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Review of Family and State: The Philosophy of Family Law

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Book Review

Family and State: The Philosophy of Family Law

Lawrence D. Houlgate

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In *Family and State: The Philosophy of Family Law*, Professor Houlgate sets out to "introduc[e] . . . a new subject area in philosophy that [I] call 'the philosophy of family law.' "[1] He defines that area as "the discipline that is concerned to present general normative principles or criteria and to apply these to ethical questions about laws that affect or concern the family."[2] He directs the book to legal scholars, social philosophers, philosophers of law, legislators, laymen, and students.

The first third of *Family and State* expounds some theoretical bases for analyzing family law. In this section, Professor Houlgate announces his philosophical perspective: hedonist act utilitarianism. He offers his definition of "family": "*two or more persons constitute a family in case at least one of them is a child and the other is a child-rearer who permanently resides with the child, who has the responsibility of providing for the child's needs, and who has certain rights over the child.*"[3] He proposes a normative model of the family as a "community": like a community (and unlike an "organization"), the family does not have goals, it cannot be said to act or make decisions, and the rights and responsibilities of its members arise not from contract or shared goals but from "the internal relationship of 'being a family member.' "[4] Like the members of a community, family

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1. HOULGATE, L. FAMILY AND STATE: THE PHILOSOPHY OF FAMILY LAW xii (1988).
2. *Id.* at 6.
3. *Id.* at 26 (emphasis in original).
4. *Id.* at 37.

members owe each other a duty of benevolence and have a right to the benevolence of the other members whether they "deserve" it or not.

To the communal model of the family, Professor Houlgate opposes the "organic" and the "individualistic" models. In the organic model, "each family member exists to serve the needs of the family instead of attending primarily to his own needs, for he has no needs or desires that are conceptually distinct from those of the family itself."[5] Despite some similarities, the organic model differs from the communal models, since in the latter family members are moral equals, while "the organic model of the family is opposed to the notion of moral equality. It asserts instead the *subordination* of the individual family member to the family itself."[6] The organic model, because it exalts the good of the family, is frequently associated with a hierarchically ordered family. The individualistic model, on the other hand, sees the family as "composed of elements, discrete individuals, who are basically complete apart from the family."[7] Like a business partnership, this family is used to satisfy its member's individual needs, and its members abandon it as soon as it ceases to serve that function. Like the communal model, the individualistic model sees the members of the family as moral equals.

Professor Houlgate concludes this first section of the book by arguing that both the family and family law are morally justifiable. The family finds its justification not only in its function in rearing children, but in the family's provision of benevolence and the psychological satisfactions benevolence brings its members. Family law finds its justification in reducing the uncertainties and inequalities that would be associated with conjugal relationships without rules, in allowing society to prevent overpopulation and genetically dangerous reproduction, in eliminating uncertainty about who has custody of children, and in deterring harm to children. The particular content of family law, of course, is to be determined by asking what rules will optimize human happiness. This inquiry is to be assisted by consulting the middle-range principle of optimum community benefit: "we are to . . . prefer the law that has the most beneficial effect on the ability of families to function as communities."[8]

The remainder of *Family and State* is intended to explicate the principles laid out in the first third of the book and to demonstrate their usefulness by applying them to a series of family law problems. The series is long, so I will give only a few examples. Professor Houlgate advocates a "two-track system of conjugal partnership arrangements,"[9] such that couples who do not intend to have children could arrange by contract all the incidents of their relationship, while couples intending to have chil-

5. *Id.* at 51.
6. *Id.* (emphasis in original).
7. *Id.* at 52.
8. *Id.* at 49.
9. *Id.* at 72.

dren would be limited to contracts of indefinite duration providing for the parties to live together, be monogamous, and share responsibility for raising their children. He advocates abolishing the spouse's privilege not to have the other spouse testify against him. He argues that everyone should have the right to use contraception, that married women should have the right to an abortion, and that parents should have the right to decide (subject to an unidentified mechanism to prevent abuse of the right) whether their seriously defective newborn children should be given medical treatment. He would establish a presumption that natural parents have custody of their children, but he would allow the presumption to be rebutted where there is a surrogate mother contract or where the natural parent has not been the custodial parent. He would allow the state to intervene to protect children from their parents only where the children are suffering or likely to suffer certain severe harms.

I could not be more enthusiastic about the project Professor Houlgate has undertaken. As I wrote some years ago, family law has suffered from the failure of its students to attempt generalizing and theoretical work and from its failure to recruit help from other disciplines.[10] And there are few disciplines from which help would be more welcome than philosophy. Therefore, I earnestly wish I could be more enthusiastic about the success of Professor Houlgate's project. Most unhappily, however, this book accomplishes neither its own ambitious aims nor the more modest hopes its readers might have for it.

The difficulties begin at the most basic level: the reader is left doubting that the author has mastered the basics of contemporary American family law. We are flatly told, to take a specific instance, that forty-two states have common-law marital property systems and that eight have community property systems.[11] Professor Houlgate seems to be unaware of the modern importance of equitable distribution doctrine. The book's descriptions and analyses of cases repeatedly raise questions about the care and understanding with which the cases were read. The author's sense of what is important is also disquieting. For example, he spends as much time on the uncontroversial and uninteresting question of whether wives should have to take their husbands' names and domiciles as he does on the complex and critical question of how marital property should be divided.

Family and State's second problem is that it is largely derivative. The reader rarely encounters an unfamiliar idea and will too often encounter discussions which draw preponderantly on what courts and commentators have already said. Much of the material on child abuse and neglect, for example, does little more than echo the work of Michael Wald and the

10. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J. L. REF. 1039 (1985). I should say that much recent scholarship is moving in just these directions.

11. HOULGATE, L., *supra* note 1, at 68.

IJA/ABA *Standards Relating to Coercive State Intervention on Behalf of Endangered (Neglected and Abused) Children and Voluntary Placements of Children.*

Yet, even while the book is derivative, the author shows little familiarity with much of the literature on family law. This presumably contributes to the book's third problem—its superficiality. The reader regularly is left wondering how the author would answer the many questions crucial to the book's arguments that the literature raises but the author does not. Perhaps the problem is simply that the author has attempted to deal with complex issues in too short a space. But often the problem is that the author appears to find easy problems that many people find hard. Thus Professor Houlgate says dismissively, "[w]e can easily see that the states ought not to interfere with abortion decisions in most circumstances and that statutes such as the one [in *Roe v. Wade*] are morally indefensible."[12]

One problem a philosopher must confront in discussing family law (particularly when, as here, the philosopher chooses to analyze specific family law issues) is the complexity of the relevant social facts and the inadequacy of our information about them. *Family and State*'s fourth difficulty is its often casual approach to this problem. Consider, for example, its proposal that mediation or therapy be substituted for adjudication of child custody disputes between divorcing parents:

> In the absence of a third party to assign custody, the parents will together attempt to reach their own solution through discussion and compromise, or through achieving an integration of their personalities. If this occurs, damaging conflict can be kept to a minimum. The evidence gathered from divorce arbitration over the last fifteen years shows that this hope has been largely realized.[13]

The first sentence of this quotation is purely speculative and quite questionable. The third sentence is unfootnoted, so the reader is left uncertain just what evidence Professor Houlgate refers to and whether that evidence in fact speaks, for example, to situations in which parties are coerced into mediation or therapy by the unavailability of adjudication.[14] Empirical problems likewise bedevil the next stage of Professor Houlgate's proposal, which is that where mediation fails, joint custody be automatically imposed. Professor Houlgate's text and footnotes simply do not grapple with the obvious question of how those parents who have been unable to agree to a custody arrangement and who have resisted mediation and therapy are going to share decisions about raising their children.

The book's attempt to devise and discuss different models of the family that the law might use is potentially invaluable. Those models raise, for

12. *Id.*

13. *Id.* at 130.

14. For a less sanguine view of the evidence to which Professor Houlgate is probably referring, see the excellent article by Teitelbaum & DuPaix, *Alternative Dispute Resolution and Divorce: Natural Experimentation in Family Law*, 40 RUTGERS L. REV. 1093 (1988).

example, such useful questions as whether the law can and should treat the family as an entity and, more significantly, what (if any) normative view of the family the law should consult. An insightful literature about these questions is now beginning to develop. However, *Family and State*'s organic and individualistic models, which are apparently intended to describe views of the family that are actually and centrally held in today's discussions of family law, are so roughly and unsympathetically drawn that discussions of them are frustratingly unprofitable. The communal model which Professor Houlgate prefers is oddly scanted; the reader is supposed to be persuaded of its usefulness not by direct argument for it, but rather by Professor Houlgate's demonstration through his discussions of particular family law issues that the other two models are unsatisfactory or are satisfactory only insofar as they share elements of the communal model. Consequently, the fascinating questions about what that model means and how the law might try to use it are largely submerged.

Finally, *Family and State*'s clumsy use of utilitarianism makes the reader understand what drove John Stuart Mill into a depression and the arms of Wordsworth. That doctrine's classic problems are widely apparent in the book. For example, since the author frequently concludes his discussion of an issue by simply announcing that one set of interests outweighs the other, the reader is frequently left puzzled about how the utilitarian calculus has been performed.

Let me close by saying what I hope does not need to be said, that *Family and State*'s drawbacks do not prove that its enterprise is not worth attempting. Readers interested in pursuing the insights of philosophy into the issues *Family and State* discusses may profitably read, to take a few examples, Jeffrey Blustein, *Parents and Children: The Ethics of the Family* (1982); Phillip Abbot, *The Family on Trial: Special Relationships in Modern Political Thought* (1981); and Joel Feinberg's four-volume series, *The Moral Limits of the Criminal Law* (1984–88).