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LEGISLATURES AND LEGAL CHANGE: THE REFORM OF DIVORCE LAW

*Carl E. Schneider**

A SILENT REVOLUTION: ROUTINE POLICY MAKING AND THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES. By *Herbert Jacob*. Chicago: University of Chicago Press. 1988. Pp. 184. \$19.95.

It is now widely understood that in the last two decades American family law has been transformed. What is not widely understood is how that transformation occurred. It is a transformation of remarkable scope, a scope yet more striking for having been made not in one national decision, but in fifty state legislatures. And the obvious explanations do not fully account for the transformation. True, social attitudes and social behavior have shifted dramatically; but to say that is not to explain why the law changed. No bureaucracy made divorce reform its business. No interest group on the model of the civil rights or ecology movements demanded changes. Indeed, far from being politically controverted, much of the transformation went almost unnoticed. In *A Silent Revolution*, a political scientist, Professor Herbert Jacob, contributes notably to our understanding of this puzzling transformation. The purpose of this review is to make the fact, the substance, and the quality of that contribution better known among lawyers and legal academics.

Professor Jacob's book examines perhaps the central aspect of the transformation of American family law — the reworking in the last two decades of the law surrounding divorce. Until the mid-1960s, America thought of itself as having "fault-based" divorce. Divorce was an adversary proceeding in which one spouse alleged that the other had violated a basic obligation of marriage in some serious way, usually by committing adultery, by deserting his or her family, or by treating his or her spouse cruelly. By the mid-1970s, however, America could think of itself as having "no-fault" divorce. To obtain a divorce a spouse had only to allege, in some form, that the marriage had broken down. This triumph of no-fault divorce alone was impressive, and it was made more so by accompanying revisions of the principles of the law governing alimony, the division of marital property, and child custody.

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Reforms of such magnitude are likely to rest on large-scale social changes, and, as Professor Jacob notes, twentieth-century America has been prolific of changes in family life. Longer life-spans and smaller families have meant that couples generally live together longer, and particularly live together longer after their children have left them. Women have increasingly entered the workforce, not just before they have children and after their children have left home, but while their children are young. Further, women have increasingly found better-paying jobs. These economic changes, Professor Jacob suggests, have both worsened tensions within marriages and made it easier — economically, socially, and psychologically — for women to leave them. The revival of feminism in the early 1960s heightened these effects. And social and personal expectations of marriage — that it be intensely rewarding, that it be a partnership of equals — grew at the same time that divorce came to seem less wrong and even less harmful personally and socially. These movements in social attitudes and structure were reflected in changing views about divorce laws: in 1966, only thirteen percent of the population believed divorce laws were too strict; in 1974, after no-fault divorce had become widely available, one-third of the population thought so.

Changing social facts, and even changing opinions about law, do not by themselves change law. What transformed new attitudes toward divorce into new law? Professor Jacob begins that story in New York. New York notoriously had the most restrictive divorce law in the country; adultery was the only ground for divorce. And New York notoriously had the most flouted divorce law in the country; the same kind of fraudulent adultery that was long the stuff of English novels and life was regularly confected in New York. The delicate-minded (and well-to-do) New Yorker went to Reno, for Nevada had a short residency requirement and a liberal divorce statute. The gap between the law on the books and the law in action distressed many who knew about it and particularly distressed the lawyers and judges who collaborated in or countenanced the hypocrisy and perjury which made the system work.

The catalyst of divorce reform in New York was a public relations man and law student who was a Democratic member of the New York legislature. Quite by chance, he came upon the issue and, in the hope of attracting attention and promoting his career, embraced it. He found that divorce reform won him little attention. But he did find an ally in an admiralty lawyer who was chairman of a special committee on family law of the elite Bar Association of the City of New York, which was concerned about the fraud that suffused New York divorce law. The legislator and the lawyer went to Professor Henry Foster, of the New York University Law School, an expert in family law. Professor Foster drafted both a bill and a legislative committee's report on

the bill, a report which emphasized the problem of fraud and of public confidence in the law.

In the legislature, the bill attracted bipartisan support and little opposition, even from the Catholic Church. The Church's power had long been feared by proponents of divorce reform in New York, but its political strength had recently been eroded and its efforts were directed to battles over abortion and parochial school aid. Legislators who disliked the bill because it made divorce easier were accorded an amendment providing for compulsory conciliation proceedings. The press ignored the issue. Thus, even though the Bar Association of the City of New York was the only interest group actively backing the bill, it became law in 1966. The statute was justified as improving the honesty of divorce proceedings, not as introducing no-fault divorce. But when, a few years later, the waiting period for divorce after separation was reduced to one year, it was widely said that no-fault divorce had come to New York.

While New York had had perhaps the most conservative divorce law in the country, California had, at least in practice, one of the most liberal. Nevertheless, California's was a fault-based statute. In the early 1960s, a group of elite matrimonial lawyers from the San Francisco Bay area who felt that the law invited dishonesty and exacerbated the hostility between divorcing spouses began to work toward reform. They were joined by a similar group from Los Angeles. They testified before a legislative committee to advocate reforms, including no-fault divorce. In 1966, Governor Edmund Brown appointed a Commission on the Family which included members of both the San Francisco and Los Angeles groups. Arguing that no-fault divorce was already effectively available, the Commission (in the most conservative of terms and tones) advocated eliminating fault grounds altogether and altering a number of other aspects of California's divorce law. In 1967, these proposals were in their essentials introduced into the legislature by a conservative Republican. As in New York, the bill was presented as primarily a technical and limited reform of the law, and it attracted little notice and little opposition. The bill passed and was signed into law by Governor Ronald Reagan.

The next stage of the transformation of divorce law involved the National Conference of Commissioners on Uniform State Laws. The NCCUSL was founded in 1892 as a quasi-public group of law professors, elite lawyers, and legislators funded by appropriations from the states and by grants from private sources. It was intended to promote uniform state laws by proposing (in conjunction with the American Bar Association) drafts of laws in areas in which uniformity among the states might be desirable. The NCCUSL had been interested in divorce law since its inception, and by the mid-1960s a group of elite divorce lawyers and law professors had convinced the Conference that

the widespread dishonesty in divorce proceedings, the unduly adversarial nature of divorce proceedings, and the great diversity of divorce standards among the states justified another try at formulating a uniform statute. Once again, in other words, the problem was formulated by lawyers in relatively technical lawyer's terms.

Elite law-reform organizations like the NCCUSL and the American Law Institute usually work through a committee staffed by a "reporter" who is commonly a law professor expert in the relevant field. In this case, the co-reporters were Professor Robert Levy, who was and is a family law specialist at the University of Minnesota Law School, and Professor Herma Hill Kay, who taught and teaches family law at Boalt Hall and who had been prominent in the reform of California divorce law. The reporters drafted, and the committee and the Conference adopted, the Uniform Marriage and Divorce Act. The UMDA not only offered states a model no-fault divorce statute, it proposed an entire body of family law, one including reforms of the law of marital property, alimony, and child custody. Yet despite the UMDA's sweep, debate over it was primarily technical and ignored the many difficult social issues the UMDA implicated. Approval by the ABA's House of Delegates, while inhibited by institutional and personal conflicts, came in 1973, reasonably easily and without discussion of any underlying social issues.

It is hard to say how much influence the UMDA had and how much its advocacy of no-fault divorce simply reflected the temper of the times. The endorsement of no-fault divorce by such respectable and conservative institutions as the NCCUSL and the ABA at least promoted a trend toward reform that had already gathered considerable momentum: By 1974, forty-five states had what could be described as no-fault divorce. By 1985, every state had no-fault divorce grounds, although many states also retained fault grounds. This description of reform's extent is somewhat misleading, however, since "no-fault" is an ambiguous term. Pure no-fault statutes permit divorce if the marriage has irretrievably broken down, but statutes allowing divorce after separation for a defined period are also often considered no-fault statutes. By the latter standard, a number of states had had no-fault divorce well before the 1960s. Even in those states, however, the 1960s and 1970s brought an increased receptivity to rapid divorce on demand.

The UMDA also contributed to the reform of the other significant components of divorce law: the law of marital property, alimony, and child support. Except in a few community property states, property had traditionally been allocated to the spouse who owned it at the time of the divorce, an allocation heavily influenced by the name in which the property was held. In the 1970s, this rule was increasingly abandoned in favor of systems that were more inclined to treat property as

marital rather than as the property of individuals, that explicitly recognized in economic terms nonfinancial contributions to a family's well-being, that ignored marital fault in allocating property, and that gave judges discretion to divide property "equitably." Alimony had, in principle, traditionally been available to wives innocent of marital fault until they remarried. This rule was increasingly abandoned in favor of rehabilitative alimony — alimony designed only to help a spouse (whether maritally at fault or not) regain the ability to support himself or herself. Finally, custody of children had traditionally gone to the mother. In the 1970s and 1980s, this maternal presumption weakened and various forms of joint custody grew more appealing.

How, then, does Professor Jacob explain the transformation of divorce law? First, it is worth noting several forces that played a smaller part than might be expected. The Roman Catholic Church, whose opposition to divorce was well-established and well-known, had little effect on the legislative debates of most states. Feminism had a somewhat greater impact, but the feminist position on these issues was undeveloped, and there were feminists on both sides. Further, the women's movement was absorbed in other issues, like the Equal Rights Amendment. Indeed, no interest group, to say nothing of any mass movement, was deeply committed to reforming divorce law. Bar associations were involved in every state's reform effort, but not intensively: divorce law is a relatively low-status practice, and not all divorce lawyers favored no-fault divorce. Even the press widely ignored the reform. And because of the low visibility of divorce reform, it was not an issue which legislators could use to advance their careers.

So let us repeat the question. How does Professor Jacob believe the transformation was worked? Changes in social structure and social attitudes made the transformation certainly less controversial and perhaps plainly desirable. Reform cost the fisc nothing and gained in respectability and even in appeal as more and more states adopted it. Reform cost almost nothing politically too, since the absence of publicity about it helped ensure the absence of opposition to it. All these factors allowed a minute number of reformers, often lawyers with professional interests in divorce law, to work with a small number of legislators to achieve their goals. They succeeded because they did nothing to alter the conditions I have just described: they carefully defined their proposals as conservative, incremental, and technical changes in the law; they denied they were dealing with any significant social problems; they strove not to stir up interest-group opposition and worked assiduously to propitiate the likeliest powerful opponent, the Catholic Church; and they asserted their special expertise against the claims of laymen.

In sum, Professor Jacob argues, the transformation of American divorce law exemplifies "routine policymaking." Professor Jacob

notes that we ordinarily think of policy as created in a fierce conflict between deeply motivated interest groups. But legislatures could not accomplish all they need to if all policy were made that way. In fact, much policy is made quite routinely—reforms are drawn narrowly and described as conservative, experts are prominently relied on, the costs of reforms are kept low, and public attention is avoided.

But even if divorce reform was achieved through routine policymaking, its effects were not trivial: no-fault divorce was universalized, the common law principles for dividing property on divorce were widely abandoned, alimony became rarer and shorter, and joint custody of the children of divorced parents made maternal custody less automatic. *A Silent Revolution* thus closes by evaluating these reforms. Professor Jacob observes that assessments of divorce reform depend on who you ask and what they thought the reforms were meant to do. The kind of lawyers who advocated no-fault divorce have not systematically evaluated divorce reform, but their general impression is that no-fault has reduced fraud and acrimony in divorce proceedings. The most extensive and best publicized consideration of the new laws by a social scientist has been Lenore Weitzman's *The Divorce Revolution* (1985). Professor Weitzman argued that reform has generally disserved women by reducing the sense that marriage is for life, by depriving wives of the bargaining chip that fault-based divorce often provided, and by eliminating the advantages that the innocent wife had under no-fault divorce. Professor Weitzman also reported that rehabilitative alimony terminates sooner than traditional alimony and that it often fails of its rehabilitative purpose. Finally, she noted that the weakening of the presumption that mothers get custody gave fathers a bargaining chip they had not had before. Professor Weitzman's figures suggested that, one year after a divorce, men's standard of living had risen forty-two percent, while women's had fallen seventy-three percent. Professor Jacob is skeptical of Professor Weitzman's conclusions. He observes that her data are from California, whose laws are less favorable to women than those of many other states, and that other studies reach different results. He sketches national data he has examined which indicate that any difference that no-fault divorce has made is slight and is in women's favor.

I hope that this all-too-abbreviated survey of Professor Jacob's book has convinced you that it warrants reading. The book is not, of course, without faults. But its faults are largely amiable ones, often the product of its admirable ambition. Professor Jacob has, after all, not only undertaken to investigate three major reforms — those of no-fault divorce, of marital property and alimony, and of child custody — each with a different legislative career, but also to develop an analysis of "routine policymaking." The book's scope deters some of its parts from being as fully developed as the reader might wish. For instance, Professor Jacob describes the legislative adoption of no-fault divorce

with uncommon efficiency (such stories are usually related in such stupefying detail that their structure is wholly obscured). But he does not attempt an equally enlightening account of how marital-property and child-custody law were rewritten.

Professor Jacob's exploration of whether the changes he describes can aptly be called a "revolution" is also somewhat limited. This question is important because it speaks to his suggestion that revolutionary change can be achieved through routine policymaking. As he notes, many features of the reform were part of the law of some jurisdictions well before the 1960s. Some of the "revolution" in divorce grounds, for example, was accomplished by simply relabelling as "no-fault" statutes which permitted divorce where couples had been living apart. This prefiguring of reforms is, after all, what made it possible to describe them as merely incremental. Furthermore, a great deal of old doctrine still persists — some states did not abolish fault grounds when they adopted no-fault grounds, and many states have not drastically revised their law of marital property and child custody. Even where doctrine has clearly changed, judicial behavior may not have. Judicial resistance is always a possible impediment to reform, particularly where, as in family law, judges are accorded wide discretion. Most of the reform statutes are notably undirective. For example, the UMDA's marital property and child custody provisions offer judges only a long list of criteria, without explaining a criterion's intended effect or weight. With statutes so vague, and with the circumstances of families varying so much, appellate courts cannot readily supervise trial courts or develop systematic standards which might guide them. Further, most families do not have enough property for courts to divide and do not dispute who is to have custody of the children. And most of the post-divorce relations between parties are negotiated, not set by courts, although legal rules presumably affect negotiations. In sum, we are left wondering how effective the revolution Professor Jacob describes can be and thus what the scope of routine policymaking is.

My own sense is that the changes in family law have been greater than these considerations would suggest. The revolution is, I think, sparked and sustained by a set of ideological assumptions which are widely shared among many elite segments of society, assumptions having to do with egalitarianism and with psychologically derived views of human nature. Professor Jacob tends to neglect such factors. While he is sensitive to the broad social changes that underlay the legislative reforms, he only hints at the process by which particular groups of people perceived those social changes, conceptualized them, brought them into social discourse, and proposed legislative responses to them. For instance, we are told that experts in family law were central in the reform process, but we are not told about the law review literature that preceded the reforms. I suspect that had Professor Ja-

cob pursued these questions further, both his explanation of the reforms and his description of their scope would have been more fully textured and convincing.

The reader is also left tantalized by the chapter which evaluates the various reforms. Professor Jacob, of course, is hampered by the fact that the reforms are so recent. This has meant, for example, that studies of joint custody are largely meaningless, since parents pioneering joint custody have tended to be self-selected enthusiasts, since the social scientists studying them have tended to be partisan, and since it is too early to measure the long-term effects on children. Similarly, studies of the financial consequences of divorce reform have generally been of single jurisdictions, and it is too early to tell yet, for example, which effects are the effects of no-fault divorce and which are the effects of changes in marital property law. Professor Jacob does give us a glimpse of his own intriguing study, which uses national data, but it is only a glimpse.

Finally, the reader is left hungry for a more extensive discussion of Professor Jacob's intriguing ideas about routine policymaking. Perhaps because the case-study format is limiting, many questions are not fully addressed: What are other examples of routine policymaking? When is it likely to occur? What are its strengths? What are its limits? I particularly wonder whether "routine policymaking" is not a somewhat inaccurate label and one that covers too many different ways of making policy. Consider the example of divorce reform. The move to no-fault divorce can in some ways be called routine. The issue of how easy divorce should be had long and widely been controverted. By mid-century, those in favor of easier divorce clearly predominated, if only because it had become plain that the enforcement problems of strict divorce were unmanageable. The divorce rate rose inexorably despite all attempts to stem it. States like Nevada undercut the restrictive statutes of states like New York. Perjury became common in states like New York. Courts acceded to pressure for easier divorce by manipulating divorce grounds like mental cruelty. By the time of the social and ideological changes of the 1960s, the way had been well prepared for no-fault divorce, and its adoption can reasonably be called the routine political implementation of a social decision. On the other hand, no such preparation paved the way for changes in marital property and child custody law. Neither aspect of the law had been debated on any broad scale since the nineteenth century. Thus legislatures seem to have had a more active role in actually developing policy, and the changes they made seem correspondingly more vulnerable. Professor Jacob apparently denominates the latter role "routine" because it did not involve conflict. But if "routine" policymaking is simply any nonconflictual policymaking, the category is so broad that it needs further development.

To criticize a book for not doing more of what it already does well is surely to praise with faint damns. And praise is the note on which I wish to close. Professor Jacob has provided us with a fair-minded, and illuminating book which much needed to be written. Students of family law will find it a valuable history of the recent transformation of their subject. They will also find it an admirable corrective to the two heroic views of how legal change can and should occur. The first such view is that legislative change happens only at the behest of aroused interest groups. The second is that legislative change happens only at the behest of aroused courts. Professor Jacob shows us that a third, if less heroic, view is possible and demands our attention.