Michigan Law Review

Volume 57 | Issue 7

1959

Cohen, Robson & Bates: Parental Authority: The Community and the Law

Luke K. Cooperrider
University of Michigan Law School

RECENT BOOKS

PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW. By *Julius Cohen, Reginald A. H. Robson,* and *Alan Bates.* New Brunswick, N.J.: Rutgers University Press. 1958. Pp. xii, 301. $6.

A law professor and two sociologists report herein on a joint attempt to assess the degree of congruence between existing legal doctrine, in a defined area of application, and a factor which the authors call "the moral sense of the community." The justification for the study is provided by the law member of the team, and proceeds from the observation that legal scholars, groping for standards of criticism external to the law, seem to gravitate toward a "sense of justice," or of "injustice"—toward a view of morality, at least, which is shared, to some degree, by the people in the community wherein the law is applicable. The authors vigorously and repeatedly disclaim a position on whether or to what extent such a common moral sense should by the law be taken into account. They assert, however, that law-makers, both legislative and judicial, do in fact frequently refer to it, and the argument is that *if* the moral sense of the community is relevant at all, then it makes sense to consider how that datum may be ascertained more scientifically than by the divination or intuition of the individual judge or legislator. Their study is offered as an example of how this may be done by making use of the developed techniques of public opinion research. They do not suggest, of course, the canvassing of the community's moral sense in order to establish premises for the adjudication of individual cases. It is argued, rather, that within a given area of law it would be possible to establish community reactions to a selected battery of propositions, and that these reactions could then be used as analogical bases for prediction of community reaction to other situations in a way which, to lawyers, would be quite familiar. Their project is an experimental survey of this type in the general area of parent-child relations.

The community selected was the adult population of the state of Nebraska. The information was obtained by personal interview, based on a standardized questionnaire, of a scientifically selected sample of that population. The basis of the study was 860 interviews, one for every 1,000 of population. The method of selecting the sample, preparing the questionnaire, training the interviewers, etc., is described in some detail for the benefit of anyone interested in pursuing a similar investigation. The questionnaire, and extensive tables of statistics compiled from the answers recorded, are set forth in full in appendices. The body of the book is a very readable account of the results, and of the conclusions drawn from them.

The questions asked of the respondents sought to determine their opinions as to what solutions the law *ought* to achieve in certain described

problem situations. An example will serve to convey an idea of their nature. "What if an 18 or 19 year old child wants very much to go to college, but the parents are completely set against it, even though the child has been awarded a scholarship to pay all his college expenses? In this case, if the law allowed the parents to keep the child out of college, it could mean that the child would lose out on the benefits which a college education can bring. On the other hand, if the law prevented the parents from keeping the child out of college, it would reduce parental control and increase the amount of outside authority over the family to that extent. With this in mind, should the law *allow* these parents to keep the child out of college, or should the law *prevent* them from doing this?" After securing an answer to the principal question the interviewer probed for reactions to the same problem under varying circumstances, e.g., in this instance, assuming that the parents were poor, that the child was a boy, or a girl, etc. He then summarized the answers, allowed the respondent to react to the summary, and asked him to state his reasons for his position. The responses were tabulated to show the extent to which there is agreement in the community as to what the law *should* do, and the extent to which the community views correspond with the solutions which would probably be reached under actual litigational circumstances. Correlations between positions assumed by the respondents and their social and personal background characteristics, such as sex, age, urban versus rural environment, religious affiliation, etc., were analyzed, and the reasons cited by the respondents were generalized to the extent possible.

It is, perhaps, unresponsive to argue the merits of the questions which were propounded to the public, for, as I have said, the authors carefully disclaim any position on the extent to which the law should seek to effectuate the community moral sense which they were investigating. They set out to establish a method, not a matrix for the remaking of the law in the area of family relations. They were, nevertheless, unable completely to conceal their feeling that their study could be used by "law-makers whose juristic philosophy stakes out as an objective a high degree of harmony between the existing law and the moral sense of the community" as a ready-made set of specifications for law revision in the area of family law. Furthermore, as it seems to me, their failure to consider the basic question—what bearing *should* community moral attitudes have with reference to the specific problems propounded—has led them into a fallacy which is fundamental, and which would be very difficult to avoid in any similar project.

The subject of investigation was the parent-child relation in its aspect of parental control versus child autonomy, with some attention given also to opinion regarding the proper locus of responsibility, whether with family or government, for the support of indigent persons. Their statistics reveal that on a total of 17 issues investigated there was a fair degree of

correspondence between the law and community views on five, disagreement on ten, and that the results in two instances were ambiguous. This amount of disagreement they regard as a serious finding. They suggest that it may be explained by the fact that law-makers are likely to be more impressed by tradition than is the general public, that this is an area in which there is likely to be little practical pressure for change, and that law-makers have simply failed to utilize adequate techniques to inform themselves of community views. In other words, the variance is explained as a lag between the law and a progressive public opinion. The findings "point up two crucial problems of political science: the distance between law-makers and their subjects, and the phenomenon of public acquiescence. . . . [T]he study raises anew the issue of adequacy of existing machinery for transmitting community feelings, sentiments and felt convictions to law-makers." (p. 21) These are rather portentous conclusions, and it seems appropriate to examine the information upon which they are based.

To support the proposition that there is a grave variance between the law and the moral sense of the community the authors cite the responses received on ten issues. Two of these relate to the minimum legal age for marriage, and parental authority to prevent a child's marriage by refusing consent. On neither of these issues did the disagreement found relate to the principle involved. It related, instead, only to the *ages* at which marriage should be legally possible, and consent unnecessary. The views of the community were diverse, and tended, contrary to the trend found on other issues, to be more *conservative* (i.e., in favor of more extensive parental control) than the law. A third related to whether a natural parent, having voluntarily surrendered custody of his child to another, should be permitted to recover it. On this issue 30 percent of the respondents sided with the natural parent, 60 percent with the person having custody, and 10 percent were in the "don't know" column. The authors assumed the law would be on the side of the natural parent. With such uncertainty among the voters, however, one can hardly say on *this* basis that there is a shocking discrepancy between community views and the law. A fourth issue related to legal liabilities for damage done by a minor child, and the finding of disagreement between the law and public opinion seems to result, very largely, from what I believe to be a misinterpretation of the law. The question put to the respondents was whether the child *or* the parent should be legally liable for damage caused by the child in four different situations, unintentionally caused property damage and bodily injury, and intentionally caused property damage and bodily injury. Nebraska has a statute, enacted in 1951, imposing upon parents joint and several liability for willful and intentional destruction of property occasioned by their minor, unemancipated children. The respondents favored the view that for intentionally caused harm

the *child* should be liable, and this was taken to be inconsistent with the law. The statute, however, does not in terms abolish the child's indisputable common law liability, and it would be surprising if it were construed to have that effect. The law, therefore, recognizes liability on the part of *both* parent and child, an alternative which was not put to the respondents. In the unintentional injury situations the respondents were about evenly divided on the allocation of liability when the child was assumed to be 19 or 20 years of age, and favored *parental* responsibility when the child was younger. Again this was put to them as an either/or proposition, and it is probable that the answer was influenced more by concern for the injured party than by concern for the child. Actually the law has managed, in response to this same concern, to recognize responsibility on the part of the parent, in addition to the normal liability of the child, for unintentional injury caused by the child in some situations, e.g., use of the family car. [Wieck v. Blessin, 165 Neb. 282, 85 N.W. (2d) 628 (1957).] This development would tend to minimize any lack of correspondence between law and community views under this heading. With reference to these four issues, therefore, I cannot feel that any very serious disagreement between the law and clear community attitudes has been established.

On all the remaining six issues where disagreement between law and morals was found, the law, at the present time, occupies a position of laissez faire. The questions relate to parental "authority" (1) to determine whether a child may have a college education, (2) to determine the child's religious affiliation, (3) to prevent the child from entering a career of his own choosing, (4) to transfer custody of a child to another person without legal supervision, (5) to disinherit the child, and (6) to treat the child's earnings as the parent's own property. In all six cases it is assumed that the law bestows upon the parent the "authority" indicated, and in all six cases the community view, according to the survey, was that the law should "prevent" the parents from exercising such authority. It is on these six issues that an unequivocal discrepancy is found between the law and the moral standards of the community, and it must be principally in connection with these issues that we judge the authors' assertions that there is a serious lag between law and public opinion, a lag which they suggest is to be attributed to imperfections in the political process, and to the "dissenting acquiescence" of a population too inert to resist.

Considering these six issues, it will be noted that the parental "authority" referred to in the first three instances is nothing more than the de facto compulsion which the parent, by the very existence of the family relation, is enabled to exert. The extent of its legal recognition is that the state has not established procedures for supervising it, and the probability is that if an issue between parent and child were in some

manner raised in court, the court would refuse to interfere unless the acts by which the compulsion was exerted were criminal, or so abusive as to place in legal jeopardy the parent's custody of the child. In assessing the reasons mentioned by the respondents for their indicated views, the authors thought that there was a noteworthy absence of feeling that the law should not intrude itself into the parent-child relationship. The percentage of those who took the "allow" position and who adverted to this point was relatively small, throughout. The authors' interpretation of this fact is exemplified by the following comment: "Although where the choice of a child's religious affiliation is concerned, there is greater expressed sentiment in the community against the role of government than when the issue relates to the availability of a college education, the predominant sentiment, nevertheless, would still recognize the need to respect the child's independent choice of religious affiliation, and, if required, to employ legal sanctions against the parent to effectuate it." (p. 171) A bit farther on the authors indicate that "Those who favored some legal control of parental authority . . . were not asked just what specific type of legal controls should be imposed: *this would have been far too involved and complicated for our undertaking.* It is fairly safe to assume that they favored *some* government-sanctioned means—the exercise of authority outside the realm of parental control for the achievement of the given ends." (p. 186. Emphasis added, in part.)

I agree that it would probably have been both impracticable and useless to have raised the "how" question with the average member of the public. But is it not of the essence? I submit that these answers cannot be taken to be, in any practical sense, a true representation of community desires, for it is apparent that the respondents had not the slightest awareness of the practical implications of their answers. Some of the questions incorporated a caveat, "if the law prevented the parents from keeping the child out of college, it would reduce parental control and increase the amount of outside authority over the family to that extent." But how much meaning does this carry to one who is not familiar with the workings of the political-legal machinery of the state? If the questions had been formulated not in the denatured "should the law allow or prevent?" form, but in the terms in which they would be faced by the legislator or the judge—"Should a statute be enacted establishing a Family Liberties Commission with power to conduct investigations into invasions by parents of certain enumerated liberties of their children, to issue subpoenas and compel testimony, and to issue cease and desist orders against parents found to have committed such invasions, and to maintain actions in court to compel obedience to such orders, etc."—or—"Should a child who feels himself aggrieved by the act of his parent refusing to him his right of free religious association be permitted to maintain in the courts an action for injunctive relief, etc."—is it likely that the

citizenry would have exhibited the same enthusiasm for the Big Brother approach that this survey seems to have revealed?

The other three of the six instances of disagreement between law and morals are somewhat different, involving situations (transfer of custody, disinheritance, parental ownership of child's earnings) which can, by a lawyer, be more easily conceived of as subjects of legal regulation. As the descent of property is already regulated by law, there would be no great derangement if the applicable law excluded complete disinheritance of a child. It might be doubted that the respondents have envisioned *all* the implications, but at least the probabilities are greater here that an implementation of their views would not produce practical consequences which would shock the majority of people affected. Administrative difficulties are certainly very substantial with reference to the custody and ownership of earnings issues, however. It is easy to pass a law—"Any person who, without prior approval of the probate court, gives his child into the custody of another person (permanently? for a period in excess of ——— days? with the intent to abandon custody himself?) shall be guilty of a misdemeanor." Enforcement would be another matter, family connections being as casual as, regrettably, they sometimes are. And with reference to the child's earnings, how should the law attend to their protection? It would be possible, I suppose, to require all parents to account as fiduciaries, periodically or upon the attainment by their children of majority, but I would imagine that compliance would be secured only to the accompaniment of a considerable amount of kicking and screaming.

The subject is fascinating, and the literary qualities of the book are high. It will reward any reader, whether he is jurisprudentially oriented or simply an interested observer of the society in which he lives. As a novel experiment the study adds to the sum total of our experience whether the individual reader's conclusions with respect to the relevance and validity of the experimenters' methods are positive or negative. To me it furnishes strong evidence of the necessity for continuing close attention to the factors which make it practicable and desirable to seek some social objectives through legal standards and sanctions, while making it equally apparent that other objectives must be left to other forms of social control. I have no doubt that the moral views indicated by the survey are effective in assuring that few parents actually exercise the full extent of the "authority" over their children which the law would probably tolerate. I am equally certain that to attempt to bring the *law* into alignment with these views would be rank folly. Law does not consist solely of norms of conduct. The official sanction through which the norm is enforced is an inescapable concomitant. A personal conviction as to what, in the abstract, *ought* to be, may serve very well as a moral standard, operating through the conscience and will of the individual, but it cannot be assumed that the same conviction would survive a marriage to official compulsion.

Many of the norms which were approved by the respondents in the Nebraska survey are such that they could be brought to bear upon the community only through legal sanctions which, according to *this* reader's intuition, would be found, by the same persons who approved the norms, to be quite intolerable, and by the agents of the law to be incapable of administration. I would submit, therefore, that an inquiry into popular views of "what the law should be" can be most misleading if it does not raise, with the persons interviewed, the legislative question in all its complexity. If that question were raised, I would doubt the ability of the great majority of all citizens to respond to it in an informed and intelligent way. Query, then, whether the law-maker can expect as much help from the opinion surveyer as these authors suggest.

Luke K. Cooperrider,
Professor of Law,
University of Michigan