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The Properties of Family and the Families of Property — Source link

Martha Minow

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Book Reviews

The Properties of Family and the Families of Property

The New Family and the New Property. By Mary Ann Glendon. *Toronto: Butterworths & Co.*, 1981. Pp. vi, 269. $19.95.

Martha Minow†

The family is in trouble; the family is "here to stay."[1] Jobs are more alienating than in the past; jobs provide more security than ever before. The welfare state undermines the family; the welfare state steps in to help families. The human condition in twentieth-century industrialized countries is marked by isolation and the illusion of personal choice; the human condition in twentieth-century industrialized countries is marked by collectively guaranteed care and is devoid of unshared risks.

Mary Ann Glendon's second ambitious and learned book in comparative law[2] advances a thesis large enough to encompass most of these contrary assessments of modern family, work, and life. As its title indicates, *The New Family and the New Property*[3] links changes in the human condition to changes in the legal constructs addressing them. Along the way, the book offers insights into social phenomena ranging from Egyptian dynasties[4] to private pensions.[5]

† Assistant Professor of Law, Harvard University.

1. M. BANE, HERE TO STAY: AMERICAN FAMILIES IN THE TWENTIETH CENTURY (1976). For a summary of recent books debating the viability of the family, see Hacker, *Farewell to the Family?*, N.Y. REV. BOOKS, Mar. 18, 1982, at 37.

2. The earlier work is M. GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE (1977).

3. M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981) [hereinafter cited by page number only].

4. Pp. 233, 236 (describing Max Weber's comparison of ancient dynasties with modern bureaucracies).

5. Pp. 172, 187 & n.196 (discussing the Employment Retirement Income Security Act (ERISA),

Put simply, the book's thesis is that family ties have slackened while employment bonds have strengthened, and that the law in the five industrialized countries studied[6] has responded to reflect these trends. Various new laws relating to the "new family"[7]—easing divorce, enlarging extrafamilial sources of income, and protecting each family member's choices about the duration and economic meaning of the family bond—have evolved to meet the family's new needs, and replaced the discrete field of family law. Adopting and expanding the concept expounded by Charles Reich that expectations of present or future income are part of the "new property,"[8] Professor Glendon asserts that benefits provided by employees or by the government have replaced transfers of status and wealth through the family. By relating change in the family to changes in property rights, Professor Glendon argues that a person's wealth and social status are now determined less by his family than by his job and its related benefits.[9]

Using graceful prose, comparative legal analysis, and an impressive variety of materials, Professor Glendon creates a new picture of family and work patterns located in new social and legal patterns. Deliberately setting out to "suggest a useful way to synthesize many seemingly unrelated phenomena,"[10] her book shapes rich descriptions of family law, employment law, landlord-tenant law, and property law into a coherent whole. The risk of creating coherence from such diverse materials is that some important and puzzling qualities may be omitted or distorted to fit a general scheme. After examining the virtues and vices of the conception of law at work in *The New Family and the New Property*, this Review considers other ways of thinking about law and social life.

I. The Virtues of Glendon's Synthesis

Professor Glendon's book offers a dramatic synthesis of the effects of new social structures upon rules that govern family and work, and pro-

29 U.S.C. §§ 1001-1381 (1976)).

6. "Although continuity of analysis is provided here by following the law of the United States, the study draws on legal developments in England, France, Sweden and West Germany, where appropriate, to support, confirm, refine or qualify the hypotheses advanced here." P. 2. The book also refers to Roman Catholic canon law, pp. 35, 104-06, and Soviet law, p. 201.

7. The "new family" is the term Professor Glendon introduces to describe twentieth-century Western family behavior and social patterns. Pp. 3-4, 17-20; *see infra* p. 378.

8. P. 3 (citing Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

9. The book does acknowledge that the family still affects educational and job opportunities for its offspring and inculcates the confidence and motivation that may largely determine success. Pp. 229-30. Certainly this is the conclusion of many researchers. *See, e.g.*, H. AVERCH, S. CARROLL, T. DONALDSON, H. KIESLING & J. PINCUS, HOW EFFECTIVE IS SCHOOLING?: A CRITICAL REVIEW OF RESEARCH 51-52, 166 (1974); C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA 76-81, 143 (1972); C. SILBERMAN, CRISIS IN THE CLASSROOM 70-79 (1970); *see also* J. COONS & S. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 52-61 (1978) (family choice in child's education should be larger because parents care the most).

10. P. 8.

vides a framework for connecting different developments in this area.

A. *Family*

"[T]he fundamental right to marry . . . now has to be understood as the right to marry, and marry and marry. . . ."[11] This line captures the first portion of *The New Family and the New Property*: Western families now possess "increasing fluidity, detachability and interchangeability of family relationships."[12] This trend not only weakens the promise of lifelong commitment between husband and wife once associated with the family institution, but also produces a growing variety of family compositions and structures.[13] Families, once wide kinship circles, are now often limited to conjugal lines.[14] This conjugal family configuration, initially centered on the patriarchal nuclear family, has in turn evolved toward "companionate marriage,"[15] with an emotional rather than economic basis.[16] And as the family's purpose became psychic satisfaction rather than economic interdependence, new instability developed in family structures.[17] Marriage has long suffered from some source of instability—Professor Glendon acknowledges that marriages between 1500 and 1800 "were dissolved by death about as often as they are now dissolved by divorce"[18]—but contemporary family bonds are unstable because of individual choice rather than death.[19]

11. P. 72.
12. P. 4.
13. "The new family is *no* family in the sense of a single model that can be called typical for modern industrialized societies." P. 4. Debates over the definition of family pervaded the White House Conferences on Families during the Carter administration. *See* N.Y. Times, June 6, 1980, at B4, col. 1; *id.*, Jan. 7, 1980, at D8, col. 1. The sense that "the family" embraces many forms is not new. *See* Llewellyn, *Education and the Family*, in THE FAMILY: ITS FUNCTION AND DESTINY 328, 329 (R. Anshen rev. ed. 1959). One demographic survey suggests only a small minority of families currently fit the nuclear model of husband, wife, and children. *See* G. MASNICK & M. BANE, THE NATION'S FAMILIES: 1960-1990, at 95 (1980). Indeed, the nuclear model may never have been adequate to describe the experience of some groups. *See* Dodson, *Conceptualizations of Black Families*, in BLACK FAMILIES 23, 23-30 (H. McAdoo ed. 1981).
14. Pp. 13-17, 19-20.
15. Pp. 14, 28.
16. Pp. 14, 31.
17. Here the book focuses on "states of mind" about family rather than on actual family groupings, p. 13 n.9, and here, as elsewhere in the book, the bonding pattern is considered apart from "the affective quality of the [interpersonal] ties while they last," pp. 17-18. This approach unfortunately denies the reader exposure to the sensitivity Professor Glendon displays on the few occasions when she introduces the emotional dimension of bonding. *See* p. 240. More troubling, avoiding the emotional aspect of interpersonal bonds mutes the tension between the thesis that family bonds have loosened and public perceptions that family bonds have grown more intense. Professor Glendon cites Lawrence Stone's discussion of this paradox, but suggests that it mainly reflects the growing emancipation of individuals from family constraints. Pp. 18-19 (citing L. STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800, at 686 (1977)). Glendon also neglects the emotional quality of work-related bonds.
18. P. 29 (citing L. STONE, *supra* note 17, at 55-56).
19. P. 31. Professor Glendon does not explain why she attributes the instability to choice rather

Marriage law in the countries Professor Glendon studies "tracks this social evolution precisely."[20] Legal rules that once empowered parents to select their child's spouse now give the individual the power to select successive spouses.[21] In particular, legal systems now permit both unilateral divorce, unsupported by proof of fault or serious cause,[22] and the separation of each individual's economic responsibilities.

Moreover, according to Professor Glendon, support obligations owed to a former spouse have noticeably declined.[23] In part, this has resulted from the greater presence of previously homebound women in the workplace. As women contribute more to the household financially, they become more able to support themselves after divorce.[24] Financial obligations to a former spouse are now likely to turn not on the recipient's need, but rather on the "available resources" of the contributing spouse.[25] Such resources can become unavailable after new family obligations begin with a new marriage. Legal support obligations after marital separation have thus weakened, as have the nonlegal ties that once bound the family together.

The loosening of family bonds has even occurred between parent and child, asserts Professor Glendon. Although many think of our age as child-centered,[26] Professor Glendon cites evidence showing that children leave home and develop psychological independence from their parents at

than economic pressures or tensions between male and female life cycle patterns. The "choice" explanation accords with the almost existential picture of isolated individualism offered in some parts of the book, *see* pp. 41-46, but clashes with the image of constrained, bureaucratic man presented in the discussion of work and benefits, *see* pp. 208-15. Although Glendon addresses this contrast, pp. 138-40, 213-14, she does not discuss its significance for the meaning of "choice" in bonding patterns.

20. P. 32. Professor Glendon describes "the law" as though it were one entity with a directional course that can be tracked regardless of the law's own division into fields and the Western world's division into nations. She attributes this assumption to the tradition of civil law. P. 2. It also partakes of the tradition of scholars of comparative law, who see individual decisions within one jurisdiction as points on a grand chart of the whole. Such a viewpoint enables a lofty perspective, though not without loss of contexual differences. It also contributes to a sense that the patterns described are inevitable and functionally adaptive. *See infra* p. 387.

21. P. 32. Professor Glendon offers developments in France as an example, even though French law remains more "traditional" than that of other legal systems. This deliberate instance of argument by weakest case, p. 33, is an artful device, but its persuasiveness depends in part upon the reader's willingness to see the trend rather than demand its proof.

22. Pp. 33-36.

23. P. 36.

24. P. 51.

25. P. 54.

26. *See* P. ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 403-04, 411-12 (1962); R. HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 363-87 (1962); Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, LAW & CONTEMP. PROBS., Summer 1975, at 38, 38-49, 64-71. The Supreme Court's regard for the parent-child bond also runs contrary to Professor Glendon's thesis. *See, e.g.*, Santosky v. Kramer, 455 U.S. 755 (1982) (strict standard of proof required for state's termination of parent-child legal relationship); H.L. v. Matheson, 450 U.S. 398 (1981) (importance of parent-child bond sustains parental notice requirement when minor seeks abortion, even if such requirement inhibits some minors from seeking abortion); Parham v. J.R., 442 U.S. 584 (1979) (traditional presumption that parents know child's best interests justifies giving parents dominant role in civil commitment of child).

younger ages than they did previously.[27] Once more, the law reflects this shift. Courts increasingly make custody determinations on the basis of psychological bonds rather than blood or legal ties;[28] parents can no longer legally control their children's marriage decisions; and grown children often leave financial responsibility for aging parents and relatives to social security and other collective means of support.[29]

Deftly handling sociological studies as well as legal materials, Professor Glendon argues that even the parental obligation to provide economic support to the child has declined. She identifies both de facto and de jure inroads on the support obligations of parents. In practice, a high proportion of children in one-parent households do not receive the support payments legally owed to them by the absent parent.[30] Commentators frequently explain this development as a result of the absent parent's poverty or support obligations to a newly formed family. Lawmakers in courts and in legislatures modify even express terms of a parental support obligation by allowing for the debtor's changed circumstances and mandating parity for children of the parent's different marriages.[31]

Professor Glendon observes that the overall pattern of weakened family bonds is consistent with other changes in legal and social patterns often summarized as the "emergence of the individual." Observers as diverse as Sir Henry Maine and Karl Marx see this larger pattern as a movement

27. Pp. 36-37. As another example of discerning a trend from the extreme cases, *see supra* note 21, Professor Glendon cites the Swedish proposal to permit children to divorce their parents, p. 39, a case from the State of Washington permitting a child to leave her family because of a serious conflict between parents and child, pp. 39-40 (discussing *In re* Snyder, 85 Wash. 2d 182, 532 P.2d 278 (1975)), and a Connecticut law permitting emancipation of a child at age 16, p. 40. Because Professor Glendon suggests that it is the plausibility of these instances that matters, p. 41, her trend analysis really focuses on ideas that particular groups of lawyers and policymakers might entertain.

28. P. 38. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 39-57 (1979) (calling for protection of psychological bonds); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 11-21, 31-53 (rev. ed. 1979) (same).

29. Professor Glendon notes the increasing legal recognition of visitation rights of grandparents, but rejects the notion that this may involve a renewed legal reinforcement of wide kinship ties. P. 38. Instead, she believes that judicial enforcement of these rights is a "legal adaptation to the fluidity and shifting composition of families, a process in which grandparents are often lumped in with 'significant others' who are not kinfolk." P. 38. This assertion seems to select the favored explanation because it accords with the overarching trend, not because alternative explanations lack support; indeed, courts considering grandparent visitation rely on a conception of the grandparent role rather than some more general notion. *See, e.g.*, Krieg v. Glassburn, 419 N.E.2d 1015 (Ind. App. 1981); Mimkon v. Ford, 66 N.J. 426, 332 A.2d 199 (1975); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977) (striking down ordinance that barred household of extended family).

30. Pp. 69-71. Professor Glendon acknowledges that a federal child-support enforcement program might make a difference, but predicts that the percentage of absent parents unable to pay will remain high. P. 70. For a study of the problem of enforcing child support obligations, see D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT (1979). This book sensitively considers both the economic and emotional consequences of jailing for nonsupport in Michigan, and concludes that the jail sanction produces greater compliance, but at excessive emotional and moral cost. *See also* Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614, 1626-34 (1982) (predicting changes in child support systems).

31. Pp. 73-76.

from status to contract and from group constraint to isolated individualism.[32] Professor Glendon's work, however, draws most from Max Weber, who asserts that the modern individual is isolated and free of ascribed status only in the family context; binding ties and constraints on freedom appear in the bureaucracies in which people work or seek economic assistance.[33] For Glendon as well, the individual has achieved self-definition in the family but is constrained in the marketplace.[34]

B. *Property, Jobs, and Security*

Professor Glendon asserts that the binding legal ties among individuals once present in family law now reappear in employment law, which "reflects the increased importance of the job, in that the network of relationships that secure an individual's job to him (and, more subtly, tie him to his job) is becoming more closely articulated."[35] Here it also becomes evident that security is the dominant concern of the book and that the essence of this security is economic, not emotional.

Professor Glendon argues that bonds between an employee and his job have grown stronger as the law has curbed the employer's power to fire. Labor agreements, arbitration practices,[36] civil service regulations, and legislative protections against discrimination and reprisal[37] restrict the employer's power to terminate the employee, and grant the employee greater job security. The most pointed and poignant connection between the employment and family trends described in the book arises here: Employers have lost their power to dismiss without cause, just as spouses have gained the power to end marriage unilaterally and without cause.[38] Glendon explains this changing of the guard as a reflection of the increasing value of the job and the decreasing value of the family in providing security.[39]

32. Pp. 41-43; *see also* pp. 138-39 (comparing loosening of family bonds with tightening of work bonds).

33. *See* M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (T. Parsons trans. 1958) (discussing isolating consequences of modern life).

34. Pp. 231-38.

35. P. 7.

36. Professor Glendon refers to her previous study comparing the disposition of 98 reported arbitrations of employee discharge cases in 1963 and 1964 with 106 such cases reported in 1977 and 1978. Pp. 154-55. Arbitrators reinstated only 36.73% of the discharged employees during the earlier time period, while 14 years later they reinstated 66.04%. P. 155. The limitations of this kind of study are obvious: Reported cases may not be representative of all cases, and the results obtained lend themselves to varied explanations. Professor Glendon reasons, however, that the contrast in reported decisions itself gives employers cause to refrain from discharging employees, especially as employees also know the costs of defending a discharge decision and the risk of an award of back pay to the employee as a penalty. *Id.*

37. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976) (Title VII); National Labor Relations Act § 8(a)(3)-(4), 29 U.S.C. § 158(a)(3)-(4) (1976).

38. Pp. 4, 152-53.

39. Pp. 108-22, 169. In this analysis, the changes in law perfectly mirror social experience, for

Professor Glendon also suggests that the value of the job to the employee gives symmetry to changing bonding patterns: The "ties that bind the employees to their present jobs" match the limits on the employer's ability to fire the employee.[40] The ties running from employees to their jobs stem from inertia, acceptance, and the kind of specialization that limits mobility;[41] work-related benefits such as pensions and seniority also deter employees from changing jobs. These ties do not, however, mean job satisfaction.[42] In fact, they may contribute to a worker's general feeling that he cannot determine his own life.[43] The employee nonetheless chooses security over freedom[44] and becomes attached to the future stream of income and benefits recognized in the legal construct of the "new property."[45]

While the "new property" also embraces government benefits,[46] Professor Glendon treats these non-job benefits as a secondary development and reserves judgment on the effect of the welfare state upon the relationship between family and work life.[47] She does suggest that the law has never shown itself able to strengthen family relationships, although it may strengthen individuals in those relationships.[48] This conclusion comports

the law eases exit from family bonds just as the significance of the family in transmitting wealth declines. Pp. 108-12. Professor Glendon does not explain how the law accomplishes this mirroring and whose perception of the locus of wealth governs. She simply points to the large percentage of the industrial population with employee status, and thus implies that this situation somehow pressures law to adapt.

40. P. 171.

41. Pp. 173, 175-76.

42. Pp. 198, 213.

43. P. 176; *cf.* Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1438 (1979) (individual choice to conform in order to gain benefit may impair individual autonomy).

44. Several aspects of the book's reliance on security as the value of measurement are troubling. First, the book's concept of security does not include the *quality* of the bond in analyzing the sources of security, *see supra* note 17, even though security involves qualities of assurance, continuity, and care. Second, conflating these connotations with *economic* security hides potentially significant differences between, for example, the security of public benefits to pay for nursing home services and the security of care provided at home by the family. Either may be callous or caring, but failing to note this contrast may shield from view qualitative dimensions. Next, the book shares the common assumption that increases in security result in decreases in freedom. This assumption, however, may reflect the way we think about things rather than the things themselves. *Cf.* R. WOLFF, THE POVERTY OF LIBERALISM 45-50 (1968) (criticizing premise of individualism producing interference-noninterference model of human relations). Finally, Professor Glendon's "security" neglects a number of important assurances that the twentieth-century welfare state does not provide. *See infra* p. 385.

45. P. 186 (citing Reich, *supra* note 8).

46. Pp. 186-87.

47. Pp. 126, 135-37, 191-92, 245. She does advert to complex interconnections among traditional homemakers entering the workplace, the need to care for dependents, and public support systems. Pp. 130-38.

48. Pp. 136-38. Thus law can hurt but cannot help. Many share this view, but for widely varied reasons. *Compare* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 52-53 (rev. ed. 1979) (law cannot create bonds) *and* Glasser, *Prisoners of Benevolence*, in W. GAYLIN, I. GLASSER, S. MARCUS & D. ROTHMAN, DOING GOOD: THE LIMITS OF BENEVOLENCE 99, 146 (1978) (law cannot promote interests of dependent people) *with* Burt, *The Constitution of the*

with the book's claim that society and law isolate the individual, as economic security and social status derive increasingly from the workplace and from government rather than from the family.

C. *Family and Property: Two Frames of View*

While refraining from prescriptions and explicit evaluative judgments,[49] Professor Glendon offers two additional frames for her picture of the "new family" and the "new property." To see the first frame, the reader must stand back from family law and focus on law's original preoccupation—property.[50] As the amount of property and significance of social rank transferred through the family unit increased,[51] the legal procedures for making and dissolving family bonds became increasingly complicated and the legal rules establishing the "legitimacy" of family membership grew more detailed. Capitalism obscured this functional relationship, however, by introducing new kinds of wealth. Family law took on the additional task of expressing ideals of family conduct, and family and property law became applicable to people lacking significant wealth. In the shift from feudalism to capitalism, the law lagged behind changes in the behavior of even the wealthy for whom it was designed.[52] The weakening of legal family bonds and the strengthening of legal work bonds should be understood as restoring law to its original function—regulating

Family, 1979 SUP. CT. REV. 329, 387, 395 (Court could serve valuable role in acknowledging conflicts within families and communities and promoting mutual accommodation and family bonds) *and* Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 207, 307-15 (1982) (contract law can and should resolve marital disputes, vindicate expectations, and substitute for lack of sustenance once available from other institutions).

49. The book's general approach is descriptive, reflective, and predictive, rather than prescriptive. Glendon's most explicit recommendation would limit the property divisible upon divorce to that produced through gainful activity during the marriage, absent a contrary private agreement. P. 63. The book also specifically suggests that future study address the indirect effects of housing, labor, pensions, tax, and social welfare policies on family life. "One might at least realistically hope for the identification and removal of disincentives to useful family cooperation in such common situations as those involving infirm elderly persons or teenage mothers, where the individualistic bias of present laws may actually discourage informal familial care arrangements." P. 137.

Researchers have already attempted to examine the impact of legislative action on the family. *See* Institute for Educational Leadership, George Washington University, Interim Report of the Family Impact Seminar (1978). Major problems with this approach include determining how to limit the scope of government policies reviewed, since "[w]ithout well defined criteria, there are no limits to what could be considered as potentially having some effect on families and children." S. KAMERMAN, DEVELOPING A FAMILY IMPACT STATEMENT 5 (1976).

50. Pp. 101-05. Professor Glendon mentions, but does not explore, the law's concern with violence. Pp. 102, 118. Violence in society and in the family clearly remain enduring concerns, and a very different picture might emerge if the law's role in these matters were included in a study of family bonds and their legal expression. *See* R. KEMPE & C. KEMPE, CHILD ABUSE (1978); Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CALIF. L. REV. 1657 (1981). The relationship between unemployment and family violence would certainly be important in such a picture.

51. Pp. 102-05.

52. Pp. 107-08.

transmissions of property and status. These sources of wealth and status, and the law that governs them, now cluster more densely in the bureaucracies of work and government than in the home.[53]

The second frame, offered as a question,[54] also calls for a sweeping view: Do the patterns described in the book amount to the reemergence of feudalism? Feudalism similarly ascribed status (albeit by occupation and parentage), interwove public and private law and life, and achieved social cohesion through mutual obligation,[55] yet Professor Glendon rejects the analogy. Unlike the institutions of medieval Europe, "the new family and the new property" involve the *attenuation*, not the accentuation, of kinship ties of all sorts.[56] For Glendon, the better explanation of modern trends is Weber's dark conception of regimented bureaucratic rationalization. Playing upon the imagery of "ties that bind," Professor Glendon invokes the bondage of Weber's "iron cage" confining society "to the technical and economic conditions of machine production."[57]

Yet for an alluring gleam of hope at the end of the book, Glendon holds up "Homer's invisible golden chain linking the heavens and all the creatures of the earth together,"[58] an image inspiring a sense of the connections among people and across generations, and within an ordered universe. This sense of connectedness may even be discerned within older notions of law, property, and family. Those notions, if now dormant, may yet someday be revived.

The optimism in the book's last few pages cannot alter its essentially grim picture of attenuated family ties and stifling workplaces. The very radiance of the golden chain exposes the harshness of the law depicted in the book. The law has "played more of a reactive than a creative role."[59] It has been "a brightly colored filament in the connective tissue of the modern social order, showing up in the attenuation of family ties, the tightening of work ties and the construction of the administrative frameworks of the large private/public organizations that dominate 20th-century life."[60] The limits of the book arise in large measure from this very conception of law as separate from, yet reflecting, society.

53. *See* pp. 108-18.

54. Professor Glendon concisely phrases her question in the title of chapter five: "Toward a Feudalism of New Property?" P. 207.

55. Pp. 226-28.

56. The book does acknowledge that the "new family" demonstrates some power to assist the economic success of its children. Pp. 229-30 (family affects confidence, motivation and access to jobs and schools). *See supra* note 9.

57. P. 236 (quoting M. WEBER, *supra* note 33, at 181).

58. Pp. 243 & n.170, 244-45.

59. P. 242.

60. *Id.*

II. The Vices of Glendon's Synthesis

The New Family and the New Property can accommodate contrary statements of modern experience like those in the first paragraph of this review. By tracing legal changes and other social indicators, the book tracks the movement of sources of economic security to explain the seemingly contrary assessments of modern work and modern family life. As detailed above, Glendon sees the law as reflecting—although maybe lagging behind—changes in the patterns of behavior, wealth, and bureaucracy.

Professor Glendon's tidy synthesis has power, but surprisingly she barely mentions the enormous economic insecurities that remain in modern life. In a brief discussion, Glendon does list the elements of this insecurity—many nonwhites and many women lack the opportunity to get any job, much less a good one with fringe benefits;[61] even for those with jobs and benefits, layoffs remain real threats to security any time the economy takes a downturn; inflation can wipe out pension and welfare benefits even for those with steady employment.[62] By pushing the precariousness of the new economic security below the surface of her analysis, Glendon also squeezes to the corner a large group of people who "do not fit."[63]

61. Glendon does note that the problems of limited access to good jobs and of women's continuing role in child care mean that many people do not "fit" into the modern work structure described. P. 195. She notes that the need for income redistribution will also produce social and political tension. Pp. 195, 198.

62. Pp. 193-96. She also notes the strain placed on pension systems as the proportion of dependent elderly people increases relative to those working and contributing to the benefit funds. Pp. 196-97. The combination of recession and plant closings currently causes appreciable instability in the United States. The steady increase in unemployment over the last three years is an even more pressing problem. *See* MONTHLY LAB. REV., June 1982, at 73-77 (average unemployment up from 5.8% in 1979 to 7.6% in 1981; 14.3% of blacks unemployed in April, 1980, and 18.4% in April, 1981; *see also* Bednarzik, Hewson & Urquhart, *The Employment Situation in 1981: New Recession Takes Its Toll*, MONTHLY LAB. REV., Mar. 1982, at 3, 5, 13 (recession and depression in key industries causing increasing unemployment).

63. Evidence of marketplace insecurity could provide the basis for a thesis entirely different from Professor Glendon's: insecurity leads people to retreat into families, conceived as "havens in a heartless world." C. LASCH, HAVEN IN A HEARTLESS WORLD 6 (1977); *see id.* at 168. Individuals often turn to their families for economic and psychological support. Grandparents, divorced parents, and family-like groups may join in tightened networks of care. *See* Bohannan, *Divorce Chains, Households of Remarriage, and Multiple Divorces*, in J. AREEN, CASES AND MATERIALS ON FAMILY LAW 604 (1978). Families may break up as a result of outside pressures rather than choice. Certainly the party and the children of the party who do not choose to leave do not experience the break-up as a matter of choice, and even the leaving spouse may feel helpless, confused, and defeated. Employers, governments, and public attitudes perpetuate barriers to full participation in the marketplace against women and minorities. *See* C. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 3-25, 436-73 (1980). At the same time, instability permeates the marketplace even when chosen by employees seeking better jobs. *See* Rosenfield, *Occupational Mobility During 1977*, MONTHLY LAB. REV., Dec. 1979, at 44, 44-48. Capital itself moves from industry to industry in search of a quick return and in flight from the retooling needed for a solid future; plants close and inflation coexists with recession despite economic theory.

This distortion results in part from Glendon's assumption that law accurately reflects society: The book simply leaves out what law does not reflect.[64] That Professor Glendon elides the limits of the modern state and its legal regime may well stem from her methodology, which bears a strong resemblance to legal reasoning itself.

A. *Saying What Law Is Doing*

Descriptions of law as adaptive and reflective[65] are of limited use: Such descriptions neglect the important ways in which law acts to structure or rationalize society. Professor Glendon describes the law's initial expansion in the family context, for instance, as a response to large and complex transfers of wealth taking place through marriage, divorce, or family inheritance.[66] The subsequent application of the law to simpler cases led to new corrective adaptation, limiting the role and complexity of the law with respect to individual choices to marry or separate and to control family property. The results of *this* adaptation have overshot the mark to the apparent benefit of the wealthy,[67] but presumably the law will adapt yet again. Professor Glendon's story demonstrates the shortcomings of a theory that law simply adapts to changes in social life. How can the law change through adaptation, but result in maladaptation? What is functional adaptation and what is dysfunctional? For whom, and when? Adaptation theory answers these questions only with circular reasoning: The law constantly adapts and, if it somehow differs from societal needs, it is evolving toward a better fit.[68] The theory's assumptions are faulty as well:

What is important about this alternative picture is not its relative explanatory power, but the fact that it too can be stated with authority. We could create other pictures emphasizing other factors. These possibilities should press us all to consider what assumptions about law and truth lie behind the picture we choose to create.

64. Professor Glendon seems to acknowledge this distortion in suggesting that law may create only the illusion of economic security: "New property in the form of job security, pension rights and welfare benefits is the creation of law, but law alone cannot preserve it." P. 197.

65. "Adaptation" is often Glendon's explicit explanation for legal change. *See, e.g.*, pp. 56-60, 76, 112, 118. Other explanations describe law's development as natural and adaptive by emphasizing law's fit to the circumstances, p. 104; its inevitability, p. 114; its adjustment to needs, p. 117; its erosion of an unacceptable rule, p. 161; its harmonizing with social need, p. 167; its participation in a general trend, pp. 176-85; and its evolution despite formal judicial rejection of legal change, p. 179 (citing E. LEVI, AN INTRODUCTION TO LEGAL REASONING 6 (1948)). The book sometimes displays a certain agnosticism, citing interpretations of change as both inevitable and as the work of particular interest groups. *Compare* p. 211 (theory that labor organizations grew complex due to inherent logic of industrialism) *with* p. 211 n.22 (Marxist view that bourgeoisie imprints labor unions with its own model).

66. Pp. 93, 104-05.

67. P. 91.

68. *See* Moore, *Functionalism*, in A HISTORY OF SOCIOLOGICAL ANALYSIS 321, 338 (T. Bottomore & R. Nisbet eds. 1978) (idea that form must fit function verges on tautology). One contrasting view is that "[w]hat appears to some as an era of 'lag' was actually a period in which issues were collectively defined and alternative solutions posed, and during which interest groups bargained for favorable formulations of law." Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, in

Social needs are not always identifiable and certainly not always compatible, and law is part of, rather than detached from, social reality.[69] The focus on law as adaptive obscures the ways in which the law helps to create the seeming necessity of particular social and economic arrangements at any given time.[70] The book wells up with insights uncontained by the equivocation of adaptive theory, but their inclusion results in an inconsistent treatment of the central questions about the purposes and methods of the law. At times the law can be influenced by a special interest group;[71] at times it is directed by legal decisionmakers.[72] Sometimes the law is split between outdated formalisms and practical applications sensitive to new realities;[73] at other times distance between law and practice reveals "law-resistant behavior."[74] Law sometimes can desirably alter behavior, but law can also undermine the bonds within families.[75] Even though generally adaptive, law may be undermined by its own handiwork.[76]

Despite the inconsistent quality of these assessments, they sensibly acknowledge that legal instruments and institutions influence the world as well as respond to it, and that law has the power to change both society and the law's influence within it. Indeed, in a remarkable passage, Professor Glendon suggests that law may actually serve its own ends, while disguising both its means and effects: "Just as one wonders to what extent 'children's rights' strengthen the state at the expense of the parents, one must wonder how much the new property and 'individual' labor law strengthens the state at the expense of unionization and the collective bargaining process."[77] This telling point suggests that law devises a rhetoric of rights replicating or even exacerbating the tension between freedom and security by enlarging state authority in the name of those rights.[78] Professor Glendon closes this tantalizing digression with a hint that law carries

AMERICAN LAW AND THE CONSTITUTIONAL ORDER 269, 281 (L. Friedman & H. Scheiber eds. 1978) (discussing accident law in the Progressive era).

69. *See* Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1033-36 (1981).

70. *Id.* at 1054.

71. Pp. 105, 211 n.22.

72. Pp. 156, 167.

73. Pp. 74-75, 116.

74. Pp. 127-29. Here Professor Glendon examines the effect of contrasting public policies in the United States and the Soviet Union concerning "the long term decline in the birth rate" in these countries. She concludes that this decline may resist legal measures, since it continues despite mild encouragement in the United States and active discouragement in the Soviet Union. P. 128. It could be, however, that very different factors explain these patterns, or that the rates would have been different had the public policies been identical.

75. Pp. 138-39.

76. Pp. 225-42.

77. P. 204.

78. *See* Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 354-55 (1979).

with it an ideology that justifies or conceals unappealing social facts:[79] "Drained of substance, the ideology of entitlements and security might serve to legitimate diminished freedom to move and circulate among the grades in an increasingly highly structured society."[80] Indeed, we might speculate that the ideology of entitlements and security legitimates the absence of real entitlements and security.[81]

The author acknowledges that "[s]ome see law as contributing to or covering up the problems of inequality and illegitimacy; . . . [or] as a mere symptom or manifestation of them."[82] And yet, the reflective theory of law prevails even in Glendon's judgment, albeit in a theological version.

> Our analysis suggests that all these observations are merely perceptions of different aspects of the linkage between law and the social order. It can be an instrument and a symbol of fragmentation as well as of harmony in social systems. As Carbonnier says, if law as such sometimes appears to be an evil, this is only so in the sense that law is linked to the human condition. Even when it does not itself do harm, law, by its very existence, reminds us that man is fallen.[83]

So the law expresses human imperfection and therefore must have failures. At this level of generality, it may be foolish to disagree.[84] But this conclusion returns the law to passivity and inevitability, exonerates it from the charge that its internal dynamics affect human understanding and social life, and accomplishes the apologetic function of adaptive theories of law, despite the book's reach for more.

B. *Seeing What Law Is Doing*

We should not let law off so easily. Even if the law simply reflects human fallibility, it addresses the ineluctable problems of human life and

79. *Cf.* Davis, *Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt's* Taking Care of Strangers, 1981 WIS. L. REV. 419, 436-37 (law mediates and legitimates inherent conflicts); Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81, 109.

80. P. 205; *see also* p. 82 (ideology of partnership behind modern divorce laws "served the comforting function of appearing to be in control of a constantly deteriorating situation").

81. It may, however, be just as limited to describe law as legitimating inaction as it is to describe law as adaptive to social needs. Both descriptions treat law and society as abstractions without exposing how action and belief interact. A similar problem in psychology has generated a theory of interaction between the world and the individual. *See* Piaget, *The Various Forms of Knowledge Seen as Differentiated Organs of the Regulation of Functional Exchanges with the External World*, in THE ESSENTIAL PIAGET 842-58 (H. Gruber & J. Volneche eds. 1977).

82. P. 242.

83. *Id.*

84. For a contrasting but equally elevated view of human limits, see H. ARENDT, THE HUMAN CONDITION 279 (1958) ("[E]ven if there is no truth, man can be truthful, and even if there is no reliable certainty, man can be reliable.").

finds answers where philosophy, history, and other intellectual endeavors can engage in debate without resolution. The law's mechanisms, however, are elusive. Their uniqueness lies not simply in the forms in which legal answers appear. If that were the case, Professor Glendon's book should succeed in exposing the device, given its splendid array of nonlegal materials and perspectives. There is rather something in the sinews of legal reasoning that allows its decisionmakers to reach and justify their decisions without disclosing the depth of the problem at hand. To get beyond the face value of legal statements, we must acquire some perspective on law's inner workings.

I suspect the very expression of the decision contains a re-creation of the problem and reserves to the law the duty and capacity to resolve the problem's next eruption. This process of re-creation may in fact be due to the alteration of the underlying problem by the legal translation.[85] A real problem for the analyst then is to avoid mistaking the legal translation for the problem itself and the legal resolution for the real world effect.

Professor Glendon's discussion of two state supreme court cases reveals some of the law's techniques but does not acknowledge the problems that these techniques obscure—or sometimes even create. Instead her discussion relies on the claims the law itself makes to affect the world.

Monge v. Beebe Rubber Co.[86] and *Fortune v. National Cash Register Co.*[87] both altered the common law rule that an employment contract for an indefinite time period is presumed to be terminable for any reason by either party.[88] In *Monge*, the New Hampshire Supreme Court expressly replaced the common law rule with a new standard:

> We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract . . . . Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.[89]

85. *See* M. GOLDING, PHILOSOPHY OF LAW 109-10 (1975) (difference between real dispute and legal dispute); Davis, *supra* note 79, at 429-39 (effect of legal reification); Wasserstrom, *Postscript: Lawyers and Revolution*, 30 U. PITT. L. REV. 125, 129 (1968) (tendency of lawyer "to transmogrify what is new into what has gone before or to reject as unworkable or unintelligible what cannot be so modified").

86. 114 N.H. 130, 316 A.2d 549 (1974).

87. 373 Mass. 96, 364 N.E.2d 1251 (1977).

88. Pp. 162-67. For a provocative study of the relatively recent origins of the common law rule, see Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

89. *Monge*, 114 N.H. at 133, 316 A.2d at 551-52, *quoted at* p. 163.

Right on the surface of the passage is the conflict between the employee's desire for secure employment and the employer's desire for the freedom to deny that security. The court implies that its new standard resolves this conflict. The standard, however, only gives the discharged employee new words to submit in objecting to destruction of his security—now he can claim "malice" or "retaliation." The employer, however, will respond with the new defenses of "business efficiency" and "profitability."[90] What has changed is the court's power in the area, for the new standard will generate new litigation for the court to resolve. The vulnerability of the employee before a volatile economic system remains unconfronted, even in a ruling avowedly on the employee's behalf. The brute power of the economic system over people's lives receives a judicial cloak—now the court will decide when efficiency and profitability justify an employee's discharge.[91] The court will express this public interest; the employee's desire for security is now subject to both the employer and the court, with the employer's discretion curbed by the court's asserted power to speak for the public.[92]

This failure to distinguish what the court says and what the law means in people's lives also afflicts Glendon's discussion of *Fortune v. National Cash Register Co.*[93] There, the Massachusetts Supreme Judicial Court more ably disguised its exercise of judicial discretion in ruling in favor of the discharged at-will employee. Professor Glendon comments that the court's decision in *Fortune* "fits so well into the body of existing case and statutory law that it makes a reformulation of the traditional rule appear not only permitted, but actually required, by a proper understanding of the evolving relevant precedents and their contemporary statutory context."[94] This is, of course, a fine description of legal craftsmanship. The *Fortune* court demonstrated this craft by holding that the at-will employment contract at issue "contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of

90. The dissent employed these tactics, 114 N.H. at 136, 316 A.2d at 553 (Grimes, J., dissenting), *quoted at* pp. 163-64.

91. Professor Glendon observes that this decision "leaves no doubt about the court's expansive view both of public policy and of its own role in formulating it." P. 163. The decision itself concludes that "[i]n all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two." *Monge*, 114 N.H. at 133, 316 A.2d at 551, *quoted at* p. 163.

92. As Professor Glendon notes, the decision provoked considerable criticism for charging into "uncharted territory," p. 164 (quoting Geary v. United States Steel Corp., 456 Pa. 171, 174, 319 A.2d 174, 175 (1974))—doubtless for the court's failure to tuck in the shirttails of its discretionary power—but Professor Glendon accepts the court's claim that its decision has increased employees' security. In fact, we do not know whether this is the case, and the decision's demonstration of judicial discretion suggests the contrary conclusion.

93. 373 Mass. 96, 364 N.E.2d 1251 (1977).

94. P. 164.

the contract."[95] In so holding, the court located its ruling in established tradition. "[W]e are merely recognizing the general requirement in this Commonwealth that parties to contracts . . . or commercial transactions are bound by this standard."[96] This reasoning demonstrates how law translates issues into problems of categorization. The court deftly reduces the issue of the employee's security to the question of whether a discharge of an at-will employee falls into the category of decisions subject to the good faith requirement. The court thus domesticates the conflict into a well-trained animal, leashed by well-settled principles and norms.

It is of no moment to the analysis that the well-settled principle must be found here by implying a covenant; the attribution of intent or knowledge, and thus of liability, to parties by objective indicia is a routine legal technique.[97] From where do the norms that permit such implication come? They are "pervasive,"[98] although the court preserves its authority to decide differently in the next case.[99] "Pervasive" norms and an "evolving precedent" adjusting to the "contemporary context" hit the notes of naturalness, objectivity, and functional adaptivity sounded by adaptation theories of law's role in society.[100] It is particularly noteworthy that the qualities of adaptation are visible in decisions that clearly change the law.[101]

Professor Glendon can distinguish the quality of legal performances according to the degree of continuity and adaptation, but she does not examine or evaluate what law does.[102] She lays bare the contrasting tactics of the *Monge* and *Fortune* decisions, but she assumes without discussion that the courts correctly claim to increase employee security. The law's self-portrayal hides how the law really acts in society; Professor Glendon's

95. *Fortune*, 373 Mass. at 101, 364 N.E.2d at 1256, *quoted at* p. 165.

96. 373 Mass. at 102, 364 N.E.2d at 1256 (citations omitted), *quoted at* p. 165.

97. *See* W. PROSSER, LAW OF TORTS 212-13, 240, 458, 646-50 (4th ed. 1971).

98. *Fortune*, 373 Mass. at 102, 364 N.E.2d at 1256.

99.

> In the instant case, we need not pronounce our adherence to so broad a policy nor need we speculate as to whether the good faith requirement is implicit in every contract for employment at will. It is clear, however, that, on the facts before us, a finding is warranted that a breach of the contract occurred.

Id. at 104, 364 N.E.2d at 1257, *quoted at* p. 166 n.110. The court's ability to distinguish fact patterns in this fashion is essential to the court's continued application of "settled" law to new problems.

100. To some extent, even the reasoning of the *Monge* court relies on a sense of objectivity and functional adaptation. The court says it can balance competing interests in accord with the public interest, as though interests were tangible and measurable. *See supra* p. 390.

101. P. 166 n.112 (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151-52 (1921)).

102. The judicial decisions of course clearly affect the parties to the suits and may even give other employees occasion to feel affirmed, although the sources of economic insecurity remain unaltered. The decisions also provide legal constructs that the same courts will use to reach future decisions. Nonetheless, Glendon does not analyze the effect of the decisions upon employer-employee relations and the relative security of work. Even if "states of mind" about security are the primary subject, Glendon leaves the meaning of that security highly ambiguous.

discussion remains within the framework of the law's method. Indeed, she concludes by suggesting that future judicial decisions about the discharge of at-will employees may base protections on yet another settled principle: that statutory displacement of the common law justifies judicial modification of the remaining common law.[103] Here Professor Glendon displays her usual adroit reasoning and lawyerly acumen. Lawerly skills, especially those skills of categorizing and molding images of continuity, characterize the book even when it deals with history and social phenomena. Seemingly contrary patterns are reconciled;[104] seemingly connected issues are analyzed as though distinct;[105] seemingly similar patterns are distinguished;[106] and seemingly stable categories are created and then offered to embrace or reject questioned examples.[107]

Most frequently, this legal method seeks to identify a trend, extrapolating from a new development or fitting disparate points to a line,[108] much as a brief writer builds her argument.[109] The trend analysis, however,

103. P. 167. Importing this principle to decisions about employee discharge serves Professor Glendon's theory that certain qualities of family law reappear in employment law. Judicial intervention based on statutory modification of contractual relations is a standard feature of marriage law: "[T]he prevailing rule is that while the marriage relation is entered into by civil contract, the rights, duties and obligations incident to the relationship are governed by statute." Washington Statewide Org. of Stepparents v. Smith, 85 Wash. 2d 564, 568, 536 P.2d 1202, 1205 (1975) (citing treatises).

104. *See* p. 38 (visitation granted to grandparents reflects fluidity of family, not reinforcement of kinship ties); pp. 68-70 (strong child support law still part of attenuated family ties because of poor compliance in practice). The book cites an elegant demonstration of the reconciliation of differences in identifying convergence in the family law of the nations under study. "As [John] Merryman points out, a contrary impression may be given by the fact that, paradoxically, one of the principal elements of convergence has been a common tendency to permit 'increasing scope for diversity, complexity and particularism.' " P. 6 n.15 (citing Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 195, 232 (M. Cappelletti ed. 1978)).

105. Thus, Glendon treats "states of mind" about family bonds separately from both actual family bonding patterns and the quality of the bonds formed. P. 13 n.9.

106. Professor Glendon distinguishes marital dissolutions between 1500 and 1800 from contemporary divorce patterns occurring in the same numbers because dissolutions in the earlier period stemmed chiefly from the death of the marriage partner. Pp. 29-30. Similarly, Glendon separates the sharing of family functions with other institutions into earlier patterns (in which churches, neighbors, and patrons figured prominently) and modern patterns (in which public agencies assume a larger share). Pp. 88-89.

107. This is most graphic when Glendon presents—and rejects—the comparison between feudalism and modern developments. Pp. 227-30.

108. *See, e.g.*, pp. 39-40 (instances of child emancipation suggest loosening of child-parent bonds as plausible pattern); *see also* pp. 57-64 (redefining and applying categories for comparing systems of dividing property after divorce).

109. Wasserstrom has noted the incrementalism of the legal system:

> [T]he law is conservative in the same way in which language is conservative. It seeks to assimilate everything that happens to that which has happened. It seeks to relate any new phenomenon to what has already been categorized and dealt with. Thus, the lawyer's virtually instinctive intellectual response when he is confronted with a situation is to look for the respects in which that situation is like something that is familiar and that has a place within the realm of understood legal doctrine. In the early development of the Anglo-American legal system this fundamental tendency mainifested itself most obviously in the operation of the writ system. Rather than enlarge substantially the number of causes of action, the law found it more conge-

fails to acknowledge that other descriptions would be possible and that comparing possible descriptions may be the best path to pursue. Rather than voicing these possibilities, the book, like legal advocacy, has the tone of reasoned neutrality and the habit of predicting the future based on knowledge of the past operations of law and society.[110]

These moves are all made with elegance, precision, and clarity. These may hardly seem grounds to fault a book by a law professor on law and society. Yet, the book fails to open the box that encloses law-and-society.[111] Instead, the book mirrors that box, analyzing trends much in the same vein that legal reasoning portrays the use of precedents as evolving in a particular direction. And just as legal reasoning obscures the way in which it makes a decision while preserving both the unresolved underlying problem and the law's power over it, the book obscures the way in which it first "finds" a trend while preserving the unanswered problem as to how the law works.

C. *What Remains To Be Seen*

I suspect that if we want to know how law and society change—or stay the same—we will have to shake loose of the way legal materials describe them. But if legal reasoning seals itself off from view, how are we to see it? First, we can try to develop an awareness about the nature of our own legal reasoning when we turn to study the nature of law, in order to notice the law's blinders and to help expose the devices law uses to yield answers that do not resolve the underlying problems. Second, we can try consciously to focus on the dynamic interaction between law and society rather than on the effect of one when the other is held constant.

> nial to adopt [sic]—to some degree—to a changing world through the use of elaborate, complicated, fictions. But it also rejected—because unfamiliar—much that was important and that should have been cognizable by the legal order.
>
> We still, I am convinced, have our own analogues of the writ system with us today. And this fundamental tendency of mind still manifests itself whenever we as lawyers boggle at a claim, an interest, or a case because it is unlike what has gone before; or whenever we attempt to force the unfamiliar (no matter how much we distort it in the process) into a category that fits into our world of legal concepts.

Wasserstrom, *supra* note 85, at 129.

110. *See* Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30. Professor Simon suggests that the ideology of advocacy has several principles. "The first principle of conduct is the principle of neutrality. This principle prescribes that the lawyer remain detached from his client's ends." *Id.* at 36. "The second principle of conduct is partisanship. This principle prescribes that the lawyer work aggressively to advance his client's ends." *Id.* In addition, a lawyer acting as a "positivist" attempts "to assist his client by using his objective knowledge of the precise, regular, mechanical operation of the legal system to predict the consequences of alternative courses of action." *Id.* at 52; *see also* K. LLEWELLYN, THE BRAMBLE BUSH 75 (3d ed. 1960) (contrast between legal persuasion and logic); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1030 (1975) (adversary system does not yield truth).

111. *See* p. 7.

In the context at hand, these approaches might yield questions like the following: What set of beliefs underlie the use of the categories "family" and "property," to describe the sources of human security? How do the categories mutually define one another, and not just mark the boundaries across which change might be tracked?[112] Does the "heartless" job make the home more of a "haven"?[113] What baggage—wanted or unwanted—comes with welcoming government entitlements into the old legal category of property?[114]

Questions about the assumed qualities of change itself might also help. Why presume that change is directional?[115] What insights arise if different national experiences are contrasted rather than fitted to a trend line? Questions about the way the law describes change might also help. Why presume that movement toward "security" is an erosion of "freedom"? Does this opposition of two central values encourage the creation of "social security" that depends on the fluctuations of a "free market"?[116] Do the very names of legal categories reflect assumptions of contemporary political and social thought? Might alternative understandings emerge from ideas of community? Finally, we could bring a variety of perspectives to bear on a particular problem selected for study because of its persistence rather than its legal elegance. Such a study might expressly address how different kinds of inquiries shed a different light on the problem, but also cast different shadows. Inquiry along these lines might appear to diverge from the search for truth into endless scepticism, but I believe that the way "to stabilize knowledge against scepticism" is to "includ[e] its haz-

112. *Cf.* Rosch, *On the Internal Structure of Perceptual and Semantic Categories*, in COGNITIVE DEVELOPMENT AND THE ACQUISITION OF LANGUAGE 111, 143 (T. Moore ed. 1973) (best examples within descriptive categories may be members most different from other categories). For a significant effort to examine the ways in which "family" and "marketplace" have been used to define each other, and to explain the limits of reform efforts on that basis, see Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

113. *See* C. LASCH, *supra* note 63, at 172.

114. A legal category may have desirable rhetorical power. Less desirable are its limited reach and its vulnerability to legal redefinition. *See* Board of Regents v. Roth, 408 U.S. 564 (1972) (protected property interest absent where not defined by existing rules or understandings); Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS 126, 132 (J. Pennock & J. Chapman eds. 1977); *see also* J. Nedelsky, Property, Myth, and American Constitutionalism 14 (1982) (unpublished paper presented at the Annual Meeting of the Law and Soc'y Ass'n, Toronto) (property retains its rhetorical power, with content nonetheless available for reshaping, but it is "peculiarly anachronistic" to use concept of property as vehicle for change just when it seems to have lost its place in the constitutional structure).

115. For inquiry into the historically contingent and culturally relative nature of the idea of progress, see T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); R. NISBET, HISTORY OF THE IDEA OF PROGRESS (1980).

116. The distinction between public and private realms of life is another opposition often assumed in contemporary analysis. *See* Hartog, *Because All the World Was Not New York City: Governance, Property Rights, and the State in the Changing Definition of a Corporation, 1730-1860*, 28 BUFFALO L. REV. 91, 109 (1979) (public-private distinction assumed in contemporary thought inapplicable to eighteenth-century).

ardous character in the conditions of knowledge."[117]

What "family" and "job" mean singly and together are significant questions for cultures that treat the first as a source of moral and emotional value and the second as a locus of economic security and insecurity. Similarly important is the role played by social security benefits that do not touch the fundamental economic insecurity of contemporary life. Understanding how law and the study of law and society reinforce and reinvest the meanings of family and work could be central to efforts to invigorate these institutions or their alternatives.

The New Family and the New Property begins with a commitment to open conversation between law and social science.[118] In this, the book succeeds. It inspires deep questions about how change occurs, what makes a family a family, what makes security secure, and what makes sense of our experience. It is a valuable contribution not just to debates about family, work, life, and law, but also to inquiries into the nature of law, society, and human meaning.

117. M. POLANYI, PERSONAL KNOWLEDGE 245 (1962). The need to develop new ways of thinking that can reach behind and beyond preexisting patterns of thought is the topic of lively inquiry in many fields. *See* R. KEGAN, THE EVOLVING SELF 6-15 (1982) (psychology); T. KUHN, *supra* note 115, at 92-135 (science); F. MATSON, THE BROKEN IMAGE 122-40 (1966) (same); A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 6-21 (1981) (moral philosophy); W. RYAN, BLAMING THE VICTIM at xi-xv, 7-18 (1971) (social policy); H. ZINN, THE POLITICS OF HISTORY 9-14 (1970) (history). These ideas ultimately point toward a need to develop modes of inquiry that account for their own patterns of thoughts and underlying assumptions.

118. P. 8.