THE NEED FOR RESEARCH IN FAMILY LAW*

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FOR several decades the family has been a favorite field of research for American sociologists and, to some extent, for those who have been interested in building a science of social service. It has been strangely neglected, however, by American lawyers and legal scholars. On the continent of Europe, especially in France, Germany, Italy, the Scandinavian countries, and Switzerland, family law has been treated extensively and intensively for a long time, at least insofar as its technical legal aspects are in question. There are numerous treatises of high standing upon the subject, and problems of family law are continuously discussed in the legal periodicals and in those innumerable monographs which are so characteristic of continental legal literature. In this country no comprehensive treatise on family law has been published since Bishop's book of the 1850's, which is now completely obsolete. The books by Peck and Madden are meant for students' use and Vernier's comprehensive survey is limited to statute law. Scholarship has also been achieved in several casebooks, but the very nature of this type of literature forbids intensive and systematic treatment. The remaining writing consists of practitioner's handbooks, especially on divorce and community property, law review articles dealing with scattered problems, and occasional allusions to legal problems in the extensive literature of sociology and social service. Significantly, family law has not been covered in the extensive presentation of the existing American law contained in the Restatement undertaken by the American Law Institute.

Family law has never attracted that concentrated effort of the legal profession which has been lavished upon business law, constitutional law, administrative law, labor law, and other fields connected with burning political issues or the interests of powerful economic groups. Yet family law influences the lives of everybody more deeply than any of these fields. For that very reason the people interested in it have remained unorganized and thus unable to influence legislation. There are no organizations and no lobbies of illegitimate children, divorced husbands, or housewives. Perhaps the obvious neglect may also to some extent be connected with the fact that litigation concerned with family problems does not yield such large fees as litigation in the fields of corporations, business regulation, finance, and taxation.

* Report on an inquiry conducted for the Social Science Research Council.

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The general impression that legal research workers have not given family law the attention which is necessary has been confirmed by an inquiry which was undertaken in the summer of 1948 by the Social Science Research Council. While testifying to the great intensity and extensiveness of research on the social, psychological, and educational aspects of the family, the inquiry reveals research on the legal aspects to be in need of both intensification and organization.

In order to obtain a survey of the work presently being carried on, as well as an indication of the problems for future research, a questionnaire was sent to approximately four-hundred persons and organizations who were believed to be interested, or are already conducting research, in the field of family law.[1]

Seventy-eight answers were received. In spite of this limited number, the answers are so varied in origin and cover such a broad field that conclusions are possible as to the present state of interest in the field and, quite particularly, as to the needs for future research. Twenty-seven answers were completely negative, i.e., they indicated that research in the field was neither carried on nor contemplated. Even when allowance is made for the short time intervening between the mailing of the questionnaire and the date of the report, as well as for the fact that some of the addressees of the questionnaire may have been absent on their summer vacations, the conclusion seems to be justified that the majority of those addressees who have not sent answers have nothing to report. This conclusion may be drawn from the fact that those who are genuinely interested in the field invariably offered expressions of enthusiastic support for the inquiry and hopes that its publication might stimulate future work.

The positive answers received indicated that thirty-three investigations concerned with various problems of family law are presently under way,[2] and

[1] Questionnaires were sent to: 1) all teachers of family law in the member schools of the Association of American Law Schools; 2) all member schools of the American Association of Schools of Social Work; 3) all state departments of public welfare; 4) the chairmen of about sixty committees of the American Bar Association and the several State Bar Associations; 5) the United States Children's Bureau; 6) several individuals known to be interested in the field.

[2] The following table indicates the number of inquiries concerned with particular groups of problems:

Problem	No. of Inquiries	Problem	No. of Inquiries
Marital property rights	8	Guardianship	1
Divorce and non-support	8	Child welfare	1
Marriage	5	Domestic relations courts	1
Insurance and old age	1	Small estates	1
Parent-child relation	1	Instalment buying	1
Status of women	1	History, general (common law)	1
Patterns of family life	1	General treatises	1
Adoption	1		

that twenty-seven future studies are proposed.[3] Professors, especially of law schools, bar association committees, attorneys, and judges constitute three-fourths of those carrying on present studies.[4] Whether all of the studies reported as research are really deserving of that name appears doubtful. Some of them are undoubtedly of an amateurish character. This statement certainly applies to some of the studies undertaken by bar associations and similar committees, which experience shows to be composed frequently of lawyers and judges who may have practical experience as well as good intentions, but lack training in genuine research methods. In each state these committees are working independently without contact with the corresponding committees in other states, and frequently in blissful ignorance of the research carried on by competent sociologists or other non-legal experts. Yet the results of the unsystematic and haphazard "inquiries" of these committees constitute the basis of most of the state legislation in the field. Coordination and guidance by well trained research workers is urgently needed for this work.

Insofar as the addressees of the questionnaire answered the question relating to the desirable qualifications for competent research, they invariably indicated that legal training alone is insufficient and must be supplemented by training in sociology, psychology, education, or other fields. Training in psychology and religion was repeatedly mentioned as desirable. Since no single individual can be expected to be competent in all these fields, cooperation of experts is clearly indicated.

The tabulation of the answers received shows that the greatest interest in the field is presently attracted by the problems of divorce and of marital property.[5] The unsatisfactory state of the present American law of di-

[3] The following table indicates the number of inquiries proposed for particular groups of problems:

Problem	No. of Inquiries	Problem	No. of Inquiries
Divorce	8	Domestic relations courts	2
Small estates	2	General treatises	1
Parent-child relation	1	Collection of state materials	1
Termination of parental power	1	Patterns of family life	2
Adoption	1	Obsolete laws	1
Child welfare	1	Guardianship	1
Marital property	1	Desertion	1
Intra-family torts	1	Comparative law, general	1
Instalment buying	1		

[4] The following table indicates the number of inquiries being conducted by particular groups of persons or organizations:

Individuals or Organizations	No. of Inquiries	Individuals or Organizations	No. of Inquiries
Professors, especially of law schools	18	State departments of public welfare	1
Graduate students	1	United States Children's Bureau	1
Undergraduate students	2	League of Women Voters	1
Bar association committees, attorneys, and judges	9	Legal aid bureaus	
Schools of social work	1	Better Business Bureau	

[5] Notes 2 and 3 supra.

vorce has been decried so frequently and so eloquently that no further elaboration is necessary. It has also frequently been observed that no reform of the evils of the divorce law is possible without improvement of the law relating to the conclusion of marriage. The inception of hasty and ill-considered marriages is favored by the present law. The anachronism of common-law marriage still exists in almost half of the states of the country. The system of formal marriage and licensing is in most states ineffective to prevent those marriages which society, for various reasons, regards as intolerable or undesirable; it is not even effective to prevent bigamy, and the rules designed by the courts to deal with this unhealthy situation are cumbersome, unsystematic, and uncertain. Legislative provisions designed to prevent socially undesirable marriages, especially marriages of people of immature age or of those afflicted with disease, are haphazard and technically deficient, and attempts by several states to establish more satisfactory provisions in this respect have been rendered ineffective by the chaotic state of the conflict of laws, which favors the easy evasion of restrictive marriage regulations.

While these problems have received some attention, much less interest has been shown in the equally unsatisfactory state of the relations of the married couple to the outside world. Under the pressure of the feminist movement, all states have enacted laws designed to emancipate married women from the domination of the husband. Much of this legislation has gone so far, however, as to neglect the fact that the family, after all, still constitutes a social unit. Especially with respect to property relations, husband and wife are treated in the majority of states as if they were complete strangers to each other. Under the system of separation of assets, as it has been developed by modern Married Women's Property Laws, the husband owns his property and the wife hers, and the fact that in numerous, perhaps the majority of all families, husband and wife pool their assets, is neglected. In consequence, grave difficulties have arisen with respect to the relations of a married couple to its creditors, both contractual and delictual, in the treatment of the assets upon the death of one of the spouses, in the case of divorce, and, quite particularly, in the case of bankruptcy. Remedies such as family expense laws or presumptions as to the ownership of assets have been unsystematic and unsatisfactory. The present system of separation of assets developed historically on the basis of those rules which were elaborated in the 18th century by the English equity courts for people of considerable wealth. In consequence, while fitting well the needs of people in the top brackets of the property and income structure, the present law is ill-suited for the middle classes, the

workers, and the farm population. At present, however, nobody knows what the needs of the lower income groups are, how well or how badly they are served by the existing law, or what improvements could be made. Factual research on the present methods of handling property matters by married couples in the various groups of the population is needed. Such research might well indicate that the present idea of having available only one system of property regulation for all groups of the population is insufficient, and that existing needs might be served better by a law which, like that of most European countries, presents married couples with a choice between various systems of property regulation.

The evil of enforced uniformity exists also in those Western and Southern states which have adopted the system of community property, under which marriage is regarded as a partnership in which the earnings of either spouse constitute a common fund belonging equally to both. The idea underlying this system seems to be more in accord with realities, especially of middle class life, than that underlying the majority system of separation of assets. However, in all community property states the basic simple idea has been encumbered with unsystematic legislation of detail, which not only varies from state to state but also results in difficulties and unnecessary litigation, especially in the relations to creditors of one spouse or the other, or when it becomes necessary to partition the community fund. The situation has been aggravated by the recent trend to adopt the community property system solely for the income tax advantages which were connected with it until the 1948 amendment of the Code of Internal Revenue.

One of the principal features of the Married Women's Property Acts, which have been gradually enacted in the several states since the 1850's, has been the grant to married women of the capacity to enter into contracts and to make dispositions of their property. However, in numerous states this legislation has been incomplete. In quite a few places married women cannot make gifts, cannot undertake to be a surety either for the husband alone or for any other debtor, cannot enter into partnership agreements with the husband, or cannot make any transactions with the husband at all. The motive of such limitations of contractual capacity has not been the desire to protect married women against supposed domination by the husband, but rather to protect families against complete financial ruin. Where the wife cannot be a business partner or surety for the husband, some assets of the family can be salvaged in case of the husband's financial breakdown and a new financial start can be made by the family.

The same desire to protect families from complete financial collapse underlies the preservation in numerous states of the Middle West, West, and South of the ancient institution of dower. Insofar as one spouse has a dower estate in the assets of the other, it cannot be taken into execution by the latter's creditors, and even during the latter's lifetime the dower estate cannot be affected in a forced sale. However, dower may be signed away and operates only with respect to immovable property. In recent years legislators seem to have lost sight of the protective functions of the so-called incapacities of married women as well as of the institution of dower. Legislation aimed at the abolition of these incapacities or of dower has been recommended or adopted in several states upon arguments concerned exclusively with the equality of the sexes or with the hampering effects of dower on real estate transactions. Without full consideration of the problems involved, such legislation must of necessity be unsuccessful and result in surprises.

Where dower has been abolished, it has been supplanted by an "indefeasible share" of the surviving spouse in the estate of the predeceasing, such as has long existed with respect to movable assets. Such an indefeasible share can easily be defeated, however, by inter-vivos transactions unless there are established proper safeguards, especially against transactions designed to defraud the surviving spouse of his or her share. The legislative and judge-made rules against such defeasance have so far been incomplete and ineffective. The long experience of civil law countries in this respect and the exemplary solutions of the problem elaborated in their laws have been neglected.

Under the ancient common law, a law suit could not be maintained between husband and wife or between a parent and his minor children. Modern legislation has mitigated this antiquated rule. Difficulties have arisen, however, with respect to personal injury suits. Following the modern trend, numerous courts, anxious to be liberal, have allowed such suits; but in so doing they have overlooked the fact that these suits are really directed not against the other spouse but against the liability insurer. The result has been a confusion between liability and accident insurance. The results may be socially desirable, but no final judgment can be ventured without an extensive investigation of the underlying facts, especially the influence of the new rule upon insurance rates. Needless to say, no such investigation has been undertaken to date.

With respect to purchases made for family needs by the wife, the ancient rule is that the wife is regarded as the agent of the husband and that the husband is the only party liable upon such purchases and other similar

transactions. However, the scope of this agency of the wife is uncertain; the sole liability of the husband has also been found sometimes to endanger the interests of the suppliers of goods which are consumed or used not only by the husband but also by the wife and other members of the family. In some states organized groups have succeeded in obtaining the enactment of Family Expense Laws, under which the liability of the wife is added to that of the husband. Again, however, the scope of such added liability is poorly defined, and research into the needs for, and the effects of, such legislation is called for.

In the case of breakdown of a family, the existing law provides a variety of remedies for the enforcement of the claims of the wife and the children for support or alimony. These remedies vary from state to state and their efficiency is insufficiently guaranteed, especially in those cases in which the claimant or claimants and the defaulting husband or father are living in different states. Research into the present structure and its effectiveness is indispensable as a preparation for a more satisfactory regulation.

Numerous and important reciprocal rights result from the relation between parent and child. The enforcement of such rights presupposes, however, the establishment of the existence of the parent-child relation. Presumptions of fatherhood and other rules of evidence are concerned with this problem. Here also, there are unsystematic differences in the laws of the different states. Even greater differences exist with respect to those institutions which substitute an artificial for the natural parent-child relation, i.e., adoption and legitimation. To what extent, if any, such differences are justified and to what extent the various state laws fulfill the existing social needs cannot be ascertained without intensive factual research.

The severe critique already expressed with respect to the present divorce laws must be applied equally to the law dealing with illegitimate children. The legislation still existing in numerous states cannot be called anything but a disgrace. Radical reforms are a crying need, but should not be undertaken without previous research, which should consider the exemplary legislation of several foreign countries, especially Germany, Austria, and the Scandinavian countries.

Important needs should be fulfilled by the institution of guardianship, which for centuries has been designed to protect the personal and property interests of orphans or children whose parents are unable or unfit to take proper care of them, or of insane and other adult persons who are unable to take proper care of their own affairs. Few fields of law have been so neg-

lected, however, as that of guardianship. Even the basic legal concepts are ill-defined, and the judicial machinery for the appointment and supervision of guardians does not seem to work properly.

Quite a few other problems could be added to the foregoing list. It is long enough, however, to indicate the unsatisfactory state of the present American family law. The need for more intensive treatment is burning. Just because of its long neglect, American family law is more unsatisfactory than any other field of the law. Not only is it devoid of dogmatic elaboration, but its present rules are to a large extent obsolete, unsystematic, and dependent on the accidental whimsies of insufficiently informed legislators or judges. In a report recently submitted by representatives of the American Bar Association to the White House Conference on Family Life, the present divorce laws were called an absurdity and a disgrace. The same epithets could be applied to most other branches of family law. Legislative reforms are indicated for every aspect of the field. More harm than good would be done, however, if such reforms were undertaken, as they have been so far, without sufficient basic research, which ought to be directed both at the elucidation of the existing legal rules and at their effects upon actual family life and social structure. All the various problems are, of course, interrelated. While detailed research is needed for every single one of them, such research should be coordinated if maximum results are to be expected. In recent years the American Law Institute has undertaken a large-scale inventory of the existing American law, but the field of family law has not been included. The gap thus left ought to be filled. Because of the existing uncertainties, the work to be undertaken cannot be limited to a restatement of the existing family law, important though such work is. What ought to be undertaken is an extensive, systematic, and complete inquiry into all those needs which the family law is meant to satisfy, the extent to which these needs are satisfactorily taken care of at present, and the probably much greater extent to which the present law is unsatisfactory. We ought to know the underlying facts; we must try to find out the impact, desirable or undesirable, of present or proposed legislation; we must find out how identical needs are taken care of in those foreign countries which have given more attention to them in the past than has this country; and, on the basis of all such inquiries, there should be elaborated a set of model laws to be recommended to the states for adoption. Finally, if and when all this work has been done, a powerful organization should be created for the educational and other efforts necessary to assure the adoption of such legislation.

Obviously such a task cannot be undertaken by lawyers alone, but only

by an organization in which lawyers can cooperate with other experts in the field of the family, i.e., sociologists, social workers, educators, representatives of home economics, tax experts, theologians, moral philosophers, and last, but not least, plain individuals with a sense of civic responsibility. Obviously too, such a task requires organization. A model is furnished by the American Law Institute. For the preparation of its Restatements as well as of its Model Codes of Evidence, Criminal Procedure, and Juvenile Delinquency, the Institute parceled out the work among the leading scholars in the various fields. Each one of these "reporters" was aided by a small group of experts, who carefully scrutinized the reports and drafts prepared by the reporters until, after repeated revision and redrafting, they appeared satisfactory to these groups. Each draft was thereupon submitted to the Council of the Institute, which consists of high-ranking judges and leading members of the Bar. After approval by the Council the drafts were submitted for final approval to the full membership of the Institute, which meets once every year for this task. Quite possibly, the American Law Institute might lend its well-established organization for the new task, enlarged in the manner indicated above. Possibly, however, the task might also be undertaken by some existing organization of sociologists or social workers or by some new organization which would have to be especially created. Until an over-all research body has been created, an effort should be made at least to coordinate the current work of those preparing state legislation.[6]

[6] The National Council on Family Relations or the National Council on State Legislation might well undertake to initiate this work.