Henry H. Foster, Jr.

One of the most momentous events in the history of any culture is the secularization of law. Both in Rome and in England, secularization was achieved and a distinct and independent legal profession and court structure were established for the adjudication of rights and the imposition of duties. The law of marriage and divorce, however, did not fit neatly in either category of the dichotomy between that which was Caesar's due as contrasted with matters spiritual.

Max Rheinstein, the dean of family law scholars and comparativists, is the one man in the world who has the knowledge and wisdom to place the long struggle between human needs and social control of marriage and divorce into proper perspective and appropriate context. His long-awaited volume, *Marriage Stability, Divorce, and the Law*, is an expansion and documentation of ideas previously expressed by him in numerous articles. Its greatest value lies in its realistic insistence that the stability of marriage, rather than a divorce rate of zero, should be the social goal of a modern urban society. Legislatures, courts, lawyers, and theologians who are concerned with pragmatic consequences rather than dogma should pay heed to this wise sociological study of law in action.

Professor Rheinstein notes that:

In Western civilization two trends can be traced, two set of drives, ideas, and ideals which have shaped our present institution of monogamous marriage including divorce. The struggle between and intermingling of these two trends has brought about results which have varied from time to time and which now vary from place to place. One of these two trends has prevailed for centuries. In recent decades the pendulum has come to swing in the direction of the other, but there has not been a complete reversal of the ideas that have been dominant for the last fifteen hundred years.

The two competing ideologies may be called Christian-conservative and the eudemonistic-liberal. When carried out consistently, the Christian-conservative principle implies that marriage is indissoluble save by death. Its consistent opposite implies that mar-

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riage may be terminated by either party at any time. The former principle is that of Roman Catholic canon law. The latter principle prevailed in ancient Rome in the time of the principate; in modern times it does not seem to have been fully adopted anywhere, at least not in official law.¹

Following the Reformation, the interaction between the two trends discerned by Professor Rheinstein produced a compromise in most of the western world. "In its totality, the American law of divorce constitutes a compromise,"² according to Professor Rheinstein. In theory, the legal dissolution of a valid marriage was possible only where an innocent victim sought such relief and by adversary procedure proved that the other party was guilty of a capital marital sin. In reality, however, "[a] conservative 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. Officially or unofficially, liberalism has come to dominate the American practice of divorce."³ The most significant fact regarding the divorce process is that in state after state and country after country in the western world, well over ninety percent of all divorce cases are uncontested and in reality we have had divorce by mutual consent for over a century. In the United States, as Professor Rheinstein explains in detail, de facto divorce by consent is constitutionally protected and immunized from attack by the full faith and credit clause.

The current debate regarding divorce reform concerns the extension of the privilege of divorce to a single party to a marriage, contrary to the wishes of the other (blameless) party, at least where the marriage is deemed to have broken down. Although Professor Rheinstein concedes that "[b]y its very essence a divorce is a restoration of the parties to the freedom of remarriage,"⁴ and "a divorce law which discourages remarriage or saddles the husband's new family with unbearable burdens is self-defeating,"⁵ he raises serious questions about statutes that purport to base divorce solely upon the breakdown of marriage. He criticizes California's new divorce statute for poor draftsmanship and a lack of guidelines and of meaningful definitions.⁶ Since few if any divorces have been denied under the new California law, and there is no procedure by

¹ Pp. 10-11.
² P. 28.
³ Pp. 29-30.
⁴ P. 124.
⁵ Id.
⁶ Professor Rheinstein also criticises similar deficiencies in the Uniform Marriage and Divorce Act, promulgated by the National Conference of Commissioners on Uniform State Laws but rejected by the American Bar Association in 1972. See ch. 15.
which the reality of breakdown is examined and verified, the next logical step would be to abolish judicial proceedings and to permit administrative divorce by unilateral registration. The social consequences of that step need no elaboration if Professor Rheinstein is correct in his observation of experience thus far: "Unquestionably, the knowledge that in the case of failure a divorce can be obtained with ease has contributed to the development of an inclination to take the step of marrying less seriously. To that extent it is justified to say that divorce breeds divorce."7

Perhaps only the criminal law presents problems of exhortation and choice of sanctions as interesting as those presented by the law of divorce. To Professor Rheinstein, "it seems that the law is impotent to prevent the conclusion of hasty or otherwise ill-considered marriages by restrictions, and that the only remedies promising a measure of success are again family life education and counseling."8

For over fifteen hundred years the Church was plagued with uncertainty and doubt as to the efficacy of requiring religious ceremonies for the celebration of marriage. As a practical matter, the Church tempered its dogma that marriage was a sacrament and indissoluble with a procrustean law of annulment. Today, the escape hatch of annulment is no longer readily available for Roman Catholics, and civil divorce does not permit the devout to remarry. But, asks Professor Rheinstein, does the unavailability of divorce promote the stability of marriage? Or, phrased differently, do permissive divorce laws engender family breakdown?

In trying to answer his own questions—a dangerous undertaking for any professor—Rheinstein presents the inconclusive evidence on the subject. He draws upon several projects that he has directed or been associated with, including studies of German, Italian-Swiss, and American incidence of family breakdown and divorce. He also recounts the story of Samuel Dike, a founder of a national organization to oppose divorce. Dike initially sought to bolster his case against divorce with statistical data, but, after the facts were at hand, came to doubt the efficacy and feasibility of making divorce law more strict.9

Perhaps the most persuasive evidence that the official law of divorce has a minimal effect on the stability of marriage is the report of Alexander Broel-Plateris, which was prepared under Professor Rheinstein's supervision and appears as Appendix A to Rheinstein's book. Rheinstein summarizes the results of the Broel-Plateris report as follows:

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7 P. 419.
8 Id.
9 Pp. 44–45.
Great permissiveness of the law, while it may be associated with a comparatively high incidence of marriage breakdown and divorce, is also associated with a lower incidence of separation without divorce.

Differences in the incidence of marriage breakdown between residence areas of the same state are even greater than those between states; that is, breakdown and divorce are higher in urban than in rural areas.

The incidence of marriage breakdown and the permissiveness of divorce laws are positively correlated with "a number of nonlegal variables indicating degree of industrialization, economic position of women, religion, and what may be called the degree of comparative settledness or restlessness of an area."¹⁰

It seems relatively certain that a repressive law of divorce engenders a higher incidence of prostitution, concubinage, the mistress system, and illegitimacy. Separation without divorce is the favorite means of self-help. The unavailability of divorce also leads to the social acceptability of illegal divorces like those formerly obtained by Swedes in Copenhagen or those currently procured in Uruguay by disgruntled victims of holy deadlock from Brazil and Argentina. A restrictive divorce law led New Yorkers to patronize a series of divorce mills abroad—to the perversion of the law of annulment at home. The relatively low divorce rate in New York before the Divorce Reform Law of 1966 concealed the fact that New Yorkers too enjoyed divorce by consent, although they either had to travel or to stay at home and commit perjury to obtain it. When Italy had no divorce, its separation rate was higher than the divorce rate of Great Britain, France, Poland, and Belgium.¹¹ Another study showed, however, that the marriage breakdown rate in Ticino, Switzerland was significantly higher than that of neighboring Comasco, Italy, although not as much higher as might have been anticipated.¹² Moreover, a number of Italians had moved to Ticino in order to get a divorce there.

It is a reasonably good guess that compared with other factors derived from social change, such as the independence of women, urbanization, anonymity, prosperity, etc., official law has but little to do with the stability of marriage. As Professor Rheinstein points out, welfare laws, education for marriage, and marriage counseling are of far greater significance.

Marriage Stability, Divorce, and the Law is a classic that will be widely read by sociologists, lawyers, and historians. Separate chapters on Japan, Sweden, Italy, Russia, France, and "the cultural breakthrough"
in England and the United States are valuable summaries of historical and sociological developments. Such separate treatment is tied together by introductory and concluding chapters that enable one to see the forest as well as the trees. It is a remarkable book in that regard—an accomplishment that others who were handicapped by insular or parochial outlooks were never able to achieve.

If there is any defect in Professor Rheinstein's book, it is a failure to reckon specifically with recent developments in the various liberation movements that may eventually influence the law of marriage and divorce. The institution of marriage is under attack today, and the avant-garde may question the social desirability of attempts to strengthen the stability of marriage. Professor Rheinstein assumes that marriage should be stabilized, but he is circumspect about the proper means to that end. His book is a guide for reform—one that should be in the hands of every legislator and judge—but it is not a call to revolution. Since Professor Rheinstein is kindly and wise, and ever a scholar, it is to be hoped that opinion and decision makers read and reread this book. In all of the literature, there is not so fair, objective, and scholarly an account of a basic conflict among legal, social, religious and human values. The message is that law alone cannot work: social goals must be defined, and, in the long run, marriages are saved by education, counseling, and forbearance. To these we might add a sense of humor, an ability to laugh at oneself. It has been unreliably reported that the following legend was inscribed over the main gate to the city of Agra, bearing a message to which Professor Rheinstein may subscribe:

In the first year of the reign of King Julief, two thousand married couples were separated, by the magistrates, with their own consent. The emperor was so indignant, on learning these particulars, that he abolished the privilege of divorce. In the course of the following year, the number of marriages in Agra was less than before by three thousand; the number of adulteries was greater by seven thousand; three hundred women were burned alive for poisoning their husbands; seventy-five men were burned for the murder of their wives; and the quantity of furniture broken and destroyed, in the interior of private families, amounted to the value of three millions of rupees. The emperor re-established the privilege of divorce.13

It is possible to accept the legend of Agra and to agree with Professor Rheinstein in general but to dissent from some particulars. Thus, Professor Rheinstein admits that when he was younger he viewed with alarm the hypocrisy of the system, but says that he has come "not only

13 Quoted, with tongue in cheek, in N. Blake, The Road to Reno 80-81 (1962), from 28 Niles' Register, June 11, 1825, at 229.
to accept but to admire the compromise" surreptitiously worked out in the courts rather than openly in the legislature because "[i]t has preserved peace in respect of an explosive issue, explosive just because it is an issue between beliefs deeply felt and thus unshakable by discussion and incapable of open adjustment."\(^{14}\) In this day and age, however, hypocrisy may come at too high a cost, and the secret compromise may contaminate the whole administration of justice. We are rapidly moving from the unarticulated divorce-by-mutual-consent phase into a phase in which the premise of the "cult of the dead marriage" is accepted. If the marriage is dead, why should mutual consent be essential for interment?

Admittedly, as Jerry Geisler is reported to have said, embalming and divorce are two things that should not be resorted to prematurely. But why not eliminate the fault element entirely, and thus the hypocrisy, by making breakdown the sole ground for divorce? The experience of lawyers, as distinguished from the kinds of sociological proof relied upon by Professor Rheinstein, indicates that divorce is only rarely opposed on reasonable grounds. Far more often, consent to divorce is withheld—and the "compromise" short circuited—for reasons of spite, greed, or vengeance. There is rarely a hope or desire to save the marriage. If this is true, and if one may reintroduce morality into an area where it has been an egregious failure, the "mutual consent" compromise rewards the wrong people with the wrong motives.

As a supplement or a companion volume to this important work, Professor Rheinstein may eventually add a full-scale discussion of marital property law—which he covers here in passing—and a set of guidelines and definitions for the breakdown ground for divorce. These are issues of great current importance and there is no one better prepared for the task of presenting an analytic and objective discussion than Professor Rheinstein. The complaint is that the learned professor has asked the questions but has not provided \textit{all} the answers, and if he does not do so, lesser men may bungle the job.

\(^{14}\) P. 254.