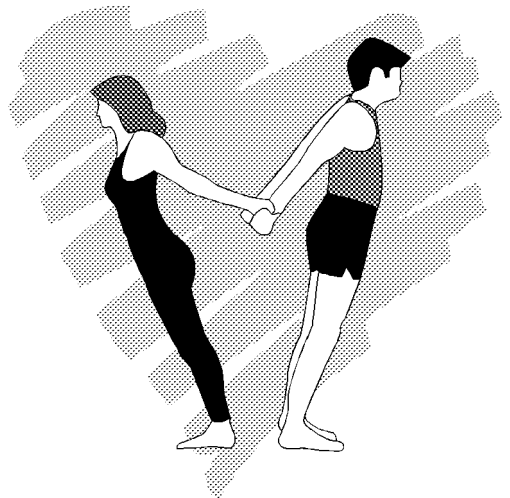


AN INDIVIDUALIST'S VIEW OF MARRIAGE AND THE FAMILY

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In Britain there are over 150,000 divorces a year, 30 percent of all marriages fail, one in two *second* marriages fail, one in five children under the age of 16 will have divorced parents, and every year hundreds of men go to prison for non-payment of maintenance. This trend toward more frequent marital breakdown is quite recent. In 1961 only 27,000 divorce decrees were granted. Although there has been a slight fall in recent years compared to the 1983 peak, most people (except, presumably, the present cohort of engaged couples) expect the trend to continue.

Yet everybody (especially political leaders) professes to be worried by all this. The family is now a 'hot' political issue with all sides claiming that only they can save it from disintegration. The next stage of Thatcherism is expected to include a review of government policy towards marriage, the family and morality in general.

Yet why should we be so concerned about the rising divorce rate? Perhaps it reflects the changing lifestyles to which the present permissive divorce law merely responds. Nevertheless, people are worried about the rise of one-parent families (and the increasing burden on the welfare system that this imposes), the apparent disintegration of domestic morality and the possible harm that comes to children from broken homes (although this has been exaggerated). Something must be done, it is said, to protect the family unit.

The usual socialist and 'caring' conservative response is to involve the state more actively in the promotion of the family: as if it were a lame-duck industry that required government support. This means more 'counselling', more welfare services and more money. What should be the individualist response to these distressing facts?

A RATIONAL EXPLANATION OF DIVORCE

The first thing to note is that the individualist social theorist always looks for regularities in social affairs and attempts to explain them by simple laws of cause and effect. Human behaviour is

more or less predictable once we understand fully the structure of incentives, costs, benefits and so on that faces individual choosers. Human motivation is pretty much the same everywhere, and what accounts for the differences in actual behaviour are the differing incentive structures that confront individual choosers (a point made by David Hume more than two hundred years ago). How can we account for the recent rise in illegitimacy in an age of easily available and effective contraception? Well, whereas at one time unmarried motherhood was met with stigma and a life of more or less permanent penury, it is now rewarded with extensive welfare payments and preferential treatment in the allocation of public authority housing. In many cases the unmarried mother can be regarded as a *rational* chooser of a slightly *risqué*, and even glamorous lifestyle.

Again, we can interpret the high divorce rate as very largely a predictable response to crucial changes in the divorce law that have taken place since 1969. What is significant here is not simply the *de facto* removal of 'fault' as a ground for divorce but the virtual (but not quite complete) elimination of fault from the post-divorce settlement, i.e. in relation to the division of property and the care and custody of children. This was the result of a common law decision (*Watchel v. Watchel*, 1971) and later embodied in statute law. What this did was to set up an entirely different incentive structure for spouses.

We have to accept the fact that in most cases love is far too thin a thread to hold a marriage together. In the past, economic constraints and legal inhibitions were clearly decisive in the stability of marriage. It may be unpalatable to the sentimental modern mind but we must also accept that people's behaviour in romance can be as rational and calculating as it is in more familiar economic markets. This is not to deny that mutual affection is a key feature of the marital relationship but merely to suggest that it is one of a number of elements that make up the individual's rational choice calculus.

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FOR LIFE, LIBERTY AND PROPERTY



In religious societies marriages are held together by the concept of a 'vow': a person can only be 'released' (the word is appropriate) from a vow by a disinterested third party. In secular societies they were, until recently, founded upon the idea of contract, the breach of which by one party involved costs to that party. In almost all modern Western societies, marriage is defined neither by vow nor by contract, but is an arrangement terminable by subjective whim, the consequences of which are unrelated to the original cause of the termination.

WHY MORE WOMEN WANT OUT THAN MEN

There are further patterns in marital behaviour which can be given rational explanations. One is the remarkable difference in the numbers of wives and husbands seeking divorce: usually it is the woman who petitions for divorce. In 1984, for example, 130,000 divorce petitions in the UK were filed by women and only 49,000 by men. In 1983 the figures were 124,000 and 45,000 respectively, and in 1982, 128,000 and 47,000.

No doubt feminists could explain this in terms of the venality, immorality and general unreliability of husbands. But this is a bit implausible (I think!). A far better approach is to look at the difference in 'exit' costs between men and women leaving a marriage. Since husbands are normally income earners they have to pay the bulk of the costs, including maintenance to the former wife and family. Since the notion of 'conduct' (the commission of a marital offence) is normally no longer relevant to a divorce settlement, it is often not worth a husband petitioning for a divorce, since even if he 'wins' he still loses in all the relevant respects.

A further intriguing statistic is the difference between the reasons for divorce that male and female petitioners present. The sole ground now for divorce is the irretrievable breakdown of the marriage: adultery, unreasonable behaviour, desertion and separation have to be demonstrated only as 'facts' of the breakdown. In husbands' petitions the fact overwhelmingly cited is adultery, in wives' petitions it is unreasonable behaviour. This must surely be because unreasonable behaviour is such a vague, subjective thing that it is not difficult to prove. Almost any day-to-day domestic conduct can sound unreasonable in a court of law.

These data also point to a delicious irony in that they suggest that our most intimate and superficially capricious behaviour, i.e. in marriage, romance and sex, is in fact much more predictable and subject to 'iron laws' than ordinary economic action: compare the volatile and chaotic movements of the stock market with the remarkable reliability of the annual divorce figures. Most people think the reverse is the case and that is why 'agony aunts' make a good living. (My elementary theory of marital behaviour is slightly different from the conventional 'economic theory of marriage' associated with Gary Becker and the Chicago School of economics. Becker's is an 'equilibrium' theory that explains divorce rates in terms of changes in the terms of trade that confront spouses. For example, Becker understands the household as an economic unit from which both parties make gains from trade through specialisation and the division of labour: the husband providing the income and the wife running the house. Marital breakdown is most likely to occur when the gains from the trade are reduced, e.g. when the wife takes a job. This theory is not specifically related to institutional factors, such as changes in the divorce laws. However, this approach is founded upon a similar view of human motivation to mine.)

PRIVATISING MARRIAGE

We have, then, to re-evaluate the role of state and law in this delicate area. The first thing to understand is that government can do little good here. It cannot compel couples to stay together who manifestly do not want to; nor can it force an unwilling partner to stay with a willing one. Thus, it cannot protect individuals from the misfortunes that afflict them in their private lives (withdrawal of affection may be damaging but it can hardly be made the subject of a tort action!). All it can do is to ensure a just distribution of the costs and benefits that result from a divorce, and refrain from action that has the effect of encouraging marital breakdown. Of course, it also has the crucially important duty of protecting the interests of children.

And how should it do this? Simple. The state should get out of the marriage business as far as is possible. If the state cannot run British Leyland there is no reason to suppose that it can run marriage and the family. I mean nothing less than the proposition that marriage should be 'privatised'.

The privatisation of marriage means that the bulk of existing marriage and divorce law should be repealed and that people themselves should determine, by voluntary agreement, what form of relationship they want, and the terms under which it should be conducted. Marriage should be governed by the common law of contract and divorce treated as a type of breach of contract. The form of marriage contract that people can make should be limited only by statutory provisions to protect children and laws to outlaw such things as bigamous marriage contracts. Just how property should be distributed, questions of the care and custody of children and future maintenance payments, would be settled by prior agreement.

Thus conduct could, if the parties so choose, re-enter the argument on the dissolution of a marriage. Adultery, unreasonable behaviour, desertion, etc. may very well feature in the types of marriage contracts that would develop outside the state. Although such provisions exist in the present law in Britain they are of little significance since no adverse consequences are visited upon spouses who breach them.

It is possible that 'no fault' marriage contracts, in which no blame is attached to any party that wishes to end, unilaterally, the marriage, would develop; but people signing such contracts would still want to protect their property interests and their parental rights. Under existing 'no fault' divorce law, as in Australia, spouses have to accept decisions about property and children imposed on them by the state. Not surprisingly, this is a constant source of post-marital bitterness and strife. Indeed, it is largely the unsatisfactory nature of federal family law in Australia that has led to the growth (in New South Wales and Victoria) of contractually-based *de facto* marriage relationships - now, regrettably, regulated by statute law. Under these arrangements, partners have more legal rights in matters of property maintenance than do conventional married couples. These latter, in the event of a marital breakdown, are at the mercy of 'Family Courts', guided not by traditional notions of adjudication and due process but by the alleged modernistic (but, in fact, primitive) idea of 'conciliation'.

One cannot be certain that this simple reform would reduce the divorce rate. This would occur only if people's voluntary choices produced tougher marriage contracts than the uniform one supplied by the monopoly state. Certainly people would be very careful about the contracts they made; and their future marital behaviour would be influenced by the likely costs of breaking them. But if the divorce rate were to be lowered this would have the inestimable advantage of reducing the numbers of one-parent families depending on the welfare state.

This suggested reform is by no means as radical as it sounds. It is rather conservative since it puts marriage back into the place in which it began - society. Although religious organisations, the originators of marriage, are no longer as influential as they once were, there is no evidence to suggest that even a secular society would automatically produce more permissive divorce arrangements than those imposed by the state.

If the state is really concerned to preserve the family but still insists on remaining in the marriage business then there is no alternative to going back to the pre-1970s situation, when divorce was difficult and the costs (to 'guilty parties') clear. We should not be sentimental about marriage and divorce. It is, like any other activity, largely dictated by prices and costs. If the costs of divorce are low, and the legal impediments to it are weak, there will be more of it.

It is extremely implausible to argue that the current instability of marriage reflects a change in attitudes and preferences towards personal relationships. I doubt that the taste for adultery and other forms of marital misconduct has changed much since the beginning of time. What has happened is that the costs of such activity have changed.