in other words, that divorce law specialists consider seriously the Utopian ideal that men and women are equally worthy of the law's best instruments and efforts; that women and children are entitled to men's law; and that the human

family is worthy of as much thoughtful concern as the employment relation, the stock market, the transportation system, tax swindling, and crime-in-the-streets. If those whose efforts are devoted to solving the problem of broken marriages keep these ideals in mind, I feel confident that their concrete proposals will be far more efficacious than those of non-experts. In brief, I argue for the practical use of philosophy.