Vanderbilt Law Review

Volume 21
Issue 6 *Issue 6 - November 1968*

Article 12

11-1968

Book Reviews

T. A. Smedley

E. Blythe Stason

BOOK REVIEWS

LAW OF DOMESTIC RELATIONS. By Homer H. Clark, Jr. St. Paul, Minn.: West Publishing Co., 1968. Pp. XIX, 754. $12.00.

During the 1966 annual meeting of the Association of American Law Schools, one of the speakers at the Roundtable on Family Law resolutely predicted that:

> We are on the threshold of a revolution in the teaching of family law, a revolution that will parallel the dramatic reshaping of the teaching of criminal law that has occurred in the past ten years. . . . Those who enter the family law area from criminal law specialization—and their number is increasing—cannot help but feel dissatisfied with a 'domestic relations' course shaped traditionally by those whose interest in the area is an outgrowth of a specialization in contracts, property or torts. The dissatisfaction of the newcomers will both be the cause of and determine the direction of the new movement in family law teaching.[1]

At first reckoning, Professor Clark's new textbook does not seem to be attuned to this new movement. It even retains the old "Domestic Relations" terminology in its title, and both its basic content and its arrangement of materials are in the traditional mold. As would be expected, the subject arrangement follows very closely the author's own conventional casebook, which was published three years earlier; furthermore, the new text does not differ radically in form and coverage from the Madden hornbook, which dates back to 1931. These two companion works of Professor Clark, concentrating largely on legal problems and principles, offer a sharp contrast to the materials recently published by Professors Goldstein and Katz under the title of *The Family and The Law—Problems for Decision in Family Law Process*,[2] and hailed as a work in which "[t]he authors in their discussion of family-law problems, bring into scrutiny data from many disciplines—psychology, philosophy, law, political science, genetics, religion, psychoanalysis, sociology, anthropology, medicine, geriatrics, economics and social work."[3]

The foregoing observations are not offered in derogation of Professor Clark's product. Quite the contrary, he has served the "new movement" well by providing a good, old-fashioned legal textbook, which is much needed to complement the recent out-pouring of good, new-fashioned, inter-disciplinary teaching materials.[4] Because of the

1. George, *New Directions In Family Law Teaching*, 20 J. OF LEGAL ED. 567 (1968).
2. Published by The Free Press, New York (1965).
3. From the front flap of the dust jacket of J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW—PROBLEMS FOR DECISION IN THE FAMILY LAW PROCESS (1965).
4. In addition to J. GOLDSTEIN & J. KATZ, *supra* note 3, see M. PLOSCOWE &

extensive scope of the subject matter included in the traditional family law course, most teachers have long found it impossible to give adequate classroom attention to several sections of the casebook and have had to rely on collateral reading to bring those topics within their courses. It seems certain that students engaged in the current sociologically-psychologically oriented study of family law on the problem basis will need to turn frequently to conventional text material to acquaint themselves with the large body of legal rules and principles relevant to this branch of the law. Further, the attorney not regularly engaged in family law practice must call upon textbooks to give him the background and the initial authorities upon which to base his research. Clark's up-to-date and carefully written new hornbook is well designed to meet these needs of teachers, students and practitioners.

Faced with the difficulty of covering such a broad segment of the law in a single-volume work, the author acknowledges the commonly assumed "provincial nature of domestic relations law," but strongly discounts that assumption as being based on conditions of an earlier era which have been substantially modified by a modern trend toward greater uniformity of state law in this field. Rather than finding the still-considerable diversity of state domestic relations law to be a severe obstacle to the writing of a short text on the subject, Professor Clark accepts the challenge to promote further uniformity. He attempts to do this by frequent forthright expression of disagreement with established legal principles, by stating his usually well-reasoned choices between divergent points of view on numerous issues, and by venturing to suggest "the directions in which the law ought to move" at a number of points.[5]

My above comparative reference to Madden's hornbook is not intended to imply lack of scope or absence of originality in Clark's book. The contents of chapter one ("Breach of Promise and Other Pre-Marital Controversies"), chapter three ("The Suit to Annul"), chapter four ("Domicile in Domestic Relations"), chapter eleven ("Jurisdiction for Divorce, Alimony and Custody"), and chapter thirteen ("Divorce Procedure") are dealt with only lightly, if at all, in Madden's text. Separation agreements, which are accorded only four pages in Madden, are the subject of a full chapter of fifty pages in the new book; adoption, covered in one section in the earlier text, is now the

D. FREED, FAMILY LAW CASES AND MATERIALS (1963); C. FOOTE, R. LEVY & F. SANDERS, CASES AND MATERIALS ON FAMILY LAW (1966); F. HARPER & J. SKOLNICK, PROBLEMS OF THE FAMILY (rev. ed. 1962); R. LEVY, SELECTED MATERIALS ON FAMILY LAW: CUSTODY, THE UNWED MOTHER, ADOPTION, PARENTAL NEGLECT, NATIONAL COUNCIL ON LEGAL CLINICS (1964).

5. H. CLARKE, LAW OF DOMESTIC RELATIONS xi (1968).

subject of an entire chapter of some seventy pages; and the discussion of protection of rights of consortium is also greatly extended. On the other hand, the subjects of "Guardian and Ward" and "Infants, Persons Non Compotes Mentis, and Aliens," to which nearly one-third of the Madden text is devoted, are entirely omitted or only brushed lightly in the new book.

Of course, any new text is expected to give especial attention to recent developments in the field, and a perusal of the Clark hornbook, while not disclosing major revisions in family law concepts, does demonstrate that numerous changes of more limited scope have been wrought during the past generation. Thus, one finds an extensive coverage of "heart balm" legislation of the 1930's, which abolished causes of action for breach of contract to marry and alienation of affections. Similarly, discussions are included of such recently significant matters as, for example, the widespread adoption of the Uniform Reciprocal Enforcement Support Act, the incidence of marriage by proxy, increasing recognition of the wife's right to recover for loss of consortium resulting from injury to the husband, substantial liberalization of the rules regarding tort liability between members of the family, recognition of incompatibility as a ground for divorce, and the gradual weakening of the doctrine of recrimination as a defense in divorce actions. Throughout the book, modern cases—post-World-War-II decisions—are consistently prominent in the citation of authorities.

On the other hand, there has been a substantial reduction in the attention given to outdated matters regarding the rights and liabilities of married women in relation to property and contracts. The entire subject of the legal position of married women is covered in a ten-page chapter. While this revision spares the reader of most of the tedious details of the common law disabilities of coverture, which are of historical interest but which because of statutory reform have long since ceased to be significant to the practicing lawyer, this curtailment may have been too severe in some respects, reducing the usefulness of the book in both the law school and the law office. For example, tenancies by the entirety are dealt with in one-third of a sentence, and community property is accorded the same treatment. This strikes me as being a summary dismissal of matters which are of some importance in current family problems; but apparently Professor Clark views these topics as more appropriate for coverage in property law texts, as they may well be. The point is illustrative, of course, of one of the difficulties inherent in trying to fix the boundaries of the family law field, whether in teaching a law school course or in writing a legal textbook, because the subject cuts across many

other areas of the law and much of the material could logically be covered by teachers and writers in torts, contracts, criminal law, property conflict of laws, and equity, among others.

If Clark has perhaps, in some aspects, limited the scope of his work too much, he has, conversely, included numerous comments which will serve to enhance the readers' comprehension of legal problems which ordinarily might not be considered a part of family law, but which will frequently confront the lawyer in this area of practice. For example, the conflict of laws aspects of actions for breach of contracts to marry and of cases involving the validity of common law marriages are given considerable attention. Also, evidence problems relating to proving that a contract to marry was actually made and that an agreement to enter a common law marriage existed are noted in some detail.

As a final observation, I would commend the literary style of this book, which provides easy reading and is generally comprehensible even for the uninitiated layman. Professor Clark expresses himself with clarity and conciseness, without bombast or undue use of legal jargon. He is capable of inserting the light touch of humor in the midst of a weighty discussion, and he has peppered his writings with phrases which, while somewhat unlawyerlike, nevertheless serve to convey his ideas effectively.[6] Furthermore, he is consistently grammatical (I find not one split infinitive in the entire volume) and has apparently given careful attention to sentence structure. While these factors may not establish his legal scholarship—about which I think there is no doubt—they do demonstrate his capability of putting the fruits of that scholarship into a highly palatable form.

T. A. SMEDLEY*

6. For example, in discussing the issue of whether disease contracted by the defendant may constitute a valid excuse for his refusal to carry out his promise to marry the plaintiff, he states: "New Jersey seems to adopt the *un-Christian rule* that the disease must make marriage or consummation impossible before it will be a defense." (Emphasis added). *Id.* at 9 n.30.

* Professor of Law, Vanderbilt University.

LAW AND THE SOCIAL ROLE OF SCIENCE. Harry W. Jones, Editor. New York: Rockefeller University Press, 1967. Pp. 243. $6.00.

In April, 1965, Rockefeller University joined with the Walter E. Meyer Research Institute of Law to hold a conference on *Law and*

the Social Role of Science. A distinguished panel of speakers discoursed for two days before an equally distinguished audience of some 80 persons, carefully selected because of anticipated contribution to the unique program arranged for the occasion. The nine papers published in the volume under review were presented at this conference.

The management assembled a galaxy of stars on the panel, and the volume sets forth the fruits of their knowledge and perception. They take long steps toward identifying and bridging the interdisciplinary gap between science and the law. Professor David P. Cavers of Harvard Law School opens the series with a catalogue of "points of confrontation" between law and science. He sees the adjudicatory function as one of the points of confrontation; for example, in personal injury litigation, with medical witnesses on the stand, and in criminal proceedings, with psychiatrists testifying pro and con. Also, he suggests as points of confrontation the areas of the law that are undergoing rapid change, where existing legal doctrines demand re-examination in the light of current social needs, as in workmen's compensation laws, zoning laws, and the law of privacy, so radically affected by modern electronics. He also finds confrontation in certain novel areas where science is creating new hazards for mankind to endure, as in the development of new drugs for the ill and new pesticides to eliminate unwanted insect life. In addition, he finds confrontation problems in devising the legal means of allocating scarce resources for expensive research and development, as in high energy physics with its price tag in the hundreds of millions, and in the elimination of air and water pollution. Finally, he takes note of international relationships with their test-ban treaties and other interdisciplinary complexities. In these and other areas, Professor Cavers observes that "the lawyer and the scientist will have to resolve many problems of concern to both," and "with this in prospect, it is high time that we learn to work together, so we can get on with these jobs."

Following this lead, Professor Arthur W. Murphy of Columbia University Law School discusses the relationship of administrative law to government-supported research, a sizeable item of fifteen billion dollars per year. He notes that "[W]here large sums are involved, red tape will flourish. . . . If the scientist will realize that some bureaucracy must accompany the use of any federal funds, and if the administration will keep in mind the objectives of governmental support of research, a good start will have been made toward bridging the communication gap." Professor Bernard Wolfman of the University of Pennsylvania Law School lays out the subject of tax preferences

favoring science. This again involves the confrontation of law and scientific activities through: exemption from taxes on the income of scientific organizations, exemption of scholarship grants, treatment of research expenses as current expenses (or at least as being subject to the five year write-off provisions) and, finally, the application of capital gains rates to patent royalties. The author feels that such exceptions and preferences are often questionable. They serve to "damage the integrity of the tax system," and they should be allowed only when the reasons are most compelling. They should not be granted just because they are the "easy way."

Professors Joe H. Munster, Jr., and Justin C. Smith of Western Reserve focus on "project research" in universities, that is, research sponsored and supported fiscally either by private enterprise or by government, with the inevitable dilution of the educational potentialities of university life. Such research is not free from current criticism. Finally, Professor Ovid C. Lewis, also of Western Reserve, deals with the difficult subject of medical experimentation on human beings, a subject of extraordinary sensitivity when it involves "normal" humans as distinguished from patients requiring therapy, especially if the normals are children or mental defectives unable to give informed consent. The foregoing five papers make up Part I, entitled "Where Law and Science Meet." The contacts—the points of "confrontation"—are legion.

Then comes Part II, "Towards Interdisciplinary Understanding." Here we embark upon a largely uncharted course, and the seas are not always calm. Again, it is worthwhile to summarize. John Gordon Palfrey, Commissioner, United States Atomic Energy Commission, leads the way. Of the five members of the Commission, three are scientists and two are lawyers, but all work together with a mixed bag of problems involving both law and science, ranging from the development of massive nuclear weapons to irradiation of the tiny *trichina spiralis* (organisms that sometimes cause trichinosis from improperly cooked pork). The "colleagueship" on the Commission is successful in carrying out the practical operations of the multi-billion dollar atomic enterprise.

Following Commissioner Palfrey, Oscar M. Ruebhausen, an eminent New York lawyer, joins with Oliver G. Brim, Jr., President of the Russell Sage Foundation and a sociologist, in presenting probably the most sophisticated piece in the entire volume, "Privacy and Behavioral Research." So that we may protect the right of individuals in a free society to the sole possession of their own personalities, they discuss the need for establishing an "equilibrium" between the interests of society in an electronic era which makes available to investigators

so many highly technical tools capable of invading privacy in numerous subtle ways. The problem of too little versus too much is upon us in the area of behavioral research, and the authors suggest that the time has arrived for the adoption of a code of ethics for this field. Indeed, they suggest seven principles that should be covered in such a code.

Ruebhausen and Brim are followed by Leonard S. Cottrell, Jr., another sociologist and an official of Russell Sage, who discusses the program followed by the Foundation in developing so wisely its support for interdisciplinary research in law and sociology. Under this program investigators in the two fields have moved "well beyond the *ad hoc* bits and pieces phase of cross-disciplinary work toward a much more systematic and solid bridging of the gap between law and social science."

Finally, the volume concludes with a sagacious paper by the editor himself, Professor Harry W. Jones, Cardozo Professor of Jurisprudence on the Columbia Law Faculty, who urges emphasis upon massive social science inquiry quite apart from its possible "practical applications." Let us not expect practical results too soon. "Law," he says, "as a great social technology and control system, has even more to gain, in a long run view of things, from the perfection of the social sciences as 'basic' sciences than from such immediate applications of social science methods and insights as may be helpful to the law from time to time as the social disciplines move toward scientific maturity." This is the doctrine that Harry Jones at one time preached so vigorously at the American Bar Foundation, although the Foundation was not then sufficiently mature to act upon it.

Additionally, the book contains a useful 65 page selective bibliography on law and science, designed to highlight and illustrate the major areas of literary concern, taken mostly from the American scene.

How does one evaluate a volume such as *Law and the Social Role of Science?* It is no easy task. In some respects the multitude of ideas expressed by the nine authors resemble the well-filled shelves of a supermarket. The rather overwhelming breadth as well as depth of what Dr. Cottrell calls "the bits and pieces" of law vis-a-vis science which are revealed in the volume tend to leave the reader afloat on a boundless sea. Yet, on a second reading, the philosophical highlights begin to stand out with notable clarity. We identify the principal "points of confrontation" of law and science; we note the need of the legal order for light to help shape the law, the light to be drawn from the more profound depths of social science research in shaping the law of the future; we see a seamy side of commercialized

confrontation, as in the tax preferences, a side to be minimized so far as possible; we are told to seek an "equilibrium" between too much and too little of government and administration in the field; and above all, we must avoid too hasty conclusions, based upon immature social science research. The nine papers in the volume taken together cause the careful reader to think about the need for communication, as well as the mere fact of confrontation. I could have wished that there might also have been papers from men of the natural sciences—for example, a George W. Beadle or a Glenn Seaborg. This would have introduced other facets of the matter. Yet nine were quite enough for two days. *Law and the Social Role of Science* is well worth both reading and reflection.

Over forty years of this reviewer's teaching of law—including some years of seminars in "law and science" coupled with several "interdisciplinary" ventures, the latest being in urban affairs collaborating with political scientists, economists, and sociologists—lead me to offer just one thought about the central theme of this volume, which concerns bridging the gap between law and the social sciences. I recall that Pasteur observed that "chance favors the prepared mind." In the process of bridging disciplinary gaps, there is no substitute for the well-forged, well-equipped mind. Legislators who shape the laws of the body politic increasingly turn to the research fraternity for solutions. Executives do likewise. Legislators, executives, and research staff alike need interdisciplinary wisdom acquired through teaching, studying, and research, as well as through action in the field. In these ways the bridges will gradually be built between law and science. Yet it will require long years and infinite patience to develop the "prepared mind" and to reach the goal.

Then finally, I have wished that the volume might have been called *The Social Role of Law and Science*, rather than *Law and the Social Role of Science*, but this is, of course, merely a personal choice.

E. BLYTHE STASON*

*Frank C. Rand Professor of Law, Vanderbilt University.