Book Review

Family Law in Practice and Theory

AMERICAN FAMILY LAW IN TRANSITION. By Walter O. Weyrauch* and Sanford N. Katz.† Washington, D.C.: The Bureau of National Affairs, Inc. 1983. Pp. xix, 629. $35.00.

Reviewed by
LYNN D. WARDLE††

I. INTRODUCTION

In a recently published and widely discussed symposium on law school curricula, several distinguished law professors concluded that "legal education has been unwisely dominated for too long by the study of doctrine and rule-manipulation, [and] there must be greater emphasis upon *both* the broader theoretical underpinning of law and legal systems *and* the practical role and tasks of the lawyer . . . ."[1] One of the writers, Roger Cramton, specifically recommended:

> The basic [law school] curriculum should include more departures from this middle road, both in the direction of the high road of legal theory (what is the nature of law? what are the limits on its efficacy? what do we mean by justice and its fulfillment in the real world?) and in terms of putting doctrine to work in solving customary legal tasks. This shift would also give greater emphasis to planning and preventive law activities of lawyering, as distinct from after-the-fact litigation which is now the almost exclusive focus of law school.[2]

Professors Walter O. Weyrauch and Sanford N. Katz share these views and have written a book in an attempt to solve part of the problem. The unmistakable premise of their book, *American Family Law in Transition*,[3] is that the most important facet of the practice of family law is the impact that family relationships and changes in family relationships have upon the economic interests of family members. Professors Weyrauch and Katz are not alone in believing that the practical aspects of family law

---

* Professor of Law, Spessard L. Holland Law Center, University of Florida. Dr. Jur., University of Frankfurt Main, Germany 1951; LL.B., Georgetown University 1955; LL.M., Harvard University 1956.

† Professor of Law, Boston College Law School. A.B., Boston University 1955; J.D., University of Chicago 1958.

†† Professor of Law, J. Reuben Clark Law School, Brigham Young University. B.A., Brigham Young University 1971; J.D., Duke University School of Law 1974.

1. Gorman, *Legal Education at the End of the Century: An Introduction*, 32 J. LEGAL EDUC. 315, 319 (1982) (emphasis in original); *see also* Klare, *The Law-School Curriculum in the 1980s: What's Left?*, 32 J. LEGAL EDUC. 336 (1982); Michelman, *The Parts and the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352 (1982).

2. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 331 (1982).

3. W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION (1983).

have been neglected in the teaching of family law. This oversight may be due, in part, to the traditional focus of family law casebooks on the ever changing doctrines or rules of law, complemented by some discussion of the policies behind the rules, and the corresponding lack of emphasis on how the law is applied by practicing lawyers and trial courts or the effects of its application on the lives of family members in specific cases. Now, Weyrauch and Katz have written a family law casebook entirely from the perspective of the family law practitioner, with specific emphasis on the business and property aspects of family law.

II. Review of Contents

American Family Law in Transition is a casebook designed for use in introductory family law courses. It consists of judicial opinions or excerpts (116 cases) plus the authors' comments (60 comments, including the chapter introductions, which average 2–3 pages each) arranged in five chapters. In the Preface, the practical orientation of the book is clearly identified: "The emphasis of this book is on practice, creating a perspective for those confronted with family law problems, including aspects of planning, counseling, and trial strategy."[4]

A. *Marriage and Contracts*

Weyrauch and Katz introduce their business/property view of marriage immediately. Chapter One, entitled "Marriage as Contract or Partnership (Co-Ownership) for Profit," begins with a discussion of "party autonomy" in marriage (*i.e.*, relationships defined by antenuptial contracts and other similar agreements). The authors underscore the advantages of premarital contracts "to safeguard deliberation" before marriage.[5] Next, the question of whether marriage should be considered a matter of status or contract is discussed. The authors favor the contract view, but note that "legal practice can live with and accommodate apparent contradictions with ease."[6] Last, the economic consequences of looking upon marriage as a partnership or business arrangement, with equal rights to enjoy income and property, and with equal liabilities for debts and obligations, are considered. The authors state and demonstrate that "ordinary business law practice can require a full mastery of family law."[7]

While Chapter One initially seems unbalanced because of the exclusive focus on a contractual, business-oriented conception of marriage, the cases clearly demonstrate that the economic consequences of marriage can be as significant as those resulting from ordinary commercial enterprises. Hence, it is prudent for lawyers and their clients to give as much deliberation to marriage before proceeding with that step as they do to commercial partnerships or investments before making those commitments. Of course, in light of the frequency of litigation over antenuptial contracts

4. *Id.* at vii.
5. *Id.* at 43.
6. *Id.* at 59; *see also* Weyrauch, *Metamorphoses of Marriage*, 13 Fam. L.Q. 415 (1980).
7. W. Weyrauch & S. Katz, *supra* note 3, at 79.

upon death or divorce, it would be unrealistic to expect such agreements to prevent all litigation. Nevertheless, careful premarital deliberation and discussion between prospective spouses of their individual expectations concerning marriage would set a healthy pattern that might avoid—or facilitate the resolution of—problems during the marriage, as well as after death or dissolution.

One characteristic that makes Chapter One and the entire book especially interesting is the revelation of information about the cases and the parties that was not discussed in the court opinions. For instance, following the opinion of the United States Supreme Court in *Maynard v. Hill*,[8] the authors reveal the following information, which sheds a fascinating light on the decision of the Court:

> David S. Maynard was a powerful figure in American history. Initially trained as a doctor, he founded a medical school in Ohio and later, after his move across the country, became one of the founders of the State of Washington and the city of Seattle. The same legislature of the Territory of Oregon, having jurisdiction over what later was to become the State of Washington, granted Maynard his divorce from his first wife, created King County upon his suggestion, declared him to be notary for King County, and established a county seat on his land claim. Obviously he was a man who could demand and receive almost anything from the legislature.[9]

Providing such detailed historical context emphasizes the authors' point that often practical factors had a more profound effect on decisions in landmark cases than the doctrinal points for which the decisions have come to stand.[10]

B. *Quasi-Marital Relationships*

Chapter Two, entitled "Informal Marriage," focuses on the abundance of different legal doctrines that permit unmarried cohabitants to obtain economic shares similar to those they would have been able to obtain had they been married. This chapter includes cases illustrating doctrines such as putative marriage, marriage by estoppel, partnership, joint venture, express trust, resulting trust, constructive trust, express contract, and implied contract. The cases concern disputes arising at or after the termination of a relationship that one or both of the parties thought was a valid marriage or in which the parties occupied a quasi-marital relationship with each other. Under these circumstances, the economic interests are often the predominant aspect of the relationship. Therefore, it is valuable for law students to realize that the legal theories and doctrines they have learned in courses on property law, business law, partnership law, agency law, and remedies may be applicable.

The treatment of the well-known palimony dispute between Lee Marvin and Michelle Triola Marvin is superb. Weyrauch and Katz set forth the opinion of the California Supreme Court, in which the right of unmarried cohabitants to recover

---

8. 125 U.S. 190 (1888).

9. W. WEYRAUCH & S. KATZ, *supra* note 3, at 59–60. For other examples of similarly intriguing historical information, see *id.* at 44, 60.

10. *Id.* at 59. This approach underscores Professor Weyrauch's previously expressed criticism of depersonalizing or "masking" the humanity of the participants in legal processes. *See* Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CALIF. L. REV. 699 (1978).

from each other upon theories of express and implied contract, partnership, joint venture, *quantum meruit,* and other equitable theories is recognized.[11] The authors go further, however, and include the exhaustively detailed subsequent opinion of the trial court, which granted rehabilitative quasi-alimony,[12] and the even later opinion of the California Court of Appeals, which overturned the trial court's award as being outside of the issues of the case as framed by the pleadings and unsupported by any recognized equitable doctrine.[13] The attention given the subsequent *Marvin* decisions is consistent with the authors' emphasis on the practical side of family law and their desire to bring major family law doctrinal decisions into perspective by exposing their context and practical consequences. Moreover, the comment on the *Marvin* cases, which emphasizes implications for legal practice, is especially thoughtful.[14]

The authors' treatment of the putative spouse doctrine, however, may be inadequate. Weyrach and Katz include only one putative spouse case in Chapter Two, a choice that may be criticized on two grounds. First, the putative spouse doctrine is not limited to community property jurisdictions; the same or similar doctrines, labeled differently, have been applied in most common-law jurisdictions.[15] Second, the case the authors include, *Sousa v. Freitas,*[16] does not represent the only, the prevailing, or even necessarily the best approach to determining the property share of a putative spouse.[17]

C. *Marriage and Equality*

Chapter Three, entitled "Equality in Marriage," addresses an eclectic collection of topics. This chapter includes cases dealing with what the authors call the "incidents of equality" such as a married woman's option of not assuming the name of her husband, the child rearing rights of fathers, alimony for men, and the right of married women to recover for loss of consortium. The authors commendably call attention to a neglected area of the law by including a case dealing with the propriety of a judge's wife running for a political office[18] and a formal opinion of the American Bar Association ethics committee concerning the propriety of lawyers who are husband and wife representing clients with adverse interests.[19] These cases and the authors' comments focus on the intriguing subject of the potential for marriage to restrict the right of a married person to engage in professional or political activity because of the spouse's employment.[20]

---

11. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

12. Marvin v. Marvin, 5 Fam. L. Rep. (BNA) 3077 (Cal. Super. Ct. 1979), *rev'd,* 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981).

13. Marvin v. Marvin, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981).

14. *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 204, 205.

15. *See* L. Wardle, C. Blakesley & J. Parker, Family Laws in the United States § 34:01–:02 (Oct. 1983) (unpublished manuscript in press).

16. 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970).

17. *See generally* W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 337–40 (2d ed. 1982).

18. *In re* Gaulkin, 69 N.J. 185, 351 A.2d 740 (1976).

19. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 340 (1975).

20. *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 261–68.

Three Supreme Court decisions dealing with contraception and abortion are also included in Chapter Three.[21] The abortion cases raise very profound but awkward questions for serious family law scholars. The issues are profound because they touch the very core of family law concerns: does the family include unborn children; is a child not a child because it is unborn; is abortion a form of child abuse; does the principle of parental autonomy justify the practice of abortion; does a principled distinction separate the abortion doctrine from doctrines that are protective of children; and do any elements distinguish the abortion decision from other procreative decisions in which the interests of parents and spouses are preserved? The awkwardness results from the popularity of the abortion rulings among lawyers; one does not ask embarassing questions about justifications for practices that one's colleagues enthusiastically support.

Although Weyrauch and Katz evidently are troubled by questions like those listed above concerning the Supreme Court abortion decisions, they try to avoid the policy debate and focus on the practical implications of the rulings.[22] The authors' practical perspectives about the abortion doctrine are valuable, but their conceptualization of those cases as establishing principles of "equality in marriage" is severely strained. It is difficult to see how a doctrine that gives a wife the unilateral right to decide to destroy the life of a jointly conceived child *in utero* contributes to equality in marriage. Equality connotes mutuality, not exclusivity, and it hardly seems necessary to exclude the father of the unborn child from the abortion decisionmaking process merely to protect "the female partner in marriage in her equal role."[23]

Nevertheless, the authors cannot be faulted too severely for this misconception since the Supreme Court, which created the abortion doctrine, has been unable to articulate a principled conceptualization of the abortion cases.[24] The problem, simply stated, is that the abortion decisions are sui generis. The Justices themselves have distinguished the abortion decisions from other decisions concerning family life.[25] Family law scholars should candidly admit that the abortion decisions are out of harmony with prevailing general principles in family law rather than wrench, twist,

---

21. Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 235–53.

22. In their effort to avoid the contemporary social and legal policy controversy, the authors have unfortunately given an unnecessarily broad reading of the contraception and abortion cases. *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 226, 300. *See generally* L. WARDLE, THE ABORTION PRIVACY DOCTRINE 303–11 (1981).

23. *Id.* at 226.

24. Archibald Cox put it best when he wrote: "My criticism of *Roe v. Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment . . . ." A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976); *see also* A. BICKEL, THE MORALITY OF CONSENT 28 (1975) ("One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject."); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 936–37 (1973) ("At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking."). *See generally* Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 B.Y.U. L. REV. 811, 830–32.

25. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979) (Powell, J., plurality opinion) (marriage by minors distinguished); Parham v. J.R., 442 U.S. 584, 623 n.6 (1979) (Stewart, J., concurring) (commitment of minors in mental institutions distinguished).

and pretend otherwise. Of course, the admission that the abortion cases are inconsistent with established family law principles does not mean that the aberration of the abortion doctrine might not be justified by special circumstances pertaining to the unique abortion decisions,[26] but that is another question.

Finally, Chapter Three includes cases dealing with no-fault divorce and its effects on property, alimony, and support obligations.[27] While the connection between these cases and the theme of equality is unclear, the case selection is excellent and the comments are illuminating.

D. *Reduction of State Involvement in Marriage*

The theme of Chapter Four, styled "State Involvement in Marriage," is that in recent years state regulation of marriage has declined. The authors explain:

> Marriage becomes a matter of active legal concern chiefly when it is in trouble, breaking up, or terminated by death. Even then the primary interest appears to be to allocate and distribute property rights, and the marriage itself is incidental to such disposition . . . . Formal requirements to obtain a marriage license and the capacity to marry are ordinarily of no serious legal import . . . unless years have passed and an action for annulment of marriage is brought or the alleged invalidity of marriage is claimed to affect devolution of property upon death. The state is interested in and regulates these proprietary issues, and in so doing it regulates marriage.
>
> . . . .
>
> . . . Moral considerations, of course, continue to be prevalent in personal relations, but on a social and religious level rather than as a matter of governmental intervention.[28]

The introductory comments to Chapter Four are superb. In this thought provoking introduction the authors make two points. The first is that the definition and regulation of marriage *qua* marriage is a secondary consideration "that comes up incidentally in distribution and adjudication of rights to private property."[29] This perspective "views marriage as essentially a prelude to potential issues of property";[30] the definition and regulation of marriage are only incidental.

Second, consistent with their first point, the authors focus on what Mary Ann Glendon calls "the new property."[31] Weyrauch and Katz note that "the focus of proprietary concern is shifting to universal entitlements. In particular, the importance of property distribution upon death is being slowly replaced by a growing list of entitlements during life."[32] The authors perceive a conflict in the cases between the conception of "new property" and the policy of minimizing tax expenditures.[33] They

---

26. *But see* L. WARDLE & M. WOOD, A LAWYER LOOKS AT ABORTION 77–90 (1982).

27. Manning v. Manning, 237 Ga. 746, 229 S.E.2d 611 (1976), *overruled,* Dickson v. Dickson, 238 Ga. 672, 235 S.E.2d 479 (1977); *In re* Marriage of Williams, 199 N.W.2d 339 (Iowa 1972). *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 302–17.

28. W. WEYRAUCH & S. KATZ, *supra* note 3, at 350, 352.

29. *Id.* at 353.

30. *Id.* at 350.

31. M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981). The term "the new property" refers generally to "new forms of property, such as jobs or entitlements." *Id.* at 3.

32. W. WEYRAUCH & S. KATZ, *supra* note 3, at 351.

33. *Id.* at 380.

suggest that "[t]he wall separating the well-off from the poor is crumbling" and that concomitantly the previously existing dual system of family law—"the courts and private law dealing with the rights of the reasonably affluent, on the one hand, and the legislative and executive branches of government concerned with the duties of the less fortunate, on the other"—is disappearing.[34]

As noted earlier, the primary theme of Chapter Four is that state interest in and regulation of marriage is decreasing. In support of this thesis, the authors include opinions in which courts have demonstrated greater flexibility in applying marriage prohibitions and formality requirements.[35] Interestingly, no cross reference is made to the cases in Chapter Two dealing with common-law marriage. If state involvement in the process of forming marriage were truly waning, an increase in the number of states allowing common-law marriage or, at least, a relaxation of the requirements for creating common-law marriages in those states that already allow them might be expected. But such a trend has not developed.[36] In fact, Professor Daube suggests that the overall historic trend is in precisely the opposite direction.[37]

Cases designed to demonstrate what the authors describe as the "waning state involvement in termination of marriage"[38] are also discussed in Chapter Four. Although no-fault divorce cases would have demonstrated this point very well, the authors included those cases in Chapter Three. Consequently, the cases in this chapter deal with jurisdiction for divorce,[39] full faith and credit,[40] and comity.[41] This is one of the strongest and most worthwhile sections of the book; the case selection is outstanding and the comments are excellent. Ironically, however, the impression conveyed by the cases is not that state involvement in the termination of marriage is waning, but that at least the procedural issues arising upon the termination of marriage are as complicated and entangling as they have ever been.

E. *Parent-Child Relationships*

The final chapter of the book is entitled "Children: In or Out of Privity." The authors' decision to limit their discussion of parent-child relations in family law to one chapter and to put that chapter at the end of their book is consistent with their

---

34. *Id.* at 351.

35. Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 65 (1958); Bilowit v. Dolitsky, 124 N.J. Super. 101, 304 A.2d 774 (1973); F.A. Marriage License, 4 Pa. D. & C.2d 1 (1955). *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 353–65.

36. It has been more than eight years since a Florida Governor's Conference on Marriage and the Family Unit recommended that "'common law marriage should be reinstated,'" Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 102 n.5 (1976) (citing Letter from Professor Weyrauch to the author (Jan. 8, 1976)), yet no resurgence of common-law marriage recognition has occurred.

37. Daube, *Historical Aspects of Informal Marriage*, 25 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 95 (1978).

38. W. WEYRAUCH & S. KATZ, *supra* note 3, at 434.

39. Sosna v. Iowa, 419 U.S. 393 (1975); Leader v. Leader, 73 Mich. App. 276, 251 N.W.2d 288 (1977). *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 434–45.

40. Estin v. Estin, 334 U.S. 541 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. North Carolina [II], 325 U.S. 226 (1945); Williams v. North Carolina [I], 317 U.S. 287 (1942); Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958). *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 445–85.

41. Yoder v. Yoder, 31 Conn. Supp. 345, 330 A.2d 825 (1974); Hyde v. Hyde, 562 S.W.2d 194 (Tenn. 1978). *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 485-94.

business/property approach to family law. Also consistent are the introductory comments, which note that the historical treatment of children in family law can be explained from the perspective of property rights: children once were viewed as "the future heirs" of the property of their parents and in relation to their parents "acquired some of the characteristics of property, or chattels."[42] The authors admit that the role of children is difficult to conceptualize clearly if marriage is viewed exclusively as a matter of partnership or property. From that perspective, they note, children could be viewed as assets, products, or consumers of the marriage[43]—to which might have been added liabilities, limited partners, investors, shareholders, or employees.

The first two sections of this chapter are the most valuable, for in them are discussed the very practical issues of custodial alternatives and factors influencing custody decisions.[44] As in the preceding chapters, the authors emphasize practical perspectives, and their astute observations demonstrate the thinking processes of two very capable lawyers.[45]

The discussion of the policy conflicts in custody questions is very perceptive. Two points stand out. First, the authors emphasize that a totally subjective, discretionary "best interests of the child" standard for determining custody may not actually be in the best interests of children. Instead, they argue that finality and family peace are in the best interests of children and that the apparent subjectivity of the "best interests of the child" standard may encourage perpetuation of conflict and turmoil.[46] This point is well made without being overdone; the authors acknowledge the failings of the present standard but realize that the judgment and common sense of the trial judge are indispensable ingredients in child custody determinations.

Second, the authors' realistic appraisal of joint custody is impressive.[47] Simply stated, joint custody is considered by many to be more beneficial to children of divorced parents than other custody arrangements because it resembles, more closely than any other child custody arrangement, the structure of predivorce family relations. It is the least dissolved of all postdissolution family structures. Children need stable families, no less when their parents' marriage fails than when it succeeds. Yet despite the advantages of joint custody, Weyrauch and Katz are not oblivious to its potential disadvantages:

> The ideal of joint custody of children after divorce, by comparison, appears to have a utopian quality. It pretends, for purposes of child custody, that the marriage continues. This unreality may be confusing to a child and indeed detrimental in that it prevents the child from confronting the divorce and its effect on the once intact family unit. Further complications arise when the child's parents remarry and form new relationships. . . . [W]hat may be psychologically desirable for children should not be confused with what in fact takes place in child custody proceedings and what actually happens thereafter.[48]

---

42. W. WEYRAUCH & S. KATZ, *supra* note 3, at 495.
43. *Id.* at 497.
44. *Id.* at 498–564.
45. *See, e.g., id.* at 505–08, 514, 535, 550, 559–63.
46. *Id.* at 550.
47. *See id.* at 519–21.
48. *Id.* at 520–21.

Overall, the authors present a balanced perspective on child custody that is understanding and sympathetic, yet practical and realistic.

Chapter Five also deals with the rights of children born outside of marriage.[49] This section accurately sketches the state of the law and the policy tensions inherent in it. In addition, the authors' comments concerning the tragic difficulties that would exist if all unwed fathers automatically had the power to block adoption proceedings have been partially vindicated by the recent Supreme Court ruling in *Lehr v. Robertson*.[50]

Another section, entitled "Children as Persons," reveals that the practice-oriented approach is not without its shortcomings. Three cases[51] and two pages of commentary[52] do not even begin to address the provocative policy questions that are implicated in any discussion of the rights of children vis-à-vis their parents or the state. The authors' laudable emphasis on the street-level perspective of the practicing family lawyer rather than the systemic perspective of the family law policymaker does not justify the incomplete treatment accorded to this immensely important subject. Nor does it explain the singular policy viewpoint that is conveyed in the cases selected by the authors. Two of the cases presented, *Bellotti v. Baird*[53] and *Phelps v. Bing*,[54] make similar arguments and reach similar conclusions supporting the rights of unemancipated minors to make extremely important decisions without parental approval (and, in *Bellotti*, arguably without parental involvement). These cases present the same policy perspective on a profound issue about which other important perspectives are worth considering. Moreover, the issues, analysis, and conclusion of the *Phelps* case duplicate *Lavato v. Evans*,[55] which is included in Chapter Three.[56]

The policy reflected in the brief glimpse of the children's rights issue in this section is myopic. The prospect of "abandoning youth to their rights" is disquieting.[57] A few years ago Ferdinand Schoeman addressed some of these concerns:

> We typically pay attention to the rights of individuals in order to stress their moral independence . . . . In other words, the language of rights typically helps us to sharpen our appreciation of the moral boundaries which separate people . . . .
>
> Ideally the relationship between parent and infant involves an awareness of a kind of union between people which is perhaps more suitably described in poetic-spiritual language than in analytic moral terminology. We *share our selves* with those with whom we are intimate and are aware that they do the same with us. Traditional moral boundaries, which give rigid shape to the self, are transparent to this kind of sharing. . . .

49. *Id.* at 582–618.

50. 103 S. Ct. 2985 (1983).

51. Bellotti v. Baird, 443 U.S. 622 (1979); White v. White, 296 So. 2d 619 (Fla. Dist. Ct. App. 1974); Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (1974). *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 564–80.

52. W. WEYRAUCH & S. KATZ, *supra* note 3, at 580–82.

53. 443 U.S. 622 (1979).

54. 58 Ill. 2d 32, 316 N.E.2d 775 (1974).

55. 1 Fam. L. Rep. (BNA) 2848 (Utah Dist. Ct. 1975).

56. *See* W. WEYRAUCH & S. KATZ, *supra* note 3, at 383–86.

57. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605.

> The danger of talk about rights of children is that it may encourage people to think that the proper relationship between themselves and their children is the abstract one that the language of rights is forged to suit.[58]

In other words, the risk of declaring the rights of children is that instead of encouraging parents and children to focus upon the values of sharing, caring, and selflessness (dare I say love?) that are the essence of, and give the greatest meaning to, the relationship of parent and child, a children's rights approach focuses upon separateness, rigidity, and *quid pro quo*. Rights are not what parent-child relations are about. The authors' attempt to force the analytical framework of individual rights upon the parent-child relationship may be like trying to force a square peg into a round hole. But for lawyers, especially academic lawyers, this may be an error of habit. As Mark Twain is reputed to have said, if the only tool you have is a hammer, all of your problems will look like nails.

III. General Criticism

One general criticism of *American Family Law in Transition* is that, perhaps in an attempt to keep the book to a moderate length (to avoid "being encyclopedic," as they put it),[59] the authors left out some materials the inclusion of which would have strengthened the book. The book seems incomplete in two respects: first, it does not adequately address the practical noneconomic factors that are extremely important in most family law disputes; and second, the theory or policy of family law is considered only haphazardly.

Although the practical economic considerations of family law are revealed with clarity and insight,[60] the significant noneconomic aspects of family law practice are not. The economic facets of marriage are not the only, or even the most important, aspects of the most troubled relationship in modern America. Even though it is axiomatic that dealing with the emotional and social aspects of troubled family relations may be far more important in achieving a successful resolution of a client's family law problems, this book pays little attention to client interviews, client counseling, client referral to other professionals, alternative means of dispute resolution such as mediation or conciliation, and similar topics. Similarly, professional responsibility dilemmas, including dual client representation in divorce and the ethical and practical considerations concerning the setting, securing, and collecting of fees for legal services and the use of contingent fees were neglected. Inclusion of materials dealing with these issues would have presented a more complete picture of family law from the perspective of the practicing lawyer and trial judge.[61]

---

58. Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 Ethics 6, 8–9 (1980) (emphasis in original).

59. W. Weyrauch & S. Katz, *supra* note 3, at viii.

60. The tax and bankruptcy aspects of divorce are the only economic issues that should have been included but were not.

61. Professor Katz has eloquently acknowledged these concerns elsewhere:

> [W]e lawyers should feel a sense of obligation to assist our clients, whether male or female, in understanding the enormous adjustment problems that they will face after divorce. We should view our responsibility as first trying to help prevent marital-breakup. I do not make this suggestion naively. I know some marriages are "irretrievably broken" by the time a lawyer is sought. But many, I am sure, are salvageable if lawyers will discuss on a realistic plane all that divorce involves.

Katz, *Humanizing the Divorce Process*, Fam. Advoc., Summer 1981, at 63.

Also, a cogent presentation or discussion of the social policies and theories that are the foundation for the rules and application of family law is omitted.[62] Although occasional comments are made about policy considerations, the book lacks a systematic consideration of the theory or policy of family law. This omission is both unfortunate and unnecessary. As Robert Gorman has noted, "the teaching of the theoretical and practical is mutually reinforcing."[63]

Weyrauch and Katz are not the only family law scholars to ignore the theory of the law. Unquestionably, American family law is in need of a good theory today, and few scholars have risen to the challenge. The best recent scholarship is by Bruce Hafen. In an excellent article, Hafen articulates a cogent justification for extending special, favorable treament in law to relationships of marriage, adoption, and kinship, focusing on the purposes of a democratic society. Additionally, he undertakes the Herculean task of reconciling the major Supreme Court family law decisions under his theory with impressive success.[64] Another excellent theoretical discussion is contained in James Fishkin's thoughtful monograph, *Justice, Equal Opportunity, and the Family*.[65] Fishkin describes what he calls the "trilemma" of American liberalism in which society, although committed equally to the principles of merit, equal life opportunity, and family autonomy, cannot achieve any two of these goals without foreclosing the third.[66] Moreover, Professor Laurence Tribe,[67] his Harvard law students,[68] and others[69] have espoused a popular theory of family law that essentially views the family as just another "private" association whose legal interests are simply the interests of the individuals who make up the family.[70]

Weyrauch and Katz make several references to a "new theory" of family law[71] and suggest in various places that the theory has something to do with "autonomy."[72] Individual autonomy, however, is not a "new theory."[73] Furthermore, while autonomy may be an important ingredient in any theory of family law, surely there is more to it than that.[74] In some contexts of family law, it is difficult to distinguish protected individual autonomy from mandatory social apathy.[75]

Notwithstanding the absence of an articulated, cogent theory of social policy regarding the family, *American Family Law in Transition* is a book of theoretical significance for two reasons. First, although Weyrauch and Katz have not described

---

62. The authors mistakenly suggest that a comprehensive discussion of some matters would have "assume[d] a closed intellectual system." W. WEYRAUCH & S. KATZ, *supra* note 3, at viii.

63. Gorman, *supra* note 1, at 319; *see also* Cramton, *supra* note 2, at 331.

64. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

65. J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY (1983).

66. *Id.* at 4–5.

67. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 882–84, 985–90 (1979).

68. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

69. *See, e.g.*, Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

70. "[T]he marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

71. W. WEYRAUCH & S. KATZ, *supra* note 3, at vii, viii.

72. *See, e.g., id.* at viii, 1–4, 43, 225–28, 250–52, 350–53.

73. *See supra* notes 67–70 and accompanying text.

74. For example, one might ask: How does individual autonomy relate to family autonomy and to family privacy? What other values underlie our system of family laws?

75. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973).

or explained a new theory of family law, they have illustrated one. Second, the authors contribute to legal pedagogy by teaching family law from the perspective of the practicing lawyer.

The authors' theory of the predominant social policy in family law is a theory of conflict resolution. Utilizing the best talents of experienced law teachers who are just as concerned about developing their students' ability to analyze cases competently and distill valid principles as they are with teaching their students those principles, the authors' thesis is reflected in the cases they have selected and is suggested, rather than stated, in their comments. Repeatedly, the authors allude to the idea that family law is best understood as the law of conflict resolution. This theory downplays the importance of social morality and other social policies. It implies that the courts, especially at the trial level, are less interested in social engineering—enforcing abstract theories of social good through state regulation of family relationships—than they are in securing peace, stability, order, predictability, and the protection of reasonable expectations within the family.

This "theory of family law from legal practice"[76] is a refreshing, undogmatic perspective. The "transition" that the authors see, at least at the trial level, is a movement away from absolutism of legal principle toward flexibility, a movement away from approaching and deciding cases with the goal of preserving intact the theory of the law toward approaching and deciding cases with the goal of resolving the disputes.

Perhaps the courts have not really been changing very much, however. The authors discovered their flexible approach when they looked at family law issues from the perspective of the practicing lawyer and the trial court. Practicing lawyers and trial courts probably have always been more interested in the pragmatic consequences of applying the law in particular cases than in preserving the pristine inviolability of the theory of the law. After all, no-fault divorce was a reality in most states long before legislation was enacted.

Even if they don't establish that the courts are moving toward a more flexible, pragmatic approach, Weyrauch and Katz make an important theoretical contribution to legal pedagogy by teaching family law from the perspective of the practicing lawyer. Perhaps in no other law school course has the traditional emphasis on teaching legal doctrines been as inappropriate as in courses on family law, which are unavoidably local in both substance and procedure. The traditional case method approach, emphasizing doctrinal trends in appellate court opinions, has graded and graduated generations of law students on the basis of knowledge about rules that have virtually no value outside of the jurisdiction in which they were rendered and that are often of only peripheral significance to the practice of family law anywhere. Students have completed law school ill-equipped to enter into the very pragmatic practice of family law and largely ignorant of the overarching theories of social policy that provide the intellectual context in which family law doctrines have developed. By

76. W. WEYRAUCH & S. KATZ, *supra* note 3, at vii.

emphasizing in their course book the practical perspective of practicing lawyers and trial judges, Weyrauch and Katz have made a major contribution to the theory of teaching family law.

Finally, concerning their thesis of "transition" in the law,[77] Weyrauch and Katz point out that social, economic, and political conditions have changed a great deal in recent years. No one would deny that. Further, they frequently note that legal rules are in a state of transition. Undoubtedly this is also true. Based on these findings the authors dutifully suggest that the theories undergirding the traditions of family law are inadequate. (I say "dutifully" because nearly everyone who writes about family law feels obliged to ritually kick the trainer while mounting the horse.) The changes in legal perspective, practice, and doctrine that the authors have identified, however, do not necessarily mean that the theory of the law needs to be modernized. Social changes and evolution of legal doctrines do not necessarily indicate theoretical obsolescence.

To understand why the claim of theoretical obsolescence is not necessarily valid, four points must be appreciated. First, the law has at least three levels: the policy of the law (law as theory); the doctrine of the law (law as written in statutes, regulations, or judicial opinions); and the application of the law (law as actually applied). Second, in some (many?) matters the law is not entirely consistent at all three levels.[78] Third, the different ethical claims that can be made about legal principles, which explain the relationship between the theory of the law and the law as written or the law as applied must be distinguished.[79] Essentially, the ethical claims range from what might be called inviolable (*i.e.*, the claim that a principle must be preserved and effectuated at all costs because it would be wrong to allow any exception to it) to what might be called advisory (*i.e.*, the claim that a principle is worth considering but is not worth enforcing through the compulsory instrumentalities of government). Fourth, the reason why the law is not consistent at every level is that the appropriate relationship between the theory of the law and the law as written may be different than the appropriate relationship between the theory of the law and the law as applied. One may logically conclude that it is more important to have the law as written clearly articulate some legal principles (*e.g.*, symbolic values) than it is to have them applied; while concerning other principles (*e.g.*, customary practices), one may conclude that it is not as important that they be specifically articulated as it is that they be applied.

Thus, to discover that the law as applied differs from the law as written does not necessarily mean that the theory of the law is changing or is inadequate. That the relationship between the theory of the law and the law as applied is not inviolable does not mean that the theory of the law is defective.

---

77. *American Family Law in Transition* is not as much about the law in transition as it is about changing the perspective from which we—*i.e.*, family law teachers and students—view the law.

78. J. COHEN, R. ROBSON & A. BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW 195, 198 (1958) (notes a large variance between the law as written and community moral sense).

79. *See generally* J. FISHKIN, *supra* note 65, at 170–77.

IV. CONCLUSION

American Family Law in Transition makes a valuable contribution to family law theory and pedagogy by focusing attention on the practical economic concerns and perspectives of the practicing lawyer. Weyrauch and Katz have very capably demonstrated that the perspectives of the practicing lawyer and trial court can be taught successfully within the framework of an introductory family law course. They have shown that teaching family law students about the practical considerations and actual consequences of the law as applied can be a stimulating intellectual exercise. Moreover, the casebook illustrates an important theory of conflict resolution in family law. Last, the work is a commendably manageable 618 pages of opinions and commentary. Thus, on balance, *American Family Law In Transition* makes an important and welcome contribution to family law literature.