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# ESSAY

## On the Expressive Functions of Family Law

Carol Weisbrod\*

*The changing role of the family in the law is captured in the headline of a New York Times article published in September, 1988: "Family Law: Battle Ground in Social Revolution." Family law is an arena in which issues of law and medicine, law and technology, and law and morals, are being discussed. The field is understood as being centrally important to our common situation. Along with this comes a renewed emphasis on the use of law to shape that situation.<sup>1</sup>*

### INTRODUCTION

This Essay concerns the suggestion that expressive or symbolic aspects of law should be used in the field of family law to guide people to better behavior.

We are reminded of this ancient theme by Professor Mary Ann Glendon's *Abortion and Divorce in Western Law*.<sup>2</sup> Professor Glendon's argument, in part, is that law has both strong educational functions and significant expressive components. Law is a play, a story, a message, a thing that is shaped by the culture and in turn shapes the culture. To

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\* Professor of Law, Law School, University of Connecticut. All rights reserved.

Students in my Family Law class (Fall 1988) provided some of the illustrative material used here. I thank them for their contributions.

<sup>1</sup> See Greenhouse, *Family Law: Battle Ground in Social Revolution*, N.Y. Times, Sept. 2, 1988, at B6, col. 3. In that article, Linda Greenhouse wrote that "Family law, long a professional backwater, has become a new constitutional battle ground on which the social revolutions in family structure, child bearing and personal relationships are being fought." *Id.*

<sup>2</sup> M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

the extent law shapes culture we should use it to send messages.<sup>3</sup>

Stronger versions of the desirability of a message in family law have also been offered. Professor Jan Gorecki writes,

Those who are unilaterally guilty of disrupting their marriages . . . should be punished . . . . Their punishment conveys a message to the general society: minimum of responsibility is anyone's family obligation, and so is an effort to avoid inflicting suffering on one's spouse and children, and wrecking their lives. This message, if properly conveyed in the process of instrumental learning, may not but influence general attitudes, and may eventually bring about . . . decline of the total sum of suffering and decrease of the broader social problems generated by widespread family disintegration.<sup>4</sup>

The message that Professor Gorecki envisions is a message to virtue. The message may be enforced if necessary as punishment, as in criminal law.<sup>5</sup> Professor Glendon sees the messages of law in various ways, sometimes the direct communication of a position — as when she speaks of the present message of no-fault-no-responsibility divorce<sup>6</sup> — and sometimes a message in the form of a compromise or a conversation, in which the law contains (or should contain) the voices of different parts of the cultural discussion.

Commentators may concede the uncertainties of the law/behavior interaction. Professor Glendon says, "No one can chart with confidence the ways in which law, customs, new lines of behavior, ideas about law,

<sup>3</sup> Law, Professor Glendon notes, is "constitutive when legal language begins . . . to influence the manner in which we perceive reality." *Id.* at 9. We must therefore be "attentive, intelligent, reasonable and responsible" in the stories we tell. *Id.* at 142.

<sup>4</sup> Gorecki, *Moral Premises of Contemporary Divorce Laws: Western and Eastern Europe and the United States*, in *MARRIAGE & COHABITATION IN CONTEMPORARY SOCIETIES* 124, 129 (J. Eekelaar & S. Katz eds. 1980) [hereafter Gorecki, *Moral Premises*]; see also Gorecki, *Divorce in Poland — A Socio-Legal Study*, in *SOCIOLOGY OF LAW* (V. Aubert ed. 1972) (discussing, inter alia, moral and pedagogical purposes of the rule of recrimination).

<sup>5</sup> Professor Gorecki argues for retention of the idea of recrimination: "In its narrower version, the principle prevents the solely guilty spouse from claiming divorce. In its broader, classical version, it also prevents a spouse from claiming divorce if both he and his counterpart are guilty of matrimonial offenses." Gorecki, *Moral Premises*, *supra* note 4, at 126. "The principle of recrimination provides the harmed spouse with an opportunity to receive compensation by use of the threat of vetoing divorce." *Id.* at 128.

<sup>6</sup> Thus Professor Glendon is concerned not with the absence of a message, but with its content. For example, the law of property settlements in divorce may teach that one can walk away from a spouse (if not children) without assuming financial responsibility. See M. GLENDON, *supra* note 2, at 78 *passim* ("no-fault, no responsibility divorce").

and ideas about morality reciprocally influence each other."<sup>7</sup> One problem is that "only the most elementary legal information reaches the public, and this almost always in a slightly inaccurate form."<sup>8</sup> Professor Glendon concludes that while there may be problems of communication, "there is no escape from the fact that, willy-nilly, law performs a pedagogical role. It contributes in a modest but not a trivial way to that framework of beliefs and feelings within which even our notions of self-interest are conceived."<sup>9</sup>

Recognition of law as expressive, as a source of symbols and values, has been common in America for some time.<sup>10</sup> This is particularly true in connection with the role of the Supreme Court, where the point is so true that one must work to persuade the public that "constitutional"

<sup>7</sup> *Id.* at 138. Professor Glendon's discussion of the law's pedagogic function uses Plato's *The Laws* as a text. *Id.* at 5-9. Plato's treatment in *The Laws* assumes, however, an unchanging truth and virtue and the desirability of an unchanging legal structure:

[An observer of] foreign customs must proceed [to the council] as soon as he gets back. If he has come across people who were able to give him some information about any problems of legislation or teaching or education, or if he actually comes back with some discoveries of his own, he should make his report to a full meeting of the council. If he seems to be not a whit better or worse for his journey, he should be congratulated at any rate for his energy; if he is thought to have become appreciably better, even higher recognition should be given him during his lifetime, and after his death he must be paid appropriate honours by authority of the assembled council. But if it seems that he has returned corrupted, this self-styled 'expert' must talk to no one, young or old, and provided he obeys the authorities he may live as a private person; but if not, and

105. he is convicted in court of meddling in some educational or legal question,

*he must die.*

106. If none of the authorities takes him to court when that is what he deserves,

*it should* count as a black mark against them when distinctions are awarded.

PLATO, *THE LAWS* 503 (T. Saunders trans. 1978). In such a world, no serious problem about the pedagogic preambles or the content of the laws themselves exists. See, e.g., A. MACINTYRE, *A SHORT HISTORY OF ETHICS* 55-56 (1966). However, this is not our world. See M. GLENDON, *supra* note 2, at 139.

<sup>8</sup> M. GLENDON, *supra* note 2, at 138-39. Professor Glendon cites in this connection Michael Kammen's *The Machine That Would Go of Itself: The Constitution in American Culture*, for examples of misinformation regarding the American constitution. *Id.* at 189 n.78.

<sup>9</sup> *Id.* at 139.

<sup>10</sup> "'Law' is primarily a great reservoir of emotionally important social symbols." T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 34 (1962).

does not necessarily mean good or wise. This emphasis on expressive functions (linked somehow to instrumental values)<sup>11</sup> has been given new vitality by work in several fields.<sup>12</sup>

Initially, in thinking about this issue we might separate two ideas. First, we look at law because law does in fact express values, and thus teaches. We should know as much as we can about what law teaches as a descriptive matter, despite the complex and contradictory substance of the teaching. It is part of knowing the culture in which we live. Second, we look at law because law can and ought to be used to teach specific things. In brief, the expressive functions of law can and should be used instrumentally. Professor Gorecki quotes Brandeis: "no small part of the law's function is to make men good."<sup>13</sup> Atiyah, describing this aspect of law, referred to the "hortatory" function.<sup>14</sup>

The first position can accommodate, though it does not require, ideas of uncertainty, indeterminacy and even chaos in law. The second idea works best when we assume that in talking about law we deal with a thing that can be known accurately, at least in theory. Clear messages can be sent and received, even when they are complex.<sup>15</sup> This assump-

<sup>11</sup> Professor Glendon suggests, for example, that a change in the message of the law on abortion might effect how we think about and deal with neonatal issues. See M. GLENDON, *supra* note 2, at 61. For a discussion of the expression in law of competing values, see *infra* note 15.

<sup>12</sup> For an example of the law's contribution, see M. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 42-45 (1981) (discussing legal trials and morality plays).

<sup>13</sup> Gorecki, *Moral Premises*, *supra* note 4, at 128. Professor Gorecki suggests that a prime function of law is society's moral education, particularly family and criminal law. *Id.* Another view sees family law increasingly through the optic of contracts. See, e.g., J. EEKELAAR, *FAMILY LAW AND SOCIAL POLICY* 32-33 (2d ed. 1984) (critiquing Gorecki's position, particularly on the law/society issue).

<sup>14</sup> Atiyah, *From Principles to Pragmatism*, 65 *IOWA L. REV.* 1249, 1272 (1980) (questioning whether we have unduly neglected this function).

<sup>15</sup> The complexity of legal messages is not necessarily a problem for those interested in the expressive function. Indeed, on some versions, a tension in the message, or a contradictory message, is viewed as a compromise between conflicting positions, or as a way of incorporating aspects of the public debate. Thus, Professor Glendon writes: "The 1976 West German divorce law . . . added to the Civil Code section on the effects of marriage the following sentence: 'Marriage is concluded for a lifetime.'" M. GLENDON, *supra* note 2, at 109. From one point of view, she indicates,

[T]his insertion, part of a last-minute compromise between the coalition government and the Christian Democrats, is strikingly out of place in a divorce statute, just another sop to the losers. Yet . . . it acknowledges an important ideal of a large segment of the population, while accommodating to some extent in practice those who do not share or cannot live up to the ideal.

tion raises the problems reviewed here.

### I. MESSAGES SENT

We might compare this idea of a clear legal message with some other ideas about law in general. Thus Robert Gordon points out that "History helps to teach us that the rule of law 'system' is fundamentally misdescribed, that inspected at close range, it's not really a system at all, but a complex mess of competing and contradictory systems."<sup>16</sup> Grant Gilmore comments that "When we think of our own or of any other legal system, the beginning of wisdom lies in the recognition that the body of the law, at any time or place, is an unstable mass in precarious equilibrium."<sup>17</sup> Gilmore's comments are particularly striking as coming from a scholar who spent his professional life working in fields — contracts and commercial law — in which formalism and theory were dominant ideas and certainty a prime legal value. If these legal contexts could produce and illustrate Gilmore's view, we would expect that this sense of instability and uncertainty would pervade the area of family law where the need for individualization is taken for granted. Indeed, these descriptions of law in general have their analogues in work on family law. Thus, Carl Schneider describes the complexity of the sources of family law, the non-theoretical nature of family law scholarship and the "rarity of attempts" in this field to "go beyond the

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*Id.* On the same basis, Max Rheinstein viewed the fault-system as a compromise. *Id.* at 66 (discussing Rheinstein); M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 254 (1972) ("With advancing age I have come not only to accept but to admire the compromise.").

Attempts to make abortion illegal remind us of Prohibition, both because the prospect of large-scale refusal to comply is so real, and because the symbolic victory (independent of enforcement) may be sufficiently important for those opposed to abortion that they will risk substantial non-compliance. On the symbolism of prohibition, see J. GUSFIELD, *SYMBOLIC CRUSADE* (2d ed. 1986). Professor Glendon illustrates a compromise with the French abortion law. See M. GLENDON, *supra* note 2, at 15 (requiring some undefined "distress" on the part of the woman). But, to consider France only, how successful has that compromise really been? See *N.Y. Times*, Sept. 24, 1988, at 1, col. 1 (recounting controversy over abortion pill). On the point that complexity may seem incapacitating, see Minow, *Supreme Court Forward: Justice Engendered*, 101 *HARV. L. REV.* 82 (1987).

<sup>16</sup> Gordon, *Exchange on Critical Legal Studies*, 6 *LAW & HIST.* 178, 181 (1988) ("The existing order, like past orders, is a teeming jungle of plural, contradictory, orders, struggling for recognition and dominance.").

<sup>17</sup> G. GILMORE, *THE AGES OF AMERICAN LAW* 110 (1977); see also Peters, *Grant Gilmore and the Illusion of Certainty*, 92 *YALE L.J.* 8 (1982) (Gilmore's commitment to the idea that certainty is an illusion evidenced by his writing in commercial law).

specific.”<sup>18</sup> He writes: “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.”<sup>19</sup> Judith Areen describes the relatively “undeveloped state of secular thinking about family life,” with particular application to surrogacy questions.<sup>20</sup> Martha Minow discusses the Supreme Court decisions in relation to group conflict, suggesting that the Supreme Court has used debates about family, state and individual to mediate larger social struggles. Thus, “it should not be surprising that constitutional rhetoric about the family is confused and inconsistent.”<sup>21</sup>

When we look at the things which law is — things we might legitimately look at in determining a message — we see constitutions, legislation, judicial opinions, official behavior of all sorts. All contribute to the “symbolism” of law or the message that law sends out. This message or symbolism will necessarily not be uniform or consistent since law carries many values. All of this is true in all areas of law, but particularly in family law which is inevitably focused on individuals, and using open standards. It is not merely, as Tennyson had it, that law is a “wilderness of single instances.”<sup>22</sup> It is that each single instance can be said to stand for different things.<sup>23</sup> The point is familiar in general. The leading example is probably *Everson v. Board of Education*,<sup>24</sup> in which the holding and rhetoric were so far apart that dissenting Justice Jackson invoked the precedent of Byron’s Julia, who

<sup>18</sup> See Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039, 1041 (1985). His point, in part, is that family law has never achieved the appearance of a system of connected doctrines. *Id.* at 1045-47. His discussion is a call for theory, with an outline of the problems involved. *Id.* at 1041.

<sup>19</sup> *Id.* at 1048.

<sup>20</sup> Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1941, 1942 (1988) (“We have never really decided, for example, what obligations a parent owes to a child, when the law should intervene to enforce those obligations, and whether enforcement should be accomplished by punishing the parent or by removing the child.”).

Surrogacy, of course, exists. Cloning does not seem far behind. See, e.g., N.Y. Times, Feb. 17, 1988, at 1, col. 3 (cloning of cows).

<sup>21</sup> Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959, 978 (1987).

<sup>22</sup> A. TENNYSON, *Aylmer’s Field*, in THE WORKS OF ALFRED LORD TENNYSON 146 (1903).

<sup>23</sup> Which is what the techniques (as against the principle) of precedent are finally about.

<sup>24</sup> 330 U.S. 1 (1947).

"whispering 'I will ne'er consent,' — consented."<sup>25</sup>

In the area of family law, we might consider the messages sent by a single text, *Marvin v. Marvin*.<sup>26</sup> First, the opinion recites the facts of cohabitation as if they matter to the legal system, thus reinforcing the idea that law's function is principally to be responsive to social facts.<sup>27</sup> Then the court opts for a kind of responsibility, by generally recognizing the enforceability of cohabitation contracts, as long as the explicit consideration is something other than meretricious sexual services. The last point is a signal in the direction of traditional moral values and the existing case law.<sup>28</sup> Finally, the court, having gone a long way toward recognizing quasi or alternate<sup>29</sup> marriage, speaks eloquently about marriage:

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends on the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.<sup>30</sup>

Considered as a teaching tool, the *Marvin* opinion can be used for many lessons or it can be used for one: expansion of rights of cohabi-

<sup>25</sup> *Id.* at 19. For another example, see *Zapeda v. Zapeda*, 41 Ill. App. 2d 240, 262, 190 N.E.2d 849, 859 (1963) (holding that wrongful life is a tort but presenting no remedy).

<sup>26</sup> 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

<sup>27</sup> "During the past 15 years, there has been a substantial increase in the number of couples living together without marrying." *Id.* at 665, 557 P.2d at 109, 134 Cal. Rptr. at 818.

<sup>28</sup> See *In re Greene*, 45 F.2d 428 (S.D.N.Y. 1930); see also RESTATEMENT (SECOND) OF CONTRACTS § 86 comment a, illustration 3, (1981) ("A has immoral relations with B, a woman not his wife, to her injury. A's subsequent promise to reimburse B for her loss is not binding under this Section.").

<sup>29</sup> However, it did not resurrect common-law marriage.

<sup>30</sup> *Marvin*, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. Thus, in Leonard Bernstein's *Candide*, we have the following response by Pangloss to the question: If marriage is so wonderful, why is there so much divorce? "Why marriage, boy, is such a joy, so lovely a condition, that many ask no better than, to wed as often as they can, in happy repetition. (Best of all possible worlds)." L. BERNSTEIN, *CANDIDE* 7-8 (1957) (book by Lillian Hellman, lyrics by Richard Wilbur, with additional lyrics by John Latouche and Dorothy Parker). I would like to thank Richard Warren, Curator, Yale Collection of Historical Sound Recordings at Yale University Library, for his assistance with this reference.

tants. The *Marvin* case, or any case, can be reduced to a proposition or a statement of law, or a holding, or a finite point of view on a problem. However, this approach (which the formal system, integrating its various structural parts and its majority and dissenting opinions, makes possible) is not the approach which those interested in expressive or symbolic functions would take. Even if one did this, the central question of message would remain. Is "expansion of the rights of cohabitants" a symbolic move away from the values of responsibility and cohesion associated with marriage, or a symbolic move towards those values now associated with nonmarital associations?<sup>31</sup>

The problem of "what is the law" is behind one of the criticisms of a well-known 1958 study comparing law and community moral standards on a number of family law issues.<sup>32</sup> As a number of reviewers

<sup>31</sup> And with *Marvin*, would we here cite cases expanding the rights of illegitimate children? For a discussion of the "confusion and vacillation" of Supreme Court decisions in this area, see H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 155 (2d ed. 1988).

<sup>32</sup> J. COHEN, R. ROBSON & A. BATES, *PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW* (1958) [hereafter *PARENTAL AUTHORITY*]. This book attempted to compare the public's moral sense of a problem's correct answer with a projected legal answer. See generally L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* 596-610 (2d ed. 1977) (discussing material on the *Parental Authority* study).

On some problems, the study did not distinguish between general principles and details. Thus, on issues relating to the legal age of marriage and the problem of parental consent, it was noted that on "neither of these issues did the disagreement found relate to the principle involved. It related, instead, only to the *ages* at which marriage should be legally possible, and consent unnecessary." Cooperrider, Book Review, 57 MICH. L. REV. 1119, 1121 (1959) (reviewing *PARENTAL AUTHORITY*). Kalven makes the same point in his review of *Parental Authority*. See Kalven, Book Review, 14 RUTGERS L. REV. 843, 846 (1960).

"Law" was used in the study to mean "the choices that the courts in the jurisdiction probably would have made — by virtue of existing statutes, precedents or analogies — if the specific situations were presented to them in litigious form." *PARENTAL AUTHORITY*, *supra*, at 14. They are not, the authors say, the "law-in-action," rather "law ready to be applied if and when the occasion calls." *Id.* A definition published in an earlier account of the project was "'Law': Choices that have been made by the courts (in opinions) and the legislature (in statutes) when actually confronted with such or similar situations." Cohen, Robson & Bates, *Ascertaining the Moral Sense of the Community: A Preliminary Report in an Experiment in Interdisciplinary Research*, 8 J. OF LEGAL EDUC. 137, 143 (1955). When were the choices made? How similar is similar? The study was not focused on knowledge of law, but rather on the discrepancy between the law and the moral sense of the community. It indirectly relates, however, to knowledge of law problems to the extent that we are, in effect, talking both about the authors' knowledge of law, and the respondents' knowledge of law to the extent that they were ignorant of the legal consequences of their answers. "[I]t is apparent that the respondents had not the slightest awareness of the practical implications of their an-

suggested, the treatment of law was static. The law was taken to mean "law ready to be applied."<sup>33</sup> Said one reviewer, this seems to mean "an application of statutes and judicial precedent without insight or imagination."<sup>34</sup>

The complexity of legal messages suggested here goes beyond what might be viewed as an ordered dialogue or a deliberate attempt to incorporate many voices. The pluralism of law seems to be something that is less planned, less obviously representative of the opinions of identifiable groups. The pluralism of law may not even reflect what we might see as judgments which are surely universal, easy cases. The law of contracts continues to suggest, for example, that a man's feeling for his bull is more important than his feeling for his son.<sup>35</sup>

Assuming there is a law, or rule of law that can be known accurately in principle, we confront the problem of whether it is known in fact. It is suggested that law is known, though somewhat inaccurately, by the public. Even Stanley Kowalski knows that Louisiana is under the Napoleonic Code.<sup>36</sup> The point is made that the message sent is received, but imperfectly.

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swers." Cooperrider, *supra*, at 1123. The "Big Brother" approach involved in implementation, the review suggests, might, if surfaced, have revealed different attitudes. Another reviewer, concerned with the same sort of problem, suggests that "there is a risk that [as to the problem of parents denying college or a career choice to their children] that most respondents did not have a clear image of what legal intervention would entail." Kalven, *supra*, at 846.

In 1975, the Cohen-Robson-Bates study was described as the "most extensive and sophisticated study on the congruence of public sentiments and family law" then available. Saunders, *Collective Ignorance: Public Knowledge of Family Law*, 24 *FAM. COORDINATOR* 69, 70 (1975).

<sup>33</sup> Milner, Book Review, 21 *U. PITT. L. REV.* 147, 148 (1959) (quoting *PARENTAL AUTHORITY*, *supra* note 32, at 14).

<sup>34</sup> *Id.* at 147.

<sup>35</sup> See G. GILMORE, *DEATH OF CONTRACT* 59-85 (1974) (discussing Restatement of Contracts); see also *RESTATEMENT (SECOND) OF CONTRACTS* § 89A illustrations 1, 6 (1981).

<sup>36</sup> See T. WILLIAMS, *A STREETCAR NAMED DESIRE* 42 (1947). Stanley Kowalski's description of the Napoleonic Code in *A Streetcar Named Desire* involves an emphasis on the community property aspects without a focus on the separate property possibilities. *Id.* at 40. He says, "There is such a thing in the state of Louisiana as the Napoleonic Code, according to which whatever belongs to my wife is also mine — and vice versa." *Id.*

## II. MESSAGES RECEIVED

What do we know about how law is understood?

One approach turns to empirical studies. That material itself is not voluminous.<sup>37</sup> However, a general feeling exists that people do not know much about the law or the legal system.<sup>38</sup> One problem relates to the sources of information about law. Newspapers and broadcast media are listed as prime sources, with informal networks of friends and family following.<sup>39</sup> Lawrence Friedman, reviewing Michael Kammen's book on the Constitution, suggested that people learned what they know from the six o'clock news.<sup>40</sup> Information may be filtered through individuals and groups in a way which is independently worth our attention.<sup>41</sup>

Another response is impressionistic. Thus Thurman Arnold tells us that: "The trader takes heart by learning that the law ignores the more profitable forms of dishonesty in deference to the principle of individual freedom from governmental restraint. The preacher, however, is glad to learn that all forms of dishonesty which can be curbed without interfering with freedom or with economic law are being curbed."<sup>42</sup>

Still impressionistically, another answer might go to other sources, other understandings, and use those sources as material speaking to this question. At the level of popular material,<sup>43</sup> journalism or detective fiction,<sup>44</sup> one finds understandings of the law which are not necessarily

<sup>37</sup> For references on legal knowledge, see Cortese, *A Study in Knowledge and Attitudes Toward the Law: The Legal Knowledge Inventory*, 3 ROCKY MTN. SOC. SCI. J. 192 (1966); Dwyer, *Law Actual and Perceived: Sexual Politics of Law in Morocco*, 13 LAW AND SOC'Y REV. 739 (1979); Greg, *Popular Perceptions of Supreme Court Rulings*, 4 AM. POL. Q. 3 (1976); Williams & Hall, *Knowledge of Law in Texas: Socio-economic and Ethnic Differences*, 7 LAW AND SOC'Y REV. 99 (1972); Note, *Legal Knowledge of Michigan Citizens*, 71 MICH. L. REV. 1463 (1973).

<sup>38</sup> See, e.g., Macaulay, *Private Government*, in LAW AND THE SOCIAL SCIENCES 445 (L. Lipson & S. Wheeler eds. 1987).

<sup>39</sup> Saunders, *supra* note 32, at 72.

<sup>40</sup> Friedman, Book Review, 6 LAW AND HIST. REV. 194, 195 (1988) (reviewing M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986)).

<sup>41</sup> Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 854 (discussing use of legal "horror stories"); see also Givelber, Bowers & Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443.

<sup>42</sup> T. ARNOLD, *supra* note 10, at 35.

<sup>43</sup> See generally Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527 (discussing popular culture's images of law and lawyers).

<sup>44</sup> This piece is not, of course, an examination of even detective fiction as a source of

those of Austinian jurisprudence. For example, in mystery stories, one sometimes finds that multiple legal systems are understood as operating in the world. Ed McBain's *Blood Relatives* tells of a woman wondering whether sexual relations and marriage between cousins are forbidden by the state or only by the church.<sup>45</sup> Arthur Upfield sees two systems, aboriginal and western, tracking the same criminal.<sup>46</sup> Sometimes the issue of the limits of state enforcement in relation to multiple systems of authority is clear. Thus, Philip Mason's *Call the Next Witness*<sup>47</sup> contains a move and counter-move description of a murder trial (based on a case in India in 1931) that centrally involves the relative power of family groups and the Indian legal system. When it deals with the official system, detective fiction may be far from sanguine about its operation. Thus Austin Freeman comments: "unspeakably dreary and depressing were the brief proceedings that followed, and dreadfully suggestive of the helplessness of even an innocent man on whom the

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information about knowledge of law in the culture. At most, it suggests that some material gives the impression that some ideas (multiple legal systems, limits of law) are known. Any serious study which attempted to use fiction in this way would have to take account of the point that one cannot take an inaccuracy (for example) as a necessary indication of the author's actual knowledge, since one might be able to prove that an author knew the law, and that the fiction nonetheless contained an inaccuracy. See LaRou, *The Portrayal of Law in Literature: Weisberg's Failure of the Word* (Book Review), 1986 AM. B. FOUND. RES. J. 313 (reviewing R. WEISBERG, *THE FAILURE OF THE WORD* (1984)). One would have to deal with the question of why that might be so. *Id.* at 317. For discussion of a (sponsored) literature as a source of information about government messages, see Dunham, *The Uses of Stalinist Literary Debris*, 32 SLAVIC REV. 115 (1973). There is a relation between at least some detective fiction and popular culture as a whole. J.I.M. Stewart [Michael Innes] suggests that, for example, "Holmes has even entered the mythology of the folk, so that if in a pub a man is called 'a ruddy Sherlock Holmes' the expression is . . . generally understood . . ." J. STEWART, *MYSELF AND MICHAEL INNES: A MEMOIR* 180 (1987). Understood, as are references to Shylock and Romeo, although "nobody has ever been called 'a peeping Poirot.'" *Id.* Some law resonates. Do we know which?

For Holmes on solemnization and duress, see A. DOYLE, *The Solitary Cyclist*, in *THE RETURN OF SHERLOCK HOLMES* 99-100 (1974).

<sup>45</sup> E. MCBAIN, *BLOOD RELATIVES: AN 87TH PRECINCT MYSTERY* 134 (1975) (distinguishing "real law" and "religious law"). A reference to "real" (official) as against "religious" law can be read as meaning that the speaker knows something in addition to "real" law. It can also be read as impacting on what "real" law is taken to mean.

<sup>46</sup> See, e.g., A. UPFIELD, *SINISTER STONES* ch. 20 (1954) (same results but different methods of Australian aborigines and modern Australian police).

<sup>47</sup> P. WOODRUFF [P. Mason], *CALL THE NEXT WITNESS* (1945); see also Vrooman, *British Justice, and the Indian Mind* (Book Review), N.Y. Times, March 10, 1946. Mason was a member of the Indian Civil Service who was serving as a joint magistrate when the episode on which the book is based occurred.

law has laid its hand and in whose behalf its inexorable machinery has been set in motion."<sup>48</sup> These points suggest the possibility of a general knowledge not of legal rules or doctrines but of legal pluralism and the limits of law in the culture.

One also suspects the possibility of vast ignorance of the role of law in general going far beyond ignorance of specific rights or rules in the legal system. Most obviously this may be true of children. Stephen Wizner offered an anecdote relating to a nine-year-old child in a burglary trial:

'Did we win or lose?'

'We won.'

'Yeah? What did we win?'<sup>49</sup>

The child was told that "what he had 'won' was a decision that he 'didn't do it . . .'"<sup>50</sup> The child answered — "but I *didn't* do it."<sup>51</sup> However, ignorance and misunderstanding may also characterize the thinking of adults. Questions might be asked, not about knowledge of rules in the state legal system, but about legal ideas more broadly. A study of knowledge of law might well start with questions devoted to the problem of marriage as a state-created relationship. For example, do people know that two people must participate in an officially structured procedure? *Hewitt v. Hewitt*<sup>52</sup> involved two people who lived together from 1960 until 1975. In that case, the defendant "told her that they were husband and wife and would live as such, no formal cere-

<sup>48</sup> R. AUSTIN FREEMAN, *THE RED THUMB MARK* 89 (1986) (Reminiscent of the gypsy curse: "May you be in a lawsuit in which you are in the right." VIKING BOOK OF APHORISMS 210 (W. Auden & L. Kronenberger eds. 1962); cf. Learned Hand's view of litigation: "After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." Learned Hand, in *Lectures on Legal Topics, 1921-22*, Association of the Bar of the City of New York, at 105 ("The deficiencies of Trials to Reach the Heart of the Matter").

Some detective stories are filled with legal technicalities, for example, those of Cyril Hare (Alfred Alexander Gordon Clarke) who was a barrister and then a County Court Judge. See J. SYMONS, *BLOODY MURDER* 144 (1972). Those may initially reflect a professional and not popular understanding of law.

<sup>49</sup> Wizner, *The Child and the State: Adversaries in the Juvenile Justice System*, 4 COLUM. HUM. RTS. L. REV. 389, 389 (1972).

<sup>50</sup> *Id.* at 399.

<sup>51</sup> *Id.*; see also O'Barr & Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 694 (1985) (reporting different perceptions by magistrate and litigants of conversational agenda in small claims courts).

<sup>52</sup> 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

mony being necessary . . . .”<sup>53</sup> States of knowledge in this case may be suggested as ranging from knowledge of common law marriage via language in the present tense, to knowledge failing to include the idea that both people have to do something to get married.<sup>54</sup> Do people know that they do not have to “ask” for a divorce?<sup>55</sup> That “grounds” are generally no longer necessary? Will it turn out that the law that people “know” is the law of their childhood? How do people answer or think they should answer the question “were you ever married” when their marriages have been annulled?<sup>56</sup>

Some journalistic discussions of the family in America contain comments about American family law that initially seem to be in the “ignorance” category. Thus, Barbara Ehrenreich, in *The Hearts of Men*, writes: “Men cannot be forced to marry; once married, they cannot be forced to bring home their paychecks, to be reliable jobholders, or of course to remain married.”<sup>57</sup> What is meant by the idea that people cannot be forced to do something? Is this about a theory of sanctions, or the limits on physical compulsion? Does she mean that American law does not command men to marry? What is meant by the idea that men do not have to — cannot be forced to — bring home their paychecks? Is there some underlying problem about the idea of the support obligation? Finally, while at the time Ehrenreich wrote people could not be

<sup>53</sup> *Id.* at 53, 394 N.E.2d at 1205.

<sup>54</sup> So that a man might come home and say “I went downtown and got us married” and be believed.

<sup>55</sup> Did this, in any case, mean, ask a spouse to be a plaintiff in a divorce action, that is, to participate in a particular kind of charade, on the one hand, and economic bargaining, on the other?

<sup>56</sup> Any relation here to people’s answers and the void/voidable distinction? Do you have to return wedding gifts? Will the answers here turn on ideas not of validity but of vesting? Or equitable compensation? See A. BROOKNER, *A FRIEND FROM ENGLAND* 118 (1987) (“And did one return wedding presents in the case of annulment, or were they just thrown in, as if the recipient probably needed or deserved some sort of consolation prize?”).

Some of these questions raise issues of the internal law of each family, (or each individual) in the sense suggested by Leon Petrazycki [Petrzhitskii] in *LAW AND MORALITY: LEON PETRAZYCKI* 68 (H. Babb trans. 1955) (“[E]ach family is a unique legal world . . . .”). On this view, each family might, for example, have its own law of divorce, existing inside the state law, and interacting with it, influenced by it, but also perhaps shaping it. On Petrazycki, see J. GORECKI, *SOCIOLOGY AND JURISPRUDENCE OF LEON PETRAZYCKI* (1975); see also Podgorecki, *Unrecognized Father of Sociology of Law: Leon Petrazycki*, 15 *LAW AND SOC’Y REV.* 184 (1980-1981).

<sup>57</sup> B. EHRENREICH, *THE HEARTS OF MEN* 11 (1983) (“[C]onsidering the absence of legal coercion, the surprising thing is that men have for so long, and, on the whole, so reliably, adhered to what we might call the ‘breadwinner ethic.’”).

forced to remain married, she presumably knew that the history of the law of divorce is about the problem of forcing reluctant couples to remain married.<sup>58</sup> Yet perhaps these comments by Ehrenreich can be best understood not as a description of actual or possible legal rules, but as a description of effective law or legal results in fact.<sup>59</sup> It may be that people know something about the practical limits of law,<sup>60</sup> as much as about the power and efficacy of law.

### CONCLUSION

Family law is a particularly important point at which to examine problems of the expressive function of law. It already contains many examples of messages.<sup>61</sup> Proposals are heard to the effect that it should

<sup>58</sup> Or even to cohabit. As to which, consider the interesting linkage in Matilda Joslyn Gage's *Women Church and State* between American efforts to recapture runaway wives and the English writ of restitution of conjugal rights, enforceable originally by excommunication, then by contempt then, and after 1884, not at all. See M. GAGE, *WOMEN CHURCH AND STATE* 390 (1893). For a discussion on the action, defenses, and meaning of a breach of duty to cohabit, see P. BROMLEY, *FAMILY LAW* 164 (3d ed. 1966). Note the parallel Scottish writ of adherence, which still exists but is unenforceable. See Clive, *Marriage: An Unnecessary Legal Concept?*, in *MARRIAGE & COHABITATION IN CONTEMPORARY SOCIETIES*, *supra* note 4, at 71 n.8; see also 3 W. BLACKSTONE, *COMMENTARIES* \*94 (1899). A. HERBERT, *UNCOMMON LAW* 95-99 (1969) (*Marrowfat v. Marrowfat*: "Is marriage legal"; action for restitution of conjugal rights).

<sup>59</sup> As to support, for example, Ehrenreich apparently does not think that the existing laws really do create a support obligation, since they do not, as she says, compel the purchase of life insurance policies. See B. EHRENREICH, *supra* note 57, at 146.

<sup>60</sup> See Lewis, *The Limits of Law*, *N.Y. Times*, Dec. 22, 1988, at 23, col. 1. The point in general, is not new. See generally Pound, *Limits of Effective Legal Action*, *A.B.A. J.* 55 (1917). On the efficacy of law, see Black, *Paths to Desegregation*, *NEW REPUBLIC*, Oct. 21, 1957, at 11 ("[B]eyond all question, law does shape attitude . . .").

<sup>61</sup> Though there has been a change in the kind of message being sent over time. See Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Powers and the Law*, 65 *IOWA L. REV.* 1249 (1980); Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 *MICH. L. REV.* 1803 (1985).

See *Reynolds v. United States*, 98 U.S. 145 (1879); *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). *Reynolds* is a case in which instrumental and expressive functions work in the same direction. *Marvin* is a case in which they diverge to some degree. The instrumental function of *Reynolds*, as has often been noted, was not entirely fulfilled.

Truman said of Eisenhower in 1952: "He'll sit here, and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike — it won't be a bit like the Army." C. NEUSTADT, *PRESIDENTIAL POWER* 9 (1960), quoted in T. SCHELLING, *CHOICE AND CONSEQUENCE* 27 (1984); see also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 258

contain more, despite the acknowledgement that the effectiveness of law is limited. For example, Max Rheinstein concluded that law was not a prime determinant of behavior in relation to marital stability.<sup>62</sup> Mary Ann Glendon notes that the relation between law and behavior are uncertain, and that other factors are critical.<sup>63</sup> Scholars whose concern is law/society issues suggest that law may not be very important in causing particular behavior.<sup>64</sup>

Even if we assume some effectiveness, the problem remains "what message?" One possibility is a message of facilitation of private choice, which may finally lead to the proposition that marriage is not a useful legal idea.<sup>65</sup> Another message would try to invoke the now-gone consensus of the Christian nation.<sup>66</sup>

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(2d ed. 1986) ("[T]he Supreme Court is a court of last resort presumptively only."). The point about law is not that nothing happens, but that things happen which we did not expect (*see* M. GLENDON, *supra* note 2, at 106-07 for consequences of no-fault divorce) and that the simple cause and effect relationship in which law shapes behavior is far from proven. This does not make law trivial or insignificant. It does limit what we can realistically expect law to do alone. Note in this connection Schneider's comment that enforcement problems in family law are ubiquitous, even where the law purports to act. *See* Schneider, *supra* note 18, at 1056. The difficulties in the child custody area, for example, require no citation.

<sup>62</sup> "Experienced observers have long known what we have laboriously tried in this book to prove, namely, that a strict statute law of divorce is not an effective means to prevent or even to reduce the incidence of marriage breakdown." M. RHEINSTEIN, *supra* note 15, at 406. Abel suggests that this observation might have been a "foundation for the study, not an afterthought . . ." Abel, *Law Books and Books About Law*, 26 STAN. L. REV. 175, 183 (1973). "[L]egal professionals, with their strong and obvious commitment to the importance of law, are clearly the last people likely to accept its irrelevance. Instead of doing so, they will make that *irrelevance* the central problem." *Id.*

<sup>63</sup> M. GLENDON, *supra* note 2, at 60. Again, her basic point concerns the impact that law may have in the formation of ideas, attitudes and ultimately the social consensus. *Id.* at 58-59.

<sup>64</sup> *See generally* material on the impact of law on society in L. FRIEDMAN & S. MACAULAY, *supra* note 32, at 197-492; *see also* Griffiths, *Is Law Important?*, 54 N.Y.U. L. REV. 339 (1979); Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 781; Weitzman, *Bringing the Law Back in*, 1986 AM. B. FOUND. RES. J. 791.

<sup>65</sup> Thus E.M. Clive raises the question of the future of the legal concept of marriage. Clive, *supra* note 58, at 78. In the context of article 12 of the European Convention on Human Rights (right to marry) he asks: "What are the underlying assumptions of that provision? Would it be breached if a country abolished marriage as a legal concept but gave its inhabitants complete freedom to participate in such religious or social marriage ceremonies as they thought fit?" *Id.*

<sup>66</sup> But that framework also had its anomalies. South Carolina had no divorce at all for most of the 19th century, but had a statute regulating "[e]xcessive legacies to bas-

The fact that the consensus is gone is a point on which we agree. However, that agreement creates a problem, since we want our law of the family to be not merely not evil, but affirmatively good.<sup>67</sup> As Lee Teitelbaum suggests,

It does not seem enough . . . to content ourselves with saying only that some rule cannot be shown to produce evil. While that may suffice for a commercial contract or the occasional tort, there is some feeling that family relationships should be founded on rules and practices we can call good.<sup>68</sup>

But what we can call "good," and how to justify the description, is precisely the issue that remains unclear. "Like just about every other long-standing institution," Clifford Geertz tells us, "— religion, art, science, the state, the family — law is in the process of learning to survive without the certitudes that launched it."<sup>69</sup> The process is associated in law with the realists and so we return to Grant Gilmore. He wrote in 1951:

At twenty years distance we may with the prescience of hindsight pass judgment. Llewellyn and his co-conspirators were right in everything they said about the law. They skillfully led us into the swamp. Their mistake was in being sure that they knew the way out of the swamp: they did not, at least we are still there.<sup>70</sup>

Decades later, it is as true in family law as in much else.<sup>71</sup>

tards or women living in adultery." See S.C. CODE ANN. § 21-7-480 (repealed 1987).

<sup>67</sup> Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 439 (1985). See generally Leff, *Unspeakable Ethics, Unnatural Law*, DUKE L.J. (1979); Kay, *Moral Knowledge and Constitutional Adjudication*, — TUL. L. REV. — (forthcoming).

<sup>68</sup> Teitelbaum, *supra* note 67, at 439.

<sup>69</sup> C. GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 217 (1983).

<sup>70</sup> Gilmore, Book Review, 60 YALE L.J. 1251, 1252 (1951) (reviewing K. LLEWELLYN, *THE BRAMBLE BUSH* (1951)). Gilmore himself thought that in general law followed society, so that a just society resulted in a just law. But, he wrote, "Law never creates society; society creates Law. Law never makes society better; a better society will improve the law." Gilmore, *Anarchy and History*, 14 U. CHI. L. SCH. REC. 7 (1966); see also G. GILMORE, *supra* note 17, at 111 ("In Heaven there will be no law . . . In Hell there will be nothing but law . . .").

For recent discussions of legal realism, see L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); Singer, *Legal Realism Now* (Book Review), 76 CALIF. L. REV. 465 (1988).

<sup>71</sup> Just before his death Gilmore said:

We stand at the end of a half century during which the body of the law has been at fives and threes — not to say, sixes and sevens. The imposing structure of our nineteenth century law — and a magnificent creation it

But there is something in family law that makes the matter peculiarly difficult. The problem is centrally that we care so much, and that law, finally, can do so little. As to this, it may be that the public is more sensitive to reality than some lawyers. Here is Trollope, particularly acute on the failure of the law to provide anything approaching an adequate remedy in certain situations. In *Kept in the Dark*,<sup>72</sup> involving the concealment of a wife's previous engagement, the wife, rejected by her husband, considers the law's relevance to her situation. The idea of the "limits of law" could not be more clearly set out.

She could not force him to be her companion. The law would give her only those things which she did not care to claim. He already offered more than the law would exact, and she despised his generosity. As long as he supported her the law could not bring him back and force him to give her to eat of his own loaf, and to drink of his own cup. . . . He had said that he had gone, and would not return, and the law could not bring him back again.<sup>73</sup>

The strength of inquiries into the expressive functions of law is that they focus not only on the formal content of the decision, but also on its effect and tone. They direct attention away from the decision maker, powerful and authoritative, and towards the audiences which the decision both addresses and reflects. While emphasis on rule and decision making gets us to clarification and thus simplification, emphasis on rhetoric gets us to complexity and contradiction. Given the circumstances, while we must somehow still decide things, we might do well to announce our decisions in a less certain voice.

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was — lies in ruins. It has not been rebuilt — nor will it be, although there are a good many would-be master builders eager to offer their services. If any of your instructors was rash enough to tell you what the law is, you would not believe him; if you did, you would be poorly equipped to operate in the real world.

Gilmore, *What is a Law School*, 15 CONN. L. REV. 1, 4 (1982).

<sup>72</sup> A. TROLLOPE, *KEPT IN THE DARK* (1882, republished 1978).

<sup>73</sup> *Id.* at 50.

