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Challenge and Response in Family Law

Max Rheinstein*

What has the challenge been in family law? What has been the response of the fashioners of American law?

The challenge has been twofold: both the structure and the functions of the American family have undergone profound transformations. They have been concomitant with the process of industrialization and urbanization that has changed the social structure of the country during the last hundred years.

Sociologists distinguish between the nuclear and the extended family.¹ The former is that small group of the household composed of a husband, his wife, and those of their children who have not yet left the parental home. The extended family consists of that wider group of persons who are related by blood or marriage and among whom ties of community are felt so strongly that they constitute a group facing the outside world with a certain measure of solidarity and that the members feel strong obligations of mutual help. Recently the concept of the modified extended family has been developed to signify that grouping of parents, children living at home, children who have left the home, and the latter's spouses and offspring, in which appreciable feelings of solidarity and mutual responsibility give a measure of cohesiveness.² In an immigrant country, such as the United States, the extended family has never been so common as in stay-at-home countries. Immigrants came here as individuals or in nuclear family groups. But once the immigrants were settled, the pattern of the extended family did tend to grow up, although it never reached that degree of strength it once had in such countries as Italy, Poland, or Scotland. Industrialization and urbanization have intensified the American's ready inclination toward migration and his individualist disregard of such traditional ties as those of blood and soil; the result is that the modest pattern of the extended family

* Professor of Law, University of Chicago Law School.

1. Until recently, American sociologists tended to the view that the nuclear family is "the" family type of the contemporary United States. The definitive formulation of this view is contained in the article by Talcott Parsons, *The Kinship System of the Contemporary United States*, 45 *AMERICAN ANTHROPOLOGIST* 22 (1943); see also PARSONS & BALES, *FAMILY, SOCIALIZATION AND INTERACTION PROCESS* (1955).

2. This view has been initiated by Eugene Litwak, *Occupational Mobility and Extended Family Cohesion*, and *Geographical Mobility and Extended Family Cohesion*, 25 *AMERICAN SOCIOLOGICAL REV.* 385 (1960); see also Sussman, *The Isolated Nuclear Family: Fact or Fiction?*, 6 *SOCIAL PROBLEMS* 333 (1959).

that once existed here has been transformed into a pattern of nuclear families without, however, completely destroying all feelings of relationship among brothers, in-laws, uncles, nephews, nieces, aunts, and cousins, not to speak of parents on the one side and their married children and the latter's spouses and children on the other.

The second and more far-reaching impact exercised upon the family by industrialization and urbanization has been the transformation of its functions.³ In 1860, the majority of Americans lived on farms or in small towns;⁴ in 1960, 69.9 per cent of all Americans were inhabitants of urban communities. In such communities the role of the family is different from what it was on the farm, and even today's farm family is no longer what it was a hundred years ago.

The old-type family was the principal institution that was supposed to serve, and actually did serve, numerous functions which it now shares with other social institutions.⁵ At the risk of oversimplification the principal functions of the old-time family may be stated as follows: On the farm, as well as among urban craftsmen and shopkeepers, or even with respect to larger-scale commercial enterprise, the family was the basic unit of production, of worship (shared with the church), education, recreation, care of the sick, the old, and the needy, and of consumption.

Of these functions only the last is still regarded as the peculiar domain of the family, and even here the function of the family has to some extent been taken over by the business man's club, the plant canteen, and the lunch counter. In worship the role of both family and church has decreased, but the former's more than that of the latter. The care of the sick and the needy has increasingly been assumed by philanthropic institutions and, above all, by the state. In education the school has come to outrank the family.

In the former tasks of the family a shrinkage has thus taken place. That does not mean, however, that the social role of the family has lost importance. Needs have arisen or have been intensified of which the present-day urban family is expected to take care. The most important of these new needs is that of providing the necessary counterweight to the modern city dwellers' isolation from nature and from those human contacts which were provided by such old-time institutions as the neighborhood or the congregation. These needs of

3. The classical paper on the transformation of the functions of the family in American society is Ogburn, *The Family and Its Functions*, in PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS, RECENT SOCIAL TRENDS 661 (1934).

4. In 1860, only 19.8 per cent of the population was urban.

5. A "theory of shared functions" has recently been developed by Eugene Litwak in a paper titled *Extended Kin Relations in an Industrial Democratic Society* (prepared for Conference on Intergenerational Relations, Duke University, Nov. 5 and 6, 1963).

tension management cannot be completely fulfilled by the clubs, cocktail parties, and other institutions of urban life. Modern man seeks the indispensable community where he was less used to seek it in earlier times—in the family or, more precisely, in marriage. In the tradition of Christianity, marriage has long been defined as the *consortium omnis vitae*, the total community of life in all and every respect.⁶ In reality this ideal was rarely achieved or even expected. For the farmer of the sod home frontier, who advertised in a New York paper for a healthy wife used to farm work, the wife was expected to be the partner in sex and work and the mother of the children. What he hardly expected was to find in her the comrade with whom he could share his innermost feelings, at whom he could unburden himself of the worries and frustrations of life, who would share his tastes in literature, arts, and music, and who would provide for him the quiet haven of refuge within a stormy and complex world.⁷ All such “tension management” is expected of marriage in modern urban life, and it is expected by both partners. The expectations and aspirations of the female have come to count. Here we touch on another of those great social trends which have contributed essentially to the transformation of the family—female emancipation. We need not trace it here in detail. Suffice it to mention that women now have the suffrage, that they are eligible for practically every kind of public office, and, above all, that as workers women have stepped out of the home, the family farm, and the family enterprise. By 1960 one-third of all American married women were engaged in work outside of the home.⁸

Our survey of the transformation of the family as a social institution has been sketchy, crude, and oversimplifying. It ought to suffice, however, to indicate that the family of the 1960's widely differs from that of the 1860's, and that, consequently, changes have occurred in

6. This view of marriage has its root in pre-Christian ideals. Cf. L. 1. Dig. de rit. nupt. (23.2): “Nuptiae sunt conjunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio.”

7. Old-style “institutional marriage” is said to have been replaced by modern “companionship marriage.” BURGESS & LOCKE, *THE FAMILY FROM INSTITUTION TO COMPANIONSHIP* (2d ed. 1950), especially chapter 16, *The American Family in Transition*.

8. 41.7 per cent of all married women residing with their husbands worked at some time during the year 1959; one-third of them (32.5 per cent) worked full-time for at least fifty weeks. UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *SPECIAL LABOR FORCE REPORTS* No. 11, Table E, at A-11. “90 percent of the women reaching adulthood today will hold jobs at some time during their lives, whereas only half of their counterparts 60 years ago might have been expected to work.” Mahoney, *Factors Determining the Labor Force Participation of Married Women*, 14 *IND. & LAB. REL. REV.* 563 (1961). In 1949 the percentage of married women engaged in outside work was 22; in 1890 it was 4.6. BURGESS & LOCKE, *op. cit. supra* note 7, at 504.

the reality of those human relationships which in their totality make up the family. Concomitant with these transformations of the factual content of these relationships has been a change in the normative expectations. How ought a husband and his wife behave toward each other? What is the proper conduct of parents toward their children and vice versa? The mere statement of these questions will evoke the uncertainty of the answers in all the norm systems which address themselves to man: the religious, the ethical, that of social convention, and that of the law. The answers must be uncertain and groping, especially if they have to be, as those of the law, uniform for all families concerned.⁹

When we speak of the transformations of the family as a social institution, that is, of transformations in the realm of the factual rather than the normative, we must not overlook the fact that not all the American families of the 1960's are of the new pattern. Old-style families survive, perhaps more than we are inclined to believe at first sight. Those families which constitute the new patterns in full purity may be comparatively few. Most American families follow a variety of patterns between the extremes. The trend from the old family pattern to the new unmistakably exists. The extent to which it has come to be actualized varies, one might almost say, from family to family. No wonder that no unity of normative expectations has arisen from this welter of different facts. But even if the transformation had been more complete in the realm of the factual one ought not to expect a fully corresponding transformation in the realm of the normative. Norms of etiquette and convention may change in fairly rapid sequence with the formation of patterns of actual social conduct, but ethical normative convictions are more resistant. A new social pattern emerging in nonconformity with long-held ethical convictions will meet with disapproval rather than provoke a quick adaptation of the old ethical norm to the new social facts. Even more vigorous will be the resistance of religious norms regarded as revealed by God Himself, and thus immutable by man. By their very nature as the stewards of the divine revelation, the churches have, of necessity, been inclined to maintain unsullied their norms of family and sex life which for centuries have been regarded as those of Christianity. What part of this norm system is of the essence of Christian revelation and what is accidental interpretation and addition? What can be shed and what must be preserved? Varying answers have been given, with considerable differences between liberal Protestants, Fundamentalists, and Catholics.¹⁰ The answers

9. Cf. Llewellyn, *Behind the Law of Divorce* (pts. 1-2), 32 COLUM. L. REV. 1281 (1932), 33 COLUM. L. REV. 249 (1933).

10. For a critical survey of the position taken by religious bodies and writers in

given by non-theologian leaders in moral philosophy have varied too, influenced as many of them are by religious traditions. But even among purely secular thinkers, unanimity cannot be found.'

What, in such a situation, shall be the norms of the law? The answer is comparatively easy in a country of comparative homogeneity of religious and ethical convictions such as, for instance, on one side, Italy, or on another, Sweden. In the former, the law of marriage coincides with that of the Roman Catholic Church.¹¹ In the latter, the law has come to conform more or less to the norms of Protestant and secular liberalism.¹² The answer is also not too difficult in a country in which the norm system of right conduct is formulated by a dominant group such as the Communist Party of the U.S.S.R. The family law will conform to the party line and it will follow the party line's changes.¹³ However, that it has not been easy for all one-party states to develop clear and undisputed norms of family life has been shown by such examples as National Socialist Germany,¹⁴ Communist Poland,¹⁵ or one-party Ghana.¹⁶

How much more difficult is it to work out norms of law which, as they ideally should, correspond to the prevailing norms of religion, ethics, and convention in a society in which widely divergent convictions are held and in which none of the divergent convictions is supposed to dominate and prevail over the others? The task with which the fashioners of American family law have been confronted has not been an easy one. The answers they have developed, or rather the standards that have emerged, are far from being universally satisfying. By and large one wonders that they have not been worse. Most of them result in decisions that appear fair and just. In a considerable measure this result is due to the fact that few family disputes ever go beyond the level of the trial court, which sees the parties, their troubles and their miseries, and which feels itself less bound by the norms of the official law than an appellate court. Indeed, there has grown up in family law a dichotomy of the law of

Germany, see MULLER-FREIENFELS, *EHE UND RECHT* 73 (1962). For a list of pamphlets published by American church bodies, see DUVALL, *FAMILY LIVING* 399 (1950).

11. Treaty between the Holy See and Italy, Feb. 11, 1929, Law of May 27, 1929, n. 810, *Gazzetta Ufficiale*, June 5, 1929, n. 130 (Italy).

12. Karlsson, *Social Policies and Marriage Stability in Sweden*, 9 *ANNALES DE LA FACULTE DE DROIT D'ISTANBUL* 246 n.13 (1960); cf. Segerstedt & Weintraub, *Marriage and Divorce in Sweden*, 272 *ANNALS* 185 (1950).

13. See GRZYBOWSKI, *SOVIET LEGAL INSTITUTIONS* (1962); GSOVSKI, *SOVIET CIVIL LAW III* (1948); HAZARD & SHAPIRO, *THE SOVIET LEGAL SYSTEM*, pt. III, 99 (1962).

14. See WOLF, *SCHEIDUNG UND SCHEIDUNGSRECHT* 78 (1959).

15. Cf. Czachorski, *Données statistiques sur le divorce en Pologne*, 9 *ANNALES DE LA FACULTE DE DROIT D'ISTANBUL* 293 n.13 (1960).

16. For a general survey, see Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 *LAW & CONTEMP. PROB.* 3 (1953).

the books and the law in action, a dichotomy which is most conspicuous in matters of divorce,¹⁷ but which can also be observed in other areas, especially the law of family support or of guardianship. Generally it can be said, however, that the norms which were established as norms of law in conformity with the then dominant convictions about norms of religion and ethics have been preserved as norms of law, especially of the law of the books, but often also as the law in action, with the result that the law has not only failed to promote "good" patterns of social behavior but has been a source of unnecessary hardship and misery.

What we need is a comprehensive survey of the entire field of family law presenting for each of its subdivisions a careful evaluation of the extent, if any, to which the legal norms and institutions have been adapted to the needs of our rapidly changing time. Considering the complexity of the problems, the coexistence of old, new, and all sorts of intermediate social needs, the diversity of our several state laws, and the inconclusiveness of many of the attempted adaptations, the task will not be easy. It cannot be undertaken here. It would require years of research and reflection. We can do no more than present some sketchy impressions.

Let us observe at the very outset that nowhere in the United States has the response to the new demands been as decisive as it has been in the Scandinavian countries. There, as we have stated already, the tasks were easier. The population is more homogeneous, the changes have proceeded at a more even rate, and the machinery of law adaptation is simpler and more efficient. The response of American law can also be said to lag behind that of such countries as Great Britain, Germany, or France,¹⁸ where the extent of industrialization and urbanization has been approximately equal to that of the United States, but where the changes have been less even and where the religious, ethnic, and social composition of the population is more diverse than in Scandinavia.

The field of American family law in which the response has been relatively best, although by no means fully adequate, has been the law of husband and wife. The change from the common law rules on matrimonial property to the latest vintage of married women's property laws has been radical. Under the common law a married woman's property belonged for all practical purposes to her husband; she could not bind herself by contract, and for torts committed by her

17. See pp. 251-52 *infra*.

18. Cf. Rheinstein, *The Code and the Family*, in SCHWARTZ, *THE CODE NAPOLEON AND THE COMMON LAW WORLD* 139 (1956); Rheinstein, *Law of Family and Succession*, in LOUISIANA LAW INSTITUTE, *CIVIL LAW IN THE MODERN WORLD* (in press). On England, see *A CENTURY OF FAMILY LAW* (Graveson & Cran eds. 1957).

the husband was responsible. The wife's personality was said to have been merged in that of the husband. Today, a married woman can own all kinds of property; she can manage and dispose of it freely and without her husband's consent; she can bind herself by contract and she is liable for her torts. Not in all states have all these rights, powers, privileges, and immunities been granted to the full extent, but the trend is unmistakable and those remnants of the old disabilities which still linger on are apparently bound to disappear. Women, unmarried and married, have stepped out of the kitchen; they have entered the economy of the nation as well as its political life. We are inclined in the United States to believe that the economic, social, and political emancipation of women has been more complete than anywhere else. It is not. It is easier for a woman to establish herself in business or in the professions in Scandinavia and Germany. But woman's ascent has been marked in the United States¹⁹ and the law has responded by giving her not only the franchise and the capacity to hold political office but also full, or almost full, personality in the field of private law.

However, the corresponding conclusions have not been drawn for the husband. Under the old regime the husband owned all the property; he was entitled to the earnings of all the family members of the household, *i.e.*, to those of his wife as well as those of the children. Consequently, and with good reason, he alone had to carry the burden of supporting the whole family. No contribution was expected from the wife. Indeed, how could it be? She had no income of her own, either from work or from capital. Now, with married women able not only to own their own property but also to have their own income, the reason is gone for the old rule which placed the entire burden of support upon the husband. But courts are still prone to say that a husband's burden fully to provide for his wife's support is neither eliminated nor even alleviated by the wife's having earnings of her own, or by her ability to earn her own living by work or to defray her support from the income of her capital.²⁰ In fact, this obsolete rule is largely ignored by courts in fixing awards of alimony, separate maintenance, or child support. The wife's income, her earnings, or her earning capacity are in fact considered, especially by trial courts.²¹ However, the courts are not consistent, and appellate courts in particular are by no means unlikely still to

19. See *BORGESE, ASCENT OF WOMAN* 172 (1963).

20. *Cf. Churchward v. Churchward*, 132 Conn. 72, 42 A.2d 659 (1945); *McFerrer v. Goldsmith-Stern Co.*, 137 Md. 573, 113 Atl. 107 (1921); *Bonanno v. Bonanno*, 4 N.J. 268, 72 A.2d 318 (1950).

21. See Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709, 719 (1956).

treat a husband's duty to support his wife as an absolute one, as it was in those days in which all the family income was united in the husband-father's hands. Perhaps the courts have been reluctant to bury the old rule because female emancipation has not been complete in the United States, because the American labor market does not need a great influx of women, and because our institutions for day care of children are insufficient to allow mothers of small children to work outside of the home. But the need is not for a flat denial of all female claims of support against husbands or ex-husbands, merely for a flexible rule which would not only allow but direct the courts in determining amounts of separate maintenance, alimony, and child support to pay attention to the fact that married women can, and often do, have an income of their own, and in appropriate circumstances ought to work, and that there is no reason why a wife's income ought any longer be immune to being used for providing for her needs and for those of her children. After all, why should Mrs. Milquetoast, a millionairess or a female movie star, be allowed to lay up all her income in savings and to claim all her support from her husband Caspar?

While with respect to marital property the response of the law has by and large been adequate to the need, excepting the continued immunity of wives to contribute to their own support and to that of the children, the response has been too eager with respect to tort claims between members of the nuclear family, especially spouses.

Regarding husband and wife as but one person, the common law could not recognize tort claims between them. When under the married women's property acts it became possible for married women to own property of their own, it also became necessary to protect this property against impairment by outsiders as well as by the husband. To this need American law has responded, as well as to its counterpart of protecting a married man's property against impairment by his wife. But what about personal injury claims between husband and wife? In this respect a constantly accelerating trend has arisen in the courts toward allowance of claims of this kind.²² Courts have taken cognizance of female emancipation in fact and in law, as well as of the opening of the automobile age. More and more courts wish to be modern and they believe that they can prove their openness to modern needs by admitting interspousal claims for damages for personal injury.

But is there a need for admitting such claims? If a married woman comes to grief in an automobile accident, it is incumbent upon her

22. For a survey of the case law, see JACOBS & GOEBEL, *CASES ON DOMESTIC RELATIONS* 565 (4th ed. 1961).

husband to pay the cost of her medical treatment, her hospitalization, and her druggist's bill. If she has been working in the household, on the farm, or in the family business, the loss of her work is the husband's. If there is to be hired a housemaid, a nurse for the children, or a substitute help on the farm or in the business, the pay has to come out of the husband's pocket. If the wife's injury was brought about by the negligence of some third party, the loss items first enumerated are the husband's and he is the party, and, in general principle, the only party who is entitled to recover from the tortfeasor.²³ If the injury happens to have been caused by the husband he would have to recover from himself, which of course would be nonsense. But, surely, the wife cannot recover from him compensatory damages for harms which are actually his rather than hers.

Injury to the wife for which damages are recoverable from a third party by her can conceivably consist of two items: impairment of future earning power and physical or mental pain and suffering. Impairment of the wife's earning power is her loss rather than her husband's if she has in fact been engaged in gainful outside work or if she is likely in the foreseeable future to engage in such work. If there has been such a loss, it is the wife's, and if it was caused by the tortious conduct of a third party, it is she who can recover for it rather than her husband. Since the physical or mental pain and suffering have been sustained by her, recovery for its compensation is again hers rather than his. Whether the husband should in addition be entitled to compensation for the mental pain he suffered in watching his wife suffer her pain is a different question. If the tortfeasor is an outsider, a married woman can recover from him for the two items. Should she also recover if the tortfeasor is her husband?

Damages for pain and suffering are a strange institution.²⁴ Universally they are called compensatory rather than punitive.²⁵ The function is not that of punishing a tortfeasor for seriously reprehensible conduct. That function is performed by the imposition of

23. See *Blaehinska v. Howard Mission & Home*, 130 N.Y. 497, 29 N.E. 755 (1892); N.Y. DOMESTIC RELATIONS LAW § 60.

24. As to the problematic nature of the *pretium doloris* (compensatory damages for non-pecuniary harm), cf. LEHMANN, RECHT DER SCHULDVERHALTNISSE 972 (14th ed. 1959); MAZEAUD, MAZEAUD & TUNC, RESPONSABILITE CIVILE 376, and further literature indicated therein; see also JANOSCH, MULLER & PIEGLER, DAS SCHMERZENSGELD IN MEDIZINISCHER UND JURISTISCHER SICHT (1962).

In the Netherlands, pecuniary damages for non-pecuniary harm were generally refused until the Supreme Court reluctantly admitted their possibility in 1934; see Kisch, *Statutory Construction in a New Key*, in TWENTIETH CENTURY COMPARATIVE & CONFLICTS LAW 262 (1961).

On American law, cf. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200 (1958).

25. See McCORMICK, DAMAGES 316 (1935).

criminal punishment and of punitive civil damages. The damages for pain and suffering are meant to "compensate" the tort victim, that is, to make him whole, to restore him to that state in which he would have been if the tort had not been committed against him—in our case if the pain and suffering had not been caused him. But how can any pain that has actually been suffered ever be undone? Besides, what manly man cares about pain that has passed? As the law can generally do no more than order a defendant to pay money to the plaintiff, the question of whether or not money damages shall be awarded for pain and suffering is answered differently in different legal systems. In recent years the trend has been toward an affirmative answer; in American law money damages for pain and suffering have long been an established institution. But how is the proper amount to be figured? By leaving the question to the jury, we may practically dispose of it in most cases, although not in all. We need some test for the determination of the proper amount. If we take seriously the compensatory function, damages for pain and suffering can be figured solely upon the following basis: By suffering pain the mental well-being of the tort victim has been pushed down below its normal level. The sight of a fat check can push it up again. How fat does the check have to be to restore the victim's previous level of mental well-being? When seen in this way, the payment of money may indeed be an appropriate means of compensation. Where the tortfeasor is an outsider, it seems indeed the only practicable one. But what if the tortfeasor is the husband of the tort victim? Is money the only, indeed, is it the apposite means at the disposal of a husband to cheer up his injured wife? The gift of a diamond brooch may work wonders, but it does so primarily because it is a gift, the object of voluntary giving. And the ways in which a husband can cheer up his wife are manifold; but hardly any of them is likely to count if it is entered under the compulsion of a court's judgment. In other words, a judgment ordering a husband to pay to his wife damages for pain and suffering is unnecessary, inappropriate, and downright shocking.

Hence the only item that remains for a married woman to recover from her husband is that of compensation for the impairment or loss of the power to engage in the future in gainful work outside of the house or the farm or the family business. This item will exist in some cases, but not in all. Whether or not it should be recoverable when it exists is by no means certain where the action is by a married woman against her husband. But if such recovery is admitted, it ought to be limited exactly to compensation for the impairment of the power to engage in future outside work.

Yet no such limitation seems to be applied by that steadily increasing number of courts in which personal injury claims between spouses are being allowed. The measure of recovery seems to be exactly the same as if the suit were against a third party. The oft-made observation that intrafamily personal injury actions would tend to disturb family peace and harmony can easily be refuted by the observation that both plaintiff and defendant are acting in full peace and harmony—they are harmoniously engaged in a joint expedition to milk the insurance company. But is it justified to make the husband's insurer pay? Yes, if the husband has taken out a policy of family accident insurance; no, if he has taken out liability insurance. These two kinds of insurance provide protection against different risks. If I take out family accident insurance I wish to protect myself against the risk of impairment of my income or capital by having to pay expenses caused by an accident to myself or a member of my family. The cause of the accident is irrelevant. By taking out liability insurance, I wish to protect myself and my family against the risk of having my resources depleted by being compelled to pay damages to some outsider. Liability insurance is not designed to shift losses within the family; this is the function of family accident insurance, for which the premiums are much higher. In recent judicial practice these two kinds of insurance have come to be confused with each other. This confusion was speeded by the transformation of automobile liability insurance from a device to protect an owner and driver into one to protect victims of automobile accidents. The principal means has been the direct action of the victim against the insurance company. If any outside victim may sue the owner's insurer, why should one exclude his wife? If the question is posed in that way, no good reason is indeed apparent for a negative answer. But should the question be posed in this manner? Should we not rather ask: In the case of an accident suffered by a married woman, which items of harm are suffered at all by her? Insofar as any harm is hers rather than her husband's we must then ask: Is there a good reason why she should receive compensation by means of a payment of money damages by her husband? And ultimately we should ask: Is the risk of loss suffered by a married woman in consequence of an accident caused by her husband's negligence within the scope of risk as to which the husband's insurer has calculated his premium? If it is, recovery from the insurance company is justified; if not, recovery from the insurance company is a taking of its property without compensation. The whole question is one of insurance law rather than family law.²⁶

26. This insight found expression when the New York legislature in 1937 combined

It follows from what has been said that there is no reason to deny recovery by an injured married woman against her husband's employer, assuming the doctrine of respondeat superior is applicable to the particular case. The employer's insurance is meant exactly to protect him and his enterprise against depletion by claims arising out of accidents caused by employees. The fact that the victim is the wife of the employee by whom the accident was caused is irrelevant to the insurer.²⁷ The fear that the employer may sue the employee and that the burden will ultimately be placed upon the victim's husband is imaginary. The typical business liability policy covers both the firm and its employees.

The reason why the courts have been led astray is not easily apparent on the surface. In their eagerness to meet the challenge of a changed social world in which the family has been transformed with respect to size, structure, and functions, courts and legislatures have come to overlook the fact that the family still exists as a social unit. Our married women's property acts have tended to regard a husband and his wife as two individuals who have no more in common than two strangers. At least as far as property is concerned, the law of the great majority of American states proceeds upon the assumption that he owns his property and she owns hers, that he manages his and she manages hers, and that there is nothing in common between them insofar as their property assets are concerned. That assumption is unrealistic. It is contradicted by the law itself, when it recognizes mutual rights of intestate succession, of indefeasible shares, of dower, homestead, or the surviving spouses' award. The assumption is also wrong in fact. It will be a rare family, especially in the American middle class, in which each spouse knows exactly which piece of furniture or kitchen equipment is his or hers. They regard these items as theirs, just as the checking and the savings account is normally taken out in the couple's joint names; and even if savings are invested in bonds or stock taken out in the name of the husband or the wife, they tend to regard such denomination as a form which does not correspond to what they regard as the true state of affairs—that the assets are theirs. Perhaps separate ownership

the enactment of a statute allowing personal injury suits between husband and wife (DOMESTIC RELATIONS LAW § 57) with an amendment of INSURANCE LAW § 167(3), which now reads as follows: "No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse . . . unless express provision relating specifically thereto is included in the policy." Where such a provision is included in the policy, the insured has, of course, to pay a higher premium.

27. Against recovery: *Riegger v. Burton Brewing Co.*, 178 Md. 518, 16 A.2d 99 (1940). Recovery allowed: *May v. Palm Beach Chem. Co.*, 77 So. 2d 468 (Fla. 1955); *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928).

is more frequently regarded as a reality with respect to real estate. Generally, however, it can be said that in the present-day American lower and middle class family the husband and his wife tend to regard the bulk of their assets as being owned jointly rather than separately. Evidence of this sentiment can be found in the common practice of holding assets in joint tenancy and in the will makers' practice of seeing to it that all those assets which were owned and enjoyed by the couple are left complete to the use and enjoyment of the survivor. In sentiment and in fact the family is as much a social unit today as it was in the past. But our law, trying to be modern, closes its eyes to this fact and deals with a husband and his wife as if they were strangers to each other. The law's response has gone beyond the need.

The unrealistic system of separation of assets is likely to result in difficulties whenever it becomes necessary to separate the husband's assets from those of the wife, *i.e.*, in the cases of death, attachment, bankruptcy, and divorce. It would be interesting to know what these difficulties are and how they are overcome. In spite of its apparent contrast with reality the system functions. How? With respect to divorce one is most easily inclined to believe that the law's response to changing needs has been unsatisfactory. But has the divorce law ever been adequate? Before one can discuss whether or not the response is commensurate to the needs, one has to determine what the needs are. In a country like Spain the answer is easy: maintain the Catholic doctrine of indissolubility of marriage. The answer is also clear in Sweden: the divorce law is to correspond to the ideals of a non-Catholic, extensively secularized society in which equality of the sexes is taken seriously and marriage is regarded not only as the institution to perpetuate the human race but also as one of the principal means for the pursuit of human happiness. In consequence, while marriage continues to be expected to be for life, divorce and, consequently, remarriage, have been made easy.

But what are the needs felt in the society of the United States? While the processes of industrialization, urbanization, and female emancipation are going on, individual families are likely to be uprooted and a marriage concluded under one set of conditions may easily cease to function under different ones. Furthermore, and even more important, in a society of transition ideas of what to expect in and of marriage are likely to be unsettled. Profound social change thus produces a rising rate of marriage breakdown and, consequently, a strong demand for easy divorce. Once conditions become settled again, the curve of marriage breakdown incidence tends to flatten out, although the new plateau will be higher in the "modern" industrial-

ized society than it was in the pre-industrial.²⁸

In the United States, we have been in this process of transition for about one hundred years and it is by no means completed. Besides, even where a family has externally been engulfed by the stream of industrialization and urbanization, the mental adjustment takes time. It is unlikely to occur with the first generation subjected to the new conditions. Just because they feel their traditional ways to be threatened, the old-timers are likely to maintain the old-time ideals with particular tenacity. In the United States we thus have no unity of normative views about marriage. The conservative ideal of indissoluble marriage lives side by side with the liberal demand for easy divorce and remarriage. Under such circumstances the best we can expect of the law is that it constitute a compromise between the divergent demands. The compromise has been brought about by the coexistence of a strict divorce law of the books and a law of easy divorce in action.²⁹ In most of our states the official law of the statute book is strict. No divorce is to be granted unless one spouse has committed a grave marital offense, such as adultery, desertion, or cruelty, and even where one party is guilty of such misconduct, restoration to the freedom of the marriage market is not to take place unless the plaintiff has been blameless in his or her marital conduct. Judging from the statute book, it is not easy to obtain a divorce. In fact a divorce can be obtained, one is tempted to say, for the asking, provided the parties can work out their own scheme of property, alimony, and custody settlement, and have sufficient funds to go to Reno or to engage an experienced divorce lawyer. This divergence of the law in action from the law of the books has been criticized, and suggestions for reform have been made. The most influential among them has been the so-called family court plan. It will be as unsatisfactory an answer as any other plan so long as we have no unanimity of norm patterns about marriage and divorce.

In conclusion we shall mention that topic of family law where the law has utterly failed to respond to the needs of life: minors' contracts and guardianship. Present American law is based upon the forgotten assumptions that as soon as a minor has any property he will also have a guardian, that if there is to be made any transaction involving the minor's property, the guardian will go into action, and that consequently there is no need for any transactions ever to be

28. For statistics, see JACOBS, *AMERICAN MARRIAGE AND DIVORCE* (1959); Plateris, *Statistical Data on Marriage Stability*, 9 *ANNALES DE LA FACULTE DE DROIT D'ISTANBUL* 253 (1960).

29. See Rheinstein, *Our Dual Law of Divorce: The Law in Action and the Law of the Books*, in *CONFERENCE ON DIVORCE* 39 (Univ. of Chicago Law School Conference Series 1952).

made by the minor except in situations of such urgent emergency that the guardian's intervention cannot be waited for. Excepting such cases of emergency, nobody within his senses is thus expected ever to deal with a minor. If anybody is rash or dishonest enough nevertheless to deal with a minor for any purpose other than providing him with "necessaries," *i.e.*, emergency food, shelter, or urgent medical services, it serves him right if the transaction is disaffirmed by the minor and he, the other party, loses what he has given or paid to the minor.

This system might be adequate to the needs of society if its underlying assumptions were correct. Whether they ever were correct in the United States is doubtful. They are clearly not correct today. In contrast to guardianship of the person, which arises "naturally" in the father or, under modern statutes, in both father and mother, of a child at the moment of his birth, no one can be guardian of a minor's property without being appointed by decree of court, and, upon general principle, no one is to be appointed, not even the father, without first having given bond. Popular opinion seems to take it for granted that the father, *qua* father, is the guardian of both his child's person and his property. This popular notion is erroneous and the discrepancy between the popular view and the law constitutes the source of difficulties, which, although widely ignored, are serious, and which would be intolerable if it were more generally known what the law is and what an arsenal of weapons it has placed into the hands of minors. Contrary to often repeated dicta, infancy can be used not only as a shield but also as a sword. If Yokum Youngman has purchased a second-hand car for 500 dollars, has paid 400 dollars, still owes the rest, and then drives the car into a lamp post, he may, upon returning the wreck to the dealer, not only keep his 100 dollars but also recover the 400 dollars already paid.³⁰ Some courts have gone even further: If at the time of disaffirmance the minor, or former minor, can no longer return in kind what he has received from the other party because he has sold it, he may keep the price received in his resale and nevertheless recover from his seller what he has paid to him.³¹ Such a refusal to trace the consideration received by the minor is a clear misapplication of the existing law. But even where tracing is allowed, the present law allowing the infant to plead impossibility of return of the consideration, in kind or as

30. See, *e.g.*, *McGuckian v. Carpenter*, 43 R.I. 94, 110 Atl. 402 (1920).

31. See, *e.g.*, *Arkansas Reo Motor Car Co. v. Goodlett*, 163 Ark. 35, 258 S.W. 975 (1924); *Wooldridge v. Hill*, 124 Ind. App. 11, 114 N.E.2d 646 (1953); *Reynolds v. Garber Brick Co.*, 183 Mich. 157, 149 N.W. 985 (1914); *Gage v. Moor*, 200 Okla. 623, 198 P.2d 395 (1948). *But see* *Myers v. Hurley Motor Co.*, 273 U.S. 18 (1927); *Rush v. Grevey*, 90 Ohio App. 536, 107 N.E.2d 560 (1951); *Pettit v. Liston*, 97 Ore. 464, 191 Pac. 660 (1920).

traceable, is intolerable in a time in which minors do have property and adults do not hesitate to deal with them. The age at which minors begin to be gainfully employed is higher today than it was in the olden days. School-leaving age has been raised and more young people go to college than ever before. But when the young people begin to earn, they earn more than in earlier times, and parents are less anxious to receive the son's or daughter's pay check, even though under the law they are still entitled thereto. The young man uses his earnings to buy cigarettes, to take his date out, or to purchase a car, a record collection, or other expensive items. The law that allows him to repudiate all his engagements is so out of tune with reality and need that it is as little known in the business world as the rule of *Foakes v. Beer*.³² It seems to be little known, too, that the law expects, nay, requires, that for every youthful wage earner the probate court appoint a guardian who will take on the management of the youngster's earnings. In fact it is hit and miss whether a guardian will be appointed to manage funds coming to minors as legacies, life insurance payments, or gifts. If the minor does not get hold of such funds, they are likely to be taken on by parents or relatives who, subject to no control, may manage or mismanage, preserve or dissipate them. Unfortunately we know little of what actually happens to minors' funds. A study that was initiated some years ago by the United States Children's Bureau could not be completed because in one of its economy moods Congress cut off the appropriation.³³ The material that was discovered before the inquiry had to be abandoned indicates the absence of any comprehensive efforts to protect minors' funds and the presence of widespread mismanagement, both involuntary and intentional.

The invitation to write for this symposium on *Stability and Change Through Law* a short article about challenges and responses in the field of family law has been a challenge. I accepted it hesitatingly. The time limit allowed was too short to permit investigation or elaboration. However, it has given me an opportunity to express some judgments I have come to form in some thirty years of occupation with family law. With one exception all these judgments are based on general impression rather than systematic incisive research. A topic on which extensive research has been undertaken is that of divorce; the result will, I hope, be published in the near future. What we need in the family field is research. Before we can begin sensibly to reform the present law we must know what the needs are. That means we must know what are the actual patterns of

32. L.R. 9 App. Cas. 605 (1884).

33. CHILDREN'S BUREAU, GUARDIANSHIP (Pub. No. 330, 1949).

behavior of all the numerous and different groups of our heterogeneous nation; we must know what normative ideas are actually maintained by these groups of our people. Only then can we know what the needs are which the law is supposed to satisfy. Next we must know what the present law is. That knowledge is by no means clear. Several fields of family law are in such a state of confusion that it is hardly possible to state with certainty what the law is. We have already pointed out the confused state of the law of guardianship and of infants' contracts. The state of clarity is hardly better as to the law of nullity and annulment of marriages, of alimony, or of child support, just to name a few examples. What we need in family law is research—research on the law, on the facts of family life, on the normative ideas actually entertained, and on the law itself. If the present sketch should stimulate some such research, it will have served its purpose.

