



## THE LAWYER'S BOOKSHELF

REVIEWED BY PETER BIENSTOCK

### *Neglected Stories: The Constitution and Family Values*

By Peggy Cooper Davis. Hill and Wang, New York, N.Y. 283 pages.

New York University Law Professor Peggy Cooper Davis's latest work, *Neglected Stories: The Constitution and Family Values*, defies characterization. It is a carefully researched, heavily footnoted, scholarly work and it is also written in simple language about common people. Similarly, it is a dispassionate exposition concerning the intersection of two American institutions — the family and slavery — that inspire intense passions. The duality is partially explained by the fact that the book is actually two books intertwined — continually shifting back and forth between the 19th century and the present, and between sociology (the day-to-day experiences of slaves, former slaves, slaveholders and abolitionists) and law (legal issues presented in Supreme Court cases).

At the outset, Professor Davis prescribes for herself a large, perhaps unrealistically large, undertaking: to relate the experiences of slaves, freed slaves and abolitionists — those whose lives demonstrated the need for the Civil War Amendments (particularly the Fourteenth Amendment) and their implementing legislation — to the Supreme Court's interpretations of the reach of the Fourteenth Amendment over the next century and a half. The life experiences are told in what Professor Davis terms "motivational stories;" the court cases are described in what she calls "doctrinal stories." Professor Davis's thesis is *not* that the former can explain the latter, or that one can divine the original intent of the framers of the Fourteenth Amendment from either, but rather that the motivational stories "reflect the values and aspirations of those who inspired the Fourteenth Amendment's conception and won its promulgation" and thus "are appropriate, albeit neglected, guides in an interpretation that is faithful to history and to tradition."

After an initial, short chapter concerning the right to work, Professor Davis concentrates on the true subject of her book: family rights, broadly construed, including the rights to marry, parent and procreate. The motivational stories are often grim recountings of unspeakable, daily occurrences in the lives of slaves, as well as freed slaves who continued to be subjugated after their purported emancipation. Told in the words of the participants, the motivational stories demonstrate the importance of those family rights we now think of as fundamental that were denied to the slaves as well as to freed slaves who theoretically gained them.

Most graphic are the descriptions of slaves forcibly separated and sold away from their loved ones, including their "spouses" and children, presented as examples of slavery's denial of fundamental rights to marry and to have and raise children. For example, a slave speaks of his mother's grief at the sale of his brother:

[A]t length, persons came who agreed to give the prices [the master] set on us. His wife, with much to be done, prevailed on him not to sell me; but he sold my brother, who was a little boy. My mother, frantic with grief, resisted their taking her child away. She was beaten, and held down; she fainted; and, when she came to herself, her boy was gone. She made much outcry, for which the master tied her up to a peach-tree in the yard, and flogged her.

The doctrinal stories, containing detailed discussions of the Supreme Court's decisions concerning the Fourteenth Amendment and the various family rights, are more complex, and like Supreme Court decisions in many areas of law, do not fit easily into any one theoretical framework. Professor Davis's early suggestion that the 19th-century life experiences have been neglected in the 20th-century case law perhaps explains why her detailed expositions of that case law at times seem disconnected from her themes. For exam-



ple, in Chapter 3, "Stories About Parenting," a detailed discussion of recent cases concerning the rights of unwed fathers has only the haziest antecedent in the motivational stories or in the experience of slaves and freedmen generally described elsewhere in that chapter.

Whether or not the lessons of the motivational stories always relate closely to the doctrinal developments, the author usually presents thought-provoking analogies. For example, in Chapter 4, "Motivational Stories About Procreating," leading up to a discussion of the Supreme Court's abortion decisions over the past two decades, Professor Davis begins by agreeing that the denial of the freedom to procreate is more a late 20th-century phenomenon than one present in the prior centuries when the slavery system was in effect. However, she goes on to relate the harrowing stories of women in slavery whose masters forced them to breed, and the inspirational stories of the abolitionists' demands that slaves be granted their inalienable rights to control their own bodies, ultimately persuading the reader that they are not an altogether remote precursor of the Supreme Court's reproductive rights cases.

It is not until the last chapter, however, that Professor Davis's view of the interrelationship of the motivational and doctrinal stories becomes clear, although any brief description of it must necessarily entail oversimplification. The Supreme Court, interpreting the Fourteenth Amendment, and particularly with respect to family rights, has completely ignored the life experiences of slaves, abolitionists, freedmen and women, Professor Davis concludes. It has thus failed to expound a coherent Fourteenth Amendment theory and particularly it has failed to grapple with the basic societal conflict between the rights of the individual to privacy and family autonomy and the rights of the community to constrain individual choice.

In Professor Davis's words, "[m]otivational [s]tories of slavery and antislavery enliven the justifications for structuring the social dialectic so that official constraints do not overwhelm opportunities for personal choice." If the Supreme Court were to heed the lessons to be learned from the life experiences of slavery and antislavery, as Professor Davis terms the freedmen and abolitionists, a stronger argument could be made for family and personal autonomy.

Professor Davis's thesis is applied to a wide variety of subjects — including sexual freedom, polygamy, foster care, adoption, abortion — all under the rubric of family rights. While she reaches predictable conclusions on many subjects (for example, she favors recognition of the right to engage in private consensual, homosexual conduct, a right so far denied by the Supreme Court), her discussion of each subject is carefully nuanced and her conclusions on some — polygamy and parental consent to abortion, to name two — may surprise the reader.

For all of its duality — plain-spoken "lessons" and detailed legal analysis — Professor Davis's book is, in the end, less a non-fiction work directed at the masses, or even at intellectuals, than a law review article, albeit a brilliant one, directed at her colleagues in academia and, hopefully, constitutional litigators and the courts.

It is a shame that Professor Davis's book will not be more widely read because each generation cannot be too often reminded that for a significant period of our history, one race of Americans was owned, exploited, terrorized and killed by another race for centuries, and that our courts and lawyers facilitated that system. For that reason, the motivational stories would by themselves have made an excellent book. By combining them with the doctrinal stories, Professor Davis has written a thoughtful and thought-provoking, if not easily accessible, work.

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