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# Divorce Stories: Readings, Comments and Questions on Law and Narrative\*

Carol Weisbrod\*\*

## I. INTRODUCTION

This article builds on the familiar point that a significant difference exists between law and narrative. While in some contexts we may stress the complexities and pluralistic aspects of law, it seems that, at least by contrast to literature, or, more expansively, narrative, law stresses a single integrated hierarchical vision and a single authoritative voice. Law and narrative are always in tension to the extent that a major emphasis in law is on clarity and reduction to a single vision, while a major point in narrative, both in the telling and in the questions we can ask about the telling, is ambiguity and complexity. Law's idea of truth is captured in the oath for witnesses: "Do you swear to tell the truth, the whole truth and nothing but the truth?"<sup>1</sup> Narrative has a different sense: "Is this true? Is this the whole story? I think not."<sup>2</sup>

The current scholarly interest in narrative raises difficult questions for law, especially to the extent that legal scholarship

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1. In other ways, law is not of course focused on truth, but has many objectives, only one of which is truth. For an overview on what is truth, see W. BISHIN & C. STONE, *LAW, LANGUAGE AND ETHICS*, ch. 6 (1972).

2. R. WILSON, *RIPLEY BOGEL* 120 (1989). Some versions of the idea that one "tells one's story" seem often thin and linear, like the law's idea that one tells where one was on the night of the tenth. See Weisbrod, *Practical Polyphony, Theories of State and Feminist Jurisprudence*, 24 GA. L. REV. 985 (1990) (similar point in another context).

is considered normative. Narrative has a function in law reform; it gives access to material which social science does not. This function is of considerable importance, particularly in the case of family law. The relationship between law and narrative may be peculiarly close in the area of family law, where judicial opinions may possess aspects not merely of narrative or story telling, but of a particularly intense form of story telling that involves the shaping of personal history and private life. But while narrative is, in its own way, as important as the statistics on non-support or child abuse, narrative is harder to deal with than statistics. For example, unless it is constructed for that precise purpose, as a form of rhetorical argument, narrative will not generally testify unequivocally either to the problem or the legal solution.

This article contains six parts. Part II of this paper uses a biblical narrative of marital break-down, the story of Vashti from the Book of Esther, to raise a number of general difficulties in establishing narrative meaning. Part III is based largely on extracts from women's narratives on marriage and divorce, and is offered as one way of describing the relationship between law and narrative. Focusing on the history of divorce as a case study, this part of the article reads law and narrative in a way that stresses the parallels between the law's image of marriage and divorce and the social image of marriage and divorce as drawn from the narratives. Part IV outlines some problems of narrative as reformist argument. Part V relates narrative to legal pluralism, noting that the conventional definition of law excludes other "law" which might be relevant to the actual experience of marriage and divorce. Part V suggests that, while narrative may be of some use in the formation of state frameworks regarding marriage and the family, it is more useful, initially and descriptively, as a method of exploring the multiplicity of family law norms existing within the society.

As this article is based on a small number of women's narratives,<sup>3</sup> at least two issues arise. The first issue is raised by the

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3. There are, of course, difficulties with narrative in relation to feminism specifically. Some have to do with traditional images of women. Diaries and other private writings may in fact work to reinforce the image of women as private and expressive rather than rational and analytic. Thus it has been noted that

present feminist theory encourages private—hence presumably "natural"—writings of women. But even diaries and letters are written according to rules. And such "expansion" could well be understood rather as the contraction of the idea of writing, and an interaction of the stereotype of woman as a

restriction of this article to a focus on women's stories. This has been done because marriage has a relationship to women and the problems of feminism which is different from its relationship to men. The traditional marriage contract of most women was highly unsatisfactory in a number of ways. Even today it remains unclear whether formally changing the contract while retaining the concepts of husband and wife is possible. In Congreve's *Way of the World*, the woman expects to "dwindle into a wife" even after arranging for a prenuptial contract.<sup>4</sup> The women's movement historically focused on freer and even free divorce. Today the economic consequences of divorce remain a women's issue. Women's history cannot be done without a history of marriage, including divorce.<sup>5</sup> It was clearly understood by some first generation American feminists that the issue of marriage was central to the question of women's equality. One femi-

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wholly private, purely expressive being.

Baym, *The Madwoman and Her Languages: Why I Don't Do Feminist Literary Theory*, in *FEMINIST ISSUES IN LITERARY SCHOLARSHIP* 45-46 (S. Benstock ed. 1987). For a description of the characteristics of slave narratives, and a contrast with the narrative of a free black woman in the North who became a minister, see Foster, *Neither Auction Block nor Pedestal: The Life and Religious Experience of Jarena Lee as Coloured Lady*, in *THE FEMALE AUTOGRAPH* (D. Stanton ed. 1984). This 1836 narrative is a spiritual autobiography, in the tradition of conversion narratives: "In the manner of the Puritan and Quaker conversion narratives, it contains a confession to sin, a testimony of conversion, and demonstrations of subsequent commitment to God's work." *Id.* at 128. What are the conventions of late 20th century law review narratives?

Similarly, this feminist emphasis on narrative and experience embraces an aspect of women's situation in the world which, in some communities, particularly that of intellectual elites, traditionally evidenced the intellectual inferiority of women. C.S. Lewis writes of this:

Wherever the men meet, the women must come too. The men have learned to live among ideas. They know what discussion, proof and illustration mean. A woman who has had merely school lessons and has abandoned soon after marriage whatever tinge of "culture" they gave her—whose reading is the women's Magazines and whose general conversation is almost wholly narrative—cannot really enter such a circle.

C. LEWIS, *THE FOUR LOVES* 69-70 (1960).

4. For a discussion of the Congreve contract, see J. BERNARD, *THE FUTURE OF MARRIAGE* 38 (1982). In general, Bernard argues that modern American marriage is more satisfactory for men than for women and that marriage should be analyzed in terms of two marriages, his and hers. For an example of a husband's narrative, see J. ERNSTEIN, *DIVORCED IN AMERICA* 11-12 (1975) (discussing "reverting to autobiography").

5. See Basch, *Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815-1870*, 8 *LAW & HISTORY REV.* 1 (1990); Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth Century America*, 8 *LAW & HISTORY REV.* 25 (1990); Rhode & Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* (S. Sugarman & H. Kay eds. 1991).

nist writer explained: "The solemn and profound question of marriage . . . is of more vital consequence to woman's welfare, reaches down to a deeper depth in woman's heart and more thoroughly constitutes the core of the woman's movement, than any such superficial and fragmentary question as woman suffrage."<sup>6</sup>

The second issue is that this article is not monographic but impressionistic. It is quite unlike, for example, Carroll Smith Rosenberg's study of nineteenth century marriage, based on the reading of thousands of letters and diaries.<sup>7</sup> Rather, this article uses narratives to support conventional historical interpretations and to suggest that other insights might be obtained by a more thorough use of narrative.

Finally, this is an article about the use of narrative texts. It is not itself a narrative text.

## II. VASHTI

*On the seventh day, when the king was merry with wine, he ordered Mehuman, Bizzetha, Harbona, Bigtha, Abagtha, Zethar, and Carcas, the seven eunuchs in attendance on King Ahasuerus, to bring Queen Vashti before the king wearing a royal diadem, to display her beauty to the peoples and the officials; for she was a beautiful woman. But Queen Vashti refused to come at the king's command conveyed by the eunuchs. The king was greatly incensed, and his fury burned within him.*

*Then the king consulted the sages learned in procedure. (For it was the royal practice [to turn] to all who were versed in law and precedent. His closest advisers were Carshena, She-thar, Admatha. Tarshish, Meres, Marsena, and Memucan, the seven ministers of Persia and Media who had access to the royal presence and occupied the first place in the kingdom.) "What, [he asked,] "shall be done, according to law, to Queen Vashti for failing to obey the command of King Ahasuerus conveyed by the eunuchs?"*

*Thereupon Memucan declared in the presence of the king and the ministers: "Queen Vashti has committed an offense not only against Your Majesty but also against all the officials*

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6. W. O'NEIL, EVERYONE WAS BRAVE 19-20 (1969) (quoting Bullard, *What Flag Shall We Fly?*, *Revolution*, Oct. 27, 1870, at 264).

7. Smith-Rosenberg, *The Female World of Love and Ritual: Relations Between Women in Nineteenth-Century America*, 1 *SIGNS* 1 (1975) (arguing that 19th century marriage allowed significant emotional attachments—to women—outside of marriage).

*and against all the peoples in all the provinces of King Ahasuerus. For the queen's behavior will make all wives despise their husbands, as they reflect that King Ahasuerus himself ordered Queen Vashti to be brought before him, but she would not come. This very day the ladies of Persia and Media, who have heard of the queen's behavior, will cite it to all Your Majesty's officials, and there will be no end of scorn and provocation!*

*"If it please Your Majesty, let a royal edict be issued by you, and let it be written into the laws of Persia and Media, so that it cannot be abrogated, that Vashti shall never enter the presence upon another who is more worthy than she. Then will the judgment executed by Your Majesty resound throughout your realm, vast though it is; and all wives will treat their husbands with respect, high and low alike."*

*The proposal was approved by the king and the ministers, and the king did as Memucan proposed. Dispatches were sent to all the provinces of the king, to every province in its own script and to every nation in its own language, that every man should wield authority in his home and speak the language of his own people.<sup>8</sup>*

The story of Vashti is told in the Book of Esther, which does not use God's name, and a book about which it might be said that no one, including Esther, is above criticism.<sup>9</sup> The Book of Esther and the celebration of Purim, concentrates on Esther, the girl who saves her people. Another reading of the Book of Esther might focus on Vashti.

What can be said about Vashti? To begin with, she does not tell her own story. The narrative is told by someone much more interested in the processes of men than of women. Vashti's story is not only told from the outside, but it is told from the outside without empathy. The narrator does not suggest that he knows Vashti's thoughts or motives in refusing to obey the king's command.

Thus, there have been many discussions of Vashti's motives, attempts by centuries of commentators to deal with the text's failure to give a reason for Vashti's conduct. One suggestion was

8. JEWISH PUBLICATIONS SOCIETY, *THE WRITINGS* 405-06 (1982) (new translation of the *Book of Esther*).

9. See L. PATON, *THE BOOK OF ESTHER* 96 (1908) ("There is no noble character in the book."). Fackenheim refers to a "curious Midrash" which says that the only festival to be celebrated in the world to come will be Purim, which has at its center the *Book of Esther*. E. FACKENHEIM, *WHAT IS JUDAISM?* 274 (1987).

that Vashti did not come because it was contrary to Persian custom for her to be present. However, "[i]t was not Persian custom to seclude the women as in the modern Orient. The Queen could be present at banquets. . . . [The suggestion] that Vashti refused to come because it was contrary to Persian custom is therefore untenable. . . ." <sup>10</sup> Another idea is that Vashti was commanded to appear naked, a version which assimilates this story to the account in Herodotus of Candaulus, King of Lydia. <sup>11</sup> The text, however, makes no reference to this. Moreover, if this were true it would give Vashti a good reason, or even an excuse, for not coming. Thus, the nakedness explanation had to also be rejected, at least within the rabbinic tradition. The rabbis "could not see why such a shameless creature as Vashti was painted by tradition should be unwilling to come even in this condition." <sup>12</sup> Other explanations were offered. Perhaps Vashti "had a disfigurement which she was unwilling to reveal." <sup>13</sup> Perhaps "she refused because she thought her feast as good as that of [Ahasuerus] and was unwilling to depreciate hers by gracing his." <sup>14</sup> Others thought "that the refusal was due to the fact that the men were drunk, and that Vashti feared to be insulted by them. However, the women were guarded by eunuchs when they attended banquets . . . ; and surely a Persian queen must have been accustomed to the spectacle of drunkenness." <sup>15</sup> Paton concludes that the author of Esther apparently regards the refusal as "merely a whim, for which he offers no explanation." <sup>16</sup> Feminist readings of Vashti have assumed that, whatever the reason for Vashti's refusal, it was heroic. As a result, Elizabeth Cady Stanton included Vashti among the positive female images in her discussion of the Bible. <sup>17</sup> She wrote: "The Bible cannot be

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10. L. PATON, *supra* note 9, at 150.

11. Bickerman, tracing the Candaulus theme, said that "[a]ccording to the rabbis, Vashti told the king '[I]f I come before the lords of the kingdom they will kill you and marry me.'" E. BICKERMAN, *FOUR STRANGE BOOKS OF THE BIBLE* 185 (1967).

12. L. PATON, *supra* note 9, at 150.

13. *Id.*

14. *Id.*

15. *Id.* (citation omitted).

16. *Id.* A later commentator offers as an explanation that only courtesans attended the banquets when the men were drinking. Therefore, "[b]y coming to the King's party, Vashti would lose face, she would degrade herself to the position of a concubine." E. BICKERMAN, *supra* note 11, at 186. It is an explanation based on feminist dignity, but it does not reinforce ideas of female solidarity.

17. E. STANTON, *THE ORIGINAL FEMINIST ATTACK ON THE BIBLE* (1874) [hereinafter *THE WOMAN'S BIBLE*]. See Jones, *Feminist Views of Exodus: Narrative of Liberation or*

accepted or rejected as a whole, its teachings are varied and its lessons differ widely from each other. In criticising [sic] the peccadilloes of Sarah, Rebecca and Rachel, we would not shadow the virtues of Deborah, Huldah and Vashti."<sup>18</sup> Stanton saw Vashti's refusal as having a reason. Vashti, who is said in the *Woman's Bible* to have refused to come with "dignity," is the model of the woman Stanton argued for all her life—the woman who refused to countenance the drunkenness of men.<sup>19</sup> Stanton interpolates this sentence in the Vashti story. Vashti said: "Go tell the king I will not come; dignity and modesty alike forbid."<sup>20</sup> Stanton then quotes Tennyson:

Oh, Vashti! noble Vashti!  
Summoned forth, she kept her state,  
And left the drunken king to brawl  
In Shushan underneath his palms.<sup>21</sup>

A second commentator in the *Woman's Bible* offers a different reason for Vashti's behavior. Here it is as if Vashti's refusal was noble in itself; Vashti was the "woman who dared" to disobey her husband.<sup>22</sup> In fact, she may have known his condition,

*Oppression?* (Book Review) 1986 UTAH L. REV. 297 (regarding Stanton and the Bible, especially *Exodus*). See also A. KRADITOR, IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 79 (1971).

18. ELIZABETH CADY STANTON, SUSAN B. ANTHONY, CORRESPONDENCE, WRITINGS, SPEECHES 233 (E. DuBois ed. 1981). [hereinafter CORRESPONDENCE, WRITINGS, SPEECHES].

19. In the Jewish tradition, drunkenness is associated with Purim in the sense that one is supposed to be intoxicated. See E. FACKENHEIM, *supra* note 9.

20. THE WOMAN'S BIBLE, *supra* note 17, at 85. See also Address by Anna Shaw to the Woman's National Council (Feb. 25, 1891) (reprinted in *Woman's J.*, Mar. 7, 1891, at 1-2, col. 3-4).

21. THE WOMAN'S BIBLE, *supra* note 17, at 86 (an almost accurate quotation from A. TENNYSON, *The Princess*, in POEMS OF TENNYSON 261 (1929) (probably largely remembered today through its parody, *Princess Ida*)).

22. THE WOMAN'S BIBLE, *supra* note 17. The stress on dignity and modesty can result in a reading in which Vashti's disobedience exemplifies the *true* duties of a Christian wife. See the discussion of Vashti in H. LOCKYER, THE WOMEN OF THE BIBLE 165-67 (1975). "A wife need not and may not obey her husband in what opposes God's laws and the laws of feminine honor and decency. All praise to the heroic Vashti for her decent disobedience." *Id.* at 166. For a similar position, see also A. KUYPER, WOMEN OF THE OLD TESTAMENT (H. Zylstra trans. 1961).

Note also the suggestion that Vashti's arrogance had something to do with her royal lineage, in that she is the grand-daughter of Nebuchadnezzar, "who scoffed at kings and unto whom princes were a derision." 4 L. GINZBERG, THE LEGENDS OF THE JEWS 375 (1947).

It is clear that the Vashti story is, as the Interpreter's Bible indicates, a requirement of the plot of the *Book of Esther*. The story of Esther requires that Vashti leave to make room for Esther, cousin and adopted daughter of Mordecai. Esther, concealing the fact that she is a Jew, is chosen by Ahasuerus as his Queen. Esther is later able to defeat the



but the real point seems to be that "she had a higher idea of womanly dignity than placing herself on exhibition as one of the king's possessions."<sup>23</sup>

In the tradition of the nineteenth century feminists, Vashti McCollum<sup>24</sup> wrote of her namesake: "[Vashti] was a spirited woman who refused to exhibit her beauty before the king's drinking companions on the seventh day of a party when 'royal wine in abundance' had made the king hilarious. It was a man's world in those days," writes McCollum, "and Vashti was banished for her successor, Esther. My mother was fond of saying that Vashti was the first exponent of woman's rights. Perhaps it was for that reason that I have always liked and been proud of my name."<sup>25</sup>

Ultimately, in Vashti's case, we know what she did, but we do not know why. It is clear that she paid a high price, but just how high a price is unclear. In one version of the story, Vashti is not only put aside and banished,<sup>26</sup> but in fact killed:

In consequence of all this, Daniel advised, not only that Vashti should be cast off, but that she should be made harmless forever by the hangman's hand. His advice was endorsed by his colleagues, and approved by the king. That the king might not delay the execution of the death sentence, and Daniel himself thus incur danger to his own life, he made Ahasuerus swear the most solemn oath known to the Persians, that it would be carried out forthwith."<sup>27</sup>

Mrs. Stanton wrote: "I have always regretted that the historian allowed Vashti to drop out of sight so suddenly. Perhaps she was doomed to some menial service, or to entire sequestration in her own apartments." The Woman's Bible also suggests that the king's judgment might have been "modified . . . when his wrath abated."<sup>28</sup>

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courtier Haman, who proposes to exterminate the Jews.

23. THE WOMAN'S BIBLE, *supra* note 17, at 86.

24. *Cf.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (mother of the plaintiff Terry McCollum in the 1948 case on released time).

25. V. McCOLLUM, ONE WOMAN'S FIGHT 11-12 (1951). She wrote that "in any case, I have always been eager to set people right when they assumed that I was named after the once-popular novel of purple passion, *Vashti*; or, 'Until Death Us Do Part.'" *Id.* at 12.

26. Mrs. Stanton referred to a divorce. THE WOMAN'S BIBLE, *supra* note 17, at 85. See also SMITH'S BIBLE DICTIONARY 25 (1979) (referring to Ahasuerus as having divorced Vashti).

27. 4 L. GINZBERG, *supra* note 22, at 378.

28. THE WOMAN'S BIBLE, *supra* note 17, at 87. The text records that the King later remembered Vashti, but not how or what he did. See M. STERNBERG, THE POETICS OF

What would Vashti have said if she had told her own story? We would assume that, as a human being, she would narrate her account to serve her own ends. She quite possibly would have identified herself as a victim. We would also assume—unless we thought her a straight-out liar—that her account would have some relation to the actual events, the raw facts of the world. But the relation of the account to the raw facts would be seen as an issue to be explored. Vashti's account would be subject to the observations made by sociologist Ernest Mowrer concerning the use of personal narratives. "Even a document such as [the Donaven diary] is incomplete in many respects," he wrote, "[The diary is] written too much in the spirit of the martyr who desires sympathy from the reader to contain always a candid account of the attitudes of the husband."<sup>29</sup> Mowrer also notes the more basic problem: "[W]here the chief interest is in the conflict between husband and wife, a more complete account is needed to bring into relief the attitudes of the husband. . . ."<sup>30</sup>

We would have to think about how we could ever know the objective reality against which to measure Vashti's version of the events.<sup>31</sup> We would not take the version of the king, the Jewish commentators, or the twentieth-century Christian scholar as that reality. We would not assume these accounts to be truer than Vashti's own. This is not bias against them or against Vashti. It is simply systematic skepticism. A certain consonance between Vashti's version and the king's or minister's version would have been needed for communication between them, and we might take as true points on which they agreed. But they might all be wrong, or the various accounts taken together might merely be parts of a whole.<sup>32</sup> If we are fortunate, the parts will fit; but we could still be mistaken as to the whole, not knowing

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BIBLICAL NARRATIVE (1987) (on gaps in biblical texts).

29. E. MOWRER, *FAMILY DISORGANIZATION: AN INTRODUCTION TO A SOCIOLOGICAL ANALYSIS* 260 (1972) (discussing the Diary of Miriam Donaven, *see infra*). In the case of Mrs. Chapman we have some indication of what the husband and the Shakers thought. *See Chapman, The Memorial of James Chapman*, in *THE OTHER SIDE OF THE QUESTION* 22 (1819); *The Remonstrance of the Shakers to the Legislature of the State of New York*, in *THE OTHER SIDE OF THE QUESTION* 30 (1819).

30. E. MOWRER, *supra* note 29, at 261.

31. "We live our lives by telling ourselves stories. There is *the* story, of course: the story of what happens, which in real life has no teller, at least none that we can hear." R. GOLDSTEIN, *THE LATE SUMMER PASSION OF A WOMAN OF MIND* 55 (1989).

32. The narrators would of course have quite different perspectives. For a consideration of the story with an emphasis on Ahasuerus, see M. SAMUEL, *CERTAIN PEOPLE OF THE BOOK* (1955).

just how many parts there are. The various parts might not fit. Or the principals might simply never have communicated at all. Vashti might say to the king "wanting me to show myself to the ministers, you never saw me." To which the king might respond—obliquely—"I married you."

As to Vashti's own story, we would consider whether it was told in the heat of the events, or recast later; rethought, reexamined, and finally recreated to fit her later sense of herself. "I thought I was happy with him," Vashti might have written, "but of course I see now that I was not, and so finally when he told me to come and show myself, that was the end of it." She, as she is in her later now, could not have been happy as that earlier self.<sup>33</sup> Her present narrative might tell of her [assumed suppressed] prior anger. The motivations of the later self explain the acts of the earlier self. We as readers may be more sympathetic with the new Vashti, and less willing to credit the values of the old Vashti. Alternatively, we may find the new Vashti brainwashed, a new convert, more royalist than the king, and the old Vashti authentic—true to her inner voices, her essential nature, or her social responsibilities.

Yet Vashti's narrative would be important. And it is important that we do not have it, since we can see in Vashti the issue

33. Feminist scholarship makes a major claim to build on reinterpretation of experience through a process called consciousness-raising. Katharine Bartlett writes that this "[c]onsciousness-raising is an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate their experiences." Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 863-64 (1990). Bartlett quotes Leslie Bender: "Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression." *Id.*

James Elkins suggests that, in the context of marriage counselling, the point is to move from stories involving self-deception or dishonesty to stories which are (more) truthful. "The truth of narrative is fundamental to the healing process." Elkins, *The Stories We Tell Ourselves in Law*, 40 J. LEGAL. EDUC. 47, 62 (1990). In some processes, however, the truth to be reached is given—e.g. patriarchy or women's subordination—and not yet-to-be-found. Further, the truth of how we feel or felt—which is often what our therapeutic narrative is about—is only part of the relevant truth. The surfacing of that truth is the beginning, and not the end, of an analytic or evaluative or transforming project.

On multiple selves, and particularly issues arising when early selves try to bind later selves—the Ulysses and the Siren problem, see J. ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1984); Scott, *Rational Decision Making About Marriage and Divorce*, 90 VA. L. REV. 9, 58-62 (1990) (in the context of divorce particularly).

of the silence of women.<sup>34</sup> It is the silence of the often-cited sister of Shakespeare<sup>35</sup> and the hardly remembered sister of Mozart.<sup>36</sup> Vashti's narrative would have been a text for us to work on, where now we have only the texts of others looking at her story.<sup>37</sup>

The problem arising out of the fact that the women's narrative is missing is just the beginning. We now have women's narratives that we read and interpret as we do all narratives—with particular questions and purposes. For some, the questions go to issues of self-expression or to a fuller sense of the facts. It is another version of thick description. We need all voices to get a fuller sense of what is real. Thus, Patricia Williams writes about her great-great grandmother to reach a hidden story "which had been overlooked and underseen."<sup>38</sup> Through such "overlooked stories," women may write to educate men.<sup>39</sup> For others, the emphasis is on narratives as a vehicle for self-expression, publicly or privately. We use narratives as readers, and perhaps as writers, to locate ourselves, to clarify our own story, to test alternative realities in our minds, without taking the risks of learning

34. It is worth noting that on one reading, it may be exactly the point that we do not have Vashti's narrative and that we do not understand Vashti's reasons for refusing to show herself. Vashti's silence and her refusal to explain may be more a key to Vashti than the fact of the refusal and certainly more than the contextual aspects of the king being merry. The point about the refusal may not be that it was based on a "whim," but that it was based on a secret. And the point of secrets is that they are not told. On this reading, Vashti stands as one of the great non-communicators, in the line of Cordelia and Bartleby, and we can never have Vashti's narrative.

35. Judith, the imagined sister of Shakespeare, as described by Virginia Woolf in *V. WOOLF, A ROOM OF ONE'S OWN* (1929).

36. Maria Anna, the sister of Mozart, though a prodigy as a child "never developed into anything more." 3 *GROVE'S DICTIONARY OF MUSIC AND MUSICIANS* 570 (1941). See also Nochlin, *Why There Are No Great Women Artists*, in *WOMEN, ART, AND POWER: AND OTHER ESSAYS* (1988) (on the issue of talent and training); Citron, *Fanny Mendelssohn Hensel: Musician in Her Brother's Shadow*, in *THE FEMALE AUTOGRAPH* 171, *supra* note 3 (on the sister of Mendelssohn).

37. The idea that narratives, even autobiographical narratives, are constructed is standard in certain fields. See *supra* note 3 and *infra* text accompanying notes 166-68. In other contexts, the idea seems to be that the narrative is to be taken as true.

In certain narrative approaches, the issue of literal truth does not arise. It does not matter if certain tribes exist. See Leff, *Law and*, 87 *YALE L.J.* 989 (1978); Ross, *TûTû*, 70 *HARV. L. REV.* 812 (1957).

38. Williams, *On Being an Object of Property*, 14 *SIGNS* 5 (1988).

39. As J. S. Mill suggested: "[T]he knowledge which men can acquire of women, even as they have been and are, without reference to what they might be, is wretchedly imperfect and superficial, and always will be so, until women themselves have told all that they have to tell." J. MILL, *THE SUBJECTION OF WOMEN* 26 (1988).

through actual experience.<sup>40</sup> "It is the precise role of narrative to offer us a way of experiencing those effects [consequent on behavior] without experimenting with our own lives as well."<sup>41</sup> But this emphasis seems to involve as much what we bring to narrative, as what we get from it.

What, after all, does Vashti's story teach us? That if we disobey authority we are put away? Divorced? Banished? Killed? That if we disobey authority future generations may look at things differently and think that we were heroic? That, for the sake of X, Y and Z, we might be justified in doing A or B?<sup>42</sup> That the law ought to be changed? And, if so, how? And to strengthen which position? These lessons are not intrinsic to Vashti's story. They are in us, reading it.

Before concluding part II, one final point may be addressed. The use of Vashti's story conceals a significant problem. We do not have to defend an interest in the *Book of Esther*. I take it that a text which has been read and written about for many centuries may safely be considered worthy of current attention.<sup>43</sup> We say of such texts that if it was worth their time it is probably worth ours. Such texts are of interest for themselves—ends not means. Modern texts—novels, poetry, legal scholarship—often require some additional justification. As to these narrative texts—which are not read primarily for information or argument—sometimes we say that they are art, and as good as anything ever done. But the narrative products of legal scholars do not usually suggest that they should be held to this standard. Our interest in them is not defended as primarily artistic. They are seen as neither data nor art, while being generally both, and they are seen as especially important in relation to law and legal institutions. Part III suggests one relationship that might be possible between law and narrative: a law/society relationship in

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40. A reviewer of the Braudy Diary, discussed *infra* text accompanying note 129, wrote, "she describes her experiences with a ruthless honesty which forces the reader to examine her own life." Musmann, Book Review, 100 LIBR. J. 1912 (1975).

41. Hauerwas & Burrell, *From System to Story: An Alternative Pattern for Rationality in Ethics*, in WHY NARRATIVE? READINGS IN NARRATIVE THEOLOGY 187 (S. Hauerwas & L. Jones, eds. 1989). "The verisimilitude of the story, along with its assessable literary structure, will allow us to ascertain whether we can trust it as a vehicle of insight or whether we are being misled." *Id.*

42. Have we enough information about Vashti to reconstruct such a calculation? Did she have children, for example? Or did she know what she was risking? Kuyper thought she did. A. KUYPER, *supra* note 22, at 172.

43. Problems of expanding the canon do not in theory require total rejection of the existing canon.

which narratives are used as evidence of societal standards which are also reflected in law.

### III. NARRATIVES AND THE HISTORY OF MARRIAGE AND DIVORCE

The consideration of Vashti in part II was intended to raise general issues about the reading of a divorce narrative, in the context of an ancient text. Part III moves to American divorce narratives and focuses on what narrative tells us about the actual reasons for the break-up of a marriage. These reasons relate to expectations of marriage, expectations also evidenced by the law of divorce.

The narratives are, of course, different not only in that they come from different historical periods, but in that they were produced for different purposes and against different legal backgrounds. The point here is to consider them as illustrations of one use of narrative; a use which stresses a consonance between the law of the state and the actual social sense of the marital institution. This social sense of marriage is not derived from the narratives used, but is taken from the work of historians. The narratives are used to support the historians' work, providing evidence of a social meaning as well as testimony about an inner meaning. The comment of Susan Braudy, that her experience is a common one, is, in short, assumed to be true. Other narratives that reflect values which are not parallel to those of the culture or the law, and that would represent minority or individual positions, could have been chosen.<sup>44</sup> That is, in a period which focused generally on low expectation marriages, stories might exist which described high expectation marriages, and in a period which viewed marriage in terms of personal satisfaction, narratives might exist which focused on duty and social meanings and/or which stressed that personal satisfaction was not an independently achievable goal but a by-product of other behavior.

Initially, part III provides an overview of the law of marriage and divorce together with the present understanding of substantive changes in those institutions. In effect, the narratives are used to illustrate conventional understandings. The narratives are selected and read to support the point—a point implied, at least in historical and social science approaches to

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44. Here one might wonder whether our sense of the central and marginal stories was correct.

the history of divorce—that state divorce law is built on a particular model of marriage.<sup>45</sup>

### A. *Marriage*

Marriage, even in monogamous societies, clearly is not one thing. It is therefore initially an error to conceive of the history of divorce as if it concerns changing ways of dissolving the same institution. As tempting as it is to assume a universal quality in human emotions and institutions, it is more useful to start with the critical sense that emotions and institutions are historically variable to a considerable degree. We are misled in this respect by the fact that we use the same words to describe certain institutions, e.g., “marriage.” As to ancient Greece, Finley tells us that “Odysseus was fond of Penelope, beyond a doubt, and he found her sexually desirable. She was part of what he meant by ‘home’.”<sup>46</sup> Monogamy was the rule, Finley writes, but this form of monogamy did not “impose monogamous sexuality on the male nor did it place the small family at the centre of a man’s emotional life.”<sup>47</sup> Indeed, Finley notes, “the language had no word for the small family, in the sense in which one might say, ‘I want to go back to live with my family.’”<sup>48</sup>

We have reached quite a different point. Historians and anthropologists<sup>49</sup> have attempted to convey both the range of marital institutions and, particularly important for present purposes, the growth of the affective aspects of the institution we presently call marriage.<sup>50</sup> It is now conventional to link the demands of that particular institution to free legal divorce and the increased social acceptance of divorce. The view that, in effect, divorce makes modern family life possible has many echoes.<sup>51</sup>

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45. Llewellyn had said as much. Llewellyn, *Behind the Law of Divorce I*, 32 COLUM. L. REV. 1281, at 1281 (1932).

46. M. FINLEY, *THE WORLD OF ODYSSEUS* 137 (1954).

47. *Id.*

48. *Id.*

49. See, e.g., R. BENEDICT, *PATTERNS OF CULTURE* 210 (1959) (describing an Eskimo marriage in which the murderer of a husband, under principles of restitution, takes the place of the husband).

50. L. STONE, *THE FAMILY, SEX, AND MARRIAGE* (1977).

51. See W. O’NEILL, *DIVORCE IN THE PROGRESSIVE ERA* (1967). Degler notes that O’Neill’s view relates to families. “Yet from what we know about divorces in the late 19th century, most of them dissolved marriages, not families. About 60% of all divorces between 1847 and 1906, for example, did not involve children.” C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 168 (1980) (emphasis in original & citation omitted).

The contrast here is between an earlier and a later view of marriage as it relates to obligation. Bishop's definition of marriage suggests the traditional nineteenth-century focus on duties and the community.<sup>52</sup> This definition may be expanded to include personal fulfillment as suggested in our time.<sup>53</sup> Historian Elaine May writes that in the earlier understanding:

[M]arriage was part of an effort to establish a tranquil domestic environment. Violations of familial ethics which culminated in divorce were an affront to the community as well as the aggrieved spouse. Husbands and wives neither expected nor hoped that their spouse would provide them with ultimate fulfillment in life, or that the home would be a self-contained private domain geared toward the personal happiness of individual family members.<sup>54</sup>

It was this limited-expectation form of marriage which changed over time:

By 1920, we find that the ideal of marriage had evolved somewhat ambiguously. Matrimony was intended to promote the happiness of the spouses. A certain amount of fun and amusement was expected as part of the bargain. At the same time, children were anticipated and the familial responsibilities of both husbands and wives remained virtually unchallenged.<sup>55</sup>

This meant that wives "wanted their mates to be good providers as well as funloving pals; men desired wives who were exciting as well as virtuous."<sup>56</sup> The idea was that "marriage would include fewer sacrifices and more satisfactions. When combined with persistent Victorian holdovers, new expectations could lead to new tensions."<sup>57</sup>

Sociologists provide additional descriptions of present expectations. They offer insight into the content of what is ordina-

52. "Marriage . . . is a civil status of one man and one woman united in law for life, for the discharge, to each other and the community, of the duties legally incumbent on those whose association is founded on the distinction of sex." 1 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 2 (1881).

53. *Marvin v. Marvin*, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976) ("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 life time.").

54. E. MAY, *GREAT EXPECTATIONS: MARRIAGE & DIVORCE IN POST-VICTORIAN AMERICA* 47 (1980).

55. *Id.* at 90.

56. *Id.*

57. *Id.*



rily called "companionate marriage"<sup>58</sup> which goes beyond the typical suggestion that it historically relates to some sort of idea of equality and companionship. Peter and Brigitte Berger write:

Bourgeois marriage is designed to provide a "haven" of stable identity and meaning in a social situation where these are very scarce commodities. Here there is the norm of mutual concern for all aspects of the individual's life. Further, it is here that two individuals are in a position to construct a "world of their own," again something that is not easy to do elsewhere amid the complexities of modern life.<sup>59</sup>

The Bergers quote an earlier version of this idea, stressing marriage as a source of meaning:

It is here that the individual will seek power, intelligibility, and, quite literally a name—the apparent power to fashion a world, however Lilliputian, that will reflect his own being. . . . [A] world in which, consequently, he is somebody. This idea has immense consequences. It is not an aspiration that one gives up easily. And thus those who have found it unrealizable in one marriage, in large numbers try again—and if necessary, again once more.<sup>60</sup>

Like others, the Bergers see the high divorce rate as the idealization of marriage:

In this sense, we would contend, the high divorce rates indicate the opposite of what conventional wisdom holds: People divorce in such numbers not because they are turned off by marriage but, rather, because their expectations of marriage are so high that they will not settle for unsatisfactory approximations. In other words, divorce is mainly a backhanded compliment to the ideal of modern marriage, as well as a testimony to its difficulties.<sup>61</sup>

The Bergers conclude that "[b]ourgeois marriage, among those who continue to live within its normative boundaries, continues to provide the stable identity and meaning it was originally designed to provide."<sup>62</sup>

Brigitte Bodenheimer, writing from the perspective of a

58. See B. LINDSAY & W. EVANS, *THE COMPANIONATE MARRIAGE* (1927).

59. B. BERGER & P. BERGER, *THE WAR OVER THE FAMILY: CAPTURING THE MIDDLE GROUND* 166-67 (1983).

60. *Id.*

61. *Id.*

62. *Id.* at 167. See also C. RIESSMAN, *DIVORCE TALK* 21-74 (1990).

family law teacher and scholar, offers this description of marriage:

The meaning of marriage has undergone profound changes within the last few generations, as has been pointed out by many writers. Husband and wife, often uprooted from their home communities, are facing each other in isolation as never before. The wife's subordination has ended. True, equal partnership is the goal, with a highly personal bond, a commitment in depth and complexity, between the spouses. This refined and lofty ideal imposes much higher demands and therefore carries in itself the seeds of more failures than the older, more down-to-earth idea of matrimony.<sup>63</sup>

The idea of the companionate marriage had to do with the idea that marriages (assumed now to be built on ideas of family planning) ought to be focused on companionship. As Nancy Cott formulates, family life was "a specialized site for emotional intimacy, personal and sexual expression and nurture among husband, wife and a small number of children."<sup>64</sup> The idea of companionate marriage modified a traditional position of feminism. Where feminism had once attacked bourgeois marriage, the "sexual pattern advanced in social science (and popular culture) of the 1920's confirmed bourgeois marriage as women's destination."<sup>65</sup> An emphasis on psychological needs and increased psychological sophistication meant that the demands for intimacy became greater and greater.<sup>66</sup> Marriage was the basis of the family and marriage created a new nomos. This nomos, at least in theory, made a claim of exclusiveness so total that all non-mari-

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63. Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 189-90 (1968) (citations omitted).

64. N. COTT, *THE GROUNDING OF MODERN FEMINISM* 156 (1987).

65. *Id.*

66. At least in some parts of the culture. Mirra Komarovsky referred to "the meagerness of verbal communication that characterizes [blue collar] marriages" and also "the absence of certain norms," particularly the confidante/best friend norm:

In interpreting specific cases, such norms were judged very weak or non-existent, not only because they were not voiced, but because emotionally significant experiences were regularly shared with others in preference to one's mate without any perceptible feeling that this reflected upon the quality of the marriage. Moreover, some persons acknowledged their ignorance of the thoughts and feelings of the mate without the apology or defensiveness usually accompanying violations of norms.

M. KOMAROVSKY, *BLUE COLLAR MARRIAGE* 125 (1967).

tal intimacy of any quality could be seen as in derogation of marriage.<sup>67</sup>

In effect, what we have seen is the triumph of the liberals in the nineteenth-century debate over marriage and divorce. "Nothing so divided liberals and conservatives as the relationship of happiness to [the divorce question]. . . ."<sup>68</sup> As the traditional functions of marriage and the family have been increasingly taken over by other institutions,<sup>69</sup> the emphasis on marriage and the family as vehicle for happiness has increased. O'Neill noted: "[C]onservatives invariably felt that happiness, if it came at all, was a bonus which no one had a right to expect. . . . Nothing was more revolutionary about the liberals' defense of divorce than their insistence that happiness was a necessary condition of marriage."<sup>70</sup>

Marriage is an issue for men and women, though there is a dimension to it which relates particularly to changes in the status of women. Companionate marriage, as it was understood until very recently, coexisted with extreme gender role division and a general context of male dominance.<sup>71</sup> Options became available in the twentieth century, however, which were largely unavailable earlier. In nineteenth-century America, marriage for women was effectively an economic necessity. On this issue, Susan B. Anthony saw the change in her lifetime: "Woman is no longer compelled to marry for support, but may herself make her own home and earn her own financial independence."<sup>72</sup> But, as Nancy Cott has noted, while there is less reason to marry for economic reasons, "the model of companionate marriage with its emphasis on female heterosexual desires made marriage a sexual necessity, for 'normal satisfaction.'"<sup>73</sup> The word "normal" here

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67. Berger & Kellner, *Marriage and the Construction of Reality*, 46 *DIAGENES* 1 (1964). Berger & Kellner discuss marriage as a reality-creating institution which tends to eliminate competitive orderings and accounts in part through the "dominance of the marital discourse." *Id.* at 12. See also C. RIESSMAN, *supra* note 62, at 51 (on the intimacy requirements of marriage).

68. W. O'NEILL, *supra* note 51, at 220.

69. But not, of course, entirely. See Teitelbaum, *Families in Context*, 22 *U.C. DAVIS L. REV.* 801 (1989).

70. *Id.*

71. For a recent examination of modern divorce stories, see C. RIESSMAN, *supra* note 62.

72. Anthony, *The Status of Woman, Past, Present, and Future*, 17 *ARENA BOSTON*, 902-04 (1897).

73. N. COTT, *supra* note 64, at 158. See also, Densmore, *On Celibacy*, 1 *J. FEMALE LIBERATION* 22 (1965) (noting the enormous emphasis being placed on sexuality as a

suggests an entire sanctioning system outside the legal system; one based on norms of health and well-being, and one which took as its basic position an opposition to difference.

The history of women following legal emancipation is in a way incomprehensible—why did so few women go to school, enter professions, or seek lives outside the home—without the understanding that conformity, or at least avoidance of excessive deviance, rather than conformity to any particular ideal, is the goal of most of the people most of the time.<sup>74</sup> The normal may itself create problems. Thus, the ideal of normal sexuality conceals a fair number of questions about the meaning of sexuality for women, and particularly the use of sexuality as a substitute, as Susan Sontag wrote, “for genuine freedom and for so many other pleasures (intimacy, intensity, feeling of belonging, blasphemy) which this society frustrates.”<sup>75</sup> But whatever the difficulties with the ideas of normal sex and normal marriage in American culture, these ideas were in fact the norm. Marriage was a significant way by which to express one’s integration into the larger social community, and make public the fact that one had met the demands of that community, enforced by the legal system, by the social system, and by the immediate demands of one’s own family.

### B. Divorce

The history of divorce involves various strands, of which two are commonly discussed. The first is the free divorce of the Roman Empire in which it was possible for men and women to marry and divorce many times. The second is the highly restrictive divorce of Christianity which conceived of marriage as not

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roadblock on the way to liberation) (quoted in J. BERNARD, *supra* note 4, at 222-23). The “supposed need” for sex had therefore to be “refuted, coped with, demythified, or the cause of female liberation is doomed.” *Id.* Usually “what passes for sexual need is actually desire to be stroked; desire for recognition or love; desire to conquer, humiliate, or wield power; or desire to communicate.” *Id.* See also O’Neill’s reference to the classic feminist demand “for more work and less sex.” W. O’NEILL, *supra* note 51, at 127. Ethel Persons has pointed out that it is far from clear what role genital sexuality has in the formation of female identity—perhaps much less than in the formation of male identity. Persons, *Sexuality as a Mainstay of Identity*, 5 SIGNS 605, 618-21 (1980).

74. Presumably the goal of men as well as women. Edward Sapir referred to the “useful tyranny of the normal.” SELECTED WRITINGS OF EDWARD SAPIR 514 (D. Mandelbaum ed. 1949).

75. Sontag, *The Third World of Women*, 1973 PARTISAN REV. 180, 189. Sontag omits from this list some other possibilities. See Densmore, *supra*, note 73.

only for life, but indeed beyond,<sup>76</sup> in that some theologians rejected the idea that one could remarry after the death of a spouse.

While the conflict between these approaches went on for some time, the Anglo-American tradition formally derives from the second. For example, there was no divorce except legislative divorce in England for some time,<sup>77</sup> and the American colonies began with a fairly restrictive approach to divorce derived from the Protestant adaptation of the Catholic position. By the early nineteenth century, legislative divorce in the United States began to yield to the institution of judicial divorce.

As Roscoe Pound indicates in his discussion of Justice According to Law,<sup>78</sup> legislative divorce is an aspect of legislative justice, and, along with other illustrations of this process, it "all but came to an end" in the nineteenth century. It should be noted, however, that while the constitutionality of legislative divorce was debated, a divorce granted by a territorial legislature was upheld by the Supreme Court as late as 1887.<sup>79</sup>

Divorce was granted only for specific reasons. Expansion of these grounds was one basis for the controversies over divorce in the nineteenth century. The development of divorce law became

76. R. PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* (1988).

77. See Mueller, *Inquiry into the State of a Divorceless Society*, 18 U. PITT. L. REV. 545 (1957). "The title of this paper is misleading, for England was not entirely divorceless during the period of inquiry. [Divorce by act of the legislature had become available for the cause of adultery.] After a parliamentary divorce the innocent party was at liberty to remarry. Very rarely a parliamentary divorce was granted for cruelty." *Id.*

78. 2 R. POUND, *JURISPRUDENCE* § 77, at 392 (1959).

79. *Maynard v. Hill*, 125 U.S. 190 (1888), often quoted for its general language on the importance of marriage. Legislative divorces ended in England in 1857, and "in the United States were precluded by constitutional provisions or became obsolete by the last quarter of the century." R. POUND, *supra* note 78.

Yet in 1914, Simeon Baldwin could still attack legislative divorce in strong terms: "The whole drift of modern institutions is away from unconfined legislative power. The grant of legislative divorce is one of the extremist forms which it can assume. It does not belong to the social life of the twentieth century." Baldwin, *Legislative Divorces and the Fourteenth Amendment*, 27 HARV. L. REV. 699, 704 (1914). Baldwin notes that before the fourteenth amendment, it was widely assumed that "state legislatures could grant divorces a *vinculo* when the constitution of their state did not forbid, at least for causes for which they could not be granted by the courts." *Id.* at 699. He explains that while British parliamentary divorces had been limited to adultery, "such a limitation was in its nature purely a matter of legislative discretion." *Id.* Baldwin notes that attempts to have the legislature grant legislative divorces in Connecticut were made as late as 1913. *Id.* at 703. He suggests that in earlier legislative divorces, while the causes of divorce were rarely stated in the final Act, the actual cause in a majority of the cases was probably insanity existing before the marriage. *Id.* at 701.

a notable illustration of the difference between the law on the books and the law in action. Roscoe Pound wrote:

What would the average community do to a [man] convicted judicially of extreme cruelty to a [woman]? Yet there are coming to be respected persons of high standing in all communities against whom there are such records. We know that in many parts of the country, at least extreme cruelty has become a convenient fiction to cover up that incompatibility of temper that may not unreasonably exist between a respected [man and his wife]. The . . . judge-made rule against collusion remains in the books. But husband and wife agree upon a settlement of property out of court, they agree that she shall aver and prove cruelty unopposed. . . . [In those communities], public thought and feeling have changed, and whatever the law in the books, the law in action is changing with them.<sup>80</sup>

This, then, is the late fault period, a period in which collusive divorce in the old categories becomes consensual divorce in the new ones. To the extent that modern no-fault divorce is read as having merely eliminated the fiction of the late fault divorce, it may also be read as doing little new. But it did more in fact than simply facilitate consensual divorces; it moved essentially to a system of unilateral divorce.<sup>81</sup>

Friedman and Percival have summarized the history of divorce:

In the first stage, divorce is *difficult* and *rare*. Only a few grounds are available. There is social pressure against divorce, and divorce bears a heavy stigma. Women are generally subservient to men. Middle-class women on the whole rarely take part in the work force. A divorced woman has an awkward role in society. Divorce is confined, as a practical matter, to a few people, mostly upper class. As far as we can tell, the grounds alleged in court are grounded in reality. That is, if adultery is the complaint, the defendant really was an adulterer or adulteress, and adultery was either the cause or at least the excuse for the plaintiff's case.<sup>82</sup>

They describe the increased expectations of marriage and the democratization of divorce.

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80. Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 21 (1910).

81. See Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79.

82. Friedman & Percival, *Who Sues For Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 76 (1976).

As William L. O'Neill has pointed out, people expected more out of marriage than in traditional eras; a wife was to be more than sex partner, servant, and nursemaid; a husband was to be more than a breadwinner and protector. Marriage was supposed to be a partnership of love. This was presumably a minority view, which slowly percolated downward and outward in society. As it spread, divorce was no longer restricted to the upper class. Divorce was democratized.<sup>83</sup>

Friedman and Percival also add a new dimension focusing on legitimization of status:

New demands on marriage increased the demand for easier divorce. But changing expectations cannot alone account for loose divorce laws. No doubt Italy too felt the pull of modern marriage, at least to a degree; but divorce remained stubbornly outlawed. What was strongly felt in the United States was a demand for *legitimization of status*. . . . In the first place, divorce was probably less stigmatic than sex outside of marriage. Men and women who had left their old partners wanted to form new families, have children, live normal economic and social lives. They saw no reason why the law should not let them do so, legitimately.<sup>84</sup>

### C. *Narratives and Divorce Law*

Our information about early American divorce is often based on divorce records themselves.<sup>85</sup> As Nancy Cott suggests, the "history of divorce practice documents sex-role expectations [and] permits comparison between the obligation and freedom of husbands and wives. . . ."<sup>86</sup> Lawrence Friedman tells us about southern legislatures which "granted divorces by passing private statutes, dissolving the marriages of specific persons. The statute books contain hundreds of these private divorces. They are usually short, stereotyped, and tell little or nothing about what led to the divorce."<sup>87</sup> He cites, as an example, an 1839 Virginia law<sup>88</sup> declaring that the marriage between Mary Cloud and William Cloud "is hereby dissolved, the said Mary

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83. *Id.* at 78.

84. *Id.*

85. See Cott, *Divorce and Changing Status of Women in 18th Century Massachusetts*, 33 *WM. & MARY QUARTERLY* 586 (1976).

86. *Id.*

87. Friedman, *Rights of Passage*, 63 *OR. L. REV.* 649, 652 (1984).

88. 1839 *Laws Va.*, ch. 262 (cited in *id.* at 652 n.10).

forever divorced from her husband . . . and the power and authority of the said William over the person and property of the said Mary, shall henceforth cease and determine."<sup>89</sup>

### 1. Nineteenth Century Divorce Narratives

a. *Legislative divorce in the early nineteenth century.* Notwithstanding the stereotypical nature of legislative divorces, perhaps we can use a narrative of the legislative divorce in a particularly extreme case to project an image of nineteenth-century marriage. The narrative relates to the controversy between a married woman and her husband, against the background of the early nineteenth-century Shaker communities.<sup>90</sup> The narrative illustrates the grounds thought appropriate for a legislative divorce and permits the inference that the law believes marriage could be dissolved only for factually grave cause. The grounds presented to the system in the petition for divorce are in fact the reasons as presented in the narratives.<sup>91</sup>

The author of the narrative is Eunice Chapman, the daughter of a man from Bridgeport, Connecticut. Eunice Chapman married James Chapman, a merchant from New Durham, New York and they had three children. She wrote in her statement of the case that

*[f]rom the year 1804 until about the year 1809, I lived with him in the most cordial harmony, stupid and insensible to his faults—vigilant to make his life comfortable and happy, when he, about this time, had several interviews with the Shaking Quakers, after which he gave himself up to a continual intoxication and vice. When in his sober hours, I, with eyes dissolved in tears, entreated of him for the sake of the dear*

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89. Friedman, *supra* note 87.

90. See N. BLAKE, *ROAD TO RENO* (1962) (discussing the Chapman case); Blake, *Eunice Against the Shakers*, 61 N. Y. HIST. 359 (1960).

91. These are of course narratives for public consumption, raising even more clearly than private diaries the issue of construction of a story for a particular purpose. If we want to say that the story is in fact a lie, we must consider the possibilities that the lie is thought to be functional, perhaps because it will be believed, or perhaps because it will be disbelieved (X transparently lies to protect Y; so that everyone will believe that Y really is so awful that his character needs protection while X is established as good).

Regarding the divorce novel as narrative see J. BARNETT, *DIVORCE AND THE AMERICAN DIVORCE NOVEL, 1858-1937* (1968) (note the limits of this work, which considers only novels in which a divorce takes place, not those in which divorce is argued against, e.g., A. EVANS, *VASHTI; OR, "UNTIL DEATH US DO PART"* (1869)). For those novels in which the possibility of free divorce is the background of the narrative, see, e.g., E. WHARTON, *THE GLIMPSES OF THE MOON* (1922) (assuming the free-divorce contract can be acted upon).



*pledges of our mutual love, to refrain from dissipation, lest it would result in the misery of his family. With a conscience awakened to horror and despair, he would hurry to the haunts of vice to get a draught to drown his senses and to stifle his conscience. He would frequently return home at a late hour of the night with such a very menacing countenance and conduct, that I often felt in imminent danger of my life.*<sup>92</sup>

In 1811, Chapman left his wife, leaving her with no furniture (according to her account) except her bed, and generally failing to provide for her maintenance.<sup>93</sup> James Chapman joined the Shakers in 1812.<sup>94</sup> Passing over the events of the intervening period, we are told that Chapman finally indicated to his wife that the Shakers had a house for her and the children. In 1814, she went to the Shaker village to see the house but found none. When she returned home, her children were gone.<sup>95</sup>

The rest of the story is an account of Mrs. Chapman's efforts to persuade the New York legislature to give her a divorce. Her grievances ranged from desertion, neglect, non-support, and drunkenness, to cruelty and adultery. In 1818, the legislature gave Eunice Chapman a divorce,<sup>96</sup> and, in 1819, she received a court order giving her custody of the children.

92. Chapman, *An Account of the Conduct of the Shakers, in the Case of Eunice Chapman & Her Children*, in *THE OTHER SIDE OF THE QUESTION* (1818).

93. See BLAKE, *supra* note 90, at 360 (citing Eunice Chapman).

94. His own version stresses that "in order to find my union with these people, I must first fulfil every lawful contract that I had ever made . . . and especially the marriage contract." Chapman, *supra*, note 29, at 25. He then said he considered it right that he should "make one more effort to live with her in peace, and to give her a fair offer of removing with myself and children, to live near these people . . ." *Id.*

95. Blake, *supra* note 90. See also M. DYER, *THE RISE AND PROGRESS OF THE SERPENT FROM THE GARDEN OF EDEN TO THE PRESENT DAY* 119-25 (1847) (extracts from Mrs. Chapman's narrative).

96. The legislature's version of the story stresses the aspects of desertion and non-support:

AN ACT FOR THE RELIEF OF EUNICE CHAPMAN, AND FOR OTHER PURPOSES, PASSED ON MARCH 14, 1818

*Whereas Eunice Chapman, in the year one thousand eight hundred and four, was lawfully married to James Chapman, by whom she had three children, and with whom she lived until the year one thousand eight hundred and eleven, when the said James Chapman abandoned his said wife, without leaving her any means of support, and soon after joined the society of Shakers in Niskeyuna, in the county of Albany: And whereas, the said James Chapman, since joining the society of Shakers, has taken from his wife her children, and now keeps them concealed from her, and insists that the marriage contract between him and his said wife is annulled, and that he is not bound to support her, and has publicly forbid all persons from harboring her, and declared that he would not be responsible for her debts: Therefore,*

The tone of Mrs. Chapman's narrative<sup>97</sup> is clear from the following extract, focused not on the divorce itself, but on the problem of retrieving the children from the Shaker community after the divorce. She is a heroine more than a victim.

*After the [divorce] bill had become a law, and I could protect and defend myself, I resolved to go in pursuit of my children. In a remarkable manner I was informed where they were carried when taken from Niskeyuna. I first sent my books to Enfield, and then dismissed my school. On the 9th of May, 1819, I entered the stage, in a dismal thunder storm, under a fictitious name, to avoid being traced by the Shakers. After a perilous journey, caused by the state of the roads at that season, I arrived at Brattleboro, 76 miles from Albany, at 2 o'clock in the morning, having been 24 hours in coming that distance. On the 10th, there fell torrents of rain, and with a crowded stage, which coming near upsetting, I fainted through fear. At evening, I arrived in Hanover. On the 13th, I took the stage to Enfield, and stepped at the stage house, two miles beyond the Shaker Village.*

*I complained of being unwell, and much fatigued, and unable to travel; thus made an excuse to stop a few days to rest. I soon found I had landed in one of the best of families, who, suspecting my business, privately sent for Mary Dyer,<sup>98</sup> who hastened to my apartment, and introduced herself by exclaiming, "Mrs. Chapman, can this be you?" We met like two unfortunate sisters.<sup>99</sup>*

Mrs. Chapman's narrative suggests that an individual's complaint,<sup>100</sup> if given sufficient time, could result in the solution of the particular problem. Blake writes that the New York legislature devoted more of its time and energy to a single private divorce bill than it ever did to any general marriage law proposal

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*Be it enacted by the People of the State of New York, represented in Senate and Assembly, That the marriage contract between the said Eunice Chapman and her said husband, James Chapman, be, and the same is hereby declared to be dissolved, and the said Eunice Chapman entirely freed from the same: Provided, That the dissolution of such marriage shall, in no wise, effect the legitimacy of the children thereof . . . .*

M. DYER, *supra* note 95, at 118-19.

97. Blake notes the heavy gothic atmosphere. Blake, *supra* note 90, at 374. In 1818 Eunice Chapman described herself as a widow, a woman bereaved of her husband and children while still living. *Id.*

98. On Mary Dyer's difficulties with the Shakers, see M. DYER, *supra* note 95, at 223-25.

99. *Id.* at 119-20.

100. The Dyer/Chapman narratives are in the form of complaint.

referring to the period 1815-1818, when the legislative divorce in the Chapman case was finally granted.<sup>101</sup> The particular solution also could enter the statutes as a formal grounds for divorce.<sup>102</sup> The entire story suggests that an element considered to justify the dissolution was the intensity of the difficulty with the marriage. Divorce with full rights to remarry for both parties was not the only legal solution in such cases. Both the legislatures and the individuals involved might well have considered separation as an alternative. A narrative quoted by Nancy Cott sounds the theme of separation: "I persuaded myself, that if he would do what was right, relative to our property, and would go to some distant place, where we should be afflicted with him no more, it might be sufficient."<sup>103</sup> Separation was seen as an appropriate remedy in a case involving incest and adultery. The standards involved—that the presence of the husband afflicted the wife and children—can be read as the general standard for divorce in low expectation marriages.

*b. A narrative of late nineteenth century feminism.* Elizabeth Cady Stanton's interest in the problem of divorce is well known. She addressed the question for many years, and her last published article before her death dealt with the issue. We can begin the discussion with a story told by Mrs. Stanton concerning a victim of an unhappy marriage:

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101. N. BLAKE, *supra* note 90, at 68-69. At one stage in the proceeding, New York's Council of revision rejected the divorce finding that separation would provide an adequate remedy and that the anti-Shaker provisions of the bill were objectionable. *Id.*

102. See discussion of divorce legislation in several states in C. WEISBROD, *THE BOUNDARIES OF UTOPIA* 46 (1980).

103. Bailey Memoirs cited by Cott, *supra* note 85. Cott reports that Mrs. Bailey did ultimately obtain a divorce. Separation was once one of the legal solutions available. See also Hartog, Abigail Bailey's Coverture: Law in a Married Woman's Consciousness (unpublished paper 1990). Elizabeth Scott raises the possibility again, in instances in which the parents remain married but live apart. Scott, *supra* note 33, at n.206. The consequences of separation in the 19th century were seen, by Annie Besant at least, to be quite destructive:

A technical tie is kept up, which retains on the wife the mass of disabilities which flow from marriage, while depriving her of all the privileges, and which widows both man and women, exiling them from home life and debarring them from love. . . . [T]he semi-divorced wife . . . is compelled to live on, without the freedom of the spinster or the widow, or the social consideration of the married woman.

A. BESANT, *MARRIAGE AS IT WAS, AS IT IS, AND AS IT SHOULD BE* 40 (1879). A fictional Vashti chose separation. A. EVANS, *supra* note 91. See also M. KELLEY, *PRIVATE WOMAN, PUBLIC STAGE* 237 (1984) (quoting novel as calling divorce "sacrilegious trifling.") For Mrs. Stanton on separation, see Address by Elizabeth Stanton to the Judiciary Committee of the New York Senate (Feb. 8, 1861) (on the New York Divorce Bill).

*Traveling, not long since, I noticed in the seat near me a sweet, girlish looking woman, dressed in deep black. She looked so sad and lonely that I went to her and proposed a walk on the platform while the cars were stopping. We were soon friends, and she gave me her sorrowful experiences. Married at sixteen to a young man of wealth, education and good family, but of intemperate habits, which she thought his affection for her would enable her to control; the mother of three sons before she was twenty, all sickly, nervous, restless; her own health broken down with anxiety, and watching not only the children, night after night, but the father; friends, thinking it best to get him out of New York from the many temptations of a city, with active business in the country, sent him to the oil regions in Pennsylvania, and there this delicate, pure, refined young child spent six years of her life trying to win a besotted man to the paths of virtue and peace. Night after night, when the babies were asleep, she would go alone through sleet, and rain, and snow, all round one of those rough pioneer settlements, into every den of vice, looking for the father of her children [sic] that she might get him home. "One thing," said she, "he would always do—lay down his cards and glass and follow me, but on our way home he would say: 'Mary, such places are not fit for you.' 'Then,' I replied, 'a man who frequents such places is not a fit companion for me.' But these," said she "were six long years of useless struggle. He became cross and irritable, loathsome, bloated, disgusting, turned my love to hate, and after a fearful attack of delirium tremens, the grave covered my shame and misfortunes, and my three children lie by his side. And when, with aching heart, I buried them all there, you may wonder to hear me say so, but it was with a sorrowful thankfulness, for I remembered that warning in the second commandment, given mid the thunders of Sinai: 'The sins of the fathers shall be visited upon the children.' Now, said I, I shall be saved the unspeakable sorrow of ever seeing my own sons come reeling home to me with that silly, sensual leer that is worse than abuse and profanity." What a chapter of experience for a girl not twenty-five! And multitudes are following in her wake!!<sup>104</sup>*

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104. A HISTORY OF THE NATIONAL WOMAN'S RIGHTS MOVEMENT 63-64 (P. Davis ed. 1871). Mrs. Stanton sometimes invoked a highly romantic view of marriage; at other times, her view seems more functional. See *infra*. See also the discussion of the drunkard and marriage in 1 HISTORY OF WOMAN SUFFRAGE 482 (E. Stanton, S. Anthony, & M. Gage eds. 1887).

On Mrs. Stanton and marriage and divorce, see particularly Clark, *Self-ownership and the Political Theory of Elizabeth Cady Stanton*, 21 CONN. L. REV. 905 (1989); Clark,

Stanton concluded that liberal divorce laws were necessary to save women from the slavery of marriage. The precise shape of the divorce laws proposed by Stanton varied, sometimes focusing on expansion of the fault grounds, and sometimes focusing on free divorce parallel to free marriage. In 1884, she argued (perhaps strategically) that we were still in an "experimental stage" with reference to divorce, and that it was too soon to formulate a national law.<sup>105</sup> But the victim of an unhappy marriage was equally a victim of a system in which women were not educated for their self-support.<sup>106</sup> Better divorce laws—though a significant focus of Stanton's activities—were logically only one part of the solution.

Stanton's narrative is in the tradition of horror stories

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*supra* note 5. Mrs. Stanton may have seen romantic love in marriage as a solution. She also, however, invoked an image of intellectual women, from the remote past. Here is her description of the hetairae:

Among the Greeks there was a class of women that possessed absolute freedom, surrounded by the wisest men of their day. They devoted themselves to study and thought, which enabled them to add to their other charms an intense intellectual fascination, and to make themselves the center of a literary society of matchless splendor. . . . In the society of this remarkable type of Grecian womanhood the most brilliant artists, poets, historians, and philosophers found their highest inspiration.

Stanton, *Has Christianity Benefited Woman?*, 140 N. AM. REV. 389, 393-94 (1885). Mrs. Stanton knew that "the position of these women was questionable" but was still able to raise the question: "Does the same class in Christian civilization enjoy as high culture and equal governmental protection?" *Id.* On the hetairae see W. SANGER, *HISTORY OF PROSTITUTION* 53-63 (1921); E. CANTERELLA, *PANDORA'S DAUGHTERS* 49-50 (1987). Demosthenes said that Athenian men had three women, the wife for legitimate children; concubines for care of the body and the hetaera for pleasure. *Id.* at 48. If we say that all three are now in one, "the wife," we might also say that it is possible to classify marriages in terms of whether, and when, the mother or the servant/concubine or consort/companion role, dominates the constellation of female roles in the marriage.

105. Stanton, *Are Homogenous Divorce Laws in all The States Desirable*, 138 N. AM. REV. 405 (1884). See also *Divorce vs Domestic Warfare*, 1 ARENA 560 (1890) (advancing individual sovereignty in divorce as in marriage). This is of course a familiar argument for federalism generally. Mrs. Stanton was responding to proposals which would have restricted divorce on the national level.

106. This theme continues to be a major one in feminist writing:

Unless they work, and their work is usually as valuable as their husbands', married women have not even the chance of gaining real power over their own lives which means the power to change their lives. The arts of psychological coercion and reconciliation for which women are notorious—flattery, charm, wheedling, glamor, tears—are a servile substitute for real influence and real autonomy.

Sontag, *supra* note 75, at 187. She later notes that "[f]or a woman to leave home to go out into 'the world' and work rarely carries a full commitment to 'the world,' that is, achievement . . . ." *Id.* at 192.

designed to move political audiences.<sup>107</sup> Apparently it did.<sup>108</sup> But the moral of the story, and its normative message, is not necessarily free divorce. Rather, at the time, the point might have been that women should not have to stay married to drunkards.<sup>109</sup> An expansion of the fault grounds provides an adequate remedy. The theory is that, in effect, divorce is permissible, even important, for particular reasons.<sup>110</sup>

What is the relationship between these ideas and Stanton's own marriage? The Stantons, we are told, had an unusual marriage. Griffiths says that Henry Stanton was absent as much as ten months a year for twenty years, and that when he died in 1887 the couple "were apparently at odds and had not lived in the same place for twenty years."<sup>111</sup> We also know that she was never divorced and apparently never tried to be.

Griffiths tells us that "she built her argument against 'man-made marriage' between 1840 and 1863, the first half of her own forty-seven year marriage, and used as evidence 'from my own life, observation, thought, feeling and reason.'"<sup>112</sup>

Perhaps Stanton's own description of her marriage can help us get the life and the ideas into relation.<sup>113</sup> Thus, Stanton writes that her own wedding day was delayed:

107. For a contemporary use of horror stories, see Fineman, *Implementary Equality: Ideology, Contradiction and Social Change; A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WISC. L. REV. 789.

108. E. DuBois, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869*, at 148 (1978) (woman who divorced after hearing Mrs. Stanton speak on divorce).

109. Historians can respond to this issue in a particular individual's case. On Stanton, see Clark, *supra* note 5. The narrative itself supports both broad and narrow normative implications. Clark notes that Stanton and Anthony had both urged that "wives of chronic inebrieties had a 'duty to seek a separation, to sever conjugal relationship, so as not to be the agent of breeding a drunkard's child.'" *Id.* at 26. Clark also notes that in general, early feminists invoked ideas of duty rather than right in dealing with the divorce issue. *Id.* at 28.

110. Other Stanton ideas go further, focusing on free divorce and self sovereignty.

111. Griffith, *Elizabeth Cady Stanton on Marriage and Divorce: Feminist Theory and Domestic Experience*, in *WOMAN'S BEING WOMAN'S PLACE: FEMALE IDENTITY AND VOCATION IN AMERICAN HISTORY* 236 (M. Kelley ed. 1979).

112. *Id.* at 233.

113. See Minow, *Rights of One's Own* (Book Review), 98 HARV. L. REV. 1084, 1088 n.15 (1985) (reviewing E. GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* (1984)).

Griffith offers no comment on whether Stanton's passion for divorce reform reflected in any way her own marital experience. Such a connection is not implausible, given the course of Stanton's marriage: she and her husband had frequent personal and political disagreements, and maintained separate residences for many years. Her husband slipped from prominence in the abolition

This delay compelled us to be married on Friday, which is commonly supposed to be a most unlucky day. But as we lived together, without more than the usual matrimonial friction, for nearly a half a century, had seven children, all but one of whom are still living, and have been well sheltered, clothed, and fed, enjoying sound minds in sound bodies, no one need be afraid of going through the marriage ceremony on Friday for fear of bad luck.<sup>114</sup>

Among the possible reasons for her failure to divorce are loyalty to her spouse (as father of her children), fear of injury to herself or her children if she did divorce, and no need to divorce, nor desire to re-marry. Apparently, economic reasons were not a consideration.<sup>115</sup> But it is also worth noting that our interest in the relationship between Elizabeth and Henry Stanton and their unusual marriage relates as much to our expectations of marriage as to hers. We identify the unexcused absence of her husband as an indicator of a violation of marital norms, but this may have been much less true of a society which considered separation more appropriate than divorce. We appreciate Stanton's comments which indicate a commitment to romantic love and a highly idealized version of a marital relationship.<sup>116</sup> But her well known essay, the *Solitude of Self*, indicates that she may well have viewed marriage as an institution whose importance was focused on children, and whose meaning for adults might be various, but which was not finally a solution to the issue of the human condition in its largest sense.

The early narratives may be read as consistent with the

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movement after he became the subject of a minor scandal concerning bonds illegally taken from the customs house he directed. Stanton appeared to want independence from him as well as a separate identity for herself, although she never sought a divorce.

*Id.* (citations omitted).

114. E. STANTON, *EIGHTY YEARS AND MORE* 71-72 (1971).

115. That is, she was economically independent in that she neither needed his money nor feared his misuse of her money.

116. The aspirational aspects of marriage may be evidenced by the language of William O. Douglas (married four times) in *Griswold*:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in, living not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

view that the purpose of marriage was delineated by various functions and roles, and that divorce was a solution when difficulties were so acute that the performance of those functions, or the living in those roles, was impossible. Thus, the language is intense and extreme; one talks of cruelty and misery. Situations are intolerable. But we see also in the late nineteenth century, the proposition that marriage had something first to do with happiness, and second with romantic love, not only in its creation, but as a condition for its continued existence. This proposition underlies our current ideas of marriage.

## 2. *Twentieth-century divorce narratives*

In 1956, William Goode noted that "[a]ll societies recognize that there are occasional violent, emotional attachments between persons of opposite sex, but our present American culture is practically the only one which has attempted to capitalize these, and make them the basis for marriage . . . ." <sup>117</sup> More recently, in a discussion of the models of family life, Herbert Jacobs noted that not only has the companionate marriage become dominant, but that "[t]he romantic ideal not only rules courtship but it also governs the criteria for continuing marriages." <sup>118</sup>

The work on divorce published in the twentieth century emphasized the point that there is a distinction between the legal grounds for divorce and the true reasons for the break-up of a marriage. For example, in 1924 Mowrer wrote:

The purpose of this article is to show that the law does not recognize as causes for divorce the natural causes of family disintegration. Thus our divorce laws become molds into which the discord arising in family relations must be made to fit before the state will sanction a discontinuance of that relationship. <sup>119</sup>

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117. Goode, *The Theoretical Importance of Love*, 24 AM. SOC. REV. 38, 40-41 (1956). That love has largely to do with the lover rather than the love-object, see W. LIPPMANN, A PREFACE TO MORALS 310 (1931) (quoting Santayana). That love has altogether to do with the lover, see 1 W. GOETHE, WILHELM MEISTER 202 (T. Carlyle trans. 1930) ("if I have a touch of kindness for thee, what has thou to do with it?").

118. H. JACOBS, THE SILENT REVOLUTION 25 (1988).

119. Mowrer, *The Variance Between Legal and Natural Causes for Divorce*, 2 J. SOC. FORCES 388, 389 (1924). See also Ross, *The Significance of Increasing Divorce, in WOMEN AND CHILDREN FIRST* (D. Rothman & S. Rothman eds.) ("In nineteen cases out of twenty the marriage purports to be shattered by some flagrant wrong . . . . [Often] the 'cause' that figures in the record is a screen for some deep-seated irritant.").



The legal grounds were typically a camouflage, or a fiction because the true grounds must, of necessity, be specific to a relationship. The actual grounds might be the legal grounds, but it was not at all necessary that this should be true.<sup>120</sup> Finally, in the no-fault divorce system, the fiction was eliminated, so we are allowed to keep to ourselves the true reasons without the need for a mask of legal grounds. The true reasons, as some works suggest, may be violations of the norms of companionate marriage: intimacy, companionship, and sexual fulfillment.<sup>121</sup>

The narratives of the period of expanded expectations of marriage see fault not in the specific evils identified by the fault grounds, but in the failure of the love relationship. The diary of Miriam Donaven,<sup>122</sup> apparently a product of the 1920's, is a story of romantic love, but without the complexities introduced by modern feminism, that is, women in the market competing with their spouses. Miriam Donaven is prepared to base her life in the love of her husband but cannot. A later narrative, Susan Braudy's *Between Marriage and Divorce*, concerns, in part, a development of this theme under the impact of a demand for a separate identity.

a. *The diary of Miriam Donaven: an early twentieth-century companionate marriage.* Eight years after her marriage, Miriam Donaven, then divorced, killed her lover and herself. Her diary was found in her apartment, the scene of the murder/suicide. Mowrer writes: "The diary opens during the seventh week of married life, December 1, 19—. Miriam Donaven is already beginning to find disillusionment in marriage."<sup>123</sup>

*December 1.—The past month has been one of happiness to us both, and I would not write of what I did. Just a month ago today I have been living in this dear flat. . . . Every night for over a week he [Alfred] has come home dead tired, crawled right into bed and after kissing me dutifully, goes to sleep with my head on his arm. One night there was no arm for my*

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120. The statutory enumeration of legal grounds may, of course, increase the possibility that these factors will become actual grounds, as the law communicates that these things justify divorce. It also communicates that these things may be forgiven (condonation) or ignored (no rule forces a divorce for grounds).

121. C. RIESSMAN, *supra* note 62.

122. E. MOWRER, *supra* note 29, at 230. Mowrer notes that "the cycle of events in the diary of Miriam Donaven is a group phenomenon rather than an individual experience." *Id.* A reviewer noted that the lay reader would find the diary a "bit of life hot with living." Zorbaugh, Book Review, 50 *NEW REPUBLIC* 280, 281 (1927).

123. E. MOWRER, *supra* note 29, at 231.

*head to rest on, and not even a good-night kiss, so I turned over and cried myself to sleep. [Oh, I wish my husband knew how much I want to be loved.] I tell him, but he does not realize what I mean all the time, every minute he is with me. . . .*<sup>124</sup>

Oh God, how will our life end? What are we coming to? Last night Alfred was kind to me when I cried. I could not hold in any longer and he quieted me and put my head on his bare breast and kissed me. Oh, how thankful I was for that attention and of how I needed it and do now. He told me he wants a pal, his little girl, and wife back again and misses her oh so bad. Oh, God, when has that part of me gone? Is the fault mine, his or ours? He says I have changed the last three weeks in what way I can't understand because I feel right toward my boy. Last week one night when he came home I cried and told him I had been lonely all day and the Saturday before Easter Sunday we kneeled and prayed to God to make us happy and Easter he said would be Little Girl's day and every Sunday thereafter. All that was less than three weeks ago, was his ideal gone then? Well, while I was crying my heart out to God I asked Alfred what he wished to do, if we could go on and he suggested separation. All of a sudden I seemed to really know what that would mean for me and I thought I would go mad. I certainly am an unhappy woman with him now sometimes, how should I feel without him?<sup>125</sup>

Mower analyzed the Donaven narrative in terms of the expectations of marriage:

Dominating the life of Miriam Donaven was the wish for response. A husband to her was a man who loved one, caressed one, and was attentive at all times. As a value he was the product of romanticism. One went to him for response. But to Alfred a wife was one who gave herself to him sexually, and who played the conventional role—cooked, kept house, mended his clothes, etc. This conflict in attitudes seems to have been the basis of the discord throughout their married life.<sup>126</sup>

Mowrer considers the issue of work in the following terms:

One writer, in commenting on the diary, has made a great deal of the fact that Miriam had no vocational qualifications. Her career in life was dependent upon her sex appeal—a dependence which became more marked, of course, after her separa-

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124. *Id.*

125. *Id.* at 234.

126. *Id.* at 257.

tion than during her life with Alfred. She did not like housework. She could not see how Alfred could respect her when she had to clean the bathtub after him with her own hands. She seems to have known little about cooking when they were first married. Miriam tried several kinds of work; folding circulars, working in department stores, china-painting, posing for a corset company, etc. In none of these occupations was she particularly adept, nor did she like any of them very well. She spent considerable time drawing, but that did not give her response. She was ambitious to become a motion-picture actress. But she never really developed a vocation. As a result, much of her effort was expended in restless attempts to realize her romantic ideal, to be loved all the time, fiercely, passionately.<sup>127</sup>

The reasons for divorce, as Mowrer analyzes them, are different from the legal grounds. Mowrer writes that finally "Alfred agrees to give her cause of divorce."<sup>128</sup> Later Miriam and her husband separate and are finally divorced. The pattern is being repeated with another man. Finally Miriam Donaven kills herself and her lover.

*b. A contemporary divorce narrative.* The divorce narrative of the late twentieth century is in part about the failure of romantic love, but seems to be more about the collapse of marriages under the strain of multiple demands.<sup>129</sup> Susan Braudy's life involved a marriage to a professor and an attempt to make a professional life of her own. The marriage lasted six years.

MAY 5—*This afternoon I exploded. I enjoyed the eruption after being careful not to reveal my tensions to Paul recently.*

*"I am not going to any more of those boring parties," I shouted. "How dare you accept another invitation for me when you know I don't like them? I find those people a total waste of time."*

*My voice sounded harsh and self-pitying. "I don't have any compulsion to go there. The only reason for these parties is that someone is enjoying the public face of a private flirtation. You can go there and flirt with Emily if you want, but why drag me to watch?" There it was, out, the ugly, self-terrorizing fantasy made into sounds, words. Part of me truly believed that if I never said the words, the ideas would disap-*

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127. *Id.* at 259.

128. *Id.* at 250.

129. Alix Nelson read the diary as centrally about sexual boredom and infidelity. Nelson, *Between Marriage and Divorce*, (Book Review) THE NEW YORK TIMES BOOK REVIEW, Nov. 9, 1975, at 24.

pear just as my childhood fear of the dark, then of school, then of millions of other pieces of my life had disappeared after the initial panic.

And in recent years, it had been Paul who had assumed the responsibility for brushing away these terrors, correcting my perceptions of reality. "Go back there and ask him how he put together the skit, don't let some public relations man scare you away," he ordered me out of the house when I was reporting for an article on an educational television show and was banned from the studio. . . . He'd sit down fearlessly at my typewriter and type out a paragraph. "No, no," I'd explain, and galvanized by his energy, but sure his beginning wasn't right, I'd sit down to write. And emotionally, Paul had been the interpreter too. "Just because Ann didn't return your call doesn't mean she doesn't want to be your friend," he'd say soothingly in New Haven. Or when I felt really out of it at faculty parties where I believed everybody was doing more interesting work than I was, he'd make a point of telling me, "Al's wife thinks you're a dynamo—working at your telephone company job and taking those writing classes, too."

Now he would come through once more and erase my fears of the past two weeks. "Don't worry so much," he said harshly, running his hands through his hair. I put my arms on his shoulders from behind and said pleadingly, "Paul, do me a favor and don't tell anyone about this conversation—including Emily." "Okay, okay, of course," he promised, walking out of my hug. His words were only slightly soothing. Since I have started lying to him, I can't really trust anything he says to me.<sup>130</sup>

The marriage ends in divorce, with Paul making a new life with Emily, and Susan living as an unmarried professional woman. As to the legal divorce itself, Susan "pushed Paul to do the suing."<sup>131</sup> Whatever the formal basis for the divorce, the actual problems relate to work and other people.<sup>132</sup> The failure, it is suggested, is not of the people but of the institution.<sup>133</sup>

Susan Braudy writes of the account of her divorce: "This

130. S. BRAUDY, *BETWEEN MARRIAGE AND DIVORCE* 115-16 (1975).

131. *Id.* at 232.

132. Braudy's account of her own affairs suggests relevance, in the traditional law, of the idea that divorce is a remedy for the innocent spouse. On recrimination, see, e.g., *Horne v. Horne*, 72 N.C. 530 (1875). In *Horne*, a jury found both parties guilty of adultery and the divorce was denied. "Both husband and wife are two miserable wretches, and the case is too disgusting to be longer entertained by the court." *Id.* at 533.

133. S. BRAUDY, *supra* note 130, at 5.

book is nonfiction, based on my diaries and memories. I have changed the names of a few of the characters. Some of the reactions I write about were overheated, but they represent my responses at the time."<sup>134</sup> The point here seems to be that her diary is basically true. Moreover, it describes a common experience, a point Mowrer suggested as to the Donaven diary. Braudy writes: "I tell this story, my story, because its outline and emotional content are common ones. In the ordinariness of my own private feelings, I hope other women can see their own. We are unsurprisingly not alone."<sup>135</sup> The narrative is thus understood not as personal but as social.<sup>136</sup> Braudy is focused throughout on the question of women and their attempt to find meaning in existing institutions: "Sometimes I think it is not that I and a growing number of women and men have failed at marriage, but that the institution of marriage has failed us."<sup>137</sup> Braudy quotes Margaret Mead: "[M]ost cultures honor concepts which people publicly uphold but privately and shamefully fail to live up to. [Mead] suggests marriage is such a concept."<sup>138</sup>

Neither Braudy's nor Donaven's diary deals extensively with the issue of children. However, this issue is of some importance in modern marital situations. Years ago, Goode noted the conflict between two norms here:

[M]uch of the verbal approval of the mother's working is likely to be hollow in actuality. That is to say, within almost every social group the working mother is under strong pressures to take care of her children and to leave the job market. Her claim that the extra salary is absolutely needed for survival is viewed with considerable skepticism, even when the claim is not openly rejected. This general disapproval becomes relatively strong in precisely those middle-class strata where the egalitarian notions are held most strongly, because in such strata and groups the recent psychodynamic justifications for child freedom, child affection, breast feeding, security in mother love, etc. have become most fully accepted.<sup>139</sup>

Goode suggests that "all other role obligations are residual, com-

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134. *Id.*

135. *Id.*

136. At the same time, certain social issues are omitted. A reviewer noted that Braudy is not concerned with the real life problem of divorced women with children, and particularly economic problems. Nelson, *supra* note 129, at 24.

137. S. BRAUDY, *supra* note 130, at 5.

138. *Id.*

139. W. GOODE, *WOMEN IN DIVORCE* 209 (1965).

pared to this, and must wait until those of mother are satisfied."<sup>140</sup> Clearly both men and women occupy several statuses. However, "[c]ompared with other major statuses, that of mother is more likely to be viewed as exclusive, other roles as residual."<sup>141</sup> This means that "the legitimacy of nonmaternal responsibilities is questioned unless it can be shown that the maternal responsibilities themselves are being properly met; and the clarity and moral force of this prescription are greater than for her other statuses."<sup>142</sup>

All of this may still be true.

Even aside from motherhood, issues of competition between the spouses, as the Braudy narrative indicates, are far from resolved. The problem of multiple loyalties, to individuals, work, and home, suggests that the tensions between marriage and friendship, or marriage and families, may be as great as the tension between marital and non-marital sexual relations. The reasons for this are clear. The present definition of marriage as a norm does not permit the possibility of other orderings of equal intensity.<sup>143</sup> The model requires that even the demands of work, friendship, and the extended family must yield—at the normative if not the practical level—to the demands of the marriage and the world it creates. Certainly this is true for mothers, usually for wives and even at times for fathers and husbands. Paul, in the Braudy narrative, said that "part of getting married . . . is to give up other deep friendships"<sup>144</sup> and to say of someone that he or she is married to work states a violation of a marital norm. The spouse has a grievance. The norm of marriage can

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140. *Id.*

141. *Id.*

142. *Id.*

143. See discussions of friendship in C. LEWIS, *supra* note 3, at 55-64 (1960). See also Simmel:

For, friendship is a relation entirely based on the individualities of its elements, more so perhaps even than marriage: because of its traditional forms, its social rules, its real interests, marriage contains many super-individual elements that are independent of the specific characters of the personalities involved. The fundamental differentiation on which marriage is based, as over against friendship, is in itself not an individual, but a species, differentiation. . . . The modern, highly differentiated woman shows a strikingly increased capacity for friendship and an inclination toward it, both with men and with women.

THE SOCIOLOGY OF GEORG SIMMEL 138 (K. Wolf ed. & trans. 1950).

144. S. BRAUDY, *supra* note 130, at 220.

understand "[t]he exclusion of all others"<sup>145</sup> in a fairly large way.

*c. A fictional divorce narrative.* The Braudy narrative on divorce, with its emphasis on the problem of an autonomous being within marriage, signals a problem with the idea of companionate marriage itself. This problem can be further illustrated by a fictional narrative by Doris Lessing.<sup>146</sup> Like Stanton, Lessing suggests that marriage could not answer all questions. Lessing's story describes the perfect marriage of the Rawlings, an intelligent couple which does things correctly. They are not too young or inexperienced when they marry. They have the right number and kind of children. The wife devotes herself to the family for twelve years, only to find that she sees herself as having put herself on hold, in cold storage, in bondage to others. She now requires time and space to herself. She therefore rents a hotel room in which to be alone. (Her husband thinks—he almost prefers, as against other possibilities—that the room is to be used for a lover, so that the husband and wife with their respective friends can make a civilized foursome). In that room, she kills herself.

This narrative describes what we see as the humanely intelligent contemporary marriage, and its inability to solve the problem of ultimate meaning. Infidelity seems unimportant in the sense that in its very normalcy it is preferred to other kinds of estrangement. While earlier narratives were focused on personal, individual experience,<sup>147</sup> the Lessing story is a comment on the costs of companionate marriage in general.<sup>148</sup>

Lessing suggests that the failure of companionate marriage is not about a failure of individuals, but rather about a failure of the world companionate marriage creates. The Rawlings have

145. See *Hyde v. Hyde*, 1 L.R.-P. & D. 130, 133 (D. 1866). ("[M]arriage . . . may . . . be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.").

146. D. LESSING, *To Room Nineteen*, in *STORIES* (1980).

147. Linked to the idea of confessional literature, perhaps, as one reviewer suggested about the Braudy diary.

148. The history of modern marriage suggests two contrasts, one between marriages considered patriarchal and those considered companionate, another between marriages understood as romantic, or total, and those which are (merely) comfortable or companionable. As to the second pair, where it was once thought that romantic marriages could properly mellow into companionable ones, it is now possible to see that the companionable marriage, which exists as a background and may not be the largest part of the life of either of the couple, can easily be judged a poor second to a real or even hypothetical romantic alternative.

everything. That everything, for the wife at least, is destructive to her core. The view of marriage is suggested in the nightmare figure of a man Susan Rawling projects. He "wants to get into me and take me over."<sup>149</sup> It was her inner experience of companionate marriage, based on intelligence, good planning and apparently perfect understanding.

*Their life seemed to be like a snake biting its tail. Matthew's job for the sake of Susan, children, house, and garden—which caravanserai needed a well-paid job to maintain it. And Susan's practical intelligence for the sake of Matthew, the children, the house and the garden—which unit would have collapsed in a week without her.*

*But there was no point about which either could say: "For the sake of this is all the rest." Children? But children can't be a centre of life and a reason for being. . . .*

*Matthew's job? Ridiculous. It was an interesting job, but scarcely a reason for living . . . .*

*Their love for each other? Well, that was nearest it. If this wasn't a centre, what was? Yes, it was around this point, their love, that the whole extraordinary structure revolved. For extraordinary it certainly was. Both Susan and Matthew had moments of thinking so, of looking in secret disbelief at this thing they had created: marriage, four children, big house, garden, charwomen, friends, cars . . . and this thing, this entity, all of it had come into existence, been blown into being out of nowhere, because Susan loved Matthew and Matthew loved Susan. Extraordinary. So that was the central point, the wellspring.*

*And if one felt that it simply was not strong enough, important enough, to support it all, well whose fault was that? Certainly neither Susan's nor Matthew's. It was in the nature of things. And they sensibly blamed neither themselves nor each other.<sup>150</sup>*

The sense of individual isolation, an isolation which cannot be relieved by a social institution like marriage, is reminiscent of late Stanton. Stanton had said that: "No matter how much women prefer to lean, to be protected and supported, nor how

149. D. LESSING, *supra* note 146, at 411.

150. *Id.* at 397-98. The story can be read as an account of individual mental breakdown. (Perhaps, following Laing, insanity is an appropriate response to insane situations?) But it can also be read as an account of an individual unable to find justification in and through institutions. There is some discussion of why the wife's experiences of bondage to the collective is so painful while the husband, who is equally bound in a way, does not experience it that way.



much men desire to have them do so, they must make the voyage of life alone, and for safety in an emergency, they must know something of the laws of navigation."<sup>151</sup> For Stanton, it did not matter "whether the solitary voyager is man or woman; nature, having endowed them equally, leaves them to their own skill and judgment in the hour of danger, and, if not equal to the occasion, alike they perish."<sup>152</sup>

Women's narratives of divorce describe personal or existential pain.<sup>153</sup> There are, of course, other possible narratives: of husbands, children, and extended family. That marriage involves more than the couple, and more even than the couple and their children, is plain. We see it best in the history of parental consent, but we can also see its survival in the public nature of the marriage ceremony and the sanction which one's presence at the ceremonies gives to the marriage.

To begin with, these narratives must be found, read, and then somehow used. Narrative scholarship suggests that it has some relationship to law reform. But, at this point, we return to some basic questions.

#### IV. NARRATIVE AND LAW REFORM

As indicated, this article does not intend to use narratives in support of some particular law reform, but rather to comment on the idea that narratives can be used in that way. The methodological issue is, in effect, discussed with reference to the history of divorce. One problem, already outlined, is that narratives may suggest varying reforms. Another is that we may not know how to evaluate narratives. Narratives may also suggest the further point that the problem is less the law than in the social meaning of the legal act.

If the problem is less with divorce than with our understanding of divorce (built in turn on conceptions of marriage), solutions might lie in directions somewhat different from those typically raised. We might continue to insist on free or even unilateral divorce, but revise our notions of what divorce implies for

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151. CORRESPONDENCE, WRITINGS, SPEECHES, *supra* note 18, at 247-48.

152. *Id.* at 248.

153. If anything, personal pain, according to the current view, is supposed to be minimized so that divorces are simply messy now, no longer painful. Thus Carl Schneider describes no-fault divorce: "There ought be no sense of guilt when a marriage doesn't work, because there was simply a technical dysfunction. . . ." Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1853 (1985).

the people involved. Our definitions of families might, for example, assimilate divorce to death, so that family relations as a whole could be maintained despite the absence of a party. Or divorced spouses might continue on as parents and in-laws but not as spouses. Another alternative is a cultural redefinition, stressing long-term commitment and more restricted divorce in some cases (typically those involving older women or young children). We might then ask less of marriage, concluding, in effect, that the various functions of marriage (e.g., companionship, child-rearing, property arrangements) are in fact severable. Just as "marriage" involves no particular arrangement in terms of property or household management, it would not involve necessary arrangements in terms of cohabitation or companionship. Thinking in social terms about families, rather than marriages, and about the meaning rather than the fact of divorce, might also change our views on legal remedies. We might find that proposals to legally enforce support obligations or statutes permitting grandparent visitation would become as important as proposals addressing the marital connection between the couple.<sup>154</sup> But the use of narrative to think through the issue of the meaning of divorce may or may not involve official law.

What is the utility of narrative for reform of official law? Somehow we must move from individual narrative to a specific legal proposal. This raises some difficult general questions.

Part III of this article outlined some narratives and some law, suggesting a correspondence, over time, between narrative and the evolution of the official law of divorce. It did not, however, conclude which came first.<sup>155</sup> Part III simply noted that certain legal regimes concerning divorce are associated with, i.e., their values can be evidenced by, certain themes in personal nar-

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154. See, e.g., Younger, *Marital Regimes: A Story of Compromise and Demoralization*, 67 CORNELL L. REV. 45 (1981); Scott, *supra* note 33 (regarding precommitment mechanisms); Llewellyn, *supra* note 198, at 262 (divorce more difficult in later years). Cf. Nineteenth century French Law cited in Stoljar, *History of the French Law of Divorce*, 1 INT'L J. OF L. & FAM. 3 (1989).

155. Llewellyn said long ago, "Society moulds and makes the individual; but individuals are and mould society. Law is a going whole we are born into; but law is a changing something we help remodel. Law decides cases; but cases make law. Law deflects society; but society is reflected in the law." Llewellyn, *supra* note 45, at 1283. This essay, described as "bizarre" in W. TWING, *KARL LLEWELLYN AND THE REALIST MOVEMENT 194* (1973), makes plain the connection with the law of divorce and marriage itself. Moreover, the piece stresses the importance of description. Llewellyn himself was concerned with bourgeois marriage, while noting regional, religious and class variations. On Llewellyn as a reader of Ellen Key, see *infra* note 198.

rative. The power of narrative lies in its capacity to awaken us, and then change us.<sup>156</sup> Often we want to say that the narrative shapes attitudes which shape the law. If so, this carries a heavy responsibility.<sup>157</sup> Because we are appealing to something complex and polyphonic,<sup>158</sup> something whose emotional content is understood to be high (and thus a problem for rational decisionmakers), our standards for narrative as a source of any particular law reform must be clear.

What is gained from the narratives in part III that summaries would not provide? Here, as an exercise, are summaries:

Eunice Chapman, in a histrionic public account, tells how (for assorted grounds some of which are related, as she sees it, to the crimes of the Shakers) she obtained a divorce and managed to recover her children from the Shakers. Included in this narrative is incidental information about the state of travel in early nineteenth-century America. Elizabeth Cady Stanton, in speech which reflects her personal pain and disgust, describes how a young friend of hers endured a desperately unhappy marriage to a chronic drunkard<sup>159</sup> and lost him and all her children. Miriam Donaven's diary records, in over-wrought language, her disappointments in marriage. It demonstrates her lack of serious interests, her infantile vocabulary, and her neurotic need for affection. Susan Braudy publishes a strong, easily recognizable story of a modern marriage strained by extramarital relations on both sides, and the stress of two careers.

Certainly, we could, in the manner of the historian, add a few selected quotations and paraphrase the narratives. It would not be necessary to abstract as was done above. Yet something would still be missing. Clearly, if we are to evoke serious empathy—and this is repeatedly stated to be the goal of narrative—we require something more than exposure to the simple outline of the narrative. Indeed, the entire movement to narrative is resisting the tendency to abstract, to give the gist, the point, the argument. As Aviam Soifer puts the issue: “[L]iterature seems to thrive upon empathetic emanations from

156. See Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989).

157. I have always read this as a major theme in Austen's novel, *Persuasion*.

158. On narrative generally, see the recent symposium, *Legal Story Telling*, 87 MICH. L. REV. (1989). See also Getman, *Voices*, 66 TEX. L. REV. 577 (1988); Yudoff, "Tea at the Palaz of Hoon": *The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988).

159. Whose "silly sensual leer" is she really talking about, the psychohistorian wonders.

the characters portrayed; law's propensity is to reduce people to stock figures, jammed into the narrow confines of a legal classification system too often concerned only with those facts readily containable within preexisting phrases, articulated by using a standardized vocabulary."<sup>160</sup>

This brings us to the justification typically raised; narratives are not merely art, they tell us something. This something is not, as Milner Ball indicates, a matter of simply conveying information. It is rather a question of moving us into other worlds.<sup>161</sup> The suggestion is made that narratives are a kind of testimony; they reveal things previously hidden or rejected, truths denied by the main system, or perspectives ignored by the dominant discourse. Frequently, what we find in those other worlds is pain. But what is the relation between this pain and law reform? First, of course, law is seen as a generalized and institutionalized source of the injury. Then there is the assumption that by feeling another's pain (as against simply saying that there is in the abstract somebody somewhere in pain) we—as readers turned reformers—get closer to eliminating that pain. This may be true. It may also be true, however, that if we can in any sense forget our own pain, we can forget the pain of others.

Moreover, simply talking about pain—our own or that felt by another—is not itself a pain-killer, though in certain processes it is considered a precondition to pain-killing.<sup>162</sup> And we are not often encouraged to admit that there is pain in the world with which we choose not to identify. Presumably the king in the account of Vashti felt a certain pain when he was embarrassed in front of his friends,<sup>163</sup> but this is discarded as, in effect, the pain of the slave holder whose slaves are freed. And there

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160. Soifer, *Listening and the Voiceless*, 4 MISS. C. L. REV. 319, 320 (1984) (describing literature, but the point is valid as to narrative generally). The present defenders of narrative, whether as writers or as persons analyzing narrative for legal purposes, are not the first people to make this argument, of course. See e.g., J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976).

161. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990).

162.

Since then, at an uncertain hour,  
That agony returns,  
And til my ghastly tale is told  
This heart within me burns.

Coleridge, *The Rime of the Ancient Mariner* (used as the epigraph in P. LEVI, *THE DROWNED AND THE SAVED* (1989)).

163. Does Vashti's nobility lie in the fact that she refuses to go to a faculty party?

are also female victim stories with which we tend not to identify.<sup>164</sup> When we say that no-fault requires this result, do we fail to recognize their pain? Our sympathy is with the abandoned or the newly impoverished individual, but not necessarily with the claim to preservation of the marital status or possible law reforms based on that idea. As to this, our view, in common with that of much of society, is that relationships are private, that marriages must be allowed to end freely (which is to say finally and unilaterally) and that the problem for the law is limited to an equitable rearrangement of property and a reasonable guarantee of continued economic security for (typically) the homemaker wife. If the women's pain is a necessary cost, then we must explain why some pain is held to be necessary while other pain is considered avoidable. Narrative will not do this work itself.

There are also questions about the narrative of pain itself. Its prime value is apparently that of testimony. There seem to be questions, however, which we are not supposed to ask<sup>165</sup> because these questions, at least at certain times and in certain contexts, are seen to blame the victim or demonstrate that one is in the wrong, or that one has a serious failure of understanding. It seems that we are sometimes asked to accept not only the fact of pain, but also the account of etiology and the suggestion for cure.

Do we assume that narratives have some relationship to truth? Are they to be understood as testimony, and examined by the conventional approaches, for example, of the legal rules of evidence?<sup>166</sup> Or is the appropriate standard more like the standard for truth in art? With reference to *Black Rain* by Masuji Ibuse, a novel about the bombing of Hiroshima, a reviewer observed: "[W]e do not know whether Ibuse imagined this or

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164. For example, the stories of women divorced in *Bucholz v. Bucholz*, 197 Neb. 180, 248 N.W.2d 21 (1976) (regarding claim that marriage involved a property right) or *Sharma v. Sharma*, 8 Kan. App. 2d 726, 667 P.2d 395 (1983) (attempt to seek free exercise exemption from divorce law for high caste hindu) who argued that they should not be divorced and suffered substantially.

165. This relates to points made in Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115; and Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). For a presentation which both records questions about a narrative and offers an argument against asking such questions, see P. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 50-51, 242 (1991).

166. For such an evaluation of biblical texts, see S. GREENLEAF, *THE TESTIMONY OF THE EVANGELISTS EXAMINED ACCORDING TO THE RULES OF EVIDENCE* (1918).

whether it is truth; or rather, we know that it is true in the sense that Ibuse convinces us in every word he writes that this is how it was and this is how people endure."<sup>167</sup> We accept this in art. We might accept it in certain scholarship.<sup>168</sup> It is an issue we cannot ignore.

The argument for narrative work assumes that narrative is not only not trivial,<sup>169</sup> but is even useful for law reform. This is viable, however, only if the use of narrative (and particularly narrative scholarship) is susceptible to analysis and judgment.<sup>170</sup>

This, however, presents a variety of problems. For example, it is clear that in a field dominated by language, we must deal with the issues raised by modern critical techniques which reject the notion of objective truth.<sup>171</sup> One answer is that the proposition that all stories are partial is different from such propositions that all stories are false and no story is more reliable than another.<sup>172</sup> But it seems that narrative scholarship itself rarely discusses how to make these determinations. We tend to avoid the issues by assuming the greater validity of the later story<sup>173</sup> and by granting the victim's story the status of an expert's testimony.<sup>174</sup>

167. Tomalin, Book Review, *Observer Rev.*, Mar. 14, 1971. (Do we want to analyze how he convinces us?)

168. Historical scholarship is supposed to be about truth, though there can be a question about how that truth is established and by what sort of thing it can be evidenced. See I. HACKING, *THE EMERGENCE OF PROBABILITY* 33 (1975) (on the 15th century attack on the donation of Constantine, a fraud proved by an argument that the Donation is not the sort of thing that would have happened, rather than by using "evidence").

169. It may have a subject which is trivial by some standards but this is not itself a problem. One can reject the standard, or adapt Gershom Scholem's comment that "nonsense is always nonsense but the history of nonsense is scholarship" (of debated origin, quoted in J. PELIKAN, *THE MELODY OF THEOLOGY* 224 (1988)).

170. See Ball, *supra* note 161.

171. And may also reject the idea that language has meaning. For a discussion of this issue, see Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *Nw. U.L. Rev.* 226 (1988) (in context of constitutional interpretation).

172. "To disclaim objective standards of truth is not to disclaim all value judgments. We need not become positivists to believe that some accounts of experience are more consistent, coherent, inclusive, self-critical, and so forth." Rhode, *Feminist Critical Theories*, 42 *STAN. L. REV.* 617, 626 (1990).

173. The convention is to automatically attribute authenticity or truth to the later reading—not necessarily an analytic reading of one's life—but it is only a convention. See also Averill, *The Acquisition of Emotions During Adulthood* in *THE SOCIAL CONSTRUCTION OF EMOTIONS* 98, 114 (R. Harré ed. 1986) (discussing getting in touch with one's feelings as being "not so much a process of discovery as it is an act of creation").

174. Perhaps the victim is an expert about that part of oppression which he/she experienced. Thus a recent writer of a Holocaust book spoke of it as series of family

The issues of normative implications of narrative—even when they are explicit<sup>175</sup>—raise other issues about the relation between the idea and the speaker. One tradition insists that the idea and the work stand apart from the speaker.<sup>176</sup> Another emphasis is on the speaker, an emphasis in which, in effect, insists on narrative as a preliminary to normative conversation or debate.

For example: why comment on Stanton's life and its influence on her ideas about divorce?<sup>177</sup> For some, her life might be used to test the validity of her ideas.<sup>178</sup> For others, her life might suggest the existence or non-existence of expert status in writing about some ideas. In the political context, it might tell us something about the underlying biases at work. As has been noted, "much (all?) scholarly work is at some level about ourselves."<sup>179</sup> But why do we assume that where we are coming from is defined socially by race, class or gender rather than some highly individualized response to issues like race, class or gender?<sup>180</sup> The point is not that life and work are unrelated. Particularly within feminist theories, with their heavy emphasis on the experiential aspects of feminist thinking, we assume that Stanton's experiences

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tragedies. P. WEBSTER, *PÉTAINE'S CRIME* (1990). But the victim is not an expert as to the whole.

175. Which often they are not. See Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. \_\_\_\_ (forthcoming 1991).

176. See Kennedy, *supra* note 165.

177. See text accompanying note 113.

178. If she really believed them, she would have divorced her husband—unless excused. Since she did not do it, she didn't believe them and [therefore?] they are less likely to be true? See O'Neill's discussion of Havelock Ellis. W. O'NEILL, *supra* note 51, at 124-26 (challenging the credentials of Ellis as a man unable to make a success of so universal an institution as marriage). This misses that while the term marriage is universal, the institution is not; that unhappy experiences may qualify people to offer critiques. As to Braudy, it was noted that her feminism was unconvincing since she "ends the book launching her career as a free lance writer with money borrowed from her husband." Nelson, *supra* note 129, at 25. Is the evil here the loan (dependence) or the source of the loan (Cinderella waiting for her prince). Is female dependence to be celebrated as an aspect of the different voice (so that the desire for independence becomes something to be rejected as a part of the male ego trip)? For a hard view on the necessity of independence, see J. SMITH, *MISOGYNIES* (1989).

179. Resnik & Heilbrun, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913, 1920 (1990) (discussing the problem of revising the canon). For a feminist discussion which largely accepts the traditional canon, see Nochlin, *supra* note 36.

180. R. LAING, *THE FACTS OF LIFE* (1976) (what others call me is their map of me; what I call myself is my map: where is the territory?). Is there a core "I" under the many ways to say "I" in Japanese. Note also that things highly specific to individual families, e.g., family pride, may be as important as any other social identification. See D. DAICHES, *TWO WORLDS* 10 (1989).

and choices in her private life reflect in some way the program she argued for in her political career. The point is that that reflection could cover many relationships, most of them unknown to us and some perhaps hardly known to her. One may argue for a range of public choices which one has no intention of making one's self; as one may condemn behavior in which one engages in privately, or even publicly. Finally, the work or idea stands or falls by itself.<sup>181</sup> A bad person can have a good idea, and a good person a bad one. Our favorite poets may have been unpleasant people.

The insistence that we tell where we are coming from before we offer our beliefs suggests that our beliefs are shaped by our situations in a more direct and linear way than is likely to be the case.<sup>182</sup> If we get to the point of saying that whatever we do is shaped entirely by our individual backgrounds, directly or by opposition, transformation or creative refining, ultimately we have not said much. Race, class, gender, religion, psychological history are blended in the individual in ways beyond calculation. But it may be that if we choose to tell our life story it is not because we see the telling as a validation of the ideas so much as that we believe the narration provides a credential. We were there. (Though sometimes people who weren't see the truth more clearly).<sup>183</sup> At other times, the telling of the life seems to have something to do with bias and self-interest.<sup>184</sup> But self-serving is, again, a dimension apart from right or even interest-

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181. Martha Fineman makes the same point—that what is centrally relevant is the argument not the speaker—and urges that this is so in part because a contrary emphasis gives a false idea of the significance of the individual in relation to social or political problems. Fineman, *Challenging Law*, 42 U. FLA. L. REV. 41, — (1990).

182. There seems no point in trying to enumerate the various ways in which one's work, one's product, or expression might be "about" oneself.

183. This would be the strong version of the outsider claim. See Merton, *Insiders and Outsiders*, 78 AM. J. SOC. 9, 31 (1972). Merton notes that Simmel is the source of aphorism: We don't have to be Caesar to understand him; but note Simmel's very special sensitivity. He was a man who could discuss the moral problems of people with "psychologically fine ears," those who suddenly and involuntarily received insights into other people which those others would prefer to keep private. *Discretion*, in THE SOCIOLOGY OF GEORGE SIMMEL 323 (K. Wolff ed. 1950) [hereinafter SOCIOLOGY]. It is one thing for such a person to claim value in the outside perspective. Quite another for that perspective to be used as a sole source by those whose empathetic capacity is either not known, or known to be fairly limited.

184. Thus Voltaire comments on Montesquieu's defense of the sale of offices in monarchies (though not despotisms): "[W]e can forgive him: his uncle purchased [an office], and left it to him. After all we find the man. No one of us is without his weak points." MONTESQUIEU, THE SPIRIT OF THE LAWS 69 n.v. (T. Nugent trans. 1975).



ing.<sup>185</sup> And again, reduction of the relevant categories to race, class, and gender is clearly inadequate.<sup>186</sup>

These, it seems, are generic problems about narrative and law reform. But narrative has a specific utility—in the context of legal pluralist approaches—a subject explored in Part V, again in the context of divorce.

## V. NARRATIVE AND LEGAL PLURALISM

In discussing narrative and law reform to this point, it is worth noting as a significant aside that we have been using too narrow a definition of law. Narratives suggest that other unofficial legal systems, e.g., religious legal systems, operate in people's lives and deserve attention. Typically, we think of these legal systems as "law" in the sense that they are formal, and emanate from an authority (albeit not the state). Religious legal systems are the model of such alternative systems.

Immigrants brought with them not only traditions of food, clothes and music, but also traditions of law. Some of this law was religious, ancient and well articulated. Religious legal systems coexisted and were used by adherents of particular religious groups within the American legal system. Some of these systems involved institutions foreign to the main system.<sup>187</sup> Conditional divorce in Jewish law is one example. The New York Times, in 1905, published this story:

*NEWARK, Jan. 15.—Following an ancient Jewish custom, Mrs. Hattie Sobel has received a conditional divorce from Samuel Sobel, a member of the Anshe Israel Congregation, who is dangerously ill with paralysis at his home, at Morton and Prince Streets. In the event of Sobel's death Mrs. Sobel will*

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185. We work in a field in which wrong but interesting is a legitimate category. This is not true in all fields.

186. There must be those, in both victim or oppressor categories, by race or class, who are unable to identify their own individual stories with the conventional stories of their group.

On the fluctuating aspects of (ascribed) identifications, see Einstein, quoted in Merton, *supra* note 183, at 28: "If my theory of relativity is proven successful, Germany will claim me as a German and France will declare that I am a citizen of the world. Should my theory prove untrue, France will say that I am a German and Germany will declare that I am a Jew."

On problems of inclusion/exclusion generally, see M. MINOW, *MAKING ALL THE DIFFERENCE* (1990).

187. For discussion of the interaction of the American legal system and religious legal system in American family law, see Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1988).

be at liberty to remarry, but if he recovers the divorce will become void.

The ceremony of divorce was performed in the presence of two rabbis and several other witnesses, and was intended to serve as a relief to Mrs. Sobel, if she becomes a widow, from certain religious requirements to which she would otherwise be subjected, among them a divorce from her husband's brother. The ceremony was performed at Sobel's request. His brother lives in Brooklyn.<sup>188</sup>

The Jewish law of marriage and divorce is different from the state law in several respects. To begin with, religious law permits divorce without specific fault grounds. Then, it assumes levirate marriage. (Note the reference to divorce from her husband's brother.)<sup>189</sup> Finally, it includes the idea of conditionality in a divorce decree. The New York Times includes the story in its pages as a piece of ethnography, as it might report some other odd event or ritual. The Sobel divorce indicates that particular groups within American society live in a domestic system operating within the official state system. Some efforts at law reform may therefore be directed at that system.

The sub-groups which think about divorce in their own way vary from each other.<sup>190</sup> They may be religious minorities in the sense that they are not mainstream Protestant, or they may indeed reflect main stream Protestants as a minority. A nineteenth-century writer saw Christians as one such group, paralleled by another group, skeptics, who used civil divorce:

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188. N.Y. Times, Jan. 16, 1905, at 5, col. 2. See generally Aranson, *Divorces on Condition*, 3 THE GREEN BAG 381 (1891). Conditional divorce might solve the current "get" problem. Regarding conditional divorce, see L. Epstein, *Adjustment of the Jewish Marriage Laws to Present Day Conditions*, in 35 PROCEEDINGS OF THE RABBINICAL ASSEMBLY 227 (1935) (conditional divorce at the time of the marriage is "halakacally sound, but very impractical," *id.* at 231). For a review of objections based on religious law, see M. MEISELMAN, *JEWISH WOMAN IN JEWISH LAW* 106-15 (1978). For a discussion of the "get" issue, see Pfeffer & Pfeffer, *The Agunah in American Secular Law*, 31 J. CHURCH & ST. 487 (1990).

See K. SIMON, *Bronx Primitive: Portraits in a Childhood* 47 (1983) (narrative of a culture in which despite the availability of divorce, "the Jewish women were as firmly imbedded in their marriages as the Catholic").

189. See *Deut.* 25:5-6. On Polygamy in Jewish Law see B. MEIZINGER, *Jewish Law of Marriage and Divorce* 28-32 (1987) (describing rabbinic ban on polygamy in the West).

190. For another approach to religious divorce, see E. FIRMAGE & R. MANGRUM, *Zion in the Courts* 322-31 (1988) (discussing Mormon divorce). Note that it is also possible to conceive marriage as neither for life nor permitting divorce. See S. HAERI, *The Law of Desire: Temporary Marriage in Iran* (1989) (temporary marriage for specified period of time). See also D. PEARL, *A Textbook on Muslim Law* 75-76 (2d ed. 1979).

Marriage is, among Christians, a contract for life, involving a vow before God. The law has no authority to annul this compact. Let it stand guarded by the command, "Those whom God hath joined together let no man put asunder." Let the skeptics have their own system. A civil contract, elastic as necessary, could be drawn by each State.<sup>191</sup>

The group-subplot is not, however, the only sub-plot visible in American family law in the sense that normative ideas about family life are not only derived from religious or minority legal systems. It is possible that in the United States the traditional conception of family law as mandatory<sup>192</sup> (like the criminal law) has been broken down, and that family law is understood, not as the instrument of enforcement of the norm of the good life, but rather as the vehicle for exploration of the question what is the good life.<sup>193</sup> Not knowing how to shape marriage collectively, we return to the notion of marriage as a contract, governed by its own law. But this emphasis first on the individual and the good life, and second on contract—the law of the parties—may raise more general questions regarding narrative and law.

The proposals for reforming the law typically assume that we know what the law is; yet this may not be the case in divorce law. The internal orderings of marriage are such that the rules for their dissolution are in one dimension not really known.

Thus, we reach the use of narrative urged by Leon Petrazycki, when he said we should use stories as tests of our own legal experiences so that we would better know our own sense of duty or obligation and our own sense of when another party had a claim on us.<sup>194</sup> In Petrazycki's version of law, we would be comparing our own individual law with the law of the outside society or of any sub-group.

191. Lee, *Final Words on Divorce*, 50 N. AM. REV. 263, 264 (1890).

192. Gorecki, *Moral Premises of Contemporary Divorce Laws: Western and Eastern Europe and the Untied States*, in MARRIAGE & COHABITATION IN CONTEMPORARY SOCIETIES 124 (J. Eekelaar & S. Katz eds. 1980).

193. The most liberal divorce regime does not require parties to divorce. On family law as an overarching scheme within which people seek their individual good life, see Markovitz, *Family Traits* (Book Review), 88 MICH. L. REV. 1734, 1740-41 (1990) (reviewing M. GLENDON, *TRANSFORMATION OF FAMILY LAW: STATE LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989)).

194. On Petrazycki, see Weisbrod, *supra* note 2 and work cited there. We could, for example, return to the issue of Vashti's narrative, and compare hers to the narratives of the others in her world: the king, the ministers, and ultimately, to the official legal system and our own legal systems.

The first point is that each marriage has its own rules.<sup>195</sup> Thus Sumner wrote:

The definition of marriage consists in stating what, at any time and place, the mores have imposed as regulations on the [timeless] relation's existence and the reproduction of the species. . . . It has no structure. Each pair, or other marital combination, has always chosen its own "ways" of living within the limits set by the mores.<sup>196</sup>

Translating this idea into legal terms, it could be said that each marriage has its own individual grounds for divorce within the official state law of divorce. This is not a new perspective. In 1911, Ellen Key wrote that "[i]n the ideas of the Church, the incapacity for marriage of one party freed the other from the duty of fidelity."<sup>197</sup> Along parallel lines,

it will be equally evident that the same right exists to dissolve a marriage which has remained unconsummated in a spiritual sense; and there may be just as many possibilities in the capacity to fulfil the spiritual claims of marriage as there are men and women; therefore also just as many causes of divorce.<sup>198</sup>

This approach is also suggested by Petrazycki's description of each family as its own legal field:

[F]rom the point of view of the psychological theory of law as imperative-attributive experiences, family and intimate domestic life (regardless of whether or not there are between those participants any bonds officially recognized) is a broad and peculiar legal world which is awaiting investigation: a legal world with innumerable legal norms, obligations, and rights independent of what is written in the statutes, and solving thousands of questions unforeseen therein.<sup>199</sup>

195. These rules may include rules about what may or may not be done, or discussed or acknowledged. They may be rules about controlling fictions. As Simmel noted, there is utility in the reserves and discretion of marriage. *SOCIOLOGY supra* note 183, at 326-29. We pretend to others and perhaps to ourselves that we are living according to the norm, which itself rejects pretense.

196. W. SUMNER, *FOLKWAYS* § 364 (1959) (noting that the family—not marriage—is the real institution).

197. E. KEY, *LOVE AND MARRIAGE* 321 (1911).

198. *Id.* at 322. See Llewellyn, *Behind the Law of Divorce II*, 33 *COLUM. L. REV.* 249, 251 n.4 (1933) (regarding his mother (conservatively acting, but radically thinking) and Ellen Key). Ellen Key is called "conservative" in that she stressed love and motherhood; "radical" in that she believed in free divorce and motherhood for single women. On Ellen Key generally, see N. COTT, *supra* note 64, at 46-49.

199. L. PETRAZYCKI, *LAW & MORALITY* 68 (1955). See also, Weisbrod, *supra* note 2.

Where each marriage has its own grounds for divorce, and each individual has his or her own sense of the proper grounds for divorce, the corresponding umbrella of state law is no-fault divorce.<sup>200</sup>

## VI. CONCLUSION

"The individual does not go about merely going about his business,"<sup>201</sup> Goffman once wrote. "Rather, he individually goes about trying to sustain a viable image of himself in the eyes of others."<sup>202</sup> Our identities—constructed in so many ways and of so many affiliations—often include "married" or "unmarried" as a critical part.<sup>203</sup> A spouse, and even a particular kind of spouse (e.g., a status wife), has critical importance in the social and contextual aspects of marriage, which is a highly public and, in varying degrees, a private relationship.<sup>204</sup> To the extent that it is

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200. This might be restricted by contract:

A variety of binding precommitment options would, of course, theoretically be possible. The most extreme would be a legal prohibition against divorce. Like Ulysses, the married individual would be irrevocably bound to the original choice. In terms of precommitment analysis, a no-exit rule would make the inconsistent short-term preference unavailable (theoretically), forcing the individual to abide by the commitment. Less extreme precommitment mechanisms could impose costs on the decision to divorce and directly or indirectly support the choice to continue in the marriage. A couple could agree before marriage to impose economic penalties, benefiting the spouse or children, on the partner seeking divorce. Some precommitment mechanisms would impose costs on the decision to divorce, while at the same time discouraging impulsiveness. An agreement or a legal rule requiring mandatory delay before divorce (a two- or three-year waiting period, for example) would discourage impulsive divorce and provide sufficient opportunity for a reconciliation. A similar effect would result from an agreement to submit to counseling, mediation, or arbitration, or a requirement of psychological evaluation of the children to assess the probable effect of divorce.

Scott, *supra* note 33, at 43-44 (footnotes omitted).

201. E. GOFFMAN, *RELATIONS IN PUBLIC* 185 (1971).

202. *Id.*

203. Minow, *Identities*, 3 *YALE J. L. & HUMANITIES* 315, 326-29 (1991). Note particularly discussion of finding room for a private self within the social identity.

204. It is the public and official aspect of marriage which creates the contrast to friendship. We are not asked to register our friendships unless we are trying to set them up as marriages. (Though, as Avi Soifer reminds me, we may choose sometimes to publicly record them.) Our friendships exist and change according to their own rules and sanctions. Note also the distinction between "consort" and "companion." Though identified, *supra* note 104, as a single role, this role may in fact be varied,—i.e., is emphasis placed on consort or companion aspects?—long a public/private line.

public, it has a clear relation to official law, which deals with public relationships and their social implications.<sup>205</sup>

We increasingly see the social cost of divorce<sup>206</sup> in the way we, as a culture, have structured it, and a new interest in "commitment" is evident in the law reviews.<sup>207</sup> That discussion however has tended to neglect the issue of re-thinking the institution to which we are seeking commitment.<sup>208</sup> We are often concerned about divorce because of its impact on children. More broadly, we are sometimes concerned because of its impact on social order. This concern relates back to our conception of marriage: "If love and marriage are seen primarily in terms of psychological gratification, they may fail to fulfill their older social function of providing people with stable relationships that tie them into the larger society."<sup>209</sup> Some years ago, Margaret Mead (three-times divorced) commented that while marriages may be broken, and very likely would be, given the demands being made on that institution, families should not be. She pointed to the need for new kinship terms and argued for a new extended family.<sup>210</sup> The same point could be made if we were centrally concerned about the impact of divorce on grandparents. A part of what Mead asked for—no-fault divorce—we did achieve, but

205. In part, as Lawrence Friedman suggests, this is due to the effect of marriage on property ownership. Friedman, *Rights of Passage*, 63 OR. L. REV. 633 (1984). We want to identify ownership and inheritance rights. It is still true, as Friedman once noted, that family law is adjunct to the law of succession. L. FRIEDMAN, *AMERICAN LAW* 150 (1984). At the same time, however, we might note that the state adjudication of property is not the only adjudication possible. E. P. Thompson provides a striking description of a Catholic family "over-watching their [forfeited] ancestral lands" for two centuries. E. THOMPSON, *WHIGS AND HUNTERS* 102 (1975).

206. That is, we see it more the way Europeans did:

[W]here a European regards the rupture of a marriage as producing social disorder and the loss of a capital of joining recollections and experiences, an American has rather the impression that 'he is putting his life straight', and opening up for himself a fresh future. The economy of saving is once again opposed to that of squandering, as the concern to preserve the past is opposed to the concern to make a clean sweep in order to build something tidy, without compromise.

D. DE ROUGEMONT, *LOVE IN THE WESTERN WORLD* 293 (1983).

207. See Scott, *supra* note 33; Bartlett, *supra* note 33.

208. We would not be the first culture to have defined an institution in such a way as to make it difficult, if not impossible, to meet all of its requirements. See R. BENEDICT, *supra* note 49.

209. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART* 85 (1985). But here our problem may be the idea that divorce dissolves families, where in law, at least, it only dissolves marriages.

210. Mead, *Double Talk About Divorce*, REDBOOK, May 1968, at 47. See also Garfinkel, *Not Exactly the Best Man*, N.Y. TIMES MAG., Oct. 14, 1990, at 24.

without the change in attitudes and social forms which might have limited the damage.

Official law itself has a role in shaping social expectations,<sup>211</sup> though its actual effective power is unclear. Moreover, while models of marriage change, it seems that the cultural ideas we have are not free of ambiguity. Marriage for life, for example, remains as an aspiration despite other demands simultaneously made of marriage. Conceivably we should work on a new legal definition of marriage, but we should be clear that whatever our legal definition, it will stand on social definitions.

Narrative provides access to our social definitions. But narratives have problems. Partiality is one weakness. Complexity and multiplicity of narrative lines—in some ways the strength of narrative—is another, particularly important when we consider narrative and law reform. We cannot tell exactly just what a story is saying. But through the examination of many narratives, we can understand the range and nature of relationships which state law should (and perhaps should not) protect. For those concerned with law and narrative, it is true that one question focuses on which voice the law shall identify as its own.<sup>212</sup> If official law is viewed as a framework, rather than as a directive, and if the existence of different ordering systems in a single society is stressed, it becomes plain that this is not the only question.

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211. On the expressive/educational function of law see M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) (discussing the idea that law has itself a role in shaping cultural understandings). See also Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989).

212. "While narrative jurisprudence may do a beautiful job of bringing to the foreground the pathos of tragic nature of human experience . . . the real challenge for the narrativists is to justify the violence of the law absent a clear source of moral consensus about the various narratives available." Duncan, *Narrative Jurisprudence: The Remystification of the Law*, 11 J. L. & RELIGION 105, 113 (1989).