University of Michigan Journal of Law Reform

Volume 18

1985

The Next Step: Definition, Generalization, and Theory in American Family Law

Carl E. Schneider
University of Michigan Law School, carlschn@umich.edu

THE NEXT STEP: DEFINITION, GENERALIZATION, AND THEORY IN AMERICAN FAMILY LAW

Carl E. Schneider*

> *The way to gain a liberal view of your subject is . . . to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.***
>
> Oliver Wendell Holmes
> *The Path of the Law*

The *Journal of Law Reform*'s Symposium on Family Law comes opportunely, in legal scholarship's spring of hope, its winter of despair, at a time when we have everything before us, when we have nothing before us. As is natural in such an epoch, reflection about legal scholarship, about its history, purposes, and methods, has flourished.[1] This Symposium invites us to extend that reflection to family law, and this essay attempts, tentatively and speculatively, to accept the invitation.

Several areas of legal scholarship—torts, contracts, criminal law, first amendment law, antitrust, and tax come readily to mind—have found a kind of maturity as scholarly disciplines by

* Associate Professor of Law, University of Michigan. B.A., 1972, Harvard University; J.D., 1979, University of Michigan. I wish to thank a number of generous people for their helpful comments on an earlier draft of this essay: David L. Chambers, Edward H. Cooper, Richard O. Lempert, Joseph L. Sax, Frederick F. Schauer, Joan W. Schneider, Dorothy Schneider, Lee E. Teitelbaum, and Maris A. Vinovskis.

** 10 HARV. L. REV. 457, 476 (1897).

1. *See, e.g.*, Symposium, *American Legal Scholarship: Directions and Dilemmas*, 33 J. LEGAL EDUC. 403 (1983); Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981).

working to define their fields, to generalize about their subjects, and to develop theories to explain their subjects. Tort law, to take a convenient instance, benefitted a century ago from attempts to define its scope,[2] progressed even in an atheoretical period through the generalizing work of treatise writers,[3] and has lately seen theory (often interdisciplinary) which has produced "a striking renaissance of creative scholarship in Torts."[4] Probably in consequence, academic influence on tort law has been "regular and profound, shaping basic conceptions of civil liability."[5]

Although family-law scholarship has had admirable successes, it has not, as I try to show in the first part of this essay, reached the maturity represented by definition, generalization, and theory. In the second part of the essay, I suggest that family law has met several obstacles to maturity, some of them common to legal scholarship, some of them inherent in family-law scholarship. In the third part, I argue that some of these obstacles have lost their power to obstruct, and that the advantages of synthetic work beckon us on. I close the essay by proposing some approaches to generalization that I hope may be fruitful.

I.

It is, I think, commonly and correctly assumed that the literature of family law has not systematically defined the discipline called "family law." The hornbook in the field[6] escapes the issue: it addresses the "law of domestic relations" and was written in 1968, before many of the developments which complicated the law of "domestic relations." Family law casebooks no doubt resolve the definitional problem implicitly, but the packrat technique of casebooks obscures the definitional views of the authors, and (understandably, perhaps appropriately) no casebook undertakes the discussion that a problem of such complexity demands.

---

2. G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3-62 (1980).

3. "In searching for the sources of Prosser's influence as a Torts theoretician one recurrently comes upon his capacity to synthesize; his persistence in maintaining classifications so that they hardened into doctrine; his skill in preserving doctrine he had helped create." *Id.* at 176.

4. *Id.* at 179.

5. *Id.* at 242.

6. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES (1968).

Similarly, family-law literature has rarely attempted large-scale generalization. By "to generalize," I mean no more than to identify the common elements and themes in different parts of family law. Traditional legal writing relies on the treatise for doctrinal generalizations, but family law has not had a multi-volume treatise for half a century,[7] nor a hornbook for twenty years,[8] and neither that treatise nor that hornbook sought to give family law the organizing viewpoint Professor Corbin, for example, gave contracts or Professor Tribe offers constitutional law. Although the casebook format is ill-suited to systematic and articulate generalization, the Goldstein and Katz family-law casebook[9] breaks the rule against generalization in family law, for it works steadily through the psychological components of family-law problems. Finally, the law-review articles of family-law scholars, wise and helpful though they otherwise can be, likewise confine themselves to specific, often greatly specific, subjects. Of course such articles are necessary and valuable, in part precisely because they can be apt ways of exploring broader topics; but the striking fact about family-law scholarship is the rarity of attempts to go beyond the specific.

"Theory" has painfully numerous connotations; here I mean by it no more than systematic explanation at some level of abstraction of how law acts or of why it should act in a particular way. Free-speech theory, for example, in some of its forms explains how free speech promotes wiser government and why free speech is morally and socially desirable apart from that consequence. While much theory used in law is borrowed from the social sciences, family-law theory, to be useful, need not meet standards of scientific (or even social scientific) rigor. Loosely as I define "theory," however, there is hardly any in family law. Two rare examples are recent, and may foretell a trend. They are Mary Ann Glendon's book *The New Family and the New Property* (1981), which describes and attempts to explain the direction of family law in industrialized western societies in historical and sociological terms, and Frances Olsen's article *The Family and the Market: A Study of Ideology and Legal Form*,[10] which tries to analyze American family law from a "critical legal studies" perspective.

---

7. 1-4 C. VERNIER, AMERICAN FAMILY LAWS (1931-1936).

8. H. CLARK, *supra* note 6.

9. J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW: PROBLEMS FOR DECISION IN THE FAMILY LAW PROCESS (1965).

10. 96 HARV. L. REV. 1497 (1983).

II.

Before discussing family law's future, we need to ask what has inhibited family law from defining its scope, generalizing about its characteristics, and theorizing about its purposes and operation. Some of the causes are general to American law. The legal realists' attack on "conceptualists" and "formalists" still stirs distrust of abstraction and theory. The realists themselves were prepared to see law explained in social terms, but theory of that kind has been hampered by the failure of the social sciences to achieve the explanatory power the realists had anticipated. The realist's ultimate legacy, Professor Ackerman suggests, was that lawyers learned to

> look upon organizing abstractions—be they 'contract' or 'the public convenience and necessity'—with deep skepticism. The life of the law was to be found in the sensitive formation of highly particularistic rules, and in the Realistic refusal to generalize those rules beyond the particular contexts that gave them meaning.[11]

The post-realist "law, science, and policy" approach never found influence to match the ambition of its conceptually oriented work,[12] and much of the work of the legal-process school "was geared primarily to problem solving."[13] A more general reason for the particularism of family law scholarship may lie in the pragmatic, anti-ideological attitude often said to be part of the American character and typical of American legal scholarship. An ideology provides a set of organizing principles through which to understand a body of law. Thus some of the first theorizing in the least theoretized areas of law has come from adherents to one of the critical legal studies views.[14]

Whatever intellectual fashions predominate, lawyers must always solve problems, and, as Professor Kuhn suggests, academics also have to and like to solve puzzles.[15] Legal academics will

---

11. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 18-19 (1984).

12. "There is much to be said—both pro and con—about the extraordinary reconceptualization of legal discourse advanced by Harold Lasswell and Myres MacDougal . . . . The important point here, however, was the profession's refusal to engage in the argument." *Id.* at 40-41.

13. R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 271 (1983).

14. *E.g.*, J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Olsen, *supra* note 10.

15. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 35-38 (1970) (emphasis in

always be pressed to work on the puzzles troubling practitioners, judges, and legislators, and family law is specially susceptible to such pressure: on one hand, much of the family law met in practice is of little theoretical interest, since it involves technicalities or questions resolved through negotiation. On the other hand, the immediate problems of identifiable classes of people—abused spouses, children in foster homes—press so cruelly that research not directed toward their immediate consolation seems almost decadent. It is crucial to recognize that a strength, and the continuing—although incomplete—usefulness of traditional legal scholarship lies in its power to direct concentrated attention to the doctrinal analysis of these issues.[16] Partly because of that strength, family-law scholarship can claim some credit for the fact that family law today is impressively different from that of twenty years ago,[17] and different often in ways that make people's lives less painful.[18]

Other general features of legal work and legal scholarship have directed work toward the specific. The traditional forms of legal expression have proved unconducive to generalization and theory. Lawyers' briefs and judges' opinions speak to issues in a particular case, and incremental, precedent-bound adjudication deters (though it does not prevent) sweeps of generalization and theory. The academic lawyer's paradigmatic form of expression, the doctrinal law-review article, has worked so successfully in what it does well that it has traditionally not been extended to other purposes. And lengthy as law-review articles can be, they

---

original):

> Perhaps the most striking feature of . . . normal research problems . . . is how little they aim to produce major novelties, conceptual or phenomenal . . . . The scientific enterprise as a whole does from time to time prove useful, open up new territory, display order, and test long-accepted belief. Nevertheless, *the individual* engaged on a normal research problem *is almost never doing any one of these things*. . . . What then challenges him is the conviction that, if only he is skillful enough, he will succeed in solving a puzzle that no one before has solved or solved so well.

16. Traditional legal scholarship is in some ways akin to and in some ways shares the virtues of the "normal science" whose utility Professor Kuhn praises. Normal science is non-revolutionary science that seeks to refine and amplify an accepted paradigm rather than to invent a new one. Professor Kuhn suggests that by "focussing attention upon a small range of relatively esoteric problems, the paradigm forces scientists to investigate some part of nature in a detail and depth that would otherwise be unimaginable." *Id.* at 24.

17. Consider the reforms in the law of divorce, marital property, alimony, child custody, and abortion, to name only a few of the major areas which have changed in the last two decades.

18. *See* Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REF. 805, 805-06 (1985).

do not provide the book-length space some other disciplines employ for their more ambitious efforts.[19] Not only have customs of legal writing slowed the maturation of legal academic fields; so also have the methods of training law professors. They have no education in the law beyond that given every lawyer, and that education conceals the schools and traditions of legal scholarship. They take no comprehensive exams, they are supervised through no theses.

All this notwithstanding, other fields of law have achieved sharper self-definition, broader generalizations, and deeper theory. Does family law differ systematically from fields like torts, contracts, criminal law, first amendment law, antitrust law, and tax law in ways that impede its progress? To answer this question, we will contrast these "maturer" fields with family law, first, in "sociological" terms, second, in terms of legal scholarship's relation to non-legal disciplines, and third, in terms of each field's substantive characteristics.

First, the "sociological" factors. It seems likely that, *ceteris paribus*, the longer a field has existed in a recognizable form, the better it will be defined and rationalized. Family law is unexpectedly new and thus differs from several of the maturer fields in the length of time society has thought about the problems for law each presents. There was relatively little family law in England, and it was administered for some time by the ecclesiastical courts; family law in the United States was almost wholly rewritten in the nineteenth century;[20] and modern family law differs dramatically not only from that of the nineteenth century, but from that of the 1950's.

It also seems likely that the intensity with which a field has been thought about affects its maturity, and family law differs from the maturer fields in the intensity with which each has been thought about in legal terms. Some fields—first amendment law, antitrust—win attention by their inescapable public importance. Everyone acknowledges the family's importance to society, but the relationship between family law and the family's social strength is complex and obscure enough to have dampened public interest in family law. Some fields—torts, contracts, antitrust, tax—command study because of their pecuniary im-

19. The treatise seems better suited to definition, generalization, and theory, and has sometimes produced them.

20. For example, the laws of husband and wife and parent and child were not even thought of as a unit until the latter part of the nineteenth century. Teitelbaum, *Family History and Family Law* (forthcoming). *See generally* M. GROSSBERG, LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA (1985).

portance to clients who can support a lucrative specialized bar. Although the problems of well-to-do clients have influenced parts of family law (marital contracts, marital property, alimony), such problems have neither dominated the concerns of major law firms nor reached systematically throughout family law, and the family-law bar has historically not been distinguished for its intellectual contributions to its field. Finally, the intensity, or at least sophistication, of thought about a field increases when it attracts national attention. Each of the maturer fields has had substantial national attention. Even torts and contracts have undergone prolonged national consideration in law schools because of their centrality in legal thought and because they are required parts of first-year curricula and in such fora as the American Law Institute because of their centrality in the law and because national uniformity in them has seemed useful. Family law, however, is not required in most law school curricula, has not seemed to need national uniformity,[21] and has been thought specially within the responsibility, authority, and interest of the states.

Family law, then, differs from maturer areas of law in its capacity to attract the well-funded, sophisticated national effort by which the bench and bar can work to rationalize the law.[22] The marginal standing of family law and its bar has had its correlate, and in part its consequence, in the marginal standing of family law in academia. That marginal standing has meant that many able academics of the kind who might be drawn to the business of generalizing and theorizing have avoided the area.[23]

The second comparison between family law and maturer areas of law arises because each of the latter has relied for theory widely, though not exclusively, on a non-legal discipline. Contracts, torts, antitrust, and tax have used economics;[24] criminal law, moral philosophy; first amendment law, political philosophy. Non-legal disciplines have supplied useful approaches to particular family-law dilemmas, and the enthusiasm greeting *Beyond the Best Interests of the Child*[25] may bespeak a hunger for theoretically founded insights. However, family law is so var-

---

21. Occasional exceptions arise. Around the turn of the century, for instance, conservatives sought to nationalize divorce law to prevent migratory divorce and relaxed standards for divorce. *See* W. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA (1967).

22. Juvenile justice, if it is a part of family law, may be an exception to this rule.

23. Prosser, *Lighthouse No Good*, 1 J. LEGAL EDUC. 257, 261 (1948).

24. *See* B. ACKERMAN, *supra* note 11, at 46-65.

25. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

ious that no single discipline has seemed to offer a convenient theoretical framework for it. Psychology has probably attracted the most attention, but, quite apart from doubts about psychology's own multiplicious theoretical bases, psychology leaves unaddressed the crucial family-law issues spoken to by sociology, political science, and philosophy. The absence of a single easily applied non-legal theory need not be disabling, but it is deeply problematic: interdisciplinary work is intensely difficult when only two disciplines are involved; to ask for competence in more than two disciplines is probably to ask too much. Less globally, non-legal disciplines often have not developed the material family law needs. Philosophers, for example, have said disappointingly little about the moral relationships of family members and between the state and families. Family sociology, otherwise a plausible source, has less powerful theory than might be hoped.

Non-legal disciplines have furnished not only a theoretical view of how a legal field should operate; they have furnished as well a theory about how the people law regulates behave. Economics, for example, supplies at least a theoretical framework for measuring, analyzing, and predicting behavior. This kind of theory is centrally important, since legal scholars stubbornly resist building the empirical basis for understanding behavior relevant to legal problems or for predicting how legal rules will affect behavior. Once again, however, the diversity of family law's requirements—for theories about what people need from families, about how people behave within families, about how abnormal people normally behave, about when and how law influences people's behavior in families, about how bureaucracies function—means at least that no single discipline is a suitable source of systematic family-law theory.

The third category of differences between family law and maturer disciplines has to do with the nature of the area regulated. The maturer disciplines deal with what can usefully be called a single discrete problem or act—with the exchange of promises, with compensation for injuries, with restrictive trade practices, and so forth. Family law, though, concerns not a single problem or act, but a whole area of life. Family law, in other words, is better compared to "business regulation" than to, say, contracts. The relative complexity of family law may be seen in the fact that it is both private law and public law, in the number of basic relationships involved in it (husband and wife, parent and child, individual and state, and family and state), and in the number of areas of law which comprise it (contracts, torts, criminal law, evidence, tax, constitutional law, conflict of laws, trusts and es-

tates, social-welfare law, and so on). Complexity at this level may impede the simplification inherent in generalization and theory.

Furthermore, the sources of family law exacerbate the complexity and unwieldiness that can obscure the path to generalization and theory. Most of the maturer areas of law developed through a "common law" method. Torts and contracts and, to some extent, criminal law, were actually common law subjects; constitutional law and antitrust law both have short, vague texts given meaning by judicial interpretation. Family law, on the other hand, relies widely on statutes whose interpretation is complicated by a residual common-law tradition, by constitutional considerations, and by the frequent intersection of family law with other areas of law. No sane lawyer thinks judge-made law is always coherent; but coherence is, for familiar reasons, a goal of case law in ways that it need not be of statutes. The complexity of family law is increased, of course, by the wonderful multiplicity of groups which seek to affect it, and by the rapidity with which the family and beliefs about it change. Complexity need not, of course, prevent us from generalizing and theorizing—indeed complexity may make it specially desirable to reduce family law to comprehensible and manageable terms. But complexity does make the path to generalization and theory perplexingly difficult.

A coherent normative view of the internal workings and external relations of families might afford a basis for theories about family law. In the nineteenth century a patriarchal-Christian view of the family perhaps did give family law some coherence.[26] But since family law deals with "the less than rational, the historically conditioned, fiercely individual, imaginative, parochial, the less than fully articulate," side of morality,[27] and since our cultural consensus about family morals long ago collapsed, and pluralism has become one of the Constitution's "values," a coherent normative view of the family now seems an unpromising source of inspiration for family-law scholars.

Finally, family law itself is historically contingent: it has responded to the flow of social change and to our fluid, even faddish, views of family life; it has been conditioned by the fierce enforcement problems which characterize family law. For these reasons, and because of our strong normative preference for

---

26. Schneider, *Moral Discourse in American Family Law*, 83 MICH. L. REV. 1803 (1985).

27. S. HAMPSHIRE, MORALITY AND CONFLICT 2 (1983).

family autonomy, family law does not regulate family life systematically, but treats it only intermittently. It is hard to produce a systematic view of an unsystematic subject, and perhaps family law must always be ad hoc, responsive to local conditions, sensitive to the day's sensibilities, and willing to compromise irreconcilable differences.[28]

III.

Much that I have said suggests that family law will not soon reach full maturity as a field of scholarship. The difficulties of borrowing theory from non-legal disciplines persist, as do the impediments to theory presented by the nature of family law itself. Nevertheless, many of the obstacles to the field's maturity are lessening. Professor Ackerman argues that American law generally is moving into a less particularistic period, one in which lawyers will require "the systematic test of particular activist interventions by legal principles that seek to capture the basic ideals that have led the American people to embrace activism . . . ."[29] It is at any rate difficult for one area of law to be unaffected by developments common in other areas, and family law can hardly be unaffected by the lively maturity of many other areas of law. The popularity of interdisciplinary work will likewise be hard to resist, and because the social sciences live to theorize, their influence should promote generalization and theory. Furthermore, the work of traditional scholarship has laid a foundation of detailed, concrete analysis and doctrine which can help us escape the dangers of *a priori* definition and theory.[30]

The greatest changes, however, may be "sociological." Family law is less marginal than before. The consensus undergirding many family laws has dissolved, and both liberals and conservatives find family-law issues pressing. The women's movement has raised old issues to new prominence and has produced fresh

---

28. *Cf.* G. WHITE, *supra* note 2, at 240:

> Conceptualism, as a mode of thought, is impatient with an ad hoc treatment of legal issues, with competing theories of liability, and with multiple purposes for an area of law. I think, however, that tort law more closely resembles a shifting mass of diverse wrongs than a tidy, conceptually unified subject. Multiple purposes for tort law, multiple standards of tort liability, and individualized determinations of tort claims reflect the innate character of the field.

29. B. ACKERMAN, *supra* note 11, at 20.

30. *Cf.* Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981).

ones, and resurgent fundamentalism has responded in kind. As controversy over family laws has intensified, combatants have sought out social theory to inform and deepen their arguments. The consequent addition of so many intriguing and intractable social issues to the family-law curriculum has enriched the field, and the pace and scope of change have enlivened it. Family law is becoming constitutionalized[31] and nationalized,[32] developments which augured well for another field Dean Prosser said no one wanted to teach—criminal procedure. Constitutionalization not only has "sociological" consequences that reduce the marginality of family law; it also promotes generalization and theory because it compels us to survey the field to see which elements are altered by new doctrine and to review family-law problems in terms of basic values.

Family-law scholarship, then, is well-situated to begin the work of generalization and theory. There is also a sense in which we cannot genuinely escape them. As Professor Kuhn writes of scientific progress, "No natural history can be interpreted in the absence of at least some implicit body of intertwined theoretical and methodological belief that permits selection, evaluation, and criticism."[33] Presumably, family law already has, at some level, theories that direct our understanding of it. But because those theories are unexamined, they are insufficiently exact, insufficiently general, insufficiently coherent, and perhaps quite mistaken. The question, then, is whether we will give ourselves the benefit of identifying, articulating, and scrutinizing our theoretical and methodological beliefs, our organizing assumptions.

Making assumptions explicit has benefits too well-known to merit prolonged elaboration; it exposes and makes available our first principles, it deepens our understanding and expands our ability to rationalize it. But there are special reasons such an enterprise might benefit the substance and scholarship of family law. First, family law concerns people's most powerful and least rational feelings, yet it is perhaps the area of law in which decisions are least often guided by clear standards. Examining and rationalizing assumptions is a conventional solution to this kind of problem. Second, family law deals with an area of social thought specially prone to facile change and, as the proponents

---

31. Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (procedural due process); Orr v. Orr, 440 U.S. 268 (1979) (equal protection); Roe v. Wade, 410 U.S. 113 (1973) (substantive due process).

32. For example, family lawyers and legal academics have collaborated on the UNIFORM MARRIAGE AND DIVORCE ACT (1970) and the Juvenile Justice Standards Project.

33. T. KUHN, *supra* note 15, at 16-17.

of "family policy" argue, specially prone to treat its problems inconsistently. Family law therefore peculiarly needs the kind of resistance to superficiality and to ill-considered change which examined assumptions can give.[34] Third, family law scholarship repeatedly over-examines some problems and ignores others. Explicit assumptions, combined with a clear view of the whole field, can help direct scholarship, and can make it easier for one scholar to build on the work of others.

The benefits of defining our field are similarly attractive. The dimensions of few legal fields are so uncertain. Twenty years ago, defining the field as "the law of domestic relations" had much appeal, but even then there were, as there remain, questions as to why other law which affects the family—tax law, social-welfare legislation, law directly regulating the behavior of children, and so forth—ought not be studied with the law of marriage, divorce, and child custody. The social and legal change of the last two decades expands the field beyond the law of domestic relations: consider, as one instance among many, the effect on the definition of family law of our present uncertainty about the definition of "family" itself, an uncertainty expressed in the law by cases blurring the distinction between married and unmarried couples,[35] by doubts about the familial status of homosexual couples,[36] by cases dealing with attempts to expand the range of parent-child relations,[37] by cases dealing with argu-

---

34. However, the arguments for articulate rationalization of law may apply better to family law's scholarship than to its substance. Scholarship is by its nature committed to understanding fully how the world works; the genius of American politics is often thought to be its ability to compromise and muddle over differences in principle in order to allow the world to work. National division on well-developed ideological lines can, as the politics of abortion may demonstrate, poison political life, put religious liberty at risk, taint toleration, and seem to justify violent resolution of political differences. *See* Schneider, *A Response to Two Puzzles* (forthcoming).

35. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (announcing that contracts—express or implied—between unmarried couples would be enforced to the extent the contract was not based on meretricious consideration).

36. Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971) (affirming a refusal to issue a marriage license to a homosexual couple), *appeal dismissed*, 409 U.S. 810 (1972); *In re* Adult Anonymous II, 88 A.D.2d 30, 452 N.Y.S.2d 198 (1982) (holding that one homosexual adult male could adopt an older one); *In re* Adoption of Robert Paul P., 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984) (holding that New York adoption statute does not authorize such adoptions).

37. Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816 (1977) (acknowledging, but not reaching, the question whether foster parents can acquire a constitutionally-protected interest in their relations with foster children); Syrkowski v. Appleyard, 122 Mich. App. 506, 333 N.W.2d 90 (1983) (finding no jurisdiction to address questions raised by a "surrogate mother" arrangement), *rev'd*, 420 Mich. 367, 362 N.W.2d 211 (1985). *See also* Alma Soc'y, Inc. v. Mellon, 601 F.2d 1225 (2d Cir.) (rejecting adoptee's claim of a constitutional right to learn the name of his natural mother

ments for narrowing the parent-child relationship,[38] and by cases raising the question of the legal definition of the extended family.[39]

Public anxiety about the family has, through proposals for "family policy," brought the definition of "family law" before the general public: The Carnegie Council on Children proposes "the nation develop a family policy as comprehensive as its defense policy,"[40] and as a candidate, Jimmy Carter could find "no more urgent priority for the next administration than to see that every decision our government makes is designed to honor and support and strengthen the American family."[41] Proponents of "family policy" argue expressly that government injures the family when it acts without considering all laws affecting the family. Thus, defining family law raises basic questions about family law's purpose substantively and as a field of scholarship. Substantively, for example, should family law merely provide the legal mechanisms minimally required to allow people to order their private lives, or should it try systematically to bulwark a social institution called the family? As scholars, are we, for example, trying to understand how a particular kind of law—family law—affects families, how governmental action as a whole affects families, or how governmental action affects people in particular aspects of their (more or less) private lives?

---

from a government agency), *cert. denied*, 444 U.S. 995 (1979). *But see, e.g.*, MICH. COMP. LAWS ANN. § 710.27 (West Supp. 1984-1985) (statute providing access to some such information).

38. Swoap v. Superior Court, 10 Cal. 3d 490, 511, 516 P.2d 840, 854, 111 Cal. Rptr. 136, 150 (1973) (Tobriner, J., dissenting) (arguing that adult children cannot be required to support their indigent parents, because they are situated vis-a-vis their parents similarly to any other member of society); Israel v. Allen, 195 Colo. 263, 577 P.2d 762 (1978) (holding that siblings by adoption who had not lived simultaneously in their adopted parents' household were not prevented from marrying by an incest statute prohibiting the marriage of siblings by adoption); Pamela P. v. Frank S., 110 Misc. 2d 978, 443 N.Y.S.2d 343 (1981) (holding that a man deceived by a woman's misrepresentation that she was using birth control could not constitutionally be ordered to pay child support if the woman could afford to support the child), *aff'd in part, rev'd in part*, 88 A.D.2d 865, 451 N.Y.S.2d 766 (1982), *aff'd*, 59 N.Y.2d 1, 449 N.E.2d 713, 462 N.Y.S.2d 819 (1983); *see also* Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982).

39. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding unconstitutional a zoning ordinance defining "family" so as to prevent a grandmother from living with grandchildren by two different children); Sparks v. Wigglesworth, 5 Fam. L. Rep. (BNA) 3173 (Ky. Ct. App. 1979) (holding that grandparents could obtain rights to visit the child of their divorced son, where the child was in the custody of his mother).

40. K. KENNISTON & THE CARNEGIE COUNCIL ON CHILDREN, ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE 76 (1977).

41. *Quoted in* G. STEINER, THE FUTILITY OF FAMILY POLICY 14 (1981).

As the preceding paragraph implies, one of legal scholarship's standard problems has peculiar acuteness in family law: what is the special province of *legal* scholarship? Is that scholarship limited to studying "legal" institutions as distinct from "governmental" institutions? To what extent can it usefully formulate substantive standards for legal decisions? Applying these general questions to family law, we may ask, for instance, whether it should investigate only the acts of legislatures and courts, or to what extent it should also investigate the behavior of executive agencies as well. Executive agencies of course make and apply family law, but their study is already the province of political science and social work. Or, we may ask whether family law should formulate substantive standards that give meaning to the empty standards—like "the best interest of the child"—usual in family law. Elaborating broad standards is a classically legal undertaking, yet elaborating the "best interest" standard invades claims staked out by psychology and sociology.

Professor Fried suggests that what lawyers distinctively do is to apply " 'the artificial Reason' of the law,"[42] to use analogy and precedent to fill out the broad structure of the law. But, by this test, family law is in major particulars hardly law at all: In its public law aspects, family law's scope often goes beyond "law" to "social policy." No doubt all law is social policy, but not all social policy is aptly, or even well, studied by lawyers. While they may have helpful things to say about, for example, the procedures by which foster care of children is begun and ended, they are rarely competent to assess the effects of foster care on children. Even less are they competent to deal with questions of how to construct a social welfare program that will combat the effects of poverty in the short run and end it in the long run. In its private law aspects, family law deliberately confides to the discretion of a judge (often a specialized judge thought to be expert in family problems) decisions guided by standards which are intentionally vague ("in the best interests of the child," "equitably apportion," or "in amounts and for periods of time the court deems just"). Not only are these standards vague, they often are not construed, amplified, and sharpened through a body of precedent. All this means that the family law scholar suffers with special discomfort uncertainty about the relationship between law and its related disciplines.[43]

---

42. Fried, *supra* note 30, at 39 (quoting Coke).

43. For example, although many jurisdictions have refined precedent on a few narrow questions about child custody (*e.g.*, whether a parent living unmarried with a new "com-

In sum, I have suggested in this part of the essay that social change, our awareness of the interconnectedness of things, our growing ambitions for social programs, and our changing definitions of "family" combine to cast doubt on the proper range of government interest in the family and thus upon the proper range of family-law scholarship. Furthermore, the same factors threaten to extend the range of factors relevant to family law well beyond any conventional range of legal scholarship and well beyond the ordinary capacity of legal scholars. Finally, this part of the essay reflects with particular clarity the interrelationship between definition and synthesis in family law. The uncertainties I have described will be best resolved when consideration of them is informed by some theoretical understanding of family law; yet such an understanding must itself rest on some definitional understandings of family law's function and ours.

IV.

Accepting *arguendo* that the time is at least riper for generalization and theory and that they offer rewards worth winning, what courses might family law next take? Let me now be more precise. I do not at all wish to eliminate inquiries into narrow topics; the difficulty lies not in the presence of narrow topics, but in the absence of broad ones. I do not at all wish to eliminate doctrinal work; rather, I want doctrinal work to have the power gained by breadth, perspective, and clarity. I do not at all believe that generalization and theory have any necessary relation to consensus or even agreement; rather, they can help us define our differences more clearly and defend them more profoundly.

I believe we should remember the dangers of generalization and theory: both encourage too sanguine a belief in the possibility of simplicity and coherence, and thus both encourage Procrustean thought; both can lead to the useless, the vacuous, the banal formulae—"equal concern and respect," for instance—which too conveniently characterize theory.[44] I think we should remember the limitations of the social sciences and the

---

panion" can have custody), most child custody decisions are likely to be made under the "best interest" standard *simpliciter*.

44. *Cf.* Nagel, Book Review, 127 U. PA. L. REV. 1174, 1178-79 (1979) (reviewing L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)). For a perceptive discussion of the complexity of doctrinal simplicity, see Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285.

inherent difficulties of interdisciplinary work. I think we must remember that many of the impediments to generalization and theory I described above remain. Thus I doubt that we should expect convincing comprehensive theory to emerge quickly; I will be content if we begin to develop the kinds of generalizations which may eventually form the basis for theory. But even if family law proves resistant to any useful sort of theory, I believe the search for syntheses itself should, as a side effect, yield helpful insights into narrower topics.

There is an inherent difficulty in urging definition, generalization, and theory. The difficulties of those three enterprises are obvious and demonstrated. Their possible disadvantages may also be convincingly shown. But their advantages can be proved only by fully developing particular definitions, generalizations, and theories. That, of course, exceeds the scope of this essay. Nevertheless, I close with some examples of generalizations that may open broader and more stimulating visions of our subject. I begin with the conventional suggestion that perspective on the present is gained by knowledge of the past. Despite a surge of illuminating writing in social history, the history of family law has hardly been begun.[45] Yet historical study is particularly useful, I think, to family law, since assumptions (often ill-founded) about both the Edenic past of families and the extent to which the family has changed over time figure repeatedly in family-law discourse.[46]

Our study of history might also reveal current trends in family law. Given law's reliance on precedent and analogy, trends can work more powerfully in law than in many areas of life, and they therefore should reward study. For instance, contractarianism, once central to American family law, is again gaining strength. The scope of pre-nuptial contracts is expanding, the permissibility of extra-marital contracts is increasing, contractual solutions to custody and property disputes on divorce are urged, contracts dictating the terms of marital life are praised, the very word "status" reeks in modern nostrils. A broad and sophisticated study of this trend could be most illuminating. It is, after all, a

45. There are signs of interest, however. The University of Wisconsin's History Department and Law School and the National Endowment for the Humanities are sponsoring a series of conferences on the history of family law, Professor Michael Grossberg will publish this year a survey of nineteenth-century family law, and there has been some historical work on divorce and child custody, and quite a bit on juvenile courts.

46. *Cf.* E. SHORTER, THE MAKING OF THE MODERN FAMILY (1977); L. STONE, FAMILY, SEX, AND MARRIAGE IN ENGLAND, 1500-1800 (1977); T. CAPLOW, MIDDLETOWN FAMILIES (1982).

trend rich in ironies. On one hand, contracts are advocated because they give the parties greater control of the terms of their association. On the other hand, contracts are welcomed because they let courts prevent parties from reaching inequitable terms of agreement, and perhaps even let courts impose equitable terms. Contractarian enthusiasm comes when contracts scholars talk of the death of contracts, and when it has become common wisdom to acknowledge the distance between what contract law says and what contracting parties do.[47] It comes too when some forms of contractarian thought in family law—breach of promise, alienation of affections—have lost their luster. What limits on family law contracts might those ironies portend? What contracts, if any, are against public policy? Contracts with respect to child support? To surrogate mothers? To abortion? What implied contracts, if any should be enforced? To what extent should people be pressured, or compelled, to contract about the terms of their relationships? To what extent is contractarian thought—arm's length bargaining, anticipation of conflict, countenancing of breaches, enumeration of rights and remedies—inimical to successful (or desirable) personal relations? What does the popularity of contractarian thought tell us about the forces molding family law? About what family law ought to seek to achieve? About what family law can achieve? About what family life is and ought to be?

Another conventional source of perspective is cross-cultural work. It is no accident that comparativists have gone further than most of us toward generalization and theory,[48] for good comparative work looks for systematic areas of difference and similarity between bodies of family law and tries to explain them systematically. Comparative work can provide Brandeisian laboratories for testing approaches to family law problems,[49] it can identify ways in which particular social factors—a country's religion, its feudal past, its revolutionary present—shape its family laws, and it can identify large social and economic forces—urbanization and industrialization are classic examples—that have affected every Western country's family laws.[50]

---

47. Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); White, *Contract Law in Modern Commercial Transactions: An Artifact of Twentieth Century Business Life?*, 22 WASHBURN L.J. 1 (1982).

48. *E.g.*, M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); *see also* Markovits, *Socialist v. Bourgeois Rights—An East-West German Comparison*, 45 U. CHI. L. REV. 612 (1978).

49. For a provocative example, see G. STEINER, *supra* note 41.

50. *See* M. GLENDON, *supra* note 48.

Useful generalizations about family law can be drawn by identifying and investigating frequently recurring issues. For instance, family law's difficulty enforcing its rules is virtually ubiquitous: Consider the problems society has experienced enforcing alimony orders, spouse- and child-support obligations, strict divorce statutes, spouse- and child-abuse laws, visitation rights, sodomy and fornication statutes, and prohibitions of abortion, contraception, and parental kidnapping. What produces the enforcement difficulty? The fact that the prohibited activities are hard to discover? That people feel the activities are not improper? That people feel the activities are not the law's business? That the laws are enforced laxly? That the penalties are mild? That the law is not supported by other social institutions? That people operate within families under emotional influences they cannot easily control? What kinds of measures can solve the enforcement difficulty, if any? What kinds of costs would those measures impose? Is the enforcement problem genuinely more severe in family law than elsewhere? Do we derive any benefits from laws that cannot be, or simply are not, well enforced? Do such laws retain some moral influence, or are they simply tools best suited for abuse? An issue like the enforcement problem can, of course, be reached through the study of specific doctrinal issues.[51] But it commonly is not reached because (in part) our piecemeal approach obscures the centrality and complexity of the enforcement problem. Looking at the enforcement problem across its whole range can also direct us to specific areas suitable for investigating hypotheses about the enforcement problem and may lead us to further questions worth studying. It surely should make inescapably plain the need for empirical research into family-law problems.[52]

Another recurrent theme in family law has to do with how decisions are made. This theme, like the enforcement problem, approaches ubiquity, for family law raises questions not only about

---

51. See, for example, D. CHAMBERS, MAKING FATHERS PAY (1979), and yet more explicitly, Lempert, *Organizing for Deterrence: Lessons From a Study of Child Support*, 16 LAW & SOC'Y REV. 513 (1982).

52. *Cf.* Kuhn's observation about research in immature sciences:

> In the absence of a paradigm or some candidate for paradigm, all of the facts that could possibly pertain to the development of a given science are likely to seem equally relevant. As a result, early fact-gathering is a far more nearly random activity than the one that subsequent scientific development makes familiar. Furthermore, in the absence of a reason for seeking some particular form of more recondite information, early fact-gathering is usually restricted to the wealth of data that lie ready to hand.

T. KUHN, *supra* note 15, at 15.

how legal actors do, can, and should make decisions, but about how families and family members make decisions. Family law does not involve itself in many kinds of family affairs, for example, partly because the law doubts it can make decisions about families as well as the families can. These doubts shape doctrine: estimations of parents' ability to make decisions for their children speak to questions of procedural due process,[53] and estimations of young girls' ability to make decisions about abortions affect questions of substantive due process.[54] Doubts about institutional capacity to make decisions similarly lie at the base of due process doctrine. The task of much family law—particularly that involving children—is to set the terms under which bureaucrats deal with citizens. Do due process limitations genuinely improve the quality of decisions? Do they do so in family law cases, where speed may be important and where many decisions are confided to experts? How are decisions made (by judges or bureaucrats) when standards are vague? Do decision-makers develop rules of thumb? Do improper considerations enter in? What are the costs of preventing improper considerations from entering in? Are the costs too great? Is it true in family law, as we assume it to be elsewhere in the law, that a good decision is one that can be, and has been, justified exclusively in logical terms?

A variation of this approach to generalization is to look at the over-arching "values" of family law. Pluralism, for instance, is called such a value. However, at some level pluralism is ultimately inconsistent with the regulation of society. What is that level? Is pluralism in fact over-arching? Because of its social importance? Because of its moral desirability? Does it regularly conflict with other possible over-arching values of family law, like individual autonomy and community cohesion? If so, can we devise principles for resolving conflicts between pluralism and those other values? What kinds of issues are appropriate for pluralistic resolution?

Still another approach to generalization lies in direct attempts to identify the assumptions underlying family law. For example, what views of human nature inform family law? This is surely a question of the utmost interest and importance. A family law that fears that people are naturally depraved must differ from one that hopes they are naturally virtuous. Yet this fascinating and crucial question seems never to have been addressed. How

53. Parham v. J.R., 442 U.S. 584 (1979).
54. Bellotti v. Baird, 443 U.S. 622 (1979).

have changing views of human nature shaped family law? Is post-Freudian family law different from pre-Freudian family law? Much of the constitutional doctrine of privacy and its attendant scholarship rests on facile assumptions about what is necessary for human dignity and happiness. What are those assumptions? Do we actually believe them? Is belief in them class-bound? Are they correct? If so, are family laws consistent with them? How much freedom in personal affairs do people need? How much do they want? How much should they have?

Another intriguing set of assumptions to investigate could be reached by asking what views of morality inform family law. I have argued at length elsewhere that in recent years family law has been transformed by an attempt to remove moral language from its discourse and to transfer responsibility for moral thought to those it once regulated.[55] To what extent can the law achieve moral neutrality? To what extent should it try to? To what extent does moral neutrality impede society in its tasks of socializing its young and enforcing its basic norms? (Even people committed to "neutral" family law argue for the deterrent and educative benefits of automatic criminal prosecutions of spouse abusers.) Any society must give its members a sense of stability and mutual concern. Is some commonality of belief about the central moral issues family law poses necessary to that sense? Can a liberal, secular, pluralist, individualist society be a moral community? Can a society prosper which is not a moral community? Assuming they are necessary, what kinds of moral views ought to inform family law, and what kinds of moral arguments are legitimate in legal analysis? Must a moral belief be susceptible of rational, utilitarian justification? Is it enough that a moral belief is deeply rooted in our national heritage? That it is ardently believed by most people?

We need, finally, to discuss directly the purposes of family law. What do we hope to accomplish through it? What functions—intended and unintended—does family law serve? To what extent should we try to use family law to change the way people behave in families? To change the way people behave generally? To change what people believe? Ought family law limit itself to trying to prevent harm, or can it try to do good?

---

55. Schneider, *supra* note 26.

V.

I close with one more, brief, suggestion. We live in an age of introspection, an age of diaries and autobiographies, an age in which self-examination has under the banner of psychoanalysis been elevated to the prestige of a science and the dignity of a philosophy. It is an age in which many scholarly disciplines have found uses in self-examination. Historians have their historiography, scientists have their philosophers, and scholars of the law may benefit from their example. Interest in the history and methods of legal scholarship has of course always existed and has sometimes flourished, but—at least in its published form—it has been sporadic and ad hoc. In family law, such reflection has hardly existed. If we are to achieve the kind of maturity which I have been urging, I suspect reflection will be persistently necessary. And such reflection may help lead us to the far far better family law that must be our goal.