NEITHER SILENT, NOR REVOLUTIONARY

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Herbert Jacob. *Silent Revolution: The Transformation of Divorce Law in the United States*. (Chicago: University of Chicago Press, 1988). vii + 209 pp. Notes, appendix, index. $19.95.

Herbert Jacob's new book on divorce reform has two related themes that are reflected in the title he has chosen. One theme, "revolution," concerns the nature and extent of divorce law reform. The other theme focuses on the "silent" method whereby the "revolution" was undertaken, the author concluding that a process of "routine policy-making" affected and was affected by the nature of divorce reforms (p. 166). Jacob accurately observes that there is an interrelationship between the methods and the products of law reform efforts. The book contains useful and interesting information about specific reforms. I particularly appreciate the effort that went into the extensive interviews conducted with some of the participants in various divorce reforms. I do, however, disagree with Jacob's characterization of what occurred as "revolutionary" and with his assumption that significant changes were accomplished amid silence.

The greatest difficulty I had with Jacob's presentation of the divorce reform story was trying to determine what he considered to be the "revolution." There is an ambiguity to that term that reflects for me the ambiguity of the changes that have been made in divorce laws during the past several decades. "Revolution" in its least transformative sense is merely a "motion in a closed curve around a center, or a complete circuit made by a body in such a course." At the other extreme is the use of the term to designate a real transformation—a "drastic change in a condition, method, idea."[1] I suspect that Herbert Jacob was thinking of the second definition when he conceived of the title for his book on divorce reform. In my opinion, however, the first definition more accurately describes the effect of the changes in the rules regulating divorce in the United States. I recognize that formal and rhetorical changes have occurred. The wording of the laws has been altered, but the revolution is of the type that merely brings us back to where we substantively began. I would argue that it is this insight that illuminates why the initial changes in divorce legislation were

[1] The quotations are the first and last (sixth) definitions of "revolution" in Funk and Wagnalls *Standard Dictionary* (1983).

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silent or perceived as routine. They did not threaten the status quo—they were not "revolutions," perhaps not even evolutions.

Jacob is not clear about exactly what changes constituted his "revolution." There are several statutory reforms discussed. Jacob spends a great deal of time detailing the move to "no-fault" divorce that took place in California and other states beginning in the mid-1960s. This change in the formal rules allowing divorce hardly represented such a dramatic deviation from existing practice that it could appropriately be labeled revolutionary. What occurred in the move to no-fault was merely a formal change in rules that were well recognized to be freely manipulated and avoided. This type of reform is an example of the language of the law catching up with the process and practice of lawyers and judges. Jacob himself recognizes that the legal community had universally tolerated (and perhaps even counseled) fraud and collusion by their clients in order to secure divorces under a fault system.

There is a second set of reforms that are candidates for the label "revolutionary," however. The subsidiary changes in the laws governing the economic relations between divorcing spouses and the rules and standards applied to custody determinations are often viewed as departures from previous norms and practices. These changes occurred (and, in fact, are *still* occurring) in the wake of no-fault reforms, and could be considered the second movement in the "revolution" Jacob envisions. It is clear that he considers these reforms significant. At one point he asserts that "equality has replaced hierarchy as the guiding principle of family law" (p. 5). He also concludes that changes in property and custody rules "validated . . . the wife's transition from subordinate to equal [that] occurred gradually both in social fact and in the law" (p. 3). Property rules were altered to recognize a homemaker's contribution to the family economy. Alimony was removed as a permanent obligation of the husband. Equality became the symbolically significant norm against which the validity and legitimacy of divorce rules were to be measured. Of particular significance in this equality revolution in family law was the replacement of a "maternal preference" for awarding custody of children with an idealized notion of shared parenting expressed in the preference for joint custody.

If these equality-based rules are the changes Jacob considers to be revolutionary, it should be pointed out that they were hardly the product of silent reform. They were separate from and cannot be considered merely part of no-fault legislation. They generated a great deal of controversy and are still under heated debate. For example, the need for change in the rules governing property distribution was recognized only after no-fault had been in operation in non-community-property states and it became apparent that fault provided bargaining leverage for economically dependent

wives when their husbands wanted a divorce.[2] Joint custody reform, which is of even more recent vintage, seems to be part of a backlash provoked by the perception that beneficial changes in the social and economic positions of women have occurred at the expense of men. Changes fashioned in this second movement are most likely to be crafted and employed by angry men seeking to use the concept of equality against women (Fineman and Opie, 1987). Other (and sometimes the same) reforms are urged by professionals who vie for ideological control, seeing an opportunity to increase their share of the booming divorce business (Fineman, 1988). There are a lot of vocal advocates and opponents involved in these reforms.

The equality-based changes in family law should also be placed in another context. They were conceived of as complements to the larger "revolution" that was occurring in society concerning the role of women in the marketplace. Family law reforms lagged behind and were defined by the visible and vocal attempts to recharacterize gender roles and allow women to function as viable economic actors. They are a product of the political forces that defined the ERA as of paramount importance in the national agenda and cannot be considered as separate from that reform. Jacob fails to place divorce reform in the context of the larger equality revolution that was occurring in the more public arenas of society. Divorce reform was molded in that image. The reforms imposed a model of formal, gender-neutral equality on divorcing families and were, for the most part, pale reflections of or afterthoughts to the revolution in the economic sphere.

One could even argue, contrary to Jacob's interpretation of the reforms as revolutionary, that the equality-based changes in family law were in fact *antirevolutionary*—operating to undermine the fledgling potential for freedom presented for women by newly won economic opportunities coupled with an ability to freely leave unsatisfactory marriages. These secondary equality reforms in family law could be interpreted as innovations designed to ensure that women's new economic power did not provoke substantial challenges to the basic organization and function of traditional social and family relations. Joint custody, imposed even over the objections of a primary care-taking mother, merely replicates the changed demographics produced by no-fault divorce and working mothers, the essential power relationships of the traditional nuclear family. Joint custody reinforces, because it allows it to continue, even if in an altered postdivorce form, one basic tenet of patriarchy—male control over women and children. Joint custody preserves primary male power in the face of rules that pro-

[2] See, generally, Fineman (1983). Jacob notes that the Wisconsin reform experience does not conform to his routine model (pp. 100–101), but he ultimately seems to ignore this fact in his analysis. He offers no explanation for the Wisconsin experience.

vide liberalized access to divorce. The same sort of analysis can be applied to the new property rules. They remove economic security for women by abolishing the common law obligation of a husband to support his wife and children (even after the marriage ends). Women now share an equal obligation in regard to children, and a divorced wife may be saddled with her "equal" share of family (or husband's) debts even though she is far from "equal" in job and salary prospects. Equality has been a piercing and potent (and far from silent) battle cry for male reactionaries who would lead us round once again to the preservation of basic patriarchal power.

This perspective on equality-based divorce reforms has led me to conclude that it is the circular not the transformative definition that should be applied to the no-fault "revolution" and its secondary reforms. This perspective also explains why I was ultimately disappointed with the book. Jacob is not critical enough of the substance of the changes that occurred. I believe this failure leads him to mischaracterize not only the extent but also the process of reform. There is a need for a critical evaluation of divorce reform. Unfortunately, *Silent Revolution* does not provide it.

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