REVIEWS

THE FAMILY AND THE LAW. By *Joseph Goldstein & Jay Katz.* New York: The Free Press, 1965. Pp. xxxviii, 1229. $17.50.

> ". . . I observed here and there many in the Habit of Servants, with a blown bladder fastened like a Flail to the End of a short Stick, which they carried in their Hands. . . . With these Bladders they now and then flapped the Mouths and Ears of those who stood near them, of which Practice I could not then conceive the Meaning. It seems, the Minds of these People are so taken up with intense Speculations, that they neither can speak, or attend to the Discourses of others, without being rouzed by some external Taction upon the Organs of Speech and Hearing; for which Reason, those persons who are able to afford it, always keep a *Flapper* . . . in their Family, as one of their Domesticks; nor ever walk abroad or make Visits without him. And the Business of this Officer is, when two or more Persons are in Company, gently to strike with his Bladder the Mouth of him who is to speak, and the Right Ear of him or them to whom the Speaker addresseth himself. . . .
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> "The Women of the Island have abundance of Vivacity; they contemn their Husbands, and are exceedingly fond of Strangers. . . . Among these the Ladies chuse their Gallants: But the Vexation is, that they act with too much Ease and Security; for the Husband is always so wrapped in Speculation, that the Mistress and Lover may proceed to the greatest Familiarities before his Face, if he be but provided with Paper and Implements, and without his *Flapper* at his Side."[1]

If Lemuel Gulliver were condemned to continue his wanderings and could not again find the floating island of Laputa, the world of Anglo-American family law would provide a fit substitute. Judges and lawyers for the most part appear to proceed in a legal world of their own, shaping doctrine to their taste but totally oblivious of the actual results, if any, of their labors. Meanwhile, though it may not be with "too much Ease and Security," the actors to whom the speculations of the men of the law supposedly relate go about their coupling, procreating and parting pretty much as they will. Fortunately, however, we may be experiencing a *Flapper* era which will bring our profession back to earth as a participant in the actual processes of forming societies and families. *The Family and the Law* is a major contribution to the

1. SWIFT, GULLIVER'S TRAVELS 124, 129-130 (Modern Library ed. 1958).

achievement of this, as its predecessor volume on criminal law is in that field.[2]

To the reviewer, traditional domestic relations law embodies a series of assumptions:

(1) The marriage ceremony is a magic ritual which somehow produces visible and ineradicable changes in its principal figures.

(2) The essence of marriage is the union of penis and vagina, preferably for purposes of procreation. That these organs happen to be attached to people is purely incidental.

(3) This predominantly genital union is not to be legally broken up until one of the parties is clearly shown to be "at fault." If there is relative equality of either fault or faultlessness, the union must remain unbroken.

(4) Property and monetary payments are to be administered as rewards to the good and chastisement to the bad.

(5) Children are indeed creatures, whose lives are the proprietary interests of those who conceived and bore them. Therefore, only the race, blood, heredity and religion of the parents are relevant factors in determining the placement and career of the child.

(6) Legal doctrines are effective devices to shape human conduct. When the law speaks, human actors will immediately conform their conduct to the law's expectations.

(7) All organs of government must order their activities as the judges would have them do. Those who are married are married for all purposes. Those who are not married are not married for all purposes. Those who are illegitimate are illegitimate for all purposes. And so forth.

If these assumptions are correct, then all relevant data can be tidily allocated under the legal categories of Marriage, Annulment, Divorce, Defenses to Divorce, Allocation of Property, Adoption and Illegitimacy. A logically impeccable hierarchy of legal propositions can be structured, and society will be ordered in a corresponding fashion. But if all or most of these assumptions are wrong or substantially defective, then the law and its processes become increasingly irrelevant, and society continues on its way unaffected in its evolution. The only losers are the relatively small band of unfortunates who for a time at least are hampered by judicial intervention in accomplishing immediately what they almost certainly will accomplish eventually.

The Family and the Law is a rich sourcebook for anyone who is ready to re-examine the traditional assumptions of the law. In the first

2. DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW (1962).

place, its organization of materials forces one to abandon the legal categories of classification so beloved of compiler, digester and casebook editor. The book is arranged in three major segments. The first is an introduction to the family law process. This process is no longer viewed according to legal classifications like marriage, annulment, divorce and the like, but in terms of functional stages by which a family unit forms itself, sustains itself and perhaps dissolves itself. The four stages or processes are (a) establishment of the husband-wife relationship in the first place, (b) "administration"[3] and reorganization of that relationship once it is established, (c) administration and reorganization of the relationship between parents and child after the child is on the scene, and (d) administration of both kinds of relationships after they have been reorganized. To observe these several processes of course brings one to the definitional problem of what is a "family." This is the subject matter of the fifth part of Chapter I. Moreover, whenever law enters the picture the state is acting. Part Six, therefore, considers the role of the state in establishing, administering, reorganizing and once again administering the family unit.

The first chapter thus examines simultaneously both husband-wife and parent-child relationships. Chapter II looks only at spousal interaction within a two-fold structural organization. The wife-husband relation is once more viewed according to the transitional stages of establishing that relation, administering it once it is formed, reorganizing it and administering it again once it has been reorganized. But there is now added the question of the degree to which certain other factors are or ought to be taken into consideration at each functional phase.

The first is "economic gratification."[4] At the stage of formation of the husband-wife relationship this is primarily a matter of how gifts and other acquisitions are to be distributed if the nascent relationship aborts. During the existence of the consummated relationship it comprehends matters like incurring and discharging consumer debts, acquiring and sharing property interests, and providing support. In reorganization it appears sometimes as a basis for invoking official action, as in an instance of nonsupport, but more often in the guise of disputes over property division and the proper level of support payments. In

3. "We had difficulty finding a relatively neutral term for problems concerned with the function of the state in nourishing, undermining, controlling, maintaining, regulating, and supervising existing and persisting "legal" family relationships. The term "administration" seems to fulfill the need and, at the same time, stimulate—without limiting—inquiry into these considerations." P. 2.

4. Pp. 565-637.

administering the reorganized unit it manifests itself chiefly as a question of contesting, and perhaps modifying, the financial arrangements earlier arrived at and of enforcing the rulings as entered.

The second factor is the relevance of sexual gratification at each stage.[5] It is in this context that one truly encounters a judicial chamber of horrors, a mixture of taboo, prudery, moral crusading and spiritual uplift that would provoke laughter if it were not for the human hardship which it produces. Sexual gratification also bears a close relation to what is treated in *The Family and the Law* as "procreative gratification";[6] judicial attitudes toward sex are almost certain to be carried through into evaluation of contraception and sterilization.

The other major factor considered in Chapter II is what the editors call "being healthy, happy and respected."[7] Much of the content of this portion relates to the significance of mental illness at the four operative stages of family evolution. Other interesting aspects, however, include interracial marriage relationships, the issue of consent in marriage, and the question of the ability of courts to intervene to authorize medical treatment for one whose religious beliefs do not permit some or all medical aid.

Chapter III picks up for independent consideration the "vertical" relationships in the family unit discussed and defined in Chapter I, and not primarily the "lateral" spousal relationship of Chapter II. The first portion lines out goals and guides for state intervention to govern parent-child relationships. The comprehensive statutes of California are set forth in full as a sample of a legislative statement. A competing(?) set of standards from psychoanalysis and psychology is next presented for comparison. The second part then proceeds to tie some of these matters down. There is first a consideration of the relevance to the parent-child relation of traumatic injury. One form of injury is of course physical abuse and neglect by a parent. Another is the fact of divorce itself, when actual care of the child devolves perhaps into the hands not of a relative but of school administrators or domestics. Also relevant is the phenomenon of the judicial or administrative proceeding itself. An untreated physical defect may, according to circumstances, amount to trauma. A parent's mental illness can have disastrous effect. So may the fact that one parent kills the other.

The third part then considers the degree to which continuity in care is important, judged in the context of foster home placement and

5. Pp. 639-711.
6. Pp. 814-829.
7. Pp. 713-811.

adoption. The elements of continuity utilized by the editors embrace blood, name, color, intellectual and vocational stimulation, financial security, sibling relationships, sexual identity and law enforcement. They then provide materials on the procedures by which the continuity which is felt to be desirable is to be achieved in fact, including the problem of "black market" adoptions.

The final portion of this chapter presents an aspect which is most often ignored by lawyers as they consider the family, that of the vertical interaction of child and elderly parent. In many cultures the aged have a position within the larger family unit which guarantees them both status and an outlet for creative activity.[8] This is sometimes true in the United States, though probably on a decreasing scale. When the "large" family disappears, something must be done with and for the aged. Parents who can be economically self-sufficient suffer only emotionally if children sever ties; we can do little by law to alleviate emotional trauma. But those who are not able to provide their own means of subsistance must be protected by the state, or the community if one prefers that term, if they are not to perish alone. *The Family and the Law* poses the problem primarily in the context of the state *versus* the child in a battle over who pays the cost of protecting the parent. Perhaps this is the only way it can be presented if precedential experience is needed, for the primary decision for the legislator and ultimately the taxpayer is whether he is to act at all to alleviate the hardship which exists unless he acts. His inaction leaves no readily discernable trace. Even death does not end all problems, as the editors show through materials on actions by the state against the children for expenses of care of the aged parent in life and by the children against the undertaker for mishandling the parent's corpse.

This, then, is the framework of *The Family and the Law*, the framework which indicates what a major contribution it is to a re-evaluation of the law's function in affecting family processes. But even this is not the whole picture. The book abounds in intriguing issues on which

8. Japan is an outstanding example. See, *e.g.*, BEARDSLEY, HALL & WARD, VILLAGE JAPAN 232-236, 336-343 (1959); DORE, CITY LIFE IN JAPAN 91-120 (1958); Beardsley, *Cultural Anthropology: Prehistoric and Contemporary Aspects*, in TWELVE DOORS TO JAPAN 48, 118-19 (Beardsley & Hall ed. 1965); George, *Law in Modern Japan*, in TWELVE DOORS TO JAPAN 484, 509-516 (Beardsley & Hall ed. 1965). In the editors' posing of the Communist Chinese Family Code as a possible pattern for state intervention, the difference in assumptions underlying Oriental and Occidental family systems is clearly pointed up. To use Japanese materials for the purpose is even better, however, in that the materials for comparative study are readily available in Japan, and the Western observer has freedom to investigate how far code provisions both affect and are affected by the social and cultural institution of the family.

legal processes have only begun to touch. One major problem is the degree to which religious differences are (a) either a cause or a symptom of the cause of disruption between spouses or between parent and child, and (b) a matter which the courts or legislature should try to regulate. While many judges appear to believe they have the answer, the total impact of the materials gathered here is not so reassuring. Another is the role of the lawyer as counselor and advocate. The canons of ethics are at best irrelevant here; more likely they work positive harm in the field of family law.[9] *The Family and the Law* is at least a beginning in rethinking the problem of professionalism in family law contexts. A third is the related but broader problem of the use of conciliation rather than litigation in domestic disputes and of determining the role of lawyer and judge in any less structured machinery which we devise to promote conciliation. A fourth is regulation of one of the last resorts of quackery, the chaotic category of marriage counseling. A fifth, which relates to the first, is state intervention to require medical attention for a minor when his own or his parents' religious beliefs are opposed. A sixth, already mentioned, is the question of whether the state should be able to require even an adult to have medical treatment which he requires. A seventh is the procedural(?) problem of providing adequate representation for the child whatever the procedural context by which his future is directly or indirectly affected. An eighth is what is to most of us the disturbing question of the form the family might take in the future and the degree of participation in the reformulation process we are comfortable in permitting the state. A ninth is alcoholism or other forms of addiction as either causes of or symptomatic of causes of marital disruptions. A tenth is the role which artificial insemination can play both in creating and disrupting family relationships. An eleventh, perhaps converse to the tenth, is sterilization as form of birth control. A twelfth is the extent to which policies developed privately by child placement and care agencies automatically become "law" by virtue of unthinking reliance on them by courts and administrators. A thirteenth is intervention by welfare authorities to disrupt a viable family-type relationship because they view it as aberrant or deviant because it does not correspond with an officially-approved stereotype. A fourteenth is legal regulation of undertaking practices. There are other problems as well; each reader can

9. Counseling, for example, is made difficult or impossible if the attorney abides strictly by the requirements of Canon 6 (Adverse Influences and Conflicting Interests), Canon 9 (Negotiations With Opposite Party), Canon 19 (Appearance of Lawyer as Witness for His Client) and Canon 37 (Confidences of a Client).

devise his own list of intriguing issues. But *The Family and the Law* does a service both to law teaching and the legal profession in general by taking what usually are free-floating problems which catch the passing fancy of lawyers and, if not mooring them, at least confining them within the breakwater of a larger concept of the family regulated and protected by law. As a profession and as a society, we can probably work out more viable solutions through first setting these isolated problems in context than by trying to work them out one by one as they drift into our field of vision.

In the earlier book of which Professor Goldstein is also an editor, *Criminal Law*,[10] effective use is made of the extended record of a criminal case which poses almost insoluble problems of criminal law policy and practice. This is a welcome change from the usual practice by casebook compilers of adding together bits and snippets from appellate opinions to make up a book. With that approach one can see only paper people, if he can see people at all. When a more voluminous record of a case is available, the people who are the causes of and the principal actors in litigation come alive, at times quite disturbingly alive. As this awareness of human participation increases, the reader's concern for legal abstractions decreases, and legal processes appear less as controlling than as controlled. *The Family and the Law* makes even more effective use of this device than the predecessor work.

One case which provides a focal point for most of Chapter I and part of Chapter II involves a couple in early middle age, with three children, embroiled in separation proceedings extending over an eight-year period. At the time of their marriage and for a long period afterwards both were Orthodox Jewish. The wife, however, was later converted to the Christian Science faith. Her actions thereafter may have been the cause of disruption, a symptom among others of the source of disruption, or part of her contribution to the totality of husband-wife conflict which gave rise to the litigation. The reader will have to make up his own mind; the raw material for the decision is there in a way unmatched in any other collection of legal materials on the family.

There are also three other interesting transcripts. One is from the record of a divorce action based on adultery in which the wife claimed that her husband had not only condoned but in effect encouraged the liaison. The decision went against her, with further litigation about whether she was a fit mother for the young daughters of the marriage in light of her testimony about whether a woman might properly have an extra-marital affair. A second is the record of a juvenile court pro-

10. DONNELLY, GOLDSTEIN & SCHWARTZ, *op. cit. supra* note 2.

tective proceeding triggered by a breaking and entry by several juveniles. A third is an adoption case. All four cases together are instructive in themselves, and provide an excellent medium for the incorporation of the psychiatric materials in which *The Family and the Law* abounds.

I mentioned earlier several assumptions which the traditional law of domestic relations appears to embody. There is little in orthodox collections of teaching materials which encourages one to question them. But *The Family and the Law*, drawing as it does as much on non-legal sources as on legal, forces one to consider whether or to what degree they are tenable. The net impact on (and from) my own thinking runs along the following lines:

(1) The legal institution of the marriage ceremony and its aftermath appears in traditional thinking to have magic operative effect. The materials in *The Family and the Law* suggest that the key relationships are already cemented before any official activity begins. The ceremonials which make public the incipient marriage relationship to the community have considerable importance, in that they feed the community's sense of ongoing ritual tradition and charge the couple with a sense of responsibility outward toward the group as well as inward toward each other. There are also perhaps a number of worthwhile practical advantages if the fact of marriage is spread on accessible public records. But in either instance it is not the law or legal institutions which are important, but society and its processes and individuals and their interaction.

(2) Much legal doctrine appears to consider genital union the primary attribute of marriage. As an example one need only look at the doctrine of condonation to adultery. A wife knowing of her husband's adultery is to "fle(e) from him as a polluted being,"[11] or else will be held to her marriage to him. One act of intercourse is enough. *The Family and the Law* suggests that sexual relationships themselves are in a sense neutral so far as a value judgment is concerned, and that sex can be used to attract, to repel, to hold and to combat a future or present marital partner. But it is only one aspect of complex human relationships. To some, to attack traditional legal dogma by presenting data on human sexuality might appear to evidence a preoccupation with sex, but to me it is the traditional judicial statement which is obscene, not the resources gathered in *The Family and the Law*.

(3) A legally-sanctioned union can be dissolved only if one partner is "guilty" or "at fault." A full array of materials both legal and non-legal suggests that if this were the test and it were applied realistically,

11. Shackleton v. Schackleton, 48 N.J. Eq. 364, 370, 21 A. 935 (1891).

divorce would never be possible. "It takes two to tango," and no marital rupture is totally caused by one spouse only. A judicial obsession with fault, moreover, appears to promote dissolution of marriage rather than reconciliation, in that it reinforces the very natural tendency to attribute fault elsewhere. Conciliation and attribution of "fault" are themselves irreconcilable.

(4) When dissolution is ordered, property settlements and monetary payments are to be administered as rewards to the innocent and punishment to the guilty. This collection ventilates this supposition in several ways. Traditionally, the financial weapon is considered available to the judge only when he finds a marriage once to have existed. If there was no "marriage" as a matter of "law," the weapon is blunted except as a woman is denied a claim to property which she and her mate amassed together as punishment for her having entered into a "meretricious" relationship in the first place. It is thus not a very effective coercive weapon. Furthermore, a "guilty" ex-spouse or ex-mate, and particularly an ex-wife, has to eat. If her former husband does not support her, the state must or she starves. If the "guilty" one is the ex-husband, he probably will not starve unless he is unemployable, but hardship will be experienced by the second family unit which in a great many instances he has already founded. There is no clear-cut solution to any of these dilemmas, and everyone concerned, including the taxpayer, suffers to some degree; but it is quite apparent that use of a "fault" concept is about the least satisfactory basis of any on which to try to construct a viable system of assets allocation.

(5) Children are creatures subservient to the adults who brought them into existence. Courts and welfare agencies, though often speaking of the "best interests of the child," are usually preoccupied with the race, blood, religion and heredity of one or both of the biological parents. If, however, one begins with the insights of sociology or psychiatry, most of the concerns of the law are misplaced. For example, child placement for adoption is often limited by considerations of whether the natural mother (or parents) and the would-be adoptive parents have the same religion. Viewed from medieval Rome or Reformation-era Geneva or London, this might be all important, since what matters is salvation of the child's soul and his redemption from error, however hellish or stunted his temporal life may be. But if one's concern is to lodge the child in an harmonious environment, the primary consideration is that the parents share the same general outlook, whether that be popularly cataloged as atheist, agnostic, Protestant, Catholic, Jewish, Buddhist or whatever. If the adoptive parents are

a member of a militant sect viewed as schismatic by much of the community in which the child will live, that is a relevant consideration, not in terms of the propriety of the parents' religious belief, but because of the impact that isolation from or persecution by the community itself might have upon the child. The matter of marriages crossing racial, national or economic lines should be viewed in exactly the same way. Incipient clashes within and without the family should be identified and compensated for as far as possible before they arise; even if the adoptive parents are in a stable relationship, there is still the community to be taken account of. In all of this, the net impression is that if the child, and not the three or four (or more) adults in actual or potential relationship to him, were in fact our focus and his welfare our primary aim, most of the existing law would be almost completely rewritten.

(6) Legal doctrines shape human conduct. This both bolsters and is a natural product of judicial egotism. A contrary supposition, which *The Family and the Law* does much to support, is that people manage to get what they want no matter what the law says, so long as personal desire and legal mandate are in contradiction. The editors have a most felicitous way of making this clear. In a great many instances in which the appellate decision included in the book has been decided since 1955, counsel for both sides have been asked to supply information about what happened after the close of litigation. In only a few instances would it seem that the courts underwrote the expectations of the parties and sent them on their way content. In most, either the judicial mandate has been evaded, by migratory divorce or otherwise, or there has been submission in form to the court's decree without any substance to back it. Here, too, if we should set out to shape the law to human processes, rather than the converse, family law would assume a far different shape than it does.

(7) Other organs of government are to conform their practices to standards laid down by judges. A more comprehensive view might lead to a conclusion that most functional determinations are made by welfare and other administrative agencies, and that judicial doctrine should be shaped as far as possible to conform to policies generated and enforced in the executive branch. True, lawyers and judges are most important as the means to preserve functional "due process" in the machinery itself, but they are among the persons least qualified in the community to determine the substantive coverage of formal norms relating to the family.

In short, the format of *The Family and the Law* and the abundance

of comparative material which it provides cannot help but promote a living awareness of the limitations of law, and the scope of effective utilization of law, in the regulation of the family. It is a work which judge or lawyer can use in rethinking his own attitude toward the desirability and limits of effectiveness of litigation involving the family. Nevertheless, it is not intended primarily for this purpose, but instead for instructional purposes. How effective a tool is it likely to be in the classroom?

On the whole it opens the classroom window to the real world just as its predecessor did for the field of substantive criminal law. Dr. Andrew S. Watson and I have used *Criminal Law* for three years, and would not be content to return to a traditional casebook. As of now we expect the same thing to be true if we adopt *The Family and the Law*. But I have one reservation which has strengthened as we have taught from *Criminal Law* and which probably applies to the present work as well. Both books have their primary impact because they abandon traditional classification and terminology and hammer home to the student the idea that there are many other ways to analyze and attempt to solve human problems than through the law. But this has its greatest effect if the student is already aware of at least the outlines of traditional classification and analysis in the law. In other words, a man does not sail in the race from Port Huron to Mackinac Island until he has learned to handle a Sailfish on an overgrown puddle. A student, or for that matter a novice instructor, may encounter great difficulty in tying, for example, flitting references to recrimination, affinity or judicial separation into any conceptual structure which he will encounter as a lawyer. This is compounded by the fact that the editors in pursuing other, and probably in the long term more important, goals refer very little to law review material, treatises for the practitioner, or other accessible legal writing. The lack of ties to tradition can produce a level of frustration in the student almost as high as that created at the other end of the spectrum when a law instructor summarily squelches a student who expresses doubt about whether legal norms are in fact meaningful or effective. Is there any way to cope with this?

It is my understanding that in teaching criminal law at Yale, using *Criminal Law*, students are expected to consult regularly one or more of the standard one-volume texts like Hall, Williams, Miller, Clark and Marshall or Perkins. While these works vary in their quality, they probably can provide the necessary background acquaintance with legal tradition, particularly if students are told at what points in the course certain portions of the texts are relevant. But this is not a very helpful

device when it comes to family law. The only student text available is hopelessly outdated,[12] and the larger works are either pedestrian or outdated, or both. He might find some help from law review articles, but for the most part he will have to use the *Index to Legal Periodicals* or a more orthodox casebook to find them. This can be a difficult order to fill for a student laboring under a heavy load of courses and research.

I am inclined to believe that the solution lies in making use of the developing technique of programmed instruction. A program, properly drawn and tested, is a learning and teaching device much superior to a text. It embodies an orderly progression of ideas in any body of knowledge which can be broken down into principles, variations on principles and the mode of their application to specific problems. In other words, it does in a somewhat different format what the case system is now supposed to do in a conservative law school curriculum. The course in Family Law which I hope to develop, therefore, is one in which during the first month or so the student works through programmed material more or less at his own speed, probably with no instructor contact at all for the moment. An objective examination can then test the degree to which the student is able to make use of orthodox language in traditional case settings. From that point on classroom sessions will begin, with joint instruction by lawyer and psychiatrist or sociologist based on whatever segments of *The Family and the Law* the instructors find most useful to them in achieving the aims of the course as they see it. Since the editors do not intend the book to be covered as a whole in any one course,[13] it does no violence to their intent to use portions of it as the basis for an individualized course. With a format like this, perhaps the student may have the best of both worlds of scholarship, the traditional and the experimental.

In summary, *The Family and the Law* is a long overdue ventilation of the stuffy field of family law, a *Flapper* to terminate "intense Speculations." It may serve to bring teaching in that field into the twentieth century, and in time to promote a more realistic mending of the fractured family than our profession seems to achieve now. Lemuel Gulliver would have approved.

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12. MADDEN, DOMESTIC RELATIONS (1931).

13. See p. vii.

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