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Comment on Friedman Paper

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CAROL WEISBROD*

Comment on Friedman Paper

Professor Friedman's paper deals with certain aspects of American family law, focusing on changes over time in the law governing divorce. Professor Friedman uses this complex and interesting material to raise fundamental questions concerning the relationships between legal and social change. In this body of law particularly, Professor Friedman indicates, one may see goals that go beyond economic questions to social, religious, and moral issues.

It seems to me that my role as commentator on this rich and suggestive paper is best fulfilled by focusing on one point. Thus, this Comment suggests that if we wish to pose questions concerning the legitimating functions of law and to explore the law of the family in relation to religious and moral ideas, we may want to look beyond the law of divorce itself and examine other parts of the law that also protect marriage and the family. We can, perhaps, better appreciate what was at stake in any particular legal change if we have a sense of what the larger contemporaneous legal universe looked like.

The period that Professor Friedman describes as the "middle period" of divorce law may serve illustratively. Professor Friedman suggests that we may usefully view the divorce law of this period as one that evidences a conflict and compromise between the "instrumental demand for divorce and the opposing moral postulate." The historical question that Professor Friedman raises concerns the precise nature of the compromise. How much contemporaneous, related law should we look at when we consider this problem? Some examples from the middle period may be useful.

In the state of New York, it is often noted, adultery was the basis for divorce. Yet adultery was not a crime for many years, and New York had, as Professor Friedman comments, a highly developed law of annulment. In the state of South Carolina, which rejected divorce altogether for a good part of its history, we find a statute

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regulating property left to a concubine. Whatever statement we make about morality and law in New York or in South Carolina based only on the law of divorce will presumably be modified when we broaden our scope of inquiry to include other pieces of the legal system.

The campaign against Mormon polygamy raises similar questions. Certainly, the movement against polygamy was a significant expression of traditional values relating to the family. But we gain a somewhat different perspective on this issue when we view the Mormon controversy against the background of the shift from legislative to judicial divorce and a rising divorce rate (serial polygamy), and not solely as a conflict between polygamy and monogamy. The problem raised here does not centrally relate to possible gaps between theory and practice. The point is that the law viewed broadly may contain enough data to support a multitude of theories.

That something has changed in the law of marriage is beyond question. One can reach some of these changes quickly by comparing nineteenth and twentieth century legal responses to the definition of marriage ("the voluntary union for life of one man and one woman to the exclusion of all others") offered by Lord Penzance in 1866. What, for example, remains of the "for life" component of the *Hyde*[1] definition? The question is what the changes mean and how they reflect and shape the social situation. And here Professor Friedman, in outlining various roles that law can play, suggests valuable lines of inquiry. Professor Friedman concludes his paper with speculations concerning the breakdown of an older, religiously-based consensus and the replacement of that consensus by "a pluralistic normative system." This perspective, which relates problems in the law of marriage and the family to questions often treated under the heading "civil religion," seems to me to be of considerable importance. The issue is one that we might usefully keep in mind as we develop our "rainbow of explanations" for legal change.

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[1] Hyde v. Hyde, 1 L.R.-P.&D. 130, 133 (1866).