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BOOK REVIEW

WHEN PARENTS FAIL: The Law's Response to Family Breakdown. By Sanford N. Katz. Boston: Beacon Press 1971. Pp. 251. \$12.50.

William F. Fox*

We sometimes think of the United States as a child-oriented society. As a result, it often comes as a surprise to the uninitiated that our system of law works occasional inequities when children are the subject matter. When the law focuses on the various relationships among state, parent, and child, the result is usually unpredictable, often confused, and sometimes downright unfair. How else explain the fact that it was not until 1967 that children accused of crimes were given some of the same rights of due process extended long before to adult criminal defendants?¹ The traditional pre-*Gault* explanation for this failure was based on "humanitarian" grounds; the poor little tykes should not be treated as hardened criminals. For the sixteen year old offender imprisoned until his majority for an offense which might have brought an adult a sentence of six months, this explanation does not entirely suffice.

Professor Katz has written a small book which examines an area perhaps even more obscure and less rigorously investigated than the juvenile criminal system. He looks into the law's reaction to the child who is not properly

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1. *In re Gault*, 387 U.S. 1 (1967). Moreover, although the courts have now afforded minimal due process rights for accused children, the legislatures have not yet seen fit to modify to any great extent the practice of convicting and sentencing children for misbehavior, such as incorrigibility and truance, for which adults are never punished.

cared for within his own nuclear family. That his book succeeds in making some sense out of this area of the law is probably due more to his own analytical ability than to the state of the law itself.

Why do we, as a society, worry about such things as family breakdown? An abandoned or neglected child in some other country might be immediately made a ward of the state with no judicial intervention, assigned to a state child-care center, and nurtured by civil servants until adulthood. Professor Katz claims that we make things somewhat more complicated because "[o]ur society prefers a family unit that is characterized by formal establishment, common residence, and economic independence."² We prefer this arrangement because the family ". . . performs several functions that are both basic to individual members and necessary for the continuation of our culture."³ This definition of the role of the American family may be the ideal, the "conventional wisdom" so to speak; but a closer analysis reveals that as a social unit, "the family . . . is less protected [legally] than corporations."⁴

The book is organized in five chapters which take the reader from a discussion of those standards we impose in a family from a societal standpoint ("Community Expectations of Parenthood") to the most drastic alternative to nurturing within one's own biological family—the process of adoption. In orderly and logical fashion the chapters move from simple neglect proceedings to the permanent termination of all parental rights.

The book is essentially a review of and comment on the literature of the law rather than an empirical study; but I cannot see this as a fault since the statutes and appellate opinions speak for themselves. Much more so than many other areas of the law, the law of parent-child is created by statute. The common law was as loath to interfere in the parent-child relationship as it was reluctant to interfere in any other form of private property ownership.⁵

2. KATZ, *WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN* (1971) at 1 [hereinafter cited as KATZ].

3. *Id.* at 1-2.

4. *Id.* at 3.

5. Clark notes that early adoption in the United States took the form of a property transaction. The adopted children were passed from one family to another by deed rather than by special judicial proceeding. H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 603 (1968) [hereinafter cited as CLARK].

A question few writers have addressed themselves to, however, is whether the pendulum has not now swung too far, making it too easy for the state or third parties to intervene between parent and child. Arizona and New Mexico, for example, have recently enacted statutes which permit termination of the parental rights of a natural parent irrespective of whether an adoption proceeding is to follow the termination. ARIZ. REV. STAT. § 8-531 to -537 (Supp. 1972); N.M. STAT. ANN. § 22-2-23 (Supp. 1973). See generally, DEP'T OF HEALTH, EDUCATION & WELFARE, LEGIS-

Virtually every state has some type of statute which permits the state to intrude on the parent-child relationship when the child is neglected. Professor Katz finds that neglect “. . . is usually manifested in a more passive context, often exhibited by a seeming indifference toward a child and an inability to carry out the expected roles of parenthood.”⁶ That seems fair enough. Parental neglect arises out of a parent’s refusal or inability to act as a parent—to care for his or her child in the way our society expects a parent to care.

Unfortunately, as the book so skillfully points out, like so much of Anglo-American law, this definition breaks down when extended over the lines of class and economic status. The notion that the neglect statutes are unequally applied to rich and poor parents is perhaps the most perceptive in the book—an idea well-known to those who practice in the area of family law (particularly in a legal services context), but maddeningly disregarded by legislators and the public. Statutory neglect, then, means one thing for the black ghetto resident and something completely different for the white suburbanite.

On the one hand we know, as a statistical matter, how many poor parents neglect their children because they are the ones dragged into court by neighbors, policemen, or social workers to answer for their indifference. Tenement walls, unlike suburban hedges, are usually paper-thin. But on the other hand,

[t]here is no way of knowing precisely how many parents neglect their children so long as our society protects the privacy of large numbers of families, particularly those in the middle and upper classes. This does not mean that middle- and upper-class parents do not neglect their children. . . .

[Rather] [i]n most instances community officials will categorize events that occur in middle- and upper-class areas as “social problems,” not cases of individual parental neglect.⁷

This forces us to ask some hard questions: Is there a difference in kind or only in degree between the working class father who leaves his child alone in the apartment while he goes down to the corner for a beer and the executive father who makes enough money to ignore the child in socially acceptable ways by farming him out to a boarding school? Is it any easier to cure the psychological harm inflicted on an upper-class child by a parent who himself has been taught to be subtle and gracefully insidious

LATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN 9-16 (Children’s Bureau Publication No. 394-1961, 1961).

6. KATZ 23.

7. *Id.* at 23-24.

than to remedy the physical effects of malnutrition? Clearly, there is not much difference between lower- and upper-class neglect, yet the lower-class parents find themselves in court while the upper-class parents usually escape liability entirely.

A second problem in parent-child law is one of definition. The statutes tell us that the state may intervene in the parent-child relationship on several grounds such as neglect, cruelty, "depravity", or simple unfitness. We are not told, however, precisely what these terms mean. Like the standard of "incompatibility" used in American divorce law, the terms and guidelines which underly state intervention between parent and child are, as Professor Katz points out, subjective. Indeed, the subjectivity is deliberate because the guidelines ". . . are designed to give a local judge, who is close to the family situation and knowledgeable about the community, discretion in interpretation and application."⁸ But the practical effect of such broad categories "is to make these standards subject to a judge's personal biases about sex, religion, and race"⁹

There is no doubt that this broad discretion has contributed in large part, to the disorder and unpredictability of American family law. We do not have to look very far for examples. A judge in South Carolina once awarded a wife alimony and child support in an amount equal to 90 per cent of her husband's gross income.¹⁰ The action of the Iowa Supreme Court in awarding custody of Mark Painter to his rural Iowa grandparents and denying a request for his return to the custody of his natural father (who happened to be an artist in San Francisco) has become a classic instance of the abuse of the "best-interests-of-the-child" test.¹¹ Professor Katz calls the reader's attention to the outburst of a trial judge in a California juvenile court case which involved a youth of Mexican-American descent:

The County will have to take care of you. You are no particular good to anybody. We ought to send you out of the country—send you back to Mexico. You belong in prison for the rest of your life for doing things of this kind. You ought to commit suicide. That's what I think of people of this kind. You are lower than animals and haven't the right to live in organized society—just miserable, lousy, rotten people.

There is nothing we can do with you. You expect the County to take care of you. Maybe Hitler was right. The animals in our

8. *Id.* at 59.

9. *Id.*

10. *Graham v. Graham*, 253 S.C. 486, 171 S.E.2d 704 (1970).

11. *Painter v. Bannister*, 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966).

society probably ought to be destroyed because they have no right to live among human beings.¹²

Perhaps these three examples can be explained as typical abuses of the discretionary powers vested in trial courts. The alternative, of course, is to incorporate standards and guidelines as part of the statutory mechanisms. Yet the statutory guidelines approach is usually rejected as being overly restrictive and an undue legislative interference with a process that requires flexibility on the part of someone closer to the dispute, in most cases the trial judge.

Unlike much of the scholarly criticism in family law, Professor Katz wisely does not avoid a head-on confrontation with the issue of trial court discretion versus statutory guidelines. Recognizing that unfettered discretion is unsatisfactory, he argues for broad statutory guidelines in the area of child neglect. Broad statutes, however, may often be no more workable than a pure discretionary standard just because of their breadth and inherent vagueness.

A good statute might well take a "middle-ground" approach perhaps best illustrated by the guidelines for awards of alimony set out in the Uniform Marriage and Divorce Act.¹³ These provisions¹⁴ are not compulsory requirements; they are instead suggested areas of inquiry to give the trial

12. KATZ 63.

13. THE UNIFORM MARRIAGE AND DIVORCE ACT [UMDA] has been promulgated by the National Conference of Commissioners on Uniform State Laws and is set out in full in 5 FAMILY L.Q. 205 (1971). Because of serious disagreements with the original UMDA the American Bar Association section of Family Law has revised certain sections of the UMDA and called these revisions the *Proposed Revised Uniform Marriage and Divorce Act*, the text of which is set out in full at 7 FAMILY L.Q. 135 (1973). However, the alimony provisions ("spousal maintenance" in the parlance of the Act) have not been affected.

14. The guidelines as set out in the *Proposed Revised Uniform Marriage and Divorce Act* are short yet comprehensive:

The maintenance order shall be in such amounts . . . as the court deems just . . . after considering all relevant factors including:

- (1) the financial resources of the party seeking maintenance, including property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) the standard of living established during the marriage;
- (4) the duration of the marriage;
- (5) the age, and the physical and emotional condition of the spouse seeking maintenance; and
- (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

§ 308(b), *Proposed Revised Uniform Marriage and Divorce Act*, 7 FAMILY L.Q. 135, 153 (1973).

judge some guidance in framing his decisions. The standards are sufficiently broad to permit the court to fashion a judgment tailored to an individual fact situation yet expressive enough to cover each of the specific areas into which every trial court should inquire before awarding alimony. A neglect statute could adopt this approach and set out similar guidelines which help ensure that the trial court looks into all relevant aspects of the child's environment.

Equally important, because Professor Katz realizes that trial court discretion cannot be abandoned entirely, he advocates the cultivation of increased awareness on the part of the judge on his own prejudices and scruples. He recognizes that decisions involving children are likely to evoke "emotional responses" in the trial judge regardless of whatever sanctions and guidelines even the best statute imposes. But if emotion cannot be suppressed—and the book argues that it should not be—judges must, at the least, "be aware of the influence of their emotions on their decisions and should know when . . . [emotions] are interfering with the making of an objective decision."¹⁵

As the book goes on to point out, there are other significant problems in parent-child law. Particularly in adoption matters, the judge is often much too easily swayed by the decisions and pronouncements of the investigating agency. Professor Katz believes that an agency recommendation in such matters carries with it almost a "presumption" of correctness. Of course, if this recommendation and the report of the investigation merely give the court another resource for its own decision-making, the use of an agency is beneficial. However, Professor Katz and other writers contend that many times there is over-reliance on the decisions of the agency and a corresponding reluctance to make an independent determination of the case. Such over-reliance constitutes an unfortunate abdication of court responsibility.¹⁶

Additionally, there is a wide variety of judicial opinion and statutory provision on the question of when parental consent to adoption can be terminated. The book indicates that the positions taken on revocation of consent range from the notion that parental consent once given is irrevocable (barring fraud or duress) to the idea that consent is "absolutely revocable until the final decree of adoption is issued."¹⁷ Most jurisdictions now, however, are assuming a middle position and providing for some (but not unfettered) judicial discretion on the question of revocation of consent.

There are some aspects of this book with which I quibble. It was often

15. KATZ 147.

16. *Id.* at 66. CLARK 616-17.

17. KATZ 119.

my impression that the book merely restates the established law in uncritical fashion with little or no discussion of new developments. For example, there is no discussion of a relatively new concept in American adoption law—due process rights for the adoptive parents. Although almost every adoption statute establishes statutory protections for the natural parents and for the child itself, there are virtually no procedural safeguards for the interests of the parents who seek to adopt. Since agency determinations are a crucial and often conclusive factor in adoption proceedings, the adoptive parents should be given some mechanism for challenging an adverse agency decision.¹⁸

Near the beginning of the book Professor Katz argues that there may be a new source of constitutional support for both parents' and children's rights in the ninth amendment, particularly as construed in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*.¹⁹ My initial reaction to this proposition was one of disagreement; the Supreme Court, as presently constituted, seems to have little affection for *Griswold* in general and for Justice Goldberg's concurrence in particular.²⁰ However, in the Court's opinion in *Stanley v. Illinois*,²¹ there is language which, broadly interpreted, appears to support Professor Katz' thesis. Justice White, writing for the Court, held that unwed fathers have certain rights in any proceedings which seek to adjudicate interests in their illegitimate children. While these rights were framed essentially in terms of conventional notions of procedural due process, he briefly sketched the Court's historical interest in parent-child relationships and noted in part that "[t]he integrity of the family unit has found protection in . . . the Ninth Amendment"²²

This dictum does not necessarily mean that the Court would at some time in the future be willing to discover some new parent-child right in

18. The recent decision of *C. v. Sacramento Superior Court*, 106 Cal. Rptr. 123, 29 Cal. App. 3d 909 (1973) as reported in 59 A.B.A.J. 443, 539 (1973) appears to hold that adoptive parents do have some due process rights in seeking to set aside or explain an adverse agency decision.

19. 381 U.S. 479, 486 (1965) (Goldberg J., concurring).

20. A check of the citator and a review of all the Supreme Court decisions which have cited *Griswold* indicate that the opinion of Justice Douglas (who delivered the opinion of the Court) has been cited in only four majority opinions. Justice Goldberg's concurrence has been cited once in a dissent and once in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

21. 405 U.S. 645 (1972).

22. Justice White's complete statement is somewhat broader than a mere ninth amendment analysis:

The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment [citation omitted], the Equal Protection Clause of the Fourteenth Amendment [citation omitted], and the Ninth Amendment [citing Justice Goldberg's concurrence in *Griswold*]. . . .
405 U.S. at 651.

the ninth amendment, primarily because there is no great need for a new right in this area to adequately protect the interests of the parties involved. It is difficult to imagine a set of circumstances which would require the formulation of some new constitutional doctrine for parents or children in the same sense that the formulation of the right of marital privacy was necessary to the decision in *Griswold*. It is probably enough to ensure that the state-parent-child controversies are governed by elementary concepts of due process and equal protection, and that some efforts, statutory or otherwise, be made to mitigate the observably harmful effects of unlimited and undisturbed trial court discretion. Children, and parents, do not need a new right nearly so much as they need sophisticated, consistent, and sympathetic application of the present standards of the law.

These minor defects and omissions do not detract from the value of the book as a whole, however. At the outset Professor Katz sought to examine "the process of state intervention into the parent-child relationship." The book not only does this but goes a bit further. It pays more than mere lip service to sociological and psychological findings in this area of the law. The book is national in scope rather than simply the study of a single jurisdiction. Moreover, it articulates generalized standards and definitions for problems and issues which have heretofore often been disposed of in the courts on an instinctual, "gut reaction" basis.

When Parents Fail is not a practitioner's desk book—although the many citations to the more interesting cases in each chapter are potentially quite helpful. Professor Katz has produced more than a manual for lawyers. This is a book that may enlighten and enlarge the perspectives of any specialist in the parent-child area whether he or she be social worker, medical practitioner, or court employee. Still, the book is sufficiently technical and exhaustive, particularly in the footnotes, to be a valuable addition to the library of any family law practitioner or domestic relations judge. In some court systems and for some judges, notably those judges responsible for the three vignettes described earlier in the discussion of judicial discretion, I would make the book required reading.